No. 22-_____

In the Supreme Court of the United States

INTEGRITY ADVANCE, LLC AND
JAMES R. CARNES,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When this Court in *Lucia v. SEC*, 138 S. Ct. 2044 (2018) instructed that an agency must hold a "new hearing" before a new and properly appointed official in order to cure an Appointments Clause violation, whether the Court intended the agency actually hold a new hearing, as the opinion plainly states, or whether a "new hearing" meant only to conduct a cold review of the paper record of the first, tainted hearing, without any additional discovery or new testimony, as the Consumer Financial Protection Bureau Administrative Law Judge did here and as the Tenth Circuit affirmed.

2. Whether an agency funding structure circumventing the Appropriations Clause violates the separation of powers, thus invalidating prior agency action taken under the unconstitutional funding structure.

CORPORATE DISCLOSURE STATEMENT

Integrity Advance, LLC states that it is a wholly owned subsidiary of Hayfield Investment Partners, LLC. No publicly traded corporation currently owns 10% or more of Integrity Advance's stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States Court of Appeals for the Tenth Circuit and the Consumer Financial Protection Bureau:

- *Integrity Advance, LLC v. CFPB*, 48 F.4th 1161 (10th Cir. 2022);
- *Integrity Advance, LLC*, CFPB No. 2015-CFPB-0029 (Jan. 11, 2021); and
- *CFPB v. Integrity Advance, LLC*, No. 21-mc-206-JWL, 2021 U.S. Dist. LEXIS 142205 (D. Kan. July 30, 2021).

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Integrity Advance, LLC, and James R. Carnes respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, which affirmed the final decision of the Consumer Financial Protection Bureau ("CFPB" or the "Bureau") denying Integrity Advance and Carnes a "new hearing," contrary to this Court's decision in *Lucia v. SEC*, and instead imposing almost $40 million in restitution and $12.5 million in fines based on a cold review of a paper record of the prior proceeding.

OPINIONS BELOW

The Tenth Circuit's order and opinion affirming the Bureau's order are available at *Integrity Advance, LLC v. CFPB*, 48 F.4th 1161 (10th Cir. 2022). See also App. 1a–32a. The Bureau's final decision and order are available at *Integrity Advance, LLC*, CFPB No. 2015-CFPB-0029 (Jan. 11, 2021). See also App. 33a–37a.

JURISDICTION

The Tenth Circuit issued its decision on September 15, 2022, and denied a timely petition for rehearing and rehearing en banc on November 1, 2022. Integrity filed a timely request for an extension of time to file a petition for writ of certiorari with Justice Gorsuch, which Justice Gorsuch granted, extending the deadline for filing the petition to March 1, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution are reproduced in the appendix at App. 166a. Relevant provisions of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5497, are reproduced in the appendix at App. 167a–176a.

STATEMENT OF THE CASE

1. Factual Background.

Integrity Advance, LLC was an online financial services company. Beginning in May 2008, Integrity Advance operated as a non-bank institution licensed and regulated under Delaware law that offered short-term, small-dollar loans to consumers nationwide. These loans typically ranged in value from $100 to $1,000. Integrity Advance did not offer any other financial products during this time and ceased making these loans in December 2012. James Carnes was the CEO of Integrity Advance's parent company, which made him the de facto CEO of Integrity Advance.

The CFPB's then-and-first Director Richard Cordray announced in January 2012 that, following state-level investigations and consumer complaints, the CFPB was launching an examination of the payday lending industry at large. The following day, the CFPB and the Federal Trade Commission ("FTC") entered a memorandum of understanding to share

information and resources as the agencies investigated industry participants.

By March 2012, high-level CFPB officials were searching the FTC's databases for consumer complaints regarding Integrity Advance. The CFPB issued a civil investigative demand to Integrity Advance on January 7, 2013. Nearly two years later, in November 2015, the CFPB commenced formal proceedings against Integrity Advance by filing a Notice of Charges.

2. Procedural History.

In the years since the CFPB initiated enforcement proceedings against petitioners, this Court has issued several important opinions directly affecting this matter, including the CFPB's structure and leadership, and the appointment of administrative law judges ("ALJs"). The proceedings below were delayed at several junctures before this matter was remanded to a new ALJ for a new hearing, ostensibly to comply with this Court's instructions in *Lucia*. But the second ALJ never held a hearing, let alone a new one. After a perfunctory review of the record, she recommended adopting all the pertinent findings and conclusions of the prior ALJ, which the Director affirmed. But the remedy required here, explicitly stated in *Lucia*, is clear: an actual new hearing before a constitutionally appointed ALJ, not a paper review of a tainted record.

a. The Tainted Proceedings—ALJ McKenna

The CFPB initiated its enforcement action against Integrity with its 2015 Notice of Charges. The CFPB

had no in-house ALJ, so it called upon U.S. Coast Guard ALJ Parlen McKenna ("ALJ McKenna") to oversee the proceedings. Integrity filed a Motion to Dismiss the Notice of Charges, which was denied—rejecting both Integrity's separation of powers and statute of limitations arguments.

In July 2016, ALJ McKenna presided over a three-day evidentiary hearing that featured sworn testimony from eight witnesses, including Carnes. Following the hearing—and Integrity's renewed arguments that the CFPB's unconstitutional structure and the relevant statutes of limitations should have barred the action—ALJ McKenna ruled that the CFPB had proved six counts in its Notice of Charges. He issued a Recommended Decision that proposed to hold Integrity Advance and Carnes jointly and severally liable for $38 million in restitution, plus an additional $13.5 million in combined civil penalties. All parties appealed.

The CFPB stayed the appeal for two years to await guidance from the courts. In July 2018, following this Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018)—which held that the proper remedy for an Appointments Clause violation is a "new hearing before a properly appointed official" who did not hear the case previously, *id.* at 2055—then-CFPB Acting Director Mick Mulvaney reopened the Integrity Advance proceedings.

The following year, the CFPB's new Director Kathleen Kraninger determined that ALJ McKenna had not been properly appointed. Director Kraninger further determined that the CFPB's now full-time, in-

house ALJ Christine Kirby ("ALJ Kirby") had been properly appointed by former Director Cordray. To cure the *Lucia* error, Director Kraninger remanded the matter to ALJ Kirby.

b. The "Cured" Proceedings—ALJ Kirby

Director Kraninger remanded the Integrity matter "for a new hearing and recommended decision." She instructed that ALJ Kirby "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by [ALJ] McKenna."

ALJ Kirby requested a status update from the parties to determine "what preliminary issues need to be addressed before we proceed to a formal hearing." The CFPB indicated its intent to pursue its 2015 Notice of Charges; Integrity and Carnes indicated their intent to file a Motion to Dismiss, as well as to seek additional discovery for their statute of limitations defense, which had never been resolved on the merits.[1]

ALJ Kirby subsequently notified the parties she would not consider any issues not raised in the first hearing and a *de novo* review of the record would satisfy *Lucia*, basing her decision largely on the remedy granted in a pre-*Lucia* D.C. Circuit case. Integrity moved to reopen the record and conduct an *actual* new hearing, citing *Lucia*'s plain mandate. Specifically, Integrity objected to ALJ Kirby making witness credibility judgments from a constitutionally

[1] ALJ Kirby noted this fact, but would not permit petitioners to seek any additional discovery on the issue, and would not conduct a new hearing.

tainted, cold paper record.[2] ALJ Kirby declared that the credibility concerns were "totally irrelevant," and decided she would "conduct a *de novo* review of the record—to the extent possible." Both petitioners and the CFPB filed Motions for Summary Disposition.

ALJ Kirby held no hearing, heard no live testimony, and received no evidence. She allowed no repleading by petitioners and denied them any additional discovery of CFPB information, including information essential to their statute of limitations defense.

In August 2020, ALJ Kirby issued her Recommended Decision to grant the CFPB's Motion for Summary Disposition. She found that the CFPB had proved the same six counts in its Notice of Charges, proposed to hold Integrity and Carnes jointly and severally liable, and proposed to more than *triple* the restitution to $132 million ($38.5 million owed jointly and severally), plus $12.5 million in combined civil penalties. ALJ Kirby's only change in disposition was to recommend *dramatically increased* financial liability.

Integrity appealed to Director Kraninger, requesting an *actual* new hearing under *Lucia*. Ultimately, Director Kraninger adopted ALJ Kirby's factual and legal conclusions, but reduced the

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[2] Integrity also moved to dismiss the matter on Appointments Clause grounds. Once this Court issued a decision in *Seila Law, LLC v. CFPB*, 140 S. Ct. 2183 (2020), ALJ Kirby denied Integrity's Motion to Dismiss.

restitution to the originally recommended amount of $38.5 million.

3. Tenth Circuit Decision.

Integrity timely appealed the Director's Final Decision to the Tenth Circuit for review. Integrity's arguments included, among others: (1) the rubberstamping of ALJ McKenna's decision failed to satisfy this Court's instructions in *Lucia* for a "new hearing" under a different ALJ; (2) the CFPB's unconstitutional structure rendered the 2015 Notice of Charges unenforceable; and (3) the limitations periods had run before the CFPB filed its Notice of Charges. The Tenth Circuit affirmed the CFPB's Final Decision. Integrity requested rehearing en banc, which the court ordered the CFPB to respond to, but which the court ultimately denied.

REASONS FOR GRANTING THE WRIT

A constitutional injury gives an individual the "right to resort to the laws of his country for a remedy" because the United States is "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 166 (1803). In *Lucia*, the Court held the appropriate remedy for an Appointments Clause violation regarding ALJs was a "hearing before a new judge." 138 S. Ct. at 2055 n.5. The Court made clear this was the only fix for the previous, "tainted" hearing. *Id.* *Lucia*'s remedy, however, is often reduced to a remedy in name only, as is the case here; many agencies and ALJs have not conducted new hearings

and many lower courts have endorsed this sham remedy.

Despite the Court's clear instruction to hold a "new hearing," ALJs and courts have reached divergent conclusions as to what *Lucia* requires, expressing confusion and frustration regarding the lack of guidance. See, *e.g.*, App. 16a ("*Lucia* offers little guidance on the constitutional requirements of a 'new hearing.'"); *Calcutt v. FDIC*, 37 F.4th 293, 320 (6th Cir. 2022) ("*Lucia* does not specify what features a 'new hearing' must contain . . . . Other decisions addressing the remedies for Appointments Clause violations are similarly vague."). Thus, ALJs' interpretations of *Lucia* run the gamut: from a full redo of the proceedings to a rubberstamping of the prior decision based on a cold review of the paper record, and almost every variation in between. This Court's "principal responsibility" is to "ensure the integrity and uniformity of federal law," *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring). *Lucia*'s required remedy is in need of both, which only this Court can provide.

Indeed, the Office of the Solicitor General recognized immediately after *Lucia* that this Court "plainly contemplated more than a perfunctory ratification of the prior ALJ's decision." Memorandum from the Office of the Solicitor General to Agency General Counsels 8 (July 23, 2018) ("*Solicitor General's Memo*"). Further, "[i]f your agency is in a position to provide a full soup-to-nuts redo of the administrative proceeding, that will be the safest course." *Id.* And a "new ALJ should at a minimum

afford the parties a new opportunity to challenge the exclusion, admission, or weighing of particular evidence." *Id.* at 9. Especially "where credibility is at issue, it may be advisable for the new ALJ to rehear the disputed testimony of the relevant witnesses." *Id.*

But without additional guidance from this Court, it is now clear that *Lucia*'s remedy, which applies to "all ALJs in traditional and independent agencies who preside over adversarial administrative proceedings and possess the adjudicative powers highlighted by the *Lucia* majority," *id.* at 2, is often ephemeral. Some agencies, ALJs, and courts have heeded this Court's plain language and provided a *de novo* hearing with new testimony, evidence, discovery, and legal arguments. But many others have not, instead settling for perfunctory ratification of the tainted decision—really no remedy at all. Such a sham remedy is *exactly* what happened here, and it has happened in many other cases across the country. In any event, consistency is needed.

The Court should grant this petition for three reasons. First, the scope of *Lucia*'s "new hearing" remedy is an important and apparently unsettled question of federal law. ALJs, agencies, and courts across the country interpret *Lucia* in a wildly inconsistent fashion. Second, the notion *Lucia* does not require a genuinely "new" *de novo* proceeding is necessarily wrong because a sham "remedy" provides parties no incentive to litigate Appointments Clause challenges. Third, this case is an ideal vehicle to provide guidance on *Lucia*'s "new hearing" remedy.

I. The "new hearing" that satisfies *Lucia*'s remedy requirement is an important, unsettled question of federal law.

Precisely what *Lucia*'s "new hearing" remedy entails is an important question of federal law. In *Lucia*, this Court found that a litigant "who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief." 138 S. Ct. at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 182–83 (1995)) (internal quotation marks omitted). The "appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official." *Id.* (quoting *Ryder*, 515 U.S. at 183, 188) (internal quotation marks omitted).

In order to cure the Appointments Clause violation, a new ALJ must hear the case, considering the matter as though it had not been adjudicated before. *Id.* While *Lucia* directly concerned SEC ALJs, all understand the decision applies to ALJs across the federal government. See, *e.g.*, *Solicitor General's Memo* 2 ("[W]e conclude that all ALJs and similarly situated administrative judges should be appointed as inferior officers under the Appointments Clause.").

Fixing a constitutional defect requires a "scalpel rather than a bulldozer." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2210–11 (2020). Without further guidance from this Court, no one is sure how to cure Appointments Clause violations regarding ALJs.

A. ALJs apply *Lucia* in a wildly inconsistent fashion.

ALJs interpreting *Lucia* have applied its remedy language in a wildly inconsistent fashion. Their interpretations fall into three categories: (1) those who remove the taint of the unconstitutional appointment by allowing parties to redo the hearing; (2) those who fail to cure the taint by ratifying the tainted ALJ's decision; and (3) those who seek a middle ground by relying on their own discretion in curing the violation. Without additional guidance, parties in one administrative proceeding before, for example, the USDA may receive a full redo—from soup to nuts—while parties before another agency such as the FDIC may receive only a rubberstamped decision reeking of unconstitutional taint. This cannot be the correct result after *Lucia*.

1. *Some ALJs fully cure Appointments Clause violations.*

Only the first category of *Lucia* interpretations is correct: these ALJs, agencies, and courts actually cure the Appointments Clause violation by allowing parties to redo the tainted hearing.

- *Solicitor General's Memo.* The Solicitor General's Memorandum provides a persuasive starting point on what a "new hearing" should entail. The Solicitor General recognized that this Court "plainly contemplated more than a perfunctory ratification." *Solicitor General's Memo* 8. That means the "safest course" would be to conduct entirely new, "soup-to-nuts" hearings. *Id.* This

would be the safest way to "ensur[e] that the final state of the record reflects the new ALJ's own judgment." *Id.* at 9. But "*at a minimum*," the Solicitor General advised that a new hearing should provide opportunities for the "parties to contest the admission, exclusion, or weighing of evidence." *Id.* (emphasis added). Furthermore, "where credibility is at issue," the new ALJ should "rehear the disputed testimony of the relevant witness." *Id.*

- *In the Matter of Traci J. Anderson, CPA*, No. 3-16386, 2020 WL 260282 (S.E.C. Jan. 10, 2020). On remand post-*Lucia*, the new ALJ allowed a pretrial conference, a motion on the pleadings, and an evidentiary hearing. *Id.* at *3. Particularly important was the new ALJ's decision to reserve judgment on the "[a]dmission of the prior hearing testimony [that] would arguably contravene" *Lucia*'s directive for a new hearing. *Id.* The ALJ also allowed the respondent to raise statute of limitations defenses after the evidentiary hearing concluded. *Id.*

- *In the Matter of Edward M. Daspin*, No. 3-16509, 2020 WL 4463315 (S.E.C. Aug. 3, 2020). The ALJ restarted the hearings from scratch, adopting the safest course approach the Solicitor General recommended. *Id.* at *2. Both parties submitted proposed witness lists, issued subpoenas, and conducted depositions for a new evidentiary hearing. *Id.* The ALJ also allowed the parties to make new motions, including dispositive ones. *Id.*

- *Social Security Ruling 19-1p*, 84 Fed. Reg. 9582-02, 2019 WL 1202036 (Mar. 15, 2019). The Social Security Administration promulgated a rule allowing litigants who successfully challenge prior decisions on Appointments Clause grounds the "reasonable opportunity to file briefs or other written statements about the facts and law relevant to this case." *Id.* at *9583. Thus, the new ALJ would have to "consider any arguments the claimant or representative made in writing or at the hearing" and also "consider any additional arguments submitted to it." *Id.* at *9584.

2. *Some ALJs utterly fail to cure Appointments Clause violations.*

The second category of *Lucia* interpretations fail to cure the Appointments Clause violation. In this category, ALJs, agencies, and courts allow the previous, tainted proceeding to *control* the "new hearing" in different ways. They may rely solely on the prior record, disallow new arguments not raised in the tainted hearing, or both. Such approaches almost guarantee the "new" decision will be a perfunctory ratification of the prior one (sometimes an *identical* decision in all respects), falling short of *Lucia*'s mandate. ALJ Kirby's interpretation of *Lucia* falls in this category, as does the Tenth Circuit's decision

affirming her actions. Both are discussed in greater depth below. See *infra* pp. 26–31.

- *Calcutt v. FDIC*, 37 F.4th 293, 320 (6th Cir. 2022).[3] The Sixth Circuit ratified the tainted ALJ's decision by permitting the ALJ's simple review of the paper record of the prior proceeding: "*Lucia* does not specify what features a 'new hearing' must contain, other than a new adjudicator." *Id.* at 320. The Sixth Circuit's incorrect ruling is further illustrated by its rationale for allowing the respondent's prior testimony. Because the court determined prior testimony would likely be admissible for *impeachment* purposes, the court also accepted it for *substantive* purposes. *Id.* at 322–23.

- *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019).[4] The Federal Circuit permitted a new ALJ panel to rubberstamp the "earlier unconstitutionally rendered decision." *Id.* at 1340. Similar to the Sixth Circuit, the court purported to recognize the need for a new, independent hearing under *Lucia*. But the Federal

[3] A petition for writ of certiorari in *Calcutt* is pending. See Petition for Writ of Certiorari, *Calcutt v. FDIC*, No. 22-714 (Jan. 30, 2022). The petition asks: (1) if a circuit court should remand a case after determining the agency applied the wrong legal standard; and (2) whether separation-of-powers challenges must offer proof of prejudice for courts to resolve removal restrictions. *Id*. at I. Those questions are different than the questions here.

[4] The Court vacated and remanded this decision on other grounds in *United States v. Arthrex*, 141 S. Ct. 1970 (2021). Nonetheless, this portion of the Federal Circuit's decision remains good law.

Circuit allowed the tainted decision here to control the "new" proceeding. *Id.* The court found "no error in the new panel proceeding on the existing written record" and left completely to the panel's "sound discretion whether it should allow additional briefing or reopen the record." *Id.*

- *In the Matter of Fang Fang*, No. 17-006, 2020 WL 13157346 (O.C.C. Aug. 4, 2020). The respondent sought to have the proceedings "terminated" and then "reinitiated" under *Lucia*. The ALJ found it "both unnecessary and inappropriate to . . . start again in order to correct whatever Appointments Clause deficiencies may have existed previously." Instead, the new ALJ "examine[d] the [tainted] record of the case *de novo*."

- *In the Matter of Cornelius Campbell Burgess*, No. FDIC-14-0307, 2020 WL 13157330 (O.C.C. Mar. 2, 2020). The ALJ found *Lucia* to be "clear that the 'appropriate remedy' for an Appointments Clause violation . . . is not dismissal of the action and refiling of the Notice of Charges." And, despite other ALJs recognizing *Lucia*'s ambiguity, the ALJ somehow found that "[a]t no point did the Court appear to entertain the possibility that the action itself was invalid and should be brought from scratch."

- *In the Matter of Saul Ortega*, AA-EC-2017, 2020 WL 13157342 (O.C.C. June 16, 2020). The respondent argued that an Appointments Clause violation was analogous to a structural error in a

criminal case, requiring a completely new proceeding. The ALJ rejected this argument and conducted a review of the prior, cold paper record instead.

3. *Some ALJs seek a middle ground.*

The third category of *Lucia* interpretations includes ALJs and agencies whose remedy is to permit limited supplementation of the tainted record. These cases involve the exercise of basically unfettered and unguided discretion, resulting in significant variation from ALJ to ALJ and agency to agency.

- *In re Cricket Hollow Zoo, Inc.*, 78 Agric. Dec. 137, 2019 WL 2345420 (U.S.D.A. Feb. 22, 2019). The new ALJ allowed the parties to "rely on the written record for all purposes moving forward," *id.* at *4, and planned to review the proceedings "***de novo*** to determine whether to ratify or revise previous substantive or procedural ALJ actions." *Id.* (emphasis in original). But the ALJ also allowed the record to be "supplemented with any ***new*** testimony or other evidence as may be supported by a showing of good cause." *Id.* (emphasis in original). The ALJ thus tried to strike a balance between completely removing the constitutional taint while respecting the evidence and testimony already produced, invoking a new standard of "good cause" for supplementation of the record. *Id.*

- *In the Matter of Laurie Bebo*, No. 3-16293, 2020 WL 4784633 (S.E.C. Aug. 13, 2020). The new ALJ gave parties a choice between a "new evidentiary hearing" or using agreed-upon "alternative

procedures." *Id.* at *2. Under the parties' agreement, the ALJ would "decide the matter de novo on the existing record with the opportunity for [respondent] to seek further discovery." *Id.* The ALJ allowed the introduction of new evidence and a summary disposition motion raising new constitutional and statute of limitation arguments. *Id.*

- *In re Stearns Zoological Rescue & Rehab Center, Inc.*, No. 15-0146, 2020 WL 836672 (U.S.D.A. Feb. 7, 2020). The new ALJ interpreted *Lucia* as "leaving it to judges' discretion to determine . . . how to conduct new hearings." *Id.* at *4. Although the ALJ opined that the respondent was "entitled to a new proceeding on the existing record," the respondent was "neither entitled to a new in-person hearing or an entirely new record." *Id.* at *2. The ALJ allowed challenges to the tainted ALJ's decisions, but found that the respondent did not challenge any *particular* rulings by the tainted ALJ. *Id.* Furthermore, the respondent had no "good cause" to supplement the record when witnesses already had been examined and the respondent did not identify a rationale for reexamination. *Id.*

- *In re Philip Tremble*, No. 15-0097, 2019 WL 2345419 (U.S.D.A. Feb. 19, 2019). The new ALJ planned to review the record *de novo*, but give the parties an opportunity to supplement the record with a showing of good cause. The respondent argued for reexamining certain witnesses because

> "it is impossible to make credibility assessments of [a] witness from a cold written transcript." *Id.* at *2 (internal citations omitted). The ALJ found "recall[ing] witnesses to testify without good cause would be unduly repetitious" and would provide respondent "with a procedural advantage." *Id.* at *3. The ALJ recognized "the trier of fact is best situated to assess credibility," but stated that "credibility assessments can be made on the record." *Id.*

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While some ALJs and agencies have provided litigants a meaningful "new hearing" remedy under *Lucia*, others have done so in name only, and others have created a mixed middle ground or even left the remedy up to the parties to negotiate. But the most problematic is that many ALJs endorse exactly the opposite of what *Lucia* required: rubberstamping the tainted ALJ's decision.

The vastly differing interpretations show that this Court's pronouncement in *Lucia*—that a "new hearing" be provided—is in obvious need of clarification and guidance. Only this Court can provide the necessary guidance on *Lucia*'s "new hearing" remedy to ensure parties have an incentive to bring Appointments Clause violations.

B. *Lucia*'s remedy should provide parties an incentive to raise separation of powers arguments by providing them actual and meaningful relief.

The *Lucia* remedy should provide parties an incentive to litigate serious separation of powers claims. Although the Solicitor General opined that this Court "did not elaborate on what the 'new hearing' should entail," the Solicitor General immediately recognized the "safest course" would be "a full soup-to-nuts redo of the administrative proceeding." *Solicitor General's Memo* 8.

At a minimum, a new ALJ should "afford the parties a new opportunity to challenge the exclusion, admission, or weighing of particular evidence" to ensure "the final state of the record reflects the new ALJ's own judgment." *Id.* at 9. Only then would a new hearing be "constitutionally adequate" and "avoid any taint from the prior ALJ's decisions." *Id.* at 8. In any event, the new ALJ's decision must be "more than a perfunctory ratification of the prior ALJ's decision." *Id.*; see also, *e.g.*, *Hoerle v. Comm'r of Soc. Sec.*, No. 2:21-cv-11605, 2022 WL 2442203, at *16 (E.D. Mich. June 16, 2022) (noting the new ALJ's decision "is identical to the older determination" which was "drawn in significant part from the one tainted by the improper appointment. This is exactly the result *Lucia* . . . seeks to avoid.").

The Solicitor General's contemporaneous interpretation of *Lucia*'s "new hearing" remedy is correct for two reasons. First, it provides parties an "incentive to litigate" Appointments Clause

violations—a goal identified by this Court. Second, it is the only remedy likely to ensure removal of the prior hearing's unconstitutional taint.

1. *Providing actual and meaningful remedies creates incentives to litigate Appointments Clause violations.*

The Court in *Lucia* made clear its "new hearing" remedy was designed to "create incentives to raise Appointments Clause challenges." 138 S. Ct. at 2055 n.5 (cleaned up). Such incentives are vital because "[w]ithout the prospect of a [new hearing] . . . the individual would have insufficient skin in the game and no reason to advance the legal claim." Elizabeth Earle Beske, *Litigating the Separation of Powers*, 73 Ala. L. Rev. 823, 826 (2022). Effective remedies are important because they are "the means by which the abstractions of substantive law are translated into concrete terms." Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 497 (2014). In other words, substantive law is meaningless without a real legal remedy because parties have no reason to enforce it. Allowing parties to challenge tainted evidence gives them an actual incentive to litigate Appointments Clause violations.

Post-*Lucia*, ALJs should not be permitted to simply rubberstamp tainted decisions. If they are, parties are left with a record exclusively shaped by a tainted ALJ. See *Lucia*, 138 S. Ct. at 2053. As an empirical matter, new ALJs who simply review the cold paper record often reach the same conclusions as their tainted predecessors. See, *e.g.*, App. 16a. This is

clear evidence of perfunctory ratification. See *Hoerle*, 2022 WL 2442203, at *16 (issuing the exact same decision as the tainted ALJ is "exactly the result *Lucia* . . . seeks to avoid."). Further, *Lucia* required new decisionmakers as an additional safeguard to avoid perfunctory ratification: "the old judge would have no reason to think he did anything wrong on the merits . . . and so could be expected to reach all the same judgments." 138 S. Ct. at 2055 n.5. Limiting secondary review to the record of the first judge, who has "no reason to think he did anything wrong on the merits," similarly strips *Lucia*'s remedy of any meaning.

The taint from the prior proceedings cannot be removed without a new hearing, demonstrating the structural error of an Appointments Clause violation. Much like an error in jury selection in a criminal trial, an Appointment Clause violation "affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907–08 (2017) (cleaned up). Because the entire proceedings are inherently infected, a litigant cannot show a causal connection between error and loss and the structural error doctrine does not demand it, doing away with a harmless error analysis because it "always results in fundamental unfairness." *Id.*; see also *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) ("Issues of separation of powers (including Appointments Clause matters), seem most fit to the doctrine [of structural error]; it will often be difficult or impossible for someone subject to a wrongly designed scheme to show the design—the structure—

played a causal role in his loss.") (internal citations omitted).

An ALJ, like a jury, is the factfinder, and error in selecting the factfinder undermines the proceedings so fundamentally that "the effects of the error are simply too hard to measure," requiring a new hearing. *Weaver*, 137 S. Ct. at 1908; see also *Nguyen v. United States*, 539 U.S. 69, 80–83 (2003) (participation of a statutorily ineligible panel member requires "fresh consideration . . . by a properly constituted panel."). Any lesser rule disincentivizes litigants from raising Appointment Clause violations.

Without the ability to challenge tainted evidence in a new hearing, parties have little chance of changing the results of their initial, tainted hearings. Petitioners are not arguing the *Lucia* remedy requires a new end result. But the process remedy *Lucia* requires must afford parties at least a meaningful and actual opportunity to influence the outcome in a new proceeding. Only such an opportunity gives parties the incentive necessary to pursue these important separation of powers challenges.

2. *New credibility determinations, based on hearing the witnesses actually testify anew, can be a clear tool to cure a tainted hearing.*

Allowing parties to challenge previously admitted evidence is the best way to remove a prior ALJ's unconstitutional taint. ALJs "critically shape the administrative record" because they have "nearly all the tools of federal trial judges." *Lucia*, 138 S. Ct. at 2053. In other words, ALJs essentially "conduct

trials." *Id.* Chief among an ALJ's trial tools is the power to "receive evidence," which entails hearing witness testimony. *Id.* (cleaned up). When the administrative proceedings end, ALJs typically "issue decisions containing factual findings, legal conclusions, and appropriate remedies." *Id.* An ALJ's recommended decision is predicated in large part on witness testimony and the witness's credibility. See, *e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) ("the trial judge's findings . . . largely will turn on evaluation of credibility.").

Factfinders (including ALJs) make credibility determinations by "consider[ing] the factors that underlie credibility: demeanor, context, and atmosphere." *Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring). As such, "determinations of credibility and demeanor lie *peculiarly* within a [factfinder's] province." *Davis v. Ayala*, 576 U.S. 257, 274 (2015) (emphasis added); see also George C. Christie, *Judicial Review of Finding of Fact*, 87 Nw. L. Rev. 14, 47 (1992) ("[D]eterminations of credibility are usually treated as quintessentially within the province of the trier of fact."). Those reviewing a matter "on the basis of a *cold record*" cannot realistically evaluate a prior factfinder's credibility determination. *Id.* (quoting *Rice*, 546 U.S. at 343) (emphasis added).

Any contrary assertion flies in the face of centuries of judicial principles, logic, and assumptions. Perhaps nothing is more likely to fail to remove the taint from an unconstitutional prior proceeding than reliance upon the previous factfinder's credibility

determinations. As this Court has observed, reviewing courts give credibility determinations "great deference," *Flowers*, 139 S. Ct. at 2244, because "when factfinding derives from credibility judgments, as it frequently does, acceptance is *near-automatic*." *Lucia*, 138 S. Ct. at 2055 (emphasis added).

The error here is particularly acute for Carnes. He testified in the tainted proceeding, and now faces over $40 million in personal civil liability, in significant part because the tainted ALJ disbelieved his testimony. This is also egregious because Carnes was denied the opportunity to present additional evidence that would have shown he had no reason to believe there was anything misleading or deceptive about Integrity's loans. Review of a cold paper record by a new ALJ who explicitly declares she can make credibility determinations on the basis of that record is no remedy at all.

Some ALJs perhaps desire to defer to the tainted ALJ's credibility determinations—but do so in direct conflict with what the Court ordered in *Lucia*. *Id.* at 2055 n.5. An ALJ is supposed to function as a factfinder, just like a District Judge, to make the findings that are fundamental to and support their agency's final decisions. Expediency and rubberstamps may be valued in some circumstances, but they are inconsistent with this Court's decision in *Lucia*.

Here, the first *entire* tainted hearing took *three* days—three days the CFPB readily can afford to provide once again to petitioners, and must. When new ALJs like ALJ Kirby rely on cold paper records,

they necessarily give great deference to the determinations of the tainted ALJs. The tainted ALJs' influence pervades the proceedings—particularly for credibility. See *Solicitor General's Memo* 9 ("[W]here credibility is at issue, it may be advisable for the new ALJ to rehear the disputed testimony of the relevant witnesses" so the "final state of the record reflects the new ALJ's own judgment.").

And credibility determinations represent just one subset of influence that would allow a tainted ALJ's decisions to pervade a "new hearing" if parties were not allowed to challenge prior evidence. Only this Court can provide the necessary guidance to ALJs, agencies, and lower courts.

C. This case is an ideal vehicle to determine the remedy *Lucia* requires.

The important and unsettled issue of federal law presented here is clearly and cleanly presented. The Court should use this case to determine what *Lucia*'s "new hearing" remedy entails. This case is an ideal vehicle for at least two additional reasons: first, the Tenth Circuit explicitly ruled on the merits of the issue and failed to cure the Appointments Clause violation; second, the issue has been properly preserved and there are no issues of forfeiture.

1. *The Tenth Circuit ruled on but failed to cure the Appointments Clause violation because it ratified a tainted decision.*

The Tenth Circuit's decision joins the second category of interpretations that fail to cure Appointments Clause violations. As *Lucia* makes

clear, Integrity's hearing before ALJ McKenna was tainted by an Appointments Clause violation. App. 7a. When Director Kraninger remanded the proceeding, she directed ALJ Kirby to "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by [ALJ] McKenna." App. 50a. But ALJ Kirby did the opposite: Integrity was not given a "new hearing"; instead, ALJ Kirby decided a "*de novo* review of the record" was sufficient, despite *Lucia's* "new hearing" mandate and Integrity's protests to the contrary. App. 128a. ALJ Kirby's decision relied *entirely* upon the constitutionally tainted hearing, and she did nothing to cure the Appointments Clause violation.

Indeed, ALJ Kirby's findings were *exactly* the same as ALJ McKenna's—a sign of rubberstamping the tainted decision. See *Hoerle*, 2022 WL 2442203, at *16 (an identical decision "is exactly the result *Lucia* . . . seeks to avoid."). Notably, ALJ Kirby's only departure was in the amount of liability, which she actually *increased* by nearly $100 million. App. 6a, 9a. ALJ Kirby's punitive decision reflects the retaliation feared by parties who litigate Appointments Clause violations. See Barnett, 92 N.C. L. Rev. at 510 ("In fact, a regulated party who challenged the CFPB on separation-of-powers grounds expressed its fears that parties who challenge the CFPB's constitutionality face the threat of the CFPB bringing a retaliatory enforcement action."). Such retaliation further undermines the *Lucia* remedy. Although Director Kraninger later reduced the liability—likely recognizing the retaliatory effect, if not intent, of ALJ

Kirby's recommendation—to the amount initially determined by ALJ McKenna, the Director's adjustment effectively reinstated the tainted decision in its entirety. App. 10a–11a.

The Tenth Circuit endorsed ALJ Kirby's perfunctory ratification. The court found there was no "bright-line rule against de novo review of a previous administrative hearing." App. 16a. Ironically, the Tenth Circuit offered no authority to support why nebulous *de novo* review was a preferable way to cure Appointments Clause violations. See *Seila Law LLC*, 140 S. Ct. at 2210 (curing a constitutional violation requires a "scalpel rather than a bulldozer"). The Tenth Circuit found that ALJ Kirby's "independent review" was sufficient because Integrity had "a full opportunity to present their case in the first proceeding." App. 16a. This holding fails to recognize that the first hearing was tainted by the unconstitutional appointment, giving Integrity no chance to cure that constitutional violation.

A "full soup-to-nuts redo" of the tainted proceeding would have been the "safest course" for ALJ Kirby to correct this error. *Solicitor General's Memo* 8. But at minimum, Integrity and Carnes should have been allowed a meaningful and actual opportunity to challenge the taint of the prior hearing. They suffered actual prejudice by not being afforded that opportunity, including:

Challenge Tainted Credibility Determinations.[5] ALJ Kirby's "new hearing" relied exclusively on tainted credibility determinations. As discussed above, one of a factfinder's principal responsibilities is making credibility determinations. Factfinders rely on "demeanor, context, and atmosphere," *Rice*, 546 U.S. at 343, all of which require a factfinder to observe testimony firsthand. Yet ALJ Kirby found Integrity's concerns about tainted credibility determinations "*totally irrelevant*." App. 130a. (emphasis added). Instead, she found it sufficient to rely on the cold record from the tainted hearing. ALJ Kirby thus abandoned her duty as a factfinder. Under *Lucia*, Integrity and Carnes should have had the opportunity for new credibility determinations based on new testimony, especially given that credibility was a critical issue. See *Solicitor General's Memo* 9. Instead, ALJ Kirby adopted the

[5] All the evidence in ALJ McKenna's hearing was constitutionally tainted. But "there would be little purpose," *Solicitor General's Memo* 9, in regenerating some evidence despite the taint, especially if the evidence is undisputed. Witness testimony, however, and especially by petitioner Carnes who faces massive personal liability, presents an obvious area where ALJ McKenna's taint is pervasive. Any meaningful *Lucia* remedy must include new testimony from such a witness before the new ALJ. Here, in fact, there were only eight total witnesses, App. 128a–129a, so it was not burdensome for ALJ Kirby and the CFPB to conduct a completely new hearing with testimony from all witnesses. See *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976) (in this Court's due process balancing test, "public interest," including the "administrative burden associated with an evidentiary hearing," should be considered).

tainted determinations *in toto* and the Tenth Circuit endorsed her perfunctory ratification.

Seek Further Discovery for Dispositive Arguments. ALJ Kirby forbade petitioners from conducting any discovery relevant to their statute of limitations defense. App. 19a–22a. Despite being an affirmative defense with potential to bar CFPB proceedings in their entirety, the Tenth Circuit affirmed ALJ Kirby's decision, opining that further discovery was "pointless." App. 22a. But that is just wrong as a matter of logic and fact. Seeking information that only the CFPB possesses, and which is directly relevant to and possibly dispositive of a defense is not *pointless*. Only the CFPB has information demonstrating when it learned of alleged misconduct by petitioners, and yet ALJ Kirby refused even to require the CFPB to produce a privilege log asserting and identifying legal privileges under which it refused to provide such internal documents.

Unlike petitioners, others litigating the *Lucia* remedy have been afforded *precisely* this opportunity. See *In the Matter of Traci J. Anderson, CPA*, 2020 WL 260282, at *3; *In the Matter of Edward M. Daspin*, 2020 WL 4463315, at *2; *In the Matter of Laurie Bebo*, 2020 WL 4784633, at *2. The Tenth Circuit further endorsed perfunctory ratification when it found ALJ Kirby made no error in refusing discovery requests on an affirmative defense that would potentially dismiss the case in its entirety.

> *Raise Defenses Negating Carnes's Liability.* ALJ Kirby prevented Carnes from raising an advice-of-counsel defense in the so-called "new hearing." App. 64a. Carnes's advice-of-counsel defense potentially would have negated the amount of restitution and civil penalties against Carnes. ALJ Kirby found that Carnes's tainted testimony from the prior hearing "sufficed on this point." App. 17a–18a. This defense represents Carnes's opportunity to negate nearly $45 million in personal liability—yet, he was prevented *from even raising it*. The Tenth Circuit affirmed ALJ Kirby's decision, despite Carnes citing case law which supported his argument. App. 18a. Because *one* of those two cases had been reversed, the court found ALJ Kirby was justified in preventing Carnes from raising the defense altogether. App. 18a.

When this Court said in *Lucia* that Appointments Clause violations require a "new hearing," it seems very unlikely it could have meant the non-relief petitioners here received: perfunctory ratification of a cold record, albeit by a new decisionmaker. The Tenth Circuit compounded the ALJ's and CFPB's error when it rubberstamped ALJ Kirby's rubberstamp review. ALJs, agencies, and the lower courts require additional guidance from this Court.

2. *The challenges to the* Lucia *remedy in this case were properly presented below, properly reserved, and addressed on the merits.*

Integrity raised the adequacy of the post-*Lucia* hearing claim throughout the proceedings, preserving the challenge for this Court's plenary review. A party may preserve a claim for this Court's review by raising the issue in the proceedings below. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378–79 (1995). "[T]his principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the *substance* of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (emphasis added). This Court can therefore review issues "raised in a court below" when the issue "was actually considered and decided" on the merits. *Orr v. Orr*, 440 U.S. 268, 274–75 (1979).

Integrity preserved the Appointments Clause issue by raising it in both of the prior proceedings below. See App. 15a, 81a. And the Tenth Circuit addressed the issue on the merits. This case therefore presents a clean vehicle for addressing the *Lucia* remedy question.

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ALJs have interpreted *Lucia*'s remedy in wildly inconsistent fashion along a wide spectrum of potential options: from requiring an actual, "soup-to-nuts" new hearing to simply rubberstamping the tainted ALJ's decision purportedly based on a cold paper record review. Only this Court can provide the necessary guidance on what *Lucia* actually requires to

cure an Appointments Clause violation, guidance much needed by ALJs, agencies, and lower courts.

II. Whether the CFPB's structure is unconstitutional under the Appropriations Clause—thus invalidating agency actions taken under that structure—is an important, unsettled question of federal law meriting this Court's review.

James Madison wisely observed that "a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a *tyrannical concentration of all the powers of government*." The Federalist No. 48 (James Madison) (emphasis added). Yet, since its creation, the CFPB's unique structure has violated this basic tenet of the nation's constitutional arrangement: the CFPB was created as a *completely* independent agency because its Director was insulated from any meaningful presidential supervision, and its budget was essentially guaranteed without any congressional or presidential support, approval, or oversight. Thus, the CFPB was situated as effectively unanswerable to the President or Congress.

This Court remedied the lack of presidential control over the Director in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) by striking the statutory for-cause removal provision with respect to the Director. But the Court has not yet considered the CFPB's unique funding scheme, which is equally alarming and "outside the [normal] appropriations process

[and] further aggravates the agency's threat to Presidential [and congressional] control," *id.* at 2204, in violation of the Appropriations Clause.

A. The CFPB's funding structure presents an important, unsettled question of federal law.

The CFPB's unique funding structure renders it almost entirely independent of any political branch's control, either executive or legislative. Typically, federal agencies receive funding from congressional appropriations in conformance with the Constitution's Appropriations Clause. See U.S. Const. Art. I, § 9, Cl. 7. The Appropriations Clause ensures congressional control over the federal government's spending, with presidential input—as the Framers intended. See The Federalist No. 48 (James Madison) ("[T]he legislative department alone has access to the pockets of the people."). It provides both the President and Congress with influence over otherwise "independent" agencies by allowing the President to propose annual agency budgets and Congress to approve or disapprove those proposals. Most agencies must also obtain Office of Management and Budget approval of their proposed budgets. See generally Eloise Pasachoff, *The President's Budget As A Source of Agency Policy Control*, 125 Yale L.J. 2182, 2223 (2016) ("[o]nly a small subset of agencies are not affected by OMB's approval lever," including the Federal Reserve System, which is the CFPB's funding source). And, ultimately, Congress must approve budget appropriations in legislation.

The CFPB, however, does not have to submit budget requests through the standard appropriations process. Instead, the Director unilaterally determines "the amount . . . reasonably necessary to carry out the authorities of the Bureau," which the Federal Reserve "shall transfer" so long as it does not exceed 12% of the Federal Reserve's total operating expenses. 12 U.S.C. § 5497(a)(1–2).

The CFPB's unique funding mechanism amounts to unconstitutional insulation from presidential and congressional oversight: the agency sets its own priorities and draws its own funds from an independent source. This Court already has warned that the CFPB's "Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy," given the agency's broad statutory enforcement powers. *Seila Law*, 140 S. Ct. at 2191. And the CFPB directly implements that authority with its vast budget—for example, some half-billion dollars for the first half of 2023's fiscal year. See *Funds transfer requests*, CFPB, https://www.consumerfinance.gov/about-us/budget-strategy/funds-transfer-requests/ (last visited Feb. 27, 2023).

The CFPB's funding arrangement is a clear threat to the separation of powers. With control of its own purse strings, the CFPB can independently and without check determine what policies it pursues, what industries and individuals it investigates and prosecutes, and how much money it is willing to spend in doing so. Neither the President nor Congress has any authority under the Appropriations Clause to

direct, supervise, or influence this agency. This is an extraordinary and unprecedented situation in our constitutional history and tradition. The CFPB, in theory an executive agency, must be subject to the constitutional principle that "[t]he buck stops with the President." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493 (2010). The CFPB's unusual independent funding structure raises an important question of constitutional law which merits this Court's review.

B. The Circuits have split over the constitutionality of the CFPB's funding structure.

The Circuits are split over the constitutionality of the CFPB's funding structure, a situation alone warranting an exercise of this Court's plenary review. The Fifth Circuit recently held that the CFPB's unprecedented funding mechanism violates the Constitution, while the D.C. Circuit and the Ninth Circuit have upheld it as an extension of the traditional independence afforded to financial regulators.[6] Compare *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616 (5th Cir. 2022), cert. granted, No. 22-448 (Feb. 27, 2023)[7] with *PHH Corp.*

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[6] These decisions are in tension with this Court's recent observation that "even assuming financial institutions like the Second Bank and the Federal Reserve can claim a special historical status, the CFPB is in an entirely different league. It acts as a mini legislature, prosecutor, and court." *Seila Law*, 140 S. Ct. at 2202 n.8.

[7] The Court granted the petition in *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, No. 22-448 on February 27, 2023. The Court's grant obviously might affect the disposition of this petition. One

v. CFPB, 881 F.3d 75 (D.C. Cir. 2018) (en banc) and *CFPB v. Nationwide Biweekly Admin., Inc.*, Nos. 18-15431, 18-15887, 2023 WL 566112 (9th Cir. Jan. 27, 2023).

This direct split of authority and the resulting uncertainty in the law is counter-productive for both regulators *and* the regulated. The CFPB now has no authority to act in the Fifth Circuit, while it does in the D.C. Circuit and the Ninth Circuit. But these decisions call into question the CFPB's authority to act in all the other Circuits. This Circuit split already has upended proceedings in district courts nationwide, inserting new issues into protracted proceedings, and causing some courts to simply stay matters pending the resolution of this important constitutional question. See, *e.g.*, *CFPB v. MoneyGram Int'l, Inc.*, No. 22-cv-3256, Doc. 52 (S.D.N.Y. Dec. 9, 2022); *CFPB v. FirstCash, Inc.*, No. 21-cv-1251, Doc. 67 (N.D. Tex. Nov. 4, 2022); *CFPB v. Progrexion Marketing, Inc.*, No. 19-cv-298, Doc. 484 (D. Utah Oct. 21, 2022); *CFPB v. TransUnion*, No. 22-cv-1880, Doc. 45 (N.D. Ill. Oct. 20, 2022).

This issue bears directly on the CFPB's prior enforcement actions—including this matter—all of which were the direct product of an unconstitutional

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possibility is to "hold" this petition until that case is resolved on the merits. Another possibility is to grant this petition independently because it presents a certworthy issue not present in the Fifth Circuit case as it has implications beyond the CFPB, specifically touching upon *Lucia*'s remedy in all federal agencies, as the OSG noted. The cases could proceed along parallel tracks with the merits disposition timing coordinated by the Court.

funding scheme. The CFPB's structure was *void ab initio* since "the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment." *Collins v. Yellen*, 141 S. Ct. 1761, 1788–89 (2021). And this unconstitutional provision has "inflict[ed] compensable harm," *id.*, from the years petitioners spent litigating the claims to the CFPB's "knee-buckling penalties." *Seila Law*, 140 S. Ct. at 2202 n.8. In this case, the CFPB's unaccountable funding facilitated a years-long prosecution with an extremely harsh outcome for petitioners. The harm the CFPB's actions have caused demands a "rewinding of agency action," to undo the improperly insulated enforcement action brought against petitioners. *Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring).[8]

C. This case is an ideal vehicle to decide whether the CFPB's funding structure violates the Appropriations Clause.

The case is an ideal vehicle to consider the constitutionality of the CFPB's funding structure. Since the beginning of these proceedings, petitioners argued the CFPB's structure in general conflicts with the Constitution's separation of powers.

This Court has the prudential authority to consider "any argument in support" of a "federal claim

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[8] The Fifth Circuit agreed that such a "rewinding" was the proper remedy to a similar challenge, noting this Court's separation-of-powers precedent: "In considering other violations of the Constitution's separation of powers, the Supreme Court has rewound the unlawful action by granting a new hearing, *see Lucia*." *Cmty. Fin. Servs. Ass'n of Am.*, 51 F.4th at 643.

[once] properly presented." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal citation omitted); see also *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) ("[T]he refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary."). Furthermore, "parties are not limited to the precise arguments they made below" when seeking this Court's review. *Lebron*, 513 U.S. at 379 (internal citation omitted). And in any case, this Court has "consistently recognized a futility exception to exhaustion requirements," noting that "[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested." *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021) (*citing Bethesda Hosp. Ass'n. v. Bowen*, 485 U.S. 399, 405–406, (1988) and *Mont. Nat'l Bank of Billings v. Yellowstone Cnty.*, 276 U.S. 499, 505 (1928)).

Where, as here, the CFPB's ALJ "ha[d] no special expertise" on constitutional claims, *id.*, and she was powerless to remedy the CFPB's unconstitutional appropriations structure, simplistic notions of issue exhaustion are inapplicable. As in *Lebron*, petitioners have presented one claim: the CFPB's structure violates the separation of powers.[9] Furthermore, the

[9] Were the Court to conclude petitioners did not raise this issue at the agency level, federal courts have made exceptions to agency exhaustion rules for "significant issues of law that are jurisdictional in nature, constitutional in magnitude or otherwise

Fifth Circuit's decision was issued after petitioners filed their petition for rehearing and rehearing en banc in the Tenth Circuit. Petitioners immediately supplemented their petition to reflect the Fifth Circuit's decision and to highlight their separation of powers arguments from earlier briefs.

By declining to rehear this case (either the panel or en banc), the Tenth Circuit skirted this important issue, leaving petitioners with no recourse but to seek this Court's plenary review.

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so compelling as to require judicial review." *N. Wind, Inc. v. Daley*, 200 F.3d 13, 18 (1st Cir. 1999); see also *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1115 (D.C. Cir. 1979). The unconstitutional funding scheme issue is both jurisdictional and constitutional, *i.e.*, how does an *ultra vires* agency take any constitutional action?

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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March 1, 2023

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APPENDIX A

48 F.4th 1161

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

[FILED September 15, 2022]

No. 21-9521

INTEGRITY ADVANCE, LLC; JAMES R. CARNES,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

Petition for Review of an Order from the
Consumer Financial Protection Bureau
(Consumer No. 2015-CFPB-0029)

Richard J. Zack (Michael A. Schwartz and Christen M. Tuttle, with him on the brief), of Troutman Pepper Hamilton Sanders LLP, Philadelphia, Pennsylvania, for Petitioners.

Lawrence DeMille-Wagman, Senior Litigation Associate (Stephen Van Meter, Acting General Counsel; Steven Y. Bressler, Acting Deputing General Counsel; and Kevin E. Friedl, Senior Litigation Counsel; Consumer Financial Protection Bureau, with him on the brief) Washington D.C., for Respondent.

Before TYMKOVICH, Chief Judge, PHILLIPS, and McHUGH, Circuit Judges.

Opinion

PHILLIPS, Circuit Judge.

Integrity Advance, LLC operated as a nationwide payday lender offering short-term consumer loans at high interest rates. In 2015, the Consumer Financial Protection Bureau ("Bureau") brought an administrative enforcement action against Integrity and its CEO, James Carnes (collectively, "Petitioners"). The Notice of Charges alleged violations of the Consumer Financial Protection Act ("CFPA"), the Truth in Lending Act ("TILA"), and the Electronic Fund Transfer Act ("EFTA").

Between 2018 and 2021, the Supreme Court issued four decisions—*Lucia v. SEC*, *Seila Law v. CFPB*, *Liu v. SEC*, and *Collins v. Yellen*—that bore on the Bureau's enforcement activity in this case. These opinions decided fundamental issues such as the Bureau's constitutional authority to act and the appointment of its administrative law judges ("ALJ"). The series of decisions led to intermittent delays and restarts in the Bureau's case against Petitioners. For instance, two different ALJs decided the present case years apart, with their recommendations separately appealed to the Bureau's Director. Ultimately, the Director mostly affirmed the recommendations of the second ALJ.

Petitioners have appealed the Director's final order to our court under 12 U.S.C. § 5563(b)(4). They ask that we vacate the order, or at least remand for a new hearing, mainly arguing that the Director's order didn't give them the full benefit of the Supreme Court's rulings. For the reasons below, we reject Petitioners' various challenges and affirm the Director's order.

BACKGROUND

I. Factual Background

From 2008 to 2013, Integrity operated nationwide as a payday lender. It was founded and run by James Carnes, its CEO.[1] The company offered short-term, small-dollar consumer loans at high interest rates. Integrity's loans usually ranged from $100 to $1,000 and were its only financial product. Though the law usually allows for non-coercive contractual arrangements between private parties, it sometimes requires heightened disclosure for loan agreements between parties of disparate bargaining power.

As relevant here, TILA requires loan providers to disclose material terms about the structure of their offered loans. Though Integrity provided borrowers TILA disclosure documents, it misled borrowers about the loan structure. Its disclosure documents misleadingly implied that the loans were single-payment loans. In fact, the loans typically resulted in multi-payment installment loans that automatically renewed. So absent undoing the automatic renewal, borrowers were left paying more in fees than Integrity had disclosed.

In January 2012, the Bureau and the Federal Trade Commission ("FTC") entered a Memorandum of Understanding by which the two agencies agreed to share information about their enforcement activities and any consumer complaints received. In March 2012, the Bureau searched the FTC database for consumer complaints about Integrity. The search

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[1] Integrity was owned by Hayfield Investment Partners. Carnes was technically employed by Hayfield. The Bureau tells us that Carnes called himself Integrity's "de facto" CEO because Integrity had no employees of its own. Resp. Br. at 4 n.4.

returned complaints revealing consumer confusion about the true cost of Integrity's loans. From this, the Bureau began investigating Integrity and its loan practices.

II. Procedural Background

A. The Bureau's Initial Investigation

In January 2013, the Bureau sent Integrity a civil investigative demand ("CID") to obtain more information on Integrity's practices, its officers, and employees.[2] Included in this requested information were copies of Integrity's loan documents. Nine months later, in October 2013, Integrity produced its initial responses to the CID. It completed production in December 2013. In June 2014, the Bureau held an investigative hearing and took Carnes's testimony. During that hearing, Carnes described his role at Integrity and acknowledged that he had the ultimate say over all of Integrity's policies and procedures.

From its investigation, the Bureau concluded that Integrity's loan documents violated federal law. The Bureau learned that Integrity charged a fixed price of $30 for first-time customers for every hundred dollars borrowed per pay period. For repeat customers, Integrity charged $24 per hundred dollars per pay period. Though Integrity provided each borrower TILA disclosures, the disclosures misled borrowers into believing that they would pay off the loan with a single payment. But if a borrower didn't call Integrity three days before his or her next payment was due and request to pay the loan in full, the loan would

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[2] CIDs work like civil subpoenas, and executive-branch departments or agencies commonly issue them in their investigations. The Bureau has statutory authority to issue CIDs under 12 U.S.C. § 5562(c)(1).

automatically default into four cycles of "auto-renewal" status. Dkt. 308 at 5. If the borrower failed to act after four renewals, the loan would enter an "auto-workout" status. *Id.* This meant that Integrity would debit the consumer's personal banking account for a "finance charge[ ]" plus a "principal payment of $50.00" *Id.* at 4. The loan would remain in auto-workout status until it had been paid off. As an example, the Bureau tells us that "it could take a borrower many months to repay a $300 loan, and the loan would cost that borrower $1065 even though [Integrity]'s TILA disclosures listed the total of payments as $390." Resp. Br. at 6.

The Bureau also learned that Integrity's loan documents required customers to provide direct automated-clearinghouse ("ACH") withdrawals from their bank accounts. If a customer tried to retract his or her ACH authorization, Integrity could remotely generate paper checks and withdraw payments directly from the customer's bank account.

On November 18, 2015, based on its gathered evidence, the Bureau filed a Notice of Charges against Petitioners. The Notice of Charges alleged that Integrity—as the loan provider—had violated TILA (Count I), EFTA (Count V), and CFPA (Counts II, III, IV, VI, and VII). The Bureau also alleged that Carnes had violated CFPA (Counts III, IV, and VII) given his knowledge of the misleading disclosures and his role as CEO.

a. The First Administrative Hearing

When the Bureau filed its Notice of Charges, the CFPB lacked an in-house ALJ. So the Bureau enlisted Parlen McKenna, an ALJ with the U.S. Coast Guard, to hear the case. In July 2016, ALJ McKenna held a

three-day evidentiary hearing. The Bureau called six witnesses, and Petitioners called two. The parties also introduced documentary evidence. After considering all the evidence, ALJ McKenna ruled that the Bureau had proved all the active counts.[3] ALJ McKenna recommended that the Director order Petitioners to pay $38 million of restitution, jointly and severally, plus "first-tier"[4] civil penalties of $8.1 million from Integrity and $5.4 million from Carnes. Dkt. 176 at 74, 80–81.

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[3] The Bureau had earlier stipulated to dismiss Count IV with prejudice before ALJ McKenna because it was duplicative of Count III. *See* Resp. Br. at 9–10 n.8 ("[T]he parties agreed that the consumer harm resulting from Count III was coextensive with Count IV."). This was because Count III alleged that Petitioners violated CFPA because Integrity's loan disclosures were *deceptive* and Count IV alleged that they violated CFPA because the loan disclosures were *unfair*. However, under the terms of the remand from the Director, the earlier dismissal of Count IV had no effect. Still, while the Director held that the Bureau properly pursued Count IV before ALJ Kirby, Count IV appears to make no difference to the ordered remedy. We assume it does not, because Petitioners make no argument explaining whether the revival of Count IV affects the resolution of the issues they raise on appeal.

[4] CFPA provides that "[a]ny person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty[.]" 12 U.S.C. § 5565(c)(1). CFPA establishes three tiers of penalties with statutory maximums ranging from $5000 to $1 million (before adjustments for inflation) for each day during which a violation continues. "A first-tier penalty requires no showing of scienter; a second-tier penalty applies to 'any person that recklessly engages in a violation' of the CFPA; and a third-tier penalty applies to 'any person that knowingly violates' the CFPA." *See CFPB v. CashCall*, 35 F.4th 734, 741 (9th Cir. 2022) (citing 12 U.S.C. § 5565(c)(2)(A)–(C)).

In 2016, Petitioners appealed the ALJ's decision to the Bureau's Director.[5] But the Director (and later the Bureau's Acting Director) held the appeal in abeyance pending the Supreme Court's decision in *Lucia v. SEC*, —— U.S. ——, 138 S. Ct. 2044, 201 L.Ed.2d 464 (2018). That case would soon decide the constitutional status of Securities & Exchange Commission administrative law judges.

In June 2018, the Supreme Court ruled that the SEC's ALJs were constitutional officers. That meant the Appointments Clause—U.S. Const. art. II, § 2, cl. 2—required that the ALJs be appointed by the President, a court of law, or a department head. *Lucia*, 138 S. Ct. at 2051, 2053–54. In May 2019, the Director concluded that *Lucia* required that ALJ McKenna be appointed under the Appointment Clause too. Because he hadn't been, the Director remanded the case to a constitutionally appointed ALJ for a "new hearing."

b. The Second Administrative Hearing

By the time the Supreme Court decided *Lucia*, the Bureau had obtained an in-house ALJ, Christine Kirby. She had been appointed in conformity with the Appointments Clause. In remanding Integrity's case to ALJ Kirby, the Director instructed her to "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by" ALJ McKenna. Dkt. 308 at 8.

Though Petitioners requested a "new hearing" in which they could further develop the record, ALJ Kirby determined that ALJ McKenna had given the

[5] Parties may appeal an ALJ's recommendation to the Director under 12 C.F.R. § 1081.402(a)(1). Otherwise, the Director can accept or reject the recommendation under 12 C.F.R. § 1081.402(b).

parties an adequate opportunity to present their case. Thus, she announced her "intent[ion] to conduct a *de novo* review of the record—to the extent possible." Dkt. 269 at 5. She clarified that she "w[ould] consider the parties' arguments as to whether the record need[ed] to be supplemented or whether portions of the record that were previously admitted should be struck." *Id.* But Petitioners wanted their proceedings before ALJ Kirby to include additional "pre-hearing discovery and an evidentiary hearing with the opportunity for both sides to present evidence and examine witnesses" beyond what they had presented before ALJ McKenna. Dkt. 295 at 12. Nevertheless, Petitioners (and the Bureau) each moved for summary disposition on the existing record.

In June 2020, while the summary-disposition motions were pending, the Supreme Court decided another case bearing on the Bureau's enforcement activities.[6] In *Seila Law LLC v. CFPB*, —— U.S. ——, 140 S. Ct. 2183, 207 L.Ed.2d 494 (2020), the Court reviewed a challenge to the Bureau's authority to issue a CID for documents from the law firm of Seila Law. *Id.* at 2194. The law firm had refused to comply with the CID, based on its assertion that the Bureau was unconstitutionally structured.[7] *Id.* Though the Bureau prevailed

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[6] *Liu v. SEC*, —— U.S. ——, 140 S. Ct. 1936, 207 L.Ed.2d 401 (2020), is another important case decided a week before *Seila Law*. The case is relevant to Petitioners' challenge to the Director's ordered remedies. Though Petitioners preserved their arguments challenging the ordered remedies, they didn't cite *Liu* in their appeal before the Director. Nor did the Director discuss *Liu*. *See generally*, Dkt. 308.

[7] Throughout this opinion, our references to the Bureau's unconstitutional "structure" relate to Congress's having limited the President's authority to remove the Bureau's Director by requiring that the removal be for cause.

in the Ninth Circuit, the Supreme Court reversed. *Id.* at 2195–97. It held that Congress had structured the Bureau by making its director removable by the President only for "inefficiency, neglect, or malfeasance" in violation of the separation of powers. *Id.* at 2197; *see also* 12 U.S.C. § 5491(c)(3) ("The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.").

By the time the Supreme Court heard the case, Congress had revised the Bureau's structure to authorize the President to remove the Bureau's Director without cause. *Id.* at 2208. And by then, the newly, properly appointed Director had ratified the previously issued CID.[8] *Id.* In this circumstance, the Court declared that the ratification issue "turn[ed] on case-specific factual and legal questions not addressed below and not briefed[.]" *Id.* Thus, it remanded the case for the Ninth Circuit "to consider whether the civil investigative demand was validly ratified." *Id.* at 2211.

In August 2020, ALJ Kirby recommended that Petitioners be held liable on all counts. She recommended that the Director hold Integrity responsible for $132.5 million in equitable restitution. Of this amount, she recommended that Carnes be held responsible for $38.4 million, jointly and severally. ALJ Kirby spared Carnes the $95.1 million difference for two reasons: (1) the Bureau hadn't charged him under all CFPA counts, and (2) the Bureau lacked

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[8] On remand, the Ninth Circuit held that the Director's ratification "remedies any constitutional injury that Seila Law may have suffered due to the manner in which the CFPB was originally structured." *CFPB v. Seila Law LLC*, 984 F.3d 715, 718 (9th Cir. 2020). That enabled the Bureau to enforce the disputed CID. *Id.* at 720.

statutory authority to enforce CFPA against Carnes until July 21, 2011, the date that the Bureau obtained its full range of authorities under CFPA. *See* Dkt. 308 at 26 n.8 (identifying the effective date of most of the Bureau's statutory authority as July 21, 2011).[9] She also recommended that the Director impose civil monetary penalties of $7.5 million against Integrity and $5 million against Carnes.

Petitioners appealed ALJ Kirby's recommendation to the Director. Petitioners contend that they "took exception to the Recommended Decision in its entirety, including but not limited to, all findings of liability, all relief recommended by the ALJ, and the ALJ's decision to deny [their] motion for Summary Disposition." Op. Br. at 9.

In January 2021, the Director adopted ALJ Kirby's recommendations on Petitioners' liability. The Director concluded that Integrity had violated TILA by using disclosures that misled borrowers into believing that their loans were single-payment loans, not multi-payment installment loans. The Director also determined

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[9] In creating the Bureau, Congress afforded the agency time to implement its statutory functions. 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010). Agencies previously enforcing consumer-protection laws needed to transfer their responsibilities to the Bureau. *Id.* Congress concluded that a "transfer date of July 21, 2011 . . . will provide the CFPB an appropriate period of time to hire and assign employees to support its new functions, as well as to plan and make important decisions necessary to build a strong foundation for the new agency." *Id.* at 57253. On this "designated transfer date, the 'consumer financial protection functions' currently carried out by the Federal banking agencies, as well as certain authorities currently carried out by the Department of Housing and Urban Development and the Federal Trade Commission" were transferred to the Bureau. *Id.* (footnote omitted).

that Integrity had violated EFTA by requiring consumers to accept the ACH authorization as a loan condition. The Director concluded that both Petitioners had violated CFPA (1) by providing deceptive loan disclosures, and (2) by using checks that Integrity created remotely, with the consumers' identifying information and without authorization, to withdraw their funds from their personal bank accounts if the ACH authorization failed.

The Director mostly adopted ALJ Kirby's recommended restitution award and civil penalties. The Director reduced the restitution award against Integrity from $132.5 million to $38.4 million, the sum needed to compensate Petitioners' borrowers for harms suffered after July 21, 2011. The Director also imposed this restitution amount jointly and severally. But the Director departed from ALJ Kirby's characterization of the restitution award as an equitable, not legal, remedy.[10] Instead, the Director chose both, concluding that "[w]hether as a matter of *equity or law* . . . an award of restitution is justified both to remedy the losses consumers suffered . . . and to deprive Respondents of the amounts that they gained as a result of their unlawful conduct." Dkt. 308 at 35 (emphasis added). Finally, the Director agreed with ALJ Kirby's recommendation to impose civil penalties

[10] Addressing the Petitioners' request for legal, not equitable, restitution, ALJ Kirby noted that the Bureau "d[id] not cite to any authority or cases applying this theory in the context of a CFPB case and [Integrity and Carnes] argue that no such authority exists." Dkt. 293 at 79. ALJ Kirby was "not convinced that [the Bureau's] theory of 'legal' restitution is applicable to the present matter." *Id.* She concluded that she "need not decide this issue because . . . an award of 'equitable' restitution is nevertheless appropriate." *Id.*

of $7.5 million from Integrity and $5 million from Carnes.

Acknowledging *Seila Law*, the Director ruled that in November 2015 (when the Notice of Charges was filed) the Bureau had been unconstitutionally structured because of the statutory limits on the President's removal authority. But the Director concluded that she could cure any associated problems by ratifying the Notice of Charges. Thus, the Director "ratif[ied] the Bureau's decision to file the Notice of Charges and to prosecute th[e] action." Dkt. 308 at 19.

Petitioners appeal the Director's final decision to our court.

III. Standard of Review

"We review agency action under the Administrative Procedure Act." *Ukeiley v. EPA*, 896 F.3d 1158, 1163 (10th Cir. 2018). Our review requires us to determine whether the agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *WildEarth Guardians v. Conner*, 920 F.3d 1245, 1256 (10th Cir. 2019) (quoting 5 U.S.C. § 706(2)(a)(A)). We review purely legal questions de novo. *Karki v. Holder*, 715 F.3d 792, 800 (10th Cir. 2013). And we review factual findings for substantial evidence. *Forest Guardians v. U.S. Fish and Wildlife Serv.,* 611 F.3d 692, 704 (10th Cir. 2010). Evidentiary rulings and the agency's chosen remedies are reviewed for abuse of discretion. *United Steelworkers of Am. v. NLRB*, 376 F.2d 770, 773 (D.C. Cir. 1967); *Cintas Corp. v. NLRB*, 589 F.3d 905, 913 (8th Cir. 2009).

DISCUSSION

Petitioners challenge the Director's final order on three primary grounds. *First*, they argue that we

should set aside the Bureau's entire enforcement action because the Bureau was unconstitutionally structured when it filed its charges. *Second*, they argue that the enforcement action resulted in multiple due-process violations, chief among them being a deprivation of their right under *Lucia* to a "new hearing."[11] *Third*, they argue that the Director's restitution award is unlawful because it concerns an equitable remedy that must account for Petitioners' business expenses.

I. The Bureau's Structure

Petitioners argue that an unconstitutionally structured agency lacks authority to act. And as mentioned, *Seila Law* held that in 2015 the Bureau was in fact unconstitutionally structured (as limiting the President's removal power) when it filed its Notice of Charges. From this, Petitioners conclude that the Bureau's enforcement action against them must be set aside entirely.

In June 2021, after Petitioners filed their opening appellate brief, the Supreme Court rejected a similar argument in *Collins v. Yellen*, —— U.S. ——, 141 S. Ct. 1761, 210 L.Ed.2d 432 (2021). First, after concluding that *Seila Law* was "all but dispositive," the Court ruled that a "for cause" restriction on the President's ability to remove the Federal Housing Finance Agency ("FHFA") Director (a principal officer) violated separation of powers. *Id.* at 1783–84. Next, the Court considered whether that defect rendered the FHFA's prior actions void ab initio. *Id.* at 1787. The Court ruled that it did not, noting that the FHFA's leadership had been properly *appointed* when they

[11] Petitioners also present a handful of arguments that pertain only to Carnes. We address these arguments in their own section of this opinion.

took the disputed actions. *Id.* Because "there was no constitutional defect in the statutorily prescribed method of appointment of that office," the Court concluded that "there is no reason to regard any of the actions taken by the FHFA in relation to the [the disputed actions] as void."[12] *Id.*

In addition, *Collins* put to rest another of Petitioners' present arguments. In response to the argument that the agency's ratification of its earlier decisions wasn't timely, the Court in *Collins* ruled that an agency need not even ratify the actions it took while it was unconstitutionally structured. *Id*. at 1788. In reaching this conclusion, the Court rejected their claim that *Seila Law* said otherwise. *Id.* That resolves Petitioners' contention that the ratification here was impermissible for occurring after the three-year limitations period for filing the Notice of Charges had supposedly expired. *See* 12 U.S.C. § 5564(g)(1); *see also CashCall*, 35 F.4th at 742 ("We find it unnecessary to consider ratification because [*Collins v. Yellen*] has made clear that despite the unconstitutional limitation on the President's authority to remove the Bureau's Director, the Director's actions were valid when they were taken.").

Still, *Collins* left open an avenue of relief for potential injuries stemming from the actions of an unconstitutionally structured agency. On the issue of

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[12] Just two days before issuing *Collins*, the Court cautioned against any approach that would invalidate swaths of administrative decisions. *See generally United States v. Arthrex, Inc*., —— U.S. ——, 141 S. Ct. 1970, 1986–88, 210 L.Ed.2d 268 (2021) (reaffirming the general principle that "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem" (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006))).

relief, the Court remanded "for further proceedings to determine what remedy, if any, the shareholders are entitled to receive on their constitutional claim." 141 S. Ct. at 1770. It observed that "the possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect cannot be ruled out." *Id.* at 1789. So the Court concluded that a future plaintiff may be able to challenge actions taken by an unconstitutionally structured agency by alleging "compensable harm." *Id.* As possible instances, the Court raised situations in which the President had wanted to remove the director but was stopped by a lower court decision or by heeding a statute disallowing it. *Id.* Petitioners in our case don't point to any such "compensable harm" resulting from the Bureau's unconstitutional structure. We therefore find no avenue of relief available to them under *Collins*.

We heed *Seila Law*'s admonition that we are to use a "scalpel rather than a bulldozer" in remedying a constitutional defect. *See Seila Law*, 140 S. Ct. at 2210–11. So, because the Director's actions weren't unconstitutional, we reject Petitioners' argument to set aside the Bureau's enforcement action in its entirety.

II. Petitioners' Due-Process Claims

Petitioners next complain of what they characterize as due-process violations. They argue that ALJ Kirby's proceeding fell short of the "new hearing" referenced in *Lucia*. They also challenge some of the ALJ's evidentiary rulings. We address these arguments in turn.

A. A "New Hearing" Under *Lucia v. SEC*

In *Lucia*, the Supreme Court provided a remedy for the Appointments Clause violation, namely, a "new hearing" before a constitutionally appointed ALJ. 138 S. Ct. at 2055. Petitioners argue that a "new hearing"

must allow additional evidence and arguments—it can't just be a de novo review of the existing record. Unfortunately, *Lucia* offers little guidance on the constitutional requirements of a "new hearing." In fact, it simply cites *Ryder v. United States*, 515 U.S. 177, 115 S.Ct. 2031, 132 L.Ed.2d 136 (1995), for the proposition that a new hearing is required. *See Lucia*, 138 S. Ct. at 2055. But *Ryder* doesn't help us much either, as it simply requires "a hearing before a properly appointed panel" of military court judges. 515 U.S. at 188, 115 S.Ct. 2031.

We do find helpful a D.C. Circuit case applying *Ryder* and rejecting an argument that a "new hearing" must be more than de novo review by a different ALJ. In *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 796 F.3d 111 (D.C. Cir. 2015), the court noted that appellant's sole support for re-opening an administrative proceeding on remand was "a single sentence at the end of the [*Ryder*] opinion," but "[n]othing in that sentence suggests that a new hearing would have been required if the reviewing court had possessed de novo authority." *Id.* at 120.

Petitioners have provided no support for a bright-line rule against de novo review of a previous administrative hearing. Nor do we see a reason for a more extensive hearing. The Appointments Clause violation notwithstanding, Petitioners had a full opportunity to present their case in the first proceeding. ALJ Kirby independently reviewed the existing record before relying on it. And she permitted Petitioners to challenge ALJ McKenna's previous determinations. Ultimately, she agreed with most of ALJ McKenna's recommendations and rejected Petitioners' various challenges. We see no error.

B. Evidentiary Rulings

Petitioners raise a handful of evidentiary challenges to the Bureau's decision. They argue that ALJ Kirby erred by not permitting evidence about Integrity's operational expenses,[13] about their reliance on counsel, and about the credibility of certain witnesses.[14] Petitioners must show that the Bureau abused its discretion by excluding this evidence. *See Manna Pro Partners, L.P. v. NLRB*, 986 F.2d 1346, 1353 (10th Cir. 1993).

Petitioners' position lacks support, as they cite no case reversing based on similar alleged error. And even without deferential review, Petitioners' arguments would still fail. Petitioners argue that ALJ Kirby prevented them from presenting their advice-of-counsel defense. They say that this defense would have negated the restitution award and civil penalties. In support, they assert that Carnes "did not draft, revise, or substantively review or approve the Loan Agreement, but instead relied on [his] legal counsel." Op. Br. at 4, 35–36. But we don't see where ALJ Kirby prevented Carnes from presenting his defense—she just ruled that Carnes's testimony sufficed on this

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[13] We address Petitioners' argument to present evidence of their expenses in Section III of this opinion discussing the Supreme Court's decision in *Liu v. SEC*.

[14] Petitioners also argue that it was legal error for ALJ Kirby to deny their motion to amend their answer to challenge as vague the Bureau's characterization of their practices as unfair, deceptive, or as abusive acts or practices ("UDAAP"). A UDAAP results in the violation of the CFPA. *See* 12 U.S.C. § 5531(a). Petitioners make no effort to brief this argument or explain why it was legal error for ALJ Kirby to deny their request. So we decline to consider it. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

point. *See* Dkt. 269 at 9 ("Respondents state in their brief that Respondent Carnes previously testified that he relied upon his outside counsel to draft the loan agreement and to ensure it complied with the law . . . . Additional testimony . . . appears unnecessary and, at best, would merely corroborate Carnes' sworn testimony.").

Further, Petitioners' asserted advice-of-counsel defense isn't relevant to the restitution award. Petitioners' contrary argument relies on two district court cases. But the Ninth Circuit has reversed one of their cases on grounds that reliance on counsel is neither an appropriate basis to deny CFPA liability nor to deny restitution. *See CashCall, Inc.*, 35 F.4th at 749. Nor is advice of counsel relevant to the appropriateness of civil penalties under 12 U.S.C. § 5565, unless "heightened" civil penalties are imposed. *See id.* at 750. Petitioners weren't subject to heightened civil penalties.

Petitioners also challenge ALJ Kirby's decision to forgo live testimony despite its help in evaluating the credibility of witnesses. But nothing requires an ALJ to "observe a witness'[s] live testimony," and Integrity never "articulated sufficient grounds for [ALJ Kirby] to recall any of the witnesses for this purpose." *See* Dkt. 269 at 7. So we find no abuse of discretion.

III. Carnes's Due-Process Claims

Carnes alleges three due-process violations pertaining solely to himself: (1) CFPA's statute of limitations had expired before the November 2015 Notice of Charges; (2) the Director wrongly upheld ALJ Kirby's denial of Carnes's discovery request seeking information relating to the statute of limitations; and (3) that ALJ Kirby granted summary disposition over

Carnes's liability despite the existence of genuine factual disputes.[15] These arguments lack merit.

A. Statute of Limitations

Petitioners argue that the Notice of Charges was filed outside the limitations period because the Bureau either did discover or could have discovered Carnes's violations more than three years before it filed its Notice of Charges. Under CFPA, "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)(1). We conclude that § 5564(g)(1)'s limitations period commences when the Bureau either knows of a violation or, through reasonable diligence, would have discovered the violation.

In *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010), the Court considered "the timeliness of a complaint filed in a private securities fraud action." *Id.* at 637, 130 S.Ct. 1784. The Court noted that "[t]he complaint was timely if filed no more than two years after the plaintiffs 'discover[ed] the facts constituting the violation.'" *Id.* (quoting 28 U.S.C. § 1658(b)(1)). The Court held that a claim for relief "accrues (1) when the plaintiff did in fact discover, or (2) when a reasonably diligent plaintiff would have discovered, 'the facts constituting the violation'—whichever comes first." *Id.* The Court further held that "the 'facts constituting the violation' include the fact of scienter, 'a mental state embracing intent to deceive, manipulate, or defraud.'" *Id.* (citation omitted).

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[15] The statute-of-limitations arguments apply to Carnes alone, because the Bureau signed tolling agreements with Integrity to toll the limitations period.

A fraud claim accrues "once a plaintiff has a 'complete and present cause of action.'" *Id.* at 644, 130 S.Ct. 1784 (citation omitted). Otherwise, "a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." *Id.* Thus, in considering accrual, we are mindful of the Court's pronouncement that "unless a § 10(b) plaintiff can set forth facts in the complaint showing that it is 'at least as likely as' not that the defendant acted with the relevant knowledge or intent, the claim will fail." *Id.* at 649, 130 S.Ct. 1784 (citation omitted). Accrual and knowledge go together.

Importantly, the Court rejected Merck's argument that "facts that tend to show a materially false or misleading statement (or material omission) are ordinarily sufficient to show scienter as well." *Id*. As support, the Court noted that "[a]n incorrect prediction about a firm's future earnings, by itself, does not automatically tell us whether the speaker deliberately lied or just made an innocent (and therefore nonactionable) error." *Id.* at 650, 130 S.Ct. 1784.

The Court also rejected Merck's argument that the limitations period accrued when a plaintiff is on "inquiry notice," meaning "the point 'at which a plaintiff possesses a quantum of information sufficiently suggestive of wrongdoing that he should conduct a further inquiry.' " *Id.* (citation omitted). The Court saw nothing in the statutory limitations period signifying "that the limitations period should occur at some earlier moment before 'discovery,' when a plaintiff would have *begun* investigating[.]" *Id.* at 651, 130 S.Ct. 1784.

Petitioners' statute-of-limitations arguments fail just as Merck's did. Petitioners make a debatable argument that by May 18, 2012, the Bureau could

have learned from public information that Carnes was Integrity's CEO. But the limitations period still wouldn't have run by November 18, 2015, when the Bureau filed its Notice of Charges. Before the limitations period would commence, the Bureau needed to know not only that Carnes was Integrity's CEO but also that *he had sufficient knowledge of those violations*. *See CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016). As discussed further below, the Bureau couldn't successfully charge Carnes personally without showing that he "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." *Id.* After all, "scienter is assuredly a fact" that the Bureau would need to prove. *Merck*, 559 U.S. at 648, 130 S.Ct. 1784 (cleaned up). We reject the argument that the receipt of consumer complaints triggered the statute of limitations. As *Merck* says, consumer complaints generally serve only as a "storm warning" that an agency might want to start investigating. 559 U.S. at 653, 130 S.Ct. 1784.

Here, the limitations period wouldn't have commenced earlier than October 2013, when the Bureau received Integrity's responses to the CIDs and deposed Carnes. Carnes hasn't identified what public information would have established his knowledge of Integrity's illegal conduct before then. Petitioners didn't provide the information about Carnes's role and knowledge until late 2013. So the Bureau's November 2015 Notice of Charges is timely.

B. Discovery Requests

Petitioners argue that the ALJ violated their due-process rights by denying Carnes additional discovery on the statute-of-limitations issue. They conclude that

"[t]he Director's denial was an abuse of discretion and, under the circumstances, a denial of Petitioners' due process rights." *See* Op. Br. at 31. But Petitioners cite no authority supporting their view that the ALJ abused her discretion. And the Bureau couldn't have learned of Petitioners' violations until they complied with the Bureau's CID, so additional discovery would have been pointless. Our conclusion might have been different had Petitioners pointed us to public documents that, for example, evinced Carnes's knowledge of Integrity's misleading practices. But, based on the record before us, we reject Petitioners' argument.

What's more, the Bureau complied with Petitioners' valid discovery requests. It produced the consumer complaints and related external communications about Petitioners. Though Petitioners argue that they should have received the Bureau's "internal correspondence" too, Op. Br. at 31, the ALJ didn't err by denying their request. Under 12 C.F.R. § 1081.206(b)(1)(ii), "[t]he Office of Enforcement may withhold a document if: . . . The document is an internal memorandum, note, or writing prepared by a person employed by the Bureau[.]" Nonetheless, Carnes complains that he never received a privilege log for any withheld documents. But the ALJ needn't order a privilege log. *See* 12 C.F.R. § 1081.206(c) ("The hearing officer *may* require the Office of Enforcement to produce a list of documents or categories of documents withheld[.]") (emphasis added).

C. Summary Disposition

Petitioners argue that the Director erred by ruling on summary disposition that Carnes acted with knowledge of Integrity's illegal practices.

Under CFPA, an individual may be held liable for a corporation's violations if "(1) he participated directly in the deceptive acts *or* had the authority to control them and (2) he 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 (citation omitted).[16]

Petitioners don't challenge the finding that Carnes controlled Integrity—the first requirement under *Gordon*. They challenge only the Director's finding under the second requirement of *Gordon* about knowledge. We note that the Director found that Carnes knew about Integrity's misrepresentations and, alternatively, found that Carnes was at least recklessly indifferent to the misrepresentations. *See* Dkt. 308 at 15 ("[T]here is ample evidence that Mr. Carnes knew that [Integrity]'s loan agreement misrepresented the amount that consumers were likely to pay, and also knew that consumers were likely to pay more than the amount disclosed unless they took affirmative action."); *see also id.* at 16 ("While Mr. Carnes asserts that as CEO he was not familiar with the details of [Integrity]'s loan agreement, I conclude that he was at least recklessly indifferent to those details[.]"). Yet, Petitioners' opening brief mentions

[16] In *Gordon*, the Ninth Circuit adopted the test for individual liability for a corporation's actions used under the FTC Act. 819 F.3d at 1193 n.8. Petitioners don't object to importing the Ninth Circuit's test for individual liability from *Gordon*. And the parties all cite *Gordon* in their briefing. We thus follow the Ninth Circuit's articulation of the relevant test in *Gordon*. We note that other courts have similarly relied on the FTC Act to interpret CFPA. *See, e.g.*, *CFPB v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 WL 7188792, at *17 (S.D.N.Y. Dec. 2, 2016).

the words "recklessly" and "indifferent" only when stating the legal standard. *See* Op. Br. at 25, 33. Petitioners' brief provides no basis for why the Director's finding of reckless indifference would be erroneous. *See Bronson v. Swensen*, 500 F.3d 1099, 1104–05 (10th Cir. 2007) (parties must adequately brief the arguments they want our court to consider). So we hold that the Director's order properly found Carnes liable for being recklessly indifferent to Integrity's practices.

Nevertheless, the Director didn't err in also finding that Carnes knew about Integrity's misrepresentations. Petitioners argue that Carnes's reliance on counsel precludes a finding that Carnes was sufficiently knowledgeable. They contend that the Director improperly "disregard[ed] other evidence that Mr. Carnes did not substantively approve the loan agreement and instead relied on outside counsel." Op. Br. at 34. But reliance on counsel isn't a defense to liability. *See CashCall*, 35 F.4th at 749 (Under CFPA, individual liability requires knowledge of the practices that misled consumers, not knowledge that the misleading practices were illegal). Addressing Carnes's review and approval of the loans, the Director had a solid basis to find that "[a]lthough Mr. Carnes did not personally draft the loan agreement that [Integrity] used for those loans, he approved its use." Dkt. 308 at 14; *see also id.* (Carnes testified: "Did they have my approval to use the loan agreement? Yes."); *id.* ("Q. And in most cases they would pay substantially more than the amount that's reflected in the total amounts

of payments box; is that right? A. They would pay more.").[17]

In short, we find the Director's analysis consistent with the applicable standard in *Gordon*. We therefore reject Petitioners' arguments.[18]

IV. Remedies Order

Petitioners challenge the remedies order on the basis that the ALJ and Director didn't allow them to present evidence of their good-faith reliance on counsel (as to restitution and civil penalties) and evidence of their expenses (as to the Director's residual disgorgement order). We reject Petitioners' challenges.

A. Evidence of Good Faith

Petitioners argue that the ALJ erred by disallowing evidence of their good faith through their advice-of-counsel defense. They contend that the Director should have denied restitution or civil penalties based on this evidence. As earlier discussed in Section II.B. of this opinion, Petitioners' advice-of-counsel argument opposing restitution lacks merit. As "developing case law," they cite two district-court decisions from the Ninth Circuit concluding that advice of counsel is relevant to restitution. But since Petitioners' briefing, the Ninth Circuit has ruled otherwise. *See CashCall*,

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[17] Petitioners contest the illegality of Integrity's practice of using remotely created checks to withdraw funds from customer accounts. We agree with the Director that Petitioners' practice was "unfair" under CFPA.

[18] In support of their argument that Carnes didn't know that Integrity's loans were misleading, Petitioners rely on the State of Delaware's approval of their application to do business there. But this didn't include a legal review of the loan document under federal law.

35 F.4th at 750–51 (finding that reliance on counsel is not an appropriate basis for denying restitution.).

As for the civil penalties under CFPA, the Director must consider five possible mitigating factors before imposing a civil-penalty order. *See* 12 U.S.C. § 5565(c)(3). The Director considered all these factors, including good faith, and rejected Petitioners' challenge to the ALJ's recommended civil penalties. As earlier discussed, the ALJ considered Carnes's own testimony on this point and deemed that sufficient. *See* Section III.C., *supra*. This is all that was required.[19]

B. Net Profits and Business Expenses

Petitioners complain that the ALJ kept them from introducing evidence of Integrity's legitimate business expenses. In their opening brief, Petitioners claim an offset for these expenses for any "disgorgement," but not an offset against the restitution award itself. Op. Br. at 39. They acknowledge that "[t]hroughout the proceedings, the CFPB sought restitution rather than disgorgement." *Id.* After that, they note that the Director further ordered that "the Bureau will deposit any remaining funds in the U.S. Treasury as disgorgement" after restitution amounts are transferred to individual consumers. Dkt. 309 at 1.

Because the Director referred to a "disgorgement" remedy, Petitioners seek an offset for expenses on disgorged amounts under *Liu v. SEC*. In that case, the Supreme Court held that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible

[19] Further, Petitioners repeatedly asserted attorney-client privilege in responding to discovery requests, which hindered the Bureau's ability to contest any advice-of-counsel evidence. Petitioners don't dispute this fact.

under [28 U.S.C.] § 78u(d)(5)." 140 S. Ct. at 1940. The Court further ruled that "courts must deduct legitimate expenses before ordering disgorgement under § 78u(d)(5)." *Id.* at 1950. But the present case differs from *Liu*.

Here, the Director ordered the full $38.4 million as both legal and equitable restitution. Petitioners haven't challenged that designation and have thus waived any challenge. So we evaluate the case as one involving a legal, not equitable, remedy. Under § 5565, the Bureau has jurisdiction in "[a]dministrative proceedings or court actions" "to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law." 12 U.S.C. § 5565(a)(1). Among the listed available remedies is "restitution." *Id.* at § 5565(a)(2)(C).

In contrast, *Liu* involved a disgorgement order under a statute allowing only equitable relief. Certainly, the Director in Petitioners' case did describe as "disgorgement" any possible sums deposited in the U.S. Treasury for borrowers the Bureau couldn't locate to reimburse. *See* Dkt. 309 at 1 ("If funds remain after this redress has been completed, the Bureau will deposit any remaining funds in the U.S. Treasury as disgorgement."). But Petitioners offer no authority that such deposits to the U.S. Treasury become equitable disgorgement. In fact, in *Liu*, the Court declared it an "open question" whether such deposits are "consistent with the limitations of § 78u(d)(5)." *Id.* at 1948. The Court noted that "[t]he parties have not identified authorities revealing what traditional equitable principles govern when, for instance, the wrongdoer's profits cannot practically be disbursed to

the victims." *Id.* at 1948–49. Left in this same circumstance, we cannot conclude that Petitioners are entitled to an offset for legitimate business expenses against any future, hypothetical funds collected as legal restitution, but by the Director's order deposited with the U.S. Treasury as disgorgement.[20] Moreover, *Liu* concerned the SEC's authority to order disgorgement under 15 U.S.C. § 78u(d)(5). That statute limits the SEC to granting "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). But 12 U.S.C. § 5565(a) is broader, permitting the Bureau to pursue both equitable and legal relief.

Finally, Petitioners contest the Director's imposition of joint and several liability for restitution or disgorgement "without consideration or evidence of what (if any) profits of the alleged misconduct went to Mr. Carnes individually." Op. Br. at 39–40. The Bureau responds that Petitioners have waived this argument by failing to object to its request for joint and several liability in moving for summary disposition before ALJ Kirby or on appeal before the Director. Petitioners reply that the possibility of disgorgement never arose until the Director issued her order, so they couldn't have objected to its joint and several nature. Even so, Petitioners could have objected to joint and several liability for the full restitution award of $38.4 million.

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[20] In their reply brief, Petitioners enlarge their argument to assert that the Director "ordered that the entire award be retained by the government as 'disgorgement,' in essence, turning the remedy into a disgorgement award." Reply Br. at 18 (citing Dkt. 309 at 1). In addition to asserting a new argument in the reply brief, Petitioners mischaracterize the record as cited, which does not support their account of it.

In that circumstance, we conclude that Petitioners have waived this issue too.[21]

CONCLUSION

The Director's order is affirmed.

PHILLIPS, Circuit Judge, concurring.

In contesting the Director's restitution award, Petitioners don't challenge the Director's approval of restitution as a legal (as well as an equitable) remedy. Though I agree that Petitioners have waived any such challenge on this point, I express some reservations about legal restitution under § 5565(a) for a case in which the issue is preserved.

Under 12 U.S.C. § 5565, the Bureau may sue either in federal district court or in its own administrative tribunal to seek "appropriate legal or equitable relief":

> (a) Administrative proceedings or court actions
>
> (1) Jurisdiction[—]The court (or the Bureau, as the case may be) in an action or adjudication proceeding brought under Federal consumer financial law, shall

[21] We note that in *Liu*, the Court addressed an argument against imposing joint and several liability. 140 S. Ct. at 1947, 1949. The Court pointed to "the common-law rule requiring individual liability for wrongful profits," and commented that the SEC's joint and several liability "could transform any equitable profits-focused remedy into a penalty." *Id.* at 1949. But the Court further noted that "[t]he common law did, however, permit liability for partners engaged in concerted wrongdoing." *Id.* The Court didn't reverse the joint and several liability. Instead, it noted that the petitioners, a married couple, had presented no evidence that they did not both "enjoy the fruits of the scheme." *Id.* Here, Integrity and Carnes obviously were closely related, and as in *Liu*, we see nothing making joint and several liability "unjust." *See id.*

> have jurisdiction to grant *any appropriate legal or equitable relief* with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law.

12 U.S.C. § 5565(a)(1) (emphasis added). In my view, whether this statute allows a given remedy depends on the forum and the nature of the remedy sought. I have three reasons for questioning whether "legal restitution" is an appropriate form of relief, especially when the Bureau chooses to litigate in its own administrative tribunal.

First, restitution is generally considered to be an equitable remedy. *See Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1162 (10th Cir. 1998); *see also CFPB v. Consumer First Legal Grp., LLC*, 6 F.4th 694, 711 (7th Cir. 2021) (rejecting the Bureau's attempt to recharacterize an award of equitable restitution under 12 U.S.C. § 5565 as legal restitution). When Congress refers to a remedy that is traditionally equitable, courts presume that the remedy maintains its equitable character. *See Liu*, 140 S. Ct. at 1947 ("Statutory references to a remedy grounded in equity must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes. Accordingly, Congress' own use of the term 'disgorgement' in assorted statutes did not expand the contours of that term beyond a defendant's net profits—a limit established by longstanding principles of equity." (cleaned up)). Nothing in § 5565 empowers the Bureau to treat the listed remedies under § 5565(a)(2) as legal or equitable for its convenience.

Second, the Bureau's claim to "legal restitution" might render superfluous another remedy listed in

§ 5565(a)(2). *See Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1130 (10th Cir. 2013) ("It is a rudimentary canon of statutory construction that such superfluities are to be avoided."). I am uncertain how the Bureau's "legal restitution" differs from "payment of damages or other monetary relief," which is separately listed in § 5565(a)(2)(E).

Third, allowing the Bureau to obtain "legal restitution" in an administrative forum raises Seventh Amendment concerns, which implicates the constitutional-avoidance canon. The Seventh Amendment guarantees jury-trial rights to parties sued for legal remedies. *See Liberty Mut. Fire Ins. Co. v. Woolman*, 913 F.3d 977, 992 n.14 (10th Cir. 2019) ("Though the Seventh Amendment guarantees the right to a jury trial in any suit involving legal rights, this guarantee doesn't extend to equitable rights." (cleaned up)); *see also Lorillard v. Pons*, 434 U.S. 575, 583, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) ("In cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial." (citation omitted)); *Jarkesy v. SEC*, 34 F.4th 446, 454 (5th Cir. 2022) (the Seventh Amendment applies to actions seeking legal relief) (citing *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987)). Under the constitutional-avoidance canon, courts interpret federal statutes to avoid risking constitutional concerns. *See United States v. Ciapponi*, 77 F.3d 1247, 1250 (10th Cir. 1996); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 247–48 (2012) (explaining that the "constitutional-doubt canon "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality."). Interpreting § 5565(a)(2) to encompass "legal restitution" would enable the Bureau

to file actions for legal relief in its own administrative tribunals potentially in violation of the Seventh Amendment.

Had Petitioners not waived their challenge to legal restitution, I would reach the issue of whether § 5565 permits legal restitution in an administrative enforcement action. If it doesn't, and only equitable restitution is permitted, I would require an explanation why, under *Liu*, the Bureau's administrative restitution order wouldn't need to be reduced by Integrity's legitimate business expenses.

APPENDIX B

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,

FINAL ORDER

IT IS ORDERED that, within 30 days after service of this Final Order, Respondents Integrity Advance LLC and James R. Carnes must pay restitution of $38,453,341.62. They shall make this payment by wire transfer to the Bureau, or to the Bureau's agent. The Bureau may use these funds to provide redress to consumers who borrowed money from Respondent Integrity Advance on or after July 21, 2011, in the amount that each consumer paid in excess of the amount disclosed in the Total of Payments box of Integrity Advance's loan agreement. If funds remain after this redress has been completed, the Bureau will deposit any remaining funds in the U.S. Treasury as disgorgement. Respondents will have no right to challenge any actions that the Bureau or its representatives may take under this portion of this Order. However, if either of the Respondents appeals this decision pursuant to 12 U.S.C. § 5563(b)(4), Respondents may, within 30 days after service of this Order, pay the award of restitution into an escrow account in lieu of making the payment to the Bureau. The escrow account shall be held by an entity that is chosen by Respondents and is acceptable to the Bureau. The

escrow account shall be established so that if all or any portion of the restitution award is upheld on appeal, that amount shall be released to the Bureau within 30 days after the mandate issues on that appellate decision. Once the mandate has issued and the Bureau has received the portion of the restitution award to which it is entitled, any funds remaining in escrow shall be released to Respondents.

IT IS FURTHER ORDERED that, within 30 days after the service of this Final Order, Respondent Integrity Advance shall pay a civil penalty of $7,500,000 to the Bureau by sending those funds by wire transfer to the Bureau or to the Bureau's agent in compliance with the Bureau's wiring instructions. The civil money penalty paid under this Consent Order will be deposited in the Civil Penalty Fund of the Bureau as required by § 1017(d) of the CFPA, 12 U.S.C. § 5497(d). If Integrity Advance appeals this decision pursuant to 12 U.S.C. § 5563(b)(4), Integrity Advance may, within 30 days after service of this Order, pay the civil penalty into an escrow account in lieu of making the payment to the Bureau. The escrow account shall be held by an entity that is chosen by Integrity Advance and is acceptable to the Bureau. The escrow account shall be established so that if all or any portion of the civil penalty is upheld on appeal, that amount shall be released to the Bureau within 30 days after the mandate issues on that appellate decision. Once the mandate has issued and the Bureau has received the portion of the restitution award to which it is entitled, any funds remaining in escrow shall be released to Integrity Advance.

IT IS FURTHER ORDERED that, within 30 days after service of this Final Order, Respondent James R. Carnes shall pay a civil penalty of $5,000,000 to the

Bureau by sending those funds by wire transfer to the Bureau or to the Bureau's agent in compliance with the Bureau's wiring instructions. The civil money penalty paid under this Consent Order will be deposited in the Civil Penalty Fund of the Bureau as required by § 1017(d) of the CFPA, 12 U.S.C. § 5497(d). If Mr. Carnes appeals this decision pursuant to 12 U.S.C. § 5563(b)(4), Mr. Carnes may, within 30 days after service of this Order, pay the civil penalty into an escrow account in lieu of making the payment to the Bureau. The escrow account shall be held by an entity that is chosen by Respondent and is acceptable to the Bureau. The escrow account shall be established so that if all or any portion of the civil penalty is upheld on appeal, that amount shall be released to the Bureau within 30 days after the mandate issues on that appellate decision. Once the mandate has issued and the Bureau has received the portion of the restitution award to which it is entitled, any funds remaining in escrow shall be released to Integrity Advance.

IT IS FURTHER ORDERED that Respondents Integrity Advance and James R. Carnes, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall cooperate in assisting the Bureau in determining the identity, location, and amount of restitution due to each consumer entitled to redress.

SO ORDERED.

/s/ Kathleen L. Kraninger
Kathleen L. Kraninger
Director
Consumer Financial Protection Bureau

January 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Final Order upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 11th day of January 2021 at Washington, D.C.

APPENDIX C

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.

DECISION OF THE DIRECTOR

INTRODUCTION

When lenders fail to comply with all applicable consumer protection statutes, consumers can suffer substantial harms. Integrity Advance (IA) was a payday lender, and it violated the law. In particular, it failed to comply with the Truth in Lending Act (TILA), the Consumer Financial Protection Act (CFPA), and the Electronic Fund Transfer Act (EFTA). IA violated TILA by making disclosures as if its loans were single payment loans, but then structuring its loan agreements so that the loans functioned as multi-payment installment loans. IA violated the CFPA through its unfair and deceptive loan disclosure practices, as well as by using remotely created checks (RCCs) to withdraw funds from the accounts of consumers who had attempted to block access. And it violated EFTA by conditioning its loans on repayment by preauthorized electronic fund transfers.

The Consumer Financial Protection Bureau (Bureau) initiated this case by filing a Notice of Charges in

November 2015 naming both IA and its CEO, James Carnes, as Respondents. In 2016, Administrative Law Judge Parlen L. McKenna conducted a trial. However, after he had issued his Recommended Decision (and both Respondents and the Bureau's Enforcement Counsel had filed appeals), this case was put on hold pending the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). As a result of that decision, it was apparent that Judge McKenna had not been appointed in a manner that was consistent with the Constitution's Appointments Clause. Accordingly, in May 2019, I directed that this case be remanded to Administrative Law Judge Christine Kirby (ALJ), who was then the Bureau's Administrative Law Judge, and who had been appointed in a manner consistent with the Constitution. In the course of the proceedings before Judge Kirby, both parties filed motions for summary disposition. She resolved those motions when she issued her Recommended Decision on August 4, 2020, granting the motion filed by Enforcement Counsel, and denying the motion filed by Respondents. She held that IA had violated TILA and EFTA. She also held that both Respondents had violated the CFPA. Respondents appealed the ALJ's Recommended Decision, and both parties filed briefs. Case Documents (Docs.) 295-297.[1] On December 8, 2020, the parties presented oral argument.

I affirm the ALJ's conclusion that IA violated both TILA and EFTA. I also affirm her holding that both Respondents violated the CFPA. With respect to the appropriate remedy, I conclude that Respondents should be jointly and severally liable for restitution

[1] Documents on the docket of this case are available at https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/integrity-advance/.

amounting to $38,453,341.62. I further hold that IA is liable for a civil penalty of $7.5 million, and Mr. Carnes is liable for a civil penalty of $5 million. With respect to injunctive relief, I order that Respondents assist the Bureau in identifying and locating the consumers who are entitled to redress.

To the extent that the ALJ's findings and conclusions are consistent with this decision, I adopt them as my own.

FINDINGS OF FACT AND LEGAL BACKGROUND

The following facts are not disputed.

A. Integrity Advance and James Carnes

IA was licensed by the state of Delaware as a short-term, small-dollar lender. Case Document (Doc.) 273 at 1. It had a single store in Delaware, but made most of its loans online. Enforcement Counsel Exhibit (ECX) 68at 10, 24; Doc. 173 at 42.[2] These loans ranged in amount from $100 to $1000. Doc. 56 at 2. IA offered only one product – consumer loans – and these loans were its sole source of revenue. Doc. 172 at 94-95. IA made its first consumer loan in May of 2008, and its last in December of 2012, but it continued processing loan payments until July of 2013. Doc. 173 at 132-33, Doc. 273 at 2. IA was a wholly owned subsidiary of Hayfield Investment Partners, Doc. 165 at 1, but had no employees of its own, Doc. 173 at 6. Instead, it was operated by individuals who, for the most part, were paid by Hayfield. *Id.* At the time IA began making loans to consumers, it was operated by four Hayfield

[2] In her Scheduling Conference Order (Doc. 227), the ALJ indicated that she would rely on exhibits that were admitted during the hearing conducted by Judge McKenna. The parties have not objected to this, and I will rely on those exhibits as well.

employees. Doc. 172 at 53. When it reached its maximum size in 2010 or 2011, approximately 20 employees operated IA. ECX 68 at 11-12. Although Hayfield owned other companies, most of its profits came from IA. Doc. 172 at 114-115. IA is no longer offering loans. ECX 68 at 9.

Respondent James Carnes was both a founder of IA and its de facto CEO. Doc. 172 at 94. He owned more than 50% of IA. Doc. 172 at 100-103. Mr. Carnes was the ultimate decision maker for IA, *id.* at 51, and he had the responsibility for approving everything related to IA's business, *id.* at 209. For example, he had final say over what appeared on IA's website, *id.* at 217; he made the final decision regarding IA's underwriting policies, *id.* at 59; and he was involved in the decision as to which call center IA would use, *id.* at 64. As he explained, he had authority to make all decisions regarding IA's policies and procedures, *Id.* at 209. Mr. Carnes' role with respect to IA did not change throughout the time period relevant to this proceeding. *Id.* at 52.

B. IA's loans

IA provided short-term loans to consumers. Doc. 56 at 2. To get a loan, the consumer had to provide IA with employment information, length of pay period, and pay dates. Doc. 88B at 2. Consumers were also required to provide an ACH authorization. ECX 2. This authorization gave IA access to the consumer's bank account, thereby allowing IA to deposit the money that the consumer borrowed directly in the consumer's bank account, and also allowing IA to make withdrawals directly from that account. Nearly all payments on IA loans were made automatically through ACH authorization. Doc. 87D at 3.

IA had a standard price for its loans. It charged new customers $30 per hundred dollars borrowed, and it charged repeat customers $24 per hundred dollars borrowed. ECX 1. To illustrate, the following is a portion of IA's loan agreement, including the TILA disclosure and description of the consumer's obligation to repay, that IA provided to a first-time borrower who was borrowing $300:

FEDERAL TRUTH IN LENDING DISCLOUSURES

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate. 644.12%	FINANCE CHARGE The dollar amount the credit will cost you. $90.00	Amount Financed The amount of credit provided to you or on your behalf. $300.00	Total of Payments The amount you will have paid after you have made all payments as scheduled. $390.00
Your Payment Schedule will be: One (1) payment of $390.00 due on 7/15/2011 ("Payment Due Date"). Security: You are giving a security interest in the ECHECK/ACH Authorization. Prepayment: If you pay off early you will be entitled to a refund of the unearned portion of the finance charge. See the terms of the Loan Agreement below for any additional information about nonpayment, default, and prepayment refunds.			

Itemization of Amount Financed: Amount given to you directly: $300.00. Amount paid on Loan#: [redacted] with us: $390.00

PAYMENT OPTIONS: 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. At that time, you may choose;

(a) Payment in full: You may pay the Total of Payments shown above, plus any accrued fees, to satisfy your loan in full. When you contact us and choose this option, we will debit Your Bank Account (defined below) for the Total of Payments plus any accrued fees, in accordance with the ACH Authorization below; OR

(b) Renewal: You may renew your loan (that is, extend the Payment Due Date of your loan until your next Pay Date[1]) by authorizing us to debit Your Bank Account for the amount of the Finance Charge, plus any accrued fees. If you choose this option, your new Payment Due Date will be your next Pay Date[1], and the rest of the terms of the Loan Agreement will continue to apply.

AUTO-RENEWAL: 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 as described under (b) above, and debit Your Bank Account on the Payment Due Date or thereafter for the Finance Charge and any accrued fees. Your new Payment Due Date will be your next Pay Date[1], and the rest of the terms of the Loan Agreement will continue to apply. You must contact us at least three (3) business days prior to your new Payment Due Date to confirm your payment option for the Renewal. If you fail to contact us, or otherwise fail to pay the loan in full on your new Payment Due Date, we may automatically renew the loan until your next Pay Date[1]. After your initial loan payment, you may obtain up to four (4) Renewals. All terms of the Loan Agreement continue to apply to Renewals. All Renewals are subject to Lender's approval. Under Delaware law, if you qualify, we may allow you to enter into up to four

(4) Renewals, also known as a "refinancing" or a "rollover". The full outstanding balance shall be due upon completion of the term of all Renewals, unless you qualify for Auto-Workout, as described below.

AUTO-WORKOUT. Unless you contact us to confirm your option for Payment in Full prior to your Fourth Renewal Payment Due Date, your loan will automatically be placed into a Workout Payment Plan. Under the Workout Payment Plan, Your Bank Account will automatically be debited on your Pay Date[1] for accrued finance charges plus a principal payment of $50.00, until all amounts owed hereunder are paid in full. This does not limit any of Lender's other rights under the terms of the Loan Agreement. All Workout Payment Plans are subject to Lender's approval

ECX 2. (Footnote "1" in the loan agreement refers to the following sentence that appears several pages later: "The term 'Pay Date' refers to the next time following the Payment Due Date, that you receive regular wages or salary from your employer. Because Renewals are for at least fourteen (14) days, if you are paid weekly, your loan will not be Renewed until the next Pay Date that is at least fourteen days after the prior Payment Due Date.")

As the above example shows, IA calculated and disclosed the annual percentage rate (APR), the finance charge, and the total of payments based on the assumption that the loan would be paid off in a single payment on the consumer's next payday. But as a result of the way in which IA structured repayment options, that rarely happened. Although the line captioned "Your Payment Schedule" described a one-payment loan, the "Payment Options" paragraph described things somewhat differently. That paragraph explained that the consumer must, at least three days

prior to the payment due date, select one of two payment options. If the consumer selected the "Payment in full" option, then IA would debit the consumer's account for the full amount of the principal and finance charge on the due date in a single payment.

If the borrower made no selection (or selected the "renewal" option), then the loan defaulted to "auto-renewal" status. The loan agreement provides that when a loan went into auto-renewal status, IA would debit the consumer's account for only the finance charge ($90 in the above example), and would then renew the loan until the consumer's next pay date. *See* Doc. 172 at 219-220. There is no indication in the record that IA would provide the consumer with new TILA disclosures when it "renewed" the loan and began withdrawing multiple payments.

At the end of this first renewal, *i.e.*, the consumer's next payday, the pattern would repeat unless the consumer took affirmative action: IA would again debit the finance charge from the consumer's account and would again "renew" the loan for another term. *Id.* Unless the consumer took affirmative action to stop the process, IA would automatically renew the loan four times. (Delaware law precludes any additional renewals. 5 Del. Admin. Code 2210-3.1.2; *see* Doc. 172 at 219-220.) If the consumer continued to take no action after four renewals, the loan would automatically switch from "auto-renewal" status into "auto-workout" status. Doc. 172 at 220. This meant that IA would debit the consumer's account for the finance charge plus $50 of principal (*i.e.*, $140 in the above example). Doc. 88D at 239. And if the consumer continued to take no action, then IA would continue, each subsequent payday, to debit the (declining) finance

charge and $50 of principal until the loan was paid in full. *Id.*

Although the loan agreement described two payment options (Payment in full; Renewal), IA sent borrowers a "welcome email" that described the options differently. Doc. 91A at 24. IA sent this email after approving loans, but before disbursing loan proceeds. Doc. 90 at 2. This email described three repayment options:

Dear CUSTOMER_FIRST_NAME,

CONGRATULATIONS! Your loan for LOAN_AMOUNT has been approved. This email confirms your loan has been processed. It will be sent to your bank tonight and the funds will be available to you within 1 to 2 business days. Your first due date will be LOAN_DUE_DATE.

Remember you have 3 options of paying the loan back:

1) YOU CAN LET THE LOAN AUTOMATICALLY RENEW. All renewals are on your pay dates. After the first initial payment, the next 4 renewals will only require payment of the finance charge. Starting with the 5th renewal, in addition to the finance charge, we will also take out $50 of principal. This will continue until the loan is repaid in full, unless of course you select either option 2 or 3 below. NOTE: PLEASE REMEMBER, YOU CAN SELECT OPTIONS 2 OR 3 AT ANYTIME DURING YOUR LOAN REPAYMENT PROCESS

2) PAY THE LOAN DOWN IN PART. If you want to increase your payment so you pay the loan back faster, you may do so in any amount ($50 increments required) which will bring down the principal of your loan. Just call us 3 business days in advance of your pay date so we can make the change.

3) PAY THE LOAN IN FULL. Once again, just call us three business days in advance so we may make the

change on your account. If you pay your loan off before your next pay date you only pay the finance charge for the days the loan remains unpaid.

Thank You and Have a Great Day!

Integrity Advance

Cust Svc: (800) 505-6073

Fax: (800) 581-8148

Doc. 91A at 24. But just like the loan agreement, if the consumer took no action, the loan would renew four times, and then go into auto-workout status. The following chart shows the debits that IA would deduct from the consumer's account (assuming a $300 loan to a first-time borrower) if the consumer took no action:

PAYDAY	PAYMENT	FINANCE CHARGE (30% OF REMAINING PRINCIPAL BALANCE)	AMOUNT APPLIED TO PRINCIPAL	REMAINING PRINCIPAL BALANCE	TOTAL PAID TO DATE
1	$90	$90	$0	$300	$90
2	$90	$90	$0	$300	$180
3	$90	$90	$0	$300	$270
4	$90	$90	$0	$300	$360
5	$90	$90	$0	$300	$450
6	$140	$90	$50	$250	$590
7	$125	$75	$50	$200	$715
8	$110	$60	$50	$150	$825
9	$95	$45	$50	$100	$920
10	$80	$30	$50	$50	$1000
11	$65	$15	$50	$0	$1065
TOTAL	**$1065**	**$765**	**$300**	-	**$1065**

See Doc. 1 at 6; Doc. 21 at 5. Thus, this table shows that, if the consumer took no action with respect to the loan, the total amount of the finance charge and the total of payments that the consumer would ultimately pay would far exceed the amounts disclosed on the TILA disclosure.

To get a loan from IA, a borrower had to initial or sign the loan agreement in seven places. *See* ECX 2.

The borrower's fourth signature accepted the ACH authorization. That portion of the agreement included the following paragraph:

> You agree that we may re-initiate a debit entry for the same amount if the ACH debit entry is dishonored or payment is returned for any reason. The ACH Authorizations set forth in the Loan Agreement are to remain in full force and effect for this transaction until your indebtedness to us for the Total of Payments, plus any other charges or fees incurred and described in the Loan Agreement, is fully satisfied. You may only revoke the above authorizations by contacting us directly. If you revoke your authorization, you agree to provide us with another form of payment acceptable to us and you authorize us to prepare and submit one of more checks drawn on Your Bank Account so long as amounts are owed to us under the Loan Agreement.

ECX 2. Pursuant to this paragraph, if the consumer attempted to revoke the ACH authorization, IA could create paper checks (remotely created checks or RCCs) ("you authorize us to prepare and submit one or more checks drawn on Your Bank Account") and use them to withdraw payments from the consumer's account. *See* Doc. 172 at 235-236. The consumer would not prepare or sign the RCC, nor would the consumer even see the RCC. *See* ECX 94 at 1-2.

C. Procedural history

1. The Notice of Charges

The Bureau's Enforcement Counsel filed its Notice of Charges with the Bureau's Office of Administrative Adjudication on November 18, 2015. Doc. 1. The Notice

contained seven counts. Count I alleged that IA violated TILA because it based its TILA disclosures on the assumption that the consumer would pay off the loan in a single payment on the consumer's first post-loan payday, even though that would happen only if the consumer took affirmative action. Count II alleged that IA's violations of TILA also violated the CFPA. Count III alleged that both IA and Mr. Carnes had engaged in a deceptive act or practice in violation of the CFPA because the net impression created by the loan agreement misled consumers to believe that the finance charge and the total of payments were lower than the amounts consumers would actually pay. Count IV alleged that both IA and Mr. Carnes had prevented consumers from assessing the actual costs of the loans they entered into, and that this was unfair, in violation of the CFPA. Count V alleged that, by requiring consumers to accept the ACH authorization as a condition of getting a loan, IA had conditioned its loans and the extension of credit on repayment by preauthorized electronic fund transfer, in violation of EFTA and its implementing Regulation E (Reg. E). Count VI alleged that IA's violations of EFTA and Reg. E also violated the CFPA. Count VII alleged that IA and Mr. Carnes had committed an unfair practice in violation of the CFPA when they used RCCs to withdraw money from the accounts of consumers who believed they did not owe money to IA.

The Notice sought a variety of remedies, including a permanent injunction prohibiting future violations of TILA, its implementing Regulation Z, EFTA, its implementing Reg. E, the CFPA, and any other federal consumer financial law. The Notice also sought an award of restitution to compensate injured consumers, as well as disgorgement, and a civil penalty.

2. Proceedings before Judge McKenna

This matter was originally assigned to the Administrative Law Judge Office of the U.S. Coast Guard because in 2015 the Bureau did not have an administrative law judge of its own. Doc. 8. The matter was then heard by Coast Guard Administrative Law Judge Parlen McKenna. At the conclusion of several days of hearings, Judge McKenna issued his Recommended Decision. Doc. 176. Both IA and the Bureau's Enforcement Counsel filed notices of appeal. Docs. 177, 178. However, resolution of those appeals was delayed, first pending a decision by the D.C. Circuit in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), and then pending a decision by the Supreme Court in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). Docs. 208, 210. As a result of the Court's decision in *Lucia*, I concluded that Judge McKenna had not been constitutionally appointed. Doc. 216. Accordingly, I directed that the matter be remanded to the Bureau's Administrative Law Judge, Christine Kirby, for a new hearing and Recommended Decision. *Id.* I further directed that Judge Kirby "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna." *Id.*

3. Proceedings before the Bureau's ALJ, Christine Kirby

On October 28, 2019, the ALJ issued an order denying further discovery regarding Respondents' statute of limitations argument. Doc. 238. Then, on January 24, 2020, she issued an order denying IA's Motion to Dismiss. Doc. 249. Finally, she issued her Recommended Decision on August 4, 2020. Doc. 293. All three of these decisions are relevant to this appeal.

a. Order denying further discovery

On October 28, 2019, the ALJ denied Respondents' motion for additional discovery. Doc. 238. Respondents had requested that the ALJ issue a subpoena requiring Enforcement Counsel to provide 1) all consumer complaints regarding IA; 2) all external correspondence regarding IA; 3) all internal correspondence regarding IA; and 4) any other internal documents regarding IA. With respect to the first two requests, the ALJ concluded that Enforcement Counsel had already provided those documents to Respondents when it fulfilled its obligation to make disclosures pursuant to Bureau Rule 206, 12 C.F.R. § 1081.206. She denied the third and fourth requests because she concluded that Respondents were seeking documents that were privileged and could be withheld pursuant to Rule 206.

b. Order denying IA's motion to dismiss

On November 15, 2019, Respondents filed a Motion to Dismiss and/or for Summary Disposition. Doc. 239. On January 24, 2020, the ALJ denied that motion in its entirety. Doc. 249. First, she rejected Respondents' argument that Enforcement Counsel were precluded from asserting the allegations in Count IV of the Notice of Charges. (Count IV alleged that IA's loan disclosures were unfair in violation of the CFPA.) During the proceedings before Judge McKenna, Respondents and Enforcement Counsel filed a joint stipulation agreeing to dismiss Count IV with prejudice. Doc. 127. A week before the parties filed the stipulation, Judge McKenna had entered an order granting in part Enforcement Counsel's motion for summary disposition. Doc. 111. In that order, he granted summary disposition with respect to Count III of the Notice of Charges, which alleged that IA's loan agreement was

deceptive. In the stipulation, the parties agreed that the consumer harm resulting from Count III was coextensive with the harm caused by Count IV. Accordingly, in the interest of judicial economy, the parties agreed to the dismissal of Count IV. Judge Kirby observed that the stipulation was based on Judge McKenna's order on the motion for summary disposition, and that, pursuant to my remand (Doc. 216), I had directed that she give no weight to that order. Because the parties had agreed to the dismissal based on an order that no longer has any effect, the ALJ held that Enforcement Counsel was not precluded from pursuing the allegations in Count IV.

Next, Judge Kirby addressed Respondents' contention that the three counts in the Notice of Charges that applied to Mr. Carnes (Counts III, IV, and VII) were time-barred. (Counts that apply to IA were not time-barred because Enforcement Counsel had entered into tolling agreements with IA that tolled the statute of limitations with respect to IA, but those agreements did not apply to Mr. Carnes. *See* Docs. 200, 201.) The relevant statute of limitations, 12 U.S.C. § 5564(g)(1), provides that the Bureau may not bring an action "more than 3 years after the date of discovery of the violation." Respondents argued that the statute of limitations should be interpreted to run for three years from the time the Bureau discovers, *or should have discovered*, the violations. The ALJ declined to decide whether the statute of limitations incorporates a constructive discovery rule. Doc. 249 at 23. However, she held that even if it did, the statute of limitations had not expired with respect to Mr. Carnes by November 18, 2015, when the Bureau filed its Notice of Charges. She recognized that, prior to November 18, 2012 (three years before the Bureau filed its Notice of Charges), the Bureau had information regarding IA's

violations. But it was only after that date that the Bureau either knew, or should have known, of evidence supporting the conclusion that Mr. Carnes was liable for IA's misrepresentations. This was, in part, because IA took 11 months to comply with the Bureau's civil investigative demand. Finally, the ALJ concluded that the CFPA's statute of limitations also applied to the allegations that IA violated TILA and EFTA (Counts I, V), as well as to Counts II and VI, which alleged CFPA violations derived from the TILA and EFTA violations.

c. Recommended decision

On May 15, 2020, both Enforcement Counsel and Respondents filed motions for summary disposition. Docs. 272, 275. On August 4, 2020, the ALJ issued her Recommended Decision granting Enforcement Counsel's motion and denying the one filed by Respondents. Doc. 293. With respect to the first two counts of the Notice of Charges, the TILA count and the associated CFPA count, the ALJ concluded that, because IA's loans would automatically roll over unless the consumer took affirmative steps, the loan was actually a multi-payment loan. Because IA made disclosures as if the loan were a single payment loan, it violated TILA, and thus also committed the associated violation of the CFPA. *Id.* at 22-29.

Next, the ALJ concluded that, not only did IA's loan disclosures violate TILA, but they were also deceptive and unfair (Counts III and IV). She held that the net impression of the loan agreement was that the loan was a single payment loan, thereby misrepresenting the costs of the loan. She concluded that this misrepresentation of costs was material. With respect to unfairness, she held that consumers were injured when they paid more than they expected to pay, that

they could not avoid the injury because the costs were never revealed to them, and that IA's disclosure practices did not benefit consumers. *Id.* 29-50.

Counts V and VI alleged a violation of EFTA and an associated CFPA violation. The parties agreed that, by signing the ACH authorization in the loan agreement, the consumer was thereby agreeing to a preauthorized electronic fund transfer in the form of both credits to, and debits from, the consumer's bank account. The ALJ observed that there was nothing in the loan agreement indicating that the ACH authorization was optional. Further, IA disbursed funds electronically and provided no alternate means whereby consumers could receive the money they borrowed. This meant that consumers had to sign the ACH authorization to receive funds. As a result, the ALJ concluded that IA had conditioned its loans on consumers' repayment by preauthorized electronic fund transfer, thereby violating EFTA and the CFPA. *Id.* at 50-56.

The ALJ held that IA's use of remotely created checks (RCCs) was unfair, as alleged in Count VII. She held that, because IA used RCCs only when consumers attempted to block IA from accessing their bank accounts, RCCs substantially harmed consumers. She held that consumers could not avoid the injury caused by the RCCs because the single sentence in the loan agreement that authorized RCCs was unclear. She also held that RCCs did not provide offsetting benefits when used to collect payments for loans whose costs were never adequately disclosed. *Id.* at 56-64.

The ALJ next held that Mr. Carnes could be held liable for IA's violations of the CFPA as alleged in Counts III, IV, and VII. She reviewed undisputed facts and concluded that there was overwhelming evidence that Mr. Carnes had authority to control both IA and

the practices at issue in those three counts. She also concluded that Mr. Carnes knew and understood the contents of the loan agreement, knew that the TILA boxes disclosed the loans that IA offered as if they were single payment loans, and also knew that the vast majority of loans would default into auto-renewal and auto-workout status. Accordingly, she held that Mr. Carnes had both the requisite authority to control and the knowledge sufficient to hold him liable for IA's violations. *Id.* at 64-76.

Finally, the ALJ addressed the appropriate remedy. She held that IA should be held liable for restitution related to its TILA violations, and that this restitution should be used to provide redress for consumers who borrowed from IA because they did not get the benefit of the bargain they thought they had entered into – they paid a substantially higher cost for loans than disclosed by IA. She rejected Respondents' contention that repeat borrowers were not entitled to restitution because she concluded that there was insufficient evidence for her to conclude that repeat customers understood those costs any better than first-time borrowers. She also held that Enforcement Counsel did not have to show that a particular consumer had suffered actual damages before that consumer could receive restitution. She held that the appropriate amount of restitution was the amount that each consumer had paid over and above the amount disclosed in the loan agreement, and that, because the FTC could have obtained restitution for TILA violations committed prior to July 21, 2011 (the date that TILA enforcement authority transferred to the Bureau), IA should be held liable for restitution for all the loans that it made going back to 2008. This amount totaled $132.5 million. Mr. Carnes' liability for restitution was different because he was only named in Counts III and

IV, which alleged violations of the CFPA. The FTC could not enforce the CFPA and as a result, no restitution was appropriate with respect to these counts for violations that occurred before July 21, 2011. Thus, the ALJ recommended that Mr. Carnes be held jointly liable with IA for $38.4 million. (This did not increase IA's liability because consumers who were entitled to redress pursuant to Counts III and IV were also entitled to redress as a result of IA's TILA violation. Thus, IA was liable for $94.1 million for consumers who entered into loans before July 21, 2011, and was jointly liable with Mr. Carnes for $38.4 million with respect to consumers who borrowed after that date.) She also recommended that Mr. Carnes and IA be held jointly liable for restitution for the amount of the RCCs – $115,024.50. *Id.* at 76-86.

The ALJ denied most of Enforcement Counsel's request for injunctive relief because she concluded that monetary relief would be adequate to remedy Respondents' violations. However, she did recommend that Respondents be ordered to assist the Bureau in identifying and locating consumers who are entitled to restitution. *Id.* at 89.

Finally, the ALJ held that there were three distinct practices that warranted civil money penalties: 1) the use of a loan agreement that violated TILA and that was deceptive and unfair; 2) the EFTA violations; and 3) the use of RCCs. She held that IA was liable for all three practices, and Mr. Carnes was liable for the first and third. The relevant time period for each of the violations was 500 days (from July 21, 2011, until IA ceased offering loans in December 2012) and the appropriate penalty was $5000 per day. Accordingly, she recommended that IA be liable for a civil penalty

of $7.5 million and Mr. Carnes be liable for $5 million. *Id.* at 90-94.

c. Respondents' Appeal

On August 11, 2020, Respondents filed their Notice of Appeal. Doc. 294. Respondents argued that: 1) the ALJ erred in holding that I could ratify this action; 2) the ALJ erred by failing to hold that the statute of limitations had expired with respect to all claims against Mr. Carnes, and all but three of the claims against IA; 3) the ALJ denied Respondents due process; 4) the ALJ's holding that Respondents were "covered persons" was erroneous; 5) the ALJ erred in concluding that summary disposition was appropriate with respect to all seven counts of the Notice of Charges; and 6) the ALJ's recommendations with respect to remedies were erroneous. Respondents' Opening Appeal Brief, Doc. 295. Enforcement Counsel filed an Answering Brief, Doc. 296, and Respondents filed their Reply, Doc. 297. Respondents requested the opportunity to present oral argument, and I conducted an argument on December 8, 2020.

ANALYSIS

I. STANDARD OF REVIEW

As explained in the Decision of the Director in *In the Matter of PHH Corp.*, File No. 2014-CFPB-0002 (June 4, 2015), *rev'd on other grounds sub nom. PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), the Bureau's rules provide that when a party appeals an ALJ's recommended decision, "the Director will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will to the extent necessary or desirable, exercise all powers which he or she could have exercised if he or she had made the recommended

decision." 12 C.F.R. 1081.405(a). That means my review as to both facts and law is *de novo*.

Pursuant to the CFPA, the Bureau conducts its administrative adjudications "in the manner prescribed by chapter 5 of Title 5, United States Code." 12 U.S.C. § 5563(a). That is, this adjudication is on the record, and is governed by a preponderance of the evidence standard. *See Steadman v. SEC*, 450 U.S. 91, 95-102 (1981) (holding that when hearings are held on the record, the Administrative Procedure Act requires a preponderance of the evidence standard).

II. LIABILITY

Respondents have appealed the ALJ's Recommended Decision. They raise nineteen separate arguments, challenging the Bureau's authority, the ALJ's holdings with respect to liability, and the recommended relief. I disagree with most of Respondents' arguments, although I agree that it should not be held liable for violations that occurred prior to the date that enforcement authority was transferred to the Bureau.

A. Preliminary arguments

1. Mr. Carnes may be held liable for IA's violations of the CFPA as alleged in Counts III, IV, and VII of the Notice of Charges

Count III alleges that IA's disclosures were deceptive, Count IV alleges that those disclosures were also unfair, and Count VII alleges that IA's use of RCCs was unfair. Each of those counts named not only IA but also Mr. Carnes. Before I address IA's liability with respect to those allegations, I will explain why Mr. Carnes may be held liable.

a. Standard of liability

In *CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016), the court held that an individual may be held liable for a corporation's violations of the CFPA:

> if "(1) he participated directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud along with an intentional avoidance of the truth."

Id. at 1193, quoting *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). In *Gordon*, as well as in other cases brought by the Bureau, courts have held that cases interpreting the FTC Act provide guidance as to when an individual may be held liable under the CFPA. *See*, *e.g*., *CFPB v. Mortg. L. Grp., LLP*, 366 F. Supp. 3d 1039, 1058 (W.D. Wis. 2018); *CFPB v. NDG Fin. Corp*., No. 15-cv5211, 2016 WL 7188792, at *17 (S.D.N.Y. Dec. 2, 2016). Indeed, the parties have also relied on FTC Act cases to assess Mr. Carnes' liability. *See* Enforcement Counsel's Answering Brief, Doc. 296 (EC Br.) at 11-13; Doc. 272 at 35-36. I will do so as well.

As the court explained in *FTC v. Amy Travel Services, Inc*. 875 F.2d 564, 574 (7th Cir. 1989), it is not appropriate for an individual to enjoy benefits from violating the FTC Act, but then insulate himself from liability by contending that he did not participate directly in the illegal conduct. Accordingly, the court established a two-part test to determine individual liability for corporate violations. That test is described in detail in *FTC v. Freecom Communications, Inc*, 401 F.3d 1192 (10th Cir. 2005), where the court explained the significance of both parts. Once the FTC has shown

that the corporate defendants had violated the FTC Act, "it only had to show [that the individual defendant] had the authority to control [the corporate] defendants to establish its case for injunctive relief against [the individual]." *Id*. at 1205. Thus, if the FTC, or the Bureau, establishes that a corporation has violated the law, and also establishes that an individual has the authority to control the corporation's wrongful acts, the FTC, or the Bureau, is entitled to forward-looking injunctive relief against the individual.

As to the second part of the test, *Freecom* held that:

> to hold an individual personally liable for consumer redress, the FTC must show a heightened standard of awareness beyond the authority to control. This awareness, however, need not rise to the level of an intent to defraud. In particular, the FTC need only show the individual had or should have had knowledge or awareness of defendants' misrepresentations. The FTC may fulfill its burden by showing the individual had actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.

Id. at 1207. Thus, to obtain monetary relief from an individual defendant, the FTC or the Bureau must make an additional showing: that the individual knew, or should have known of, the corporate defendant's wrongful acts. As the court explained in *Amy Travel*, this means that the FTC (or the Bureau) must show that "the individual had some knowledge of the practices." 875 F.2d at 573. But if the Bureau can show that the individual knew of the acts or practices that

constitute the violation of the CFPA, that is, the elements of the violation, the Bureau need not also show that the individual knew that the acts or practices violated the law. *See id.* at 575.

b. Mr. Carnes is liable for IA's unfair and deceptive practices

The ALJ held that Mr. Carnes satisfied the first part of the test – participation in, or authority to control IA's unlawful conduct – and I agree. As explained above, the evidence shows that Mr. Carnes had ultimate control over all aspects of IA's business, even though he was not necessarily directly involved in every aspect. *See*, *e.g.*, Doc. 172 (Hearing Transcript) at 51 (testimony of Timothy Madsen) ("any large decision [at IA] would have been made by Mr. Carnes"); *id.* at 221 (testimony of James Carnes) ("I had ultimate authority over the company"); *id.* at 228 (testimony of James Carnes) ("Q. As CEO, did you have to approve the loan agreement template? A. Again, as CEO you are ultimately approving everything"); ECX 68 (Deposition Transcript of James Carnes) at 32 ("Q. As the CEO, I assume you had ultimate say over the company's policies and procedures; is that correct? A. Yes.").

With respect to the first part of the test, IA argues that Mr. Carnes did not have the authority to control IA's violations because he "did not draft, edit, or substantively review the loan agreement." Respondents' Opening Appeal Brief (Resp. Br.) at 16; Transcript of Proceedings on Appeal, Dec. 8, 2020 (Appeal Tr.), at 8-9. But this argument focuses only on the "participation" element of the first part of the test. Thus, Respondents have not disputed that Mr. Carnes had control over IA's conduct. *See also* Respondents' Reply Brief in Support of Appeal (Resp. Reply) at 3 n.2 (focusing on who wrote the loan agreement). The fact

that Mr. Carnes could control IA's conduct (and, in particular, that he authorized use of IA's loan agreement) is sufficient to satisfy the first part of the test. *See FTC v. AMG Servs., Inc.*, No. 2:12-cv-0536, 2016 WL 5791416, at *6 (D. Nev. Sept. 30, 2016), *aff'd* 910 F.3d 417 (9th Cir. 2018), *cert. granted*, No. 19-508, 141 S. Ct. 194 (2020) ("[a]n individual's position as a corporate officer . . . is sufficient to show requisite control").

I also agree with the ALJ that Enforcement Counsel has shown that Mr. Carnes had sufficient knowledge to hold him liable for monetary relief. IA offered only one product, short-term consumer loans, and that product was its sole source of revenue. Doc. 172 at 94-95 (testimony of James Carnes). Although Mr. Carnes did not personally draft the loan agreement that IA used for those loans, he approved its use. Doc. 172 (testimony of James Carnes) at 232 ("Q. But isn't it true that they had your approval to implement this loan agreement? . . . A. Did they have my approval to use the loan agreement? Yes.") Mr. Carnes knew that IA's loan agreement made disclosures as if IA's loans were single-payment loans. Doc. 173 (Hearing Transcript) (testimony of James Carnes) at 50-51 ("A. Are you saying, did I understand that on the – in the TILA box [for a consumer who borrowed $100] that it said, sum of payments was $130? . . . Yes.") He was aware that, unless a consumer took affirmative action, the loans would not be paid off in a single payment, but would renew, and would continue to renew, until the loans went into auto-workout status. Doc. 172 at 218-220; Appeal Tr., at 10 (Mr. Carnes "was aware of the structure of the loan"). Mr. Carnes also knew that a large portion of IA's loans would renew at least once, Doc. 172 at 222, and that as a result of those renewals, consumers would pay more than the amount disclosed

in the loan agreement. ECX 68 at 245 ("Q. And in most cases they would pay substantially more than the amount that's reflected in the total amounts of payments box; is that right? A. They would pay more."). As explained below, I have concluded that IA's loan agreement was deceptive on its face. Because Mr. Carnes' testimony establishes that he was aware of the elements of IA's deceptive conduct – that the loan agreement made disclosures as if the loan were a single payment loan when the loan was actually a multi-payment loan – Mr. Carnes had sufficient knowledge to hold him personally liable for IA's unfair and deceptive practices.

Mr. Carnes also had sufficient knowledge to hold him liable for the unfair acts or practices that resulted from IA's use of RCCs. He testified that he knew what RCCs were, he knew that IA used RCCs, and he knew the circumstances in which IA used RCCs. Doc. 173 at 84-85 (testimony of James Carnes). In particular, he knew that IA used RCCs when consumers revoked ACH authorization and IA was unable to induce payment by any other means. *Id*.

Thus, I conclude that Mr. Carnes had sufficient knowledge to hold him liable for monetary relief as a result of the conduct challenged in Counts III, IV, and VII of the Notice of Charges.

None of the arguments raised by IA convinces me otherwise. IA's central argument is that Mr. Carnes did not know the specific contents of the loan agreement. Resp. Br. at 17; Resp. Reply at 5; Appeal Tr. at 12 (Mr. Carnes reviewed the loan agreement for the first time in connection with the trial of this proceeding). But as explained above, Mr. Carnes had ample knowledge of how IA's loans worked. In particular, he was aware that the disclosures in the loan agreement

did not comport with the default repayment process that the vast majority of IA's borrowers experienced. That is the basis of Counts III and IV, and it is sufficient knowledge to hold Mr. Carnes liable for restitution.

Respondents also argue that, because the loan agreement was drafted by an attorney (in 2008), Mr. Carnes was entitled to assume that the agreement complied with all laws, even the CFPA (which was not enacted until 2010). Based on this, Respondents claim that Mr. Carnes did not have sufficient knowledge to hold him liable for IA's violations. Doc. 173 at 27-28 (testimony of IA's vice president, Edward Foster) (the loan agreement was drafted by outside counsel); Resp. Br. at 18, Resp. Reply at 3; Appeal Tr. at 10. While Respondents resist the label, *see* Doc. 172 at 230, this is an advice-of-counsel defense. But no such defense is available here. *See CFPB v. CashCall, Inc*., No. 15-cv-7522, 2016 WL 4820635, at *12 (C.D. Cal. Aug. 31, 2016) ("'reliance on advice of counsel is not a valid defense on the question of knowledge required for individual liability'"), quoting *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1102 (9th Cir. 2014); *FTC v. J.K. Publ'ns, Inc*. 99 F. Supp. 2d 1176, 1206 (C.D. Cal. 2000) (court held individual defendant liable even though she claimed that she had not read the documents she signed); *Amy Travel*, 875 F.2d at 575 ("reliance on advice of counsel was not a valid defense on the question of knowledge"). The reason for this is that the relevant question is whether Mr. Carnes "had some knowledge of the practices" that harmed consumers, *Amy Travel*, 875 F.2d at 573, not whether he knew that those practices violated the law. *See CFPB v. CashCall*, 2016 WL 4820635, at *12 ("'We have long recognized the common maxim, familiar to all minds, that ignorance of the law will not excuse any person,

either civilly or criminally'"), quoting *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010). As explained above, there is ample evidence that Mr. Carnes knew that IA's loan agreement misrepresented the amount that consumers were likely to pay, and also knew that consumers were likely to pay more than the amount disclosed unless they took affirmative action. Thus, he was aware of the essential facts that form the basis of the violations of the CFPA alleged in Counts III and IV. It is irrelevant that he may have (incorrectly) believed that the loan agreement complied with the law, and it also irrelevant that he reached this belief because the agreement was drafted by a lawyer.[3] What counts is what he knew would occur, not what he believed regarding the law.

Respondents also argue that Mr. Carnes did not have sufficient knowledge because state regulators reviewed IA's loan agreement as a part of Delaware's annual licensing process. Resp. Reply at 3 & n.3; Appeal Tr. at 10. But just as Mr. Carnes cannot escape liability because a lawyer drafted the loan agreement, he cannot escape liability for the deception in IA's loan agreement merely because it was reviewed by an employee of the Office of the State Bank Commissioner of Delaware. This would be so even if Delaware

[3] Even if advice of counsel were a valid defense, that defense has been waived by Respondents. Throughout the administrative trial in this matter, they repeatedly asserted attorney-client privilege and refused to permit the disclosure of any advice they were actually given by their outside counsel who drafted the loan agreement, or by IA's in-house general counsel. *See*, *e.g.*, Doc. 172 at 230; Doc. 173 at 20, 22, 27-28, 86, 95. The attorney-client privilege "may not be used both as a sword and a shield." *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc*., 259 F.3d 1186, 1196 (9th Cir. 2001). By repeatedly asserting the privilege, they waived the defense. *See id.*

had reviewed the agreement for compliance with the CFPA, and there is no evidence that it did.

Finally, Respondents argue that it was reasonable for Mr. Carnes to conclude that IA's customers were not deceived because IA had so many repeat customers. Resp. Reply at 4; Appeal Tr. at 8. But this argument assumes its own conclusion – that if a consumer sought a second loan from IA, then that consumer was not deceived. This argument also ignores that IA had a substantial number of customers who were one-time customers. Indeed, there were more than 120,000 customers who borrowed once, but only once, from IA. Doc. 173 (testimony of Robert Hughes) at 158. Even if it were proper for Mr. Carnes to assume that repeat customers were not deceived (but see the discussion of repeat customers below), he could not make the same assumption regarding IA's one-time customers. What is relevant is that Mr. Carnes had sufficient knowledge of facts that established that customers were likely to be deceived by IA's loan agreement. Thus, he may be held liable for IA's violations even if there may have been some customers who were not deceived.[4]

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[4] Respondents claim that Mr. Carnes did not receive customer complaints. Resp. Reply at 4; *see* Doc. 172 (testimony of James Carnes) at 233 ("Q. So you were unaware personally of any complaints? A. I wasn't aware of complaints."). However, when Enforcement Counsel sought to probe whether consumer complaints had been brought to Mr. Carnes attention, Respondents asserted the attorney-client privilege and refused to provide any information. Doc. 173 (testimony of Edward Foster) at 29-31. Respondents may not argue that Mr. Carnes never received consumer complaints when they refuse to provide necessary evidence to support or refute that argument. In any event, although knowledge of consumer complaints may be probative of an individual's knowledge, there are other ways to establish knowledge,

Similarly, Respondents argue that Mr. Carnes did not have sufficient knowledge to hold him liable for the RCCs because he was not familiar with how RCCs were disclosed in the loan agreement. Resp. Br. at 18; Resp. Reply at 5. As explained above, the authorization for RCCs was set forth in one sentence of the loan agreement that was buried in the ACH authorization. But Mr. Carnes was aware that IA used RCCs, and he knew the circumstances under which they were used. Doc. 173 at 84-85. That is, he knew that IA used RCCs in situations where consumers had withdrawn ACH authorization, presumably to block IA from gaining access to their bank accounts, and that IA used the RCCs to evade that block. While Mr. Carnes asserts that as CEO he was not familiar with the details of IA's loan agreement, I conclude that he was at least recklessly indifferent to those details, and that is sufficient to hold him liable. *Amy Travel*, 875 F.2d at 574.

2. The Bureau's TILA and EFTA claims are not time-barred

Respondents contend that both TILA and EFTA impose a one-year statute of limitations on Bureau enforcement actions and that as a result, the Bureau's TILA and EFTA claims (Counts I and V) are time-barred. Resp. Br. at 9, citing 15 U.S.C. § 1640(e) (TILA) and 15 U.S.C. § 1693m(g) (EFTA). Respondents claim that these one-year limitations periods also apply to the two CFPA claims brought under 12 U.S.C. § 5536(a)(1)(A) (Counts II and VI) that derive from IA's

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and there is ample evidence here showing that Mr. Carnes was well aware of the essential facts of IA's violations. *See also FTC v. NHS Sys., Inc.*, 936 F. Supp. 2d 520, 535 (E.D. Pa. 2013) (individual defendant, who may not have had actual knowledge of misrepresentations, was nonetheless liable because of his degree of involvement in corporate affairs).

violations of TILA and EFTA. These arguments fail because both 15 U.S.C. § 1640(e) and 15 U.S.C. § 1693m(g) specify that the prescribed one-year statute of limitations applies only to actions "under this section." Administrative enforcement actions of TILA and EFTA are governed by different sections of those statutes. *See* 15 U.S.C. § 1607 ((TILA); *id.* § 1693*o* (EFTA); *see also BCFP v. Citizens Bank, N.A.*, No. 20-cv-044, 2020 WL 7042251, at *6 (D.R.I. Dec. 1, 2020) ("In sum, TILA's plain language dictates that § 1640 governs civil suits brought by individuals and state attorneys general, while § 1607 provides the cause of action for federal enforcement agencies such as the CFPB."). Respondents do not claim that either § 1607 or § 1693*o* restricted Enforcement Counsel's ability to bring any of the claims asserted in the Notice of Charges.[5]

Even if the one-year statute of limitations in § 1640(e) or § 1693m(g) somehow applied to Bureau enforcement actions notwithstanding the clearly contrary statutory text, the Bureau's related claims (Counts II and VI), which are brought under 12 U.S.C. § 5536(a)(1)(A), would not be affected. Actions brought by the Bureau are governed by the CFPA's general three-year limita-

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[5] Respondents have not, for instance, claimed that relief sought pursuant to Counts I and II is restricted by 15 U.S.C. § 1607(e). I find that Respondents have intentionally waived any such arguments by failing to present them either to the ALJ or in their appeal. A finding of waiver is particularly appropriate because Respondents have long been on notice that § 1607(e) could potentially be relevant, *see, e.g.*, Doc. 193 at 1; Doc. 199 at 1, and because any effect of § 1607(e) might have depended on factual matters that, due to Respondents' waiver, were not addressed by the ALJ or by the parties on this appeal, *see, e.g.*, 15 U.S.C. § 1607(e)(3)(C) (setting time limitation on certain relief except with respect to "a willful violation which was intended to mislead the person to whom credit was extended").

tions period, *id.* § 5564(g)(1), unless those actions are brought "solely under" one of the other laws (such as TILA or EFTA) that the Bureau enforces, *id.* § 5564(g)(2)(A). But actions brought under § 5536(a)(1)(A) (such as Counts II and VI), do not arise "solely under" TILA or EFTA. Accordingly, these claims are governed by the CFPA's general three-year limitations period, *see id.* § 5564(g)(1).

3. The Bureau satisfied the statute of limitations with respect to Mr. Carnes

Respondents argue that the CFPA's three-year statute of limitations bars Enforcement Counsel's claims against Mr. Carnes because the Bureau either discovered or should have discovered Mr. Carnes' violations more than three years before the filing of the Notice of Charges.[6] I disagree. Like the ALJ, I find that Respondents have failed to demonstrate that there is a genuine question whether the Bureau discovered or with due diligence should have discovered Mr. Carnes' violations three years before the Notice of Charges was filed on November 18, 2015. As a result, I do not need to address the question of whether the CFPA's statute of limitations begins to run when a reasonably diligent agency plaintiff could have discovered a violation as opposed to when the Bureau actually discovered the violation.

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[6] Respondents have not identified any evidence concerning the Bureau's discovery of IA's unfair practices in connection with RCCs, let alone Mr. Carnes' knowledge or participation in that conduct. As a result, even if I accepted Respondents' arguments regarding the Bureau's discovery of Mr. Carnes' violations related to the loans' costs, Mr. Carnes would still be liable for IA's use of RCCs. Mr. Carnes would also be liable for restitution (and the related injunctive relief) for all of IA's unfair and deceptive conduct that occurred after November 18, 2012.

Under 12 U.S.C. § 5564(g)(1), "no action may be brought under [the CFPA] more than 3 years after the date of discovery of the violation to which an action relates." Here, as discussed more fully above, Mr. Carnes' violations of the CFPA were based on his liability for IA's deceptive and unfair conduct. To obtain consumer redress for Mr. Carnes' violations of the CFPA on this theory, the Bureau had to prove that "(1) he participated directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Gordon*, 819 F.3d at 1193; *see also* Resp. Br. at 17.

Because it is undisputed that the Bureau could not recover from Mr. Carnes (or obtain injunctive relief requiring Mr. Carnes to cooperate in identifying consumers entitled to redress) without proving participation in or authority over the unlawful conduct as well as his knowledge, recklessness, or intentional avoidance of the truth, I find that these are important and necessary elements of the "violation" that must be discovered before the statute of limitations clock begins to run. *See Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648-49 (2010) (holding that scienter is a fact constituting a § 10(b) securities violation because it is "an important and necessary element" of such a violation without which "[a] plaintiff cannot recover"); Doc. 249 at 19 ("[T]he CFPB claims against Respondent Carnes could not have accrued until the CFPB discovered evidence that he participated directly in or had actual knowledge of the misrepresentations involved, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a

high probability of fraud and intentionally avoided learning the truth.").

Respondents have not identified any reason to suggest that the Bureau discovered, or that a reasonably diligent agency would have discovered, Mr. Carnes' violations of the CFPA before November 18, 2012 (*i.e.* three years before the filing of the Notice of Charges). Instead, Respondents identify evidence that pertains, at most, to the discovery of *IA*'s violations. Respondents point to five pieces of evidence, one concerning the Bureau's focus on the payday lending industry, one about the Office of Enforcement's general investigatory policies, and three related to the Bureau's awareness of consumer complaints about IA's conduct. *See* Resp. Br. at 7-8; *accord* Appeal Tr. at 15-16. Because Respondents failed on appeal to identify a genuine factual issue concerning the Bureau's discovery of Mr. Carnes' violations, I find that Mr. Carnes' affirmative statute of limitations defense fails.

In their brief to the ALJ (but not on appeal), Respondents asserted that the Bureau obtained IA's loan agreement and learned that Mr. Carnes' was IA's CEO (or should have done so) before November 2012. Doc. 239 at 9-10. Even if these arguments had not been waived for failure to press them on appeal, they do not suggest that the Bureau discovered (or should have discovered) Mr. Carnes' liability, *i.e.*, his participation in, or knowledge of, IA's violations more than three years before the filing of the Notice of Charges. Indeed, as the ALJ explained (and Respondents have failed to dispute in this appeal), Mr. Carnes' individual liability "would not have been evident merely from the loan agreement, Carnes' title as CEO of the company, and complaints against Integrity Advance." Doc. 249 at 24.

Instead, such a conclusion "required further documentation and investigational testimony." *Id.*

Under the CFPA, the Bureau obtains that kind of documentation and investigational testimony through administrative subpoenas. Here, the Bureau sent IA an administrative subpoena on January 7, 2013. Doc. 234, ¶ 3. IA provided an initial, partial production on October 25, 2013, and a largely complete production in December 2013. *Id.* ¶ 5. Enforcement counsel conducted investigational hearings in June 2014. *Id.* ¶¶ 7-8. As a result, I find that even based on their arguments to the ALJ, IA failed as a matter of law to show that the Bureau discovered Mr. Carnes' violation before November 18, 2012. I likewise find that Respondents did not show that a reasonably diligent agency in the Bureau's position would have discovered Mr. Carnes' violations before November 18, 2012. After all, even if the Bureau had sent IA an administrative subpoena as fast as possible – for instance, immediately after an enforcement attorney accessed complaints concerning IA's conduct on March 29, 2012, *id.* ¶ 2 – the Bureau would not have even had any documents relevant to Mr. Carnes liability until 2013 given the time it took IA to respond to the Bureau's administrative subpoena.

4. Ratification provides Respondents with an appropriate remedy for the CFPA's unconstitutional for-cause removal provision

As is apparent from the conclusions I have reached here, I ratify the Bureau's decision to file the Notice of Charges and to prosecute this action. *See Guedes v. BATFE*, 920 F.3d 1, 13 (D.D.C. 2019). This provides Respondents with an appropriate remedy for the

CFPA's unconstitutional removal restriction. *See FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996).

Respondents cite *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994), and argue that I cannot ratify this action because, if the Bureau were to bring this action now, the statute of limitations would have expired. This is incorrect for three reasons. As explained above, the statute of limitations in the CFPA is satisfied once the Bureau has "brought" an action. 12 U.S.C. § 5564(g)(1). Nothing in the CFPA's statute of limitations suggests that it can be satisfied only if the action is brought at a time when the Bureau is headed by a Director who can be removed by the President at will. Here, the Bureau brought an action against Respondents when it filed the Notice of Charges in 2015. Because the Bureau has already satisfied the statute of limitations, my ratification is timely.

Second, if the Bureau did not satisfy the statute of limitations when it filed the Notice of Charges, then the statute of limitations has not yet expired. Pursuant to the CFPA, the limitations period is triggered by the date that the Bureau discovers the violation. By tying the limitations period to the discovery of the violation, Congress indicated that it did not want violations of the CFPA to be placed beyond the reach of the Bureau's diligent enforcement efforts. Respondents' argument flies in the face of Congress's will. Respondents essentially contend that the Bureau was constitutional enough to discover their violations and thereby begin the ticking of the statute of limitations clock, but not constitutional enough to issue a Notice of Charges that would satisfy the limitations period. There is no reason to believe that Congress intended this kind of heads-I-win, tails-you-lose result. Accordingly, if the statute of limitations was not satisfied when the

Bureau issued the Notice of Charges, then the limitations period has yet to expire, and my ratification is timely.

Third, the CFPA's statute of limitations expressly states that the limitations period applies "[e]xcept as otherwise permitted . . . by equity." 12 U.S.C. § 5564(g)(1). So even if the statute of limitations might have otherwise run, the limitations period should be equitably tolled. *See Holland v. Fla.*, 560 U.S. 631, 649 (2010) (holding that a party is entitled to equitable tolling if it pursued its rights diligently and some extraordinary circumstance prevented timely filing). As I have explained above, the Bureau has pursued its rights diligently. Indeed, it filed a timely Notice of Charges. And, to the extent that the filing did not satisfy the statute of limitations, that was only because of an extraordinary circumstance – the unconstitutionality of the for-cause removal provision, a circumstance over which the Bureau had no control.

Respondents argue that the equitable tolling of the statute of limitations would be to their detriment. Resp. Br. at 3. But "statutes of limitations are designed to insure fairness to defendants by preventing the revival of stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 473 (1975) (Marshall, J., concurring in part, dissenting in part). None of those purposes would be served here since Respondents have long had notice of the Bureau's claims. Accordingly, if the statute of limitations has not been satisfied, but has nonetheless expired, it should be equitably tolled.

Respondents cite the district court's decision in *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729,

785 (S.D.N.Y. 2018), *vacated and remanded for further proceedings*, No. 18-2743, 2020 WL 6372988 (2d Cir. Oct. 30, 2020), and argue that ratification would be impossible because the Bureau's structure was unconstitutional at the time of the filing of the Notice of Charges. Resp. Br. at 4. But the district court in *RD Legal* reached that decision because it concluded that, as a result of the for-cause removal provision, the entire CFPA should be struck down. The Supreme Court rejected this conclusion in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). Indeed, it held that even though the for-cause removal provision was unconstitutional (and severable from the remainder of the CFPA), "[t]he provisions of the [CFPA] bearing on the [Bureau's] structure and duties remain fully operative." *Id.* at 2209 (emphasis added); *see BCFP v. Citizens Bank, N.A.*, No. 20-cv-044, 2020 WL 7042251, at *8 (D.R.I. Dec. 1, 2020) ("This Court thus interprets the Supreme Court's use of the word 'structure' to refer to attributes of the CFPB's top brass, not deeper issues with the authority or makeup of the Bureau as a whole."). That is, despite the unconstitutional removal restriction, the Bureau had the authority to file the Notice of Charges.

5. Respondents have not been denied due process

Respondents make two arguments in which they contend they were denied due process. First, they argue that they were denied due process when the ALJ refused to grant their request for additional discovery. Second, they contend that they were denied due process because the ALJ did not conduct a new hearing with witnesses and an opportunity for cross-examination. I reject both of those arguments.

a. Respondents' request for issuance of a subpoena

First, on August 23, 2019, Respondents filed a request with the ALJ pursuant to Bureau Rule 208, 12 C.F.R. § 1081.208, seeking to have her issue a subpoena directed to the Bureau that required the production of:

1) All consumer complaints received by the Bureau from July 21, 2011, to November 18, 2012, regarding IA or Mr. Carnes;

2) Records of all communications (from July 21, 2011, to November 18, 2012) between anyone employed by the Bureau and any other person regarding IA or Mr. Carnes;

3) Records of all internal Bureau communications (from July 21, 2011, to November 18, 2012) regarding IA or Mr. Carnes;

4) Any document drafted by any Bureau employee regarding IA or Mr. Carnes.

Doc. 232. Respondents argue that they sought this information in support of their contention that, by the time the Bureau filed its Notice of Charges, the statute of limitations had expired. Appeal Tr. at 17, 43. They contend that their proposed subpoena was narrowly tailored, and that pursuant to the Bureau's rules, the ALJ was required to issue the subpoena unless the subpoena was "unreasonable, oppressive, excessive in scope, or unduly burdensome." Resp. Br. at 10.

As explained above, I have concluded that the statute of limitations set forth in the CFPA applies to all the violations alleged in the Notice of Charges. On June 2, 2014, and on March 16, 2015, the Bureau and IA entered into tolling agreements. Docs. 200, 201.

Because enforcement authority was not transferred to the Bureau until July 21, 2011, and because the Bureau entered into the tolling agreements less than three years after that date, the statute of limitations did not expire with respect to IA. However, the Bureau and Mr. Carnes never entered into a tolling agreement. So the issue is whether the ALJ's denial of Respondents' subpoena request denied them due process with respect to their argument that the statute of limitations had expired as to Mr. Carnes.

Bureau Rule 206, 12 C.F.R. § 1081.206, seeks "to ensure that respondents have prompt access to the non-privileged documents underlying enforcement counsel's decision to commence enforcement proceedings, while eliminating much of the expense and delay often associated with pre-trial discovery in civil matters." 77 Fed. Reg. 39058, 39059 (June 29, 2012). Rule 206 therefore required Enforcement Counsel to make available to Respondents those documents obtained by the Bureau's Office of Enforcement from outside sources in connection with its investigation of Respondents. Enforcement Counsel state (and Respondents do not dispute) that they complied with Rule 206 and provided Respondents all consumer complaints and all external correspondence upon which Enforcement Counsel might have relied, regardless of which office in the Bureau initially received those documents. EC Br. at 23. Nonetheless, Respondents now speculate that other offices at the Bureau might have received consumer complaints or other documents regarding IA and Mr. Carnes, that these documents might never have come to the attention of the Office of Enforcement, and that if these other offices had received these documents, this might have triggered the running of the statute of limitations.

Respondents' request for additional discovery is based on far too many assumptions. They ask me to assume: 1) that there are consumer complaints (or other external communications) regarding IA or Mr. Carnes that were received by the Bureau but that never came to the attention of the Office of Enforcement (and thus were not turned over to Respondents pursuant to Rule 206); 2) that these documents contained information regarding Mr. Carnes' role as the CEO of IA; and 3) that the Bureau received these documents prior to November 18, 2012 (*i.e.*, more than three years before the Bureau filed its Notice of Charges). Even assuming that there are complaints or other external documents that never came to the attention of Enforcement Counsel, I am unwilling to assume that these documents might have contained the sort of information regarding Mr. Carnes that would be relevant to Respondents' statute of limitations argument. Pursuant to Rule 206, Respondents have already received complaints and other communications that came from external sources. And yet, Respondents have not pointed to anything in those documents to support the claim that the Bureau did discover or should have discovered Mr. Carnes' violations (as opposed to IA's violations) before November 18, 2012. There is thus no reason for me to assume that any documents responsive to the first two specifications of Respondents' proposed subpoena, documents that are of the same character as the documents that Respondents have already received, would be relevant to their statute of limitations argument. Respondents' request flouts the purpose of Rule 206. Accordingly, these two specifications are excessive in scope and unreasonable.

The third and fourth specifications of Respondents' proposed subpoena seek internal Bureau communications

and documents. Pursuant to Bureau Rule 206(b), as part of its initial production to Respondents, the Office of Enforcement was not required to provide privileged documents, internal memoranda, other notes or writings prepared by Bureau employees, or documents subject to the work-product privilege. Respondents do not dispute that the documents requested by the third and fourth specifications are exempt from disclosure under Rule 206. Instead, they argue that the exemptions in Rule 206 do not apply to documents requested by subpoena pursuant to Rule 208, and that even if the documents are exempt, the ALJ should have required Enforcement Counsel to provide a privilege log for those documents. Resp. Br. at 11.

As the Bureau explained when it issued Rule 206, the purpose of that rule is to:

> provide the respondent with access to, in effect, the documents they would likely seek and obtain in the course of a protracted discovery period soon after service of the notice of charges. . . . By automatically providing respondents with the factual information gathered by the Office of Enforcement in the course of the investigation leading to the institution of proceedings, this provision helps ensure that respondents have a complete understanding of the factual basis for the Bureau's action and can more accurately and efficiently determine the nature of their defenses or whether they wish to seek settlement. Because this approach renders traditional document discovery largely unnecessary, it will lead to a faster and more efficient resolution of Bureau administrative proceedings, saving both the Bureau and respondents

> the resources typically expended in the civil discovery process.

77 Fed. Reg. 39058, 39070 (June 29, 2012). By seeking a subpoena for documents that do not have to be disclosed under Rule 206, Respondents seek to thwart the purpose of that rule. Such a subpoena undermines the goal of a faster and more efficient resolution of the administrative proceeding. Thus, to the extent that a respondent seeks issuance of a subpoena to obtain from Enforcement Counsel documents that are specifically protected from disclosure by Rule 206, that subpoena is "excessive in scope" pursuant to Rule 208, and a request for issuance of such a subpoena is properly denied.

In connection with their request for a subpoena, Respondents also requested that, if the ALJ were not willing to issue a subpoena, she should require Enforcement Counsel to provide a list of withheld documents. Resp. Br. at 11-12. The ALJ denied that request because she concluded that requiring Enforcement Counsel to produce such a list would be "an unnecessary and dilatory exercise." Doc. 238 at 9. I agree. Bureau Rule 206(c) states that the administrative law judge "may require the Office of Enforcement to produce a list of documents or categories of documents" that were not provided to the respondent in connection with the disclosures required by Rule 206. It is not clear to me whether Respondents' request is even appropriate when it is made not at the time Enforcement Counsel complied with Rule 206, but in conjunction with a meritless request for a subpoena pursuant to Rule 208. In any event, the ALJ correctly denied the request because there is no question that the documents requested by specifications 3 and 4 are privileged. Respondents claim that if Enforcement

Counsel provided the date of each of the requested documents, this would be relevant to when the Bureau discovered Respondents' violations. Resp. Br. at 11. But disclosure of the date on which documents responsive to specifications 3 and 4 were created would not advance Respondents' argument regarding when the Bureau should have discovered Mr. Carnes' role in connection with IA's violations. Nor would it advance this argument even if Respondents were able to show that the Bureau had access to IA's loan agreement prior to November 2012, *see* Resp. Br. at 11 n.9, because the loan agreement does not reveal Mr. Carnes' role. Accordingly, the ALJ did not err when she denied IA's request for issuance of a subpoena, and Respondents were not thereby denied due process.

b. Respondents' request for a second evidentiary hearing

On May 29, 2019, I remanded this matter to the ALJ "for a new hearing and recommended decision in accordance with Part 1081 of the Bureau's Rules." Doc. 216. I further directed that the ALJ was to "seek submissions from the parties regarding the conduct of further proceedings." *Id.* The ALJ ultimately resolved this matter based on the parties' cross motions for summary disposition. However, Respondents argue that they were denied due process because the ALJ did not conduct a second evidentiary hearing "with the opportunity for both sides to present evidence and examine witnesses." Resp. Br. at 12; *see* Appeal Tr. at 44. (Respondents had an evidentiary hearing before Judge McKenna, and the transcript of that hearing is part of the record of this proceeding. *See* Docs. 172-174.) Respondents contend that *Lucia v. SEC*, 138 S. Ct. 2044 (2018), entitles them to such a hearing. Resp. Br. at 12-13.

In *Lucia*, the Court held that the appropriate remedy for an administrative adjudication conducted by an administrative law judge who had not been appointed in a manner consistent with Article II of the Constitution was a new hearing before a properly appointed official. 138 S. Ct. at 2055. But the Court did not indicate the nature of the new hearing that the properly appointed official was required to conduct. *See Kornman v. SEC*, 592 F.3d 173, 181-82 (D.C. Cir. 2010) (upholding SEC's use of summary disposition as consistent with statutory requirement for an "opportunity for hearing"). Indeed, the Constitution does not automatically require an in-person evidentiary hearing whenever an agency such as the Bureau makes an adjudicative determination. *See Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010). Rather, "[a]dministrative summary judgment is not only widely accepted, but also intrinsically valid." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994). Respondents received the process due under the Constitution: notice of the charges against them and a meaningful opportunity to be heard before an impartial tribunal. *See Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950).

Nor did my order require the ALJ to conduct the sort of hearing that Respondents seek. It is true that the hearing Respondents seek is provided for by Bureau Rules 300-306, 12 C.F.R. §§ 1081.300-306. But my order directed the ALJ to "seek submissions from the parties regarding the conduct of further proceedings." Doc. 216. I thus implicitly left it to her to determine the scope of further proceedings, so long as those proceedings were consistent with the Bureau's rules. Those rules permit an administrative law judge to resolve a proceeding on motions for summary disposition. 12 C.F.R. § 1081.212(c). Here, both Respondents

and Enforcement Counsel filed such motions. *See* Docs. 272, 275. A motion for summary disposition may be supported by "documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position." 12 C.F.R. § 1081.212(d). Thus, it was wholly appropriate, and consistent with Bureau Rule 212(d), for the ALJ to consider documentary evidence from the proceedings in this matter held before Administrative Law Judge McKenna. Respondents complain that the ALJ was not able to consider the demeanor of the witnesses who testified at the evidentiary hearing held before Judge McKenna. Resp. Br. at 13-14. Nothing in the Bureau's rules required that she do so. *Puerto Rico Aqueduct*, 35 F.3d at 606 ("Due process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way."). In any event, Respondents have not raised any argument that calls the veracity of any witness into question.

B. IA violated TILA (Counts I and II)

As relevant here, TILA requires that before closed-end credit is extended, the creditor must disclose to the consumer the "finance charge," and the "total of payments" (which is the sum of the amount the consumer financed and the finance charge). 15 U.S.C. § 1638(a)(2)(A), (3), (5). Accurate disclosure of the finance charge and total of payments is foundational to the Congressional scheme: A primary purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare

more readily the various credit terms available to him and avoid the uniformed used of credit." *Id.* § 1601(a).

Regulation Z specifies that these required "disclosures shall reflect the terms of the legal obligation between the parties." 12 CFR § 1026.17(c)(1). The Bureau's official interpretation of Regulation Z further clarifies that "[t]he disclosures shall reflect the terms to which the consumer and creditor are legally bound as of the outset of the transaction." Comment 17(c)(1)-1.

In this case, IA disclosed the finance charge and the total of payments as if consumers were obligated to repay the loans in full by the consumer's next pay date. I find that consumers were not under any such obligation.

Under IA's contract, immediate repayment was purely optional. The contract says that the consumer "may choose" either the "option" of fully repaying the loan by her next pay date "OR" the "option" of "renew[ing] [the] loan," which meant "extend[ing]" the payment due date until the consumer's following pay date. When consumers entered into an agreement with IA, they were not obligated to immediately repay the loan in full. Instead, consumers would only have that obligation if they affirmatively chose the immediate repayment option by contacting IA three business days before the payment due date. As a result, IA's TILA disclosures did not "reflect the terms of the legal obligation between the parties," 12 C.F.R. § 1026.17(c)(1), "as of the outset of the transaction," comment 17(c)(1)-1. *See United States v. Moseley*, 980 F.3d 9, 26 (2d Cir. 2020) (affirming TILA conviction because the evidence showed that "the 'total of payments' disclosure included just one finance charge in addition to the loan principal amount ...

notwithstanding Moseley's knowledge (and in fact, his intention) that, unless the borrower acted, the total she would pay would amount to much more than a single finance charge").[7]

Respondents argue that IA's TILA disclosures were lawful because "consumers 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." Resp. Br. at 19. This argument is wrong. Consumers did not have a legal obligation to pay the loan in full on the payment due date because, as Respondents concede, unless consumers took affirmative action, IA automatically renewed the loans and deducted multiple payments from their accounts. Thus, consumers' legal obligation was to pay the loan according to the contractually-defined renewal and auto-workout schedule. Under TILA therefore, IA was required to provide consumers with disclosures that reflected consumers' ultimate legal obligation to complete repayment of the loan by the end of the renewal and auto-workout schedule. Contrary to Respondents' suggestion, Resp. Br. at 20, disclosures based on the full renewal and auto-workout term would not reflect consumers' "post-consummation choices," but rather consumers' legal obligation at the time loans were issued. *See also Moseley*, 980 F.3d at 27 (rejecting similar argument).

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[7] At argument, Respondents attempted to distinguish *Moseley* by claiming that the rest of IA's contract clearly disclosed the consumer's obligations. Appeal Tr. at 15. But even if that were true (and it is not, for the reasons discussed in the next section), the alleged clarity of the remainder of IA's contract is irrelevant to whether IA's mandatory TILA disclosures were accurate.

Allowing IA to make disclosures that reflected consumers' option to repay the loan immediately would neuter TILA's requirements that creditors prominently disclose a closed-end loan's finance charge and total payments. After all, closed-end loans commonly permit a consumer to repay the loan ahead of schedule, often without a penalty for prepayment. *See, e.g.*, 12 C.F.R. § 1026.18(k) (requiring disclosures about prepayment of closed-end loans). On Respondents' theory, lenders who offer consumers a 30-year home mortgage with a prepayment option would only need to disclose a tiny fraction of the finance charge and total payments that consumers are obligated to repay.

To the extent that there were any doubt about whether consumers had a legal obligation to immediately repay the loans based on the terms of the contracts alone, the undisputed evidence concerning the parties' course of conduct removes it. Most significantly, Respondents admitted in their answer "that unless a consumer contacted Integrity Advance *to change the terms of the loan* – through one of several available means – Integrity Advance renewed the consumer's loan." Doc. 21, at ¶ 29 (emphasis added); *accord id.* ¶ 30 (Respondents admit that "$50 would be automatically applied to a consumer's loan principal after four loan renewals, unless a consumer contacted Integrity Advance – through one of several available means – *to change the terms of payment*." (emphasis added)). *See, e.g.*, *AT&T Corp. v. Lillis*, 970 A.2d 166, 172 (Del. 2009) ("It is hornbook law that the contracting parties' course of conduct may be considered as evidence of their intended meaning of an ambiguous contractual term. In this case, that course of conduct included the undisputed fact that AT&T made certain admissions in its original answer, which it later withdrew."). Consistent with this admission, Respondents

do not point to any evidence to suggest that IA could or did treat consumers as having an obligation to immediately repay the loans. Unless a consumer affirmatively chose to repay her loan right away, IA would not debit the consumer's account for the full amount of the loan. Nor would IA treat the consumer as if she had breached the agreement for failing to either repay the loan or affirmatively renew the loan. Indeed, the first repayment option that IA identified for consumers in their welcome was: "YOU CAN LET THE LOAN AUTOMATICALLY RENEW." Doc. 274A at 24. Instead, as Respondents concede in their brief on appeal, the contract "informed consumers that their loans would be automatically renewed if they failed to select a payment option, and . . . allowed consumers to decline renewals . . . ." Resp. Br. at 21.

Accordingly, I find that IA's disclosures violated TILA as implemented by Regulation Z. Because IA is a covered person,[8] I find that IA also violated 12 U.S.C.

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[8] In a two-sentence paragraph, Respondents assert that they were not covered persons "during the period of the CFPB's authority," by which they mean the period after the CFPA took effect but before the Senate confirmed Richard Cordray as the Bureau's first director in July 2013. Resp. Br. at 14. This argument has been waived. To the extent that this drive-by assertion is not waived, I reject it. The definition of covered person became effective on July 21, 2010, and the prohibition on unfair, deceptive, and abusive acts or practices by covered persons took effect on July 21, 2011. *See* 12 U.S.C. § 5301 note (setting the general effective date of the Dodd-Frank Act that is applicable to 12 U.S.C. § 5481's definition of covered person); *id*. § 5531 note (providing that subtitle C of the CFPA, which includes 12 U.S.C. §§ 5531, 5536's prohibitions on unfair, deceptive, or abusive acts and practices would take effect on the designated transfer date); 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010) (establishing July 21, 2011 as designated transfer date). Accordingly, as of July 21, 2011, Respondents were covered persons subject to

§ 5536(a)(1)(A) by providing consumers disclosures that violated Federal consumer financial law.

C. Through IA's use of the loan agreement, IA and Mr. Carnes engaged in deceptive practices (Count III)

Under the CFPA, "an act or practice is deceptive if (1) there is a representation, omission, or practice that, (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material." *Gordon*, 819 F.3d at 1192 (quotation marks omitted); *see also id.* at 1192 n.7.

Here, the ALJ concluded that IA's loan agreement was deceptive as a matter of law because it was likely to mislead reasonable consumers about how much the loans cost. Doc. 293, at 40-41. The loan agreement's TILA disclosures identified the total of payments that applied only to those consumers who affirmatively chose, at least three days before the first payment due date, to pay the loan in full. *Id.* at 8 ¶¶ 37, 38, 46. But neither in the TILA disclosures nor elsewhere in the loan agreement did IA disclose to consumers how much they would have to pay under the loan's default payment schedule pursuant to which IA made ACH withdrawals according to the auto-renewal and auto-workout process. *Id.* at 8, ¶ 47. As the Ninth Circuit recently concluded in affirming summary judgment on the FTC's deception claim in a case involving a very similar loan agreement, a reasonable consumer who received the loan agreement "might expect to pay only" the amount listed in the "total of payments." *FTC v. AMG*, 910 F.3d at 423 (2018); *cf. also Moseley*, 2020

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the CFPA's requirements and restrictions, including the prohibitions on unfair and deceptive acts or practices.

WL 6437737, at *12 ("[A] jury could rationally have found that Moseley's "total of payments" disclosure of just the loan principal plus one finance charge – despite the fact that no such payment was actually scheduled – was inaccurate and misleading.").

On appeal, Respondents challenge the ALJ's deception conclusion in three ways.

First, they say that Enforcement Counsel failed to establish as a matter of law that IA's misrepresentations about the full cost of the loans were material to consumers. In support of this argument, Respondents note that Enforcement Counsel did not present any extrinsic evidence of materiality. Resp. Br. at 21-22. But Respondents' argument misunderstands the law of materiality.[9] A misrepresentation is "material if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). Not surprisingly, the FTC and the courts have long treated misrepresentations about how much a product or service costs as presumptively material. *See, e.g.*, FTC Policy Statement on Deception, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 1984 WL 565319, at *49; *In re Sanctuary Belize Litig.*, Civ. No. 18-3309, 2020 WL 5095531, at *11 (D. Md. Aug. 28, 2020); *accord FTC v. Freecom*, 401 F.3d at 1203 (10th Cir. 2005) ("Misrepresentations concerning anticipated income from a business opportunity generally are material and likely to mislead consumers because such misrepresentations

[9] Notably, Respondents failed in their opening brief to specifically identify *any* basis to rebut the presumption of materiality, instead citing to various pages of their briefs to the ALJ. Resp. Br. at 21-22.

strike at the heart of a consumer's purchasing decision."). Where the presumption of materiality applies, additional evidence of materiality is unnecessary. *See* FTC Policy Statement on Deception, 1984 WL 565319, at *49-50; *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992). I find that the application of this presumption was particularly appropriate here because IA's misrepresentation concerned a nearly $700 discrepancy in the total cost of a $300 loan. Accordingly, Enforcement Counsel was not required to provide additional evidence to prove that IA's misrepresentation was material.

Respondents also attempt to rebut the presumption of materiality by noting that IA had repeat customers. Resp. Br. at 22-23. But as the court explained in *FTC v. AMG*, "[i]t is equally plausible that the repeat borrowers were just as confused as those taking out their first loans." 910 F.3d at 425; *see also* discussion below. Indeed, Respondents have no evidence that a cost difference of several hundred dollars would somehow be less important to the decision of a repeat borrower. After all, materiality does not require proof that, but for the misrepresentation, no consumer would ever purchase a product. Instead, the question is whether the misrepresentation was likely to affect consumer behavior. The existence of some consumers willing to repay more than $1000 in order to borrow $300 does not mean that price is irrelevant to IA's borrowers, even to repeat borrowers. All it shows is that *some* consumers were willing to pay that price.

Second, Respondents dispute, in passing, the ALJ's conclusion that the net impression of the loan agreement was deceptive as a matter of law. They claim that IA "took steps" to ensure consumers understood the loan, and that there was "ample other evidence"

establishing a genuine issue of fact on this issue. Resp. Br. at 22. But Respondents' brief on appeal did not specify the "steps" or the "evidence" on which Respondents hoped to rely, citing instead pages of argument that it made to the ALJ. To the extent that Respondents have not waived this argument, I reject it. As the Ninth Circuit explained in *AMG*, "the TILA box suggested that the value reported as the 'total of payments' . . . would equal the full cost of the loan," but in fact, "under the default terms of the loan, a consumer would be required to pay much more." 910 F.3d at 423. None of the steps or evidence Respondents identified in the proceeding before the ALJ could have even arguably corrected that misimpression. *See* Doc. 272 at 9-11. Indeed, the closest IA came to disclosing to consumers that, as a result of the loan's default terms, consumers "would be required to pay much more" than the amount disclosed in the total of payments box was a generic statement in the loan agreement in all capital letters that "Additional fees may accrue if the loan is refinanced or 'rolled over.'" Doc. 293 at 9, ¶ 50. But as the ALJ pointed out (and Respondents have failed to meaningfully dispute, *see* Appeal Tr. at 46-47) this disclosure "did not clearly set forth what those additional fees would be for a loan that followed the default renewal procedure or explain how a reasonable consumer was to calculate these additional fees." Doc. 293 at 38. Even worse, this disclosure was itself "misleading" because it "present[ed] the accrual of additional fees upon renewal as a possibility rather than the certainty that it was, further contributing to the overall impression that consumers could expect to pay only the 'Total of Payments' disclosed." *Id.*

Finally, Respondents contend that because IA had repeat customers, this shows that the loan agreements

would not have misled reasonable consumers. This misstates the standard for proving deception. To prove that an act or practice is deceptive, the Bureau did not need to prove that every consumer was, in fact, misled. *See, e.g.*, *FTC v. Johnson*, 96 F. Supp. 3d 1110, 1119 (D. Nev. 2015) ("The FTC is not required to show that all consumers were deceived, and the existence of satisfied consumers does not constitute a defense."). Rather, all Enforcement Counsel had to show was that the act or practice was *likely* to mislead reasonable consumers. Here, consistent with the Ninth Circuit's decision in *AMG*, I find that as a matter of law IA's loan agreement was likely to mislead reasonable consumers, and as explained above, Mr. Carnes is liable for that violation of the CFPA.

D. Through IA's use of the loan agreement, IA engaged in unfair practices (Count IV)

Under the CFPA, an act or practice is "unfair" if it is likely to cause substantial injury that is not reasonably avoidable by consumers and that is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1). The ALJ held, and I agree, that IA's use of loan agreements that misrepresented the total cost of credit was unfair, and as I explain above, Mr. Carnes was liable for that violation of the CFPA.

First, IA's practice was likely to cause (and did cause) substantial injury because many consumers paid significantly more than they would have anticipated based on the loan agreement. This harm easily clears the "substantial injury" bar, which can be satisfied by showing that an act or practice does "a 'small harm to a large number of people, or if it raises a significant risk of concrete harm.'" *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010) (quoting *Am.*

Fin. Servs. Ass'n v. FTC, 767 U.S. 957, 972 (D.C. Cir. 1985)).

Second, the injury consumers suffered was not reasonably avoidable because it was not properly disclosed in the loan agreement. *See Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) ("Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it. . . ."). And once consumers realized that IA had deducted more money from their bank accounts than the amount disclosed in the loan agreement's total of payments box, they still could not avoid injury because, as illustrated by the example set forth above in the Findings of Fact and Legal Background, at that point they still owed IA more than the principal amount of the loan. Respondents claim, Resp. Br. at 24, that the evidence would support the inference 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" because the loan agreement said that "additional fees may accrue if the loan is refinanced or 'rolled over.'" *Id.* But as explained above in connection with Respondents' liability pursuant to Count III, the mere fact that the loan agreement stated that there *may* be some unspecified additional fees does not permit the inference that consumers understood that they were actually authorizing IA to charge them more than twice as much as the loan agreement actually disclosed. Nor is it persuasive that IA had repeat customers. *See id.* Even if there were a subgroup of IA customers who understood IA's loan agreement well enough to avoid paying more than the total of payments (and IA has not demonstrated that there were such customers), that would not excuse IA's violations with respect to other customers.

Third, whatever benefits IA's loans might have provided to consumers, there is no evidence that the challenged practice of misrepresenting or otherwise obscuring the material terms of those loans provided a countervailing benefit to consumers or competition. As the ALJ observed (and Respondents do not challenge), "the benefit of the loans could have been provided to consumers while accurately disclosing the costs. There is no plausible argument that can be made that IA had to misrepresent the costs in order for consumers to receive the benefit of a payday loan." Doc. 293 at 49.

Respondents attempt to avoid liability for their unfair practice by asserting that the Bureau is estopped from pursuing its unfairness claim because when this matter was being considered by Judge McKenna, Enforcement Counsel agreed to dismiss this claim (*i.e.*, Count IV) with prejudice in light of Judge McKenna's summary disposition order. *See* Doc. 127. But dismissal of the unfairness claim came before I ordered that Respondents be given a new hearing in light of the Supreme Court's decision in *Lucia* and before I directed Judge Kirby to "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna." Doc. 216. Consistent with that order, the parties were permitted to proceed as if Judge McKenna had not issued any opinions, orders, or rulings.

In this context, I find that it was appropriate for Judge Kirby to allow Enforcement Counsel to pursue a claim that it had abandoned in reliance on a now-inoperative opinion by Judge McKenna. That decision makes particular sense because Respondents have not shown that the stipulated dismissal in the proceeding before Judge McKenna provided an unfair advantage to Enforcement Counsel in the proceeding before

Judge Kirby or imposed an unfair detriment on Respondents. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (observing that one consideration in a claim of judicial estoppel is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped"). Nor can the stipulated dismissal be understood to have persuaded Judge McKenna to adopt the Bureau's position on a contested matter. *Cf. id.* at 750 (courts ask "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled" (quotation marks omitted)).

E. IA violated EFTA (Counts V and VI)

Count V of the Notice of Charges alleged that IA violated a provision of EFTA, 15 U.S.C. § 1693k, and its implementing Regulation E, 12 C.F.R. § 1005.10(e), when IA conditioned extensions of credit on repayment by preauthorized electronic fund transfers. Count V alleged that IA required consumers to complete IA's ACH Authorization as part of the loan application process. By doing this, consumers authorized repeated electronic fund transfers every payday until the principal reduced to zero. This ACH authorization constituted a "preauthorized electronic fund transfer" as that term is defined in Regulation E, and there was no indication in IA's documents that a consumer could obtain a loan without signing the ACH Agreement.

Count VI of the Notice of Charges alleged that by virtue of its violation of EFTA and Regulation E, IA also violated the CFPA. In particular, the CFPA

provides that when a covered person violates an enumerated statute, that covered person also violates the CFPA. 12 U.S.C. § 5536(a)(1)(A). Respondents have not disputed that if they violated EFTA, they also violated the CFPA. *See* Resp. Br. at 25.

I conclude that IA violated EFTA and Regulation E, and as a result, also violated the CFPA.

EFTA provides that "No 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. Regulation E has a similar prohibition: "No financial institution or other person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers[.]" 12 C.F.R. § 1005.10(e). Regulation E defines an "electronic fund transfer" as "any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account." 12 C.F.R. § 1005.3(b)(1). A "preauthorized electronic fund transfer" is defined as "an electronic fund transfer authorized in advance to recur at substantially regular intervals." 12 C.F.R. § 1005.2(k). The parties do not dispute that the payments that IA extracted from consumers' bank accounts were "preauthorized electronic fund transfers."

As an initial matter, there is no dispute that IA is a "person" for purposes of EFTA and Regulation E. Regulation E defines a person to mean "a natural person or an organization, including a corporation, government agency, estate, trust partnership, proprietorship, cooperative, or association." 12 C.F.R. § 1005.2(j). The parties jointly stipulated that IA is a Delaware limited liability company. Doc. 56 at 1. Respondents

have also not disputed that IA extended credit to consumers.[10] EFTA does not specifically define the term "credit," but that term is defined elsewhere in the Consumer Credit Protection Act (of which EFTA is Title IX) as the right to "incur debt and defer its payment." 15 U.S.C. § 1602(e). The parties jointly stipulated that IA made loans to consumers. Doc. 56 at 2. The question that remains is whether IA conditioned its extensions of credit on the consumer's repayment by preauthorized electronic fund transfers. I conclude that it did.

The following provisions of the loan agreement (ECX 2) demonstrate that IA required consumers to agree to preauthorized electronic fund transfers to repay their loans as a condition of getting the loans:

- "In order to complete your transaction with us, you must electronically sign the Loan Agreement by clicking the 'I Agree' button at the end of the Loan Agreement, as well as all the other 'I Agree' buttons that appear within the Loan Agreement and related documents that appear

[10] It has been argued that Regulation E limits the scope of EFTA's prohibition to extensions of credit granted by financial institutions. *See McCready v. eBay, Inc*., No. 03-cv-2117, 2005 WL 6082528, at *5 (C.D. Ill. Feb. 4, 2005), *aff'd*, 453 F.3d 882 (7th Cir. 2006). Respondents have not made this argument, and it is accordingly waived. In any event, I would reject the argument because a regulation cannot limit the scope of a violation defined by a statute. *See Zuniga v. Barr*, 946 F.3d 464, 470 (9th Cir. 2019) (court must reject an interpretation of a regulation if it is inconsistent with the statute under which the regulation has been promulgated). *See also* 61 Fed. Reg. 19662, 19667 (May 2, 1996) (promulgating what is now codified as 12 C.F.R. § 1005.10(e) and noting that the provision applies not just to financial institutions).

below." ECX 2 at 4. (The ACH Authorization was one of these buttons.) *Id.* at 11.

- "By entering your name and clicking the 'I Agree' button below, you are electronically signing and agreeing to all the terms of the Loan Agreement, the Arbitration Provision, and the ACH Authorization ('the Loan Documents') as providing or confirming your electronic signature on all of the Loan Documents. . . ." *Id.* at 15.
- "The ACH Authorizations set forth in the Loan Agreement are to remain in full force and effect for this transaction until your indebtedness to us for the Total of Payments, plus any other charges or fees incurred and described in the Loan Agreement, is fully satisfied." *Id.* at 10.
- "You grant us a security interest in your ECheck/ACH Authorization in the amount of the Total of Payments (the 'ECheck/ACH') which we may negotiate on the Payment Due Date or thereafter. . . . Pursuant to the ECheck/ACH Authorization, you have directed us to initiate one or more ECheck/ACH debit entries to Your Bank Account for the amounts owed to us under the Loan Agreement on the Payment Due Date or thereafter and for certain fees that may be assessed in the event of dishonor when presentment is made to your bank on your ECheck/ACH Authorization." *Id.* at 4-5.

There is no indication in the loan agreement that a borrower could obtain a loan from IA without agreeing to the ACH authorization. Accordingly, I conclude that the loan agreement violates EFTA.

Respondents argue that the loan agreement did not condition the extension credit on repayment by

recurring electronic fund transfer because the ACH Authorization indicated that consumers could repay their loan through other means. Resp. Br. at 25; Resp. Reply at 13. Indeed, a provision of the ACH Authorization did say, "You understand and agree that this ACH authorization is provided for your convenience, and that you have authorized repayment of your loan by ACH debits voluntarily. You agree that you may repay your indebtedness through other means, including by providing timely payment via cashier's check or money order directed to: Integrity Advance, 300 Creek View Road, Suite 102, Newark, DE 19711." ECX 2.

While this provision allowed borrowers, at least in theory, to make payments by a means other than preauthorized electronic fund transfer, it did not allow the borrower to obtain credit from IA without agreeing to allow IA to make preauthorized electronic fund transfers from the borrower's account to repay the loan. Although IA made loans to a small number of borrowers who, despite the provisions of the loan agreement did not agree to the ACH Authorization, Doc. 272 at 34, there is no clear explanation in the record as to why. (I do not read the Notice of Charges to allege that IA violated either EFTA or Regulation E with respect to this small number of borrowers who were the exception to the rule.)

I disagree with Respondents' interpretation of the relevant provisions of EFTA and Regulation E. EFTA and Regulation E prohibit a lender from conditioning a loan on repayment by preauthorized electronic fund transfers. Respondents, however, would apparently permit a creditor to require that a consumer agree to repayment by preauthorized electronic fund transfer, but contend that the creditor would not violate EFTA

so long as the creditor does not then require the consumer to actually make every single payment by preauthorized electronic fund transfer. There is no evidence that Congress intended such a result and IA has offered none. Indeed, the legislative history of EFTA is to the contrary. Two bills that were precursors to EFTA contained the same language that was ultimately enacted as section 1693k. *See* S. 3499, 95th Cong. § 913 (1978); S. 3156, 95th Cong., § 913 (1978). The Senate reports explained that these bills provided that "a creditor could not condition the extension of credit on a consumer's agreement to repay by automatic EFT payments." S. Rep. No. 95-915, at 7 (1978); S. Rep. No. 95-1273, at 14 (1978) (emphasis added). That, of course, is exactly what IA required.

The court in *De La Torre v. CashCall, Inc.*, 56 F. Supp. 3d 1073 (N.D. Cal. 2014), considered, and rejected, the same argument made by Respondents here. The defendant in that case argued that what EFTA actually prohibited was "conditioning the extension of credit upon a requirement to make all loan payments by [electronic fund transfer] during the life of the loan." *Id*. at 1088. However, the court concluded that EFTA's language is "unambiguous" that a violation of EFTA's compulsory use provision "occurs at the moment of conditioning – that is, the moment the creditor requires a consumer to authorize EFT as a condition of extending credit to the consumer." *Id*. at 1089. The court also concluded that the legislative history of EFTA confirmed its unambiguous meaning. *Id*. It further held that the mere fact that a borrower may revoke an agreement to repay by preauthorized electronic fund transfer does not allow a creditor who conditions the extension of credit on entering into such an agreement to avoid liability under EFTA and Regulation E. *Id.* at 1089-91. Other court decisions

have reached a similar conclusion. *See* Doc. 111 at 34-35 (citing *O'Donovan v. CashCall, Inc*., No. 08-cv-3174, 2009 WL 1833990, at *3 (N.D. Cal., June 24, 2009), and *FTC v. PayDay Financial LLC*, 989 F. Supp. 2d 799, 811-13 (D.S.D. 2013)).

I therefore conclude that EFTA's text is best read as prohibiting a person from conditioning a loan on a consumer's agreement to authorize repayment by preauthorized electronic fund transfers and reject Respondents' contrary argument.

As explained above, because IA violated EFTA and Regulation E, it also violated the CFPA, as alleged in Count VI.

F. As a result of IA's use of RCCs, both IA and Mr. Carnes engaged in unfair practices (Count VII)

Count VII of the Notice of Charges alleged that Respondents engaged in an unfair practice in violation of the CFPA when IA obtained authorization for RCCs in a confusing manner and then initiated the RCCs. IA's loan agreement included a provision allowing IA to create RCCs if consumers successfully canceled their authorization for ACH withdrawals. But IA buried this provision in the section of the loan agreement regarding ACH authorization, and, even if a consumer had focused on the provision, that consumer would not have reasonably known that the provision also authorized IA to use RCCs. IA then used this provision to withdraw funds from consumers' bank accounts in situations where consumers had cancelled the ACH authorization. I conclude that IA's use of RCC was unfair – it caused substantial injury to consumers that they could not reasonably avoid, and that injury was not offset by benefits to consumers or competition.

I conclude that IA's use of RCCs imposed two types of injury on consumers. As I explained above in connection with Count IV, IA caused substantial injury to consumers whenever IA debited consumers' accounts for amounts in excess of what was disclosed in the total of payments box in the loan agreement. IA used RCCs to make such withdrawals 602 times on or after July 21, 2011. These withdrawals totaled $115,024.50. ECX 97 at 4-5. I also conclude that consumers suffered substantial injury because IA withdrew funds from consumers' accounts when, as explained below, consumers reasonably believed that IA no longer had access to their accounts. *See FTC v. Neovi, Inc*., 604 F.3d 1150, 1157-58 (9th Cir. 2010) (facilitating unauthorized access to consumers' bank accounts constitutes substantial injury). This second type of injury would occur regardless of whether the consumers had already paid the amount disclosed in the total of payments box – consumers might have other reasons for withdrawing ACH authorization. Nonetheless, Enforcement Counsel have only alleged violations for those RCCs that IA used after consumers had paid the amount in the total of payments box. Accordingly, I will only consider the violations caused by those RCCs.

This injury is enhanced by the fact that consumers are not likely to be aware that, by entering into the loan agreement, they have authorized IA to create RCCs. The authorization for RCCs is buried in the loan agreement's ACH authorization. The ACH authorization is more than a page of dense text that begins in the middle of the lengthy loan agreement. The main purpose of the ACH authorization section is to permit IA to deposit borrowed funds into the consumer's bank account and then to withdraw funds in amounts and at times as agreed to in the loan agreement. ECX 92 at 22-23. However, approximately half-way through

the ACH Authorization, there is a paragraph that grants IA powers that are distinct from the central purposes of the ACH authorization. One sentence in that paragraph authorizes RCCs: "If you revoke your authorization, you agree to provide us with another form of payment acceptable to us and you authorize us to prepare and submit one or more checks drawn on Your Bank Account so long as amounts are owed to us under the Loan Agreement." Nothing in this sentence, or anywhere else in the loan agreement, explains that by signing the ACH Authorization, consumers are also authorizing IA to write checks on consumers' accounts without notifying consumers about the checks, and without obtaining their signatures. And the only instruction in the ACH authorization regarding revocation reads as follows: "You may only revoke the above authorizations by contacting us directly." This does nothing to inform consumers that, if they contact their bank and revoke ACH authorization, this will have no impact on IA's authority to use RCCs. I conclude that as a matter of law the sentence authorizing RCCs is neither clear nor conspicuous, and not likely to be read or understood by borrowers. *See* ECX 92 at 26.

Although Respondents argue that "consumers did consent to the use of RCCs when they signed the Loan Agreement," Resp. Br. at 26, they did not do so knowingly. Respondents also argue that extrinsic evidence is necessary to show that consumers did not understand the authorization. *Id.* Given the placement of the RCC authorization, and given its wording, extrinsic evidence is unnecessary to support my conclusion that consumers were not likely to understand that they had authorized IA to use RCCs. *See Frendreis v. Blue Cross Blue Shield*, 873 F. Supp. 1153, 1157 (N.D. Ill. 1995)

("[j]udges need not check their common sense at the door when interpreting" contractual agreements).

Consumers could not reasonably avoid this injury because, as explained above, it was unlikely that consumers even knew that they had authorized IA to use RCCs. Even if consumers somehow did know that they had authorized IA to use RCCs, it would have been very difficult for them to revoke that authority. Consumers could have contacted their financial institutions to stop payment of RCCs, but this might not have been successful since it is doubtful they would have the basic information (such as the check number) necessary for the financial institution to stop payment. And of course, even if the financial institution did stop payment, the financial institution might impose stop-payment fees. Consumers could also have closed their accounts at the financial institutions, but that could have resulted in fees for overdrafts and nonsufficient funds on items outstanding at the time the account was closed, as well as the other potential costs and inconvenience of such a process. Further, even if consumers had contacted their financial institutions after discovering the unauthorized RCCs and sought reimbursement by asserting the RCCs were not properly payable, see Uniform Commercial Code § 4-401, obtaining reimbursement would likely have required a "substantial investment of time, trouble, aggravation, and money." *See F.T.C. v. Neovi, Inc*., 604 F.3d at 1158. And consumers still would have incurred injury during the time they lost access to and use of the funds taken using RCCs. *Id*. So even if consumers' financial institutions eventually restored the consumers' money, consumers likely would have suffered unavoidable injuries that could not be fully mitigated. *Id*.

Respondents argue that consumers could have avoided the injury by contacting IA and offering another form of payment. Resp. Br. at 26. But consumers cancelled ACH authorization because, as I have determined, IA was attempting to collect amounts that exceeded what was disclosed in the total of payments box, amounts that consumers did not owe. Offering payment in some other form would not have diminished that injury.

I also conclude that the substantial injury was not outweighed by countervailing benefits to consumers or to competition. It is hard to imagine a situation in which policy considerations would justify withdrawing money from consumers' accounts without authorization. Here, the only benefit that has been suggested is that, because of RCCs, IA made loans to some consumers who would not otherwise have been eligible for credit. *See* Resp. Br. at 26. But this argument fails given the minuscule number of instances in which IA actually used RCCs. *See* Doc. 278 at 22. Nor does this justify IA's failure to provide adequate disclosure of the RCC authorization. Finally, if consumers were actually delinquent, IA had other means at its disposal, such as bringing a lawsuit to collect the debt. Accordingly, I conclude that, as a result of IA's use of RCCs, IA engaged in an unfair practice in violation of the CFPA, and as explained above, Mr. Carnes is liable for that violation.

REMEDIES

The ALJ recommended restitution, monetary civil penalties, and injunctive relief. I agree.

A. Restitution

The ALJ recommended that IA and Mr. Carnes be ordered to pay restitution. In particular, as a result of

the TILA and CFPA violations stemming from the loan agreement, she ordered IA to pay $132,580,041.06. This amount included restitution for loans that IA originated both before and after July 21, 2011. Part of that total, $38,453,341.62, was for loans that IA originated after July 21, 2011, and she held that Mr. Carnes was jointly and severally liable with IA for that amount. I have decided not to impose restitution for loans that IA originated before July 21, 2011, but I do order that it pay restitution for loans it originated on or after that date. That amount – $38,453,341.62 – is the amount paid by consumers to IA that exceeded what was disclosed to them in IA's TILA disclosures. I also conclude that Mr. Carnes should be held jointly and severally liable for this amount because, as explained above, the loans agreements for loans originated on or after July 21, 2011, violated the CFPA's prohibition of unfair and deceptive practices, violations for which both IA and Mr. Carnes are liable.

The CFPA authorizes the Bureau in a proceeding such as this one "to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law." 12 U.S.C. § 5565(a)(1). Appropriate legal or equitable relief includes "restitution." 12 U.S.C. § 5565(a)(1). Here, Enforcement Counsel sought restitution as "measured by the amount consumers paid to Integrity Advance above what the company disclosed in its loan agreements." Doc. 276 at 2. As the ALJ found, because consumers made payments directly to IA, this amount captures both consumer losses and Respondents' unjust gains. Doc. 293 at 81; *see also Gordon*, 819 F.3d at 1195; *FTC v. Stefanchik*, 559 F.3d 924, 931-32 (9th Cir. 2009). As explained above, I have determined that IA's loan agreement violated TILA and was unfair and deceptive. As a result, consumers who did not take

affirmative steps to pay their loans in full prior to the first payment-due date paid IA more than the amount disclosed in the loan agreement. Whether as a matter of equity or law, *see* Doc. 293 at 79, I find that an award of restitution is justified both to remedy the losses consumers suffered as a result of Respondents' unlawful practices and to deprive Respondents of the amounts that they gained as a result of their unlawful conduct.

The ALJ recommended that restitution be awarded for IA's TILA violations that occurred prior to the date that TILA enforcement authority was transferred to the Bureau. She based this on her belief that the FTC could have sought such relief pursuant to its authority under 15 U.S.C. § 53(b). Doc. 293 at 83-84. However, the Supreme Court has granted certiorari in *AMG v. FTC*, No. 19-508, and the only question presented by the petitioner in that case is whether § 53(b) authorizes the FTC to obtain monetary equitable relief. Rather than further delay this proceeding by waiting for a decision in *AMG*, I have decided to drop all charges against IA to the extent that they apply to acts that occurred prior to July 21, 2011, the date that enforcement authority was transferred to the Bureau. Similarly, Counts III, IV, and VII allege violations of the CFPA, and because the CFPA did not take effect until July 21, 2011, I will award restitution only for loans that IA originated, or for RCCs that IA issued, on or after that date. (Enforcement Counsel does not dispute that restitution for pre-transfer date CFPA violations would be inappropriate.) Thus, the same loans that give rise to restitution as a result of TILA violations – loans originated on or after July 21, 2011 – also give rise to restitution as a result of CFPA violations.

The record shows that IA originated 55,661 loans on or after July 21, 2011, on which the borrower paid more than the amount disclosed in the total of payments box. Doc. 163B at 2. In connection with those loans, I award restitution only for the amounts that consumers paid to IA over and above the amount disclosed in the total of payments box on IA's loan agreement – that is the amount IA gained as a result of its wrongful conduct. The record in this case shows that this amount totals $38,453,341.62. Doc. 163B at 2. With respect to Count VII, the record shows that, in connection with loans that IA originated on or after July 21, 2011, IA used 602 RCCs to withdraw money from the accounts of consumers who had already paid an amount that was at least equal to the amount disclosed in the total of payments box of their loan agreements. Doc. 163B at 3. Those RCCs totaled $115,024.50. *Id*. Because these RCCs collected amounts over and above the amounts disclosed in the total of payments box, any separate award of restitution would duplicate amounts encompassed by the award of $38,453,341.62. Because both IA and Mr. Carnes are liable for the violations alleged in Counts III, IV, and VII, the ALJ correctly held that they are jointly liable for the restitution.[11] Doc. 293 at 85. "If an individual may be held personally liable for corporate violations . . . nothing more need be shown to justify imposition of joint and several liability for the corporation's restitution obligations." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016). This is particularly appropriate because IA was merely a shell. *See* Doc. 173 at 6.

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[11] Respondents have raised no argument regarding my authority to hold them jointly and severally liable, and have therefore waived any such challenge.

Respondents argue that restitution is not appropriate because there was no showing of fraudulent intent, and because Respondents used the loan agreement with advice of counsel. Resp. Br. at 27. These arguments are based on a misunderstanding of the purpose of restitution. The "primary purpose of restitution is to restore the victims to their position prior to the deceptive sale." *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 386 (D. Conn. 2009), *aff'd* 654 F.3d 359 (2d Cir. 2011). Restitution is not based on any particular degree of culpability of the wrongdoer, other than responsibility for the deceptive conduct. *See Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988) ("a practice may be deceptive without a showing of intent to deceive"). It is true that knowledge is relevant when assessing whether an individual may be held responsible for a corporation's violations, but that knowledge need not rise to the level of fraudulent intent. And, as explained above, "[o]btaining the advice of counsel did not change the fact that the business was engaged in deceptive practices." *FTC v. Amy Travel*, 875 F.2d at 575. That is because the degree of knowledge is irrelevant with respect to IA, and as to Mr. Carnes, "counsel could not sanction something that the [individual defendant] should have known was wrong." *Id*. To the extent that *CFPB v. CashCall, Inc*., No. 15-cv-07522, 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018), suggests that advice of counsel may be relevant to a determination of whether an award of restitution is appropriate, *see* Resp. Reply at 14, I conclude that case is inconsistent with the cases discussed above and will follow the weight of authority.

Respondents argue that restitution was inappropriate because there was no showing that consumers failed to receive the benefit of the bargain. Resp. Br. at

27. But as I have explained, consumers contracted to pay the amount in the loan agreement's total of payments box. Respondents were not entitled to whatever they collected in excess of that amount. Respondents argue that Enforcement Counsel failed to present testimony from consumers who were deceived by IA. Resp. Br. at 27. No such testimony is necessary. *FTC v. Colgate-Palmolive* Co. 380 U.S. 374, 391-92 (1965) (holding that no consumer testimony is necessary to establish deception); *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 n.10 (3d Cir. 1982) (same); *FTC v. Medlab, Inc*., 615 F. Supp. 2d 1068, 1078 (N.D. Cal. 2009) (same).

Respondents cite *FTC v. Verity Int'l, Ltd*., 443 F.3d 48, 67 (2d Cir. 2006), and *CFPB v. CashCall*, 2018 WL 485963, at *13, and argue that any award of restitution must be limited to unjust gains. Resp. Br. at 28. Even assuming that the redress in this case must be limited to Respondents' unjust gains (as opposed to consumers' losses), Respondents' argument does not apply here. As the court explained in *CFPB v. Gordon*, 819 F.3d at 1195, the first step in calculating an award of restitution is calculating the defendant's unjust gains. The problem in *Verity* was that the district court based its calculation on consumer losses, not on the defendants' gains. As a result, the district court ordered the defendants to pay, as part of an award of restitution, money that they had never received. Nothing like that happened here. Respondents have never disputed that IA actually received the amounts that consumers paid in excess of what was disclosed in the total of payments box. That is, Respondents' unjust gains equaled consumers' losses. In *CashCall*, the court faulted the Bureau for failing to present any evidence that the award the Bureau sought approximated defendants' unjust gains. 2018 WL 485963, at *14. The court was

concerned that the Bureau was seeking restitution for loans that were legal, and that the proposed restitution might thereby have created a windfall for certain consumers. Whatever the merits of the concerns raised in *CashCall*, they are not applicable here because the restitution I have awarded is based on amounts that consumers paid above and beyond the total of payments disclosed in IA's TILA disclosures. No consumer will get a windfall.

Respondents argue that IA's repeat customers are not entitled to restitution. Resp. Br. at 28. In particular, Respondents suggest that repeat customers understood, and were satisfied with, the loans they got from IA, and this explains why they were repeat customers. *See* Resp. Reply at 6. In *FTC v. AMG*, 910 F.3d at 428, the court rejected a very similar argument. That case involved a loan agreement and loan repayment arrangement that were nearly identical to what was involved in this case. *See id.* at 422. Defendants in *AMG* argued that repeat customers demonstrated that AMG's loan agreement was not deceptive. Unlike Respondents here, the defendants in *AMG* presented evidence regarding repeat customers – a study conducted by an economist, Dr. David Scheffman. *Id.* at 425. This study purported to show that repeat borrowers behaved the same as first-time borrowers when it came to paying off their loans. *Id.* at 425. Because Dr. Scheffman assumed that repeat borrowers could not be misled (based on experience gained from their first loan), he concluded that no borrowers had been misled. *Id.* But the court held otherwise: "Dr. Scheffman's reasoning begs the question. . . . While Dr. Scheffman concludes that first-time borrowers were just as well informed as the repeat ones, it is equally plausible that the repeat borrowers were just as confused as those taking out their first

loans."[12] *Id.* Respondents here have provided no evidence that IA's repeat borrowers were any less confused than its first-time borrowers.

Respondents also cite *FTC v. Publishers Business Services, Inc.*, 540 F. App'x 555 (9th Cir. 2013), and *FTC v. Kuykendall*, 371 F.3d 745 (10th Cir. 2004), Resp. Br. at 28, but those cases merely recognize that a defendant charged with engaging in deceptive practices should have the opportunity to show that certain customers suffered no injury. Here, there is no dispute that Respondents used the same loan agreement for all its borrowers, both first-time and repeat. That means that Respondents made the same misrepresentations with respect to all their borrowers, first-time as well as repeat. It is Respondents' burden to show that repeat borrowers were not deceived. *FTC v. Ewing*, No. 2:14-cv-0683, 2017 WL 4797516, at *11 (D. Nev. Oct. 24, 2017); *FTC v. Bronson Partners*, 674 F. Supp. 2d at 386; *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008). Respondents had ample opportunity to satisfy that burden but failed to do so. For instance, Respondents apparently assumed that all repeat borrowers necessarily understood how much they were agreeing to pay IA without providing evidence to support this assumption, particularly with respect to consumers who may have ended up paying more for their second or third loan than they did for their first. Accordingly, I reject their

[12] Respondents note that AMG used a variety of different corporate names, and they contend that AMG's repeat borrowers did not know they were dealing with the same company. Appeal Tr. at 45. However, regardless of the corporate name, AMG used the same loan agreement, with the same repayment terms, for all its customers. 910 F.3d at 421.

argument that repeat customers are not entitled to restitution.

B. Civil Money Penalty

The CFPA provides that "[a]ny person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty . . . ." 12 U.S.C. § 5565(c)(1). The CFPA establishes three tiers of penalties with statutory maxima ranging from $5000 to $1 million (before adjustments for inflation) for each day during which a violation continues. I conclude that IA and Mr. Carnes are separately liable for civil penalties for violations that occurred on or after July 21, 2011.

Enforcement Counsel has sought only first tier penalties ($5000 per day), and the ALJ accepted that recommendation. She identified three distinct practices that merited civil penalties: 1) the use of the loan agreement that violated the CFPA (as well as TILA); 2) EFTA violations; and 3) the use of RCCs. She held that IA and Mr. Carnes were separately liable for civil penalties with respect to the first and third of those practices, and that only IA was liable for the second. She concluded that the relevant time period for each of these practices was from July 21, 2011, until December 1, 2012, inclusive, a total of 500 days. Accordingly, she recommended that IA pay a penalty of $7.5 million (500 (days) x $5000 (penalty amount) x 3 (practices)), and that Mr. Carnes pay a penalty of $5 million (500 x $5000 x 2). Enforcement Counsel have not challenged this amount. Respondents' only argument is that the amount recommended with respect to the RCCs was excessive because there was no showing that IA actually used RCCs on each of the 500 days. Resp. Br. at 30. They also argue that the award should

be reduced based on their good faith and on their lack of history of violations of federal consumer laws. *Id.*

I agree with the ALJ that the relevant time period for violations relating to the use of the loan agreement (practices 1 and 2 above) is from July 21, 2011, until December 1, 2012, inclusive, a total of 500 days. During that period, IA originated 82,980 loans. ECX 97 at 1. I could impose a $5000 penalty for each of those loans, an amount that far exceeds the $2.5 million recommended by the ALJ. However, as an exercise of my discretion, I will limit the award to a single $5000 per each of the 500 days during which Respondents consummated loans using the loan agreement. Thus, I determine that the appropriate penalty is $5000 x 500 = $2,500,000 for each of the first two practices. Since both IA and Mr. Carnes are responsible for the CFPA violations in the loan agreement, I hold each of them separately liable for $2,500,000. (I do not impose any additional civil penalty on IA as a result of its TILA violations.) With respect to the second distinct practice, EFTA violations, I hold IA liable for a penalty of $2.5 million. As to the third practice, Respondents argue that the record does not show that they used RCCs on each of the days from July 21, 2011, until December 1, 2012. Resp. Br. at 30. But the record does show that, during that period, IA used RCCs on 602 occasions. I could impose a $5000 for each of those 602 RCCs. However, as an exercise of discretion, I will limit the award to a single $5000 for each of days during which Respondents consummated loans that authorized the use of those RCCs. This again totals $2,500,000, and again I hold IA and Mr. Carnes separately liable for this amount. Thus, the total award imposed on IA is $7,500,000, and the total award imposed on Mr. Carnes is $5,000,000.

There are five factors in the CFPA that I must consider in determining an appropriate civil penalty. 12 U.S.C. § 5565(c)(3). I conclude that the amount I award – substantially less than the statutory maximum – is appropriate in light of those factors. The first factor is the size of the financial resources and good faith of the person charged. With respect to the financial resources, although IA may no longer have financial resources, it is not apparent that the same is true with respect to Mr. Carnes. Indeed, information with respect to Mr. Carnes' resources is within his control and since he has not attempted to justify mitigation on this basis I will not do so. Respondents do argue, however, that they acted in good faith because they consulted with a lawyer, they provided the loan agreement to Delaware state regulators, and they "intended to act lawfully." Resp. Br. at 30. As explained above, consulting with counsel provides no excuse for conduct that Mr. Carnes should have known was wrong. (Otherwise, patently unreasonable, incompetent, or corrupt legal advice could shield a wrongdoer. But that is not the law.) Moreover, in April 2012, the FTC filed a complaint against AMG Services alleging that a loan agreement very similar to the one used by Respondents was deceptive and violated TILA and EFTA. *FTC v. AMG Servs., Inc*., No. 2:12-c-v536 (D. Nev. Filed Apr. 2, 2012). And yet Respondents' practices continued unabated. There is also no reason to believe that Delaware state regulators evaluated compliance with all the statutes that are at issue in this case. Accordingly, I decline to conclude that Respondents acted in good faith or that their financial resources render any further reduction in the amount of the recommended penalty amount appropriate.

The next factor is the gravity of the violation. Respondents committed their violations over an extended

period of time, and their violations affected thousands of consumers. This factor does not favor any further reduction in the penalty amount. The third factor looks to the severity of the violations and the number of "products or services sold." Again, Respondents' violations were extensive. Thus, this factor does not favor mitigation. The fourth factor considers the history of previous violations. Respondents conceded that, prior to the filing of the Bureau's Notice of Charges, IA was subject to an enforcement action brought by the State of Minnesota. Doc. 239 at 17; *see Minnesota v. Integrity Advance, LLC*, 846 N.W.2d 435, 438 (Minn. Ct. App. 2014), *aff'd* 870 N.W.2d 90 (Minn. 2015). It is irrelevant that, since the filing of the Notice of Charges, IA has not engaged in any additional violations because IA has not functioned since 2013. ECX 68 at 9-10. The final factor looks to such other matters as justice may require. I am not aware of any, and Respondents have not brought any to my attention. Accordingly, there is no reason to further reduce the award of civil monetary penalties.

C. Injunctive relief

The ALJ ordered Respondents to cooperate in assisting the Bureau in determining the identity, location, and amount of restitution due to each consumer who was entitled to redress. I agree that this is appropriate injunctive relief. The ALJ did not impose other conduct prohibitions, and I agree that this is appropriate because there is no evidence that Respondents are engaging in the conduct that led to this proceeding, or that they have done so for many years.

Respondents make one argument: They contend that because IA ceased operations seven years ago and sold its assets, they should not be ordered to assist the Bureau. However, one of the goals of injunctive relief

is to promote compliance with other terms of the order. *FTC v. Direct Mktg. Concepts,* 648 F. Supp. 2d at 212. The Order that I am entering includes an award of restitution, and the injunctive provision will assist in effectuating that award. Even if IA's assets have been sold, there may be assistance that Respondents (including Mr. Carnes) can provide to the Bureau in locating consumers who are entitled to relief.

CONCLUSION

For these reasons, I AFFIRM the Recommended Decision in part, and REVERSE it in part.

/s/ Kathleen L. Kraninger
Kathleen L. Kraninger
Director
Consumer Financial Protection Bureau

January 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Decision of the Director* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 11th day of January 2021 at Washington, D.C.

APPENDIX D

UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL
PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

IN THE MATTER OF:
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,

Respondents.

ORDER DENYING IN PART RESPONDENTS' MOTION TO OPEN RECORD FOR A NEW HEARING

Procedural History

On August 14, 2019, counsel for Respondents (RC) filed *Respondents' Motion to Open Record For A New Hearing* (*Motion*) (Doc. 229) and accompanying memorandum of law in support of the motion (Doc. 229A). In the memorandum, Respondents stated that they were merely identifying, but not asking for dispositive rulings on the issues therein, and that the memorandum did not contain their full arguments on the merits. Rather than addressing all the issues identified in the *Motion*, I chose to first address the issues related to the Statutes of Limitations,[1] followed by other issues which arose in the interim. On March 13, 2020, I

[1] The issues related to the Statute of Limitations have already been adjudicated and will not be addressed further in this Order.

issued a *Scheduling Order for Issues in Respondents' August 14, 2019, Motion*, in which I directed the parties to return to the issues raised in the *Motion* and set forth a briefing schedule. I ordered Respondents to file any supplemental brief in support of their motion no later than March 26, 2020.

On March 26, 2020, RC filed *Respondents' Supplemental Brief in Support of Their Motion to Open Record for a New Hearing* (Doc. 261). On April 9, 2020, Enforcement Counsel (EC) for the CFPB filed *Enforcement Counsel's Opposition to Respondents' Motion to Open Record for New Hearing* (Doc. 263). On April 15, 2020, RC filed a consolidated reply brief which addressed *inter alia Respondents' Motion to Open Record for a New Hearing* (Doc. 265).

Respondents' Motion

RC make four main arguments in the motion: 1) a new hearing is required by the Supreme Court's Ruling in *Lucia v. SEC*[2] and the CFPB Director's Order; 2) a new hearing is needed to assess witness credibility; 3) a new hearing is needed to supplement the record on issues where the prior administrative law judge (ALJ) granted summary disposition; 4) a new hearing is needed to present testimony with regard to the issues of good faith reliance on advice of counsel and calculation of restitution that have become relevant due to changes in the law. Doc. 261 at 1.

CFPB's Position

EC assert that the record, created on the parties' own accord, contains an ample basis for the current administrative law judge to conduct a *de novo* review and issue a new recommended decision. They assert

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[2] *Lucia v. SEC*, 128 S. Ct. 2044 (2018).

that Respondents have failed to show good cause to supplement the existing record with cumulative live testimony and that the ALJ can adjudicate liability without the need to make credibility determinations based on witness demeanor. They further assert that Respondents lack good cause to introduce new evidence of their reliance on advice of counsel and that there has been no change in the law necessitating supplemental evidence in this regard. Finally, they assert that Respondents lack good cause to introduce supplemental evidence of their expenses for purposes of determining restitution. Doc. 263 at 1.

ANALYSIS

1. Legal Standard

In *Lucia v. SEC*, the Supreme Court held that, where a case was heard and decided by an ALJ who was not constitutionally appointed and where the issue of improper appointment is timely raised, the appropriate remedy is a new "hearing before a properly appointed official."[3] The Court did not specify what form a "new hearing" was to take.[4]

On May 29, 2019, the CFPB Director, pursuant to the holding in *Lucia*, remanded this matter to me for a "new hearing and recommended decision in accordance with" the CFPB *Rules of Practice for Adjudication Proceedings* (Rules).[5] Doc. 216 at 9. The authority of the hearing officer is set forth in Rule 104. Pursuant to this Rule, the hearing officer has the authority *inter alia* to receive relevant evidence and to

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[3] *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (quoting *Ryder v. U.S.*, 515 U.S. 177, 183, 188, (1995)).

[4] *See id*.

[5] 12 C.F.R. Part 1081.

rule upon the admission of evidence and offers of proof; regulate the course of a proceeding and the conduct of the parties and their counsel; consider and rule upon, as justice may require, all procedural and other motions appropriate in adjudication proceedings; and to do all other things necessary and appropriate to discharge the duties of a presiding officer.[6]

In *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, the U.S. Court of Appeals for the D.C. Circuit held that a *de novo* record review by a properly appointed Board was sufficient to cure an Appointments Clause violation, but indicated that the adjudicator could decide to supplement the record if a party provides a specific reason why it is necessary to reopen the record and take further evidence.[7]

2. Is a new hearing required by the Supreme Court's Ruling in *Lucia v. SEC* and the CFPB Director's Order?

The fact that a new hearing is required based on the Supreme Court's decision in *Lucia* and the CFPB Director's May 29, 2019, *Order Directing a Remand to the Bureau's Administrative Law Judge* is not in dispute. Respondents correctly state that in *Lucia*, the Supreme Court held that the appropriate remedy for an adjudication tainted by an Appointments Clause violation is a "new hearing before a properly appointed official." Doc. 261 at 3 (citing *Lucia*, 138 S. Ct. at 2055).

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[6] *See* 12 C.F.R. § 1081.104(b)(4), (5), (10), (14).

[7] *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 126 (D.C. Cir. 2015). *See also Stearns Zoological Rescue & Rehab Ctr., Inc.*, AWA Docket No. 15-0146, 2020 WL 836672, at *4-5 (U.S.D.A. Feb. 7, 2020) (finding *de novo* record review appropriate to remedy an Appointments Clause violation, absent specific reason to reopen record for further evidence).

In the CFPB Director's May 29, 2019, remand order, she remanded the case to me for a "new hearing and recommended decision in accordance with Part 1081 of the Bureau's Rules, 12 C.F.R. Part 1081." Doc. 216 at 9.

The more relevant question posed by Respondents' motion is what form the "new hearing" should take. To put it in plain language, the issue is whether I should discard the entire record from the previous hearing and truly start anew or whether I may retain and review all or parts of the previous record, supplementing it where necessary, in rendering my own independent decision.

The Court in *Lucia* noted that another ALJ or the Securities and Exchange Commission itself must hold the new hearing because the judge that already heard the case and issued an initial decision on the merits could not be expected to consider the matter as though he had not adjudicated it before. *Lucia*, 138 S. Ct. at 2055. In a footnote, the court explained that a new hearing officer is required because the previous judge would have no reason to think he did anything wrong on the merits and could be expected to reach all the same judgments. *Id.* n.5. In the present matter, a review of the record would not impair my ability as the new ALJ to make an untainted decision on the merits. Neither *Lucia* nor the *Ryder* case on which the Court relied in the *Lucia* decision further explains what is meant by a "new hearing" and therefore, are not helpful in answering the question of what form the "new hearing" should take.

Respondents seem to assert that a "new hearing" means that everything that was done in this case previously should be discarded and the case should truly start afresh. In *Respondents' Memorandum of*

Law in Support of Motion to Open Record for a New Hearing (Doc. 229A), RC argued that the Chief ALJ for the SEC has ordered that post-*Lucia* matters before the SEC are entitled to new hearings and that it is only appropriate to conduct a "mere review of the existing record where both parties agree to that review." Doc. 229A at 3-4.

However, the SEC never defined what is meant by a "new hearing" and never indicated that a review of the record by a newly assigned ALJ would be inappropriate.[8] Furthermore, the language that RC relied on to argue that the Chief ALJ distinguished between a full new hearing and a review of the existing record does not support their argument. *See* Doc. 229A at 3-4. The SEC order states that ALJs were assigned "to preside over 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.'"[9] This language merely distinguishes a new hearing in front of an ALJ from the Commission deciding petitions based on the record. It does not follow that a new hearing in front of an ALJ could not include a review of the record by the ALJ.

The CFPB's position, based on the D.C. Circuit Court's decision in *Intercollegiate* is that a mere *de*

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[8] *See In Re: Pending Administrative Proceedings*, 2018 WL 4003609 (Aug. 22, 2018); *In re: Pending Administrative Proceeding*, File Nos. 3-140061, Chief Administrative Law Judge's Order assigning Proceedings Post *Lucia v. SEC* (Sept. 12, 2018), https://www.sec.gov/alj/aljorders/2018/ap-5955.pdf.

[9] *In re: Pending Administrative Proceeding*, File Nos. 3-140061, Chief Administrative Law Judge's Order assigning Proceedings Post *Lucia v. SEC* (Sept. 12, 2018), https://www.sec.gov/alj/aljorders/2018/ap-5955.pdf (emphasis added).

novo record review is a sufficient remedy for an Appointments Clause violation. Doc. 263 at 1-3.

In opposition, RC assert that, to the degree *Intercollegiate* stands for the proposition that a *de novo* record review is appropriate, it has been overturned by *Lucia*, or even if it is still good law, that the circumstances in the instant case are different and require a new hearing. Specifically, they argue that "a *de novo* record review may be appropriate where the parties have not identified 1) any determination that 'turned on witness' credibility nor 2) any relevant evidence that is not on the record." Doc. 261 at 3. RC claim that key issues turn on witness credibility and the written record does not contain all of the relevant evidence. *Id*. at 4. Finally, they argue that "the ALJ cannot make factual findings based on a paper review of the existing record as the prior ALJ explicitly relied upon credibility determinations to make his factual findings." *Id*.

Examining RC's arguments regarding *Intercollegiate*, it appears that RC misstate the Court's analysis and reasoning for finding a *de novo* record review appropriate. The language that RC rely on is not, in fact, the analysis of the court but rather the rationale for the Copyright Royalty Board's decision not to hold new evidentiary hearings. *See Intercollegiate*, 796 F.3d at 116. The court never opined on the Board's reasons for determining that a *de novo* review of the existing record was appropriate. Rather, the court analyzes "the validity of a subsequent determination when—as here—a properly appointed official has the power to conduct an independent evaluation of the merits and does so." *Id.* at 117.

The *Intercollegiate* court goes on to analyze two Supreme Court cases that dealt with new hearings as

a result of Appointments Clause violations. First, the court concludes that the Supreme Court in *Ryder v. United States* stands for the proposition that review by a properly appointed body *can* be insufficient to cure an Appointments Clause violation, but that it does not stand for the proposition that *de novo* review is insufficient. *Id.* at 120. It also notes that the Supreme Court never stated that a new hearing would be required if the reviewing court possesses *de novo* authority nor that such a hearing would have to involve live witnesses or additional evidence. *Id.* The other case, *Wingo v. Wedding*, 418 U.S. 461 (1974), involved federal habeas corpus proceedings and stands for the proposition that a *de novo* review of an existing record "is inadequate when a statute expressly requires the reviewing judge to personally hold an evidentiary hearing." *Id.* at 120-121.

After reviewing the briefs and cited cases, I conclude that both parties have raised valid points. I find that it would be inefficient and imprudent to totally discard everything that has been done to create the extensive record in this matter. The cases cited by Respondent do not support such an extreme measure. During the previous hearing, several relevant witnesses were called, who testified under oath and were subject to both direct and cross examination by the parties. It does not make sense to now state that these witnesses are no longer relevant, that their testimony has suddenly become unreliable, and/or that they need to re-testify. Similarly, both parties submitted several relevant documentary exhibits. Respondents have not stated anything that convinces me that such testimonial and documentary evidence should be discarded.

However, a mere *de novo* record review is also not practical, because the previous ALJ made decisions

in the course of the proceedings that affected what charges went forward to full hearing and what evidence was admitted and/or excluded. So, to the extent that the previous judge made rulings on motions for summary disposition and admitted or excluded evidence over objection of the parties, I must decide whether the record needs to be supplemented or whether portions of it should be struck. I am not bound by the prior ALJ's evidentiary or other rulings. Also, if there have, indeed, been changes in the relevant law, I must consider whether the changes merit supplementation of the record.

With regard to judging the credibility of witnesses, I will address this issue in more detail below, but I am not bound by the previous ALJ's rulings on credibility and they are irrelevant to my independent adjudication of this matter.

In summary, as I have stated to the parties previously, it is my intent to conduct a *de novo* review of the record - to the extent possible. However, I will consider the parties' arguments as to whether the record needs to be supplemented or whether portions of the record that were previously admitted should be struck.

2. Is a new hearing needed so the hearing officer can assess witness credibility in person?

RC assert that because the prior ALJ relied upon credibility determinations, factual findings cannot be based on a paper review of the existing record. Doc. 261 at 4. They assert that because the previous ALJ made either explicit or implicit credibility determinations of every witness' testimony, that I must therefore hear live testimony from every witness so that I can assess their demeanor and thus determine whether

they are credible. They specifically want me to hear live testimony from: Respondent James Carnes, Edward Foster, an unspecified representative of the Delaware Office of the State Bank Commissioner (to replace the testimony of previous witness Elizabeth Quinn Miller, who has died since the previous hearing), Robert Hughes, Dr. Xiaoloing Ang, Joseph Baressi,[10] Bruce Andonian, and Timothy Madsen. *Id.* at 4-10.

EC assert that the prior ALJ's credibility determinations are due no weight on this remand and that I can review the prior testimony to reach my own conclusions without resorting to past credibility determinations. Doc. 263 at 4. They assert that Respondents have not demonstrated that it is necessary to evaluate a particular witness' demeanor. *Id.* They further assert that it is unnecessary to disbelieve the testimony in order to find Respondent Carnes personally liable. *Id.* at 5. Furthermore, they assert that the prior ALJ's credibility determinations were based on the weight of the evidence and not on witnesses' demeanor. *Id.* at 7. They assert that recalling the witnesses would be cumulative.

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[10] With regard to Joseph Baressi there is a separate issue as to whether his testimony should be struck from the record. In the previous hearing, Respondents made a motion to strike his testimony (Doc. 153). EC filed an opposition to the motion (Doc. 158). The motion was granted in part and denied in part by the previous ALJ (Doc. 161). In their Supplemental Brief (Doc. 261) Respondents state that "[f]or the reasons stated in the motion to strike [Doc. 153], Enforcement Counsel should not be permitted to present Mr. Baressi's testimony in this proceeding. I will therefore need to examine this issue and make an independent ruling on it. I will make a ruling on this when I review the testimony in detail and will examine Respondents' motion to strike and EC's opposition and make a ruling at that time.

As the CFPB Director stated in her remand order, I am to give no weight to nor presume the correctness of any prior opinions, orders, or rulings issued by the previous ALJ in this matter. Doc. 216 at 9. Therefore, whether the previous judge found some or all of the witnesses' testimony to be credible or not, and what method he used to do so, is totally irrelevant to my adjudication of this matter.

The case that RC cites refers to witness demeanor in the context of appeals courts granting deference to trial courts' credibility determinations because "only 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." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985).

There is much discussion and disagreement in the legal and psychiatric community as to whether it is possible to determine whether someone is lying by evaluating their demeanor.[11] While demeanor is one factor that a judge *may* use to evaluate a witness' credibility, a judge is not *required* to utilize this factor. I do not find this factor to be reliable and I do not plan to consider it to determine credibility in this matter. I do not believe that I have any special power to determine whether someone is lying based on observing their demeanor and I believe it is possible for a dishonest person to portray an air of utter confidence, sincerity and seeming honesty, while an honest person can seem to be lying based on nervousness, gestures,

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[11] *E.g.*, Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 Am. U. L. Rev. 1331 (2015); Honorable James P. Timony, *Demeanor Credibility*, 49 Cath. U. L. Rev. 903 (2000).

and mannerisms that make them appear to be uncertain or untruthful. An exception to this is where someone is obviously joking or being sarcastic and means the opposite of what he or she says.[12]

The Merit Systems Protection Board has established a number of factors that a fact-finder may consider in assessing witness credibility. Specifically:

> To resolve credibility issues, the trier of fact must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.[13]

In noting that deference must ordinarily be given to an administrative judge's credibility determinations "when they are based on the observation of the demeanor of witnesses testifying at a hearing," the Merit Systems Protection Board implied that demeanor is one possible factor that *can* be considered, but it is

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[12] If the parties can identify any specific instance of this in the record and want to bring it to my attention, I will consider it.

[13] *Rapp v. Office ofPers. Mgmt.*, 108 M.S.P.R. 674, 681 (2008) (citing *Faucher v. Dep't ofthe Air Force*, 96 M.S.P.R. 203, ¶ 8 (2004); *Hillen v. Dep't ofthe Army*, 35 M.S.P.R. 453, 458 (1987)).

not required. While not binding precedent, I find the list of possible factors to be helpful.

The factors that I intend to utilize to determine credibility in this matter include a combination of the following: opportunity and capacity to observe the event or act about which witness is testifying; ability to recall; consistency or inconsistency of the witness' testimony with other testimony or evidence; relevant background, training, education or experience; bias; interest in outcome of case; inconsistent statements of the witness; corroboration; inherent probability of the witness' version of events/plausibility. These factors do not require me to observe a witness' live testimony and I do not find that Respondents have articulated sufficient grounds for me to recall any of the witnesses for this purpose. I therefore deny Respondents' request to reopen the record to have some or all of the witnesses re-testify (or, in the case of Mrs. Quinn Miller, have a new unnamed person testify in her place) so that I can observe their testimony in person and judge their credibility based on demeanor.

3. Is a new hearing needed to supplement the record on issues where the prior ALJ granted summary disposition?

RC accurately assert that in the first proceeding, the former ALJ granted summary disposition in favor of the CFPB as to Integrity Advance's liability for Counts I, II, III, V, and VI.[14] Doc. 261 at 10. Based on these rulings, the prior ALJ then granted the CFPB's *Motion* in Limine *to Preclude Evidence Disputing Issues Decided*

[14] *Order Granting in Part and Denying in Part Bureau's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition*, Doc. 111.

and Facts Established at Summary Disposition.[15] *Id*. at 11. Respondents assert that they therefore never had the opportunity to present live testimony or cross-examine CFPB witnesses on these issues and that they should now have the opportunity to do so. *Id*.

EC do not specifically address this argument in their opposition brief, but indicate that they intend to make a motion for summary disposition in the current matter. Doc. 263 at 8 n.7. I note that RC have also indicated an intent to seek summary disposition. Doc. 261 at 3 n.1.

As stated above, I am not bound by the prior ALJ's rulings and am to give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by the previous ALJ. Accordingly, the previous ALJ's ruling with regard to summary disposition (Doc. 111) and subsequent evidentiary decision based on that ruling (Doc. 141) have no effect in this remand proceeding. Both parties have indicated their intent to again make motions for summary disposition, but have not yet done so. That will be the next phase of this proceeding. However, since I have not yet adjudicated such motions, RC's assertion of a need to supplement the record on the relevant counts is premature.

4. Have there been changes in the law which require the testimony to be supplemented?

    a. Good faith reliance on advice of counsel

Respondents assert that at the time the prior ALJ rendered a recommended decision in this matter, there was no case law recognizing the relevance of good faith reliance on the advice of counsel to the

[15] Doc. 141.

appropriateness of restitution in a CFPA matter, but that in the time since the recommended decision, there have been two additional cases[16] that reflect that restitution is not an appropriate remedy in a CFPA case where the CFPB does not establish fraudulent intent or that consumers did not receive the benefit of their bargain. Doc. 261 at 11-12. They assert that by introducing evidence that Respondent Carnes relied on the advice counsel to draft the loan agreement and ensure it complied with the law, he can establish that he acted in good faith such that the CFPB could not prove that he acted with fraudulent intent and thus could not establish the appropriateness of awarding restitution. In order to establish that Carnes relied on the advice of counsel and thus acted in good faith, they want to reopen the record to call the following witnesses: James Foster (in-house counsel) and Claudia Calloway (outside counsel). Doc. 261 at 13. Additionally, they want to call an unnamed representative of the Delaware Bank Commissioner, a state regulator, so I "can assess Respondents' good faith reliance on the repeated approvals by the Delaware Bank Commissioner." Doc. 261 at 9, 13.

EC assert, in opposition, that there has been no change in the law necessitating new evidence of good faith reliance on advice of counsel. They state that Respondents' reliance on counsel/good faith was not relevant in the prior hearing on the issue of restitution and continues to be irrelevant on this issue. Doc. 263 at 9. They state that the issue was relevant in the previous hearing, and continues to be a mitigating

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[16] *CFPB v. CashCall, Inc., et al*., No. CV 15-07522-JFW, 2018 WL 485963 (C.D. Cal. Jan. 19, 2018) and *CFPB v. Nationwide Biweekly Admin., Inc., et al*., No. 15-cv-02106-RS, 2017 WL 3948396 (N.D. Cal. Sept. 8, 2017).

factor, only on the issue of the amount of a civil money penalty pursuant to 12 U.S.C. §5565(c)(3). *Id.* at 8. They assert that because the CFPB is seeking legal restitution, there is no discretion to deny restitution if the ALJ finds Respondents liable of a violation and resulting harm. *Id.* at 9-10. They assert that to deny restitution on the grounds that Respondents did not act in bad faith or reasonably relied on the advice of counsel would contradict the CFPA's purpose. *Id.* at 10. They assert that the *CashCall* case relied upon by Respondents, which is under appeal and not binding precedent, is inconsistent with these principles and was incorrectly decided. *Id.* at 11.

The first question to address is whether there has, in fact, been a change in the relevant law. Respondents cite to *CashCall*, a case from the Central District of California, that is currently pending appeal in the 9th Circuit. EC are correct that this district court case is not binding precedent in the current matter. Nevertheless, a non-binding case can sometimes provide persuasive authority. Respondents argue that *CashCall* represents a change in the law as to the appropriateness of restitution. Specifically, they state that in *CashCall*, the Court found that while advice of counsel is not a defense to liability, it is relevant to the determination of whether restitution is an appropriate remedy. Doc. 261 at 12. I note that in reaching its holding that advice of counsel is relevant to the determination of whether restitution is appropriate, the *CashCall* court cited to its previous holding in the 1985 *Chase*[17] case. RC cited to this section of the case in their brief. *Id*. The court was merely applying its previous holding rather than making a change to the

[17] *Chase v. Trs. of W. Conference of Teamsters Pension Trust Fund*, 753 F.2d 744, 753 (9th Cir. 1985).

law. I thus fail to see how this case represents new law. Granted, the CFPB was not a party to the 1985 case, so the application of the law to the CFPB is clearer now, but I find that the state of the law regarding restitution and the relevance of advice of counsel in the 9th Circuit has not changed. Similarly, it does not appear that the *Nationwide* case, cited by Respondents, represents a change in 9th Circuit law.

Nevertheless, as stated above, Respondents want to call three witnesses to address whether Respondents relied on the advice of counsel.[18] Aside from the issue of whether this truly represents a change in the law, it would also appear based on Respondents' brief, that there is already testimony in the record regarding whether Respondent Carnes received advice of counsel.

Respondents state in their brief that Respondent Carnes previously testified that he relied upon his outside counsel to draft the loan agreement and to ensure it complied with the law, but that he did not speak to outside counsel regarding the loan agreement template. Doc. 261 at 6, 13 (citing to the hearing transcript). They also state that Carnes testified that he did not recall Integrity Advance's in-house counsel, Mr. Foster, ever explaining Integrity Advance's loan agreement to him. *Id*. at 6. Nor did he recall specific conversations with Integrity Advance personnel about the loan agreement. *Id*. Additional testimony from

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[18] I note that in their briefs (Docs. 229A, 261, 265) Respondents do not indicate a desire to call additional witnesses to testify regarding whether consumers received the benefit of their bargain or present any arguments in this regard. Accordingly, I do not find the need to call additional witnesses for this purpose to be an issue in the case and alternatively find that Respondents have waived this issue.

Foster and Calloway thus appears unnecessary and, at best, would merely corroborate Carnes' sworn testimony. Similarly, with regard to additional testimony from a representative of the Delaware Bank Commissioner, Respondents concede that Elizabeth Quinn Miller already testified that she reviewed loan agreements for compliance with Delaware law and looked at agreements to make sure TILA disclosures were presented in the correct format, but that her team did not approve the contract and, other than the APR, did not conduct any mathematical calculations. Doc. 261 at 8, (citing to the hearing transcript). Additional testimony on this issue, thus would also be unnecessary.

I also note, as EC point out,[19] that good faith clearly was relevant in the previous hearing in this matter, albeit on the issue of the appropriateness of a civil money penalty, in accordance with 12 U.S.C. § 5565(c)(3). Thus, Respondents would have had no less motivation to develop the testimony in the prior proceeding than they do now.

Accordingly, I deny Respondents motion to reopen the record to call James Foster and Claudia Calloway to testify as to the legal advice they gave Respondents and similarly deny their motion to call an unidentified representative of the Delaware Bank Commissioner. I decline at this time to opine on the issue of "legal" versus "equitable" restitution raised by EC as it is not required to decide this motion. In the event this case proceeds to a consideration of remedies, the parties will be allowed to brief their legal theories at that time.

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[19] *See* Doc. 263, at 11 n.9.

b. Calculation of restitution

RC assert that in calculating restitution, there is a two-step process. First, the CFPB must prove that the amount it seeks reasonably approximates the Respondents' unjust gains and if does so, then the burden shifts to Respondents to show that this amount overstates any "unjust gains." Doc. 261 at 14, citing to the *Gordon*[20] and *CashCall* cases. Respondents assert that the law regarding the calculation of "unjust gains" has developed since the first proceeding in this matter and that according to the *CashCall* court, adjudicators must now consider whether the damages calculation has been "netted for expenses" in determining whether the CFPB's approximation is reasonable. *Id*. at14-15. They assert that the record in this case is silent on Respondents' expenses and, therefore, they must now have the opportunity to put on evidence regarding their expenses.

EC assert that Respondents had an opportunity to present evidence of expenses in the previous proceeding, but of their own volition, failed to do so. Doc. 263 at 12. They assert that the law has not changed since the original hearing and that expenses have no place in the proper calculation of restitution. *Id*.

At this stage, I need not rule on the appropriate measure for calculating restitution, but rather, whether the law has changed since the first proceeding such that Respondents should be allowed to present additional evidence regarding their expenses. RC assert that in *CashCall*, "[t]he court has now made

[20] *CFPB v. Gordon*, 819 F.3d 1179, 1195 (9th Cir. 2016).

clear that adjudicators should consider whether the damages calculation has been 'netted for expenses.'" Doc. 261 at 14-15.

I find this to be a mischaracterization of the court's position. Specifically, the opinion mentions expenses only once, in the last sentence of a paragraph concluding that the CFPB did not demonstrate that the amount it sought was appropriate for restitution. *See CashCall*, 2018 WL 485963 at *13. After noting that a court may use net revenues as a basis for measuring restitution, the court states, "[i]n fact, [the CFPB's witness] admitted on cross-examination that he did not believe that the CFPB's proposed restitution amount was netted to account for expenses." *Id*. Given the cursory manner in which the court mentions expenses, I find it a stretch to conclude that the court has "now made clear" that expenses may be pertinent to the calculation of net revenues, as RC contend. At most, the court implies that expenses may be pertinent to the calculation of net revenues, but the court never truly analyzes that calculation and makes no conclusion as to the relevant variables. Given the *CashCall* opinion's reliance on 9th Circuit precedent for the proper calculation of restitution, citing to cases including *Gordon* and *FTC v. Commerce Planet, Inc.*,[21] which exclude expenses from the calculation, combined with the lack of discussion concerning including expenses in the calculation, it does not appear that the court departed from established precedent and created a new standard. Thus, I find that there has not been a change in the law necessitating new evidence of Respondents' expenses.

[21] *FTC v. Commerce Planet, Inc*., 815 F.3d 593 (9th Cir. 2016).

Furthermore, the two-step framework for calculating restitution that RC cite as applicable requires, and has always required, Respondents to show in the second step that an amount presented by EC overstates any unjust gains. Nothing in the prior proceeding prevented RC from presenting evidence regarding their expenses if they believed that including expenses in the calculation would otherwise overstate their unjust gains. Therefore, I find this evidence to be no more relevant to the calculation now than it was in the prior proceeding and deny Respondents' motion to reopen the record to put on additional evidence for this purpose.

ORDERS

1. Respondents' request for oral argument is DENIED.
2. Respondents' *Motion to Open Record for a New Hearing* is DENIED, IN PART.[22]

SO ORDERED this 24th day of April 2020.

Digitally signed by Christine L. Kirby
Date: 2020.04.24 15:02:16-04'00'

Christine L. Kirby
HON. CHRISTINE L. KIRBY
Administrative Law Judge

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

[22] As stated *supra*, I am not yet adjudicating whether the testimony of Joseph Baressi should be struck from the record or whether the record needs to be supplemented based on future summary disposition rulings.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Denying in Part Respondents' Motion to Open Record for a New Hearing* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

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

APPENDIX E

UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

IN THE MATTER OF:
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,

Respondents.

ORDER DENYING FURTHER DISCOVERY ON STATUTE OF LIMITATIONS ISSUE

BACKGROUND

Procedural History

On August 16, 2019, I conducted an initial scheduling conference in this matter. At the conference, I made the decision to reopen the record with regards to the statute of limitations issue based upon a decision by the D.C. Circuit Court of Appeals, issued after the previous Administrative Law Judge's (ALJ) recommended decision, that could potentially impact the current matter. *See PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (finding *inter alia* that statutes of limitations apply to claims brought in CFPB's administrative proceedings); and *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc court reversing some parts of the previous panel's decision, but reinstating portion relating to applicability of statutes of limitations).

I directed the parties to meet and confer and provide me with a joint proposal for supplementing the record.[1]

The parties subsequently submitted a *Joint Statement on Fact Development Regarding Statute of Limitations Defense* on August 23, 2019 (*Joint Statement*; Doc. 231). Respondents' Counsel (RC) simultaneously submitted *Respondents' Request for Issuance of Subpoena to the Consumer Financial Protection Bureau for Production of Documents*, seeking additional factual discovery (Doc. 232). In the *Joint Statement*, Enforcement Counsel (EC) presented various arguments as to why the record should not be reopened and RC requested an opportunity to respond. In the *Joint Statement*, EC also represented that they had already produced all required factual information pursuant to the CFPB's *Rules of Practice for Adjudication Proceedings*, 12 C.F.R. § 1081.206 (Rule 206).

I therefore issued an order dated August 30, 2019, in which I directed counsel to confer again and clarify whether the required discovery documentation had, in fact, already been provided. In the event the parties could not agree that the required documentation had been provided, I set forth a schedule for the parties to submit briefs on the issue of whether additional

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[1] I note that contrary to Respondents' representation in *Respondents' Brief in Support of Further Discovery on the Statute of Limitations Issue* (Doc. 236), I did not recognize that "Respondents were denied the opportunity to develop the factual record on the statute of limitations issue." Respondents' Brief at p. 3. That characterization is either an overstatement or a misunderstanding of what I said. The point I was making was that there had been a change in the relevant case law and the parties had not had a chance to fully address its impact in the prior proceeding due to the timing of the decision. Therefore, the record is silent as to the applicability of *PHH Corp.* to this matter.

discovery needs to be conducted on the statute of limitations issue.

On September 11, 2019, the parties submitted a *Joint Update on Fact Development Regarding Statute of Limitations Issue* (*Joint Update*; Doc. 234) in which they informed me that they were unable to reach agreement as to whether all required discovery had been provided and they would proceed to brief the issue. In the *Joint Update* at pages 3-4, the parties provided a list of undisputed facts relating to the statute of limitations issue to which they were willing to stipulate.

On September 18, 2019, EC submitted *Enforcement Counsel's Brief Addressing the Completeness of the Factual Record on Respondents' Statute-of-Limitations Defense* (*EC's Brief*; Doc. 235). On October 4, 2019, RC submitted *Respondents'Brief in Support of Further Discovery on the Statute of Limitations Issue* (*RC's Brief*; Doc. 236). On October 15, 2019, EC submitted *Enforcement Counsel's Reply Brief Addressing the Completeness of the Factual Record on Respondents' Statute-of-Limitations Defense* (*EC's Reply*; Doc. 237).

CFPB's Position

EC argue that no further discovery on Respondents' statute of limitations defense is warranted for four reasons: 1) EC have already produced or stipulated to all the documents and material facts Respondents need to advance their limitations defense; 2) Respondents have failed to show that reopening the record is necessary or that they were denied the ability to present their statute of limitations defense during the prior proceeding; 3) legal developments between the initial proceedings and this remand hearing do not address how to apply the Consumer Financial

Protection Act's (CFPA) "date of discovery" statute of limitations and do not address the facts needed to adjudicate limitations questions under the CFPA; and 4) Respondents' request for additional discovery contravenes the discovery limits set forth in the CFPB's *Rules of Practice for Adjudication Proceedings*, 12 C.F.R. part 1081.

EC agree that further development of the record with regards to briefing on the merits of the statute of limitations defense is appropriate.

Respondents' Position

RC argue that additional discovery is needed on the statute of limitations issue for four reasons: 1) the discovery Respondents seek is highly relevant to determining a potentially dispositive threshold issue; 2) the CFPA's three-year statute of limitations begins running from the date that the CFPB knew or should have known of the alleged violations; 3) the discovery Respondents seek is narrowly tailored and appropriate under CFPB rules; and 4) supplementing the record is appropriate under *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.*, 296 F.3d 111 (D.C. Cir. 2015).

Rules of Practice for Adjudication Proceedings

The procedures for the conduct of administrative adjudication proceedings brought by the CFPB are governed by the *Rules of Practice for Adjudication Proceedings* (Rules) set forth at 12 C.F.R. part 1081. The final rules were issued after receiving and analyzing public comments. The comments and explanations for the rules are found in the Federal Register, Vol. 77, No. 126.

Rule 206, *Availability of documents for inspection and copying*, deals with the production of documents in an administrative adjudication. The commentary explains that the rule adopts an "affirmative disclosure" approach to fact discovery in order to promote fair and efficient resolution of adjudicatory proceedings. Rather than requiring respondents to submit discovery requests, the rule is written to provide them with an automatic right to inspect and copy documents they would likely seek and obtain in the course of a protracted discovery period. The purpose of the rule is to ensure that respondents have a complete understanding of the factual basis for the CFPB's action, thereby enabling them to determine the nature of their defenses or decide whether to seek settlement (emphasis added). 77 Fed. Reg. 39058, 39070 (June 29, 2012).

The rule provides that the Office of Enforcement (OE) shall make available for inspection and copying documents it has obtained prior to the institution of proceedings, from persons not employed by the CFPB, in connection with the investigation leading to the institution of proceedings. It sets forth three categories of documents that shall be provided: 1) documents turned over in response to civil investigative demands or other written requests to provide documents or be interviewed issued by the OE; 2) all transcripts and transcript exhibits; and 3) any other documents obtained from persons not employed by the Bureau. 12 C.F.R. § 1081.206(a)(1). Additionally, the OE must make available for inspection and copying: 1) each civil investigative demand (CID) or other written request to provide documents or be interviewed issued by the OE in connection with the investigation leading to the institution of proceedings; and 2) any final examination or inspection reports prepared by any other office of the

Bureau if the OE intends to introduce them into evidence or use them to refresh the recollection of, or impeach, any witness.[2] 12 C.F.R. § 1081.206(a)(2).

The rule clarifies that the OE may provide additional documents if it so chooses and that respondents may seek access to or production of additional documents pursuant to subpoena. The hearing officer has the authority to order a subpoena issued unless he or she determines that it is unreasonable, oppressive, excessive in scope, or unduly burdensome. 12 C.F.R. §§ 1081.206(a)(3), 1081.208(d).

The rule also specifies that the OE may withhold a document if: 1) it is privileged; 2) it is an internal memorandum, note or writing prepared by a person employed by the Bureau or another government agency, other than an examination or supervision report as specified in paragraph 206(a)(2)(ii), or it would otherwise be subject to the work product doctrine and will not be offered in evidence; 3) the document was obtained from a domestic or foreign governmental entity and is either not relevant to the resolution of the proceeding or was provided on condition that the information not be disclosed; 4) the document would disclose the identity of a confidential source; 5) applicable law prohibits disclosure of the document; or 6) the hearing officer grants leave to withhold the document or category of documents as not relevant to the subject matter or otherwise, for good cause shown. The rule also prohibits the OE from withholding any material exculpatory evidence it would otherwise be required to produce. 12 C.F.R. § 1081.206(b).

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[2] I am paraphrasing the rules, but recommend the parties review the source document.

Respondents' Request for Issuance of Subpoena

On August 23, 2019, Respondents filed a request for issuance of a subpoena (Doc. 232). Pursuant to the request, Respondents seek four categories of documents for the period July 21, 2011[3] to November 18, 2012:[4] 1) all consumer complaints regarding Respondents; 2) all external correspondence regarding Respondents; 3) all internal correspondence regarding Respondents; and 4) all internal reports, memoranda, notes, analysis, or other documents regarding Respondents.

In their request for subpoena, Respondents appear to acknowledge that some of the materials they are requesting could be subject to privilege and therefore properly withheld pursuant to Rule 206(b). To the extent that any of the requested documents are withheld or redacted, Respondents therefore request a withheld documents log. Respondents argue that the requested documents should be produced for the four reasons set forth above under Respondents' Position.

In their briefs (Docs. 235, 237), EC argue that the request for subpoena should be denied for the four reasons stated above under the CFPB's Position.[5]

Parties' Stipulation of Fact and Declarations

In the parties' *Joint Update* (Doc. 234) filed on September 11, 2019, they stipulated to several facts relevant to the production of documents issue. The parties stipulated that EC have produced, among other things, documents obtained by the OE prior to

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[3] The effective or transfer date of the CFPB.

[4] Three years prior to the date the Notice of Charges was filed in this matter.

[5] I am treating EC's brief and arguments as a motion to quash the subpoena. Both parties have set forth their arguments regarding whether the subpoena should be issued.

the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of such proceedings and a PDF indicating that the OE searched the Federal Trade Commission's database of consumer complaints. They stipulated as to relevant dates concerning the CID, investigative hearing testimony of Carnes and Foster, and the Notice and Opportunity to Respond and Advise (NORA) letter. The parties further stipulated as to the dates that Respondents made an initial partial production in response to the CID and dates it completed production, as well as the date of Respondents' response to the NORA letter.

Within the stipulation of facts, the parties also referenced Doc. 187, a Declaration of EC, Alusheyi J. Wheeler, who stated, in addition to the dates relating to the CID and responses thereto, that the OE first obtained copies of Integrity Advance's loan agreement through the company's productions in response to the January 7, 2013, CID. The stipulation also references Doc. 189, a Declaration of Peter S. Frechette, former counsel for Respondents, who submitted a copy of the Memorandum of Understanding between the CFPB and the Federal Trade Commission (FTC) and a document reflecting that EC searched the FTC Consumer Sentinel database of consumer complaints for complaints about "Integrity Advance" on March 29, 2012.

In their brief, EC specify that they have produced each CID in this matter, responses to each CID, transcripts of testimony taken in June 2014 from Respondent James Carnes and Integrity Advance's Chief Operating Officer, Edward Foster, and consumer complaints obtained by the OE (Doc. 235, pp. 4-5). They represent that if they had other information they

were required to disclose, they would have supplemented the disclosures.

ANALYSIS

1. Has EC already produced all required categories of documents set forth in Rule 206(a)?

In their brief, EC represent that they have already produced all of the documents obtained by the OE from external sources prior to filing the *Notice of Charges* and stipulated to material facts pertinent to Respondents' statute of limitations defense. EC specifically represent that they have produced each CID and responses thereto, transcripts of testimony taken in June 2014 from James Carnes and Edward Foster, and all consumer complaints and communications regarding Respondents that the OE received from outside sources before these proceedings were initiated. *EC's Brief* at 4-5, *EC's Reply* at 1-2. EC represent that they have no further information to disclose pursuant to Rule 206 and, if they did, they would have supplemented their production. *EC's Brief* at 5.

Pursuant to the stipulation of facts contained in the *Joint Update* (Doc. 234, pp. 3-4), as discussed above, Respondents have conceded that EC produced documents obtained by the OE prior to the institution of proceedings from persons not employed by the Bureau and a PDF indicating that a member of the OE searched the Federal Trade Commission's Consumer Sentinel database of consumer complaints on March 29, 2012. Respondents have also stipulated to other relevant facts and dates related to the investigation including the dates of the CID, responses to the CID, investigational hearing testimony, the NORA letter, responses to the NORA letter, and filing of the *Notice of Charges*.

Within the stipulation of facts, the parties also referenced Doc. 187, a Declaration of EC, Alusheyi J. Wheeler, who stated, in addition to the dates relating to the CID and responses to the CID, that EC first obtained copies of Integrity Advance's loan agreement through the company's productions in response to the January 7, 2013, CID. Attached to the Declaration was a copy of the January 7, 2013, CID which also sets forth, beginning at page 7, *Interrogatories* and *Requests for Documents* that EC were specifically seeking from the Respondents as part of the investigation.

In their brief (Doc. 235, p. 5), EC reiterate that the loan agreement, upon which EC's claims rest, was received by the OE when it was produced in response to the January 7, 2013, CID. EC also represent that they learned of Respondent Carnes' awareness of Integrity Advance's consumer lending activities and his involvement in and authority to control those activities when they conducted the investigational hearings of Carnes and Foster. The parties stipulated in their *Joint Update* (Doc. 234) that the interviews of those two individuals took place in June of 2014.

The stipulation of facts (Doc. 234) also references Doc. 189, a Declaration of Peter S. Frechette, former counsel for Respondents, who submitted a copy of the Memorandum of Understanding between the CFPB and the Federal Trade Commission (FTC) and a document reflecting that EC searched the FTC Consumer Sentinel database of consumer complaints for complaints about "Integrity Advance" on March 29, 2012.

Respondents thus do not appear to allege that EC has not produced the documents required under Rule 206, but rather they are requesting additional categories of documents that they perceive to be relevant,

above and beyond those described in Rule 206(a), *Availability of documents for inspection and copying*.

After reviewing the parties' briefs, stipulation of facts, and documents they have submitted or referenced therein, I find that EC have already produced the documents required under Rule 206(a), which includes documents obtained by the OE prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of the proceedings. This encompasses categories one and two of Respondents' subpoena: consumer complaints and external correspondence (Doc. 232 at 1, and Att. A). I therefore DENY Respondents' request for issuance of a subpoena for these two categories of documents as unreasonable. I decline to issue a subpoena for documents that have already been provided in accordance with the Rules.

2. Are Respondents entitled to additional documents that Rule 206(b) lists as *Documents that may be withheld*?

In their brief, Respondents clarify that they are seeking documents to establish: 1) when someone at the CFPB first viewed a copy of the loan agreement; 2) when someone at the CFPB first viewed a consumer complaint; 3) when the CFPB opened a research matter; and 4) when the CFPB opened an investigative matter. *RC's Brief* at 1. They assert that the answers to these questions are relevant to when the CFPB "knew or should have known of the alleged violations"[6]

[6] Respondents are thus asserting that the term "date of discovery" within the Consumer Financial Protection Act statute of limitations means "constructive" discovery, i.e., the date when the CFPB "knew or should have known of the alleged violations." I note however, that Respondents state in their brief (*RC's Brief*

and that the Rules allow for discovery of additional relevant documentation.

EC argue in reply that Respondents are seeking documents that are explicitly exempt from disclosure, including the Bureau's internal correspondence and internal reports, and that Respondents are thus seeking to employ discovery mechanisms that are not available under the Bureau's procedural rules (Doc. 237 at 6). They argue that Respondents should not be allowed to seek information beyond the required discovery documentation that EC have already provided that may specifically be withheld under Rule 206(b).

I find based on *RC's Brief* (Doc. 236), *Request for Subpoena* (Doc. 232), and the *Joint Statement* (Doc. 231) that Respondents are seeking to obtain documentation from the CFPB that goes beyond the required documentation listed under Rule 206(a), and that would reveal its attorneys' mental impressions of the factual information received, work product, and case strategy in deciding when to institute proceedings by filing the *Notice of Charges* in this matter.

In their *Request for Subpoena*, Respondents specifically state that that they are seeking "internal correspondence" and "internal reports" (Doc. 232 at 2 and Att. A). Thus, on its very face, the subpoena is seeking categories of documentation that may properly

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p. 2) and EC agree (*EC's Brief* p. 6) that whether a constructive discovery standard applies in this matter need not be ruled upon for purposes of determining whether the Respondents are entitled to additional factual discovery on the statute of limitations issue. I agree that an analysis of this issue will be more appropriate when I am considering the merits of the parties' statute of limitations arguments, so I decline to discuss that issue now, although both parties devote a significant portion of their briefs to arguing their positions on this issue.

be withheld under the Rules. In both their brief and subpoena, Respondents acknowledge that the documentation they are seeking may properly be withheld under the categories set forth in Rule 206(b) which would include privilege, internal communications, and work product. (Doc. 232 at Att. A, Doc. 236 at 13).

Furthermore, Respondents have already acknowledged, via a document referenced in the stipulation of facts (Doc. 187), 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. So, presumably Respondents know when the CFPB asserts that someone at the Bureau first viewed a copy of the loan agreement. Respondents also stipulated that EC provided copies of documents obtained by the OE prior to the institution of proceedings, from persons not employed by the Bureau. This would include copies of consumer complaints. Thus, presumably Respondents also already know when someone at the Bureau first viewed a copy of a consumer complaint. I therefore find the Respondents' argument that they are trying to ascertain missing information unconvincing.

I also am not convinced by the Respondents' argument concerning the relevance of whether members of the OE followed guidance set forth in an internal office manual. Such guidance, whether followed or not, would not reveal when the OE received the factual information which is the basis for the allegations contained in the *Notice of Charges*. As discussed in the Rules and commentary, Respondents are entitled to know the factual bases for the charges against them.

Respondents are correct that Rule 206(a)(3) provides for the possibility that additional documents other than those enumerated in Rule 206(a)(1)-(2) may

be either provided by the OE of its own accord or sought by Respondents pursuant to subpoena under Rule 208, *Subpoenas*. However, the fact that Respondents may perceive information to be relevant does not mean that Rule 206(b) regarding withheld documents may be ignored.

Rule 208 governs the issuance of subpoenas in administrative adjudication proceedings. The rule grants the hearing officer the discretion to determine whether to issue or deny a subpoena. The standard for denying a subpoena is whether the hearing officer finds it to be unreasonable, oppressive, excessive in scope, or unduly burdensome.

The commentary to Rule 206 provides that Rule 208 permits a respondent to seek other relevant documents in the possession of the Bureau. However, it goes on to explain that Rule 206 is intended to give respondents access to the material facts underlying enforcement counsel's decision to recommend the commencement of enforcement proceedings (emphasis added). It states that it is not intended to create an obligation for enforcement counsel to search the files of other divisions or offices in the Bureau, but that the Bureau will include in its affirmative disclosure documents obtained by other elements of the Bureau from persons not employed by the Bureau and later provided to the OE for its use in connection with the investigation leading to the institution of proceedings. It further states that through the affirmative disclosure process, the OE will turn over the documents that informed its decision to recommend the institution of proceedings (emphasis added). 77 Fed. Reg. 39058, 39073 (June 29, 2012).

Respondents acknowledge in their brief that the purpose of the discovery process is to provide them

with a complete understanding of the factual basis for the Bureau's action (Doc. 236 at 13). Respondents also cite to a case which *inter alia* actually appears to support EC's position that they should not be required to produce either documents or witnesses which reveal counsel's mental impressions, case strategies, or legal opinions, but only those materials which contain factual matters that support the allegations. *See CFPB v. Universal Debt Sols., LLC*, No. 1:15 CV-859, 2017 U.S. Dist. LEXIS 146222 (N.D. Ga. Aug. 25, 2017).

I find that EC have provided documentation showing the material facts underlying their decision to recommend the commencement of enforcement proceedings. I further find that Respondents are attempting to subpoena documents via their subpoena categories 3 and 4 (Doc. 232, Att. A) that clearly fall within the categories of documents that may properly be withheld under Rule 206(b). Respondents have not provided convincing authority entitling them to such categories of information. Accordingly, I DENY Respondents' request for issuance of a subpoena for these two categories, i.e., internal correspondence and internal reports, memoranda, notes, analysis and other documents. I find that the subpoena of these documents is both unreasonable and excessive in scope.

3. Are Respondents entitled to a withheld document list?

In their brief, Respondents acknowledge that some of the documents they are seeking "could be privileged" (Doc. 236 at 13). They therefore request that EC be ordered to provide a "privilege log."[7] In support of their request for a privilege log they cite to Rule 206(c)

[7] I believe what RC are referring to by "privilege log" is a "withheld document list" as discussed in Rule 206(c).

which provides that a hearing officer *may* require the OE to produce a list of documents or categories of documents withheld pursuant to paragraphs (b)(1)(i) through (v). Respondents again cite to the *Universal Debt Sols*. case, described above, in which the court did not even address the issue of a withheld document list, but emphasized that the defendants in that case were entitled only to the factual bases for the CFPB's allegations. I therefore do not find the case particularly helpful or supportive of Respondents' request for a withheld document list. Respondents did not cite to any other cases or authorities to support their position that they are entitled to a withheld document list. EC did not address the issue of a withheld document list in its reply brief.

Rule 206(c) provides for the possible production of a "withheld document list" and states that the hearing officer *may* require the OE to produce a list of documents or categories of documents withheld based upon the five withholding categories set forth above or to submit to the hearing officer any document withheld.

The commentary regarding Rule 206(c) states only that a hearing officer *may* require the OE to submit a withheld document list. It provides that the hearing officer *may* require the OE to submit a list of documents or categories of documents withheld "when appropriate" but does not elaborate further. 77 Fed. Reg. 39058, 39074 (June 29, 2012).

I do not find it appropriate in this case to compel EC to produce a detailed withheld document list. Although the rules provide that I may alternatively require EC to provide a list of "categories" of documents that it wishes to withhold, based on the briefs, it is clear that those categories would include categories three and four, set forth in Respondents' subpoena request:

internal correspondence, reports, memoranda, notes, analysis, etc. I therefore find requiring a category list to be an unnecessary and dilatory exercise. Given that the documents in question involve EC's internal correspondence and internal reports, etc., reflecting counsels' analysis of the case and charging strategy, rather than documents containing factual information obtained from external sources that provided the bases for the allegations, I decline to require a withheld document list.

4. Are Respondents entitled to supplement the record under the *Intercollegiate* case?

In their brief, RC argue that they are entitled to the additional discovery they request in their subpoena pursuant to the case of *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015) (Doc. 236 at 14-15). They argue that because the law regarding applicability of statutes of limitations in administrative proceedings has changed due to the *PHH Corp*. case, they have therefore provided a "specific reason" why it is necessary to reopen the record. They also argue that, although they did not make a discovery request for the documents they are seeking now when the statute of limitations issue was adjudicated by the ALJ previously, and, although they presented their argument to Judge McKenna without claiming that they needed this additional information, they should be excused from not having requested these documents previously, because it would not have made a difference.

EC argue that Respondents have not provided a "specific reason" why it is necessary to reopen the record to take further evidence and that Respondents cannot explain how they were denied an opportunity to present their case or point to any decision of the

prior ALJ that prevented them from obtaining information. They assert that Respondents are attempting to reason backward from the ALJ's decision on the motion to dismiss by arguing that any efforts to seek discovery would have been futile (Doc. 235 at 8-10). EC also argue that *PHH Corp.* did not change the law with regards to the "date of discovery" issue or what elements parties must assert in the statute of limitations.

In the *Intercollegiate* case, the D.C. Circuit addressed the cure for an appointments clause violation in a case involving the Copyright Royalty Board. The Court found *inter alia* that a *de novo* record review, rather than live trial-like adversarial hearing, was reasonable where each party had ample opportunity to present its case in the initial proceedings, and no party provided any specific reason why it was necessary to reopen the record to take further evidence.

In the current matter, as I discussed in my *Scheduling Order* (Doc. 233 at FN. 1), the Respondents' previous motion to dismiss based on the running of the statute of limitations was denied by the ALJ based on the CFPB Director's decision in *PHH Corp*. (finding statutes of limitations inapplicable in CFPB administrative proceedings). Ultimately, the Director's decision was overturned on this point by the D.C. Circuit Court. However, due to the timing of the D.C. Circuit's decision, the statute of limitations issue was never revisited in the previous proceeding, and the issue of what effect, if any, the D.C. Circuit's *PHH Corp.* decision has on this matter, was not resolved.

I therefore do agree that Respondents have presented a specific reason why I need to reopen the record on the statute of limitations issue. I find that the parties should be able to submit their respective arguments regarding what effect, if any, the *PHH*

Corp. case has on this matter, in light of the fact that Respondents' previous motion on this issue was denied specifically due to the Director's *PHH Corp.* decision. I also find Respondents' argument that, even though they did not seek the additional evidence that they now seek when they made their previous statute of limitations argument before Judge McKenna, their failure to do so should be ignored because it "would not have made a difference" to be unconvincing. Regardless of whether or when Respondents did or did not seek the additional discovery, as discussed above, I have found that Respondents are not entitled to the additional discovery they are seeking because it may properly be withheld under Rule 206(b).

I find that the *PHH Corp.* decision is significant because it addressed the applicability of statutes of limitations to CFPB administrative proceedings. The case did not address the "discovery rule" or the specific statute of limitations in this matter. Nor did the case address whether Respondents should be entitled to the type of discovery they are now requesting. It did not make a finding that would entitle Respondents to discovery of documents that would properly be withheld under Rule 206(b). Accordingly, I find only that the record on the statute of limitations issue should be reopened to allow the parties to present their arguments regarding what effect, if any, the *PHH Corp*. case has in this matter and whether any of the charged Counts are time-barred. I DENY the Respondents' request to open the record for additional factual discovery on the statute of limitations.

Accordingly, I issue the following ORDERS:

1. *Respondents' Request for Issuance of Subpoena to the Consumer Financial Protection Bureau*

for Production of Documents (Doc. 232) is DENIED.

2. The parties will submit briefs on the issue of whether any, or all, of the counts in this matter are barred by the relevant statute of limitations. In their briefs, the parties will specifically address the following issues:

   a. what statute of limitations applies to each count and their position as to whether the count is time-barred by the relevant statute;

   b. what effect, if any, the *PHH Corp*. case or other recent case law has on the current matter;

   c. what the parties' position is with regard to Count IV which was previously dismissed with prejudice by ALJ McKenna based upon the parties' *Stipulated Motion to Withdraw Count IV With Prejudice*. *See* Doc. 127, 133.

3. The briefing schedule is as follows:

   a. RC's Brief due November 15, 2019

   b. EC's Response Brief due December 6, 2019

   c. RC's Reply Brief due December 13, 2019

SO ORDERED.

Digitally signed by Christine L. Kirby
Date: 2019.10.28 15:24:28-04'00'

Christine L. Kirby
HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 28th day of October 2019 at Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Denying Further Discovery on Statute of Limitations Issue* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Date: 2019.10.28 15:35:15 -04'00'

Jameelah Morgan
Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 28th day of October 2019 at Washington, D.C.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed November 1, 2022]

No. 21-9521
(Consumr No. 2015-CFPB-0029)
(Consumer Financial Protection Bureau)

INTEGRITY ADVANCE, LLC, *et al.*,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

ORDER

Before TYMKOVICH, PHILLIPS, and McHUGH, Circuit Judges.

The petition for rehearing en Banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition is denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX G

United States Code Annotated
Constitution of the United States
Annotated
Article I. The Congress

U.S.C.A. Const. Art. I § 9, cl. 7

Section 9, Clause 7. Appropriations;
Publication of Statements and Accounts

Currentness

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

APPENDIX H

United States Code Annotated
Title 12. Banks and Banking
Chapter 53. Wall Street Reform and Consumer Protection
Subchapter V. Bureau of Consumer Financial Protection
Part A. Bureau of Consumer Financial Protection

12 U.S.C.A. § 5497

§ 5497. Funding; penalties and fines

Effective: July 21, 2010

Currentness

(a) Transfer of funds from Board of Governors

(1) In general

Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).

(2) Funding cap

(A) In general

Notwithstanding paragraph (1), and in accordance with this paragraph, the amount that shall be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System,

as reported in the Annual Report, 2009, of the Board of Governors, equal to--

(i) 10 percent of such expenses in fiscal year 2011;

(ii) 11 percent of such expenses in fiscal year 2012; and

(iii) 12 percent of such expenses in fiscal year 2013, and in each year thereafter.

(B) Adjustment of amount

The dollar amount referred to in subparagraph (A)(iii) shall be adjusted annually, using the percent increase, if any, in the employment cost index for total compensation for State and local government workers published by the Federal Government, or the successor index thereto, for the 12-month period ending on September 30 of the year preceding the transfer.

(C) Reviewability

Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.

(3) Transition period

Beginning on July 21, 2010, and until the designated transfer date, the Board of Governors shall transfer to the Bureau the amount estimated by the Secretary needed to carry out the authorities granted to the Bureau under Federal consumer financial law, from July 21, 2010 until the designated transfer date.

(4) Budget and financial management

(A) Financial operating plans and forecasts

The Director shall provide to the Director of the Office of Management and Budget copies of the financial operating plans and forecasts of the Director, as prepared by the Director in the ordinary course of the operations of the Bureau, and copies of the quarterly reports of the financial condition and results of operations of the Bureau, as prepared by the Director in the ordinary course of the operations of the Bureau.

(B) Financial statements

The Bureau shall prepare annually a statement of--

(i) assets and liabilities and surplus or deficit;

(ii) income and expenses; and

(iii) sources and application of funds.

(C) Financial management systems

The Bureau shall implement and maintain financial management systems that comply substantially with Federal financial management systems requirements and applicable Federal accounting standards.

(D) Assertion of internal controls

The Director shall provide to the Comptroller General of the United States an assertion as to the effectiveness of the internal controls that apply to financial reporting by the Bureau, using the standards established in section 3512(c) of Title 31.

(E) Rule of construction

This subsection may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information referred to in subparagraph (A) or any jurisdiction or oversight over the affairs or operations of the Bureau.

(F) Financial statements

The financial statements of the Bureau shall not be consolidated with the financial statements of either the Board of Governors or the Federal Reserve System.

(5) Audit of the Bureau

(A) In general

The Comptroller General shall annually audit the financial transactions of the Bureau in accordance with the United States generally accepted government auditing standards, as may be prescribed by the Comptroller General of the United States. The audit shall be conducted at the place or places where accounts of the Bureau are normally kept. The representatives of the Government Accountability Office shall have access to the personnel and to all books, accounts, documents, papers, records (including electronic records), reports, files, and all other papers, automated data, things, or property belonging to or under the control of or used or employed by the Bureau pertaining to its financial transactions and necessary to facilitate the audit, and such representatives shall be afforded full facilities for verifying transactions

with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, documents, records, reports, files, papers, and property of the Bureau shall remain in possession and custody of the Bureau. The Comptroller General may obtain and duplicate any such books, accounts, documents, records, working papers, automated data and files, or other information relevant to such audit without cost to the Comptroller General, and the right of access of the Comptroller General to such information shall be enforceable pursuant to section 716(c) of Title 31.

(B) Report

The Comptroller General shall submit to the Congress a report of each annual audit conducted under this subsection. The report to the Congress shall set forth the scope of the audit and shall include the statement of assets and liabilities and surplus or deficit, the statement of income and expenses, the statement of sources and application of funds, and such comments and information as may be deemed necessary to inform Congress of the financial operations and condition of the Bureau, together with such recommendations with respect thereto as the Comptroller General may deem advisable. A copy of each report shall be furnished to the President and to the Bureau at the time submitted to the Congress.

(C) Assistance and costs

For the purpose of conducting an audit under this subsection, the Comptroller General may, in the discretion of the Comptroller General, employ by contract, without regard to section 6101 of Title

41, professional services of firms and organizations of certified public accountants for temporary periods or for special purposes. Upon the request of the Comptroller General, the Director of the Bureau shall transfer to the Government Accountability Office from funds available, the amount requested by the Comptroller General to cover the full costs of any audit and report conducted by the Comptroller General. The Comptroller General shall credit funds transferred to the account established for salaries and expenses of the Government Accountability Office, and such amount shall be available upon receipt and without fiscal year limitation to cover the full costs of the audit and report.

(b) Consumer Financial Protection Fund

(1) Separate fund in Federal Reserve established

There is established in the Federal Reserve a separate fund, to be known as the "Bureau of Consumer Financial Protection Fund" (referred to in this section as the "Bureau Fund"). The Bureau Fund shall be maintained and established at a Federal reserve bank, in accordance with such requirements as the Board of Governors may impose.

(2) Fund receipts

All amounts transferred to the Bureau under subsection (a) shall be deposited into the Bureau Fund.

(3) Investment authority

(A) Amounts in Bureau Fund may be invested

The Bureau may request the Board of Governors to direct the investment of the portion of the Bureau Fund that is not, in the judgment of the

Bureau, required to meet the current needs of the Bureau.

(B) Eligible investments

Investments authorized by this paragraph shall be made in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Bureau Fund, as determined by the Bureau.

(C) Interest and proceeds credited

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Bureau Fund shall be credited to the Bureau Fund.

(c) Use of funds

(1) In general

Funds obtained by, transferred to, or credited to the Bureau Fund shall be immediately available to the Bureau and under the control of the Director, and shall remain available until expended, to pay the expenses of the Bureau in carrying out its duties and responsibilities. The compensation of the Director and other employees of the Bureau and all other expenses thereof may be paid from, obtained by, transferred to, or credited to the Bureau Fund under this section.

(2) Funds that are not Government funds

Funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.

(3) Amounts not subject to apportionment

Notwithstanding any other provision of law, amounts in the Bureau Fund and in the Civil Penalty Fund established under subsection (d) shall not be subject to apportionment for purposes of chapter 15 of Title 31 or under any other authority.

(d) Penalties and fines

(1) Establishment of victims relief fund

There is established in the Federal Reserve a separate fund, to be known as the "Consumer Financial Civil Penalty Fund" (referred to in this section as the "Civil Penalty Fund"). The Civil Penalty Fund shall be maintained and established at a Federal reserve bank, in accordance with such requirements as the Board of Governors may impose. If the Bureau obtains a civil penalty against any person in any judicial or administrative action under Federal consumer financial laws, the Bureau shall deposit into the Civil Penalty Fund, the amount of the penalty collected.

(2) Payment to victims

Amounts in the Civil Penalty Fund shall be available to the Bureau, without fiscal year limitation, for payments to the victims of activities for which civil penalties have been imposed under the Federal consumer financial laws. To the extent that such victims cannot be located or such payments are otherwise not practicable, the Bureau may use such funds for the purpose of consumer education and financial literacy programs.

(e) Authorization of appropriations; annual report

(1) Determination regarding need for appropriated funds

(A) In general

The Director is authorized to determine that sums available to the Bureau under this section will not be sufficient to carry out the authorities of the Bureau under Federal consumer financial law for the upcoming year.

(B) Report required

When making a determination under subparagraph (A), the Director shall prepare a report regarding the funding of the Bureau, including the assets and liabilities of the Bureau, and the extent to which the funding needs of the Bureau are anticipated to exceed the level of the amount set forth in subsection (a)(2). The Director shall submit the report to the President and to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives.

(2) Authorization of appropriations

If the Director makes the determination and submits the report pursuant to paragraph (1), there are hereby authorized to be appropriated to the Bureau, for the purposes of carrying out the authorities granted in Federal consumer financial law, $200,000,000 for each of fiscal years 2010, 2011, 2012, 2013, and 2014.

(3) Apportionment

Notwithstanding any other provision of law, the amounts in paragraph (2) shall be subject to

apportionment under section 1517 of Title 31 and restrictions that generally apply to the use of appropriated funds in Title 31 and other laws.

(4) Annual report

The Director shall prepare and submit a report, on an annual basis, to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives regarding the financial operating plans and forecasts of the Director, the financial condition and results of operations of the Bureau, and the sources and application of funds of the Bureau, including any funds appropriated in accordance with this subsection.