

**UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION**

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

JOINT PROPOSED SCHEDULE

On January 24, 2020, Administrative Law Judge (ALJ) Christine L. Kirby ordered the parties to file a Joint Proposed Schedule by February 6, 2020. The parties conferred via teleconference on January 30, 2020, and January 31, 2020, but were not able to agree on a proposed schedule. The parties now submit as follows:

Respondents' Proposed Schedule

1. By **February 20, 2020**, Respondents will file a motion to dismiss on the grounds that the Consumer Financial Protection Bureau (“CFPB”) is unconstitutional because it violates separation of powers.¹ On the same day, Respondents will file a motion to stay the

¹ Since the prior proceedings, the law has developed and the Supreme Court has granted certiorari on this exact issue. See *Seila Law LLC v. CFPB*, 140 S. Ct. 427 (Oct. 18, 2019) (granting writ of certiorari); see also, e.g., *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (*en banc*), petition for

proceedings, pending the Supreme Court's decision on this issue in *Seila Law LLC v. CFPB*.²

2. By **March 11, 2020**, Enforcement Counsel will file their responses to Respondents' motion to dismiss and motion to stay, related to the separation of powers issue.
3. By **March 16, 2020**, Respondents will file their replies, if any, to Enforcement Counsel's responses.
4. If the motion to dismiss or the motion to stay is not granted, by **April 30, 2020**, Respondents will seek leave to amend Respondents' Answer to include an advice of counsel/good faith defense, pursuant to 12 CFR § 1081.202(a).³

cert. pending, No. 19-422 (filed Sept. 25, 2019), and petition for cert. pending, No. 19-563 (filed Oct. 25, 2019) (holding that that a similarly-constituted agency, the Federal Housing Finance Agency, violates separation of powers). In fact, since the prior proceedings, the CFPB changed its position and now agrees that its structure violates the constitution. *See Letter from CFPB at 2, CFPB v. CashCall, Inc.* (9th Cir., Dkt. 57, filed Sept. 18, 2019) (Nos. 18-55407 & 18-55479) ("The Bureau's Director has now determined that the for-cause removal provision is unconstitutional. Accordingly, the Bureau will no longer defend the constitutionality of that provision in this Court or in any other."); *see also* Brief for the Respondent at 7, *Seila Law LLC v. CFPB* (Sept. 17, 2019) (No. 19-7), 2019 U.S. S. CT. BRIEFS LEXIS 4516 at *11 ("The United States previously informed this Court that it has also concluded the statutory restriction on the President's authority to remove the Director violates the Constitution's separation of powers." (citing Gov't Br. in Opp., *State Nat'l Bank of Big Spring v. Mnuchin* (Dec. 10, 2018) (No. 18-307)).

² 140 S. Ct. 427 (Oct. 18, 2019) (granting writ of certiorari). The Ninth Circuit has stayed proceedings in a CFPB enforcement matter pending the Supreme Court's decision on this issue. *CFPB v. CashCall, Inc.*, 2019 U.S. App LEXIS 31720 (staying proceedings) (9th Cir. Oct. 21, 2019). Similarly, a District Court has stayed proceedings pending an interlocutory appeal to the Fifth Circuit Court of Appeals on this issue. *See CFPB v. All American Check Cashing, Inc. et al.*, No. 3:16-cv-00356 (S.D. Miss., Dkt. 240, filed Mar. 27, 2018). In certifying the interlocutory appeal, the District Court found "the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity." *Id.* at 3.

³ Respondents previously provided notice of their intent to amend their answer because the law regarding the applicability of the advice of counsel/good faith defense, particularly as it relates to restitution, has developed since the initial proceedings in this case. *See* Dkt. 228 at ¶¶ 4-5; Dkt. 229A at 8; *see also CFPB v. CashCall, Inc. et al.*, 2018 U.S. Dist. LEXIS 9057, *35-*37 (C.D. Cal. Jan. 19, 2018) (holding that advice of counsel/good faith is relevant to determining if restitution is appropriate in CFPA actions). However, at the ALJ's direction, Respondents first addressed the statute of limitations issue.

5. By **June 1, 2020**, Enforcement Counsel will complete any fact discovery related to the advice of counsel/good faith defense, including any document requests or depositions, pursuant to 12 CFR §§ 1081.208-209.
6. By **June 1, 2020**, Respondents and Enforcement Counsel will submit any expert witness reports related to the calculation of damages.⁴ Expert discovery will close by **July 1, 2020**, and the parties will identify any rebuttal expert witnesses and file any rebuttal reports in that time, pursuant to 12 CFR § 1081.210.
7. By **July 31, 2020**, the parties will file any motions for summary disposition or motions to dismiss, pursuant to 12 CFR § 1081.212. Any responses will be filed by **August 20, 2020**. Any replies to the responses will be filed by **August 25, 2020**.
8. The hearing will occur within **30 days** of the ruling on the motions to dismiss and/or motions for summary disposition.⁵

Enforcement Counsel's Proposed Schedule

Enforcement Counsel's position remains that the factual record in this matter is complete and that there is no credible justification for staying the matter or further delaying resolution of

⁴ Respondents previously provided notice of their intent to introduce expert testimony related to damages, particularly given the developments in the law. See Dkt. 229A at 9. At the ALJ's direction, Respondents first addressed the statute of limitations issue.

⁵ As more fully explained in Respondents' memorandum of law, Dkt. 229A at 4-6, a new hearing is required for the ALJ to determine the credibility of witnesses, including both the CFPB's witnesses and Respondents' witnesses. In particular, the ALJ must make credibility determinations on key issues such as the individual liability of James Carnes. See *Intercollegiate Broad Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 116 (D.C. Cir. 2015) (holding that a de novo record review was appropriate in that case where the defendant "fail[ed] . . . to point to any instance of an exclusion of relevant evidence that affected the outcome . . . or to any portion of the Final Determination that turned on witness credibility.") Additionally, Respondents seek to develop the factual record due to developments in the law in order to assert defenses such as the advice of counsel/good faith defense, limitations on restitution, and other issues. See, e.g., *CFPB v. CashCall, Inc. et al*, 2018 U.S. Dist. LEXIS 9057, *35-37 (C.D. Cal. Jan. 19, 2018); see also *PHH Corp. v. CFPB*, 839 F.3d 1, 41 (D.C. Cir. 2016), upheld on statute of limitation grounds and reversed on other grounds by 881 F.3d 75 (D.C. Cir. 2018).

Respondents' liability for the claims asserted in the Notice of Charges and any appropriate remedies. Enforcement Counsel requests that the ALJ enter a scheduling order requiring that any motions to dismiss or for summary disposition be filed four weeks from the date of the scheduling order, that opposition briefs be filed four weeks thereafter, and that reply briefs be filed two weeks after opposition briefs. If, however, the ALJ determines that Respondents' request to open the pre-hearing record should be entertained, Enforcement Counsel proposes the following schedule to address that request and resolve this matter expeditiously:

1. By February 27, 2020, Enforcement Counsel will file a response to Respondents' Motion to Open Record for New Hearing.⁶ Enforcement Counsel's response will address whether Respondents should be permitted to assert an advice of counsel/good faith defense and whether Respondents should be permitted to introduce expert witness reports relating to the calculation of damages. Respondents will file a reply, if any, by March 4, 2020.
2. If the ALJ denies Respondents' Motion to Open Record for New Hearing as it relates to Respondents' proposed advice of counsel/good faith defense and Respondents' ability to introduce expert witness reports relating to the calculation of damages, the parties will meet and confer and propose a schedule within 10 days of such order for filing dispositive motions on all remaining issues. Respondents can raise any appropriately-asserted defenses

⁶ Respondents filed a Motion to Open Record for New Hearing [Dkt. 229A] on August 14, 2019, in which they argued that the record in this matter should be supplemented by additional evidence. Following that filing, and prior to Enforcement Counsel filing a brief in opposition to the motion, the ALJ bifurcated "the statute of limitations issue from the issues which are related to the format and content of the new hearing." Scheduling Order (Aug. 30, 2019) [Dkt. 233]. The ALJ has since resolved the statute of limitations issues raised in Respondents' filings, *see Order Denying Respondents' Motion to Dismiss and/or For Summary Disposition on Grounds Limited to October 28, 2019 Order and Denying Respondents' Request for Additional Discovery (Jan. 24, 2020)* [Dkt. 249]. But, consistent with the ALJ's order bifurcating the proceedings, Enforcement Counsel has not yet responded to the other grounds on which Respondents seek to reopen the record.

as part of any dispositive motion that they file.⁷

3. If the ALJ grants Respondents' Motion to Open Record for New Hearing as it relates to Respondents' proposed advice of counsel/good faith defense and Respondents' ability to introduce expert witness reports relating to the calculation of damages, the parties will meet and confer and propose a schedule within 10 days of such order for conducting additional record development and filing dispositive motions on all remaining issues.

⁷ Enforcement Counsel will offer legal argument regarding the propriety of any defenses that Respondents may raise in motions practice regarding those defenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February 2020, I caused a copy of the foregoing Joint Proposed Schedule 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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