UNITED STATES OF AMERICA
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.**	**ENFORCEMENT COUNSEL'S CONSOLIDATED OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND RESPONDENTS' MOTION TO AMEND ANSWER**

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I. Introduction

For more than four years Respondents Integrity Advance and James Carnes ran an online payday loan operation that misled consumers. When originating loans, Integrity Advance provided consumers with figures ostensibly stating what the loan would cost: the total expense after Integrity Advance withdrew all payments as scheduled, the finance charge, and the annual percentage rate ("APR"). Indeed, this information was prominently displayed and emphasized in Integrity Advance's contracts. Integrity Advance calculated the amounts it disclosed by assuming that the loans would be repaid in full in a single payment. However, under the default terms of the contract, the loans would *not* be paid off in a single payment. Nestled in the confusing fine print of the contract were a series of terms that caused the loans to roll over automatically. Instead of withdrawing the full amount owed, as the disclosures suggested, Integrity Advance would—at least for the first five payments—withdraw only the amount of the finance charge without applying any amount to principal. As a result, unless the consumer took affirmative action to change the default terms of the contract, the total cost of the loan was much higher than the amount on the disclosure.

Respondents attempt to evade liability for this unlawful conduct by raising a series of meritless arguments in their motion to dismiss. Respondents contend that this proceeding must be dismissed in its entirety because the Bureau has no jurisdiction to pursue violations of law that occurred before the Senate confirmation of the Bureau's first Director. There is no basis for this assertion in law or logic. When the Bureau initiated this proceeding in November 2015, *see* Notice of Charges (Nov. 18, 2015) [Dkt. 1] ("Notice"), the Bureau had a confirmed Director and was vested with the full powers granted to it by Congress—facts which even Respondents admit. On that date, the Bureau had the authority to pursue non-banks, like Respondents, for violations of the Truth in Lending Act ("TILA"), the Electronic Fund Transfer Act ("EFTA"), and the Dodd Frank Consumer Financial Protection Act ("CFPA") itself. There is simply no authority for the proposition that the Bureau can only enforce the law against a person who continued violating the law after the confirmation of the Director, particularly given that the CFPA's substantive prohibitions indisputably took effect on July 21, 2011 (and TILA and EFTA long before that), a time when Respondents admit that they were still conducting business.

Respondents' other arguments are equally meritless. Not only is Respondents' argument that the Notice of Charges fails to state a TILA claim without merit, the language of Integrity Advance's contract and Respondents' admissions in their Answer demonstrate that—as a matter of law—Integrity Advance violated TILA. Integrity Advance's contracts disclosed annual percentage rates, finance charges, and payment totals on the assumption that the loans would be fully repaid in one payment. Respondents' Answer and Affirmative Defenses (Dec. 14, 2015) [Dkt. 21] ("Answer") ¶ 26. However, Integrity Advance admits that "unless a consumer contacted Integrity Advance *to change the terms of the loan* . . . Integrity Advance renewed the consumer's loan." *Id.* ¶ 29 (emphasis added). These automatic renewals led to additional undisclosed finance charges and higher APRs and total repayment sums.

Finally, Respondents cannot, more than four years into this proceeding and ten months after the Director's remand, be allowed to interject new legal issues into this matter that they could have raised years ago but chose not to. Respondents long ago forfeited any reliance on counsel or fair notice defenses, and to hold otherwise would conflict with the rules governing Bureau adjudications and give Respondents a procedural windfall that is not available to other litigants and that cannot be justified. Further, asserting either of these two defenses would be futile as neither defense could save Respondents from liability.

For these reasons, as discussed further below, the ALJ should deny Respondents' Motion to Dismiss and Respondents' Motion to Amend Answer.

II. Standards of Review

A. Motion to Dismiss

To prevail on their Motion to Dismiss, Respondents must show that they are entitled to dismissal as a matter of law. *See* 12 C.F.R. § 1081.212(b). For purposes of the motion, all allegations in the Notice of Charges must be accepted as true. *Id*.[1]

In their motion, Respondents seek to apply the Supreme Court standards found in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to assert that the Bureau failed to adequately plead causes of action. Respondents' Brief in Support of Their Motion to Dismiss (Mar. 26, 2020) [Dkt. 260] ("MTD Br.") at 5, 14. While the detailed Notice in this matter would easily survive review under those standards, it is settled law that administrative proceedings are not governed by the same standards as those pertaining to Federal district court cases. *See Flying Food Grp., Inc. v. NLRB*, 471 F.3d 178, 183 (D.C. Cir. 2006) ("As we have long held, '[p]leadings in administrative proceedings are not judged by the standards applied to an indictment at common law.'") (quoting *Aloha Airlines, Inc. v. Civil Aeronautics Bd*., 598 F.2d 250, 262 (D.C. Cir. 1979)). An administrative agency merely has to show that Respondents "understood the issue" and were "afforded full opportunity" to defend their conduct. *Aloha*, 598 F.2d at 262 (quoting *NLRB v. Mackay Radio & Tel. Co*., 304 U.S. 333, 350 (1938)). Moreover, the Bureau's

[1] *Accord, e.g., Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993) (construing the Federal Rules of Civil Procedure).

Rules of Practice for Adjudication Proceedings clearly outline the requirements of a Notice of Charges. *See* 12 C.F.R. § 1081.200.[2] There is no question that the Bureau has met these standards.[3]

B. Motion to Amend Answer

A party may amend a pleading "with the opposing party's written consent or leave of the hearing officer." 12 C.F.R. § 1081.202(a). The standard for permitting amendments is liberal, but is not without "limit for amendments that are unduly prejudicial." 77 Fed. Reg. 39058-01, 39069 (June 29, 2012). In federal court, undue delay, undue prejudice, or futility of the proposed amendment are factors that may warrant denying leave to amend. *United States v. Eisenberg*, 149 F. Supp. 3d 71, 84 (D.D.C. 2015). As the ALJ has recognized, 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*." Order Denying Motions to Stay and Dismiss (Mar. 13, 2020) [Dkt. 257] at 3-4, quoting *Harris v. Sec'y, U.S. Dep't. of Veterans Affairs*, 126 F.3d 339, 343 (D.C. Cir. 1997) (emphasis in original, internal quotation marks, citations, and alterations omitted); and citing *Wood v. Milyard*, 566 U.S. 463, 470 (2012) ("An affirmative

[2] "(b) *Contents of a notice of charges*. The notice of charges must set forth: (1) The legal authority for the proceeding and for the Bureau's jurisdiction over the proceeding; (2) A statement of the matters of fact and law showing that the Bureau is entitled to relief; (3) A proposed order or prayer for an order granting the requested relief; (4) The time and place of the hearing as required by law or regulation; (5) The time within which to file an answer as required by law or regulation; (6) That the answer shall be filed and served in accordance with subpart A of this part; and (7) The docket number for the adjudication proceeding." 12 C.F.R. § 1081.200(b).

[3] In deciding a motion to dismiss, the Administrative Law Judge overseeing the PHH administrative adjudication did find that 12 C.F.R. § 1081.212 (allowing motions to dismiss in Bureau administrative proceedings) was similar enough to Federal Rule of Civil Procedure 12(b)(6) such that cases pertinent to the Federal Rule could be applied to the administrative process. However, the judge explicitly declined to rule on the application of *Twombly* and *Iqbal* as the Bureau's Notice of Charges had met those standards. *See PHH Corp., et al.*, 2014-CFPB-0002, Order Denying Motion to Dismiss at 7 n.1 (Mar. 13, 2014) [Dkt. 67].

defense, once forfeited, is excluded from the case.") (internal quotation marks and alterations omitted).

Courts also act within their discretion in denying leave to amend a pleading as futile when an amended pleading would not survive a motion to dismiss. *Eisenberg*, 149 F. Supp. 3d at 85. When an affirmative defense is meritless as a matter of law, it is futile to amend an answer. *United States v. All Assets Held at Bank Julius*, 229 F. Supp. 3d 62, 71 (D.D.C. 2017).

III. Argument

A. Respondents' Motion to Dismiss

1. The Bureau has authority to bring this enforcement proceeding against Respondents.

The Bureau's authority to bring this enforcement proceeding against Integrity Advance and James Carnes is straightforward. On November 18, 2015, when the Bureau filed the Notice of Charges against Respondents, the Bureau undeniably had authority to enforce the law against nonbanks, including through administrative enforcement proceedings like this one. *See* 12 U.S.C. § 5563 (establishing administrative enforcement authority). Indeed, Respondents themselves concede that by July 16, 2013, when the Senate confirmed then-Director Cordray as the Bureau's Director, the Bureau had authority "to exercise the new powers to regulate nonbanks," including "the authority to pursue enforcement actions" against them. MTD Br. at 8-9. That should end the matter.

Respondents nonetheless attempt to muddy the waters with arguments about the Bureau Director's earlier recess appointment, the authorities the Bureau had during that recess appointment, and the Bureau's ratification of all actions taken during the recess appointment. MTD Br. at 5-13. Those arguments are all wholly irrelevant. Respondents argue that "before there was a lawfully-appointed Director, the CFPB did not have the authority to pursue enforcement actions against" nonbanks like Integrity Advance. *Id.* at 6; *see also id.* at 5-10. But even if that were true (which Enforcement Counsel does not concede),[4] it would not matter here because the Bureau did not bring this proceeding prior to the confirmation of a Director. Rather, it filed the Notice of Charges in November 2015—at a time when even Respondents concede that the Director was properly appointed and the Bureau was vested with its full authorities to take action against nonbanks under the CFPA. *See* MTD Br. at 9, 11. Whether the Bureau could have brought this proceeding earlier, during the Director's recess appointment, is simply beside the point.[5]

At bottom, then, Respondents' argument comes down to this: even when vested with its full authorities, the Bureau cannot enforce the law against anyone who stopped offering consumer financial products and services, and thus stopped the activity qualifying them as a "covered person," before the Director was confirmed. *See id.* at 1, 9-10, 11-12, 13. Although not clearly stated, this argument seems to rest on the proposition that Respondents, as nonbanks, were not subject to the Bureau's enforcement authority at the time they acted as "covered persons" and thus cannot be held liable by the Bureau *now* for the unlawful actions they committed before. That is nonsensical. The CFPA's prohibition on unfair, deceptive, and abusive acts and practices

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[4] The Bureau disagrees with Respondents' contention that the agency's authority over nonbanks took effect only once the Director received Senate confirmation. MTD Br. at 9. The statute specifies that the Bureau's authority to bring administrative enforcement proceedings, including against nonbanks, would take effect on "the designated transfer date," which was set as July 21, 2011. *See* Consumer Financial Protection Act ("CFPA") § 1058, *codified at* 12 U.S.C. § 5561 note (setting "designated transfer date" as effective date for subtitle E); CFPA § 1062, *codified at* 12 U.S.C. § 5582(a) (directing Treasury Secretary to designate a "transfer date"); 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010) (establishing July 21, 2011 as "designated transfer date"). But this dispute is irrelevant here because the parties agree that the Bureau's full enforcement authority had taken effect by the time the agency filed the Notice of Charges in this case.

[5] Respondents' arguments about the Notice of Ratification are likewise a red herring. With the Notice of Ratification, the Bureau "affirm[ed] and ratif[ied] any and all actions" that the Director took on behalf of the Bureau during the period of his recess appointment. 78 Fed. Reg. 53734, 53734 (Aug. 30, 2013). But the relevant action in this case—the filing of the Notice of Charges in November 2015—did not take place during that period and therefore is not covered by the ratification. Respondents' arguments that the ratification was not effective, *see* MTD Br. at 11-13, are therefore entirely off-point.

("UDAAPs") applies to "covered persons" and "service providers." *See* 12 U.S.C. §§ 5531(a), 5536(a). And a "covered person" is "any person that engages in offering or providing a consumer financial product or service," such as the loans that Respondents offered here. *See* 12 U.S.C. § 5481(6)(A); *see also id.* §§ 5481(5), (15)(A)(i) ("extending credit" "for use by consumers primarily for personal, family, or household purposes" qualifies as "consumer financial product or service"). But it does not follow that an entity must *still* engage in conduct qualifying it as a "covered person" to face liability for past violations committed when it was undeniably a "covered person." Ceasing their "covered person" activity may remove Respondents from the law's applicability going forward, but it does not absolve them of violations committed in the past. The fact that the Bureau did not have a Senate-confirmed Director at the time Respondents indisputably met the definition of covered persons does not magically immunize them from liability for violations they committed at that time.

Respondents nonetheless seek such immunity by claiming that the use of the present tense in the definition of "covered person" somehow insulates them from the Bureau's enforcement authority.[6] According to Respondents, the present-tense definition means that the Bureau can only take enforcement action against entities who were currently involved in offering consumer financial products or services "at some point in time when the Bureau had authority as to that conduct." MTD Br. at 10 (emphasis removed). In other words, because the Bureau (in Respondents' view) could not have taken enforcement action against Respondents while their conduct was ongoing, it cannot take action now either.

[6] Notably, Respondents' "covered person" argument has no bearing on the TILA and EFTA claims in this case, as those statutes' requirements are not limited to "covered persons." *See* 15 U.S.C. §§ 1631, 1638 (TILA); *id.* § 1693(k) (EFTA). And Respondents make no other argument addressing those claims. Thus, Respondents apparently focus solely on the Bureau's authority to bring claims arising from violations of the CFPA. *See* MTD Br. at 10.

But Respondents never explain how they make that leap. They emphasize that present-tense language generally does not "extend to past actions." *Id.* at 10. But this principle does not preclude an agency from enforcing the law after a violation has occurred. The present-tense language at most suggests that the provisions do not extend to "past actions" that predate the provisions' effective date. *Cf. Carr v. United States*, 560 U.S. 438, 442 (2010) (concluding that statutory prohibition phrased in present tense did not apply to conduct that "occurred prior to [the statute's] effective date"). But by the statute's plain terms, the CFPA's substantive prohibitions took effect on July 21, 2011—at a time when Respondents' conduct was still ongoing. CFPA § 1037, *codified at* 12 U.S.C. § 5531 note (providing that subtitle C "shall take effect on the designated transfer date"); 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010) (establishing July 21, 2011, as "designated transfer date").[7] To the extent that Respondents suggest that these laws were somehow not effective until the Director was confirmed—because under their theory the Bureau did not have authority to enforce those prohibitions against nonbanks until that time—they are wrong. Any such contention is flatly contradicted by the statute's express effective dates. And there is of course no principle—and Respondent point to none—that a substantive prohibition does not take effect until a federal government agency gains the power to enforce it.

Further, Section 1053 of the CFPA—the provision establishing the Bureau's administrative enforcement authority—does not limit the Bureau to bringing enforcement proceedings only against people who presently, at the time of the enforcement proceeding, engage in conduct qualifying them as "covered persons." The statute provides that the Bureau may serve a notice of

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[7] Moreover, the definition of "covered person" that Respondents emphasize took effect one year earlier, on July 22, 2010. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 4, *codified at* 12 U.S.C. § 5301 note. And the statutes on which the other claims in this case are based took effect long before that: TILA took effect in 1969, Pub. L. No. 90-321 § 504(b) (1968), *codified at* 15 U.S.C. § 1631 note, and EFTA in 1979 and 1980, Pub. L. No. 95-630 § 2101 (1978), *codified at* 15 U.S.C. § 1693 note. In any event, as noted above (*see supra* note 6), Respondents' "covered person" argument has no apparent relevance to the TILA and EFTA claims.

charges when it believes a "covered person or service provider is engaging or *has engaged in*" a violation of law. 12 U.S.C. § 5563(b)(1)(A) (emphasis added). Indeed, Respondents expressly disclaim any argument to that effect. *See* MTD Br. at 10 ("Respondents are not arguing that a company must be currently engaged in the offering or provision of a consumer financial product or service to be called a 'covered person' under the CFPA."). And for good reason. The provision authorizes the Bureau to initiate enforcement proceedings not just against a "covered person" who "is engaging" in a violation, but also against a "covered person" who "has engaged in" a violation, and not just to halt ongoing unlawful conduct, but also to require "affirmative action to correct the conditions resulting from" past violations. 12 U.S.C. § 5563(b)(1)(A), (D).

2. The Notice of Charges properly states a claim for violations of the Truth in Lending Act.

Respondents contend that the Bureau did not state a TILA claim because Integrity Advance's contracts were properly disclosed as single-payment loans, and any rollovers were 'post-consummation' changes that do not have to be disclosed under TILA. MTD Br. at 14. Essentially, Respondents claim that—as a matter of law—Integrity Advance's TILA disclosures were lawful. Respondents are mistaken. Regulation Z requires that loan disclosures "reflect the terms to which the consumer and creditor are legally bound as of the outset of the transaction." Official Staff Comments, 12 C.F.R. § 1026, Supp. I, 1026.17(c) cmt. 1; *see* 12 C.F.R. § 1026.17(a), (c) (requiring disclosure of "the terms of the legal obligation between the parties"). At the time it provided disclosures, Integrity Advance's contracts were designed to repeatedly roll over automatically without any additional action whatsoever by the consumers. Hence, the plain language of Integrity Advance's contracts, as properly alleged in the Notice and as admitted by Respondents in the Answer, demonstrates that Integrity Advance's disclosures—as a matter of law—violated TILA.

The relevant facts are not in dispute. Integrity Advance's contracts disclosed the annual percentage rate, the finance charge, and the total of payments. Answer ¶ 25; *see also* Notice ¶ 27 (including an image of the TILA disclosures from an actual Integrity Advance contract). Integrity Advance calculated the amounts contained in the TILA disclosures by assuming that the loan would be fully repaid in one payment. Answer ¶ 26; *see also* Notice ¶ 26. Integrity Advance also admitted that "unless a consumer contacted Integrity Advance *to change the terms of the loan* . . . Integrity Advance renewed the consumer's loan." Answer ¶ 29 (emphasis added); *see also* Notice ¶ 29 (alleging that Integrity Advance automatically renewed consumer loans). Thus, Respondents have admitted that unless customers contacted Integrity Advance to "change the terms" of the loans, the contract's terms *at signing*, albeit in confusing fine print, provided that the loans would roll over automatically. Answer ¶ 29. And thereby Respondents have conceded that the amounts disclosed in the contracts did not reflect consumers' repayment obligations at loan origination. *See* Answer ¶¶ 25, 26, 29.[8]

Respondents' statements otherwise in their motion are disingenuous at best. *See* MTD Br. at 15 ("There is no question that the contract between Integrity Advance and consumers *at the time of loan consummation* was for a single payment loan which could be extended, *at the consumer's option*, beyond the maturity date.") (emphasis added); *id.* at 16 ("Here, any change to the loan terms necessarily resulted from a payment decision made after the loan was consummated. If consumers did not indicate that they would repay the loan under the initial terms, or if consumers elected to request a renewal, the consumer's repayment obligation changed in accordance with the

[8] Tellingly, although Respondents currently are seeking leave to file an amended answer, *see* Respondents' Brief in Support of Their Motion Amend Answer (Mar. 26, 2020) [Dkt. 259] ("MTAA Br."), the proposed amended answer would not alter any of these paragraphs and would not withdraw any of Respondents' concessions. *See* Respondents' Proposed Amended Answer and Affirmative Defenses, Exh. A to MTAA Br. (Mar. 26, 2020) [Dkt. 259A] ("Proposed Amended Answer").

terms of the contract."). These statements suggest that Integrity Advance would withdraw only a single payment for the full amount owed absent some additional action by consumers. But under the terms of the contract just the opposite was true: Integrity Advance rolled the loans over automatically, which Respondents admitted in their Answer.

The fact that Integrity Advance's contracts were designed to roll over automatically, and thereby accrue additional finance charges, rendered the APR, finance charge, and total of payments contained in the TILA disclosures false. Notice ¶¶ 33-38. Indeed, under the default terms of the contracts, an Integrity Advance consumer would pay five times the disclosed finance charge before any payments were applied to principal. A consumer who took a $300 loan would have made 11 separate payments totaling $1,065, not $390 as the TILA disclosure would have shown. Any argument that this practice complies with the letter or spirit of TILA strains credulity.

On very similar facts, the only court to address this issue held that—as a matter of law—disclosing the APR, finance charge, and total of payments based on a single payment when the contract automatically rolled over both violated TILA and was deceptive under the Federal Trade Commission Act. *FTC v. AMG Servs.,* 29 F. Supp. 3d 1338 (D. Nev. 2014), *aff'd* 910 F.3d 417 (9th Cir. 2018). In *AMG Services*, as in this case, the defendant made its TILA disclosures by assuming that the loan would be repaid in full in one payment. *Id.* at 1343. The contract in that case also renewed the loan automatically unless the customer contacted AMG in advance of the initial repayment date. *Id.* at 1345-46. Based on its review of the contract language, the court in *AMG Services* held that the defendant had violated TILA and that the contract was deceptive. *Id*. at 1354, 1368-72. On appeal, the Ninth Circuit held that AMG's loan contract, under which "borrowers had to perform a series of affirmative actions in order to decline to renew the loan and thus pay only the amount reported in the TILA box," was deceptive, and noted that the corresponding TILA claim was "largely duplicative" of the deception claim. 910 F.3d at 421 n.3, 423, 426. Respondents simply ignore this case.

Finally, Respondents' claims regarding post-consummation changes cannot salvage its false TILA disclosures. MTD Br. at 15-16 (citing 12 C.F.R. § 1026.17(e)). Section 1026.17(e) provides, "If a disclosure becomes inaccurate because of an event that *occurs after* the creditor delivers the required disclosures, the inaccuracy is not a violation of this part, although new disclosures may be required . . . ." 12 C.F.R. § 1026.17(e) (emphasis added). As the official commentary to this section makes clear, the section applies when the customer has failed to meet his or her obligations under the terms of the agreement, and as a result the creditor has imposed new charges that are allowed by the contract. 12 C.F.R. Pt. 1026, Supp. I, 1026.17(e) cmt. 1 ("For example, when the consumer fails to fulfill a prior commitment to keep the collateral insured and the creditor then provides the coverage and charges the consumer for it, such a change does not make the disclosures inaccurate."). But here, if an Integrity Advance customer takes no action, and the loan therefore rolls over automatically, the customer has not breached any of his or her obligations under the terms of the loan. The loan is just operating according to its default terms. Each case cited by Respondents on this issue is inapposite because it involves a party explicitly breaching an obligation after consummation of a loan. *Jasper County Savings Bank v. Gilbert* involves a consumer who protested the failure to include delinquency charges in the TILA disclosures. 328 N.W.2d 287, 291 (Iowa 1982). And in *Stein v. TitleMax of Georgia*, a consumer alleged that a lender who charged a lien-filing fee (which is ordinarily excluded from TILA disclosures) violated TILA when it failed to actually file a lien (thereby rendering the lien-filing fee a finance charge that must be disclosed). *See* Case No. 19-cv-00669-WMR-WEJ, 2019 WL 5549265, at *5 (N.D. Ga. July 25, 2019). There, the magistrate judge recommended dismissal of the TILA claim because the lender's post-consummation failure to actually file the lien, in violation of its contract with the consumer, is what rendered the otherwise accurate disclosure inaccurate. *Id.* at *9.

3. Respondents' fair notice defense does not provide a reason to dismiss the Notice of Charges.

Respondents argue in their motion to dismiss that the ALJ should dismiss the deception claim asserted in Count III and the unfairness claims in Counts IV and VII because the Bureau allegedly failed to provide fair notice of the prohibited conduct. The ALJ should reject Respondents' fair notice defense because, like the belatedly asserted constitutional separation-of-powers defense that the ALJ recently rejected, *see* Order Denying Motions to Stay and Dismiss (Mar. 13, 2020) [Dkt. 257] at 2-4, Respondents have forfeited the defense by failing to assert it in the more than four years since the Notice of Charges was filed. *See* Section III.B.1., *infra*.

And even if the ALJ were to allow Respondents to assert the defense, the motion to dismiss on these grounds should still be denied because Respondents had fair notice of the Bureau's deception and unfairness claims. Nothing in the CFPA requires the Bureau to declare specific acts or practices to be deceptive or unfair through rulemaking before commencing an enforcement action. *CFPB v. Think Finance, LLC*, No. CV-17-127-GF-BMM, 2018 WL 3707911, at *3 (D. Mont. Aug. 3, 2018); *CFPB v. Navient Corp.*, No. 17-101, 2017 WL 3380530, at *7-8 (M.D. Penn. Aug. 4, 2017); *CFPB v. D&D Mktg.*, No. 15-9692, 2017 WL 5974248, at *5 (C.D. Cal. Mar. 21, 2017); *see N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293 (1974) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.") (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

Indeed, courts considering the issue have unanimously held that the CFPA's prohibition against unfair and deceptive conduct provides parties like Respondents with fair notice. *Think Finance*, 2018 WL 3707911, at *3; *Navient*, 2017 WL 3380530, at *7; *D&D Mktg.*, 2017 WL

5974248, at *5. As the court in *Think Finance* noted, "the CFPA provides fair notice that it prohibits 'unfair, deceptive, or abusive act[s] or practice[s],' and other district courts have not found to the contrary when considering similar consumer protection statutes." *Think Finance*, 2018 WL 3707911, at *3 ("[O]ther consumer protection statutes and regulations use these terms, and their meaning provides 'the minimal level of clarity that the due process provision demands of non-criminal economic regulation.'") (quoting *CFPB v. CashCall, Inc.*, CV15-7522, 2016 WL 4820635, at *12 (C.D. Cal. Aug. 31, 2016)); *see also CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 906 (S.D. Ind. 2015). Any argument that Respondents did not have fair notice of what the statute requires is particularly untenable given the established body of decades of FTC law on which the CFPA's deception and unfairness claims rest.[9]

Respondents suggest they lacked fair notice that their conduct violated the CFPA because it apparently complied with Delaware law and the use of remotely created checks is legal. But that is a non-sequitur. The court in *Navient* makes clear that purported compliance "with other statutory, regulatory, and contractual obligations does not relieve [Respondents] of [their] other obligation to refrain from committing acts that are unlawful under the [CFPA]," and does not "begin to explain why it was not reasonably foreseeable . . . that a court could construe the [alleged] acts or practices" as violations of the CFPA. 2017 WL 3380530 at *8. Respondents' reject these courts' holdings, with little explanation, as simply wrongly decided. *See* MTD at 18. Respondents cite only to a case in which the Supreme Court declined to defer to an agency's interpretation of a regulation it announced for the first time in an enforcement proceeding. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157-59 (2012). The Bureau, though, is not seeking deference here.

[9] Deception under the CFPA "has an established meaning in the context of the [FTC] Act." *CFPB v. Gordon*, 819 F.3d 1179, 1193 n.7 (9th Cir. 2016). Likewise, the statutory elements of an unfairness claim are the same as those set forth in the FTC Act. *Compare* 12 U.S.C. § 5531(c) *with* 15 U.S.C. § 45(n).

It seeks only to enforce a statute whose prohibitions have been widely read to provide fair notice on their face.

B. Respondents' Motion to Amend Answer

1. Respondents cannot assert entirely new affirmative defenses at this late date and without cause.

Respondents seek to assert at this late stage of the proceedings that their reliance on the advice of counsel and the Bureau's alleged lack of fair notice are affirmative defenses to the Notice of Charges filed more than four years ago. *See* MTAA Br.; Proposed Amended Answer at 15, Affirmative Defense ¶¶ 9, 10. Despite the Bureau's rules governing adjudications stating that "[t]he answer must set forth affirmative defenses, if any, asserted by the respondent," 12 C.F.R. § 1081.201(b), Respondents did not assert an advice-of-counsel/good faith affirmative defense or a fair notice affirmative defense in their December 2015 Answer. *See* Order Denying Motions to Stay and Dismiss (Mar. 13, 2020) [Dkt. 257] at 4 ("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."). For that matter, they did not raise either issue in their first motion to dismiss, *see* [Dkt. 28]; or in their first motion for leave to file an amended answer, *see* [Dkt. 83]; or in their motion for summary disposition, *see* [Dkt. 89]; or during their appeal to the Director, *see, e.g.*, Respondents' Opening Appeal Brief (Nov. 4, 2016) [Dkt. 184]. Indeed, Respondents waited to raise the possibility of asserting an advice-of-counsel affirmative defense until August 2019, *see* Joint Proposed Pre-Hearing Schedule (Aug. 14, 2019) [Dkt. 228] at 2 and n.2, and waited to raise a fair notice affirmative defense until the present Motion to Amend Answer. *See* [Dkt. 259] at 3-8.[10] The ALJ therefore should treat Respondents' arguments relating to these two defenses as waived or forfeited and deny Respondents' grossly belated attempt to raise them in this proceeding.

The fact that this case has been remanded does not change this analysis. Remand was necessary, of course, because of a constitutional defect in the manner in which the prior ALJ was appointed. *See generally Lucia v. SEC*, 138 S. Ct. 2044 (2018). But the reasons for revisiting the prior ALJ's legal conclusions do not apply to Respondents' decisions about what defenses to raise in response to the Notice of Charges. Simply put, the flaw in ALJ McKenna's appointment has nothing to do with the strategic decisions Respondents made when filing their answer. Certainly, it does not give Respondents license to inject new defenses into this proceeding, particularly where Respondents do not even allege that there was any impediment to their raising these defenses before now.

For similar reasons, the D.C. Circuit held that a constitutional defect in the Copyright Royalty Board did not provide grounds for a party appearing before the Board to revisit its own prior litigation choices on remand. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015). "There is no Appointments Clause problem," the court explained, "in limiting [that party] to the evidence that it decided, on its own volition, to submit to the previous

[10] Respondents' attempt to introduce a new fair notice affirmative defense is so late in the process that the ALJ, in fact, has not even contemplated that they would seek to amend their Answer to add it. After considering representations that Respondents' counsel has made since the case was remanded to her, the ALJ allowed Respondents an opportunity only to seek "to amend their answer to include an advice of counsel/good faith defense." Scheduling Order for Issues in Respondents' August 14, 2019 Motion (Mar. 13, 2020) [Dkt. 258] at 1 and n.2 (citing Respondents' representation in a February 6, 2020 Joint Proposed Schedule, *see* [Dkt. 250] at 2, that Respondents would seek leave to amend their Answer to include only an advice-of-counsel/good faith defense).

Board." *Id.* at 122. The same reasoning applies to Respondents' decision, on their own volition, to assert certain affirmative defenses in this proceeding but not others.[11]

And there has been no intervening change in the law in the last four years that would justify allowing Respondents to assert either new affirmative defense at this late date. Respondents contend that the Central District of California's decision in *CFPB v. CashCall, Inc.* constituted such a change in the law, but as Respondents acknowledge, that case involved an assertion of advice of counsel not as an affirmative defense but as one relevant only to the determination of appropriate remedies. *See* Case No. CV 15-07522-JFW (RAOx), 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018), *appeal pending*, No. 18-55407 (9th Cir.). Whether *CashCall* or any other case would justify now allowing the introduction of advice-of-counsel evidence relating to possible remedies is addressed in Section III.C. of Enforcement Counsel's Opposition to Respondents' Motion to Open Record for New Hearing, filed this same day. And Respondents do not contend that any intervening change in the law would justify allowing them to assert a fair notice affirmative defense at this late date, and with good reason. The only intervening case law confirms what previous courts considering the defense in the context of the CFPA have consistently held: that defendants had appropriate fair notice in accord with constitutional due process. *See* Section III.B.2., *infra*.

Respondents' attempt to introduce two new affirmative defenses years into this proceeding also runs counter to the rules governing adjudications. The rules are emphatic that "the Bureau's

[11] There is no inconsistency in holding Respondents to their choice of defenses and the ALJ's determination that Enforcement Counsel can pursue Count IV of the Notice of Charges. *See* 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 (Jan. 24, 2020) [Dkt. 249] at 10–11. Enforcement Counsel's prior decision to drop that count was made in reliance on a decision of ALJ McKenna that is no longer entitled to any weight, and the decision was made effective in another order by the ALJ that also "has no effect in this new hearing." *Id.* at 11. In contrast, Respondents' choice of affirmative defenses was their decision alone.

policy is to conduct . . . adjudication proceedings fairly and expeditiously." 12 C.F.R. § 1081.101. Thus, "[i]n the conduct of such proceedings, the hearing officer and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay." *Id.*; *see also* CFPB Rules of Practice for Adjudication Proceedings (Final Rule), 77 Fed. Reg. 39058 (June 29, 2012) ("In drafting the Final Rule, the Bureau endeavored to create an adjudicatory process that provides for the expeditious resolution of claims . . . ."). In keeping with that emphasis, the rules impose a number of strict deadlines. *See, e.g.*, 12 C.F.R. § 1081.400(a). Indeed, the Director recently emphasized the need to adhere to the administrative rules and those deadlines by directing that this remand be brought to an expeditious close. *See* Order Granting in Part the ALJ's Request for Additional Time to Issue the Recommended Decision (Mar. 27, 2020) [Dkt. 262] at 2.[12]

2. Respondents cannot assert defenses that would be futile if litigated.

Even if the ALJ were to find that Respondents' two new affirmative defense were not waived or forfeited, Respondents still cannot assert them because doing so would be futile. Because both affirmative defenses are meritless as a matter of law, it would be futile to allow Respondents to amend their Answer to assert them. *See United States v. All Assets Held at Bank Julius*, 229 F. Supp. 3d 62, 71 (D.D.C. 2017).

Respondents' amendment to add an affirmative defense for good faith reliance on advice of counsel would be futile because advice of counsel is not a cognizable affirmative defense to any of

[12] The Director in her order also clarified that "return of jurisdiction to an ALJ on remand for further proceedings is akin to recommencement of the matter before the ALJ," *id.*, suggesting that she did not envision that her remand for a new hearing would result in a full re-litigation of the matter, but instead that the previous hearing would "recommence," or resume, with a constitutionally-appointed ALJ. Such an approach to the remand fits squarely within the D.C. Circuit's view of similar remands, *see Intercollegiate Broad. Sys.*, 796 F.3d at 126 (holding that new hearing requirement is satisfied by a *de novo* record review), and runs counter to Respondents' assertion that "the proceeding is not merely a continuation of the prior proceeding." MTAA Br. at 4-5.

the Notice of Charges' counts. Respondents nearly concede as much in their motion. *See* MTAA Br. at 7 ("Respondents are not raising advice of counsel/good faith as an affirmative defense to liability . . . .").

Good faith reliance on advice of counsel is not a valid defense to Counts III, IV, or VII for Integrity Advance or Mr. Carnes. It does not apply to counts against Integrity Advance because neither unfairness nor deception take into account a party's mental state. *See Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988). And it does not apply to Mr. Carnes because good faith reliance on advice of counsel "'is not a valid defense on the question of knowledge' required for individual liability." *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006) (quoting *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 575 (7th Cir. 1989), overruled on other grounds by *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019)). Even the court in *CashCall*—upon which Respondents principally rely in seeking this amendment—recognized this. *See CFPB v. CashCall, Inc.*, CV 15-07522-JFW(RAOx), 2018 WL 485963 at *12 (C.D. Cal. Jan. 19, 2018), *appeal pending*, No. 18-55407 (9th Cir.); *CFPB v. CashCall, Inc.*, CV 15-07522-JFW(RAOx), 2016 WL 4820635 at *12 (C.D. Cal. Aug. 31, 2016) (holding that reliance on advice of counsel is not a valid defense on the question of knowledge required for individual liability) (citing *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1102 (9th Cir. 2014)). Indeed, given the futility of such a defense, it would have been appropriate to strike the defense had Respondents originally asserted it. *See FTC v. Direct Benefits Grp., LLC*, No. 6:11-cv-1186-Orl-28TBS, 2012 WL 5508050, at *3 (M.D. Fla. Nov. 14, 2012) (striking good faith reliance on reasonable advice of counsel defense).

Finally, good faith reliance on advice of counsel is not a defense to violations of TILA or EFTA because there is no knowledge element to be disproved for either. *Cf. Orkin*, 849 F.2d at 1368; *Baker v. G. C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982) (explaining that law violations committed in reliance on advice of counsel do not count as a bona fide error that would excuse violations of TILA). It is also not relevant to any existing affirmative defenses to the TILA or EFTA claims. Respondents suggest that reliance on advice of counsel may be relevant to whether their "actions or omissions were in good faith and in conformity with the rules, regulations, and Interpretations of" TILA and EFTA. *See* MTAA Br. at 7-8; Answer at 15 ¶¶ 5-6. But it has nothing to do with either of these statutory defenses. *See* 15 U.S.C. § 1640(f) (TILA); 15 U.S.C. § 1693m(d) (EFTA). To prevail under them, Respondents would need to show that their acts or omissions conformed with a "rule, regulation, or interpretation" of TILA or EFTA, not that they reasonably relied on counsel's interpretation of TILA or EFTA's rules, regulations, or interpretations. *See* 15 U.S.C. § 1640(f); 15 U.S.C. § 1693m(d); *Cox v. First Nat. Bank of Cincinnati*, 751 F.2d 815, 825 (6th Cir. 1985); *Kessler v. Assoc. Fin. Servs. Co.,* 573 F.2d 577, 579 (9th Cir. 1977).

Respondents' amendment to add an affirmative defense for lack of fair notice likewise would be futile. *See* Section III.A.3., *supra*.

IV. Conclusion

For the reasons described above, the ALJ should deny Respondents' Motion to Dismiss and should deny Respondents' Motion to Amend Answer.[13]

Respectfully submitted,

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April 9, 2020

[13] Enforcement Counsel respectively submits that the issues raised by Respondents' motions are sufficiently clear to be resolved without oral argument. Enforcement Counsel stands ready, however, to present oral argument if the ALJ determines that it would be of assistance in resolving the motions.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April 2020, I caused a copy of the foregoing Enforcement Counsel's Consolidated Opposition to Respondents' Motion to Dismiss and Respondents' Motion to Amend Answer to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on Respondents' counsel at the following addresses:

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