UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	ORDER DENYING MOTIONS TO STAY AND DISMISS
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

In a *Joint Proposed Schedule* submitted by the parties on February 6, 2020 (Doc. 250), Respondents indicated their intent to file a motion to dismiss on grounds that the Consumer Financial Protection Bureau's ("CFPB") structure is unconstitutional and a motion to stay proceedings pending the Supreme Court's decision on this issue in *Seila Law LLC v. CFPB*.[1] Therefore, on February 7, 2020, I issued a *Scheduling Order* (Doc. 251) setting forth a briefing schedule for these issues. On February 19, 2020, Respondents filed *Respondents' Motion to Stay Proceedings* (Doc. 252) and *Respondents' Motion to Dismiss on Grounds Limited to February 7, 2020 Order* (Doc. 253). On March 4, 2020, the CFPB filed *Enforcement Counsel's Consolidated Opposition to Respondents' Motion to Dismiss and Motion to Stay Proceedings* (Doc. 254). On March 10, 2020, Respondents filed their reply (Doc. 256).

Respondents' Motions

Counsel for Respondents (RC) argue that the structure of the CFPB, which is led by one director who serves a five-year term and may only be removed "for-cause," violates Article II of the Constitution which vests executive power exclusively in the President of the United States.[2] They assert that the CFPB's structure is unprecedented, impacts individual liberty, and infringes on the President's authority. They further assert that the for-cause removal provision is not severable from the Dodd-Frank Act and therefore the appropriate remedy is dismissal of this matter.

RC also request that I grant a stay of proceedings because the issues regarding the CFPB's structure and severability of the for-cause removal clause are currently pending decision by the Supreme Court. They assert that a stay should be granted in the interest of judicial economy and to avoid inconsistent rulings. They further assert that a stay would be of limited duration and not harm the CFPB.

[1] 140 S. Ct. 427 (Oct. 18, 2019) (granting writ of certiorari).
[2] U.S. Const. art II, § 1.

CFPB's Response

With regard to Respondents' motion to dismiss on separation of powers/constitutionality grounds, Enforcement Counsel ("EC") assert that Respondents are attempting to raise a new affirmative defense that they waived by failing to raise it either in their answer or at any time earlier in the proceedings. Alternatively, they assert that even if Respondents have not waived this defense, the issue of the constitutionality of the CFPB structure is beyond the jurisdiction of administrative agencies and administrative tribunals. They assert that Respondents will have the opportunity to make their argument in the Court of Appeals, should the Director ultimately find them liable.

With regard to Respondents' motion to stay proceedings, EC assert that the rules of adjudication do not provide for a stay in these circumstances. Furthermore, a stay would serve no purpose because the decision in *Seila Law* is highly unlikely to dispose of the claims in this matter and the balance of equities weighs heavily against a stay.

Respondents' Reply

In their reply brief RC assert *inter alia* that Respondents "clearly raised the separation of powers issue in their answer" and thus have not waived the issue. Alternatively, they assert that even if they did not sufficiently raise the separation of powers issue previously, the subsequent change in law and the CFPB Director's position justifies raising the issue now. They also assert that it is within my authority as an Administrative Law Judge to rule on this constitutional challenge and I should find that the provision is unconstitutional and not severable. Finally, they assert that if I do not grant the motion to dismiss, I should stay the proceedings.

ANALYSIS

I. Have Respondents waived or forfeited the separation of powers/constitutionality issue?

As EC note in their brief, the Bureau's Rules of Practice for Adjudication Proceedings ("Rules") state that "[t]he answer must set forth affirmative defenses, if any, asserted by the respondent." 12 C.F.R. § 1081.201(b). They contend that Respondents' assertion that the Bureau is unconstitutionally structured is an affirmative defense that must have been raised in the answer. Doc. 254 at 3. EC cite to a case in which the D.C. Circuit Court determined that a similar challenge to a federal agency's constitutionality was an affirmative defense that should have been raised in the pleading pursuant to Fed. R. Civ. P. 8(c). *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 706-707 (D.C. Cir. 1996).

RC do not deny that lack of jurisdiction due to an alleged violation of the separation of powers clause is, in fact, an affirmative defense. Rather, they assert that Respondents "clearly raised the separation of powers issue, and others, in their *Answer*." Doc. 256 at 1.

In discussing the language of the *Answer*, RC cite to the opening paragraph of Respondents' *Answer* in which they stated that "the Bureau does not have jurisdiction to proceed

with this action as to Integrity Advance or Carnes and that their Answer to the Notice of Charges does not waive any right to contest the jurisdiction of the Bureau. Rather, the Respondents **answer as follows**, in order to preserve any and all rights." (emphasis added).

What Respondents have not included in their brief, however, is the language within the *Answer* that followed and set forth the specifics regarding the challenge to jurisdiction. In reading the more specific language that followed, at no time did Respondents ever mention a separation of powers issue, either explicitly or by implication. So, while I agree with Respondents that they were not required to use "magic words," they were required to use *some* words to indicate their intention to assert an affirmative defense of lack of jurisdiction due to an unconstitutional violation of the separation of powers clause. They did not do so. Rather, they very clearly stated in the *Affirmative Defenses* section of the *Answer* that jurisdiction was lacking over Respondents "because the CFPB had no authority over nonbanks until a director was lawfully appointed." Doc. 21 at 15, par. 7. Although the *Answer* did contain a catch-all clause at paragraph 9 of the *Affirmative Defenses* section, there is nothing in the *Answer* that would have suggested a potential separation of powers/constitutionality affirmative defense. I therefore find that RC's assertion that the *Answer* "clearly raised the separation of powers issue" is, at best, inaccurate.

Furthermore, following the submission of the *Answer*, Respondents followed up on their assertion of lack of jurisdiction with a *Motion to Dismiss the Notice of Charges* on December 21, 2015. In the brief that accompanied the motion (Doc. 28-A), Respondents set forth in detail their argument that the CFPB lacked jurisdiction over the matter because it did not obtain legal authority to regulate non-banks until there was a lawfully-appointed Bureau Director. The brief was silent as to a separation of powers/constitutionality affirmative defense.

Nor did Respondents raise the issue at any time subsequently. This is especially notable because during the pendency of the first hearing in this matter, the very issue was before the D.C. Circuit Court in the case of *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016). Although the *PHH* Court initially found that the removal provision was unconstitutional (later overturned in relevant part, *see* 881 F.3d 75 (D.C. Cir. 2018)) after Judge McKenna had issued a recommended decision in this matter, the case was before the Director on appeal at the time of its issuance. Respondents brought the *PHH* case to the attention of the Director in seeking a stay related to the statute of limitations issue, but never mentioned the separation of powers/unconstitutionality issue. *See* Doc. 179. Nor have they ever mentioned this issue until they filed the pending motion to dismiss.

The D.C. Circuit Court analyzed the timeliness of affirmative defenses in *Harris v. Sec'y, U.S. Dep't. of Veterans Affairs*, 126 F.3d 339 (D.C. Cir. 1997). The Court noted that although the Federal Rules of Civil Procedure "do not explicitly mention waiver or forfeiture as the consequence of failure to follow Rule 8(c), it is well-settled that a party's failure to plead an affirmative defense generally results in the waiver of that defense and its *exclusion from the*

case." *Harris*, 126 F.3d at 343 (quoting *Dole v. Williams Enters., Inc.*, 876 F.2d 186, 189 (D.C. Cir. 1989) (emphasis in original, internal quotation marks and alterations omitted)); *see also Wood v. Milyard*, 566 U.S. 463, 470 (2012) ("An affirmative defense, once forfeited, is excluded from the case.") (internal quotation marks and alterations omitted).

The Court explained that the purpose of the pleading requirement is to ensure the opposing party has notice and time to frame legal arguments and establish relevant facts to respond to the affirmative defense. *Harris*, 236 F.3d at 343. "Failure to raise an affirmative defense in pleadings deprives the opposing party of precisely the notice that would enable it to dispute the crucial issues of the case on equal terms." *Id.* The Court next recognized that "some circuits permit parties to raise affirmative defenses for the first time in dispositive motions where no prejudice is shown." *Id.* at 344. However, the D.C. Circuit held that "Rule 8(c) means what it says: a party must first raise its affirmative defenses in a responsive pleading before it can raise them in a dispositive motion." *Id.* at 345.

In the matter at hand, the rationale for upholding a "forfeiture" or "waiver" of the affirmative defense of constitutionality, i.e., that the opposing party needs notice and time to address it, falls short, as the Bureau itself has analyzed this issue and presumably has the legal arguments and relevant facts available.[3] However, even if the rationale would not apply, the D.C. Circuit's conclusion was clear. Similarly, Rule 201(b) is clear that affirmative defenses must be set forth in the answer and this plain language should be upheld barring any special circumstances. I do not find the circumstances of this case rise to that level.

As EC assert, there are several factors that support a finding of forfeiture or waiver of this defense. First, Respondents had many opportunities to raise this defense previously, and it would have been particularly relevant following the D.C. Circuit's opinion in *PHH* finding the Bureau's structure unconstitutional.[4] There has been no recent change in applicable precedents concerning the Bureau's constitutionality that would make this issue novel and therefore newly ripe for raising, and the fact that the Supreme Court is currently considering the issue does not change the current status of the law. In addition, the remand order did not change anything about the substance of the case that would make a defense of unconstitutionality newly applicable.

Accordingly, I find that Respondents have not shown that good cause exists to depart from the standard set out in Rule 201(b) that requires affirmative defenses be set forth in the answer and I find that they have forfeited this affirmative defense.[5]

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[3] In *Seila Law*, the CFPB takes the position that the structure of the Bureau which provides for one Director who is removable only for-cause violates the separation of powers clause of the Constitution, but asserts the for-cause removal provision of the Dodd Frank act is severable from the rest of the act and thus the current matter and other enforcement proceedings would not be affected.

[4] *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *rev'd in relevant part en banc*, 881 F.3d 75 (D. C. Cir. 2018).

[5] I find forfeiture rather than waiver, because it is unclear whether the failure to raise the defense previously was intentional.

II. Should this proceeding be stayed pending resolution of *Seila Law LLC v. CFPB?*

RC's Motion to Stay Proceedings asserts that a stay should be granted in the interest of judicial economy because the Supreme Court's ruling on the CFPB's constitutionality could be dispositive as to all of the charges in this matter. Doc. 252 at 4-5. They further argue that even if the Supreme Court's ruling is not fully dispositive of all of the issues, a stay is still appropriate because the issues are substantially similar. *Id.* at 5. They also note that granting a stay would avoid inconsistent rulings on the constitutionality issue. *Id.* at 5-6. Lastly, they argue that the stay would be moderate in its duration and that the CFPB would not be harmed. *Id.* at 6-7.

EC argue that the Bureau's Rules do not authorize the ALJ to stay this proceeding, and that the pending Supreme Court decision is unlikely to dispose of the Bureau's claims here. Doc. 254 at 10-13. They also assert that a stay would harm both the public interest and the Bureau. *Id.* at 14-15.

While EC are correct that the Bureau's Rules do not explicitly authorize the ALJ to stay proceedings in these circumstances, the Rules do, as RC note, broadly provide the ALJ "all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay." 12 C.F.R. § 1081.104(a). Furthermore, the Supreme Court has noted that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Therefore, I have concluded that I have the authority to grant or deny a stay based on "the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254-255. The competing interests here include, as EC highlight, "conduct[ing] . . . adjudication proceedings fairly and expeditiously" while "mak[ing] every effort at each stage of a proceeding to avoid delay." 12 C.F.R. § 1081.101.

In considering the competing interests and both parties' arguments, I find that a stay is not warranted. First, RC's assertion that a stay is necessary to avoid an inconsistent ruling between the Supreme Court's decision in *Seila Law* and my ruling on the *Motion to Dismiss* is moot. As discussed above, I have found that Respondents forfeited the defense that the Bureau's structure is unconstitutional. Therefore, I need not reach the merits of the constitutionality issue and there is no risk of inconsistent rulings.

I also find that balancing the equities of the parties and the public weighs in favor of denying the stay. RC argue that the Supreme Court's ruling in *Seila Law* will be dispositive as to the charges in this matter because the unconstitutional provision is not severable from the Dodd-Frank Act. EC argue, on the other hand, that if the provision is found to be invalid, it can be severed and therefore, the decision in *Seila Law* is unlikely to dispose of the Bureau's claims. Without attempting to predict the Supreme Court's decision, I find that there is a strong public interest in resolving this case without any further delay, given the significant delays to date.

Notably, the Bureau's Rules require that a recommended decision be filed within 300 days of the filing of the *Notice of Charges*. The *Notice of Charges* was filed over four years ago and this remand proceeding alone is approaching 300 days. Therefore, I find it prudent to continue the proceedings. If the Supreme Court should find that the Bureau's structure is unconstitutional and the removal provision is not severable, the impact of such a holding can be reviewed at that time. Such a finding may not automatically dispose of the charges at issue, so the possibility of that outcome does not weigh in favor of staying the matter.

ORDERS

1. Respondents' Motion to Dismiss on Grounds Limited to February 7, 2020 Order is **DENIED**.

2. Respondents' Motion to Stay Proceedings is **DENIED**.

Christine L. Kirby

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HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 13th day of March 2020
at Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Denying Motions to Stay and Dismiss* 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
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Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 13th day of March 2020
at Washington, D.C.