UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	ORDER GRANTING RESPONDENTS' REQUEST FOR RECONSIDERATION IN PART AND DENYING RESPONDENTS' MOTION TO DISMISS
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

Procedural History

On July 6, 2020, Respondents' Counsel ("RC") filed *Respondents' Notice of Supplemental Authority and Request for Reconsideration*. (Dkt. 285). In the filing, RC requested that I reconsider my March 13, 2020, *Order Denying Motions to Stay and Dismiss* (Dkt. 257) (in which I found that Respondents had forfeited the defense that the Consumer Financial Protection Bureau's ("CFPB") structure is unconstitutional)[1], consider the defense on the merits, and order dismissal of this entire matter. On July 20, 2020, Enforcement Counsel ("EC") filed *Enforcement Counsel's Opposition to Respondents' Request for Reconsideration*. (Dkt. 286). On July 23, 2020, RC filed a reply brief. (Dkt. 287).

In my *Order Denying Motions to Stay and Dismiss*, I found that Respondents had failed to raise the affirmative defense of the CFPB's unconstitutional structure either in their answer or at any time subsequently and had thus forfeited it. In the order I declined to stay this matter pending the Supreme Court's decision in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), but stated that if the Supreme Court were to find the CFPB's structure was unconstitutional and that the Director's removal provision was "non-severable," I would examine the impact of the decision on the current matter.

On June 29, 2020, the Supreme Court issued an opinion in *Seila Law* finding that restrictions on the removal of the CFPB director in the Dodd-Frank Act are unconstitutional. *Id.* at 2197. However, the Court rejected the request to strike down the rest of the Dodd-Frank Act,

[1] The specific issue was whether the Dodd-Frank Act's restrictions on the removal of the CFPB Director, i.e., only for inefficiency, neglect of duty, or malfeasance in office, violated the separation of powers clause and thus rendered the structure of the CFPB unconstitutional.

and instead found that the CFPB can operate without the removal restrictions, i.e., that the removal restrictions are "severable" from the rest of the statute. *Id.* at 2211. The Court did not opine as to whether the current CFPB Director must ratify actions that were initiated prior to its decision in *Seila Law* but remanded the case to the lower courts to decide these case specific factual and legal questions in the first instance. *Id.* at 2208, 2211.

Respondents' Request for Reconsideration

In their request for reconsideration, Respondents argue that the state of the law has now changed to such an extent that they should not be deemed to have forfeited a defense on an issue that is substantially reliant on the Supreme Court's recent decision. (Dkt. 285 at 2-3; Dkt. 287 at 5-7). They assert that the current matter was filed and litigated under an unconstitutionally insulated Director and was not ratified by the subsequent Acting Director[2] (who preceded the current CFPB Director). (Dkt. 285 at 3). They further argue that, even if the Acting Director had attempted to ratify this matter, he would have been time-barred from doing so under the statute of limitations with respect to Respondent Carnes and that the current Director is time-barred from ratifying the matter with regard to both Respondents. (*Id*. at 4, Dkt. 287 at 4).

CFPB's Opposition

The CFPB argues in opposition that the Supreme Court's recent decision in *Seila Law* does not make the issue of the CFPB's unconstitutional structure "newly ripe for raising" because nothing barred Respondents from raising the defense before. (Dkt. 286 at 1). They argue that, even if Respondents had not forfeited the defense based on unconstitutional removal restrictions, the defense would not provide a basis for dismissal since the Court made it clear that the removal clause is "severable" and the CFPB may continue to operate with a Director removable by the President at-will. (*Id*. at 2). They assert that this proceeding is now being prosecuted by an agency led by a Director fully accountable to the President who can step in at any time and dismiss the charges and that the Respondents will face no liability unless and until the Director, under the President's plenary supervision, enters a final order against them, which would then amount to a ratification of the notice of charges. (*Id*. at 2-3). They assert that such a ratification would cure any separation-of-powers problem that may have existed at the initial filing of the notice of charges. (*Id*. at 3). They argue that, even assuming a ratification of an enforcement action is effective only if it occurs before the limitations period has run, that poses no bar to ratification by the current Director because no statute of limitations has run. (*Id*. at 5). Finally, they argue that equity permits a fully accountable Director to ratify claims the agency had already brought during the limitations period. (*Id*. at 4).

Analysis

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[2] The Acting Director would have been subject to removal at-will by the President and thus there would not have been a separation-of powers issue during his tenure.

A. Has the state of the law changed such that the issue of unconstitutional structure should be considered on the merits?

RC assert that as of the date of the *Seila Law* decision, the CFPB's structure now passes constitutional muster. (Dkt. 285 at 2). They assert, however, that the Court left open the question of the appropriate remedy in matters where an action was filed and litigated under an unconstitutionally insulated Director. (*Id.*) They therefore argue that the state of the law has changed and they should now be able to argue that the unconstitutional structure of the CFPB at the time this case was filed and litigated warrants dismissal. (*Id.* at 2-3).

EC argue in opposition that the *Seila Law* decision does not make the issue "newly ripe for raising" because nothing barred Respondents from raising the defense before. (Dkt. 286 at 1). They assert that the exception to ordinary waiver principles applies only where there was a strong precedent prior to the change that made it reasonable not to raise the issue before, and that in the current matter the defense of the constitutional separation-of-powers issue was unsettled and a live controversy that Respondents were aware of and should have asserted as an affirmative defense previously. (*Id.* at 2).

At the time Respondents filed their answer in this matter, two district courts had held the removal provision to be constitutional.[3] EC argue that these two district court decisions did not amount to a "strong precedent" that would have made it reasonable for Respondents to fail to raise the issue, but rather that the issue was still a live controversy that should have been raised as an affirmative defense. This position seems to be supported by the fact that the very issue was also pending before the D.C. Circuit Court in the case of *PHH Corp. v. CFPB* at the time of the first hearing in this matter.[4]

Nevertheless, I do find that the *Seila Law* decision represents a significant change in the status of the law because it raises new issues that would not have been contemplated previously: (a) whether the Director of the CFPB needs to ratify the actions in this matter; and (b) if ratification is required, whether the Director is time-barred from ratifying the actions and the form such a ratification would take. I therefore will consider these issues on the merits.

B. Must the Director ratify the action?

EC assert in their opposition brief that this proceeding is now being prosecuted by an agency led by a Director fully accountable to the President. (Dkt. 286 at 2). They state that Respondents will face no liability in this case unless and until the Director enters a final order

[3] *See CFPB v. Morgan Drexen, Inc*., 60 F. Supp. 3d 1082, 1088 (C.D. Cal. 2014); *CFPB v. ITT Educ. Servs*., 219 F. Supp. 3d 878, 893 (S.D. Ind. 2015).

[4] The D.C. Circuit Court initially found the removal provision to be unconstitutional after Judge McKenna issued a recommended decision in this matter and while the case was before the Director on appeal. *See PHH Corp. v. CFPB*, 839 F. 3d 1 (D.C. Cir. 2016). The *en banc* D.C. Circuit Court later overturned this decision in relevant part and found the removal provision to be constitutional. *PHH Corp. v. CFPB*, 881 F. 3d 75 (D.C. Cir. 2018).

against them, which would amount to a ratification of the notice of charges. (*Id*. at 3). They acknowledge that it is well established that such a ratification can cure a separation-of-powers problem with the initial filing of an enforcement proceeding. (*Id*.). They assert, however, that Respondents 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. (*Id*. at 4).

RC assert that ratification is necessary to cure the separation-of-powers problem inherent in the CFPB's filing of charges against Respondents at a time when the CFPB was unconstitutionally structured. (Dkt. 287 at 1-2). They cite only to the *Seila Law* opinion which addressed the ratification question because the CFPB raised it by asserting that the civil investigative demand could still be enforced on remand because it was ratified. Ratification thus could be a possible remedy in that particular case, but not necessarily the only one. RC claim that the Director has "declined to ratify" the action in the current matter to date and that, at any rate, she would be time-barred from doing so. (*Id*. at 2-3).

The parties thus appear to at least be in agreement that ratification by a properly appointed Director could cure an existing deficiency in this matter due to the case being initially filed and litigated[5] under an unconstitutionally insulated director. They differ, however, in their position as to whether the Director is time-barred from ratification. Also, if ratification is necessary and not time-barred, the question arises as to what form it must take.

C. Is the Director time-barred from ratifying the action and, if not, what form would ratification take?

RC assert that although the previous Acting Director issued two orders in this matter, they did not amount to ratification because he did not rule on the merits of the case. (Dkt. 285 at 3). They further assert that, even if the Acting Director had attempted to ratify this matter, he would have been time-barred from doing so with regard to Respondent Carnes because the statute of limitations would have already run by the time he was appointed Acting Director. (*Id*. at 4). They also assert that the current CFPB Director is time-barred from ratifying this matter with regard to both Respondents because the statute of limitations has now run for all allegations against both Respondents. (*Id*. at 4-5).

EC argue that under Respondents' logic, the statute of limitations would have run before the Bureau could even have brought an action and that Respondents cite to no case law in which a statute of limitations has been interpreted to run before a party could lawfully file a suit. (Dkt. 286 at 4). They further assert that the claims against both Respondents were brought during the limitations period and that equity permits a fully accountable Director to ratify such claims, which the agency has actively pursued. (*Id.*). They assert that Respondents will suffer no unfair surprise or injustice by having to defend against claims the Bureau timely filed. (*Id.* at 5). Alternatively,

[5] I note that although this case was initially filed during the tenure of an unconstitutionally insulated Director, the case is still in litigation and there has never been a final agency decision.

they assert that since the case law they cite holds that a claim does not accrue until a plaintiff can file suit and obtain relief, the limitations period did not begin to run until the Supreme Court invalidated the unconstitutional removal provision on June 29, 2020, when it issued the decision in *Seila Law*. (*See id.* at 4-5 & n.1).

In analyzing this issue, it is helpful to review a summary[6] of the procedural history of this matter which, due to circumstances beyond the control of the parties, has been unusually long, with lengthy delays. The *Notice of Charges* (Dkt. 1) was filed by EC for the CFPB on November 18, 2015. At that time, although there was discussion and litigation in other cases concerning the constitutionality of the CFPB's structure, there was no apparent legal impediment to the CFPB pursuing this matter, and the CFPB actively pursued litigation. In accordance with the *Rules of Practice for Adjudication Proceedings* ("Rules"),[7] a formal hearing was conducted by an Administrative Law Judge ("ALJ") who then filed a recommended decision in accordance with Rule 400, on September 27, 2016 (Dkt. 176). At that time, the ALJ, in accordance with the Rules transmitted the recommended decision along with a certified index of the entire record to the Director for review in accordance with Rule 401. Absent an appeal, the Director could then have either issued a final decision and order adopting the recommended decision or ordered further briefing. If one or both parties filed an appeal, at the end of the appeals process, in accordance with Rule 405(c), the Director would then have rendered a decision affirming, adopting, reversing, modifying, setting aside, or remanding the decision for further proceedings.

Since both parties filed appeals (Dkt. 177, 178), the Director did not reach the stage of issuing a final decision, but instead received appellate briefs, heard oral arguments, and received post-argument supplemental briefs. Following presentation of the arguments, the proceeding was then delayed and placed into abeyance by the Director (Dkt. 208) and then again by the, subsequently appointed, Acting Director (Dkt. 210), pending decisions in two other cases that had the potential to impact this matter.[8] Following decision in the second of these cases, the Acting Director concluded that additional briefing was needed and ordered the parties to submit briefs on additional issues. (Dkt. 213). The Acting Director thus continued the litigation of this case, although he could have dismissed it at that point. Although this did not amount to a ratification (which would not have been necessary since the CFPB structure had not yet been found unconstitutional and the Acting Director was subject to at-will removal by the President), it indicated, at a minimum, an intent to proceed with litigation.

However, the Acting Director then left the Bureau prior to analyzing the briefed issues and issuing a final decision. In the interim, the current Director was appointed. On May 28, 2019, the current Director issued an order remanding this matter to me for a new hearing (due to the improper appointment of the previous ALJ) and new recommended decision. Although the Director issued

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[6] This is merely a summary of key events, not a comprehensive list of every procedural event.
[7] 12 C.F.R. pt. 1081.
[8] *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), 881 F.3d 75 (D.C. Cir 2018); *Lucia v. SEC*, 138 S.Ct. 244 (2018).

this order prior to the issuance of the *Seila Law* decision, it clearly indicates an intent, as of that date, to continue litigating the matter using administrative adjudication procedures. However, since *Seila Law* had not been issued, there would have been no need to address the issue of ratification. I therefore find RC's assertion in their reply brief that the Director has "declined to ratify" this action to be disingenuous. (*See* Dkt. 287 at 2). As I have not yet issued a new recommended decision, the case has not been transmitted to the current Director for action in accordance with Rule 401. EC are correct in stating that the Respondents will face no liability unless and until the Director, under the President's plenary supervision, enters a final order against them. (Dkt. 286 at 2).

However, the questions remain whether the Director is time-barred from ratifying the action and, if not, what form that ratification must take. RC are correct that, at this point in time, the statute of limitations would have run with regard to all offenses against both Respondents, in the normal course of events. In support of their position, RC cite to *FEC v. NRA Political Victory Fund*, which held that "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*." 513 U.S. 88, 98 (1994) (emphasis in original). Unlike in *NRA Political Victory Fund*, however, where the action that the principal attempted to ratify was one that was never properly taken in the first instance (*see id.*), the CFPB properly filed the *Notice of Charges* within the limitations period under a then-constitutional structure in 2015.

On the other hand, EC oppose RC's contention that that statute of limitations could expire before the CFPB could properly file a notice of charges, which, due to the *Seila Law* decision, could not have occurred before June 29, 2020. They cite to *Johnson v. United States*, in which the Supreme Court, in analyzing a specific statute, called it "highly doubtful" that Congress would have meant to start the statute of limitations running before the discoverability of facts that were the basis of the cause of action had any real meaning. 544 U.S. 295, 305 (2005). Similarly, if the CFPB truly could not lawfully bring this action until June 29, 2020, the discovery of the violations which were the basis of this action, which is what begins the 3-year statute of limitations under 12 U.S.C. § 5564(g)(1), would have no real meaning until the CFPB could take action. While the instant case is distinguishable from *Johnson* because all of the necessary components of the cause of action existed and were in place during the period that RC contend the SOL ran, the theory that the SOL could not have begun to run before the CFPB could properly bring the action is in accord with the analysis in my previous *Order Denying Respondents' Motion to Dismiss*. (Dkt. 268). In that order, I found that the CFPB has the authority to enforce violations of the law related to activities that took place prior to the CFPB's effective date. There, I found that "[i]t would render the law's effective dates meaningless to find that the CFPB could not enforce violations of the law that occurred prior to the constitutional appointment of a Director." (Dkt. 268 at 4). Similarly, the CFPA's prohibitions would effectively be meaningless if the CFPB could not enforce violations of the law that occurred prior to the ability of a constitutionally appointed Director to enforce those laws.

I do not find, however, as RC assert, that this means the CFPB can now reopen the statute of limitations and bring claims against *any* covered person for conduct dating back to the inception of the CFPA. (*See* Dkt. 287 at 4-5). Rather, I find that the statute of limitations has been equitably tolled in this matter, where EC "actively pursued [their] judicial remedies by filing a defective pleading during the statutory period." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). While courts have "generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights," I find that EC exercised diligence in investigating and bringing this case within the limitations period, and thus preserved their legal rights. (*See id.*). While RC are correct in noting that "equitable tolling applies only in 'rare and exceptional circumstances,'" (Dkt. 287 at 4) (quoting *Harris v. Boyd Tunica, Inc.*, 628 F.3d 237, 239 (5th Cir. 2010)), this case seems to fall into one of those "rare and exceptional circumstances" where equity would weigh in favor of allowing a case that was properly brought within the limitations period by a then-constitutionally structured agency, that was later declared unconstitutional, to proceed. Furthermore, because the unconstitutional provision has been determined to be "severable" from the other provisions of the CFPA, and the Supreme Court expressly found that the remaining "provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative," there is no indication that the Supreme Court did not intend for ongoing matters to proceed under a Director who can now be removed at-will. *See Seila Law*, 140 S. Ct. at 2209.

Lastly, as EC note, the applicable statute of limitations provision in the CFPA expressly includes the language "[e]xcept as otherwise permitted by law or equity." 12 U.S.C. § 5564(g)(1). Thus, Congress contemplated that equitable considerations might allow for an alternative statute of limitations. Where, as here, the traditional rationales for statutes of limitations fall short since the case was originally brought within the limitations period, equity would support extending the time by which the CFPB could ratify an action that has, years later, been determined to be improperly filed. *See Clymore v. United States*, 217 F.3d 370, 376 (5th Cir. 2000) ("Statutes of limitations are primarily designed to assure fairness to defendants, and to 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."); *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965).

Thus, I find that the Director is not time-barred from ratifying the action. The question remains, then, what form the ratification must take. Contrary to Respondents' assertion, I do not find that the Director has "declined to ratify this action." (Dkt. 287 at 2). However, there has been no express Director ratification of this matter since issuance of the *Seila Law* decision on June 29, 2020. It is not clear, however, that there must be, since the Rules require the Director, herself, to enter any final order and her actions will necessarily represent either ratification or dismissal of the CFPB's prior actions. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213 (D.C. Cir. 1998) (holding that by continuing in the normal course of agency adjudication and issuing a final cease-and-desist order against the bank, the OTS Director necessarily affirmed the validity of the charges and his actions amounted to "ratification"). I therefore find that since Respondents will face no liability unless and until the Director enters a final order against them, which would amount to ratification in this matter through continuance in the normal course of agency adjudication, such ratification will be sufficient to cure the constitutional defect in the original filing of the *Notice of Charges*.

In accordance with Respondents' request for reconsideration, I have thus considered the new issues raised by the *Seila Law* decision but find insufficient grounds to order dismissal of this matter.

ORDER

Respondents' Motion to Dismiss is **DENIED**.

SO ORDERED this 3rd day of August 2020.

Christine L. Kirby

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Date: 2020.08.03 10:22:23 -04'00'

HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 3rd day of August 2020 at
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Granting Respondents' Request for Reconsideration in Part and Denying Respondents' Motion to 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
Docket Clerk
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Bureau of Consumer Financial Protection

Signed and dated on this 3rd day of August 2020
at Washington, D.C.