Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

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

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

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BACKGROUND

I. Procedural History

In accordance with the briefing schedule set forth in my October 28, 2019, *Order Denying Further Discovery on Statute of Limitations Issue* (Doc. 238), the parties have filed briefs setting forth their arguments as to whether any of the counts in the current matter are time-barred by the relevant statutes of limitations.

On November 15, 2019, Respondents filed *Respondents' Motion to Dismiss and/or for Summary Disposition on Grounds Limited to October 28, 2019 Order* (Doc. 238). Concurrent with the motion, Respondents also filed a brief in support of their motion ("Res. Br." - Doc. 239), a statement of undisputed facts in support of the motion (Doc. 240), and a declaration of Respondents' Counsel ("RC"), Richard Zack, with attached exhibits A-C (Doc. 241).[1] In the motion, Respondents requested oral argument.

On December 6, 2019, the Consumer Financial Protection Bureau ("CFPB") filed *Enforcement Counsel's Opposition to Respondents' Motion to Dismiss and/or for Summary Disposition on Grounds Limited to October 28, 2019 Order* ("Enf. Br." -Doc. 242) as well as a statement regarding Respondents' statement of undisputed facts and Enforcement Counsel's ("EC") statement of additional undisputed material facts (Doc. 243).

On December 10, 2019, I conducted a telephonic conference with the parties to discuss scheduling. During the conference, RC reiterated their request for oral argument on the issues raised in the motion.

On December 10, 2019, RC filed an addendum to the motion, correcting a typo and clarifying the counts for which they are seeking dismissal and/or summary disposition (Doc. 244). On December 13, 2019, RC filed a reply brief in support of their motion ("Reply" - Doc. 245).

On January 6, 2020, the parties presented oral argument on the issues raised by Respondents' motion. At the oral argument, each side was allotted thirty minutes to discuss their position and answer questions from the bench, with Respondents going first. Each side was then allotted fifteen minutes for rebuttal. The parties were notified of these rules prior to the oral argument (Doc. 246).

At the conclusion of EC's rebuttal argument, RC requested that they be permitted a second rebuttal opportunity to address two issues they claimed that EC raised at oral argument for the first time. The first issue they wanted to address was EC's statement that the CFPB is subject to the five-year "catch-all" statute of limitations set forth in 28 U.S.C. § 2462. RC argued that despite this concession by the CFPB, it was still bound by the three-year CFPA statute of limitations set forth in 12 U.S.C. § 5564(g). Second, RC claimed that EC had raised facts that were not in the record and that I should not consider them in deciding this matter.[2] In the event that I were to

[1] Exhibits A-C filed electronically with the motion were redacted versions of the exhibits. The full versions of the exhibits were submitted via FedEx and filed under seal.

[2] I note that RC also discussed these issues during his first rebuttal argument.

consider the additional facts,[3] RC stated that they would renew their request for discovery as to the nature and extent of the CFPB's knowledge that led it to search the FTC database on March 29, 2012. EC did not make a second rebuttal argument.

On January 9, 2020, RC filed a supplemental letter (Doc. 247). In the letter, RC raised the same points that they had already raised in their rebuttal arguments on January 6, 2020, and renewed their request for additional discovery, which I had previously denied in my October 28, 2019, *Order Denying Further Discovery on Statute of Limitations Issue* (Doc. 238). As I have not considered EC's statements to constitute facts in the record, I deny RC's request to reopen discovery.

On January 15, 2020, EC filed a response to the supplemental letter (Doc. 248). EC took issue with RC filing what it characterized as an "unauthorized third brief" in support of their motion[4] and stated that RC had mischaracterized EC's arguments and the facts. EC asserted that the CFPB had previously acknowledged the potential applicability of 28 U.S.C. § 2462 and that it had not asserted additional facts that were not in the record, but had merely stated obvious characteristics of a government enforcement agency. EC opposed reopening the record for additional discovery on the statute of limitations issue.

II. Respondents' Motion

In their motion, Respondents are seeking dismissal and/or a grant of summary disposition as to Counts III and VII of the *Notice of Charges* ("*NOC*")[5] against Respondent, James Carnes, and Counts I, II, V, and VI against Respondent, Integrity Advance ("IA"), based on the applicable statutes of limitations. Respondents further request that Count IV against both James Carnes and Integrity Advance remain dismissed with prejudice. Respondents concede that Counts III and VII against Integrity Advance are not time-barred due to tolling agreements signed by the parties (Docs. 200, 201).

III. Respondents' Position

Respondents assert, based upon the D.C. Circuit Court decision in *PHH Corp. v. CFPB,*[6] that the CFPB is subject to applicable statutes of limitation regardless of the forum in which it chooses to bring suit.[7] They assert that the Consumer Financial Protection Act[8] ("CFPA") Counts

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[3] I have not considered the comments made by EC to be facts in this matter. Although EC stated possible factors for why a government enforcement agency may move relatively slowly in pursuing a matter, these possible factors do not constitute facts. Furthermore, EC did discuss similar factors for why a reasonably diligent government agency may not move as quickly as RC assert they should in their written brief, so the point was not raised for the first time at oral argument, as RC assert. See Enf. Br. at 17.

[4] Although RC characterized the document as a "supplemental letter," EC is correct that the document was, in effect, a supplemental brief that discussed arguments that had already been made and are part of the transcribed record. In the future the parties are to refrain from sending me letters. Issues will be raised in formal motions or requests or at conferences and briefed, as I deem necessary.

[5] Doc. 1.

[6] *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016).

[7] Res. Br. at 5.

[8] The CFPA is also known as Title X of the Dodd-Frank Act of 2010, 12 U.S.C. §5301, et seq..

III (Deception) and VII (Unfairness) against Respondent, James Carnes, are time-barred.[9] In this regard, they assert that the CFPA's (three years after date of discovery of the violation) statute of limitations[10] applies to this administrative proceeding.[11] They assert that the claims against Carnes are barred because the CFPB *knew* of the alleged violations more than three years prior to the filing of the (November 18, 2015) *NOC*.[12] Alternatively, they assert that the counts are barred because the CFPB *should have known* of the alleged violations more than three years prior to the filing of the *NOC*.[13] Furthermore, they assert that the claims against Carnes are not preserved under a "continuing violations" theory.[14]

With regard to the Counts under the Truth in Lending Act ("TILA") and derivatively under the CFPA (Counts I and II) and the Electronic Funds Transfer Act ("EFTA") and derivatively under the CFPA (Counts V and VI) against Integrity Advance, Respondents assert that the claims are time-barred by the TILA and EFTA one-year statutes of limitations, which apply to CFPB administrative proceedings.[15]

With regard to Count IV against both Respondents, James Carnes and Integrity Advance, Respondents assert that the count has been withdrawn with prejudice and cannot proceed.[16]

IV. CFPB's Position

In their opposition brief, EC for the CFPB assert that none of the Counts against Respondents are time-barred.[17] They assert that the D.C. Circuit Court's decision in *PHH Corp. v. CFPB* only interpreted the statute of limitations of the Real Estate Settlement Procedures Act ("RESPA") and is thus irrelevant to the current proceeding which contains only TILA, EFTA, and CFPA claims.[18]

Alternatively they assert that, even if the statutes of limitations for the TILA, EFTA, and CFPA that apply in federal court were to apply to this administrative proceeding, the claims would still not be time-barred, and that I can thus "assume without deciding" that the statutes of limitations applicable to TILA, EFTA, and CFPA also apply here.[19]

With regard to discovery of the violations against Respondent Carnes, EC assert that the CFPB did not discover the violations prior to November 18, 2012 and could not have discovered them until it conducted an actual investigation and determined Carnes' personal involvement in Integrity Advance's bad acts.[20] They assert that the CFPB could not have discovered the level of

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[9] Res. Br. at 4-20. In the event I were to find that Count IV may proceed, RC also assert that Count IV (CFPA - Unfairness) against Respondent Carnes is similarly time-barred. *Id.* at 2.
[10] 12 U.S.C. § 5564(g)(1).
[11] Res. Br. at 4-6.
[12] *Id.* at 6-12.
[13] *Id.* at 12-18
[14] *Id.* at 18-20; During oral argument, EC stated that the CFPB is not taking this position.
[15] *Id.* at 20-23.
[16] *Id.* at 23-25.
[17] Enf. Br. at 1.
[18] *Id.* at 5-7.
[19] *Id.* at 2.
[20] *Id.*

Carnes' personal involvement until well after November 18, 2012.[21] They assert that a "constructive discovery" standard, i.e., "should have discovered" standard, does not apply to government agencies, and even if it did apply, there is no basis to conclude that the CFPB *should have* discovered Carnes' alleged violations prior to November 18, 2012.[22]

With regard to the TILA and EFTA claims and derivative CFPA claims against Respondent, Integrity Advance, EC assert that the CFPB is not bound by the one-year limitations provisions that apply only to private plaintiffs.[23] With regard to Count I, they assert that the CFPA "three years after the date of discovery of the violations" statute of limitations that might apply to the CFPB in a court proceeding, would not apply in an administrative proceeding, but if it did, then the claim should be treated as a violation of the CFPA [and is preserved by the tolling agreements].[24] With regard to Count V, they assert that EFTA's one-year statute of limitations does not apply, but if a statute of limitations were determined to apply, it would be the "five-years from date when claim first accrued" provision set forth in 28 U.S.C. § 2462.[25] With regard to Counts II and VI, they assert that, in the event a statute of limitations is determined to apply to these claims, then the CFPA statute of limitations provision would apply and they would thus be preserved by the tolling agreements.[26]

With regard to Count IV, EC assert that the previous Administrative Law Judge's ("ALJ") order dismissing it is due no weight in this remand hearing, the claim remains alive, and the CFPB intends to pursue it.[27] Additionally, they state that the CFPB only moved to withdraw Count IV in the prior proceeding based upon the prior judge's order granting summary disposition with regard to Count III against Respondent Integrity Advance and, but for that order, they would have proceeded with Count IV in the original proceeding.[28]

V. Standard for Granting or Denying Motion

In their motion and accompanying brief, RC state that they are seeking "dismiss[al] and/or [a] grant [of] summary disposition" as to Counts III and VII against Respondent Carnes and Counts, I, II, V, and VI against Respondent Integrity Advance.[29] They do not set forth the applicable standards for granting the motion either as a motion to dismiss or as a motion for summary disposition.[30] However, they have submitted a statement of undisputed facts in support of their motion (Docs. 240-241) and it is evident that the motion cannot be decided solely based on the face of the pleadings, without considering additional undisputed facts.

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[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*. at 19-22.
[25] *Id*. at 22-23.
[26] *Id*. at 8-9.
[27] *Id*. at 23-26.
[28] *Id*. at 24-25; EC concede that the prior ALJ's *Order Granting in Part and Denying in Part Bureau's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition* (Doc. 111) is due no weight in this remand proceeding. *Id*. at 2.
[29] Res. Br. at 3.
[30] See *Id*. at 1.

In their opposition brief, EC assert that Respondents' motion should be treated solely as one for summary disposition since both parties are relying on materials and facts outside the pleadings.[31]

The applicable rule governing dispositive motions in this administrative proceeding is Rule 212.[32] According to paragraph (b) of the rule, which governs motions to dismiss, "[a] respondent may file a motion to dismiss asserting that, even assuming the truth of the facts alleged in the notice of charges, it is entitled to dismissal as a matter of law." Accordingly, a motion to dismiss on statute of limitations grounds "is appropriate only if it is apparent from the face of the complaint that the claim is time-barred."[33] "Generally, the question of whether a claim is barred by the statute of limitations is best raised as an affirmative defense in the answer, rather than in a motion to dismiss."[34]

According to paragraph (c) of Rule 212, which governs motions for summary disposition, "[a] party may make a motion for summary disposition asserting that the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition 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."

With their opposition to Respondents' motion, EC submitted a statement regarding Respondents' statement of undisputed facts as well as their own statement of additional undisputed material facts (Doc. 243). EC do not dispute the truthfulness of the facts submitted by Respondents. However, EC assert that several of the facts are not material to Respondents' statute of limitations defenses. EC also submitted additional undisputed material facts which were not disputed by Respondents in their reply brief. I note that the undisputed facts submitted by both parties were also encompassed within the stipulated facts section of the *Joint Update on Fact Development Regarding Statute of Limitations Issue* (Doc. 234), previously submitted by the parties in this matter. I thus accept the undisputed facts set forth by the parties and will consider them in analyzing this motion. Given the reliance on facts outside the pleadings, I will treat this motion as a motion for summary disposition. Accordingly, all evidence must be viewed in the light most favorable to the non-moving party.[35]

ANALYSIS

I. What is the effect of the prior administrative law judge's order dismissing Count IV in this matter?

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[31] Enf. Br. at 4-5.

[32] Rules of Practice for Adjudication Proceedings, 12 C.F.R. § 1081.212.

[33] *CFPB v. Ocwen Fin. Corp.*, No. 17-CV-80495, slip op. at 43 (S.C. Fla. Sept. 5, 2019) (quoting *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845-46 (11th Cir. 2004) (internal quotation marks omitted)); *see also Capitol Services Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 788 (D.C. Cir. 2019) (at motions to dismiss stage, dismissal for failure to state a claim on statue of limitations grounds is proper only if complaint on its face is conclusively time-barred).

[34] *Ocwen* at 43 (quoting *Persaud v. Bank of Am., N.A.*, 2014 WL 4260853, at *11 (S.D. Fla. Aug. 28, 2014)).

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

On July 11, 2016, during the previous hearing in this matter, the parties filed a *Stipulated Motion to Withdraw Count IV with Prejudice* (Doc 127). In the motion, the parties stated, *inter alia*, that in a July 1, 2016 order,[36] the ALJ found that Respondent Integrity Advance's loan agreement was facially deceptive, i.e., that it had violated the CFPA with regard to Count III. The parties stated that the consumer harm caused by the deceptive loan agreement (Count III) was co-extensive with the harm EC would allege in continuing to assert the Count IV unfairness claim. Therefore, in the interests of judicial economy and narrowing the issues, EC was submitting a stipulated motion seeking to withdraw Count IV of the *Notice of Charges* with prejudice. The motion further stated that, although Respondents initially objected to the withdrawal of Count IV, after further consideration, they did not object to this motion. On July 12, 2016, the prior ALJ, Judge McKenna, issued an *Order Granting Stipulated Motion to Withdraw Count IV With Prejudice* (Doc. 133).

In the Director's May 28, 2019, *Order Directing a Remand to the Bureau's Administrative Law Judge* (Doc. 216), forwarding the case to me to conduct a new hearing, CFPB Director, Kathleen Kraninger, directed that I was to give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna. In my October 28, 2019, *Order Denying Further Discovery on Statute of Limitations Issue* (Doc. 238), I directed the parties to state their positions as to whether Judge McKenna's order dismissing Count IV with prejudice is still effective in this remand hearing.

RC's position is that the CFPB cannot resurrect Count IV as it is barred by the principles of res judicata and judicial estoppel. They argue that the CFPB cannot now take a position that is contrary to its prior position. They also alternatively assert that in order to proceed with Count IV, the CFPB would have to re-file the claim, and that it would be barred by the CFPA's three-year statute of limitations.[37]

EC's position is that Judge McKenna's order dismissing Count IV is due no weight on remand. Furthermore, they concede that Judge McKenna's order in which he granted summary judgment in the Bureau's favor on Count III against Integrity Advance (Doc. 111) is also due no weight in this remand proceeding. EC assert that it was in reliance on this summary judgment order that they sought to dismiss Count IV in the prior proceeding. They argue that claim preclusion cannot apply here because this is not a successive proceeding, but rather 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. Furthermore, they assert that judicial estoppel cannot apply because EC has neither prevailed on any of its claims, nor taken a position incompatible or inconsistent with its prior positions.[38]

It is clear from the remand order in this case, that I am to give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna. Thus, the orders issued by Judge McKenna do not constitute valid and final judgments. As the Supreme

[36] *Order Granting in Part and Denying in Part Bureau's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition*, Doc. 111, at 31.
[37] Res. Br. at 23-25, Reply at 8-9.
[38] Enf. Br. at 23-26.

Court stated in *Arizona v. California*,[39] cited by RC in its brief, "[i]t is the general rule that issue preclusion attaches only when an issue of fact or law is actually litigated and determined by valid and final judgment." There has been no valid and final judgment in the current matter. I have also read each of the cases cited by RC concerning this issue and find that they differ in nature from the current matter and do not involve cases that were remanded for a new hearing due to a defect in the appointment of the adjudicator. Accordingly, I find that Judge McKenna's order dismissing Count IV has no effect in this new hearing and that the CFPB may proceed with Count IV.

Furthermore, I do not find that the CFPB is taking a position inconsistent with one that it has previously asserted. In the original *Stipulated Motion to Withdraw Count IV with Prejudice*, EC made it clear that it was only seeking to withdraw Count IV based upon Judge McKenna's finding that Respondent Integrity Advance's loan agreement was facially deceptive, i.e., that it had violated the CFPA with regard to Count III. The *Stipulated Motion to Withdraw* stated that the consumer harm caused by the deceptive loan agreement (Count III) was co-extensive with the harm EC would allege in continuing to assert the Count IV unfairness claim. However, since Judge McKenna's *Order Granting in Part and Denying in Part Bureau's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition* no longer has any effect, Count III has not been decided against Integrity Advance. Therefore, the reason for EC seeking to withdraw Count IV no longer exists and it is not inconsistent to choose to proceed with Count IV at this stage of the proceeding. Furthermore, I find that RC has not presented a convincing argument as to why the CFPB would need to re-file Count IV, as it does not cite to any authority that would require such action.

Since Count IV against Respondent, Integrity Advance was covered by the tolling agreements, I find that the CFPB can proceed with Count IV against Integrity Advance. Respondents effectively conceded this by omission in their brief by stating that if the claim were revived, it would still fail *against Carnes*.[40] As to whether Count IV against Respondent, Mr. Carnes, can proceed, I will analyze that count along with Counts III and VII against Respondent Carnes below, as suggested by Respondents.[41]

II. What is the effect of *PHH Corp. v. CFPB* in this administrative proceeding?

RC assert that, based on the D.C. Circuit Court's decision in *PHH Corp. v. CFPB*, the CFPA's three-year statute of limitations applies to CFPB administrative proceedings as well as court actions.[42] Similarly, they assert that the one-year statutes of limitations contained in TILA and EFTA also apply to CFPB administrative proceedings.[43] They assert that the D.C. Circuit Court's analysis in *PHH* encompassed all of the consumer protections statutes enforced by the CFPB and was not limited to the RESPA statute at issue in that case and that the CFPB is subject to the statutes of limitations of the various federal consumer protection laws it is charged with enforcing.[44]

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[39] *Arizona v. California*, 530 U.S. 392, 414 (2000) (internal quotation and alteration omitted).
[40] Res. Br. at 2.
[41] See *Id*.
[42] *Id*. at 4-6.
[43] *Id*. at 21-23.
[44] Reply at 1-2.

EC assert that the Court in *PHH* was only interpreting the RESPA statute of limitations and that its interpretation does not control here, as there are no RESPA claims. They assert that Respondents have failed to tie the analysis from *PHH* to the particular statutes at issue in this matter.[45] They further assert that the *PHH* decision has no effect on this administrative proceeding.[46]

I find that the holding in *PHH* is neither as broad nor as narrow as the parties assert. The Court in *PHH* clearly rejected the CFPB's argument that no statutes of limitations ever apply when it chooses to bring cases in administrative proceedings as opposed to court actions.[47] In *PHH*, the CFPB argued that the CFPA contains no statute of limitations for CFPB enforcement actions brought in administrative proceedings, as opposed to in court actions. The Court characterized such an argument as "absurd."[48] On the other hand, the Court did not state that all statutes of limitations contained within consumer financial protection statutes necessarily apply to government agencies' administrative proceedings. Rather, the Court set forth a methodology of analyzing such statutes to determine whether a particular statute of limitations applies to government enforcement agencies and whether the term "action" in a statute encompasses court actions as well as administrative proceedings. Specifically, the Court emphasized the importance of looking at the overall text, context, purpose and history of the particular statute.[49]

III. Are CFPA Counts III, IV and VII against Respondent James Carnes time-barred?

A. Does the CFPA "[three] years after the date of discovery of the violation" statute of limitations apply to administrative proceedings?

In their brief, RC argue that the CFPA's "[three] years after the date of discovery of the violation"[50] statute of limitations applies to this administrative proceeding. They base their argument on the D.C. Circuit Court's finding in *PHH*, discussed above.

In response, EC argue that *PHH* has no effect on this proceeding because it did not address whether or how limitations provisions in the CFPA apply in Bureau administrative proceedings, but merely analyzed whether a statute of limitations contained in the RESPA applies to Bureau administrative proceedings. EC further assert that it is unnecessary to resolve whether the CFPA's statute of limitations applies here, because even if it does apply, the *NOC* was timely filed.

At oral argument, both sides confirmed that no court has fully addressed this issue, to date. The facts in *PHH* were different because the Court was not analyzing a charge based solely on the

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[45] Enf. Br. at 1.
[46] *Id*. at 5.
[47] I note that in the current matter, EC did not make this argument, but rather stated that it did not matter, because even if the "[three] years after the date of discovery of the violation" statute of limitations were to apply, the CFPB filed the *NOC* in a timely manner. In oral argument, EC also asserted that a five-year statute of limitations might apply to CFPB administrative proceedings brought under the CFPA, citing to 28 U.S.C. § 2462, but it did not fully develop this argument.
[48] *PHH Corp.*, 839 F.3d at 54.
[49] *Id*. at 53.
[50] 12 U.S.C. §5564(g)(1).

CFPA. In the current matter, we have three counts, Counts III, IV, and VII, that are solely CFPA claims and not derivative CFPA claims. I note that in their briefs and oral arguments, neither side applied the analysis suggested in *PHH*, i.e., they did not examine or discuss the text, context, purpose, and history of 12 U.S.C. § 5564(g)(1).

The *PHH* court stated that "the broader purpose and history of the Dodd-Frank Act strongly reinforce the conclusion that the CFPB is bound by a three-year statute of limitations **in its administrative actions to enforce Section 8** [of RESPA]" and that it "would expect Congress to actually say that there is no statute of limitations for CFPB administrative actions **to enforce Section 8**."[51] Accordingly, EC are correct in asserting that the *PHH* Court was specifically analyzing whether the RESPA statute of limitations applied to CFPB administrative proceedings.

While the Court did more broadly discuss whether the CFPA statute of limitations applies to CFPB administrative proceedings, it did not specifically make such a finding in the context of a case involving solely a CFPA claim, because it did not have that particular issue before it for decision. I also note that the *PHH* Court did not discuss 12 U.S.C. § 5564(f) which discusses the "forum" for a civil action as being a "United States district court or in any court of competent jurisdiction of a state in a district in which the defendant is located or resides or is doing business...." This section seems to indicate that 12 U.S.C. § 5564(g)(1) would apply only to actions within the specifically designated fora rather than to administrative proceedings discussed in 12 U.S.C. §5563, which contains no statute of limitations.

Ultimately, although the *PHH* court provided an analysis for why it believed that CFPB administrative proceedings should be limited by statutes of limitations, it did not decide what that particular statute of limitations is in a case that solely involves a CFPA claim, rather than a derivative CFPA claim based on RESPA. The issue thus remains unresolved to date, and RC has cited no other cases to support their position. EC suggested in their brief,[52] oral argument, and response letter that 28 U.S.C. § 2462 may apply to the claims against Respondent Carnes.[53] However, EC did not fully develop this argument and assert that this is a question that I need not decide to resolve this motion.

EC state that I may "assume without deciding" that the CFPA statute of limitations that applies in federal court[54] also applies in this administrative proceeding, because even if it does apply, Respondents have failed to show that these claims are time-barred against Carnes under either an "actual" or "constructive" discovery standard.[55] I find that this a prudent course of action since neither party has analyzed the overall text, context, purpose and history of the relevant portions of the CFPA in their briefs or oral arguments to support their positions. As I will discuss below, assuming that the "three years after date of discovery of the violation" statute of limitations

[51] *PHH Corp*., 839 F.3d at 53-54 (emphasis added).
[52] Enf. Br. at 23.
[53] This section states 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...."
[54] 12 U.S.C. § 5564(g)(1).
[55] Enf. Br. at 1, 7, 10.

applies, as RC assert, I find that Respondents have failed to show that Counts III, IV, and VII against Respondent Carnes are time-barred.[56]

B. When does a claim for individual liability accrue?

RC assert that the CFPB both "discovered" and "should have discovered" the alleged violations against Respondent Carnes more than three years before filing the *NOC*. EC deny this assertion.

Before I can determine which of these positions is valid, I must first discuss what specifically needed to be discovered. In other words, I need to determine what would be required for a claim for individual liability against Carnes to accrue. The general limitations rule is that a cause of action accrues once a plaintiff has a complete and present cause of action.[57]

In their brief, RC state that the CFPB seeks to hold Carnes personally liable for Integrity Advance's alleged violations of the CFPA and that it does not allege any separate violation or distinct conduct on the part of Carnes.[58] They further state that the claims against Carnes arise solely from the allegation that Integrity Advance's loan agreement was deceptive and/or misleading and the fact that Carnes was the CEO at the time of the conduct.[59] Therefore, they assert that if the CFPB had obtained these two "critical facts," it would have had enough information to bring a *NOC*, i.e., a complete and present cause of action, months prior to November 18, 2012.[60] They further assert that the CFPB should have learned of the alleged violations against Carnes at or around the time it searched the FTC database on March 29, 2012.[61]

EC respond that to state a claim for monetary relief against Carnes making him individually liable, they needed to plead allegations that plausibly showed that he had participated directly in or had actual knowledge of the misrepresentations involved, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud and intentionally avoided learning the truth.[62] They argue that they did not have such information prior to conducting a formal investigation, i.e., issuing a CID, obtaining production based on the CID, and conducting investigational interviews. They assert that the loan agreement, consumer complaints, other factors cited by RC, and Carnes' title as CEO would have been insufficient to support the filing of a *NOC* for individual liability.[63]

Although RC are correct in stating that both Respondents Carnes and Integrity Advance were charged in Counts III, IV, and VII, the elements of proving a charge of individual liability against Carnes are more extensive than those required to prove a similar charge against Integrity Advance. I also note that the *NOC* does address the nature of Carnes' role and authority within

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[56] I note that since I am making this assumption here, I also plan to apply this assumption should this case reach the stage of determining a remedy, which could potentially affect the amount of damages EC may seek.
[57] *Merck & Co. v. Reynolds*, 559 U.S. 633, 644 (2010).
[58] Res. Br. at 15.
[59] *Id*. at 16.
[60] *Id*. at 18. November 18, 2012 is three years prior to the November 18, 2015, *NOC*.
[61] *Id*.
[62] Enf. Br. at 12.
[63] *Id*. at 12-13.

Integrity Advance.[64] I therefore find it inaccurate for RC to assert that the *NOC* does not allege any distinct conduct on the part of Carnes and to imply that the elements of the offenses are the same for individual liability as they would be for corporate liability.

I find that EC have accurately stated what they must establish to prove the elements for individual liability. Therefore, I find that the claims against Carnes could not have accrued absent some evidence that he participated directly in or had actual knowledge of the misrepresentations involved, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud and intentionally avoided learning the truth.[65]

So, the next question is when did the CFPB discover such evidence regarding Carnes' role in the company. In answering this question, I must first examine whether the term "discovery" means "actual" discovery or "constructive" discovery.

C. Does the term "discovery" in the CFPA statute of limitations mean "actual" discovery or "constructive" discovery?

In their brief, RC assert that the CFPA's three-year statute of limitations runs from the date that the CFPB *knew* or *should have known* of the alleged violations.[66] In support of their position, they cite to *Merck & Co. v. Reynolds*, *CFPB v. Nationwide Biweekly Admin., Inc.*,[67] *CFPB v. NDG Fin. Corp.*,[68] and *Gabelli v. SEC*.[69] In their reply brief, RC dispute EC's interpretation of and reliance on *Gabelli* and seek to distinguish its facts from those in the current matter.[70]

In their opposition brief, EC assert that the CFPA's statute of limitations runs from the date of "actual" discovery, not "constructive" discovery.[71] In support of their position, EC assert that Respondents are mistaken in their attempt to expand the *Merck* findings to this fact pattern.[72] They assert that the *Merck* finding that the term "discovery" includes "constructive" discovery is only applicable to private plaintiffs and not to government agency plaintiffs.[73] They further assert that the Supreme Court later clarified in *Gabelli* that constructive discovery does not apply to government enforcement actions.[74] They also cited to *3M Co. v. Browner*,[75] a 1994 D.C. Circuit Court case, as similarly supporting their position.[76]

I have read each of the cases cited by the parties and while I find that none of them are exactly on point, they are instructive in deciding this issue:

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[64] Doc. 1 at par. 8-9.
[65] See *CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016) (quoting *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)).
[66] Res. Br. at 13.
[67] *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-02106, 2017 WL 3948396 (N.D. Cal. Sep. 8, 2017).
[68] *CFPB v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 WL 7185792 (S.D.N.Y. Dec. 2, 2016).
[69] *Gabelli v. SEC*, 568 U.S. 442 (2013).
[70] Reply at 6.
[71] Enf. Br. at 14.
[72] *Id*.
[73] *Id*. at 14-15.
[74] *Id*.
[75] *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).
[76] Enf. Br. at 15.

a. *Merck*

Merck involved a lawsuit in which investors brought a securities fraud class action against a drug manufacturer, alleging that it had made misrepresentations and omissions regarding the drug's safety. The case thus involved private plaintiffs, rather than a government agency plaintiff. The Court found that a cause of action generally accrues once a plaintiff has a complete and present cause of action, but that there is an exception in cases where the plaintiff is prevented from knowing of the cause of action due to fraud. Under the discovery rule, where a plaintiff has been injured by fraud and remains in ignorance of it, without fault or want of diligence or care, the statute of limitations does not begin to run until the plaintiff discovers the fraud.

The court specifically held that the limitations period in the relevant section of the Securities Exchange Act of 1934 ("SEC Act") began to run once the plaintiff actually discovered the facts constituting the violation, *or* when a reasonably diligent plaintiff would have discovered the facts constituting the violation, whichever came first.[77] Furthermore, the Court found that when "discovery" is written into a statute, courts have typically interpreted the word to refer to both "actual" and "constructive" discovery, and that Congress intended courts to interpret the word "discovery" in the SEC Act provision similarly.[78] RC is thus correct that the Court, in the context of the private securities fraud case before it, determined that the discovery rule allows a claim to accrue when the private litigant first knows, or with due diligence, should know facts that will form the basis of an action.

However, I note that the case also made other findings that RC have not discussed, but are relevant to the current matter. First, the Court found that the plaintiffs could not have discovered the facts constituting the violation until they discovered facts relating to a necessary element for the violation (which in that case was "scienter," but in the current matter would equally apply to the elements to establish "individual liability"). Additionally, the court noted that a reasonably diligent investigation may consume as little as a few days or as much as **a few years** to get to the bottom of the matter (emphasis added). The Court also held that "inquiry notice" is not sufficient to start the running of the statute of limitations period.[79]

In their concurrence, Justices Scalia and Thomas favored a stricter reading of the statute's language and discussed the fact that while the term "discovery" in a statute *might* mean "constructive" discovery, it does not *always* mean "constructive" discovery and that Congress' collective intent cannot trump the text that it enacts.[80] In other words, the term "discovery" has been interpreted in different ways by different courts and one must therefore look to the text enacted.

I conclude that *Merck* is limited to the specific federal statutory context in which it was decided. The findings in this securities fraud action do not go as far as RC claim and do not stand for the proposition that the term "discovery" always includes "constructive" discovery. Nor does

[77] *Merck & Co.*, 559 U.S. at 633.
[78] *Id*. at 633-634.
[79] *Id*. at 634-635.
[80] *Id*. at 656-661.

Merck discuss or reasonably extend to the context of a case involving a government agency plaintiff.

b. *Gabelli*

Three years after *Merck*, the Supreme Court in *Gabelli* went further in clarifying whether the "discovery rule" applies to a government plaintiff. *Gabelli* involved a case where the Securities and Exchange Commission brought enforcement actions against investment advisors, seeking civil penalties for aiding and abetting fraud. The statute of limitations in question ran "five years from the date when the claim first accrued," and thus did not include the "discovery" language which we have in the current matter. The SEC argued that the "discovery rule" should apply because it had not discovered the fraud within five years of its occurrence. The Supreme Court held that it had never applied the discovery rule in this context, where the plaintiff was not a defrauded victim seeking recompense, but was instead the Government bringing an enforcement action for civil penalties. It thus declined to extend the discovery rule to Government enforcement actions.

RC are correct in stating that the facts in *Gabelli* were different from those in the present matter. However, what RC omit is that the *Gabelli* court went on to discuss *reasons* why, aside from the text of the particular statute of limitations in the case, the discovery rule should not apply to government agency plaintiffs. First, the Court expressed concern that it would leave defendants exposed to government enforcement actions for an uncertain period into the future, a concern that is also of relevance in the current matter. It then explained there were far more challenges involved in applying the discovery rule to a government enforcement action than to a suit by defrauded victims. It stated that repose would hinge on speculation about what the government knew, when it knew it, and when it should have known it. It stated that deciding when the government knew or reasonably should have known of a fraud would also present particular challenges for the courts, such as determining who the relevant actor is in assessing government knowledge, whether and how to consider agency priorities and resource constraints in deciding when the government reasonably should have known of a fraud, **and so on** (implying that additional factors would also need to be considered).[81]

Although, not exactly on point with the facts in the current matter, I find that the Court recognized the challenges inherent in attempting to determine when a government plaintiff knew or should have known of a violation and thus declined to apply the discovery rule to a government plaintiff. In the current matter, despite the Supreme Court's concerns about leaving respondents exposed to government enforcement actions for uncertain periods of time, Congress chose to write a discovery rule into the CFPA statute of limitations. However, I note that it did not include the language regarding "should have discovered" in the statute. So, although the CFPA statute of limitations clearly contains a discovery rule, despite the concerns expressed in *Gabelli*, I decline to infer that it also necessarily includes a "constructive" discovery rule.

c. *NDG*, *Nationwide Biweekly*, and *Ocwen*

[81] *Gabelli,* 568 U.S. at 443 (emphasis added).

RC state that there are at least two courts which have explicitly held the CFPB to the "knew or should have known" standard, citing to *NDG* and *Nationwide*.[82] There is also a third case they did not cite, *Ocwen*, which in reliance on *NDG*, states the same standard.[83] I have read each of these cases closely, and while it is true that they all state that "discovery" includes "constructive" discovery, none of these cases actually applies the discovery rule to the facts of the case before it. Nor do they discuss standards or factors that a court should consider in determining whether a government agency plaintiff has acted with reasonable diligence and what factors would indicate that a government agency plaintiff should have discovered a violation. Had they reached the stage of actually applying a constructive discovery rule, I suspect they would have encountered the significant challenges described in *Gabelli* and *Browner*, and either would have reconsidered its application - or provided helpful guidance as to factors to consider in applying it. However, because they did not reach this stage, they did neither, and I therefore do not find them to be particularly helpful in deciding this issue.

d. *3M Co. v. Browner*

EC cite to *Browner* in support of their position. In *Browner*, the D.C. Circuit Court declined to read a discovery rule into a statute of limitations provision that ran from the "accrual" of the government's claim. Although it rejected a discovery rule, in part, because an agency's failure to detect violations, for whatever reasons, would not avoid problems of faded memories, lost witnesses etc., it also significantly rejected the discovery rule for the government agency as "unworkable."[84] Specifically, the court stated that it seriously doubted that conducting administrative or judicial hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities would be a workable or sensible method of administering any statute of limitations and it commented that the "subject matter seems more appropriate for a congressional oversight hearing."[85]

Having examined all of the cited case law on the issue, and relying particularly upon the Supreme Court's discussions in *Gabelli* and *Merck*, I believe that I must look to the text that Congress enacted in 12 U.S.C. § 5564(g)(1), the statute of limitations of the CFPA.[86] In that section, the statute specifically says that "no action may be brought...more than 3 years after the date of discovery of the violation to which an action relates." Congress did not, although it could have, state the additional language that RC argues I should infer that it meant, i.e., "when a reasonably diligent plaintiff would have discovered the violation." I decline to make this inference and agree with the Courts in *Gabelli* and *Browner* that applying such a standard to a government agency plaintiff is "far more challenging" than applying it to a suit by a private plaintiff and is "unworkable."

In order for a court to resolve the challenges discussed by *Gabelli* and *Browner*, e.g. determining the relevant actor in assessing government knowledge, determining whether and how to consider agency priorities and resource constraints in deciding when the government reasonably

[82] Res. Br. at 14-15.
[83] *CFPB v. Ocwen Fin. Corp.*, Case No. 17-CV-80495, slip op. (S.D. Fla. Sept. 5, 2019).
[84] *Browner,* 17 F. 3d at 1462.
[85] *Id.* at 1461.
[86] As discussed above, the D.C. Circuit Court in *PHH* also recommended examining the specific text of a statute.

should have known, and other pertinent questions, would potentially require a court to examine an agency's history, mission, leadership, structure, budget, human resources, technological resources, contracts, memoranda of understanding, records of complaints, statistical data, manuals, policies, procedures, and a host of issues that would make this an unmanageable proposition for any court or administrative proceeding to take on.

When questioned at oral argument as to what factors I should consider in determining whether a government agency is "reasonably diligent," RC was vague and could cite to no caselaw or specific guidance other than to suggest that I look to the 2017 CFPB Enforcement Manual for guidance as to what the CFPB should have done. As stated in *Browner*, the "subject matter seems more appropriate for a congressional oversight hearing" and thus beyond the scope of a court or an administrative proceeding to resolve. Nevertheless, in the interest of thoroughness, I will proceed to examine RC's arguments that the CFPB both "discovered" and "should have discovered" the alleged violations against Respondent Carnes three years prior to the filing of the *NOC*.

D. When did the CFPB discover the alleged violations against Respondent Carnes?

As I found in section "B" above, the CFPB claims against Respondent Carnes could not have accrued until the CFPB discovered evidence that he participated directly in or had actual knowledge of the misrepresentations involved, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud and intentionally avoided learning the truth.

RC assert that the CFPB *knew* of the alleged violations against Carnes well before November 18, 2012 and that the statute of limitations began running at the latest on or around March 29, 2012.[87]

EC counter that they did not know the pertinent facts about Carnes' involvement in and knowledge of Integrity Advance's operations until the CFPB received production based on the January 7, 2013, CID and conducted investigational hearings of Carnes and Foster in June of 2014. They thus assert that the filing of the *NOC* on November 18, 2015, was timely.[88]

In support of their argument, RC assert that several factors establish that the CFPB *knew* of the alleged violations before November 18, 2012:

a. *January 19, 2012, remarks by Director Cordray* at the Payday Loan Field Hearing in Birmingham, AL, in which he stated that the CFPB had developed and "launched [its] examination program" and would be "giving payday lenders much more attention."[89]

[87] Res. Br. at 6, 12.
[88] Enf. Br. at 12-13.
[89] Res. Br. at 6.

RC assert that the fact that Director Cordray stated on January 19, 2012, that the CFPB had launched its examination program and would be giving payday lenders much more attention means that the CFPB had set its sights on payday lenders like Integrity Advance prior to January 2012.[90]

EC address this comment by stating that [the speech] did not refer or relate to Respondents in any way.[91] At oral argument EC emphasized that the speech did not relate to *investigations* of payday lenders, but instead to the Bureau's plans to conduct supervisory *examinations* of them.[92]

I find that the Cordray speech was a rather general statement that did not mention any payday lenders by name or provide any indication that either Carnes or Integrity Advance were being targeted for examination or investigation. I therefore find that this speech does not establish that the CFPB knew of the alleged violations against Respondent Carnes on or about January 19, 2012.

b. The *CFPB began collecting information about Integrity Advance "around that time."*[93]

The phrase "around that time" is vague and RC go on to clarify that by "around that time" they are referring not to January 2012, but rather to the March 29, 2012, search of the FTC database. RC state that it is undisputed that "a high-level CFPB employee ran a search for 'Integrity Advance'" on that date.[94] They also assert that "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."[95] They assert that "[m]ultiple 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."[96] RC also state that on August 14, 2012, the CFPB conducted a second search of the FTC database for "Integrity Advance" which revealed additional consumer complaints that provided further evidence of the CFPB's specific knowledge of the alleged violations.[97] RC state that the consumer complaints describe exactly the same type of conduct alleged in the *NOC*.[98]

EC take issue with RC's characterization of the "undisputed facts." They correctly state that the parties stipulated only that "an individual in the Office of Enforcement" conducted such a search of the FTC database on March 29, 2012. They also assert that EC have never contended that they could not have obtained the loan agreement until it was produced by Integrity Advance and that EC has not admitted that its lawyers saw, in "early 2012," complaints from consumers that the loan agreement was misunderstood and confusing.[99] They do not address the August 2012 search specifically. EC assert that even if the CFPB had seen complaints against Integrity Advance, obtained the loan agreement, and known that Carnes was the CEO of a company that had committed unfair and deceptive acts or practices on or around March 29, 2012, that would

[90] *Id*.
[91] Enf. Br. at 11.
[92] Transcript ("TR.") at 58.
[93] Res. Br. at 7.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Id*. at 7-8.
[98] *Id*. at 8.
[99] Enf. Br. at 17.

have been insufficient to prove that he engaged in conduct that would make him individually liable, because they needed evidence that Carnes had the requisite control or knowledge.[100]

I find that the record establishes that an individual in the Office of Enforcement conducted a search of the FTC database using the search term "Integrity Advance" on March 29, 2012. Having reviewed exhibits A-C submitted by Respondents with their motion, I find that the March 29, 2012, search yielded twenty records, approximately fourteen of which contained consumer allegations of being overcharged for loans and possible wrongdoing by Integrity Advance.

After reviewing exhibit A, I find that none of the records mentioned Respondent Carnes by name or any information whatsoever that would indicate his personal involvement or authority within Integrity Advance. I find that a second search of the FTC database was conducted on August 14, 2012 (exhibit B). That search yielded three records alleging that Integrity Advance had overcharged on loans. I find that none of these records mentioned Respondent Carnes by name or contained any information that would indicate his personal involvement with Integrity Advance. While RC is correct that some of the complaints in the FTC database described similar conduct to that included in the *NOC*, I find, in accordance with *Merck*,[101] that these complaints put the CFPB on inquiry notice of possible misconduct by Integrity Advance (not Carnes) and did not begin the running of the statute of limitations.

c. *January 20, 2012, Memorandum of Understanding* between the CFPB and FTC.[102]

RC assert that it would be appropriate for me to infer that the CFPB knew of the alleged violations against Carnes pursuant to the CFPB's formal information sharing agreement with the FTC in which the two agencies discussed a strong and comprehensive framework for coordination and cooperation and by which the FTC was required to share information with the CFPB.[103] RC also assert that I should infer that the CFPB would have asked the FTC "for information on Integrity Advance" at or around the time of the March 29, 2012, search, that the FTC shared a July 30, 2010, complaint about Integrity Advance with the CFPB, and that the CFPB would have asked the FTC for more information on Integrity Advance.[104]

EC counter that at summary disposition, inferences must be drawn in favor of the nonmoving party. They also assert that the conjecture suggested by RC does not support an inference that the CFPB discovered the elements of the violations underlying the claims for individual liability against Carnes before November 18, 2012.[105]

I find that the MOU does not create an inference that the CFPB knew of the alleged violations against Respondent Carnes. I find that the existence of the MOU does, however, create

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[100] *Id*. at 12.
[101] *See also CFPB v. Nationwide Biweekly Administration Inc*., No. 15-cv-02106-RS, 2017 (N.D. Cal. Sep. 8, 2017) (notion that mere receipt of a consumer complaint can trigger statute of limitations is unsupported by any authority and would be unworkable; at most, credible complaint might serve as a storm warning and put CFPB on inquiry notice that it should begin investigating).
[102] Res. Br. at 8-9.
[103] *Id*.
[104] *Id*. at 9.
[105] Enf. Br. at 11.

an inference that between January 20, 2012 and March 29, 2012, an individual at the FTC provided an individual at the CFPB with the name "Integrity Advance" as a company for which it had received consumer complaints. I infer that this exchange of information prompted an individual in the CFPB Office of Enforcement to conduct a search of the FTC database on March 29, 2012, using the search term "Integrity Advance." I do not infer from the existence of the MOU that the CFPB received any information from the FTC regarding Respondent Carnes in particular, or that would have led it to conduct a search of "James Carnes" on or around March 29, 2012, or at a later date. I do not infer that the CFPB would have asked the FTC for more information about Integrity Advance on or around March 29, 2012, beyond the information that it received from the database search conducted on that date.

d. *May 5, 2017, Enforcement Manual*.[106]

RC assert that the CFPB's May 2017 Enforcement Manual provides evidence that the CFPB already knew of the alleged violations against Carnes in or around March 2012. They state that, according to the Manual, before a formal investigation is launched, employees are to conduct a research matter to determine whether relevant conduct likely violates federal consumer financial law.[107] According to the Manual, employees are 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.[108] When the research phase, which typically takes two months, reveals a plausible set of facts that, if proven, would amount to a violation, then the matter proceeds to the investigation phase.[109] RC thus argue that the CFPB would not have been able to proceed to an investigation without knowing what was in the loan agreement.[110] They then assert that I should infer that CFPB personnel reviewed a copy of the loan agreement as well as information regarding Carnes' position as CEO on or around March 29, 2012, and that such information would have provided the CFPB with the prerequisite for proceeding to the formal investigation phase.[111] RC assert that I should find that the CFPA statute of limitations began running at the latest on or around March 29, 2012.[112]

EC oppose this argument, stating that the 2017 Office of Enforcement Manual is irrelevant because it was not in effect during the relevant time period. They assert that it does not establish that the CFPB knew of the violations against Carnes in or around March 2012. Furthermore, they assert that even if the CFPB had known of Carnes' title as CEO and had reviewed a copy of the Integrity Advance loan agreement around that time, it still would have been insufficient information to establish that Carnes engaged in conduct that would make him individually liable for the policies and procedures developed and implemented by Integrity Advance. They state that none of the pertinent facts about Carnes' involvement in and knowledge of Integrity Advance's operations is apparent from the loan agreement or from Carnes' title as CEO, and that the Bureau did not discover the level of Carnes' involvement before November 18, 2012.[113]

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[106] Res. Br. at 9.
[107] *Id*. at 9-10
[108] *Id*. at 10.
[109] *Id*.
[110] *Id*.
[111] *Id*. at 10-11.
[112] *Id*. at 12.
[113] Enf. Br. at 10-13.

I am not convinced by RC's argument on this point. First, they are relying on a Manual that clearly is dated 2017, several years after the time period in question. However, even if I were to assume that the Manual had been in existence at or around March 2012, I do not believe that it establishes that the CFPB would have had a copy of the loan agreement and/or known of Carnes' title of CEO at the time. Furthermore, even if I were to assume that the CFPB had seen the loan agreement and did know of Carnes' title, coupled with FTC complaints against Integrity Advance viewed on or around March 29, 2012, I do not find that this would have been sufficient information to charge Carnes for individual liability. Such information would not have shed light on the necessary elements of an individual liability charge, as I discussed above in section "B", i.e., evidence that Carnes participated directly in or had actual knowledge of the misrepresentations involved, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud and intentionally avoided learning the truth.

Furthermore, RC has presented no authority for me to presume that just because someone bears the title of "CEO" that he or she therefore exercises a specific level of involvement or role within a company. I find that the CFPB did not discover Carnes' alleged violations until it received production from the CID and took investigational hearing testimony in June of 2014.

E. When "should" the CFPB "have discovered" the alleged violations against Respondent Carnes?

Although, as discussed above, I am not convinced by RC's assertion that a constructive discovery rule necessarily applies in this case, I have nevertheless, for thoroughness, examined RC's arguments on this point and EC's opposition.

RC assert that the CFPB should have known of the alleged violations against Carnes well before November 18, 2012, for several reasons.[114] First, they assert that the *NOC* does not allege any separate violation or distinct conduct on the part of Carnes.[115] As I discussed in section "B" above, I do not find this assertion to be accurate.

Next, RC state that as the CEO of Integrity Advance, Carnes was directly responsible for all of the policies and procedures developed and implemented by the company.[116] Although this statement may be true, I do not find that it would be apparent solely based on Carnes' title as "CEO," and would require further evidence as to the nature of his involvement in and knowledge of the policies and procedures of the company such as testimony and documentation describing the extent of Carnes' role in the company.

Third, RC state that if the CFPB had followed its policies and procedures (as set forth in the 2017 Manual, discussed above), that it should have obtained readily available information, i.e., the loan agreement and the fact that Carnes was the CEO on or around March 29, 2012.[117] RC claim that EC "may assert" that the CFPB could not have discovered the alleged violations until

[114] Res. Br. at 15-18.
[115] *Id*. at 15.
[116] *Id*. at 15-16.
[117] *Id*. at 16.

EC received a copy of Integrity Advance's loan agreement pursuant to production based on the CID, but that the CFPB could have obtained the loan agreement well before that from three possible sources.[118] Similarly, RC assert that the CFPB should have discovered that Carnes was the CEO of Integrity Advance well before November 18, 2012, because he was listed as the President and CEO on documents filed with the Delaware Office of the State Bank Commissioner.[119]

EC assert that they have never contended that the CFPB *could not* have obtained the loan agreement until it was produced by Integrity Advance.[120] However, they contend that there is no basis to assert that a reasonably diligent government agency should have asked a consumer for a copy of his loan agreement instead of relying on a tool specifically provided to it by Congress, i.e., by issuing a CID to collect more fulsome documentation from the company.[121] Furthermore, they assert that even if the CFPB had obtained the loan agreement and the title of Carnes as the CEO at or around the time EC assert that they should have (March 29, 2012), they still could not have discovered Carnes' violations absent documents received directly from the company and investigational hearings.[122] They assert that Respondents have provided no basis to conclude that a reasonably diligent agency would have completed such steps by November 18, 2012, especially where it took Integrity Advance over ten months to begin producing information in response to the CID.[123]

As discussed in section "B" above, I find that the claims against Carnes could not have accrued absent some evidence that he participated directly in or had actual knowledge of the misrepresentations involved, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud and intentionally avoided learning the truth. I agree with EC that such information would not have been evident merely from the loan agreement, Carnes' title as CEO of the company, and complaints against Integrity Advance, and that it required further documentation and investigational testimony.

At the oral argument, RC argued that the CFPB did not act with reasonable diligence because it did nothing between its March 29, 2012 search of the FTC database and November 18, 2012.[124] However, when questioned on the accuracy of this point, RC conceded that the CFPB conducted another database search for complaints against Integrity Advance on August 14, 2012, which revealed additional, albeit similar, complaints.[125] So, it appears that the time period in question, when RC is alleging that the CFPB did nothing, is not March 31, 2012 to November 18, 2012 (roughly seven and a half months), but rather August 14, 2012 to November 18, 2012, a period of roughly three months.

However, RC was unable to cite to any specific court cases that have explained what constitutes reasonable diligence for a government agency plaintiff, despite being asked more than

[118] *Id*. at 16-18.
[119] *Id*. at 18.
[120] Enf. Br. at 17.
[121] *Id*. at 17-18.
[122] *Id*. at 18.
[123] *Id*.
[124] Tr. at 15.
[125] *Id*.

once. When probed on this issue, RC first cited to *NDG* and *Nationwide*.[126] As discussed (in section III. C.) above, although these cases state the "constructive discovery" rule applies to the CFPB, they never actually applied or analyzed it due to the nature of the cases before them.

Next RC cited to *Merck* and *Gabelli* as standing for the propositions that no case holds that a government agency is exempt from the reasonable diligence requirement and as suggesting that government agencies have enhanced diligence requirements.[127] However, as discussed above, *Merck* did not involve a government agency plaintiff, so there is no reason the Court would have discussed that issue. RC asserted that *Gabelli* suggested that government agencies should exercise more diligence than private plaintiffs because of their investigative tools.[128] However, as discussed above, the *Gabelli* court specifically declined to apply the discovery rule to a government plaintiff and discussed practical reasons why it should *not* apply to them. So, I disagree with this interpretation of the *Gabelli* holding.

RC also cited to May 5, 2017, Enforcement Manual, stating that the CFPB should have talked to consumers, conducted internet searches, and talked to other agencies and regulators.[129] However, as discussed above, this Manual was not in effect during the relevant time period and even if it had been, would not have led to the discovery of the elements of individual liability. RC asserted that reasonable diligence would have meant that the CFPB "should have done something" but that they did nothing, which as discussed above is not entirely true.[130]

RC also did not explain either in its brief or oral argument why it took Respondents from January to December of 2013, almost a 12 month period, to complete document production in response to the January 2013, CID.[131] Instead, RC both faulted the CFPB for making "no effort to enforce that CID," but also stated that the "production schedule [was] negotiated"[132] and the [delay] was "perfectly satisfactory to the Bureau."[133] This raises the unanswered question of whether I should take this lengthy production delay into consideration in deciding whether the CFPB acted with reasonable diligence, because even though this delay may have been "perfectly satisfactory" to the Bureau, as RC assert, it appears to have been for the benefit of the Respondents, not the CFPB.

Additionally, RC did not explain why, when it took Respondents almost twelve months to complete production in response to the CID in December of 2013, conducting investigational hearings approximately six months later (June 2014) was unreasonably slow for the CFPB, and what factors I should consider in determining whether this delay constituted reasonable diligence for a government regulatory agency. RC also argued that it was unreasonable when the investigational hearings were conducted in June of 2014 to wait until November of 2015 to file

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[126] *Id*. at 8.
[127] *Id*. at 8-9.
[128] *Id*. at 9-10, 22.
[129] *Id*. at 14.
[130] *Id*. at 14-15.
[131] *See Joint Update on Fact Development Regarding Statute of Limitations Issue*, containing the parties' stipulations. The parties stipulated that the CID was issued on January 7, 2013, Integrity Advance made an initial partial production on October 25, 2013, and largely completed production in December 2013. Doc. 234, at 3-4.
[132] Tr. at 19.
[133] *Id*. at 17.

the *NOC*.[134] However, RC did not comment in its brief or oral argument on the fact that, in the interim, the CFPB provided Respondents with a *Notice and Opportunity to Respond and Advise* ("NORA") on October 23, 2014,[135] and whether and how that should factor into a determination of reasonable diligence. Instead, RC implied that the CFPB did nothing between the June 2014 testimony and November 2015 filing of the *NOC*.[136] I note that these issues regarding actions the CFPB did or did not take after November 18, 2012, are not relevant to determining whether the CFPB should have discovered the allegations against Respondent Carnes prior to November 18, 2012, and thus are distractions from the main issue.

When queried about the concerns raised in *Gabelli* regarding the challenges for courts in applying a discovery rule to the Government, e.g. assessing agency priorities and resource constraints, RC attempted to distinguish *Gabelli* by stating that we have a different situation because the Director made a speech on January 19, 2012 saying payday lending is a priority, opened a matter into Integrity Advance no later than March 2012, and had six or seven lawyers working on the case.[137] RC also made some assumptions about the extent of the CFPB's investigatory tools and resources that are not in the record before me.[138]

In their brief and response letter, EC assert, based on *Merck*, that any information about whether the CFPB itself exercised appropriate diligence is irrelevant to whether any claims are time-barred. [139] *Merck* states that the limitations period does not begin to run until the plaintiff discovers or a reasonably diligent plaintiff would have discovered the facts constituting the violation, whichever comes first - **irrespective of whether the actual plaintiff undertook a reasonably diligent investigation**.[140] Thus, EC assert that the proper question is whether a reasonably diligent plaintiff would have discovered Carnes' violations before November 18, 2012, and whatever steps the CFPB did or did not take are irrelevant. They argue that Respondents have failed to establish that a reasonably diligent plaintiff would have made this discovery. EC are correct in asserting that Respondents have failed to set forth any factors that lead me to conclude that a reasonably diligent government agency plaintiff would have discovered the alleged violations before November 18, 2012.

Considering all of the arguments on this issue, I find that RC have not established that the CFPB should have known of the alleged violations against Respondent Carnes prior to November 18, 2012.

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[134] *Id*. at 19-20.

[135] Doc. 234 *at* 3. The parties stipulated that before the Office of Enforcement recommends that the Bureau commence enforcement proceedings, it may give the subject notice of potential violations and an opportunity to respond to ensure potential subjects have the opportunity to present their positions before an enforcement action is recommended or commenced. EC in this case provided Respondents with a Notice and Opportunity to Respond and Advise letter on October 23, 2014.

[136] See Tr. at 19-20.

[137] *Id*. at 20-21.

[138] E.g., *Id*. at 9 (implication that the CFPB can pay rewards for information); *Id*. at 23 (agency has significant resources in the way of budget and personnel and devoted significant resources to this matter and industry). This information was not contained in the undisputed facts submitted by the parties or stipulations. I also note that "significant" is a vague term. So, I neither know the CFPB's budget and resources, nor do I have a standard available for analyzing how the agency prioritized or should have prioritized its resources.

[139] Enf. Br. at 14-18 and Response Letter at 2.

[140] *Merck*, 559 U.S. at 653 (emphasis added).

IV. Are the TILA and EFTA and derivative CFPA claims against Respondent Integrity Advance time-barred?

Count I of the *NOC* asserts a violation of the TILA, 15 U.S.C. §§ 1631, 1638, by Integrity Advance. Count V asserts a violation of the EFTA, 15 U.S.C. § 1693k, by Integrity Advance. Counts II and VI assert violations of the CFPA, 12 U.S.C. § 5536(a)(1)(A), by Integrity Advance by virtue of its violations of TILA and EFTA, respectively.

A. What statutes of limitations applies to the TILA (Count I) claim?

RC assert that Count I is time-barred because TILA provides that any action under TILA must be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e).[141] RC cite to the *PHH* decision to argue that the statutes of limitations contained in the consumer protection statutes enforced by the CFPB, including TILA (and EFTA, discussed below), apply to the CFPB's enforcement actions, whether brought in district court or in an administrative proceeding. They also cite to *CFPB v. ITT Educ. Servs., Inc.* to support the proposition that TILA's one-year statute of limitations applies to actions brought by the CFPB, not just private plaintiffs.[142]

With regard to Count I, EC assert that the one-year statute of limitations found in TILA at 15 U.S.C. § 1640(e) applies only to the consumer and state attorney general lawsuits that § 1640 authorizes.[143] They contend that since a different section of TILA, § 1607, authorizes enforcement by federal government agencies, the plain text of the statute indicates that the statute of limitations cited by Respondents applies only to actions "under this section," i.e. § 1640.[144]

Alternatively, EC assert that, even assuming that the TILA statute of limitations that applies to CFPB claims brought in court actions also applies to claims it brings in administrative proceedings, the correct statute of limitations is three years after date of discovery of the violation as set forth in 12 U.S.C. § 5564(g)(1) of the CFPA.[145] They base this assertion on language in § 1607(b) of TILA, which provides that when the Bureau enforces TILA, a violation of TILA "shall be deemed to be a violation of a requirement imposed under [the CFPA]" and therefore, is subject to the statute of limitations applicable to CFPA claims.[146] EC cite to *CFPB v. Ocwen Financial Corp.* which applied § 5564(g)(1)'s statute of limitations to a CFPB action to enforce TILA.[147]

RC overstate the finding of *PHH*. In order to determine the appropriate statute of limitations, if any, to apply to the TILA and EFTA claims, we must analyze the "overall text,

[141] Res. Br. at 20-21.
[142] *Id*. at 21-22.
[143] Enf. Br. at 19.
[144] *Id*.
[145] *Id*. at 20.
[146] *Id*. at 20-21.
[147] *Id*. at 21.

context, purpose, and history of the statute" as suggested by the *PHH* court.[148] The court in *Ocwen* recently conducted an analysis of TILA's one-year statute of limitations provision in 15 U.S.C. § 1640(e).[149] The court concluded that § 1640(e) does not apply to administrative actions.[150] Rather, the plain language of TILA, 15 U.S.C. § 1607(a)(6) provides that the CFPB enforces the requirements of TILA under Subtitle E of the CFPA. Subtitle E of the CFPA describes the CFPB's enforcement powers and provides in § 5564, which governs "Litigation Authority," that actions may be brought no more than 3 years after the date of discovery of the violation.[151]

RC are correct that the court in *CFPB v. ITT Educ. Servs., Inc.*, also analyzed the text and context of TILA's one-year statute of limitations provision and arrived at a different conclusion.[152] That court found that there was no evidence that § 1640 governs only private civil actions and that enforcement powers contemplated by § 1607 are administrative in nature.[153] Therefore, cases brought in civil court, whether by an agency or a private plaintiff, would be subject to the one-year statute of limitations provided in § 1640(e). Both courts seem to have concluded that TILA claims brought *administratively* by the CFPB are brought under § 1607 and therefore, the one-year statute of limitations in § 1640(e) would not apply.

RC argue that the distinction between civil and administrative actions noted by the *ITT* court was made moot by *PHH*.[154] However, the holding in *PHH* was not as broad as RC suggest, and more narrowly found that the statute of limitations *at issue* (i.e., RESPA) applied equally in CFPB court actions and CFPB administrative actions—not that there is no distinction between the types of actions.[155] Furthermore, the purpose of dissecting the language of the statute is to apply the methodology the *PHH* court set forth in order to determine whether there is a distinction between actions brought administratively and those brought in court.

I am persuaded by the analysis in both the *Ocwen* and *ITT* decisions that conclude that TILA actions brought administratively by the CFPB are brought under § 1607 rather than § 1640(e) and therefore, that the 1-year statute of limitations does not apply. Although RC argue that reliance on *Ocwen* is "misplaced" because the court failed to consider *PHH* in its analysis,[156] RC do not provide further explanation about what, specifically, is missing from the *Ocwen* analysis and how the conclusions in *PHH* would affect the conclusions reached in *Ocwen*. Therefore, looking at the text and context of TILA and the CFPA, I conclude that the one-year statute of limitations in § 1640(e) does not apply.

The *Ocwen* court's conclusion that the 3-year statute of limitations contained in § 5564(g)(1) of the CFPA governs CFPB claims to enforce TILA in court is persuasive. The Court

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[148] *PHH Corp.*, 839 F.3d at 53.
[149] *Ocwen* at 50.
[150] *Id.*
[151] 12 U.S.C. § 5564(g)(1).
[152] *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878 (S.D. Ind. Mar 6, 2015).
[153] *Id.* at 922.
[154] Resp. Br. at 22 note 16; Reply at 7 note 5.
[155] *PHH Corp.,* 839 F.3d at 55.
[156] Reply at 7-8.

reached a similar conclusion in analyzing analogous language in the Fair Debt Collection Practices Act (FDCPA).[157] Specifically, the Court found that the "deeming" language, cited by EC in their brief, i.e., a violation of TILA shall be deemed a violation of the CFPA, means that the Bureau's TILA claims are subject to the CFPA statute of limitations found at §5564(g)(1).[158] Accordingly, assuming that §5564(g)(1) of the CFPA applies to CFPB administrative as well as court proceedings, I find that it applies to Count I against Respondent Integrity Advance. I find that Count I is not time-barred due to the tolling agreements which suspended "the running of any applicable statute of limitations for any cause of action or related claim or remedy that could be brought against IA by the Bureau arising under Federal Consumer Protection Laws."[159]

B. What statute of limitations applies to the EFTA (Count V) claim?

With the exception of citing to the EFTA "one year from date of occurrence" statute of limitations, 15 U.S.C. §1693m(g), RC make the same arguments to support their position that Count V is time-barred as they did above regarding the TILA claim (Count I).[160]

EC also make similar arguments as they made above with regard to Count I, arguing that 15 U.S.C. §1693m(g) only applies to actions brought by private plaintiffs and that the CFPB enforces EFTA under 15 U.S.C. §1693o, through "subtitle E of the [CFPA]."[161] They assert that since the Bureau enforces EFTA under § 1693o, the one-year statute of limitations does not apply to the Bureau.[162] Alternatively, EC argue that if a statute of limitations applies to CFPB administrative proceedings, then the appropriate statute to apply would be that set forth in that 28 U.S.C. § 2462 which would limit EC's ability to commence any action, suit, or proceeding for civil penalties and disgorgement more than five years from the date when the claim first accrued.[163] EC do not elaborate upon why 28 U.S.C. § 2462 would apply rather than 12 U.S.C. § 5564(g)(1).

In analyzing the parties' EFTA arguments, I find similar issues as with TILA, discussed above. 15 U.S.C. § 1693m refers to "Civil Liability" whereas § 1693o refers to "Administrative Enforcement." As does § 1607(a)(6) of TILA, § 1693o(a)(5) of EFTA provides that the CFPB enforces the requirements of TILA under Subtitle E of the Consumer Financial Protection Act.[164] Having found the analysis in *Ocwen* persuasive for applying the CFPA's "three years after date of discovery of the violation" statute of limitations to TILA claims, it is similarly persuasive for applying it to EFTA claims. I note that the *Ocwen* court rejected a similar CFPB argument for the

[157] *Ocwen* at 45-48. As EC note in their brief, there are additional cases that support this analysis and conclusion in the FDCPA context. *See*, *CFPB v. Weltman, Weinberg & Reis Co., L.P.A.*, No. 1:17-817, 2017 WL 4348916 (N.D. Ohio Sept. 29, 2017); *CFPB v. Frederick J. Hanna & Assocs., PC*, 114 F. Supp. 3d 1342, 1380 (N.D. Ga. 2015); *FTC v. CompuCredit Corp.*, No. 1:08-CV-1976-BBM-RGV, 2008 WL 8762850 (N.D. Ga. Oct. 8, 2008).
[158] *Ocwen* at 48-50.
[159] Doc. 200, 201.
[160] Res. Br. at 20-23.
[161] Enf. Br. at 22-23.
[162] *Id*. at 22-23.
[163] *Id*. at 23.
[164] 15 U.S.C. § 1693o(a)(5).

application of 28 U.S.C. § 2462, albeit in the context of FDCPA and TILA claims, and found the appropriate statute of limitations to be the three-year statute of limitations found in the CFPA.[165]

Accordingly, assuming that §5564(g)(1) of the CFPA applies to CFPB administrative as well as court proceedings, I find that it applies to Count V against Respondent Integrity Advance. I find that Count V is not time-barred due to the tolling agreements which "suspended the running of any applicable statute of limitations for any cause of action or related claim or remedy that could be brought against IA by the Bureau arising under Federal Consumer Protection Laws."[166]

C. What statute of limitations applies to the derivative CFPA claims (Counts II and VI)?

RC asserts that the derivative CFPA claims (Counts II and VI) are based solely on the underlying TILA and EFTA allegations.[167] They assert that because the TILA and EFTA claims (Counts I and V) are barred by a one-year statute of limitations, that the derivative CFPA claims cannot proceed when the predicate offenses cannot.[168] RC cite to 12 U.S.C. §5564(g)(2) which states that "in any action arising solely under an enumerated consumer law, the [CFPB] may commence, defend, or intervene in the action in accordance with the requirements of that provision of law."[169] RC thus assert that the CFPA derivative claims are time-barred by the one-year statute of limitations of their respective predicate offenses.[170]

With regard to Counts II and VI, EC assert that they are CFPA claims, not TILA or EFTA claims.[171] EC assert that both claims 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 conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law."[172] EC cite to the CFPA's text which states that "no action may be brought under [the CFPA]" more than three years after discovery of the violation.[173] They assert that the text further clarifies that "[a]n action arising under [the CFPA] does not include claims arising solely under enumerated consumer laws," such as TILA and EFTA.[174] They further assert that because claims asserting a violation of the CFPA are not "claims arising solely under enumerated consumer laws," the three years after discovery limitation set forth in 12 U.S.C. §5564(g)(1) would apply to them - if I assume that the statute of limitations set forth therein applies to both CFPB court actions *and* administrative proceedings.[175] Since the parties entered into tolling agreements, EC assert that these claims are not time-barred.[176]

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[165] *Ocwen* at 46, 50.
[166] Doc. 200, 201.
[167] Res. Br. at 20-21.
[168] *Id*. at 21.
[169] *Id*.
[170] *Id*.
[171] Enf. Br. at 8.
[172] 12 U.S.C. § 5536(a)(1)(A).
[173] 12 U.S.C. § 5564(g)(1).
[174] 12 U.S.C. § 5564(g)(2)(A).
[175] Enf. Br. at 9.
[176] *Id*.

As I discussed above, I do not find that Counts I and V in this matter have a one-year statute of limitations, but rather I find that the "three years after discovery of the violation" statute of limitations set forth in the CFPA applies to these predicate offenses. Accordingly, I agree with EC that the same statute of limitations would apply to the derivative CFPA claims. Alternatively, I also agree with EC that Counts II and VI are, in fact, CFPA claims, requiring the CFPB to establish the elements of a CFPA claim in addition to the elements of the underlying predicate TILA and EFTA claims, respectively, and they are thus not claims arising solely under enumerated consumer laws. I thus find that Counts II and VI are subject to the CFPA statute of limitations and that they are not time-barred due to the tolling agreements entered into by the parties.

ORDERS

1. Respondents' Motion to Dismiss and/or for Summary Disposition on Grounds Limited to October 28, 2019 Order is **DENIED**.

2. Respondents' January 9, 2020, Request for Additional Discovery is **DENIED**.

3. The parties will file a Joint Proposed Schedule no later than **February 6, 2020**.

SO ORDERED.

Christine L. Kirby

Digitally signed by Christine L. Kirby
Date: 2020.01.24 15:50:42 -05'00'

HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 24th day of January 2020
at Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Denying Respondents' Motion To Dismiss And/Or For Summary Disposition On Grounds Limited To October 28, 2019 Order And Denying Respondents' Request For Additional Discovery* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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

Signed and dated on this 24th day of January 2020
at Washington, D.C.