UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	ORDER DENYING
	)	RESPONDENTS'
INTEGRITY ADVANCE, LLC and	)	MOTION TO AMEND
JAMES R. CARNES,	)	ANSWER
	)	
Respondents.	)	

Procedural History

On December 11, 2015, Respondents filed an *Answer* (Doc. 21) to the *Notice of Charges* in this matter (Doc. 1). In the *Answer*, Respondents stated eight specific affirmative defenses. Doc. 21 at 14-15. On March 26, 2020, Respondents' Counsel ("RC") filed *Respondents' Motion to Amend Answer* (Doc. 259), seeking to add two additional affirmative defenses. Respondents requested oral argument. On April 9, 2020, Enforcement Counsel ("EC") for the Consumer Financial Protection Bureau ("CFPB") filed a consolidated response brief addressing the motion (Doc. 264). On April 15, 2020, RC filed a consolidated reply brief addressing the motion. (Doc. 265).

Respondents' Motion

Respondents' seek to amend their *Answer* to add: 1) an affirmative defense of good faith reliance on the advice of counsel; and 2) an affirmative defense of lack of fair notice as to the prohibited conduct underlying the Consumer Financial Protection Act (CFPA) claims for "unfairness" and "deception." RC assert that a recent District Court decision held that good faith reliance on advice of counsel can have a significant impact on the financial penalties and restitution that can be imposed in CFPB enforcement matters and that any potential prejudice to the CFPB can be mitigated by allowing additional discovery. Doc. 259 at 1. With regard to the fair notice defense, they assert that EC will not be prejudiced because the CFPB has responded to similar challenges in other cases. *Id*.

CFPB's Response

The CFPB asserts that Respondents should not be allowed to interject new legal issues into this matter that they could have asserted previously, and that Respondents waived or forfeited these defenses by electing not to raise them earlier. Doc. 264 at 2, 15-17. EC assert that there has been

no intervening change in the law that would justify adding these defenses. *Id*. at 17. They assert that allowing the addition of these defenses now would provide Respondents with a procedural windfall that is not available to other litigants and cannot be justified. *Id*. at 2. EC also argue that asserting these two defenses would be futile as neither could save Respondents from liability. *Id.* at 18-20.

ANALYSIS

I. Legal Standard

The CFPB's *Rules of Practice for Adjudication Proceedings* ("*Rules*") state that "[a]n answer must specifically respond to each paragraph or allegation of fact contained in the notice of charges and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact." 12 C.F.R. § 1081.201(b). Rule 201(b) further states that "[a] respondent is not required to respond to the portion of a notice of charges that constitutes the prayer for relief or proposed order" and that "[t]he answer must set forth affirmative defenses, if any, asserted by the respondent." *Id*.

Pursuant to Rule 202(a), an answer may be amended before the hearing "only with the opposing party's written consent or leave of the hearing officer." 12 C.F.R. § 1081.202(a). The commentary to Rule 202 explains that the rule "encourages parties to plead their case fully" and "reflect[s] a liberal standard of permitting amendments of pleadings, but implements an appropriate limit for amendments that are unduly prejudicial." 77 Fed. Reg. 39058, 39069.

The Supreme Court has held that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Furthermore, "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the [Federal Rules of Civil Procedure] require, be 'freely given.'" *Id.*

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*."[1]

II. Good Faith Reliance on Advice of Counsel Defense

[1] *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).

In their brief, RC cite to the case of *CFPB v. CashCall, Inc., et al*.[2] as support for their motion to amend their answer to include an affirmative defense of good faith reliance on advice of counsel. Doc. 259 at 3-4. RC argue that although Respondents did not raise the defense at the first hearing and even raised objections to questioning regarding what if any advice of counsel Respondents received, based on their desire to preserve attorney-client privilege, they now believe based on the recent decision in *CashCall* that this defense "could have a significant impact on any potential penalty and restitution award." *Id*. at 4. RC further argue that the CFPB will not be unduly prejudiced by allowing Respondents to raise an advice of counsel/good faith defense because we are not in the midst of or on the eve of a hearing and EC may seek reasonable discovery. *Id*. at 5.

EC assert that Respondents made the strategic decision not to raise an affirmative defense of good faith reliance on advice of counsel previously and thus waived or forfeited the defense. Doc. 264 at 15-16. In support of this position they rely on the D.C. Circuit Court decision in *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd*.[3] as holding that in a remand case to remedy an Appointments Clause problem, a party is limited to the evidence that it decided, on its own volition, to submit in the previous proceeding. *Id*. at 16-17. EC also assert that *CashCall* did not represent a change in the law as to whether good faith reliance on advice of counsel is an affirmative defense to liability. *Id*. at 17. Furthermore, EC assert that since good faith reliance on advice of counsel is not a cognizable affirmative defense to liability, as Respondents concede, it would therefore be futile to assert it. *Id*. at 18-20.

In *CashCall*, the court cited to its previous holding[4] that advice of counsel is **not** a defense to liability, but that it is relevant to the determination of whether restitution is an appropriate remedy. *CashCall*, 2018 WL 485963, at *12. In their brief, Respondents concede that assertion of good faith reliance on counsel is not, in fact, an affirmative defense, but contend that it would assist them in establishing that the CFPB has not met its burden to show that restitution is an appropriate remedy. Doc. 259 at 7. They also accurately state that under the CFPB's rules, they are "not even required to respond to the CFPB's sought-after remedies, much less assert affirmative defenses as to the remedies." *Id*. They vaguely state, however, that they are nevertheless seeking to amend their *Answer* to include good faith reliance on the advice of counsel as an affirmative defense "in an abundance of caution." *Id*. at 7, 8.

Accordingly, I find that good faith reliance on advice of counsel is not an affirmative defense to liability. I further find that Respondents are not required to respond to portions of the *Notice of Charges* that constitute the prayer for relief. As restitution is only mentioned in the prayer for relief portion of the *Notice of Charges*, I find no need to include information in the *Answer* responding to the CFPB's request for restitution. Respondents' motion to amend the *Answer* to add an affirmative defense of good faith reliance on the advice of counsel is **DENIED**.[5]

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[2] *CFPB v. CashCall, Inc., et al*., No. CV 15-07522-JFW, 2018 WL 485963 (C.D. Cal. Jan. 19, 2018).
[3] *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd*., 796 F.3d 111 (D.C. Cir. 2015).
[4] *Chase v. Trs. of W. Conference of Teamsters Pension Trust Fund*, 753 F.2d 744, 753 (9th Cir. 1985).
[5] The question remains whether Respondents can introduce supplemental evidence on advice of counsel to assist me in adjudicating the merits of the action, i.e., the appropriateness of restitution. I will address this issue in the Order addressing *Respondents' Motion to Open Record for a New Hearing*.

III. Lack of Fair Notice Defense

In their brief, RC also seek to amend their *Answer* to assert a defense that the CFPB did not provide fair notice of the prohibited conduct underlying the CFPA claims for "unfairness" and "deception." RC do not explain why this defense was not raised previously and, unlike the good faith reliance on advice of counsel defense discussed *supra*, do not cite to any purported change in the law that would make this defense more relevant now than it would have been in the previous hearing. They simply assert that the CFPB will not be prejudiced because it has responded to this defense in other matters. Doc. 259 at 8.

EC make similar arguments as those made above. Specifically, EC assert that Respondents made the strategic decision not to raise the lack of fair notice defense previously and thus waived or forfeited it and there has been no change in the law. Doc. 264 at 15-17. They also argue that the defense would be futile and result in prejudice. *Id*. at 20.

Respondents seek to assert this defense more than four years after the *Notice of Charges* was filed and cite to absolutely no reason why they failed to assert it earlier. Nor do they cite to any change in the law that would make this defense more relevant now than it was previously. I also note that in the course of this remand proceeding, unlike with the advice of counsel defense which Respondents raised immediately at the start of the proceeding (*See* Doc. 228), Respondents did not raise the lack of notice defense until now, several months into this proceeding. Given their lack of any explanation whatsoever for the delay, and the requirement to conduct adjudication proceedings expeditiously and the duty of all parties, as well as the hearing officer, to make every effort at each stage of a proceeding to avoid delay,[6] I find that Respondents have waived this affirmative defense[7] and that to allow it to be raised now would result in prejudice to the CFPB and cause undue delay. Respondents' motion to amend the *Answer* to include an affirmative defense of lack of fair notice is **DENIED**.

ORDERS

1. Respondents' request for oral argument is **DENIED**.

2. Respondents' Motion to Amend Answer is **DENIED**.

SO ORDERED this 24th day of April 2020.

Christine L. Kirby

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HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 24th day of April 2020 at Washington, D.C.

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[6] *Rules of Practice for Adjudication Proceedings*, 12 C.F.R. § 1081.101.
[7] *See* March 13, 2020, *Order Denying Motions to Stay and Dismiss* (Doc. 257, at 3-5) in which I discussed the D.C. Circuit Court's analysis of the timeliness of affirmative defenses.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Denying Respondents' Motion to Amend Answer* 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
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 24th day of April 2020 at Washington, D.C.