UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of: **INTEGRITY ADVANCE, LLC and JAMES R. CARNES,** **Respondents.**	**RESPONDENTS' NOTICE OF SUPPLEMENTAL AUTHORITY AND REQUEST FOR RECONSIDERATION**

RESPONDENTS' NOTICE OF SUPPLEMENTAL AUTHORITY AND REQUEST FOR RECONSIDERATION

Pursuant to Federal Rule of Civil Procedure 60(b)(6), as well as the ALJ's authority to administer the proceedings at 12 CFR § 1081.104(a) and §§ 1081.104(b)(5) and (10), Respondents Integrity Advance, LLC and James R. Carnes ("Respondents") respectfully submit this Notice of Supplemental Authority and Request for Reconsideration on the basis of the Supreme Court's decision in *Seila Law LLC v. CFPB*, No. 19-7 (June 29, 2020) (attached hereto as Exhibit A).[1] Counsel for Respondents certify pursuant to 12 C.F.R. § 1081.205(f) that

[1] The Consumer Financial Protection Bureau Rules of Practice for Adjudication Proceedings address motions for reconsideration of the Director's final orders and decisions, however, that standard is not applicable to the circumstances of the current request. *See* 12 CFR § 1081.406.

Respondents also seek reconsideration based on the ALJ's statement that: "[i]f 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." Dkt. 257 at 6 (Order Denying Motions to Stay and Dismiss). Respondents recognize that the Supreme Court held that the unconstitutional removal provision can, in fact, be severed. However, because the Supreme Court ruled on constitutionality but expressly left open the question of remedy, Respondents are seeking the ALJ's review and reconsideration at this time.

they have conferred with Enforcement Counsel in a good faith effort to resolve the issues raised by this Request and have not been able to resolve this matter by agreement.

In *Seila Law*, the Supreme Court held that the structure of the Consumer Financial Protection Bureau ("CFPB") is unconstitutional based on its "leadership by a single individual removable only for inefficiency, neglect, or malfeasance." *Id.* at 11. The Supreme Court further held that the unconstitutional provision regarding for-cause removability was severable. *Id.* at 36. Therefore, as of the date of that decision, the CFPB's structure now passes constitutional muster on this issue. However, the Court expressly left open the question of the appropriate remedy in matters, such as this one, where an action was filed and litigated under an unconstitutionally insulated Director. *Id.* at 30-31 (remanding to the lower court to determine if dismissal is the appropriate remedy, whether ratification had occurred, and whether any such ratification was "legally sufficient to cure the constitutional defect in the original demand").

Given this newly-issued opinion, Respondents request the ALJ to reconsider her finding that Respondents forfeited the defense of the CFPB's unconstitutionality. In her finding, the ALJ noted that:

> 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.

Dkt. 257 at 4. Now that the Supreme Court has ruled on *Seila Law*, it is now clear that the CFPB's structure was unconstitutional and the current status of the law has changed.[2] Therefore,

[2] The state of the law on this issue also is vastly different than what existed at the time Respondents filed their initial Answer. *See CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1088 (C.D. Cal. 2014) ("[T]he for cause removal provision of the CFPB, when considered as a part of the CFPB's overall structure and mission, does not impermissibly interfere with the President's power to assure that the laws be faithfully executed."); *see also CFPB v. ITT Educ. Servs.*, 219 F. Supp. 3d 878, 893 (S.D. Ind. 2015) ("[W]e conclude that the structure of the CFPA is permissible when viewed through this doctrinal prism [including *Humphrey's Executor* and *Morrison*]."

Respondents should not be deemed to have waived or forfeited a defense that is substantially reliant on a Supreme Court ruling that was just issued approximately one week ago.[3] *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 142-43 (1967) ("[A]n effective waiver must . . . be one of a 'known right or privilege.'").

Considering the defense on its merits, the unconstitutional structure of the CFPB warrants dismissal in this case. The CFPB recently argued in *CashCall* that dismissal was not appropriate in that case, despite the Supreme Court's ruling in *Seila Law*, because "this action has already been approved by an Acting Director subject to the President's unrestricted removal power." Ex. A at 2 (*CFPB v. CashCall, Inc.* Nos. 18-55407, 18-55479 (Dkt. 55) (9th Cir. June 30, 2020)). The CFPB also explained that Director Kraninger "intends to assess whether to formally ratify this action herself, now that it is clear she is removable at will." *Id*.

Unlike *CashCall*, the instant matter was not ratified by the Acting Director and the CFPB has never alleged that ratification occurred. *See generally* Dkt. 254 (Enforcement Counsel's Consolidated Opposition to Respondents' Motion to Dismiss and Motion to Stay Proceedings). Instead, the Acting Director's role in this case was limited to ordering that (1) the matter "not be submitted for final Bureau decision" pending the Supreme Court's ruling in *Lucia v. SEC*, and (2) the parties brief open issues. Dkt. 210 at 2; Dkt. 211; Dkt. 213. In fact, prior counsel for Respondents asked the Acting Director to review the merits of this matter, but the Acting Director declined to do so and cautioned Respondents' prior counsel against *ex parte* communications. Dkt. 209A; Dkt. 210 at 2.

[3] Respondents also continue to maintain that they have not waived or forfeited this issue for the reasons previously stated in the briefs supporting their Motion to Dismiss. *See* Dkt. 253 and 256. However, the ALJ has already ruled on those arguments so Respondents will not repeat them here.

Even if the Acting Director had attempted to ratify this matter, he would have been time-barred from doing so under the applicable statute of limitations, at least as to Mr. Carnes. The current Director also is now time-barred as to both Respondents. *See CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016) ("[F]or a ratification to be effective, 'it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*.'") (emphasis in original) (citing *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994)). Ratification must occur before the deadline for the original action sought to be ratified. *NRA Political Victory Fund*, 513 U.S. at 98 (finding that the Solicitor General's attempted ratification of a filing decision "simply came too late in the day to be effective" because the time period for filing had already passed). The deadline in this matter has passed because the statute of limitations has run.

The ALJ previously assumed without ruling that the statute of limitations in the Consumer Financial Protection Act ("CFPA") applies to this action. *See* Dkt. 249 at 13; 12 U.S.C. § 5564(g)(1) (actions under the CFPA to be brought within three years after the "date of discovery of the violation"). Under even the CFPB's interpretation of "discovery," the CFPB would have "discovered" the alleged violations by June 2014. *See* Dkt. 242 at n.45 ("The record shows that the Office of Enforcement learned of Mr. Carnes's involvement through investigational hearings that occurred in June 2014"); *id.* at 8 (loan agreement produced to Enforcement Counsel by December 2013). Therefore, pursuant to the CFPA's statute of limitations, the CFPB could not have brought charges against Mr. Carnes (for whom there was not tolling agreement) any time after June 2017. The Acting Director was not appointed until November 2017, so he could not have ratified the charges against Mr. Carnes. The current Director is likewise time-barred from ratifying the charges now.

For Integrity Advance (for which tolling agreements were in place from June 2, 2014 to November 18, 2015), the CFPA's statute of limitation would have run by November 2018. *See* Dkt. 200 and 201 (Tolling Agreements). Therefore, the current Director cannot ratify the charges now.

If the three-year statute of limitations in the CFPA does not apply to this action, the CFPB has conceded that it is constrained by the five-year statute of limitations at 28 U.S.C. § 2462. Dkt. 248 ("§ 2462 provides a limitation in this forum on the civil penalties and disgorgement that Enforcement Counsel may seek.") Both parties agree that Integrity Advance ceased offering loans in December 2012. Dkt. 56, ¶ 10. Therefore, the five year statute of limitations would have run against Mr. Carnes in December 2017, so the Notice of Charges could not have been ratified by the Acting Director who took *no* action in this matter until March 5, 2018. *See* Dkt. 210. Additionally, the five year statute of limitations has certainly now run as to both Respondents, so the current Director does not have authority to ratify the Notice of Charges as to either Respondent.

For the above reasons, Respondents respectfully request the ALJ to reconsider her ruling that Respondents forfeited the separation of powers defense, consider the defense on its merits, and order dismissal.

Dated: July 6, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July 2020, I caused a copy of the foregoing Respondents' Notice of Supplemental Authority and Request for Reconsideration to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on opposing counsel at the following addresses:

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