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' MOTION TO STAY THE DIRECTOR'S FINAL DECISION AND ORDER**

RESPONDENTS' MOTION TO STAY THE DIRECTOR'S FINAL DECISION AND ORDER

Pursuant to 12 CFR § 1081.407, Respondents Integrity Advance LLC and James R. Carnes ("Respondents") hereby move for a stay of the Director's Final Decision and Order issued on January 11, 2021 ("Final Order"). *See* Dkt. 308; Dkt. 309. Respondents intend on filing an appeal of the Final Order to a United States Court of Appeals, and respectfully request that the Final Order be stayed pending judicial review. In the alternative, Respondents ask that the Director grant a temporary stay of the Final Order for thirty (30) days to allow Respondents the time to seek a stay in the appellate court. In support thereof, Respondents incorporate the accompanying Memorandum of Law and attached exhibit.

Counsel for Respondents certify pursuant to 12 C.F.R. § 1081.205(f) that they have conferred with Enforcement Counsel in a good faith effort to resolve the issues raised by this Motion and have not been able to resolve this matter by agreement.

Dated: February 9, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February 2021, I caused a copy of the foregoing Respondents' Motion to Stay the Director's Final Decision and Order 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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RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY THE DIRECTOR'S FINAL DECISION AND ORDER

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I. INTRODUCTION AND SUMMARY

In the Director's Final Decision and Order issued on January 11, 2021 ("Final Order"), the Director found Respondents Integrity Advance, LLC and James R. Carnes ("Respondents") liable for violating the Truth in Lending Act ("TILA"), the Consumer Financial Protection Act ("CFPA"), and the Electronic Fund Transfer Act ("EFTA") and ordered that Respondents pay or put into escrow more than $50 million in restitution and civil penalties within 30 days. Dkt. 308; Dkt. 309. Respondents intend to file a Petition for Review in a United States Court of Appeals challenging the Director's decision, and they respectfully ask that the Final Order be stayed pending judicial review pursuant to 12 C.F.R. § 1081.407.

A stay is warranted here. First, Respondents respectfully submit that they are likely to succeed on appeal. However, if the Director disagrees with Respondents' conclusion, there are nonetheless a number of serious legal questions implicated in this matter, any one of which justify imposition of a stay to maintain the status quo pending appeal. Additionally, Respondents will suffer irreparable injury in the absence of a stay, because enforcement of the judgment will cause them to continue to suffer constitutional harm in addition to non-recoverable economic harm. Finally, the balance of the equities favors Respondents as any alleged harm to the Consumer Financial Protection Bureau ("CFPB") does not outweigh the substantial harm to Respondents if they are forced to pay more than $50 million into escrow during the pendency of their appeal, and the stay is not against the public interest.

II. LEGAL STANDARD

"The Director may, in his or her discretion, and on such terms as he or she finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for

judicial review of that order." 12 C.F.R. § 1081.407(e).[1] The Director considers four factors in assessing the propriety of granting a stay pending appeal: (1) the likelihood of the movant's success on appeal, (2) whether the movant will suffer irreparable harm if a stay is not granted, (3) the degree of injury to other parties if a stay is granted, and (4) why the stay is in the public interest. *Id.* § 1081.407(c).[2]

III. ARGUMENT

A. Respondents' appeal presents serious legal questions upon which they are likely to prevail.

A stay is warranted here because Respondents are likely to be successful on appeal on multiple grounds. However, a party seeking a stay of a judgment pending appeal can satisfy the "likelihood of success on the merits" prong "by raising a 'serious legal question . . . whether or not [the] movant has shown a mathematical probability of success.'" *Comm. On The Judiciary U.S. House of Representatives v. Miers*, 575 F. Supp. 2d 201, 203 (D.D.C. 2008) (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)); *see also id.* (a movant need not "demonstrate a 50% chance or better of prevailing on appeal"). Such a stay maintains the status quo and "it will ordinarily be enough that the [movant] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Id.*;

[1] Consistent with 12 C.F.R. § 1081.205(f), Respondents, through their counsel, conferred with Enforcement Counsel via e-mail on February 1, 2021 regarding the instant motion. Enforcement Counsel indicated they did not consent to a stay of the judgment pending judicial review.

[2] Considering these four factors, as articulated in *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008), the D.C. Circuit granted a stay pending judicial review in a matter factually equivalent to the instant case. Order, *PHH Corp. v. CFPB* (No. 15-1177) (Aug. 3, 2015) (Doc. No. 1565883).

see also Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (same). As the D.C. Circuit has noted,

> An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Holiday Tours, Inc., 559 F.2d at 844; *see also Philipp v. Fed. Republic of Germany*, 436 F. Supp. 3d 61, 66 (D.D.C. 2020) (finding that the "'serious legal question' standard may replace the 'likelihood of success on the merits' standard" and noting that "this approach is entirely consistent with the purpose of granting interim injunctive relief, whether by preliminary injunction or by stay pending appeal" because "[g]enerally, such relief is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit") (citing *Holiday Tours, Inc.*, 559 F.2d at 844).

Therefore, even if the Director disagrees that Respondents are likely to succeed on the merits of their appeal, the Director should find that there are a number of serious legal questions implicated here such that the "likelihood of success" prong of the analysis weighs in favor of a stay.[3]

[3] Dispensing with a rigid "'likelihood of success on the merits' standard" makes eminent sense here where the Director has already considered and rejected Respondents' arguments after briefing and oral argument. *Philipp*, 436 F. Supp. 3d at 66. Although Respondents respectfully submit that the Director erred in doing so, Respondents should not be placed in the position of essentially arguing for reconsideration of the Director's decision when it is clear, as discussed below, that there are a number of serious legal questions that will be litigated in the appellate court. Indeed, if the Director were to apply a rigid "'likelihood of success on the merits' standard" here, it would suggest that virtually no respondent could ever convince the Director that a stay is appropriate without also convincing the Director that his or her own decision on the merits was erroneous. That is not, and should not be, the law. *See id.*; *Holiday Tours, Inc.*, 559 F.2d at 844; *McPherson*, 797 F.2d at 1078.

First, it is undisputed that this action was brought against Respondents by an unconstitutionally structured agency that violated separation of powers. *See CFPB v. Seila Law*, 140 S. Ct. 2183 (2020). Despite that, and despite the running of the relevant statutes of limitations barring ratification, the Director found that her ratification of the filing of the Notice of Charges "provide[d] Respondents with an appropriate remedy for the CFPA's unconstitutional removal restriction." Dkt. 308 at 19; *contra FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) ("[I]t 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.*") (internal citation omitted) (emphasis in original). Putting aside whether the Director's conclusion is correct (it is not, *see, e.g.*, Dkt. 295 at 1-4; Dkt. 297 at 7-8), the issue of ratification as a purported remedy under these circumstances is a substantial question of law that is presently being litigated in multiple circuits. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 17-56234 (9th Cir.); *CFPB v. RD Legal Funding, LLC*, No. 18-2743 (2d Cir.); *CFPB v. All Amer. Check Cashing, Inc.*, No. 18-60302 (5th Cir.); *CFPB v. Navient, Corp.*, No. 3:17-cv-00101-RDM (M.D. Pa.). The Supreme Court also may soon take up the ratification issue, as RD Legal Funding LLC has recently informed the Second Circuit that it intends to file a petition for *certiorari* asking the Supreme Court to resolve whether the CFPB may ratify an action taken while the agency was unconstitutionally structured after the relevant statute of limitations has lapsed. *See* Ex. A (Mot. to Stay Issuance of Mandate, *CFPB v. RD Legal Funding*, No. 18-2743 (2d Cir., Dkt. 268, filed Jan. 20, 2021) (asking the Second Circuit to stay issuance of mandate pending the filing of a petition asking the Supreme Court to resolve "a question of exceptional importance: whether, after *Seila Law LLC*, 140 S. Ct. at 2192, 2202, held that the CFPB's 'structure' 'violate[d] the separation of powers,' the government agency can escape the consequences of that constitutional

error by ratifying an enforcement action and subsequent appeal long after the time for commencing either has lapsed"). The ratification issue qualifies as a "serious legal question" that, taken on its own, justifies finding that the "likelihood of success" prong weighs in favor of Respondents. *See Philipp*, 436 F. Supp. 3d at 66; *Holiday Tours, Inc.*, 559 F.2d at 844; *McPherson*, 797 F.2d at 1078; *see also FEC v. NRA Political Victory Fund*, 6 F.3d at 828 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994) (when a party "raise[s a] constitutional challenge as a defense to an enforcement action," there is "no theory that would permit [a court] to declare the [agency]'s structure unconstitutional without providing relief to the [party]").

Second, there is, at the very least, a "serious legal question" as to whether restitution may be imposed without consideration of evidence that a party lacked fraudulent intent and relied in good faith on the advice of counsel. *See CFPB v. CashCall, Inc.*, No. CV1507522JFWRAOX, 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018) (noting that advice of counsel "is relevant to the determination of whether restitution is an appropriate remedy" and finding evidence of the defendants' reliance on counsel to weigh against restitution) (citing *Chase v. Trs. of W. Conference of Teamsters Pension Tr. Fund*, 753 F.2d 744, 753 (9th Cir. 1985)); *see also CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-02106-RS, 2017 WL 3948396, at *10-13 (N.D. Cal. Sep. 8, 2017) (denying restitution where the CFPB failed to show that the restitution it sought was appropriate). There is substantial evidence that Respondents lacked fraudulent intent and relied in good faith on the advice of counsel here—*see, e.g.*, Dkt. 295 at 26-27 (explaining, *inter alia*, that Respondents retained highly-regarded counsel (in fact, the same counsel that provided advice to the defendants in *CashCall*) to create the Loan Agreement and ensure it was legally compliant)—but the Director simply declined to consider that evidence even though there is developing case law holding that such evidence is relevant in

CFPB enforcement actions. *See* Dkt. 308 at 36. The Director's failure to consider evidence showing Respondents' lack of fraudulent intent and good faith reliance of counsel is an issue on which Respondents believe they are likely to succeed on appeal—*see, e.g.*, Dkt. 295 at 26-29; Dkt. 297 at 14-15—but, at the very least, it is a "serious legal question" that will be litigated by the parties in the appellate court and that justifies a stay of the judgment pending that appeal. *See Philipp*, 436 F. Supp. 3d at 66; *Holiday Tours, Inc.*, 559 F.2d at 844; *McPherson*, 797 F.2d at 1078.

Third, there is a "serious legal question" as to whether Enforcement Counsel's interpretation of the CFPA's statute of limitations in denying discovery into the CFPB's diligence in investigating its claims is legally correct. *See* Dkt. 296 at 18-20 (arguing that "discovery" under the CFPA is limited to actual discovery of a violation). It is not. *See, e.g.*, Dkt. 295 at 4-7 (explaining that the term "date of discovery" in the CFPA's statute of limitations should be interpreted in line with the general rule for such statutes that "discovery" means the date on which the plaintiff "first knows or with due diligence should know facts that will form the basis for an action"). Although the Director did not decide the question, *see* Dkt. 308 at 17, she nonetheless upheld the denial of Respondents' discovery requests regarding when the CFPB discovered the violation, a decision on which the Director erred resulting in a denial of Respondents' right to due process. *See* Dkt. 308 at 20-23. This case will present a Court of Appeals with a vehicle for resolving another substantial legal issue—the meaning of the term "discovery" in the CFPA's statute of limitations—and, as such, it further demonstrates the appropriateness of a stay of the judgment here. *See Philipp*, 436 F. Supp. 3d at 66; *Holiday Tours, Inc.*, 559 F.2d at 844; *McPherson*, 797 F.2d at 1078.

In addition to the substantial legal questions discussed above, there are a number of other serious legal questions that further justify a stay of the judgment pending the appeal, including:

- Whether the Director erred in failing to consider properly the undisputed evidence of Integrity Advance's high rate of repeat customers as relevant to the substantive deception and unfairness claims, Mr. Carnes' knowledge for purposes of individual liability, the appropriateness of restitution, and the calculation of penalties. *See, e.g.*, Dkt. 297 at 6-7.

- Whether the Director erred in finding Mr. Carnes individually liable where the evidence failed to establish that he had the requisite knowledge. *See, e.g.*, Dkt. 295 at 16-18; Dkt. 297 at 2-6.

- Whether the Director denied Respondents due process and incorrectly interpreted the Supreme Court's holding in *SEC v. Lucia*, 138 S. Ct. 2044 (2018) when she declined to grant Respondents a new live hearing in accordance with the CFPB's Rules of Practice for Adjudication Proceedings. *See, e.g.*, Dkt. 295 at 12-14; Dkt. 297 at 8-10.

- Whether the Director erred by denying Respondents discovery related to when the CFPB knew or should have known of the alleged violations for purposes of 12 U.S.C. § 5564(g)(1). *See* Dkt. 295 at 10-11.

- Whether the Director erred in her determination that the terms of the loan agreement and the use of remotely created checks were unfair and deceptive in violation of the CFPA. *See, e.g.*, Dkt. 295 at 21-25.

- Whether the Director erred in her legal interpretation of the EFTA in finding that Integrity Advance unlawfully conditioned offers of credit on preauthorized electronic repayments. *See, e.g.*, Dkt. 295 at 24-25; Dkt. 297 at 13-14.

- Whether the Director erred in ordering that funds be retained by the U.S. Treasury as disgorgement without consideration of whether the funds constituted profits from unlawful activity. *See* Dkt. 308, 309.

In light of the above, the Director should find that there are a number of "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation" and thus that a stay of the

judgment pending Respondents' appeal is warranted. *See Philipp*, 436 F. Supp. 3d at 66; *Holiday Tours, Inc.*, 559 F.2d at 844; *McPherson*, 797 F.2d at 1078.

B. Respondents will suffer irreparable harm absent a stay.

A stay also is appropriate because enforcing the Final Order during the pendency of Respondents' appeal will subject Respondents to irreparable harm.

First, Respondents have suffered the constitutional harm of being subjected to an enforcement action brought by an unconstitutionally structured agency in violation of separation of powers. *See Seila Law*, 140 S. Ct. 2183. Respondents also have been denied due process by a number of decisions of the Director that limited their ability to defend themselves. Constitutional harm, in itself, constitutes irreparable injury. *See, e,g.*, *Roman Catholic Diocese v. Cuomo*, 208 L.Ed. 2d. 206, 209-210 (2020) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (quoting 11A C. Wright, A. Miller & M. Kane, *Fed. Prac. & Proc.* § 2948.1 (2d ed. 1995)) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1048 (9th Cir. 2009) (finding irreparable injury based on an alleged violation of the Supremacy Clause).

This general principle applies to violations of separation of powers. *See City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 878 (N.D. Ill. 2018) (finding that "unconstitutionally imposed [c]onditions" in violation of the separation of powers constitute irreparable injury). While merely speculative harm, such as a pre-enforcement investigative demand in violation of separations of powers, may not "invariably" establish irreparable injury, that is not the case here. S*ee Doe Co. v. Cordray*, 849 F.3d 1129, 1135 (D.C. Cir. 2017) ("In the absence of 'immediate or

ongoing harm stemming from the [Bureau's] alleged constitutional defects,' the 'violation of separation of powers' by itself is not invariably an irreparable injury.") (internal citation omitted). Here, Respondents have been found liable and ordered to pay $50 million – the harm is clearly "immediate or ongoing."[4] *Id.*

The CFPB does not dispute that Respondents suffered at least one type of constitutional harm but argues only that any such harm was remedied by the Director's decision to ratify the action in January 2021. Dkt. 308 at 19. But, as argued above, the harm cannot be remedied by this attempt at ratification because the statute of limitations has lapsed; this issue is, at the very least, a substantial legal question that will be litigated in an appellate court. Respondents respectfully request that the Director maintain the status quo and hold the $50 million judgment in abeyance until after Respondents' appeal is resolved.

Respondents also would suffer irreparable harm in being forced to either pay the $50 million judgment or place the funds in escrow pending their appeal because it will inflict non-recoverable economic costs on Respondents, including the loss of access to their own funds. *See Sunday Sch. Bd. v. United States Postal Serv.*, No. 99-5018, 1999 WL 322746, at *1 (D.C. Cir. Apr. 30, 1999) ("economic loss may constitute irreparable harm" where such losses are "unrecoverable"); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (considering the availability of adequate compensatory or other corrective relief at later date); *District of Columbia v. Masucci*, 13 F. Supp. 3d 33, 41 (D.D.C. 2014) ("Courts have recognized . . . non-recoverable economic costs as irreparable harm."). Respondents could not recover from the

[4] Enforcement Counsel has informed Respondents' counsel that the CFPB will not consent to a stay of the judgment pending appeal and has provided wiring instructions for payment of the $50 million judgment. There is thus no question that Respondents face an immediate threat of harm as Enforcement Counsel clearly seeks to enforce the Final Order imminently.

CFPB damages based on its losses, including the inability to otherwise access or otherwise use such substantial amounts of money, as the CFPB is protected from a suit for monetary damages by sovereign immunity. *See, e.g.*, *Odebrecht Constr. v. Sec'y, Fla. DOT*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable."); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury."). Therefore, Respondents non-recoverable economic harm also constitutes irreparable harm.

Accordingly, the Director should find that Respondents will suffer irreparable harm in the event that the judgment is not stayed pending appeal.

C. A stay of the Final Order during the pendency of Respondents' appeal will preserve the status quo, will not harm the CFPB, and is not against the public interest.

The instant motion seeks only to preserve the status quo pending review of the Director's Final Order by an appellate court. The substantial harm to Respondents that would result if the Final Order is enforced during the pendency of their appeal is not outweighed by any harm to the CFPB, nor is it against the public interest. Respondents stopped offering loans in December 2012, more than nine years ago. *See* Dkt. 308 at 2. Thus, the CFPB can claim no threat of ongoing harm to the public. Additionally, it is not in the public interest to subject Respondents to an unconstitutional judgment, for which Respondents cannot recover damages, particularly in light of the active litigation occurring in multiple forums regarding the appropriate remedy for the CFPB's unconstitutionality.

The Director should find that a stay will not harm the CFPB or the public and, to the extent that it would, any such harm is not outweighed by the far greater substantial harm that

Respondents would suffer by being forced to comply with a $50 million judgment during the pendency of an appeal that raises numerous serious issues of law on which they are likely to prevail.

IV. CONCLUSION

For the foregoing reasons, the Director should stay the Final Order in its entirety pending judicial review. In the alternative, if the Director denies this motion, the Director should grant a temporary stay of 30 days so Respondents can seek a stay from a United States Court of Appeals.

Dated: February 9, 2021

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