UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

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

RESPONDENTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS AND/OR FOR SUMMARY DISPOSITION ON GROUNDS LIMITED TO OCTOBER 28, 2019 ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

The Opposition ("Opp'n") filed by Enforcement Counsel confirms that the Consumer Financial Protection Bureau ("CFPB") failed to exercise reasonable diligence in bringing its claims. The investigation was characterized by long periods of inactivity with only a small handful of investigative steps. The undisputed record in this case clearly demonstrates that Enforcement Counsel failed to exercise even the most basic diligence in pursuing this case. Although Enforcement Counsel acknowledges that it was alerted to something being potentially "amiss" at Integrity Advance no later than March 29, 2012, it offers no explanation for why the CFPB waited almost a year before taking the next step in its investigation and why it made no efforts to obtain a copy of what it admits was the key document in the case, the Integrity Advance loan agreement. During these long periods of inactivity and lack of any reasonable diligence, the applicable statutes of limitations had begun to run. These statutes bar Counts III and VII against Mr. Carnes and Counts I, II, V, and VI against Integrity Advance. Respondents' Motion should be granted.

I. The D.C. Circuit's reasoning in *PHH* applies equally to this case.

Enforcement Counsel continues to assert that the D.C. Circuit's decision in *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), has no effect on this case. Opp'n at 5-7. That argument reflects the very same kind of agency overreach that the D.C. Circuit sought to curtail in *PHH*. *See id.* at 54 ("Why would Congress allow the CFPB to bring administrative actions for an indefinite period, years or even decades after the fact? . . . The CFPB's interpretation is especially alarming because the agency can seek civil *penalties* in these administrative actions.") (emphasis in original) (citation omitted). Although the D.C. Circuit addressed the issue in the context of a different statute, the Real Estate Settlement Procedures Act ("RESPA"), the Court's reasoning forecloses the precise argument Enforcement Counsel

advances here: that it is immune from statutes of limitations when it chooses to pursue an action in an administrative forum:

> [T]he CFPB's Dodd-Frank-based argument — if accepted here — would apply not only to actions to enforce Section 8 of the Real Estate Settlement Procedures Act. 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.*** *Cf. Integrity Advance, LLC*, 2015-CFPB-0029, Doc. No. 33, CFPB Opposition to Motion to Dismiss, at 12 (arguing no statute of limitations applies to CFPB administrative action to enforce the Truth in Lending Act and the Electronic Fund Transfer Act). . . . The CFPB's argument misreads the enforcement provisions of the Dodd-Frank Act . . . . Congress limited the enforcement power granted in Section 5563. The CFPB may enforce those federal laws "*unless* such Federal law specifically limits the Bureau from conducting a hearing or adjudication proceeding." Obviously, one such "limit" is a statute of limitations. ***By its terms, then, Section 5563 ties the CFPB's administrative adjudications to the statutes of limitations of the various federal consumer protection laws it is charged with enforcing.*** The Dodd-Frank Act therefore makes clear that in its enforcement action against PHH, the CFPB was bound by any statute of limitations located in the Real Estate Settlement Procedures Act.

PHH, 839 F.3d at 51-52 (emphasis added) (citations omitted).

As this passage makes clear, Enforcement Counsel is subject to the statute of limitations "of the various federal consumer protection laws it is charged with enforcing" regardless of the forum in which it chooses to bring suit. *PHH*, 839 F.3d at 51; *see also* Resp'ts' Opening Mem. Law ("Resp'ts' Mem.") at 4-6. To hold otherwise would "create . . . a nonsensical dichotomy between CFPB court actions and CFPB administrative actions" and would lead to "absurd" results. *PHH*, 839 F.3d at 54. Thus, Enforcement Counsel is incorrect in its contention that "Respondents have failed to tie the analysis from [*PHH*] to the particular statutes at issue here." Opp'n at 1. The ALJ should conclude that the CFPB is subject to the statutes of limitations at issue in this matter.

II. The record and Enforcement Counsel's Opposition confirm that the CFPA claims against Mr. Carnes are time-barred.

In its Opposition, Enforcement Counsel suggests a reading of the "discovery" provisions of the statute of limitations in such an unreasonably broad manner as to make itself immune from the applicable statute of limitations and render the limitation period of the legislation a nullity. Opp'n at 10-18. In essence, Enforcement Counsel contends that "discovery" cannot occur until after it has fully completed its investigation and concluded that there is a potential violation of the Consumer Financial Protection Act ("CFPA"). It also asserts that it has no obligation to exercise any diligence whatsoever in investigating matters, suggesting that it can sit on its hands and do nothing for years even though it has a generous three-year statute of limitations. Notably, these contentions would mean that there is no limit to the length of time the CFPB can take to investigate. That is not, and cannot be, the law. Statutes of limitations exist precisely to avoid this kind of boundless uncertainty relating to potential liability. *See* Resp'ts' Mem. at 5-6 (citing cases).

Enforcement Counsel's Opposition confirms that the CFPB knew or should have known of the alleged violations against Mr. Carnes more than three years prior to filing the Notice of Charges on November 18, 2015.[1] It is undisputed that, consistent with then-Director Cordray's announcement of an "examination program" of payday lenders, the CFPB searched the Federal Trade Commission's Sentinel database for consumer complaints relating to Integrity

[1] Enforcement Counsel fails to respond to Respondents' citation of *Alexander v. United States*, 44 F.3d 328, 330-31 (5th Cir. 1995), in noting that the statute of limitations is a threshold issue that may be considered jurisdictional in nature. Even if it is an affirmative defense, Respondents have carried their burden, especially where, as here, Enforcement Counsel has failed to offer any explanation in response to the unrefuted evidence of numerous specific complaints followed by at least months of inaction which demonstrate its lack of diligence in investigating this matter. *Contra 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. Sept. 8, 2017) (rejecting statute of limitations argument where defendant sought to rely on the CFPB's "mere receipt of a consumer complaint").

Advance on March 29, 2012.[2] That search revealed multiple complaints that described the same type of alleged conduct that Enforcement Counsel later set forth in its Notice of Charges. *See* Resp'ts' Mem. at 7-8. Enforcement Counsel concedes that these complaints "may have alerted the Bureau that something was [allegedly] amiss at Integrity Advance[.]" Opp'n at 17. Given the nature of the complaints and the concessions in its Opposition, the CFPB knew that the loan agreement was the key document in the case. But despite having been "alerted" to the alleged conduct no later than March 2012 and knowing the significance of the loan agreement, Enforcement Counsel does not identify ***any*** steps the CFPB took to advance its investigation between March 2012 and January 2013 when it finally decided to issue a Civil Investigative Demand ("CID").[3] At most, the record shows that the only additional step the CFPB took in the intervening time period was to conduct an additional search for consumer complaints in the Sentinel database on August 14, 2012. Those complaints, again, alleged the same type of conduct that Enforcement Counsel describes in the Notice of Charges. *See* Resp'ts' Mem. at 7-8.

Enforcement Counsel also concedes that the CFPB did nothing to obtain the loan agreement at the center of its claims, *see* Resp'ts' Mem. at 11-12, until, at the earliest, January 2013 when it issued a CID to Integrity Advance. Even at that point, the CFPB apparently did not do anything else to obtain the loan agreement from other available sources, but waited until late 2013 when it received a copy of that agreement from Respondents. Enforcement Counsel did not seek the loan agreement despite three key facts that Enforcement Counsel does not dispute in its Opposition: (1) it was publicly available on the Integrity Advance website or from borrowers

[2] Enforcement Counsel contests Respondents' description of the individual who conducted the search, Kara Miller, as "high-level." However, Ms. Miller is the Assistant Litigation Deputy at the CFPB.

[3] Respondents, of course, were denied discovery relating to this critical time period. Even so, Enforcement Counsel's silence speaks volumes. Had Enforcement Counsel had any evidence of diligence, it surely would have cited that evidence in its Opposition.

who had brought the relevant language to the attention of the FTC; (2) the complaints related to the precise language of the agreement Enforcement Counsel later described in the Notice of Charges; and (3) even the most inexperienced investigator would know of the existence of these other sources. Enforcement Counsel also concedes that the CFPB did nothing to ascertain information about Mr. Carnes' role as Chief Executive Officer of Integrity Advance until well after issuing its CID to Integrity Advance in January 2013—it did not conduct an investigational hearing of Mr. Carnes until June 17, 2014.[4] And, although the CFPB sought and obtained tolling agreements with Integrity Advance, it never bothered to do so with Mr. Carnes. *See* Resp'ts' Mem. at 4 n.3.

The record is clear—despite having been aware of something allegedly "amiss" at Integrity Advance no later than March 2012, the CFPB waited almost a year before doing anything to move forward with its investigation. Enforcement Counsel does not attempt to offer an explanation in its Opposition. This is the very definition of a lack of diligence. Particularly in light of the critical role that statutes of limitations provide in our legal system, *see* Resp'ts' Mem. at 5-6, the ALJ should reject Enforcement Counsel's invitation to hold it immune from the obligation to exercise reasonable diligence. *See 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") (citation and internal quotation marks omitted) (emphasis deleted); *Phillips*

[4] One of the supposed critical facts that Enforcement Counsel asserts the Bureau could not have discovered prior to November 18, 2012 is that "senior executives of Integrity Advance reported directly or indirectly to Mr. Carnes[.]" Opp'n at 13. The fact that senior executives report to a CEO is hardly unusual or surprising, and, even if the CFPB did not actually know this prior to November 2012, it most certainly should have.

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.").

The ALJ also should reject Enforcement Counsel's argument that the Supreme Court's decision in *Gabelli v. SEC*, 568 U.S. 442 (2013), means that there is no "constructive discovery" standard under the CFPA's statute of limitations. *See* Opp'n at 14-15. Enforcement Counsel's reliance on *Gabelli* is misplaced because the issue in *Gabelli* was whether to infer a discovery rule into a statute of limitations that was keyed to the date of ***occurrence*** of a violation. That is not the case where, as here, the statute of limitations is expressly tied to the date of discovery. *See* Resp'ts' Mem. at 13-14. Unlike in *Gabelli*, the ALJ is not being asked to "read in" a constructive discovery standard to the statute; that standard was already written into the statute by Congress when it chose to tie the running of the statute to the "date of discovery of the violation," which, as discussed previously, has long been understood to encompass not only facts a particular plaintiff knows, but also facts that a reasonably diligent plaintiff would know. *See* Resp'ts' Mem. at 13-15.

The ALJ should similarly reject Enforcement Counsel's invocation of *Gabelli* in support of its argument that the constructive discovery rule does not apply because it is a government agency, as opposed to a private plaintiff. *See* Opp'n at 14-15. There is no such distinction identified in the statutory language, such a distinction is contrary to the D.C. Circuit's observation in *PHH* that Congress did not intend to allow the CFPB to bring administrative actions seeking civil penalties for an indefinite period, and it is notable that Enforcement Counsel does not attempt to argue otherwise in its Opposition. Moreover, the statute of limitations is very generous, affording the CFPB three years to complete its investigation after

discovery of any violation. Three years is more than enough time for diligent investigators to complete investigations into matters of this type.

Finally, by failing to respond to the argument, Enforcement Counsel has conceded that its claims cannot be saved by the continuing violation doctrine. *See TJGEM LLC v. Republic of Ghana*, 26 F. Supp. 3d 1, 12 (D.D.C. 2013) ("[T]he Court 'may treat the plaintiff's failure to oppose the defendant[s'] . . . arguments as a decision to concede those arguments.'") (*citing Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 268 (D.D.C. 2012)). In sum, the ALJ should conclude that Counts III and VII against Mr. Carnes are time-barred because the CFPB knew or should have known of the alleged violations more than three years prior to the filing of the Notice of Charges.

III. The TILA and EFTA claims are subject to, and barred by, a one-year statute of limitations.

While declaring that the District Court was wrong, Enforcement Counsel fails to explain why the holding of *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 922-23 (S.D. Ind. Mar. 6, 2015), that TILA's one-year statute of limitations applies to actions brought by the CFPB, not just private plaintiffs, should not be applied to this case.[5] But, as discussed above and previously, statutes of limitation apply to the CFPB regardless of its status as a government agency and regardless of the forum in which it chooses to bring suit. *See PHH Corp.*, 839 F.3d at 50-52. Enforcement Counsel's reliance on *Consumer Fin. Prot. Bureau v. Ocwen Fin. Corp.*, Case No. 17-CV-80495, 2019 U.S. Dist. LEXIS 152336 (S.D. Fla. Sept. 5, 2019), is similarly misplaced. The *Ocwen* court failed to consider *PHH* in connection with its

[5] As noted previously, although the *ITT* court drew a distinction between administrative proceedings and court actions, such a distinction is untenable in light of the D.C. Circuit's reasoning in *PHH*. *See PHH Corp.*, 839 F.3d at 41.

resolution of the statute of limitations issue. It therefore provides no insight into the issue before the ALJ.

Enforcement Counsel also ignores that the derivative claims in Counts I, II, V, and VI against Integrity Advance are based solely on underlying TILA and EFTA allegations. *See* Dkt. 1 at ¶¶ 49-61; 78-87. In such a case, it is the statute of limitations in TILA and EFTA that apply, not the statute of limitations in the CFPA. *See* 12 U.S.C. § 5564(g)(2)(B) ("[I]n 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.").

Here, the Notice of Charges indicates the alleged violations ended in December 2012. Dkt. 1 at ¶ 12. This means the "occurrence of the violation" was completed and the one-year statute of limitations for the TILA, EFTA, and derivative CFPA claims would have run one year later in December 2013. The Notice of Charges was not brought until almost ***three years later*** on November 18, 2015. These claims are time-barred and should be dismissed.

IV. Count IV was dismissed with prejudice at Enforcement Counsel's request and should not be revived.

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 stipulation did not "reserve" any rights for Enforcement Counsel to change course later in the proceeding or after remand, nor did Enforcement Counsel state, as it does now, that its withdrawal of Count IV was made "in express reliance on the legal holdings in ALJ Parlen L. McKenna's summary disposition decision." Opp'n at 24. To the contrary, its withdrawal of Count IV was made ***with***

prejudice, which usually carries the weight of a final judgment on the merits and therefore cannot be resurrected when a party changes its mind. *See Plumberman, Inc. v. Urban Sys. Dev. Corp.*, 605 F.2d 161, 162 (5th Cir. 1979) (citing *Astron Indus. Assocs., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958, 960 (5th Cir. 1968)) ("It is clear that a stipulation of dismissal with prejudice, or, for that matter, a dismissal with prejudice at any stage of a judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action.") (citations omitted); *Nemaizer v. Baker*, 793 F.2d 58, 60 (2d Cir. 1986) (finding the parties' stipulation of an action with prejudice was effectively a final judgment on the merits).

The ALJ should reject Enforcement Counsel's attempt to gain a strategic advantage following remand by allowing an expansion of the claims now at issue. As Enforcement Counsel acknowledges, it seeks to resurrect Count IV because, if it loses on Count III, it would like another bite at the apple under Count IV. *See* Opp'n at 25. But the principles of judicial estoppel seek to prevent such gamesmanship. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (*quoting Pegram* v. *Herdrich*, 530 U.S. 211, 227, n. 8 (2000)). Under principles of equity, the CFPB is estopped from changing course and bringing the dismissed claim back to life. Whether the prior ALJ ordered it is beside the point given that Enforcement Counsel previously moved to dismiss the count with prejudice. In any event, doing so would be futile because, even if the CFPB was allowed to "re-file" Count IV, it would undoubtedly be barred by the CFPA's three-year statute of limitations—a point that Enforcement Counsel does not address in its Opposition. *See* 12 U.S.C. § 5564(g).

* * *

For the foregoing reasons, and for the reasons stated in Respondents' opening Memorandum of Law, 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: December 13, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December 2019, I caused a copy of the foregoing Respondents' Reply 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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