

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

RESPONDENTS' OPENING APPEAL BRIEF

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TABLE OF ABBREVIATIONS**Abbreviated Terms**

ALJ	Administrative Law Judge
APR	Annual Percentage Rate
CFPA	Consumer Financial Protection Act
CFPB	Consumer Financial Protection Bureau
CFPB Rules	Rules of Practice for Adjudication Proceedings; 12 C.F.R. Part 1081
CMP	Civil Monetary Penalty
EC	Enforcement Counsel
EFTA	Electronic Fund Transfer Act
FTC	Federal Trade Commission
IA	Respondent Integrity Advance, LLC
Mr. Carnes	Respondent James R. Carnes
RCC	Remotely Created Check
RD	Recommended Decision
TILA	Truth in Lending Act
UDAAP	Unfair, Deceptive, or Abusive Acts or Practices

Docket Citations

Dkt. 1	Notice of Charges (filed Nov. 18, 2015)
Dkt. 56	Parties' Joint Stipulations of Fact (filed Mar. 23, 2016)
Dkt. 162	Enforcement Counsel's Post Hearing Brief (Public) (filed Aug. 29, 2016)
Dkt. 187	Declaration of Alusheyi J. Wheeler (filed Dec. 5, 2016)
Dkt. 200	Joint June 2, 2014 Tolling Agreement (filed Feb. 8, 2017)
Dkt. 201	Joint March 16, 2015 Tolling Agreement (filed Feb. 8, 2017)

- Dkt. 216 Order Directing a Remand to the Bureau's Administrative Law Judge (filed May 29, 2019)
- Dkt. 232 Request for Issuance of Subpoena to CFPB (filed Aug. 23, 2019)
- Dkt. 235 Enforcement Counsel's Brief Addressing the Completeness of the Factual Record on Respondents' Statute of Limitations Defense (filed Sept. 18, 2019)
- Dkt. 236 Respondents' Brief in Support of Further Discovery on the Statute of Limitations Issue (filed Oct. 4, 2019)
- Dkt. 238 Order Denying Further Discovery on Statute of Limitations Issue (filed Oct. 28, 2019)
- Dkt. 239 Respondents' Motion to Dismiss and/or For Summary Disposition on Grounds Limited to October 28, 2019 Order (filed Nov. 15, 2019)
- Dkt. 242 Enforcement Counsel's Opposition to Respondents' Motion to Dismiss and/or For Summary Disposition on Grounds Limited to October 28, 2019 Order (filed Dec. 6, 2019)
- Dkt. 245 Respondents' Reply Brief in Support of their Motion to Dismiss and/or for Summary Disposition on Grounds Limited to October 28, 2019 Order (filed Dec. 13, 2019)
- Dkt. 249 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 (filed Jan. 24, 2020)
- Dkt. 253 Respondents' Motion to Dismiss on Grounds Limited to February 7, 2020 Order (filed Feb. 19, 2020)
- Dkt. 254 Enforcement Counsel's Consolidated Opposition to Respondents' Motion to Dismiss and Motion to Stay Proceedings (filed Mar. 4, 2020)
- Dkt. 256 Respondents' Consolidated Reply Brief in Support of their Motion to Dismiss on Grounds Limited to February 7, 2020 Order and their Motion to Stay Proceedings (filed Mar. 10, 2020)
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- Dkt. 261 Respondents' Supplemental Brief in Support of their Motion to Open Record for a New Hearing (filed Mar. 26, 2020)
- Dkt. 267 Order Denying Respondents' Motion to Amend Answer (filed Apr. 24, 2020)
- Dkt. 268 Order Denying Respondents' Motion to Dismiss (filed Apr. 24, 2020)

- Dkt. 269 Order Denying in Part Respondents' Motion to Open Record for a New Hearing (filed Apr. 24, 2020)
- Dkt. 272 Respondents' Motion for Summary Disposition (filed May 15, 2020)
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- Dkt. 283 Respondents' Reply Brief in Support of their Motion for Summary Disposition (filed June 10, 2020)
- Dkt. 285 Respondents' Notice of Supplemental Authority and Request for Reconsideration (filed July 6, 2020)
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- Dkt. 288 Order Granting Respondents' Request for Reconsideration in Part and Denying Respondents' Motion to Dismiss (filed Aug. 3, 2020)
- Dkt. 293 Recommended Decision (filed Aug. 4, 2020)

I. INTRODUCTION AND SUMMARY

The Director should decline to accept the RD, which is based on the following legal and factual errors. *First*, the ALJ erred in concluding that this action, which was brought by an unconstitutionally-structured agency, can now be ratified by the CFPB Director. *Second*, the ALJ improperly found that this action was not time-barred by the applicable statutes of limitations. *Third*, the ALJ erred by failing to conduct a new hearing as required by the Supreme Court’s holding in *SEC v. Lucia* and as directed by the CFPB Director. *Fourth*, the ALJ erred in recommending summary disposition on both liability and remedies without considering the evidence in the light most favorable to the nonmoving party, disregarding factual disputes, and relying on incorrect legal standards.

II. ARGUMENT

A. The ALJ erred in finding that the Director can ratify this action.

1. The ALJ erred in finding that the statute of limitations has been equitably tolled so that the Director can now timely ratify this action.

This action was brought against Respondents by an unconstitutionally-structured CFPB that violated separation of powers. *See CFPB v. Seila Law*, 140 S. Ct. 2183 (2020). The CFPB has argued that this constitutional error can be remedied because “ratification can cure a separation-of-powers problem with the initial filing of an enforcement proceeding.” Dkt. 286 at 4.¹ However, “for a ratification to be effective, ‘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.*’” *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016) (emphasis in original) (quoting *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994)). Here, the

¹ The Director has attempted to ratify other pending matters that were brought when the agency was unconstitutionally structured. *See, e.g., CFPB v. CashCall, Inc.*, Nos. 18-55407, 18-55479 (Dkt. 61) (9th Cir. July 10, 2020); *CFPB v. RD Legal Funding, LLC*, No. 18-2743 (Dkt. 237) (2nd Cir. July 10, 2020); *CFPB v. Navient Corp. et al.*, No. 3:17-CV-00101-RDM (Dkt. 506) (M.D. Pa. July 14, 2020).

applicable statutes of limitations have lapsed, so the Director cannot now ratify the action. *See* Dkt. 285 at 3-5; Dkt. 287 at 3-4.

The ALJ recognized that “the statute of limitations would have run with regard to all offenses against both Respondents, in the normal course of events.” Dkt. 288 at 6. However, she found that “the Director is not time-barred from ratifying the action” because the statute of limitations was “equitably tolled.” *Id.* at 7. Her conclusion was based on three faulty grounds.

First, the ALJ incorrectly found that equitable tolling was appropriate because “EC exercised diligence in investigating and bringing this case within the limitations period, and thus preserved their legal rights.” *Id.* However, the ALJ previously held that she cannot determine whether the CFPB acted with diligence nor how a reasonable government plaintiff should act. *See* Dkt. 249 at 18 (declining to determine “when a reasonably diligent plaintiff would have discovered the violation” because “applying such a standard to a government agency plaintiff is ‘far more challenging’ than applying it to a suit by a private plaintiff and is ‘unworkable.’”); *id.* at 19 (determining what a reasonable government plaintiff “should have known . . . would potentially require a court to examine . . . a host of issues that would make this an unmanageable proposition for any court or administrative proceeding to take on”). Despite so holding, the ALJ concluded in the RD, without discussion, that the CFPB was diligent in its investigation and suit. *See* Dkt. 288 at 7.²

Second, while the ALJ acknowledged that equitable tolling is only available in “rare and exceptional circumstances,” she found this was one such circumstance because the action “was properly brought within the limitations period by a then-constitutionally structured

² This error is compounded because the ALJ denied Respondents discovery on whether the CFPB acted diligently in investigating this matter. *See* Dkt. 238. Further, as discussed in Section II.B.1.b below, the evidence indicates that the CFPB was *not* diligent.

agency, that was later declared unconstitutional, to proceed.” Dkt. 288 at 7. This conclusion misunderstands the law. Consistent with the Supreme Court’s holding in *Seila Law*, the CFPB was *not* constitutionally structured at the time the Notice of Charges was filed. *See* 140 S. Ct. at 2192. The CFPB remained unconstitutionally structured until the Supreme Court severed the unconstitutional provision in June 2020. *Id.* Therefore, there is no equitable reason to toll the statute of limitations to the detriment of Respondents during the long period of the CFPB’s unconstitutionality, particularly where the CFPB defended that structure as constitutional until approximately Fall of 2019.³ *See* Dkt. 254A.

Finally, the ALJ erroneously relied on statutory language that the statute of limitations applies “[e]xcept as otherwise permitted by law or equity.” 12 U.S.C. § 5564(g)(1). However, that provision does not override the clearly-articulated statute of limitations, and does not provide an independent basis to equitably toll the statute. Instead, in this case, the statute of limitations has run, and the Director cannot ratify this action. It must be dismissed.

2. The ALJ erred in failing to rule that the Director cannot ratify this action because the agency itself was unconstitutionally-structured.

As Respondents previously asserted, the Director may not cure the error through ratification because, under principles of agency law, ratification only applies to decisions by a *principal* to ratify actions by an unauthorized *agent*. *See* Dkt. 256 at 7-8; *see also, e.g., Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (“[R]atification occurs when a principal sanctions the prior actions of its purported agent.”) (citation omitted). Here, the CFPB itself (the principal) lacked authority due to its unconstitutional structure. *See* Dkt. 253 at 16-17;

³ The ALJ also asserts that the equity favors tolling the statute of limitations because the original Notice of Charges was filed timely. *Id.* at 7. However, ratification is only effective where the ratifier has authority at the time of the initial action *and* at the time of ratification. *NRA Political Victory Fund*, 513 U.S. at 98. It is not enough for the initial action to be timely.

see also, e.g., CFPB v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018) (finding that the unconstitutional provision does not simply concern “the authority of an agent to make decisions on the CFPB’s behalf[,]” it “concerns the structure and authority of the CFPB itself[.]”). The ALJ failed to address these issues, which were raised in support of Respondents’ motion to dismiss, even after granting Respondents’ request for reconsideration of that motion. *See* Dkt. 253 at 16-17; Dkt. 256 at 8; Dkt. at 288. The ALJ should have found that ratification cannot cure the error, and the matter should be dismissed.

3. The ALJ erred in finding that the administrative proceeding can continue where the Director has not ratified the action and the harm is ongoing.

Even if the Director could ratify this action, she has not done so in this case as she has attempted to do in others. *See* Dkt. 288 at 7 (ALJ acknowledging “there has been no express Director ratification of this matter since issuance of the *Seila Law* decision on June 29, 2020”). The ALJ erred in determining that the administrative proceeding can continue to proceed where the harm has not been cured. *Id.* at 8 (finding that the Director’s final order “would amount to ratification in this matter through continuance in the normal course of agency adjudication.”) As a result, Respondents have been afforded no remedy and the harm is ongoing. *See 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]”). The matter should be dismissed.

B. The ALJ erred in failing to dismiss all claims against Mr. Carnes and failing to dismiss Counts I, II, V, and VI against IA on statute of limitations grounds.

1. The ALJ erred in finding that the CFPA claims against Mr. Carnes were not time-barred.

The CFPA's statute of limitations provides that "no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g). The ALJ assumed without deciding that the CFPA's statute of limitations applies to this proceeding. *See Dkt. 249 at 13.* The ALJ should have ruled that the CFPA's statute of limitations applies, and that it bars all claims against Mr. Carnes.⁴ *See 12 U.S.C. § 5564(g); see also PHH Corp. v. CFPB, 839 F.3d 1, 52 (D.C. Cir. 2016), reinstated on statute of limitation grounds and reversed on other grounds by en banc panel, 881 F.3d 75 (D.C. Cir. 2018))* (holding that statutes of limitations of the "various federal consumer protection laws it is charged with enforcing" apply to CFPB administrative proceedings).

a. The ALJ improperly construed the term "discovery" within the CFPA's statute of limitations.

The ALJ committed error in ruling that "although the CFPA statute of limitations clearly contains a discovery rule . . . I decline to infer that it also necessarily includes a 'constructive' discovery rule." *See Dkt. 249 at 17.* The ALJ misunderstood the legal definition of "discovery" within statutes of limitations. She was not required to "infer" a "constructive discovery rule," but simply apply the term "discovery" as defined by well-established law.

In the context of statutes of limitations, "discovery" is a "term of art" that generally means the date on which the plaintiff "first knows *or with due diligence should know* facts that will form the basis for an action" and "has long been understood to include discoveries a reasonably diligent plaintiff would make." *Merck & Co. v. Reynolds*, 559 U.S. 633, 644-647 (2010) (citation and internal quotation marks omitted) (emphasis in original). At least three courts have applied this general rule to the CFPB. *See CFPB v. Nationwide Biweekly Admin.*,

⁴ The CFPB entered into tolling agreements with IA on June 2014 and March 2015, so the CFPA statute of limitations did not run as to IA. The CFPB sought no such tolling agreement from Mr. Carnes. *See Dkt. 200 and 201 (Tolling Agreements).*

Inc., No. 15-cv-02106, 2017 U.S. Dist. LEXIS 145923 (N.D. Cal. Sep. 8, 2017) (“[T]he statute did not begin to run until CFPB ‘thereafter discover[ed] or a reasonably diligent plaintiff would have discovered ‘the facts constituting the violation.’”); *see also CFPB v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 U.S. Dist. LEXIS 177756, at *58 (S.D.N.Y. Dec. 2, 2016) (“The date of discovery is the date when the plaintiff ‘obtains actual knowledge of the facts giving rise to the action or notice of the facts, which in the exercise of reasonable diligence, would have led to actual knowledge.’”); *CFPB v. Ocwen Fin. Corp.*, No. 17cv-80495, 2019 U.S. Dist. LEXIS 152336, at *65 (S.D. Fla. Sept. 5, 2019) (citing the standard in *NDG Fin. Corp.*, 2016 U.S. Dist. LEXIS 177756). Neither the ALJ, nor the CFPB, identified any court that has ever excluded the CFPB (or any government plaintiff) from this general rule. *See generally* Dkt. 249; Dkt. 242.

In her ruling, the ALJ discussed the purported difficulties of determining when a reasonably diligent government plaintiff should have known of an alleged violation. Dkt. 249 at 16-19.⁵ However, despite these potential difficulties, Congress drafted the CFPA with a statute of limitations that incorporates the legal term of art “discovery.” 12 U.S.C. § 5564(g). And, “it is a ‘cardinal rule of statutory construction’ that, when Congress employs a term of art, ‘it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken[.]’” *FAA v. Cooper*, 566 U.S. 284, 291-92 (2012) (quoting *Molzof v. United States*, 502 U.S. 301, 307 (1992)) (citation omitted)). The ALJ did not provide any analysis to overcome that presumption. *See* Dkt. 249.

Finally, the ALJ’s interpretation effectively concludes that the CFPB has no

⁵ In this discussion, the ALJ relied on two inapposite cases that interpreted statutes of limitations that were keyed to the dates of occurrence or accrual, not “discovery.” *See* Dkt. 249 at 16-19 (discussing *Gabelli v. SEC*, 568 U.S. 442 (2013) and *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994)). In any event, the CFPB has issued a manual that outlines the actions that should be taken before and during an investigation. *See* Office of Enforcement Policies and Procedures Manual at 34 (May 5, 2017). The manual provides ample guidance to assess whether the CFPB acted diligently in accordance with its own standards, which it did not do in this case.

requirement to be reasonably diligent in investigating potential claims. As a result, based on the ALJ's erroneous interpretation, the CFPB could bring any claim up to three years after it "discovers" the violation, which would occur only after the CFPB takes action to gather all of the relevant information, regardless of how long that takes or whether the CFPB acts reasonably. This creates an essentially limitless limitation, and is contrary to the purpose of statutes of limitation. *See Gabelli*, 568 U.S. at 452 (noting that Chief Justice Marshall "emphasiz[ed] the importance of time limits on penalty actions, stating that it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'") (citing *Adams v. Woods*, 6 U.S. 336 (1805)). The ALJ should have properly construed the term "discovery" in the CFPB statute of limitations, and dismissed the claims against Mr. Carnes.

b. The ALJ erred in finding that the CFPB did not know nor should have known of the alleged violations prior to November 18, 2012 – three years before the filing of the Notice of Charges on November 18, 2015.

First, the ALJ erred in finding that the CFPB did not "know" of the alleged violations before November 18, 2012 because she did not consider the whole record and her finding was not supported by substantial evidence. *See* Dkt. 249 at 19-23; *see also* 12 C.F.R. § 1081.400(c)(1) ("A recommended decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable, probative, and substantial evidence."). In so finding, the ALJ improperly analyzed the evidence of the CFPB's knowledge piece by piece, rather than in its totality. *Id.* She found that each individual piece of evidence in itself did not establish the CFPB's knowledge, but she failed to consider all of the evidence together along with the reasonable inferences of that evidence. This failure is inconsistent with the directives of the CFPB Rules. *See* 12 C.F.R. § 1081.400(c)(1).

The combined evidence, which is discussed in more detail at Dkt. 239 at 6-12, includes: (1) January 2012 statement from CFPB regarding its focus on payday lenders; (2)

March 29, 2012 search of the FTC consumer complaint database by CFPB senior enforcement attorney Kara Miller for “Integrity Advance,” resulting in multiple alleged complaints; (3) August 14, 2012 search of FTC complaint database regarding IA, resulting in multiple alleged complaints; (4) MOU between CFPB and FTC providing for information-sharing between the agencies, where the FTC had received an alleged complaint about IA as early as 2010; (5) CFPB Enforcement Manual outlining the steps to investigate potential violations before and after the opening of an investigation. Taken together, the evidence demonstrates that the CFPB knew or should have known of the alleged violations well before November 18, 2012.

The ALJ also erred in concluding that Respondents “have not established that the CFPB should have known of the alleged violations against Mr. Carnes prior to November 18, 2012.” Dkt. 249 at 26. If the CFPB acted as the ALJ appears to assume, it did nothing from March 29, 2012 (when Ms. Miller ran a search for complaints about “Integrity Advance”) until it issued a CID in January 2013, with the exception of one additional complaint search in August 2012. *See* Dkt. 249 at 24. If this is accurate, the CFPB did not follow its own procedures to investigate Respondents, despite the information that it gathered in early 2012, and therefore did not act diligently. The statute of limitations ran from the time that the CFPB should have known of the alleged violations through reasonable diligence, which also would have occurred well before November 18, 2012.⁶

The evidence in its totality establishes that the CFPB knew or should have known through reasonable diligence of the alleged violations more than three years before filing charges. The CFPA claims against Mr. Carnes are time-barred and should be dismissed.

⁶ If there is any doubt when the CFPB knew or should have known of the alleged violations, the ALJ should not have denied Respondents’ targeted discovery requests on this issue. *See* Dkt. 238.

2. The ALJ erred in determining that the one-year statute of limitations in the Truth in Lending Act and Electronic Funds Transfer Act do not apply to this action.

Claims under TILA and EFTA must be brought within one year of the violation. 15 U.S.C. § 1640(e) (“Except as provided in the subsequent sentence, any action under this section [TILA] may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.”); 15 U.S.C. § 1693m(g) (“Without regard to the amount in controversy, any action under this section [EFTA] may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.”) Additionally, the derivative CFPA claims are based solely on the underlying TILA and EFTA allegations and, therefore, cannot proceed when the predicate offenses cannot. *See* Dkt. 1 at ¶¶ 58-61; 84-87.

The terms of the underlying consumer laws apply to CFPB enforcement actions. 12 U.S.C. § 5564(g)(2) (“[I]n any action arising solely under an enumerated consumer law [*e.g.*, TILA and EFTA], the [CFPB] may commence, defend, or intervene in the action in accordance with the requirements of that provision of law, as applicable.”) This includes statutes of limitations. *See PHH*, 839 F.3d at 52 (“By its terms, then, Section 5563 ties the CFPB’s administrative adjudications to the statutes of limitations of the various federal consumer protection laws it is charged with enforcing.”). Therefore, the ALJ erred in determining that the TILA and EFTA claims, as well as the derivative CFPA claims, were not barred by their statutes of limitations. Dkt. 249 at 28, 29, 31. The alleged violations concluded in December 2012,⁷ so the statutes of limitations on Counts I, II, V and VI ran by December 2013. The claims are time-barred against both Respondents and should be dismissed.

⁷ IA ceased offering loans in December 2012. Dkt. 56, ¶10.

C. The ALJ denied Respondents due process.

1. The ALJ committed error and abused her discretion when she (1) denied Respondents' discovery requests related to when the CFPB knew or should have known of the alleged violations, and (2) denied Respondents' request for a privilege log or withheld document log of the responsive documents withheld by the CFPB.

As demonstrated above, the CFPRA's statute of limitations is a dispositive issue as to all of the claims against Mr. Carnes. In order to effectively raise the issue, Respondents properly sought targeted discovery to determine when the CFPB knew or should have known of the alleged violations by seeking a subpoena for records, narrowly-tailored to four categories of documents related to consumer complaints, external correspondence, internal correspondence, and internal reports, limited to the time period prior to November 18, 2012. *See* Dkt. 232 and 232A. Unless the subpoena was found to be "unreasonable, oppressive, excessive in scope, or unduly burdensome," the ALJ was required to grant the request. *See* 12 C.F.R. § 1081.208(d) ("The hearing officer *shall* promptly issue any subpoena requested pursuant to this section" unless he or she "determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome.") (emphasis added).⁸ The ALJ should have granted the request for the subpoena, given the limited scope of the documents sought, and, therefore, denied Respondents due process by rejecting the subpoena request.

Instead, the ALJ found the first two document categories (consumer complaints and external correspondence regarding Respondents) to be "unreasonable" because they had purportedly already been produced by the CFPB pursuant to its mandatory disclosure obligation. Dkt. 238 at 6; *see also* 12 C.F.R. § 1081.206(a). However, the CFPB never claimed to have

⁸ The CFPB Rules provide that respondents may seek discovery from the CFPB by way of subpoena. 12 C.F.R. § 1081.206(a)(3) ("Nothing in paragraph (a) of this section [relating to affirmative disclosures the CFPB must make] . . . shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena."); *see also* Dkt. 236 at 12-13.

produced all such documents. The CFPB instead contended that they had produced “all documents relating to this investigation that the *Office of Enforcement* obtained from non-Bureau employees before these proceedings were instituted.” Dkt. 235 at 4 (emphasis added). Respondents sought relevant records and communications that were obtained or reviewed by the *CFPB* – not merely the Office of Enforcement, which is just one of many offices within the CFPB. *See* Dkt. 232 and 232A. The requests were directly relevant to the issue of when the CFPB (not just the Office of Enforcement) discovered the alleged violations for purposes of the statute of limitations, and were not “unreasonable.”⁹

The ALJ also erred in denying the latter two document request categories (internal communications and reports drafted by CFPB personnel regarding Respondents) because they could be withheld pursuant to Rule 206(b). *See* Dkt. 238 at 9. This is not a proper grounds to deny a subpoena request under Rule 208(d). It also is unsupported by the evidence on the record, as the ALJ did not actually view any of the documents nor require the CFPB to identify whether such documents exist.

Even if some or all of these documents could be properly withheld, based on an applicable privilege or the statutory grounds found in Rule 206(b), the existence and date of such documents is highly relevant to the question of when the CFPB discovered the alleged violations. Therefore, Respondents requested a privilege or withheld documents log, consistent with the CFPB Rules, for any documents withheld by the CFPB. *See* Dkt. 232A; Dkt. 236 at 17; *see also* 12 C.F.R. § 1081.206(c) (“The hearing officer may require the Office of Enforcement to produce

⁹ The ALJ also incorrectly found that “Respondents have already acknowledged . . . that the CFPB represents that it first received a copy of Integrity Advance’s loan agreement through the company’s production in response to the CID.” Dkt. 238 at 7. Instead, as Respondents previously explained, the CFPB has only contended that “*Enforcement Counsel* first obtained copies of Integrity Advance’s loan agreement through the company’s productions in response to the January 7, 2013 CID.” Dkt. 187 at ¶ 2, 7 (emphasis added); *see* Dkt. 239 at 10-11. Respondents do not know when the CFPB first viewed or obtained the loan agreement, which is the document on which the ALJ exclusively relied to find Respondents’ practices unfair and deceptive. *See* Dkt. 293 at 40.

a list of documents or categories of documents withheld” The ALJ abused her discretion by denying that request because “I do not find it appropriate in this case to compel EC to produce a detailed withheld document list.” Dkt. 238 at 9. As a result, Respondents were denied the opportunity to fully develop the factual record regarding when the CFPB discovered the alleged violations and whether the action was time-barred by the CFPA’s statute of limitations.

2. The ALJ erred in declining to hold a new hearing in light of SEC v. Lucia and the Director’s remand order.

The ALJ denied Respondents due process by improperly denying Respondents’ request for a new hearing in accordance with the CFPB Rules. *See* Dkt. 269 at 5 (ALJ stating “it is my intent to conduct a *de novo review of the record* - to the extent possible” while considering arguments for portions of the record to be augmented or struck) (emphasis added). The ALJ’s ruling is inconsistent with the Supreme Court’s holding in *SEC v. Lucia*, 138 S. Ct. 2044, 2055 (2018) (proper remedy for an Appointments Clause violation is a “new hearing before a properly appointed official”) (internal citations omitted).¹⁰ The ALJ’s ruling also is inconsistent with the Director’s May 29, 2019 order that Respondents be granted a new hearing “in accordance with the Bureau’s Rules of Practice for Adjudication Proceedings.” *See* Dkt. 216 at 2, 9. The CFPB Rules outline the process for CFPB hearings, which include pre-hearing discovery and an evidentiary hearing with the opportunity for both sides to present evidence and examine witnesses. *See, e.g.*, 12 C.F.R. § 1081.206-210, 300-306. Respondents were not afforded this hearing.

Instead, the ALJ incorrectly relied on a 2015 D.C. Circuit Court opinion that, to

¹⁰ In the aftermath of *Lucia*, the SEC Chief ALJ assigned new ALJs to conduct new hearings except “where the parties *waived their right to a new hearing* and requested that the Commission decide their petitions for review on the present record.” *See In re: Pending Administrative Proceedings*, File Nos. 3-15006, *et al.*, Chief Administrative Law Judge’s Order Assigning Proceedings Post *Lucia v. SEC* (emphasis added).

the degree it stands for the proposition that a *de novo* record review (rather than a new hearing) is an appropriate remedy after an Appointments Clause violation, was effectively overruled by the Supreme Court in *Lucia*. See Dkt. 269 at 2, 4; *see also Intercollegiate Broad Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015); *cf. Lucia*, 138 S. Ct. at 2055 (“To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Luca is entitled.”). Far from conducting a new hearing, the ALJ repeatedly and improperly denied Respondents’ requests to obtain discovery, present evidence, and assert defenses unless they were part of the record from the first hearing, even where the requests were rooted in legal developments that occurred after the first proceeding.¹¹ See Dkt. 238 (denying Respondents’ request for discovery related to the CFPRA statute of limitations); Dkt. 269 (denying Respondents’ request to introduce evidence of good faith reliance on counsel for purposes of determining the appropriateness of restitution); Dkt. 269 (denying Respondents’ request to introduce evidence of expenses for purposes of calculating restitution); Dkt. 269 (denying Respondents’ request to put on live witness testimony for purposes of credibility determinations); Dkt. 267 (denying Respondents’ request to amend answer as to good faith reliance on advice of counsel); Dkt. 267 (denying Respondents’ request to amend answer for the defense that the UDAAP claims are unconstitutionally vague).

Each of these denials constituted legal error, as the ALJ denied Respondents’ due process, failed to conduct a new hearing in accordance with the CFPB Rules, and failed to follow the order of the Director and the directive of the Supreme Court in *Lucia*. The ALJ committed further error in these rulings as follows:

- Contrary to established law, the ALJ improperly found that a factfinder’s observation of witness demeanor is not a “reliable” way to judge credibility and denied Respondents’

¹¹ At the same time, the ALJ permitted the CFPB to revive Count IV, despite the fact that the CFPB stipulated to its withdrawal with prejudice during the first proceeding. Dkt. 249 at 9-11.

request for a live hearing, stating “I do not plan to consider [demeanor] to determine credibility in this matter.” Dkt. 269 at 6; *contrast Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (“[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.”).

- The ALJ disregarded the development in the law regarding the relevance of good faith in determining the appropriateness of restitution in CFPB enforcement actions, and improperly denied Respondents’ request to introduce evidence of good faith. *See* Dkt. 269 at 9; *see also* Dkt. 261 at 11-13 (Respondents’ discussion of good faith/advice of counsel in *CFPB v. CashCall, Inc.*, 2018 U.S. Dist. LEXIS 9057, at *35 (C.D. Cal. Jan. 19, 2018) and *Nationwide*, 2017 U.S. Dist. LEXIS 145923)).
- The ALJ disregarded the development in the law regarding the relevance of Respondents’ expenses to the calculation of restitution, and improperly denied Respondents’ request to introduce evidence of such expenses. *See* Dkt. 269 at 10-11; *see also* Dkt. 261 at 14-15.

D. The ALJ erred in finding the CFPB has legal enforcement authority over Respondents even though they were not “covered persons” under the CFPA.

As recognized by the ALJ, the CFPB “was not authorized to initiate this proceeding before the Director was lawfully appointed on July 16, 2013.” Dkt. 268 at 4. However, the ALJ erred in finding that the CFPB nonetheless has enforcement authority over Respondents, where Respondents ceased offering loans in December 2012 and therefore were never “covered persons” during the period of the CFPB’s authority. *Id.*; *see* 12 U.S.C. § 5481(6); *see also* Dkt. 260 at 5-11 (Respondents’ argument).

E. The ALJ erred in recommending that summary disposition be granted in the CFPB’s favor as to liability.

1. The ALJ failed to consider the facts in the light most favorable to Respondents.

Throughout the RD, the ALJ erred by failing to view the evidence in the light most favorable to Respondents, the nonmoving party. *See* Dkt. 293 at 3-4 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The ALJ’s error is most evident in her evaluation of the undisputed evidence that a large number of IA’s customers took out multiple loans under the same terms and conditions that the ALJ found were misleading, deceptive, and

unfair. *See id.* at 9 ¶¶ 53-54 (acknowledging that, “[s]ince July 21, 2011, a total of 26,129 customers (48% of Integrity Advance customers since July 21, 2011) took out two or more loans with Integrity Advance” and that “[o]f the 82,980 loans originated on or after July 21, 2011, 66% were loans to repeat customers”). Rather than viewing that evidence in the light most favorable to Respondents (*e.g.*, by drawing the reasonable inference that return customers understood the terms of the loans and were satisfied with those loans),¹² the ALJ essentially disregarded the evidence because she found that “neither party has established what actually motivated a repeat customer to take out a subsequent loan[.]” *Id.* at 34; *see also, e.g., id.* at 80 (“I find that there is insufficient evidence to support RC’s assertion that repeat customers were fully informed when taking out subsequent loans.”); *id.* at 82 (“Since I have found that EC proved the deceptive nature of the loans, I therefore presume that returning customers relied upon the deceptive disclosures and, consequently, suffered harm.”). The ALJ’s citation to *FTC v. Nat’l Urological Grp., Inc.*, as purported support for her decision to disregard that evidence is misplaced. *See id.* at 34 (citing 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008)). That case is distinguishable because consumers logically may have continued to rely on false advertising to repeatedly purchase a weight loss drug, even where he or she did not experience the purported benefits of the product. *See Dkt. 283* at 3. That is not the case for IA’s large number of repeat customers, who experienced the loan repayment process and costs firsthand before taking out another loan under the same terms. In any event, if the ALJ did not believe there was sufficient evidence in the record of the import of repeat customers, the proper course of action would be to deny summary

¹² The existence of a large number of repeat customers is relevant to (and tends to disprove) a number of the CFPB’s claims, including Respondents’ alleged liability for deceptive and unfair conduct under the CFPA, Mr. Carnes’ knowledge for purposes of individually liability, and whether restitution and CMPs are appropriate.

disposition and proceed to a hearing, not disregard the evidence and rule in the CFPB's favor.¹³

The ALJ's misapplication of the legal standard for summary disposition is reversible error, and should result in a new hearing being granted in this case. *See, e.g., Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (reversing summary judgment where court "failed to view the evidence . . . in the light most favorable to [the non-moving party] with respect to the central facts of th[e] case" and noting that "[b]y failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party"); *Jackson v. Beech*, 636 F.2d 831, 838 (D.C. Cir. 1980) (reversing default judgment where the court failed to "construe[] all ambiguous or disputed facts in the light most favorable to the defendants").

2. The ALJ erred in finding Mr. Carnes individually liable.

The ALJ also wrongly found Mr. Carnes individually liable as to Counts III, IV, and VII.¹⁴ *See* Dkt. 293 at 64-76. First, the ALJ erred by finding that Mr. Carnes "had the authority to control IA and the deceptive and unfair practices at issue." *Id.* at 71. The evidence may establish that, as the *de facto* CEO, Mr. Carnes had the authority to control IA in a general sense, but there is insufficient evidence to demonstrate that he participated in or had the authority to control the specific alleged deceptive and unfair practices. *See* Dkt. 278 at 21-23. Instead, the facts show that Mr. Carnes did not draft, edit, or substantively review the Loan Agreement,

¹³ The ALJ's failure to view the evidence in the light most favorable to Respondents was not limited to the evidence of repeat customers. *See, e.g.*, Dkt. 293 at 27, 62 (disregarding the form of IA's Loan Agreement, including its use of demarcation, bold lettering, and the placement of key terms, in connection with Respondents' argument that they clearly and conspicuously disclosed the terms of the loans, but relying on form in concluding that the placement of the provision on RCCs "hinder[ed] it from standing out"); *id.* at 39 (acknowledging that Mr. Carnes testified that "everyone who applied for a loan was called to and talked to" but declining to make the reasonable inference that representatives walked customers through the loans and answered questions); *id.* at 72 (finding that Mr. Carnes "knew that about 90% of IA's loans would experience at least one rollover" despite recognizing that he "later testified that the 90% number was not in his head at the time he was the CEO").

¹⁴ The ALJ also should not have found Mr. Carnes individually liable because, as discussed *infra* in Sections II.E.3-7, the CFPB failed to show its entitlement to summary disposition as to those Counts.

which was created by experienced outside counsel, and that the decision to use RCCs, which were rarely used, was made by a third party call center. *Id.* at 23; *see also* Dkt. 272 at 27-28. The ALJ committed error by ignoring these, and other, key factual disputes regarding Mr. Carnes' authority to control the alleged deceptive and unfair practices. *See CFPB v. Mortgage Law Group, LLP*, 196 F. Supp. 3d 920, 946-947 (W.D. Wis. July 20, 2016), modified by 2016 U.S. Dist. LEXIS 192781 (W.D. Wis. Nov. 23, 2016) (granting summary judgment in favor of individual defendant as to allegedly deceptive marketing communications, despite the fact that he was the majority partner with final decision-making authority over the company and actively participated in the company's operations).

Second, the ALJ also erred in finding that Mr. Carnes possessed the requisite level of knowledge to subject him to individual liability. *See* Dkt. 293 at 72-76. To find Mr. Carnes individually liable, the ALJ had to find, as a matter of law, that Mr. Carnes "had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation[s], or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Gordon*, 819 F.3d at 1193. Thus, it would not have been sufficient to simply find that Mr. Carnes had knowledge in some general sense; the evidence must establish that he knew that the alleged conduct was deceptive or unfair. *See, e.g., id.; see also* Dkt. 272 at 25-27 (citing cases). The ALJ did not properly apply that standard.

Additionally, the ALJ incorrectly found that Mr. Carnes "kn[e]w and underst[oo]d the contents of the Loan Agreement." Dkt. 293 at 75. However, the only evidence the ALJ cites regarding Mr. Carnes' knowledge of the contents of the Loan Agreement itself is testimony that Mr. Carnes "knew that for a fictional consumer with a \$100 loan, their TILA disclosure would say they owed \$130 for the 'Total of Payments.'" Dkt. 293 at 72. There is no evidence that Mr.

Carnes knew about the contents of the Loan Agreement as a whole, or its other disclosures and representations, let alone that the Loan Agreement was deceptive or unfair. The ALJ also improperly found that Mr. Carnes “kn[e]w and underst[oo]d that RCCs were being used in circumstances when consumers had revoked their ACH authorization and tried to prevent IA from debiting their bank accounts.” Dkt. 293 at 76. However, there is no evidence that Mr. Carnes knew how RCCs were disclosed within the Loan Agreement nor how consumers authorized RCCs, which would be the crux of any finding that he knew their use was unfair.

The above facts are not sufficient to meet the high bar for individual liability. *See* Dkt. 272 at 25-30; Dkt. 278 at 23-25; Dkt. 283 at 8. Instead, the key facts, which should have been viewed in the light most favorable to Respondents at this stage, include: the Loan Agreement template was created by experienced outside counsel, and Mr. Carnes did not draft, revise, or substantively review the Loan Agreement; a third party call center made the decision when to use RCCs; the number of consumer complaints was low; the rate of repeat business was high; Delaware regulators were provided the Loan Agreement and approved IA to operate each year during the relevant time period; IA was subject to lengthy examinations by the Delaware regulator. *See* Dkt. 283 at 8-9; Dkt. 273 at 30-31. The Director should find that the CFPB cannot carry its burden of proving individual liability and erred in denying Mr. Carnes’ motion for summary disposition, but, at the very least, the Director should decline to adopt the ALJ’s recommendation that summary disposition be granted as to Mr. Carnes’ liability.

3. The ALJ erred in recommending that summary disposition be granted as to Counts I and II (TILA and CFPA).

The ALJ wrongly concluded that IA “disclosed multi-payment loans as if they were single payment loans” and thus violated TILA and the CFPA. Dkt. 293 at 23-29. TILA and Regulation Z require that creditors clearly and conspicuously disclose specific information

about the loan, including a loan's APR, the finance charge, the amount financed, and a payment schedule, based on the legal obligation agreed to at the time the loan is consummated. *See* 15 U.S.C. §§ 1631 and 1638; 12 C.F.R. § 1026.17. That is precisely what IA's Loan Agreement did. *See* Dkt. 272 at 21-24; Dkt. 278 at 3-8.

As required by TILA and Regulation Z, the Loan Agreement accurately disclosed, at the time the loans were made, that the consumer had a legal obligation to pay the loan in full on the Payment Due Date or to set up an alternative payment option, including electing to renew the loan, by contacting IA.¹⁵ *See* Dkt. 273 ¶ 13 (“You must select your payment option at least three (3) business days prior to your Payment Due Date by contacting us at (800) 505-6073.”); *id.* ¶ 22 (consumers “[p]romise[d] to pay [Integrity Advance] the Total of Payments . . . on the Payment Due Date . . .” and, contingent on the consumers’ choices, “[a]ll other amounts owed to us under the Loan Agreement”). Only when a consumer failed to meet this obligation would the loan be renewed. *Id.* (“If you fail to contact us to confirm your Payment Option at least three (3) business days prior to any Payment Due Date, or otherwise fail to pay the loan in full on any Pay Date, Lender may automatically renew your loan . . .”).

The ALJ misread those provisions and found, contrary to the plain language of the Loan Agreement, that consumers were not obligated to select a payment option because “if a consumer did not select a payment option, then the loan would automatically renew.” Dkt. 293 at 25; *see also id.* at 26-27. That conclusion misconstrues the evidence. At the time of loan consummation, a consumer had no legal obligation to make multiple payments to repay the loan. Under the terms of the Loan Agreement, the consumer was obligated only to pay off the loan in full or set up an alternative payment option. Therefore, the TILA box did not contain disclosures

¹⁵ Because IA's Loan Agreement tracked the model form set forth in Regulation Z, the ALJ should have treated it as presumptively compliant with TILA. *See* Dkt. 272 at 22 (discussing legal safe harbor in Regulation Z).

assuming that loans would be automatically renewed. Indeed, IA would have had no way of knowing what those costs might be at the time a loan was issued because that depended entirely on a consumer’s post-consummation choices.¹⁶ Neither TILA nor Regulation Z requires such after-the-fact disclosures to be made.¹⁷ *See* 12 C.F.R. § 1026.17(e); *see also Stein v. Titlemax of Ga.*, 2019 U.S. Dist. LEXIS 189993, at *17 (N.D. Ga. July 25, 2019) (noting that “[a]ccurate disclosures do not become TILA violations because they were rendered inaccurate by subsequent events”); *Jasper Cnty. Sav. Bank v. Gilbert*, 328 N.W.2d 287, 290 (Iowa 1982) (concluding that TILA “does not require the lender to disclose that the dollar amount of the costs of credit will increase if the consumer makes late payments”).

The ALJ also erred in finding that the differences between this case and *FTC v. AMG Servs., Inc.*, are not “necessarily . . . significant.” Dkt. 293 at 27-29 (citing 29 F. Supp. 3d 1338 (D. Nev. 2014), *aff’d sub nom. FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018)). The differences are key. *See* Dkt. 278 at 6-9. For instance, in *AMG*, the format of the loan agreement was designed to obscure key provisions, the loan agreement never informed consumers that their loans would automatically renew if the loans were not paid off in full on the due date, and consumers could only decline renewal of the loan through a “confusing email-and-

¹⁶ The Director should reject the ALJ’s assertion that Respondents “did not adhere to th[e] mandate” in 12 C.F.R. § 1026.17(c)(2) requiring a creditor to “state clearly that the disclosure is an estimate.” That provision applies only where “information necessary for an accurate disclosure is unknown to the creditor[.]” *Id.* That is not the case here because IA was not missing any existing information. Nothing in Section 1026.17(c)(2) requires a creditor to make disclosures based on potential post-consummation events that have not yet occurred.

¹⁷ Indeed, requiring a lender to disclose all potential scenarios at the time of loan consummation would hardly be workable in light of the myriad ways that a consumer’s obligation could subsequently change. Such a requirement also would be inconsistent with TILA’s intent to balance the need for complete disclosures against the need to avoid “information overload.” *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (internal quotation marks and alterations omitted); *see also* Testimony of Governor Edward M. Gramlich, Regulation Z (Truth in Lending Act), Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, May 17, 2005, available at <http://www.federalreserve.gov/BoardDocs/Testimony/2005/20050517/default.htm> (recognizing that combating “information overload” was a key concern of the Federal Reserve Board when it comprehensively reviewed Regulation Z’s implementation of TILA in 2005).

hyperlink procedure.” *See AMG*, 29 F. Supp. 3d at 1361, 1377. In contrast, IA’s Loan Agreement utilized short paragraphs, bolded important terms, bolded and all-caps headers, and up to eight signature points to ensure that consumers could review the Loan Agreement efficiently and effectively. *See Dkt. 278* at 11. The Loan Agreement also informed consumers that their loans would be automatically renewed if they failed to select a payment option, and, unlike in *AMG*, allowed consumers to decline renewals by simply calling IA at the provided telephone number.¹⁸ *See id.* at 7. In short, the ALJ erred in “fail[ing] to see how” the key differences between this case and the *AMG* case are “pertinent.” Dkt. 293 at 28.

The Director should find that IA’s Loan Agreement clearly and conspicuously disclosed the total legal obligation that consumers had at the time the loan was consummated and thus complied with TILA and Regulation Z’s requirements. At the very least, the Director should find that there is a genuine issue of material fact precluding the granting of summary disposition in the CFPB’s favor as to Counts I and II.

4. The ALJ erred in recommending that summary disposition be granted as to Count III (CFPA – Deception)

The ALJ incorrectly concluded that the CFPB proved, as a matter of law, that Respondents engaged in deceptive practices in violation of the CFPA. *See Dkt. 293* at 29-41. As the ALJ noted, whether a representation is “material” depends on whether it is “likely to affect the consumer’s decision to buy the product or service.” *Id.* at 32 (citing *FTC v. Int’l Computer Concepts, Inc.*, No. 5:94cv1678, 1995 WL 767810, at *3 (N.D. Ohio Oct. 24, 1995)). The ALJ erred in the application of that standard, however, by ignoring that the CFPB did not

¹⁸ Further illustrating the ALJ’s failure to view the evidence in the light most favorable to Respondents, she also found, incorrectly, that Respondents “did not cite to any evidence in the record demonstrating that [calling IA via telephone] was, in fact, a simple procedure.” Dkt. 293 at 28. The ALJ should have made the reasonable inference that making a telephone call was a “simple procedure” for consumers.

present any evidence regarding what even one consumer may have considered material to his or her decision, and by disregarding the undisputed facts identified by Respondents showing that the additional cost associated with loan renewals was *not* material to consumers' decisions to take out loans from IA. *See* Dkt. 272 at 13-14; Dkt. 278 at 13-14. Indeed, the ALJ essentially found that a representation about the cost of a loan is always material as a matter of law, regardless of the facts of a particular case. *See id.* at 34 (finding that "the credit terms including the APR, finance charge, and total of payments disclosed in the TILA boxes were 'material' representations to consumers taking out loans"). But that is not the law. *See Matter of Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984) ("[A] material representation, omission, act or practice involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product."); *cf. In re Akorn, Inc. Sec. Litig.*, 240 F. Supp. 3d 802, 814 (N.D. Ill. 2017) (noting that, for purposes of a securities claim, "[m]ateriality is a 'fact -specific inquiry' . . . [that] requires delicate assessments of the inferences a reasonable shareholder would draw from a given set of facts and the significance of those inferences to him").

The ALJ also erred in finding that the "net impression" of the Loan Agreement was deceptive. *Id.* The undisputed material facts show that Respondents took steps to ensure that consumers understood and appreciated the terms of the loans and that IA's Loan Agreement was designed in such a way as to enable consumers to easily understand its terms. *See* Dkt. 272 at 9-11; Dkt. 278 at 14-16. And, there is ample other evidence in the record (which the ALJ disregarded) establishing, at the very least, that there is a genuine issue of material fact precluding entry of summary disposition in the CFPB's favor. *See* Dkt. 278 at 8, 11-12.

Finally, the ALJ erred by failing to consider the import of repeat customers in her analysis. It strains credulity to think that a reasonable consumer, who was deceived into paying

more than he or she anticipated, would return to take out additional loans under the same terms from the same company. The ALJ should have considered the evidence of the large number of repeat customers to support the conclusion that a *reasonable* consumer was not deceived.

Although the Director should find that the Loan Agreement was not deceptive as a matter of law, *see* Dkt. 272 at 8-14, at the very least, the Director should find that there is a genuine issue of material fact precluding entry of summary disposition in the CFPB's favor as to Count III.

5. The ALJ erred in recommending that summary disposition be granted as to Count IV (CFPA – Unfairness)

The ALJ also erred in finding that Respondents engaged in unfair practices in violation of the CFPA. *See* Dkt. 293 at 41-50. As an initial matter, the ALJ committed legal error by reviving Count IV following remand after that Count had previously been dismissed with prejudice at the request of the CFPB “in the interests of judicial economy and narrowing the issues for trial.” Dkt. 245 at 8 (noting that the CFPB requested dismissal of Count IV because “[t]he consumer harm caused by the [allegedly] deceptive loan agreement [in Count III] is co-extensive with the harm Enforcement Counsel would allege in continuing to assert the Count IV unfairness claim”); *see also* Dkt. 249 at 9-11 (order reviving Count IV). The ALJ should have found that the CFPB was estopped from reviving Count IV and that doing so would have been futile in light of the running of the statute of limitations. *See* Dkt. 239 at 23-25; Dkt. 245 at 8-9.

The ALJ also erred in her conclusion on the merits that Respondents engaged in unfair practices as a matter of law. Here, again, the ALJ arrived at that conclusion despite the existence of evidence in the record that, taken in the light most favorable to Respondents, precludes entry of summary disposition in the CFPB's favor. *See, e.g.,* Dkt. 278 at 13 (evidence of repeat customers); *id.* at 8 (low rate of consumer complaints). And while the ALJ found that “many consumers paid significantly more than they anticipated,” Dkt. 293 at 46, there is no

competent evidence in the record that even a single consumer suffered any such harm. *See* Dkt. 278 at 10 (noting that the CFPB did not conduct any consumer surveys or present any consumer testimony). The reasonable inference to have drawn from the evidence in the record is that reasonable consumers *did* understand that they would incur additional costs if they did not pay off the loans in full on the Payment Due Date. This is particularly so where the Loan Agreement explicitly warned consumers that “ADDITIONAL FEES MAY ACCRUE IF THE LOAN IS REFINANCED OR ‘ROLLED OVER.’” Dkt. 272 at 10.

The ALJ also erred in finding that “consumers could not have reasonably avoided substantial monetary injury from IA’s loans,” Dkt. 293 at 48, and that “the harm to consumers . . . was not outweighed by a countervailing benefit to consumers or competition.” Dkt. 293 at 49. Respondents identified numerous facts undercutting those conclusions, including that consumers had the right to rescind the Loan Agreement or pay off the loan in full at any time. *See* Dkt. 272 at 17-20. Moreover, though the ALJ correctly acknowledged that consumers did receive a benefit (i.e. loan proceeds), she erred in finding that the alleged harm outweighed any benefit as a matter of law because “consumers’ decisions regarding Respondents’ loan product was tainted by IA’s failure to reveal the actual costs of the loans.” There is no evidence in the record to support such a conclusion, *see* Dkt. 278 at 10, and Respondents identified ample facts that, viewed in the light most favorable to them, preclude granting summary disposition in the CFPB’s favor, including the fact that a large number of IA’s customers returned to take out additional loans under the same terms (*see* Dkt. 272 at 19) and that the CFPB itself has acknowledged that consumers have reported benefits to having received payday loans (*see* Dkt. 272 at 19-20). The Director should reject the ALJ’s recommendation as to Count IV.

6. The ALJ erred in recommending that summary disposition be granted as to Counts V and VI (EFTA and CFPA)

The ALJ misread the plain language of the Loan Agreement in finding that IA “conditioned its loans on consumers’ repayment by preauthorized electronic fund transfers” in violation of the EFTA and the CFPA. Dkt. 293 at 56; *see also id.* at 50-56. The Loan Agreement’s ACH authorization expressly stated that “[y]ou may repay your indebtedness through other means, including by providing timely payment via cashiers check or money order directed to: Integrity Advance, 300 Creek View Road, Suite 102, Newark DE 19711.” Dkt. 272 at 24. Despite that clear language, the ALJ found that IA violated the EFTA and the CFPA because it required consumers to “agree to authorize ACH debits even if they later chose to repay by other means.” Dkt. 293 at 56. But giving IA the authority to debit payments electronically (while allowing consumers to make payments via non-electronic methods instead) is not the same thing as *requiring* that consumers make payments electronically. As such, IA did not violate the EFTA, which provides that “[n]o person may condition the extension of credit to a consumer on such consumer’s *repayment* by means of preauthorized electronic fund transfers.” 15 U.S.C. § 1693k(a)(1) (emphasis added).¹⁹

Additionally, as the ALJ acknowledged, the evidence established that a number of consumers received loans without even signing the ACH authorization. *See* Dkt. 293 at 55 (citing Dkt. 272 at 24; Dkt. 278 at 20) (noting that 5% of IA’s consumers received loans without signing the ACH authorization). The ALJ should have found that IA did not violate the EFTA and the CFPA or, at the very least, denied the CFPB’s request for summary disposition.

7. The ALJ erred in recommending that summary disposition be granted as to Count VII (CFPA – Unfairness Regarding RCCs)

¹⁹ For the same reason, the ALJ’s reliance on *O’Donovan v. CashCall, Inc.*, No. C 08-03174 MEJ, 2009 WL 1833990 (N.D. Cal. June 24, 2009) and *FTC v. PayDay Fin. LLC*, 989 F. Supp. 2d 799 (D.S.D. 2013), is misplaced. *See* Dkt. 293 at 54-56. Unlike those cases, this is not a case where IA required consumers to make payments electronically but gave consumers the option of later cancelling those electronic payments. Here, IA’s consumers were not *obligated* to make *any* payments via electronic means from the beginning.

The ALJ also wrongly concluded that IA's limited use of remotely created checks was unfair. *See* Dkt. 293 at 56-64. In finding "substantial injury," *see id.* at 60, the ALJ ignored the undisputed fact that consumers ***did*** consent to the use of RCCs when they signed the Loan Agreement. *See* Dkt. 278 at 17-18. She also ignored that the CFPB failed to present any evidence suggesting that consumers did not understand that provision or that they suffered harm. *See id.* at 18-19 (noting that the CFPB did not provide any empirical data, such as a consumer survey, to establish what consumers might have understood).

The ALJ also erred in finding that the alleged harm was not "reasonably avoidable" and that it "was not outweighed by a countervailing benefit to consumers or competition." The Loan Agreement provided consumers with a simple way to avoid the alleged harm caused by RCCs: contact IA and offer another form of payment for the amount owed. *See* Dkt. 272 at 21; Dkt. 278 at 18.²⁰ And while the ALJ found that RCCs did not benefit individual customers who had attempted to renege on their obligations to pay amounts owed to IA, she ignored the larger benefit to consumers that resulted from the use of RCCs. *See* Dkt. 283 at 7 (Respondents' explanation that RCCs "protect[] lenders, which in turn allows them to extend credit to consumers who might not otherwise be eligible"). The Director should reject the ALJ's recommendation that summary disposition be granted in the CFPB's favor as to Count VII.

F. The ALJ erred in recommending that summary disposition be granted in the CFPB's favor as to remedies

1. The ALJ erred in awarding restitution.

First, the ALJ erred in failing to consider the undisputed evidence showing that

²⁰ The ALJ's finding that "IA [could] continue to use RCCs, regardless of whether the consumer offers another form of payment" is belied by the plain terms of the Loan Agreement, which states that RCCs would only be used "so long as amounts are owed to us under the Loan Agreement." Dkt. 293 at 62-63. IA would have had no basis to use a RCC in a situation where a consumer provided another form of payment for the outstanding amount, and the record is devoid of any evidence showing that that ever occurred.

restitution is not appropriate due to Respondents' lack of fraudulent intent and good faith reliance on the advice of counsel. *See* Dkt. 293 at 90; Dkt. 272 at 31 (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). Such evidence is highly relevant to (and weighs heavily against) the appropriateness of restitution, and it was error not to consider it. *See CashCall, Inc.*, 2018 U.S. Dist. LEXIS 9057 at *40 (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)). Second, the ALJ should have found restitution inappropriate because the CFPB failed to establish "that consumers did not receive the benefit of their bargain." *CashCall*, 2018 U.S. Dist. LEXIS 9057, at *35. As noted above, there is no evidence that consumers did not receive the benefit of their bargain, nor is there evidence that any consumers were actually confused or misled by the Loan Agreement—indeed, the CFPB did not seek to present testimony from even a single consumer who allegedly suffered harm. *See* Dkt. 278 at 10; *cf. CashCall*, 2018 U.S. Dist. LEXIS 9057, at *41 (finding that "the CFPB did not present credible evidence" to support its assertion that it was entitled to restitution because the loan agreements were deceptive on their face because "there was no testimony from consumers that they were confused about the terms of the loans or the fees"). Moreover, there is ample evidence in the record, which, taken in the light most favorable to Respondents, demonstrates that consumers **did** receive the benefit of their bargain. *See id.* at 8, 28 (noting that IA had a high rate of repeat customers and that the rate of consumer complaints was low). And, as the ALJ acknowledged, there is no question that IA's consumers did receive a benefit, i.e. the loan

proceeds for which they applied. *See* Dkt. 293 at 49; *cf. CashCall*, 2018 U.S. Dist. LEXIS 9057, at *42 (restitution not appropriate where “the evidence indicated quite clearly that consumers received the benefit of their bargain—i.e., the loan proceeds”).

Moreover, the ALJ’s finding is erroneous because the CFPB failed to establish Respondents’ alleged “*unjust gains*,” as opposed to merely their “overall gains.” *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006); *see also CashCall*, 2018 U.S. Dist. LEXIS 9057 at *44-45 (concluding that the CFPB “failed to present any evidence that its proposed restitution approximates Defendants’ unjust gains”). The CFPB simply calculated the total amount that all of IA’s consumers paid above the amount identified in the “Total of Payments” box in the Loan Agreement. *See* Dkt. 278 at 29. But that is not sufficient. *See CashCall*, 2018 U.S. Dist. LEXIS 9057 at *43-44 (rejecting the CFPB’s argument that restitution could be appropriately calculated based on “the total interest and fees Defendants collected on the void loans at issue in this case, less any previous settlement payments” because such a calculation did not “approximate[] Defendants’ unjust gains”). The ALJ’s finding that restitution is appropriate is erroneous.

The ALJ also erred in her calculation of the restitution amount. At the very least, the ALJ should have excluded repeat customers from the calculation. *See* Dkt. 278 at 25-26. That would have reduced the figure to \$8,999,964.45 for conduct since July 21, 2011, or approximately 5% of the amount that the CFPB was seeking. *Id.* at 25. The ALJ did not even address the cases cited by Respondents, which further illustrate that restitution is inappropriate because returning customers could not have been harmed by the allegedly misleading disclosures in the Loan Agreement. *See FTC v. Publrs. Bus. Servs.*, 540 F. App’x 555, 558 (9th Cir. 2013) (in determining restitution, courts may consider that “a customer who renewed subscriptions necessarily knew the actual terms of the transaction at the time of renewal”); *see also FTC v.*

Kuykendall, 371 F.3d 745, 766 (10th Cir. 2004) (defendants may offset restitution calculation by showing that customers “were wholly satisfied with their purchases and thus suffered no damages”). No amount of restitution is appropriate here, but even if it were, there is no basis for including repeat customers in the calculation.

The ALJ also erred in recommending that restitution be awarded for alleged pre-July 21, 2011 TILA violations and in declining to exclude fees from the calculation. *See Dkt. 293 at 82-85.* Allowing the CFPB to recover for pre-July 21, 2011 conduct, which increased the restitution award by over \$90 million, impermissibly imposed retroactive liability on IA, as neither the CFPB nor its enabling statute existed, and there was no agency that could seek restitution for TILA violations in administrative proceedings at that time. *See Dkt. 278 at 31-32.* And, the ALJ should have excluded fees that were charged to consumers before they repaid the amounts disclosed in the “Total of Payments” box, *see Dkt. 162 at 29* (setting forth amounts without fees).²¹ For all of these reasons, and for the reasons stated in Respondents’ previous filings (Dkt. 272 at 30-34; Dkt. 278 at 25-32; Dkt. 283 at 9-10), the Director should find that restitution is not appropriate or should be significantly reduced in this matter.

2. The ALJ erred in awarding injunctive relief.

The Director also should reject the ALJ’s recommendation that Respondents be ordered to “cooperate fully to assist the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress.” Dkt. 293 at 89. The ALJ should have found this relief to be inappropriate in the light of the undisputed facts that IA stopped operating

²¹ The Director should find it appropriate to deduct these fees, regardless of whether Respondents explicitly raised it in the context of summary disposition briefing. *See Nationwide*, 2017 U.S. Dist. LEXIS 145923, at *31 (“[R]estitution is an equitable remedy, to be applied with as much fairness as is feasible.”); 12 C.F.R. § 1081.400(c)(1) (“A recommended decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable, probative, and substantial evidence.”).

approximately seven years ago, and its assets were sold to another company. *See id.* at 33.

3. The ALJ erred in awarding civil monetary penalties.

The ALJ also erred in awarding and calculating the amount of CMPs and in finding that none of the mitigating factors in 12 U.S.C. § 5565(c)(3) apply. *See Dkt. 293 at 90-94.* With respect to Count VI (relating to RCCs), the ALJ should have found that CMPs were not appropriate because the CFPB did not identify the days or number of days on which RCCs were used, a fact which the ALJ acknowledged. *Id.* at 91. Despite this, the ALJ recommended that CMPs be calculated based on the assumption that RCCs were used every day from July 21, 2011 through December 1, 2012, resulting in maximum CMPs for 500 days. *Id.* at 91-92. But that assumption is unwarranted in light of the undisputed evidence that RCCs were used in less than one percent of all loans after July 21, 2011. *Id.* at 91. Under the ALJ's reasoning, the maximum CMP should have been calculated based on 5 days (1% of 500 days).

The ALJ also should have found that Respondents' good faith was a mitigating factor, where the undisputed evidence established that Respondents intended to act lawfully, including by relying on experienced counsel to draft the Loan Agreement and transparently providing that Loan Agreement to the Delaware state regulators responsible for approving IA. *See Dkt. 272 at 11, 27-28; Dkt. 278 at 28.* The ALJ also erred by failing to view IA's lack of history of violations of federal consumer laws, or any new violations in the intervening years of this litigation, as a mitigating factor. *See Dkt. 293 at 94.* The Director should not impose CMPs.

III. CONCLUSION

For the foregoing reasons and for the reasons stated in Respondents' previous filings, based on which Respondents reserve the right to make argument, the Director should decline to adopt the Recommended Decision and enter an order directing that this matter be dismissed with prejudice.

Dated: September 3, 2020

Respectfully submitted,

/s/ Richard J. Zack
Richard J. Zack, Esq.
richard.zack@troutman.com
215.981.4726

Michael A. Schwartz, Esq.
michael.schwartz@troutman.com
215.981.4494

Christen M. Tuttle, Esq.
christen.tuttle@troutman.com
215.981.4285

Saverio S. Romeo, Esq.
saverio.romeo@troutman.com
215.981.4440

TROUTMAN PEPPER HAMILTON
SANDERS LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103-2799

*Counsel for Respondents Integrity Advance LLC
and James R. Carnes*

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September 2020, I caused a copy of the foregoing Respondents' Opening Appeal Brief 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:

Stephen Jacques, Esq.
Stephen.Jacques@cfpb.gov

Benjamin Clark, Esq.
Benjamin.Clark@cfpb.gov

Alusheyi Wheeler, Esq.
Alusheyi.Wheeler@cfpb.gov

Deborah Morris, Esq.
Deborah.Morris@cfpb.gov

/s/ Saverio S. Romeo
Saverio S. Romeo, Esq.