UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' REQUEST FOR RECONSIDERATION**
INTEGRITY ADVANCE, LLC, and JAMES R. CARNES,	
Respondents.	

In a "Request for Reconsideration," Respondents yet again seek to have this enforcement proceeding dismissed, this time because of the Supreme Court's recent decision in *Seila Law LLC v. CFPB*, No. 19-7, 2020 WL 3492641 (U.S. June 29, 2020). The Administrative Law Judge ("ALJ") should deny that request.

In *Seila Law*, the Supreme Court held, consistent with the Bureau's position, that the Bureau's "leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers" by improperly insulating the agency from presidential oversight. *Id.* at *9. It further held, also consistent with the Bureau's position, that 12 U.S.C. § 5491(c)(3)—the provision in the Consumer Financial Protection Act ("CFPA") that purported to limit the President's ability to remove the Bureau's Director—is severable from the remainder of the CFPA. *Id.* at *5. In so holding, it remedied the constitutional problem with the Bureau's organic statute and made clear that the agency could "continue to operate" with a Director who is "removable by the President at will." *Id.*

This decision provides no basis to dismiss this proceeding. As the ALJ previously concluded, Respondents forfeited any separation-of-powers constitutional defense by failing to raise it in their answer or, indeed, at any other point during the first four years of this proceeding, despite "many opportunities" to do so. Ord. Denying Motions to Stay and Dismiss (Mar. 13, 2020) [Dkt. No. 257] at 4. There is no reason to revisit that conclusion. The Supreme Court's decision in *Seila Law* does not make the issue "newly ripe for raising," *id.*, because nothing barred Respondents from raising the defense before. Although a party's "failure to pursue [an] issue" may be excused where "there has been an intervening change in the law recognizing an issue that was not previously available," that exception to ordinary waiver principles applies only where "there was strong precedent prior to the change" that made it reasonable not to raise the

issue before. *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605-06 (4th Cir. 1999). That was not the situation here. At the time Respondents filed their answer that omitted this defense, the constitutional separation-of-powers issue was unsettled. Respondents note that, at that time, two district courts had held the removal provision constitutional. But those cases hardly amount to "strong precedent" making it reasonable for Respondents to fail to raise the issue; rather, they indicate that the separation-of-powers issue was a live controversy that litigants were aware of and asserting as an affirmative defense.

In any event, even if Respondents had not forfeited their defense based on the unconstitutional removal restriction, that defense would provide no basis for dismissal. As Respondents concede, as of the decision in *Seila Law*, the Bureau's "structure now passes constitutional muster" on the issue they assert. Respondents' Notice of Supplemental Authority and Req. for Recons. (July 6, 2020) [not yet docketed] ("Resps. Mot. for Recons.") at 2. And, indeed, in *Seila Law*, the Court made clear that the Bureau may "continue to operate" with a Director "removable by the President at will." 2020 WL 3492641, at *5.

Respondents nonetheless claim that this proceeding should be dismissed because a Director improperly insulated from presidential removal initially approved the filing of the notice of charges against them. They are mistaken. This proceeding is now being prosecuted by an agency led by a Director fully accountable to the President. If the Director now thinks that this proceeding should end, she can step in at any time and dismiss the charges. *See* 12 C.F.R. § 1081.211(a) ("The Director may, at any time, direct that any matter be submitted to him or her for review.").

Moreover, Respondents will face no liability here unless and until the Director—under the President's plenary supervision—enters a final order against them. *See* 12 C.F.R.

§§ 1081.402, 1081.405, 1081.407(a). If she does, that decision will "necessarily" amount to a ratification of the notice of charges filed against Respondents in 2015. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213 (D.C. Cir. 1998) (holding that OTS Director's issuance of final cease-and-desist order against bank was "necessarily an affirmation of the validity of the charges, and hence a 'ratification'"), *superseded by statute on other grounds, as recognized in Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019).

It is well established that such a ratification can cure a separation-of-powers problem with the initial filing of an enforcement proceeding. *See CFPB v. Gordon*, 819 F.3d 1179, 1190-91 (9th Cir. 2016) (holding that ratification by properly appointed official "cures any initial Article II deficiencies" with action's initial approval by unconstitutionally appointed official); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708-09 (D.C. Cir. 1996) (concluding that it was "neither necessary nor appropriate" to dismiss enforcement action filed by unconstitutionally structured agency where agency ratified action after becoming properly structured); *cf. also Doolin*, 139 F.3d at 213-14 (declining to vacate cease-and-desist order where properly appointed Director entered the final order in, and thus ratified, enforcement proceeding initiated by Director who may have been improperly appointed).

After all, respondents in an administrative adjudication may only obtain relief for "prejudicial error[s]." 5 U.S.C. § 706; *see also Air Canada v. Dep't of Transp.*, 148 F.3d 1142, 1156 (D.C. Cir. 1998), *as amended* (Sept. 24, 1998) ("As incorporated into the APA, the harmless error rule requires the party asserting error to demonstrate prejudice from the error."). And whatever prejudice a party might suffer when it is held liable in a proceeding initially brought by an official insufficiently accountable to the President, a ratification by a fully

accountable official is an "adequate remedy" for that prejudice. *Legi-Tech*, 75 F.3d at 709; *id.* at 708 n.5; *accord Doolin*, 139 F.3d at 213-14 (similar). Respondents, moreover, could not claim they are entitled to obtain relief before the full administrative process runs its course and the Director has an opportunity to ratify. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (refusing to review agency enforcement proceeding before entry of final order despite the "expense and disruption" the respondent would face in "defending itself in protracted adjudicatory proceedings"; explaining that "the expense and annoyance of litigation is part of the social burden of living under government" (internal quotations omitted)).

Nor is there any merit to Respondents' contention, Resps. Mot. for Recons. at 4-5, that no ratification is possible here because any potentially applicable statute of limitations has already expired. On Respondents' logic, the statute of limitations not only began to run, but expired, before the Bureau could even bring an action. Respondents cite no case in which a statute of limitations has been interpreted to run before a party (let alone a federal agency charged with enforcing the law) could lawfully file suit. *Cf. Johnson v. United States*, 544 U.S. 295, 305 (2005) (calling it "highly doubtful" that Congress intended a time limit on pursuing a claim to expire before the claim arose); *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (absent some contrary indication in statute, limitations period ordinarily does not begin to run until "the plaintiff can file suit and obtain relief").

The limitations provision the ALJ has applied bars actions brought more than 3 years after discovery of a violation "[e]xcept as otherwise permitted by law or equity." 12 U.S.C. § 5564(g)(1); *see* Ord. Denying Resps. Mot. to Dismiss (Jan. 24, 2020) [Dkt. No. 249] (concluding that claims were timely filed). Equity surely permits a fully accountable Director to ratify claims the agency had already brought during the limitations period. "Courts have typically extended

equitable tolling where 'the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period.'" *Harris v. Boyd Tunica, Inc.*, 628 F.3d 237, 239 (5th Cir. 2010) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & nn.3-4 (1990)). This is because statutes of limitations are meant to "assure fairness to defendants" and "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence is lost, memories have faded, and witnesses have disappeared." *Clymore v. United States*, 217 F.3d 370, 376 (5th Cir. 2000) (quoting *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 428 (1965)). Respondents face no unfair surprise or other injustice by having to defend against claims that the Bureau timely filed.[1]

Thus, even assuming that a ratification of an enforcement action is effective only if it occurs before the limitations period has run, that poses no bar to any ratification by the Director here—because no statute of limitations has run.

[1] If the statute of limitations in 28 U.S.C. § 2462 applied instead, that likewise would not bar the claims here. That provision requires only that certain proceedings be commenced "within five years from the date when the claim first accrued." 28 U.S.C. § 2462. And "[u]nless Congress has told us otherwise in the legislation at issue," a claim accrues or arises only once "the plaintiff can file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201. So, if Respondents are correct that the unconstitutional removal provision meant that the Bureau could not file the notice of charges while that provision was in place, the Bureau's cause of action did not accrue—and § 2462's limitations period did not begin to run—until the Supreme Court invalidated the unconstitutional removal provision on June 29, 2020.

For all these reasons, Respondents' request for reconsideration should be denied.

Dated: July 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July 2020, I caused a copy of the foregoing Enforcement Counsel's Opposition to Respondents' 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 Respondents' counsel at the following addresses:

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