Pepper Hamilton LLP
Attorneys at Law

3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
215.981.4000
Fax 215.981.4750

Richard J. Zack
direct dial: 215.981.4726
direct fax: 215.981.4750

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Via Electronic Filing

The Hon. Christine L. Kirby
Consumer Financial Protection Bureau
1700 G St NW
Washington, DC 20552

Re: *In the Matter of Integrity Advance, LLC and James R. Carnes* (2015-CFPB-0029): Supplemental Letter Following Oral Argument on Respondents' Motion to Dismiss and/or for Summary Disposition

Dear ALJ Kirby:

Respondents Integrity Advance, LLC and James R. Carnes ("Respondents") respectfully submit this supplemental letter following oral argument held in the above-captioned matter on January 6, 2020. This letter is necessary to address two arguments that Enforcement Counsel raised at oral argument for the first time, so Respondents respectfully request the opportunity to respond by way of this letter.

First, in response to Your Honor's probing of Enforcement Counsel's position that the Consumer Financial Protection Bureau ("CFPB") is not subject to statutes of limitation when it chooses to proceed in an administrative forum, Enforcement Counsel conceded, for the first time, that claims under the Consumer Financial Protection Act ("CFPA") are subject to the five-year catch-all statute of limitations set forth in 28 U.S.C. § 2462.[1] This new argument is a stark departure from Enforcement Counsel's previous position that it is not subject to ***any*** statute of limitations when it chooses to proceed in front of an ALJ. *See* Dkt. 242 at 1, 5-7. In fact, it is a departure from the CFPB's prior position anywhere; it has been telling courts for several years that it is not subject to any statute of limitations and that its claims could remain viable for 100 years. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 50-51, 55 (D.C. Cir. 2016). Any argument that is raised for the first time on oral argument should not be considered at all. *See, e.g.*, *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 55-56 (D.C. Cir. 2012) ("The court generally does not entertain arguments raised for the first time in a reply brief, let alone for

[1] Although Enforcement Counsel referenced 28 U.S.C. § 2462 in its Opposition, it did so in passing and only in connection with its argument relating to the Electronic Fund Transfer Act claim against Integrity Advance in Count V of the Notice of Charges. *See* Dkt. 242 at 23.

the first time at oral argument, much less during rebuttal oral argument[.]") (emphasis deleted) (citations omitted); *Newark Pre-School Council, Inc. v. United States HHS*, 201 F. Supp. 3d 72, 80 (D.D.C. 2016) (declining to consider argument raised at oral argument for first time). Further, Enforcement Counsel's eleventh-hour concession that the CFPB is bound by the Section 2462 statute of limitations in its administrative proceedings is just an attempt to circumvent the diligence requirement embedded in the more-specific statute of limitations contained in the CFPA. The CFPA statute is triggered when the CFPB knew or should have known of the alleged violations. *See* 12 U.S.C. § 5564(g).

However, while Section 2462 does limit the CFPB's efforts to seek damages for conduct occurring more than five years prior to the filing of the charges, Section 2462 does not eliminate the specific three year from discovery limitations period for its CFPA claims (including the due diligence requirement). *See* 28 U.S.C. § 2462 ("***Except as otherwise provided by Act of Congress***, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . .") (emphasis added). The catch-all statute cannot and does not supplant the more specific and shorter statute of limitations contained within the CFPA governing CFPA claims. Enforcement Counsel is attempting to circumvent Congress' imposition of a three-year statute of limitations with a diligence requirement by cherry picking what it sees as a more favorable statute of limitations which would shield it from scrutiny as to its diligence.

Second, at oral argument, Enforcement Counsel also alleged, for the first time, that the March 29, 2012 search for complaints against Integrity Advance may have been only one of many searches that Enforcement Counsel Kara Miller ran in that timeframe, i.e. that entities other than Integrity Advance may have been also under investigation. Enforcement Counsel also suggested that the CFPB's resources and priorities restricted its ability to diligently investigate matters. Such facts, however, appear nowhere in the record. To the contrary, the record establishes only that the Office of Enforcement was investigating Integrity Advance and Mr. Carnes and by March 29, 2012 discovered the alleged violations and/or should have discovered the alleged violations before November 2012 if it exercised appropriate diligence. *See* Decl. of Richard J. Zack (Dkt. 241), ¶¶ 14-16; Enforcement Counsel's Stmt. of Facts (Dkt. 243), ¶¶ 14-16, 30. Likewise, the record demonstrates that the CFPB had given priority to investigating payday lending and had assigned more than a half dozen lawyers to this case in particular. The ALJ should reject Enforcement Counsel's inappropriate attempt to consider matters outside the record and about which Enforcement Counsel has opposed any inquiry. To the extent the ALJ does consider these new allegations, Respondents should be permitted to inquire into Enforcement Counsel's assertions. Respondents respectfully renew their request for discovery as to, *inter alia*, the nature and extent of the CFPB's knowledge that led to the March 29, 2012

search, when that knowledge was acquired, what and when additional knowledge was acquired afterward and by whom, and whether CFPB exercised appropriate diligence based on what it learned in the March 29, 2012 search. It would also be necessary to obtain testimony from Kara Miller relating to these issues.

The ALJ should reject Enforcement Counsel's new arguments and grant Respondents' Motion to Dismiss and/or for Summary Disposition (Dkt. 239).

Respectfully submitted,

/s/ Richard J. Zack

Richard J. Zack
Counsel for Respondents Integrity Advance, LLC and James R. Carnes

cc: Stephen Jacques (via e-mail)
Benjamin Clark (via e-mail)
Alusheyi Wheeler (via e-mail)
Deborah Morris (via e-mail)