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 OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY DISPOSITION ON GROUNDS LIMITED TO OCTOBER 28, 2019 ORDER**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

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I. Introduction

The ALJ should deny Respondents' motion to dismiss or for summary disposition on their statute of limitations defense because Respondents have failed to carry their burden of proving that any of the claims asserted in the Bureau's Notice of Charges are time-barred. Indeed, Respondents cannot prove that any are. There is no support in the record or under applicable law for Respondents' argument that the Consumer Financial Protection Act ("CFPA") claims, Truth in Lending Act ("TILA") claim, or Electronic Fund Transfer Act ("EFTA") claim are barred either because of statutes of limitations or any pre-remand order by the prior ALJ.

As a preliminary matter, Respondents err in their assertion that the D.C. Circuit's decision in *PHH Corp. v. CFPB* holds that any statute of limitations that applies in federal court must also apply in an administrative proceeding. By its own terms, that case interprets only the Real Estate Settlement Procedures Act ("RESPA") statute of limitations. That interpretation does not control here, as there are no RESPA claims, and Respondents have failed to tie the analysis from the case to the particular statutes at issue here.

Even if Respondents were correct that any statute of limitations that applies in federal court also applies to a Bureau administrative proceeding, the claims in this case would not be time-barred. Had Enforcement Counsel filed its Notice of Charges as a federal court complaint, each count would be timely under the applicable statute of limitations in that forum. So the ALJ can deny Respondents' motion (and resolve their statute-of-limitations defenses) by assuming without deciding that the statutes of limitations applicable to the CFPA, TILA, and EFTA claims in federal court also apply here.

Respondents spend a large part of their motion arguing that the CFPA claims against Respondent Carnes are time-barred because Enforcement Counsel's searches for complaints about Integrity Advance suggest that the Bureau either discovered or should have discovered those

violations before November 18, 2012. This is contrary to law and logic. Enforcement Counsel could not and did not discover Mr. Carnes's violations until it conducted an actual investigation and determined his personal involvement in Integrity Advance's bad acts, which occurred well after November 18, 2012. Respondents fare no better when arguing that Enforcement Counsel "should have" discovered Mr. Carnes violations earlier. The Supreme Court case Respondents rely on in arguing that a "should have discovered" standard applies does not apply to government agencies. Even if it did, there is no basis to conclude that consumer complaints about Integrity Advance returned by a March 2012 search should have prompted the Bureau to discover Mr. Carnes's violations by November 18, 2012. Indeed, the steps Respondents suggest the Bureau should have taken would not even have led to the discovery of Mr. Carnes's violations, so there is no basis to conclude that the Bureau "should have" discovered the violations before November 18, 2012.

Respondents also misidentify the statutes of limitations applicable to Enforcement Counsel's TILA and EFTA claims against Integrity Advance. Neither of those claims is bound by the one-year limitations provisions that apply to private plaintiffs.

Finally, despite Respondents' contrary suggestion, Count IV remains alive and Enforcement Counsel continues to pursue it. The previous ALJ's order dismissing Count IV is due no weight in this remand, just as his order granting Enforcement Counsel summary disposition—upon which Enforcement Counsel relied when originally stipulating to dismiss Count IV—is due no weight. The ALJ should not allow Respondents to misconstrue the terms of the Director's remand order by demanding finality on past orders that suit them while insisting on reconsideration of orders adverse to their interests.

II. Facts

A. Bureau's Statement of Undisputed Material Facts

The Bureau's investigation of Respondents included serving civil investigative demands ("CIDs") and conducting investigational hearings.[1] The Bureau's first CID directed to Integrity Advance was issued on January 7, 2013, and included document requests and interrogatories.[2] Integrity Advance made an initial partial production in response to the CID on October 25, 2013, and largely completed its production in December 2013.[3] Included in Integrity Advance's production was a copy of Integrity Advance's loan agreement with its customers.[4] Enforcement Counsel did not have possession of the loan agreement before that production.[5]

Subsequently, Enforcement Counsel took investigational hearing testimony from Respondent and Integrity Advance Chief Executive Officer James Carnes on June 17, 2014, and from Integrity Advance Chief Operating Officer Edward Foster on June 24, 2014.[6]

Enforcement Counsel issued a Notice and Opportunity to Respond and Advise ("NORA") letter to Respondents on October 23, 2014, stating that the "CFPB's Office of Enforcement is

[1] Enforcement Counsel's Statement Regarding Respondents' Statement of Undisputed Facts in Support of Their Motion to Dismiss and/or for Summary Disposition on Grounds Limited to October 28, 2019 Order, and Enforcement Counsel's Statement of Additional Undisputed Material Facts on the Statute-of-Limitations Issue (Dec. 6, 2019) ("EC Statement of Undisputed Material Facts") (filed in connection with this Opposition) ¶¶ 24-31.

[2] *Id.* ¶¶ 24, 25.

[3] *Id.* ¶ 26.

[4] *Id.* ¶ 27.

[5] *Id.* ¶¶ 28, 29.

[6] *Id.* ¶¶ 30, 31.

considering recommending that the Bureau take legal action against" Respondents.[7] Respondents provided a response to that letter to Enforcement Counsel on November 13, 2014.[8]

B. Response to Respondents' Statement of Undisputed Facts

Respondents submitted a statement of undisputed facts in support of their motion.[9] Enforcement Counsel does not dispute the factual statements therein. However, as explained in Enforcement Counsel's Statement of Undisputed Material Facts and in the Argument section below, Enforcement Counsel contests the materiality of many of those facts.[10]

III. Argument

A. Legal Standard

Respondents have moved to dismiss or for summary disposition based on their statute-of-limitations defenses, but do not explain what standards the ALJ should adopt or how the ALJ should analyze its motions in the alternative. Because both parties are relying on materials and facts outside the pleadings, Respondents' motion should be treated solely as one for summary disposition.[11]

[7] *Id.* ¶¶ 32, 33.

[8] *Id.* ¶ 34.

[9] Respondents' Statement of Undisputed Facts in Support of Their Motion to Dismiss and/or for Summary Disposition on Grounds Limited to October 28, 2019 Order (Nov.15, 2019) [not yet docketed] ("Resp. Statement of Undisputed Facts").

[10] *See* EC Statement of Undisputed Material Facts ¶¶ 4-13.

[11] *See Highland Renovation Corp. v. Hanover Ins. Grp.*, 620 F. Supp. 2d 79, 82 (D.D.C. 2009). Despite the ALJ's decision to resolve Respondents' statute-of-limitations defenses in the initial phase of this remand, *see* Scheduling Order (Aug. 30, 2019) [Dkt. 233] at 1, Respondents suggest that they intend to seek additional discovery and file a future motion on their statute-of-limitations defenses if any part of their present motion is denied. Doing so would ignore the ALJ's decision to bifurcate this proceeding, as well as the ALJ's ruling denying any further discovery in connection with Respondents' statute-of-limitations defenses. *See* Order Denying Further Discovery on the Statute of Limitations Issue (Oct. 28, 2019) [Dkt. 238] at 6, 9, 11. The ALJ should reject Respondents' attempt to reframe the initial phase of this remand and should fully resolve and adjudicate Respondents' statute-of-limitations defenses at this time.

Summary disposition is appropriate where the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and other evidentiary materials properly submitted show that: (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to a decision in its favor as a matter of law.[12] In considering such a motion, all evidence must be viewed in the light most favorable to the nonmoving party.[13] The party seeking summary disposition bears the initial burden of identifying the specific evidence that it believes demonstrates the absence of a genuine issue of material fact.[14] If that burden is met, the opposing party must present facts showing that there is a genuine issue for trial.[15] Where, as here, the material facts underlying the case are substantially undisputed and the heart of the controversy is the legal effect of those facts, "such dispute effectively becomes a question of law that can, quite properly, be decided on summary judgment."[16]

B. Effect of *PHH Corp. v. CFPB* on this Administrative Proceeding

As part of the briefing on Respondents' statute-of-limitations defenses, the ALJ ordered the parties to address what effect, if any, the D.C. Circuit's *PHH Corp. v. CFPB* decision has on this administrative proceeding.[17] The short answer is none.

[12] 12 C.F.R. § 1081.212(c).

[13] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[14] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[15] *See id.* at 324.

[16] *FTC v. Gill*, 71 F. Supp. 2d 1030, 1035 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001).

[17] Order Denying Further Discovery on Statute of Limitations Issue (Oct. 28, 2019) [Dkt. 238] at 11.

The *PHH* decision did not address whether or how limitations provisions in the CFPA, TILA, or EFTA apply in Bureau administrative proceedings.[18] Instead, the decision focused on whether a statute of limitations contained in the Real Estate Settlement Procedures Act, 12 U.S.C. § 2614, applies to an administrative proceeding initiated by the Bureau, or only to actions in court. Section 2614 states that "*actions* brought by the Bureau . . . may be brought within 3 years from the date of the occurrence of the [RESPA] violation."[19] The D.C. Circuit acknowledged that Supreme Court precedent might "articulate[] a presumption that the term 'action' means court proceedings," not administrative proceedings, but emphasized that that "is at most a presumption."[20] Thus, the court explained, whether a particular statute of limitations that applies to "actions" also applies to administrative proceedings "turns on the overall text, context, purpose, and history of the statute."[21] The court interpreted § 2614 and concluded that that particular provision's reference to "actions," in connection with that particular statute, encompassed administrative proceedings.

Of course, it does not follow from that conclusion that other statutes of limitations that apply only to "actions" also apply to administrative proceedings. Indeed, that would be contrary to the Supreme Court's decision in *BP America*, which held that "actions" in a different statute-of-limitations provision did *not* include administrative proceedings.[22]

Here, Respondents contend that statutes of limitations in the CFPA, TILA, and EFTA also apply to the Bureau's administrative proceedings. *PHH* has no relevance to the TILA and EFTA

[18] *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).

[19] 12 U.S.C. § 2614 (emphasis added).

[20] *PHH Corp.*, 839 F.3d at 53 (reinstated portion of panel opinion) (citing *BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006)).

[21] *PHH Corp.*, 539 F.3d at 53 (reinstated portion of panel opinion).

[22] *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91-94 (2006).

claims because, as explained in Sections III.F and III.G below, the TILA and EFTA limitations provisions that Respondents invoke do not apply to the Bureau at all—in court *or* in the administrative forum. And Respondents have failed to examine the "text, context, and history" of § 1054(g)(1) of the CFPA (which applies a three-year discovery rule to "*actions*") or argue why the *BP America* presumption should not apply.

In any event, the ALJ need not resolve this question here because even if the CFPA's statute of limitations applies to this administrative proceeding, the Notice of Charges was timely, as demonstrated below. Thus, the ALJ can resolve the present motion by simply assuming without deciding that the statutes of limitations that would apply to the Bureau's actions in court also apply to Bureau administrative proceedings.

D. Respondents have not established that the CFPA claims against Integrity Advance (Counts II, III, IV, VI, and VII) are untimely.

In the Notice of Charges, Enforcement Counsel asserts five CFPA claims against Respondent Integrity Advance: Count III, alleging that Integrity Advance's loan agreement is deceptive; Count IV, alleging that Integrity Advance unfairly failed to disclose the costs of its loans;[23] Count VII, alleging that Integrity Advance unfairly used remotely created checks; and Counts II and VI, alleging that Integrity Advance also violated the CFPA's prohibition on covered persons committing acts in violation of a Federal consumer financial law when it violated TILA and EFTA.

[23] Respondents argue that Count IV is no longer part of the case because it was previously withdrawn with prejudice. But as explained below in Section III.H, Count IV has not been withdrawn because the previous ALJ's order dismissing Count IV is an order that is due "no weight" on remand. *See* Director's Ord. [Dkt. 216] at 9. In addition, Enforcement Counsel relied on the previous ALJ's summary disposition decision in originally stipulating to dismiss Count IV, and that order is also due no weight for the same reason. Enforcement Counsel no longer stipulates to dismissing this count.

Respondents do not dispute the timeliness of Counts III and VII against Integrity Advance, nor could they.[24] Even under Respondents' theory that these claims are governed in this proceeding by the three-years-from-discovery statute of limitations in § 1054(g)(1) of the CFPA,[25] the claims would not be time-barred. As Respondents acknowledge, Enforcement Counsel entered into tolling agreements with Integrity Advance on June 2, 2014, and March 16, 2015.[26] Together those agreements tolled the statute of limitations between June 2, 2014, and the filing of the Notice of Charges on November 18, 2015, meaning that even under Respondents' theory these claims would only be time-barred under § 1054(g)(1) if the Bureau had discovered them before June 2, 2011, or more than one month before the Bureau formally began operations.[27] In light of the agreements, Respondents have conceded that any claims against Integrity Advance to which the three-years-from-discovery provision applies are timely.

Respondents argue that Count II is nonetheless untimely because it is barred by TILA's statute of limitation, and that Count VI is untimely because it is barred by EFTA's statute of limitation. But Counts II and VI are CFPA claims, not TILA or EFTA claims.[28] Both are brought under § 1036(a)(1)(A) of the CFPA, which provides that it is unlawful for any "covered person" or "service provider" to "offer or provide a consumer any financial product or service not in

[24] *See* Respondents' Brief in Support of Their Motion to Dismiss and/or for Summary Disposition on Grounds Limited to October 28, 2019 Order (Nov. 15, 2019) [not yet docketed] ("Resp. Br.") at 4, n.3. Respondents have not explicitly conceded that Count IV is timely because they take the position that it has been dismissed with prejudice. If, however, the ALJ gives no weight to the prior order dismissing Count IV and determines that Enforcement Counsel may still pursue it, Count IV against Integrity Advance is timely for the same reason that Counts III and VII are timely.

[25] 12 U.S.C. § 5564(g)(1).

[26] [Dkt. 200] and [Dkt. 201].

[27] *See id.*

[28] As discussed below in Sections III.F and III.G, Count I (TILA) and Count V (EFTA) are also not time-barred.

conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law."[29]

Respondents assert that these CFPA claims must be brought within the same limitations period as the TILA and EFTA claims because these "derivative" claims "cannot proceed when the predicate offenses cannot."[30] Respondents ignore the relevant statutory language. The CFPA's text provides that "no action may be brought under [the CFPA]" more than three years after discovery of the violation.[31] It further clarifies that "[a]n action arising under [the CFPA] does not include claims arising solely under enumerated consumer laws," such as TILA or EFTA.[32] And a claim asserting a violation of the CFPA cannot arise "solely" under TILA or EFTA; although a violation of TILA or EFTA is one element of a § 1036(a)(1)(A) claim, to prove the claim Enforcement Counsel also must show that Respondents are "covered persons" or "service providers."[33]

Because these CFPA claims are "brought under" the CFPA and are not "claims arising solely under enumerated consumer laws," the three-year date-of-discovery statute of limitations in § 1054(g)(1) would apply to them, assuming that the limitations provision applies to administrative proceedings at all.[34] Respondents have not argued this provision would bar Counts II and VI, nor could they because of the tolling agreements that they concede have preserved Counts III and VII. Thus they are not time-barred.

[29] 12 U.S.C. § 5536(a)(1)(A).

[30] Resp. Br. at 21.

[31] 12 U.S.C. § 5564(g)(1).

[32] 12 U.S.C. § 5564(g)(2)(A).

[33] 12 U.S.C. § 5536(a)(1). *See* Notice of Charges [Dkt. 1] ¶¶ 10-11 (alleging that Respondents are covered persons).

[34] *See* 12 U.S.C. § 5564(g)(1).

E. Respondents have not established that the CFPA claims against Mr. Carnes (Counts III, IV, and VII) are untimely.

Enforcement Counsel asserts three CFPA claims—Counts III, IV, and VII—against both Integrity Advance and Respondent James Carnes. Respondents assert that these claims are barred as to Carnes by the three-year date-of-discovery statute of limitations found at § 1054(g)(1) of the CFPA.[35] But even assuming that that limitations provision applies to administrative proceedings, Respondents have failed to show, and indeed cannot show, that these claims are time-barred against Mr. Carnes under either the actual discovery or constructive discovery standard.

1. Respondents have not established, and cannot establish, that the Bureau actually discovered Mr. Carnes's violations before November 18, 2012.

Respondents assert that Enforcement Counsel's UDAAP claims against Mr. Carnes in Counts III and VII (and IV, to the extent it has not been dismissed) are untimely because the Bureau allegedly discovered his violations before November 18, 2012. In support of their argument, Respondents primarily contend that individuals in the Office of Enforcement reviewed consumer complaints about Integrity Advance more than three years before the Notice of Charges was filed. Such evidence falls far short of satisfying Respondents' burden of showing that Enforcement Counsel discovered all the necessary elements of the violations underlying claims against Mr. Carnes before November 18, 2012.[36]

Any preliminary review of unverified consumer complaint narratives could not constitute "discovery" of Integrity Advance's violations under the CFPA, let alone Mr. Carnes's violations.

[35] Respondents primarily argue that Count IV has been dismissed and cannot be reinstated. As explained in Section III.H, that is incorrect. They argue in the alternative that Count IV would be barred by § 1054(g)(1) to the extent it is asserted against Mr. Carnes. *See* Resp. Br. at 4, n.2.

[36] *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).

That position is contrary to logic, as well as the district court's analysis in *CFPB v. Nationwide Biweekly Admin.*, which explained that the Bureau has not discovered a violation if it lacks sufficient facts to file suit.[37] That court went so far as to warn that a complaint "based on no information other than [a] consumer complaint" could be so insufficient as to subject an attorney to sanctions.[38] The fact that here searches of the FTC's Consumer Sentinel Database returned more than one complaint does not change this analysis. Consumer complaints cannot substitute for information the Bureau obtains through further investigation.

Respondents devote most of their argument to explaining why the ALJ should conclude that two events—when the Bureau learned that Mr. Carnes was the CEO of Integrity Advance and when the Bureau first reviewed the Integrity Advance loan agreement—occurred before November 18, 2012. But there is no evidence supporting that. Respondents speculate that the Bureau must have obtained the loan agreement and information about Mr. Carnes earlier than November 18, 2012, but in support of that theory they point only to a combination of Bureau speeches, inter-agency memoranda of understanding, and post-dated Office of Enforcement policies—none of which refer or relate to Respondents in any way. Such conjecture does not support an inference that Enforcement Counsel discovered the elements of the violations underlying claims against Mr. Carnes before November 18, 2012. And even if it did, at summary disposition, inferences must be drawn in favor of the nonmoving party.[39] In any event, this speculation is contrary to the record. Through its Rule 206 disclosures, Enforcement Counsel provided to Respondents the factual basis for the claims asserted in the Notice of Charges. This includes Integrity Advance's loan agreement,

[37] No. 15-cv-02106-RS, 2017 WL 3948396 at *10, n.22 (N.D. Cal. Sept. 8, 2017), *appeal pending*.

[38] *Id.*

[39] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

which Integrity Advance produced to the Bureau in 2013, and transcripts of the investigational hearings of Mr. Carnes and Edward Foster, which were conducted in June 2014.

Regardless, even if Respondents could show that the Bureau had obtained Integrity Advance's loan agreements and knew that Mr. Carnes was Integrity Advance's CEO before November 18, 2012, it would not follow that the Bureau discovered Mr. Carnes's violations at that time. The reason is simple: the fact that Mr. Carnes was the CEO of a company that committed unfair and deceptive acts or practices is insufficient, on its own, to prove that he engaged in conduct that would make him individually liable for such acts and practices. To state a claim for monetary relief against Mr. Carnes, Enforcement Counsel needed to plead allegations that plausibly show that Mr. Carnes "participated directly in [Integrity Advance]'s deceptive or unfair acts or had the authority to control them" and "had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud along with an intentional avoidance of truth."[40] Courts have held that pleading individual liability under this standard requires more than the bare fact that a person is an executive of a company that engaged in deceptive practices because a person's status as a company's officer does not, without more, plausibly suggest the requisite control or knowledge.[41] Other allegations

[40] *CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016) (quoting *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)) (emphasis omitted).

[41] *FTC v. Swish Mktg.*, No. C 09-03814 RS, 2010 WL 653486, at *5 (N.D. Cal. Feb. 22, 2010); *FTC v. Wellness Support Network, Inc.*, No. C-10-04879 JCS, 2011 WL 1303419, at *11 (N.D. Cal. Apr. 4, 2011).

regarding the executive's activities and responsibilities with respect to the company are necessary for such an inference.[42]

That is why Enforcement Counsel pleaded more than just Mr. Carnes's title as CEO in the Notice of Charges. It also pleaded allegations of Mr. Carnes's involvement in Integrity Advance's operations, stating that senior executives of Integrity Advance reported directly or indirectly to Mr. Carnes,[43] who was "an active and involved CEO" who was "personally" and "directly" responsible for all of the policies and procedures developed and implemented by Integrity Advance.[44] None of these pertinent facts about Mr. Carnes's involvement in and knowledge of Integrity Advance's operations is apparent from the simple fact that he held the title of CEO, and the Bureau did not discover them before November 18, 2012.[45]

[42] *See, e.g., FTC v. Innovative Mktg., Inc.*, 654 F. Supp. 2d 378, 387 (D. Md. 2009) (allegations that individual who was an officer that "played an important and functional role within [an enterprise], by handling its finances and its relationships with payment processors" sufficient to state claim); *FTC v. LeanSpa, LLC*, 920 F. Supp. 2d 270, 278 (D. Conn. 2013) (allegations of specific acts showing an individual's "active involvement in business affairs and the making of corporate policy" sufficient to state claim (quoting *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1980), *overruled on other grounds by FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019))).

[43] Notice of Charges [Dkt. 1] ¶ 8.

[44] *Id.* ¶¶ 9, 15.

[45] The record shows that the Office of Enforcement learned of Mr. Carnes's involvement through investigational hearings that occurred in June 2014, well after November 2012. *See* Order Denying Further Discovery on Statute of Limitations Issue [Dkt. 238] at 6; EC Statement of Undisputed Material Facts ¶ 30. The record also shows that the Office of Enforcement obtained Integrity Advance's loan agreements after November 18, 2012, through Integrity Advance's response to the Bureau's CID. *See* EC Statement of Undisputed Material Facts ¶¶ 27-29. Enforcement Counsel produced these loan agreements and transcripts of the investigational hearings as part of its Rule 206 disclosures, which provide the factual basis for the claims asserted in the Notice of Charges. *Id.* ¶ 23.

2. Respondents have not established, and cannot establish, that the Bureau should have discovered Mr. Carnes's violations before November 18, 2012.

Respondents argue in the alternative 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. But the CFPA's statute of limitations runs from actual discovery, not constructive discovery. In any event, the ALJ need not decide whether the constructive discovery rule applies to § 1054(g)(1) because, even if such a rule did apply, Respondents cannot establish that the Bureau should have discovered Mr. Carnes's violations before November 18, 2012.

Respondents are mistaken that a constructive discovery standard applies to § 1054(g)(1). In arguing that it does, they rely on *Merck & Co., Inc. v. Reynolds*. In *Merck*, the Supreme Court interpreted a statute of limitations that required private plaintiffs to bring certain securities law claims within "2 years after the discovery of facts constituting the violation."[46] In light of the "history and precedent surrounding the use of the word 'discovery' in the limitations context," the Court held that "'discovery' as used in that statute encompassed not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known."[47] But that "history and precedent" involved only statutes of limitations that applied to *private* plaintiffs.[48] As the Court later noted in *Gabelli v. SEC*, those precedents decidedly do not apply to government

[46] *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010). The statute of limitations analyzed in *Merck* reads as follows: "[A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of (1) 2 years after the discovery of facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. § 1658(b)(1).

[47] *Merck*, 559 U.S. at 648.

[48] *Id.* at 644-48.

enforcement actions.[49] Thus, nothing in the Court's analysis in *Merck* suggests that a statute of limitations applying only to the government should be interpreted to encompass constructive discovery.

Various practical considerations suggest that such a standard should not be read into a statute of limitations applying only to the government. There can be a host of reasons why "[a]n agency may experience problems in detecting statutory violations."[50] And "[c]onducting administrative or judicial hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities" is "not a workable or sensible method of administering any statute of limitations."[51] This is especially true because it is "unclear whether and how courts should consider agency priorities and resource constraints in applying [the constructive discovery] test to Government enforcement actions."[52]

In addition to creating these practical difficulties, interpreting "discovery" in the CFPA to incorporate constructive discovery would run afoul of Supreme Court precedent requiring statutes

[49] 568 U.S. 442, 449 (2013) (canvassing some of the same discovery-rule cases that the Court surveyed in *Merck* and emphasizing that "[w]e have never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties").

[50] *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994) (declining to read a discovery rule into a statute of limitations provision that runs from the "accrual" of the government's claim).

[51] *Id.*

[52] *Gabelli*, 568 U.S. at 452-453.

of limitation to receive strict construction in favor of the government.[53] The ALJ, therefore, should recognize that the CFPA's statute of limitations does not incorporate a constructive discovery standard.

At any rate, even if § 1054(g)(1) imposed a "should have discovered" standard on the Bureau, the Bureau's claims would not be time-barred because Respondents have failed to establish, and cannot establish, that the Bureau should have discovered the violations before November 18, 2012. Respondents argue that the Bureau should have discovered Mr. Carnes's violations on or around March 29, 2012—the date an individual in the Office of Enforcement searched the FTC Consumer Sentinel database for the term "Integrity Advance"—because at that time it purportedly could have "easily" discovered that Mr. Carnes was the CEO of Integrity Advance and could have obtained a copy of Integrity Advance's loan agreement with its

[53] *See Badaracco v. Comm'r*, 464 U.S. 386, 391-392 (1984). Respondents assert that two courts have explicitly held the Bureau to the "knew or should have known" standard. Resp. Br. at 14-15. But neither court analyzed whether this is the proper standard. In *CFPB v. NDG Fin. Corp.*, a district court suggested that a constructive discovery rule would apply to claims brought by the Bureau under the CFPA, but it provided no analysis on that point and relied on a Second Circuit case involving private plaintiffs and a different statute. *See* No. 15-CV- 5211 (CM), 2016 WL 7188792, at *19 (S.D.N.Y. Dec. 2, 2016) (citing *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1042 (2d Cir. 1992)). Moreover, since the court was deciding a motion to dismiss, it did not have the occasion to apply the standard to any set of facts. *See id.* And, in *Nationwide Biweekly Admin.*, the court simply assumed without explanation that the constructive discovery rule from *Merck* applied to actions brought by the Bureau. 2017 WL 3948396 at *10.

customers.[54] This does not satisfy Respondents' burden of showing that the Bureau should have discovered Mr. Carnes's violations before November 18, 2012.

First, it is far from clear that a reasonably diligent plaintiff "should have" discovered even the facts that Respondents emphasize—the loan agreement and that Mr. Carnes was the CEO—quickly after viewing the consumer complaints. The consumer complaints may have alerted the Bureau that something was amiss at Integrity Advance, but there is no reason to think that a reasonably diligent government agency would have obtained the loan agreements and discovered the CEO's identity quickly in response—particularly given the large volume of consumer complaints about a large number of companies and the limited resources available to the agency. Nor is there reason to believe that a reasonably diligent government agency would have used certain investigative tools (like asking a consumer for a copy of his loan agreement) in lieu of

[54] *See* Resp. Br. at 15-18. While of little consequence to the ALJ's resolution of the pending motion, the Bureau notes and objects to several instances in Respondents' motion that misstate the facts in this matter and Enforcement Counsel's position relating thereto. Especially in this section of Respondents' motion, statements of fact are skewed, Enforcement Counsel is said to have argued positions that it has never argued, and Enforcement Counsel is said to have admitted to certain facts to which it has never admitted. Specifically, it is not "undisputed that a high-level CFPB employee" searched an FTC database for complaints relating to Integrity Advance, *id.* at 16; the parties stipulated only that "an individual in the Office of Enforcement" conducted such a search. *See* Joint Update [Dkt. 234] at 3 ¶ 2; Resp. Statement of Undisputed Facts ¶¶ 14, 15; EC Statement of Undisputed Material Facts ¶¶ 14, 15. Also, Enforcement Counsel has never contended "that it could not have obtained the loan agreement until it was produced by Integrity Advance, Resp. Br. at 17; Respondents' claim about what Enforcement Counsel has argued is neither supported by a citation in their motion nor true in any respect. And Enforcement Counsel has not "admit[ed] that its lawyers saw, in early 2012, complaints from consumers that the loan agreement was misunderstood and confusing," *id.*; Enforcement Counsel has never admitted that Bureau lawyers reviewed consumer complaints relating to Integrity Advance in early 2012, or that those complaints were evidence that consumers misunderstood Integrity Advance's loan agreements or found them confusing. Although these facts and misrepresentations should not have any bearing on the pending motion, Respondents' casual approach to the facts nevertheless risks distracting from the legitimately-agreed-upon facts and the actual arguments that Enforcement Counsel has advanced.

issuing a CID (a tool specifically provided to it by Congress)[55] to collect more fulsome evidence as part of its investigation.

Second, even if (as Respondents contend) the Bureau "should have" obtained the loan agreement and discovered Mr. Carnes's identity as CEO quickly, it does not follow that the Bureau "should have discovered" *Mr. Carnes's violations* before November 18, 2012. As explained above, to discover Mr. Carnes's violations, the Bureau would have to learn more about Mr. Carnes's involvement—including the extent of his participation in the business or his authority to control the loan disclosures, as well as his knowledge of the deceptive statements in those disclosures. Respondents make no argument that the Bureau, exercising reasonable diligence, "should have discovered" those key facts in the less than eight months between when an individual in the Office of Enforcement first saw a consumer complaint about Integrity Advance and the date three years before the notice of charges was filed. Nor could they. Those facts are difficult to obtain without documents from the company and investigational hearings, and there is no basis to conclude that a reasonably diligent agency would have completed such steps by November 18, 2012. This is especially true here, where it took Integrity Advance over ten months to begin producing information in response to the Bureau's CID to it.[56]

[55] *See* 12 U.S.C. § 5562(c) (authorizing the Bureau to issue CIDs).

[56] EC Statement of Undisputed Material Facts ¶¶ 25-26.

F. Respondents have not established that the TILA claim against Integrity Advance (Count I) is untimely.

Respondents' sole argument that the TILA claim in Count I is time-barred is based on a limitations provision that does not apply to Enforcement Counsel's claim in either federal court or the Bureau's administrative proceedings. On that basis alone, Respondents have not met their burden to prove that the claim is untimely.

Respondents contend that the TILA claim is time-barred under the one-year statute of limitation found in 15 U.S.C. § 1640(e), but they are mistaken. By its plain terms, § 1640(e) provides that "any action *under this section*" may be brought within one year (and provides longer limitations periods for certain specific actions). "This section"—§ 1640—authorizes individual and class actions as well as actions by state attorney generals, but does not authorize actions by the Bureau.[57] Rather, a separate section, § 1607, authorizes the Bureau and other federal agencies to bring actions to enforce TILA.[58] Reading the entirety of §§ 1607 and 1640 makes clear that one section of TILA authorizes consumer and state attorney general lawsuits (§ 1640), while another provides for enforcement by federal government agencies (§ 1607). Respondents' argument that § 1640 applies to Count I ignores this statutory framework—and the statute's plain text stating that the one-year limitations period applies only to actions "under this section"—and should be rejected.[59]

[57] *See* 15 U.S.C. § 1640.

[58] 15 U.S.C. § 1607(a)-(c). Respondents argue that since § 1640 contemplates lawsuits brought by states' attorneys general, it must also include proceedings brought by federal agencies. That bizarre assertion finds no support in the text. Respondents' reasoning would require courts to assume every statutory provision referencing a state attorney general should be read to also reference the federal government, an absurd proposition. Section 1640(e) simply does not apply to the Bureau.

[59] *See Corley v. United States*, 556 U.S. 303, 314 (2009) (holding that statutory constructions that render any part of a statute "inoperative or superfluous, void or insignificant" are to be avoided) (citations omitted).

In support of their argument that Count I is time-barred, Respondents cite to *CFPB v. ITT Educ. Servs., Inc.*, which held that the Bureau's TILA claim in that matter was subject to § 1640(e)'s one-year statute of limitations.[60] But that decision was wrong, as the court in *CFPB v. Ocwen Financial Corp.* recently held.[61] In any event, even *ITT* does not support Respondents' argument here. The *ITT* court determined (incorrectly) that the Bureau's claim in that matter was brought under § 1640, not § 1607, because in the court's view § 1607 applied only to administrative enforcement proceedings, not actions in court. Thus, even under the *ITT* court's reasoning, § 1640(e) would not apply to this administrative proceeding brought under § 1607.

Because TILA's one-year statute of limitations does not apply to the Bureau, Respondents' argument that Enforcement Counsel's TILA claim is time-barred under that limitations provision fails, and the ALJ should decline to grant them summary disposition on that claim for that reason alone.

Moreover, Respondents would not be entitled to summary disposition on the TILA claim even assuming (as they generally contend[62]) that the statute of limitations that applies to the Bureau's TILA claims in court also applies in administrative proceedings. In court, Bureau claims to enforce TILA are subject to the three-years-from-discovery limitations period set forth in § 1054(g)(1) of the CFPA. This limitations provision applies to TILA claims brought by the Bureau in federal court through § 1607(b) of TILA, which provides that in instances in which the Bureau enforces TILA, "a violation of any requirement imposed under [TILA] shall be deemed to be a violation of requirements imposed under" the CFPA.[63] To "deem" means "[t]o treat

[60] 219 F. Supp. 3d 878, 922-23 (S.D. Ind. 2015).

[61] No. 17-80495, slip op. at 50 & n.9 (S.D. Fla. Sept. 5, 2019).

[62] *See* Resp. Br. at 21.

[63] 15 U.S.C. § 1607(b).

(something) as if [] it were really something else," [64] so by providing that TILA violations are deemed violations of the CFPA, § 1607 provides that a violation should be treated as if it were a violation of the CFPA. Thus, in accordance with this "deeming" provision of TILA,[65] TILA claims are subject to the same statute of limitations that applies to CFPA claims—3 years from discovery under § 1054(g)(1).

Applying the statute of limitations from § 1054(g)(1) to Enforcement Counsel's TILA claim under this theory would be consistent with holdings and analysis from federal courts considering similar questions. In *CFPB v. Ocwen Financial Corp.*, a district court recently applied § 1054(g)(1)'s three-year discovery-based statute of limitations to Bureau claims to enforce TILA. [66] That court likewise held that the analogous deeming language in the Fair Debt Collection Practices Act ("FDCPA") means that the Bureau's FDCPA claims are subject to § 1054(g)(1). [67] Similarly, in *FTC v. CompuCredit Corp.*, a magistrate judge concluded that the statute of limitations from the FTC Act applies to violations of the FDCPA brought by the FTC because of similar deeming language. [68] Courts in two other Bureau cases have relied upon *CompuCredit*

[64] Black's Law Dictionary (10th ed. 2014).

[65] *See* 12 U.S.C. § 5564(g)(2)(B).

[66] *Ocwen*, slip op. at 48-51.

[67] *Id.* at 45-48.

[68] *Cf. FTC v. CompuCredit Corp.*, No. 1:08-CV-1976-BBM-RGV, 2008 WL 8762850, at *10 (N.D. Ga. Oct. 8, 2008) (holding that a similar provision in the FDCPA deeming an FDCPA violation to be a violation of the FTC Act indicated that "the statute of limitations applicable" to an FTC FDCPA claim "is that provided under the FTC Act").

Corp. to suggest that "deeming" language in an enumerated statute means that § 1054(g)(1) applies to claims brought under that statute.[69]

So, assuming—as Respondents contend[70]—that statutes of limitation that apply to the Bureau in court must also apply in administrative proceedings, § 1054(g)(1) would apply to the TILA claims here. Respondents concede that the claims against Integrity Advance were brought within that provision's three-years-from-discovery limitations period. The TILA claims therefore are not time-barred.

G. Respondents have not established that the EFTA claim against Integrity Advance (Count V) is untimely.

Respondents' sole argument that the EFTA claim in Count V is time-barred is based on a limitations provision that does not apply to Enforcement Counsel's claim. On that basis alone, Respondents have not met their burden to prove that the EFTA claim in Count V is untimely.

Respondents contend that the EFTA claim is time-barred under the one-year statute of limitations in 15 U.S.C. § 1693m(g), which provides that "any action *under this section* [i.e., § 1693m] may be brought within one year from the date of the occurrence of that violation."[71] But § 1693m(g) does not apply to the Bureau because the Bureau does not bring its EFTA claims under § 1693m. Rather, § 1693m only applies to actions brought by private plaintiffs.[72] The Bureau, by contrast, enforces EFTA under 15 U.S.C. § 1693o, through "subtitle E of the [CFPA]."[73] By its

[69] *See CFPB v. Weltman, Weinberg & Reis Co., L.P.A.*, No. 1:17-817, 2017 WL 4348916, *6-7 (N.D. Ohio Sept. 29, 2017) ("The Court finds the reasoning in *CompuCredit* to be persuasive."); *CFPB v. Frederick J. Hanna & Assocs., PC*, 114 F. Supp. 3d 1342, 1380 (N.D. Ga. 2015) (noting that "the Court could arguably follow [*CompuCredit*'s] reasoning and hold that § 1692*l* indirectly imposes the three-year statute of limitations from the CFPA onto the FDCPA claim").

[70] *See* Resp. Br. at 5, 21.

[71] 15 U.S.C. § 1693m(g) (emphasis added).

[72] *See* 15 U.S.C. § 1693m(a). As discussed above, the ALJ should not apply to this case the incorrect reasoning from *ITT Educ. Servs., Inc.*, 219 F. Supp. 3d at 922-23.

[73] 15 U.S.C. § 1693o(a)(5).

plain terms, the statute of limitations in § 1693m—which applies to actions "under this section," i.e., under § 1693m—does not apply to the actions that the Bureau brings under § 1693o.

Because EFTA's one-year statute of limitations does not apply to the Bureau, Respondents' argument that Enforcement Counsel's EFTA claim is time-barred under that limitations provision fails, and the ALJ should decline to grant them summary disposition on that claim for that reason alone.

Alternatively, the ALJ could apply the statute of limitations set forth in 28 U.S.C. § 2462, which provide that unless otherwise provided by Congress, "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture . . . shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ." Section 2462 would limit Enforcement Counsel's ability to obtain civil penalties and disgorgement[74] to EFTA violations that occurred on or after June 2, 2009 (five years before the Bureau and Integrity Advance entered into a tolling agreement).

Count V of the Notice of Charges is not subject to the one-year statute of limitation in § 1693m(g), and summary disposition should not be granted on Count V because Respondents have not proved that it is time-barred. The ALJ can reserve until the next stage of this proceeding any decision on the remedies, if any, to which Enforcement Counsel might be entitled.

H. The prior ALJ's order dismissing Count IV does not prevent Enforcement Counsel from pursuing that count during this rehearing.

Enforcement Counsel still intends to pursue all charges set forth in the Notice of Charges, including Count IV.[75] Although Enforcement Counsel previously stipulated to dismissal of Count

[74] *See Kokesh v. SEC*, 137 S. Ct. 1635, 198 L.Ed. 2d 86 (2017) (holding that disgorgement is a penalty under § 2462).

[75] *See* Joint Statement (June 19, 2019) [Dkt. 221] at 1.

IV, it did so in express reliance on the legal holdings in ALJ Parlen L. McKenna's summary disposition decision.[76] That decision held that Respondents had committed other violations that caused consumer harm that was co-extensive with the harm caused by the violation in Count IV.[77] "Hence, in the interests of judicial economy and narrowing the issues for trial," Enforcement Counsel stipulated to dropping this claim during the prior proceeding.[78] But neither the legal holdings in ALJ McKenna's summary disposition decision, nor ALJ McKenna's order dismissing Count IV are due weight on remand.[79] By insisting that Count IV has been dismissed and cannot be reinstated, Respondents seek to reopen legal holdings adverse to them while preserving those that benefit them. The ALJ should reject that reasoning and hold that Enforcement Counsel can continue to pursue Count IV.

As is apparent from the docket, Enforcement Counsel's decision to dismiss Count IV was made in reliance on ALJ McKenna's summary disposition decision. On July 1, 2016, ALJ McKenna entered an order granting in part and denying in part Enforcement Counsel's motion for summary disposition.[80] In that order, ALJ McKenna held that Respondents' loan agreement was deceptive and granted Enforcement Counsel summary disposition on Count III,[81] but he denied summary disposition on Count IV because he found that there was "not enough information to

[76] *See* Stipulated Motion to Withdraw Count IV with Prejudice (July 11, 2016) ("Stipulated Motion re Count IV") [Dkt. 127] (referencing Order Granting in Part and Denying in Part Bureau's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition (July 1, 2016) [Dkt. 111] ("ALJ McKenna's Summary Disposition Order")).

[77] *See* ALJ McKenna's Summary Disposition Order [Dkt. 111]; Stipulated Motion re Count IV [Dkt. 127].

[78] Stipulated Motion re Count IV [Dkt. 127].

[79] *See* Order Directing a Remand to the Bureau's Administrative Law Judge (May 29, 2019) [Dkt. 216] at 9.

[80] ALJ McKenna's Summary Disposition Order [Dkt. 111].

[81] *Id.* at 31.

make a decision as to unfairness at the summary disposition stage."[82] Ten days later, the parties filed a stipulated motion to withdraw Count IV.[83] As the motion explained, Enforcement Counsel sought to dismiss Count IV (a claim it would have needed to prove at the hearing) in the interest of judicial economy because the harm caused by it was co-extensive with the harm from Count III (a claim on which it had already prevailed).[84] ALJ McKenna entered an order granting the stipulated motion the following day.[85]

Under the terms of Director Kraninger's May 29, 2019 order, neither of ALJ McKenna's orders are due any weight on remand.[86] Thus, on remand, the legal holding upon which Enforcement Counsel relied in stipulating to the dismissal of Count IV is open to reexamination. So if the ALJ determines that there must be a hearing to determine liability for Count III, the judicial economy interests that Enforcement Counsel sought to vindicate through dismissal of Count IV would no longer be present. Or if the ALJ decided that Respondents are not liable under Count III, Enforcement Counsel might no longer be willing to abandon Count IV because, in that instance, the relief that Enforcement Counsel could obtain under that count would no longer be coextensive with available relief under Count III. Without the order providing the predicate for dismissal or a determinative order actually dismissing it, the ALJ should find that Enforcement Counsel can still pursue Count IV.

[82] *Id.* at 42-43.

[83] Stipulated Motion re Count IV [Dkt. 127].

[84] *See id.* at 1.

[85] Order Granting Enforcement Counsel's Stipulated Motion to Withdraw Count IV with Prejudice (July 12, 2016) [Dkt. 133].

[86] *See* Order Directing a Remand to the Bureau's Administrative Law Judge (May 29, 2019) [Dkt. 216] at 9.

None of the reasons that Respondents provide support the idea that Count IV cannot proceed. They argue that Count IV is barred by claim preclusion, a doctrine in which final judgments from past actions foreclose parties from successively litigating the same claim in the future.[87] But claim preclusion cannot apply here because this is not a successive proceeding. It is the same proceeding in which Count IV was earlier dismissed, and there has been no final judgment, only an interlocutory order that is due no weight.[88] They also argue that judicial estoppel prevents Enforcement Counsel from asserting Count IV.[89] But given the status of the remand, judicial estoppel cannot apply. Enforcement Counsel has neither prevailed on any of its claims at any phase, nor taken a position that is inconsistent or incompatible with any of its prior positions. As was the case when Enforcement Counsel originally moved to withdraw Count IV, if it were to prevail on Count III but not Count IV at summary disposition (counts for which consumer harm is co-extensive, but for which Respondents are subject to separate civil penalties), dismissing Count IV before a hearing would preserve judicial economy and narrow issues. Thus, Enforcement Counsel is not seeking the sort of advantage that judicial estoppel is meant to prevent.[90]

[87] *See* Resp. Br. at 23-24.

[88] *See, e.g., Cloud Foundation, Inc. v. Kempthorne*, 546 F. Supp. 2d 1003, 1010 (D. Mont. 2008) (holding that order granting summary judgment in same case not entitled to claim preclusive effect because it was not a final judgment).

[89] *See* Resp. Br. at 24-25.

[90] *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotation marks and citations omitted) (explaining that judicial estoppel is meant "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment").

IV. Conclusion

For the reasons described above, the ALJ should deny Respondents' motion to dismiss or for summary disposition on their statute-of-limitations defense.

Respectfully submitted,

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December 6, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December 2019, I caused a copy of the foregoing Enforcement Counsel's Opposition to 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 Respondents' counsel at the following addresses:

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