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.**	**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO OPEN RECORD FOR NEW HEARING**

Table of Contents

I. Introduction 1

II. Legal Standards 2

III. Argument 2

A. Respondents Must Show Good Cause to Supplement the Complete Record from the Prior Hearing 2

B. Respondents Have Not Shown Good Cause to Supplement the Record with Cumulative Live Testimony 4

C. Respondents Lack Good Cause to Introduce New Evidence of their Reasonable Reliance on Advice of Counsel 8

1. Respondents, on their own volition, declined to introduce evidence of reasonable reliance on advice of counsel. 8

2. There has been no change in the law necessitating new evidence of reasonable reliance on advice of counsel. 9

D. Respondents Lack Good Cause to Introduce New Evidence of their Expenses 12

IV. Conclusion 15

I. Introduction

This matter was remanded so a new hearing officer could determine whether Integrity Advance originated and serviced consumer loans in an illegal manner and whether James Carnes, the company's chief executive, is responsible for any of Integrity Advance's unfair and deceptive acts or practices. On those issues, the parties made an expansive record during a prior administrative adjudicative proceeding that included documentary evidence, deposition testimony, data analysis, and trial testimony. This record, created on the parties' own accord with scant limitation by the prior ALJ, provides an ample basis for the current ALJ to conduct a *de novo* review and issue a new recommended decision. In their motion to open the record for a new hearing, Respondents seek an opportunity to jettison large portions of that past record, conduct an entirely new live hearing, and revisit prior litigation decisions that were theirs alone. Such an undertaking is not required by the Supreme Court's decision in *Lucia v. SEC* or the Director's order remanding this proceeding for a new hearing.

Further, Respondents have failed to show good cause to supplement the existing record. Respondents suggest that the parties must present new live testimony so the ALJ can evaluate the credibility of all witnesses. But new witness testimony would result in cumulative evidence that potentially would be less reliable given the passage of time. Moreover, the existing record makes clear that the ALJ can adjudicate Respondents' liability on all counts without the need to make credibility determinations based on witness demeanor. Finally, Respondents' contention that changes in the law of restitution make evidence of their reliance on advice of counsel and operating expenses newly relevant is baseless. The caselaw cited by Respondents does not represent a change in the law that would justify introducing evidence of Respondents' good faith or expenses. This proceeding should go forward on the existing record.

II. Legal Standards

The appropriate remedy for an adjudication tainted by an Appointments Clause violation is a "new hearing before a properly appointed official." *Lucia v. SEC*, 138 S. Ct. 2055, 2055 (2018). The new hearing requirement is satisfied by a *de novo* record review, particularly where neither party has shown good cause to supplement the existing record. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 126 (D.C. Cir. 2015); *Stearns Zoological Rescue & Rehab Ctr., Inc.*, AWA Docket No. 15-0146, 2020 WL 836672, at *4-5 (U.S.D.A. Feb. 7, 2020).

This proceeding was remanded for "a new hearing and recommended decision in accordance with Part 1081 of the Bureau's Rules, 12 C.F.R. Part 1081." Order Directing a Remand to the Bureau's Administrative Law Judge (May 29, 2019) [Dkt. 216] at 9. As part of this new hearing, the ALJ has authority to "regulate the course of a proceeding and conduct of parties," and "consider and rule upon, as justice may require, all procedural and other motions appropriate in adjudication proceedings." 12 C.F.R. § 1081.104(b)(5), (10). The ALJ may exclude evidence that is "irrelevant, immaterial, and unreliable," and also evidence "based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* § 1081.303(b)(1), (2).

III. Argument

A. Respondents Must Show Good Cause to Supplement the Complete Record from the Prior Hearing

In conducting a new hearing consistent with *Lucia*, an ALJ may conduct a *de novo* review of an existing record "to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any new testimony or other evidence." *Philip Trimble*, HPA Docket No. 15-0097, 2019 WL 2345419, at *2 (U.S.D.A. Feb. 19, 2019). It is appropriate to rely on the existing record and supplement only if a party can demonstrate good cause. *See Stearns Zoological Rescue & Rehab Ctr., Inc.*, AWA Docket No. 15-0146, 2020 WL 836672, at *4-5 (U.S.D.A. Feb. 7, 2020). To show good cause to

supplement the record, Respondent must provide a "specific reason why it is necessary to reopen the record and take further evidence," and explain how they were denied an "opportunity to present [their] case." *Intercollegiate Broad. Sys.*, 796 F.3d at 126. Taking new live testimony or receiving new evidence is necessary only if Respondents can point to any instance of an exclusion of relevant evidence that could affect the outcome of the proceeding, or any determinations that turn on witness credibility. *See id.* at 123, 126.[1]

Limiting parties to the existing record absent good cause is consistent with the reason for this remand, as the record will be reviewed by a new decision-maker who is to "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by [the prior ALJ]." Order Directing a Remand to the Bureau's Administrative Law Judge (May 29, 2019) [Dkt. 216] at 9. It also eliminates any procedural advantages a party may seek in calling witnesses whose memories have faded, *see Trimble*, 2019 WL 2345419 at *3, or in revisiting previous litigation strategies that were not affected by the prior ALJ, s*ee Intercollegiate Broad. Sys.*, 796 F.3d at 122 ("There is no Appointments Clause problem in limiting [a party] to the evidence that it decided, on its own volition, to submit to the previous Board.").[2] And the good cause standard eliminates the presentation of cumulative evidence. *See* 12 C.F.R. § 1081.303.

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[1] Respondents argue, without citation, that *Intercollegiate Broadcasting Systems* was effectively overruled by the Supreme Court's decision in *Lucia*. But a *de novo* record review like the one considered by the court in *Intercollegiate* is consistent with *Lucia*, which did not define what such a new hearing must look like. *See Trimble*, 2019 WL 2345419 at *2. It is also consistent with the Bureau's Rules of Practice, which provide the ALJ with discretion to conduct the proceeding and exclude cumulative evidence. *See* 12 C.F.R. §§ 1081.104, .303.

[2] There is no inconsistency in holding Respondents to their previous litigation decisions and the ALJ's recent determination that Enforcement Counsel can pursue Count IV of the Notice of Charges. *See* Order Denying Respondents' Motion to Dismiss and/or For Summary Disposition on Grounds Limited to October 28, 2019 Order and Denying Respondents' Request for Additional Discovery (Jan. 24, 2020) [Dkt. 249] at 10-11. Enforcement Counsel's prior decision to drop that count was made in reliance on a decision of ALJ McKenna that is no longer entitled to any weight, and the decision was made effective in another order by the ALJ that also "has no effect in this new hearing." *Id.* at 11. In contrast, Respondents' litigation decisions were their decisions alone.

B. Respondents Have Not Shown Good Cause to Supplement the Record with Cumulative Live Testimony

As the ALJ has recognized, both parties had the opportunity to develop a true and accurate record during the prior hearing. Scheduling Conference Order (July 24, 2019) [Dkt. 227] at 3. The parties were able to call witnesses, who testified under oath and were subject to both direct and cross examination. *Id.* at 2. The parties offered documentary exhibits, which were "admitted into the record with full regard and adherence to applicable administrative due process rules of practice and procedure." *Id.* And "[n]either side was prevented from calling and fully examining all witnesses, [and] from presenting all relevant documentary and other forms of evidence." *Id.* at 3.

The reasons Respondents provide for jettisoning the prior hearing's record of testimony and creating a duplicative one with the same witnesses fall well short of good cause. Respondents argue that it is necessary to hear from all previously-called witnesses because the prior ALJ made implicit credibility determinations merely by accepting their testimony.[3] This cannot be right. Otherwise, a *de novo* record review would never be possible, even in the absence of explicit demeanor-based credibility determinations. *See Intercollegiate Broad. Sys.*, 796 F.3d at 123 (rejecting argument that failure to conduct new hearing deprived board of ability to make own assessments of witness credibility where there was no evidence of reliance on past board's demeanor-based credibility determinations). In any event, the prior ALJ's credibility determinations are due no weight on this remand, Order Directing a Remand to the Bureau's Administrative Law Judge (May 29, 2019) [Dkt. 216] at 9, and the current ALJ can review the prior testimony to reach her own conclusions without resorting to past credibility determinations. Respondents have not shown that it is necessary to evaluate these particular witnesses' demeanors, and there is no good cause to do so

[3] *See, e.g.,* Respondents' Supplemental Brief in Support of their Motion to Open Record for a New Hearing (Mar. 26, 2020) [Dkt. 261] at 8 ("Ms. Miller's testimony was relied upon by the prior ALJ and evidently found credible,"); 10 ("The former ALJ accepted and relied upon [the] testimony [of Bruce Adonian and Timothy Madsen], therefore finding it credible.").

without such a demonstration. *See Intercollegiate Broad. Sys*, 796 F.3d at 123, 126 (in curing an Appointments Clause violation, it may be appropriate to take live testimony in limited instances, such as if a party can point to determinations that turn on witness credibility).

Respondents also point to the prior ALJ's explicit credibility determinations, but they overstate the extent to which the record contains material factual disputes that turn on witness credibility. Indeed, it is not necessary to disbelieve either Mr. Carnes's or Integrity Advance General Counsel Edward Foster's testimony in order to find Mr. Carnes personally liable.[4] The ALJ can rely upon Mr. Carnes's own uncontested statements in finding that he had the requisite knowledge and authority for liability under the CFPA.

To establish Mr. Carnes's liability, Enforcement Counsel must prove that Mr. Carnes "participated directly in [Integrity Advance's] deceptive or unfair acts or had the authority to control them," and that 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 truth." *CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016) (quoting *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)). Uncontested testimony from the prior hearing establishes that Enforcement Counsel can satisfy each element of the CFPA claims asserted against Mr. Carnes. Indeed, his testimony shows he understood that the agreements disclosed the cost of a single payment and knew that by default Integrity Advance would automatically renew the loans, resulting in costs that were inconsistent with the loan agreements' disclosures. For example, Mr. Carnes testified that he:

- understood how Integrity Advance's loans worked. Reporter's Official Transcript of Proceedings Volume I ("Tr. I") at 220:12 (Sept. 26, 2016) [Dkt. 172];

[4] Enforcement Counsel will fully develop any arguments about Mr. Carnes's liability in its forthcoming Motion for Summary Disposition and does not waive any arguments it may make then based on undisputed facts or law.

- understood that Integrity Advance's "TILA Disclosure would say $130" for a "$100 loan." Transcript of Proceedings Volume II ("Tr. II") at 50:21-51:25 (Sept. 26, 2016) [Dkt. 173];
- knew that if a customer "didn't call or email, and it was their first payment . . . they would be renewed." Tr. I at 219:13-20;
- knew that if that same customer did nothing on their next payday, the loan would be renewed again. *Id.* at 219:21-23;
- knew that an Integrity Advance loan would rollover four times before it went to workout. *Id.* at 19:24-220:3;
- understood that consumers who had their loans rolled over would pay more than what had been disclosed in their TILA disclosures. EC-EX-068 at 245:10-25;
- understood that consumers who did not contact the company would have their loans renewed repeatedly, which would result in much higher costs than what had been disclosed. Tr. I at 219:13-220:3; and
- understood that ninety percent of Integrity Advance's loans experienced at least one rollover, *Id.* at 222:17-20, and that most Integrity Advance consumers would experience at least one rollover. Tr. I at 219:11-222:20.

Mr. Carnes's testimony also shows that he had the authority to control the misrepresentations in Integrity Advance's loan agreement. He testified that he had the authority to change Integrity Advance's fee structure, Tr. II at 49:15-18, that his attorneys had his approval to use the agreement, Tr. I at 232:7-12, and that as CEO he "ultimately approve[d] everything," including the loan agreement, for which he provided "tacit approval." Tr. II at 96:2-14. Since there is no evidence disputing these and other relevant facts, finding that Mr. Carnes had control over Integrity Advance's misrepresentations does not require a factfinder to adjudge Mr. Carnes's credibility.

The credibility issues that Respondents raise in their motion to open the record do not undercut or contradict any of these admissions. Regarding knowledge, Respondents argue that Mr. Carnes's credibility must be newly assessed because he attempted to disclaim responsibility for authoring, reviewing, or explicitly approving Integrity Advance's deceptive loan agreement. But even if a factfinder credits Mr. Carnes's testimony—as the previous ALJ did in finding that Mr. Carnes's did not draft, edit, or revise the loan agreement or template, *see* Recommended Decision (Sept. 27, 2016) at 112 ¶ 30 [Dkt. 176]—it does not contradict or negate Mr. Carnes's admissions

establishing his knowledge of the misrepresentations.[5] Regarding Mr. Carnes's participation in or authority to control the misrepresentations, the prior ALJ found incredible Mr. Carnes's attempt to disclaim his personal involvement in the loan agreement and his responsibility for explicitly approving it. But the ALJ's credibility determination was based on the weight of the evidence, not the witnesses' demeanor. Indeed, statements made by Mr. Carnes and Mr. Foster regarding Mr. Carnes's involvement are contradicted by other undisputed record evidence or Mr. Carnes's own statements. *See, e.g.,* Enforcement Counsel's Proposed Findings of Fact, Conclusions of Law, and Order at ¶¶ 18-63 (Aug. 29, 2016) [Dkt. 163]. Thus, even if it is necessary to reach these issues, it is possible to address them without hearing testimony that is duplicative of that already offered.[6]

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[5] Indeed, courts routinely hold individuals liable for deceptive materials that they did not personally author. *See, e.g., FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 539 (S.D.NY. 2000). The fact that outside counsel may have drafted the loan agreements also makes no difference, as reasonable reliance on advice of counsel is not a defense to individual UDAAP liability. *See, e.g., FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006). The futility of any defense that Respondents relied on advice of counsel is discussed further in Section III.B.2 of Enforcement Counsel's Consolidated Opposition to Respondents' Motion to Dismiss and Respondents' Motion to Amend Answer, filed this same day.

[6] Respondents do not point to any credibility determinations that rested explicitly on a witness's demeanor. In fact, most of the credibility determinations that Respondents point to rested explicitly on the weight of the evidence. For example, the ALJ did not:

- credit Respondents' proposed finding of fact that "[t]he decision to use RCCs was made by the third-party call center on a case-by-case basis," because it was "wholly unsupported by the record." Recommended Decision (Sept. 27, 2016) [Dkt. 176] at 35;
- credit Mr. Carnes's testimony that he was not aware of complaints about Integrity Advance's loan product because his own testimony showed that he was generally aware such complaints existed. *Id.* at 51; or
- credit parts of Mr. Carnes's testimony about his role at Integrity Advance given the weight of other evidence. *Id.* at 54.

Because Respondents have not demonstrated good cause to take cumulative live testimony or introduce new evidence, this proceeding should go forward on the existing record without supplementation.[7]

C. Respondents Lack Good Cause to Introduce New Evidence of their Reasonable Reliance on Advice of Counsel

Respondents, having previously disavowed any assertion that they reasonably relied on advice of counsel, now seek an opportunity to introduce evidence that they did. There is no good cause to supplement the record on this issue. Respondents should be limited to their prior litigation choices, s*ee Intercollegiate Broad. Sys.*, 796 F.3d at 122, as they cannot show that they were denied an opportunity to present their case or provide a valid specific reason for supplementing the record. *Id.* at 126. *Cf.* Order Denying Further Discovery on Statute of Limitations Issue (Oct. 28, 2019) [Dkt. 238] at 10-11 (applying *Intercollegiate Broad. Sys.* and denying Respondents opportunity to seek further discovery); Order Denying Motion to Stay and Dismiss (March 13, 2020) [Dkt. 257] at 4 (holding that Respondents forfeited affirmative defense that they repeatedly failed to assert in previous proceeding).

1. Respondents, on their own volition, declined to introduce evidence of reasonable reliance on advice of counsel.

Respondents' new contention that they reasonably relied on advice of counsel could be, and only could have been, relevant to one issue in this proceeding: whether Respondents' (supposed) good faith should mitigate any civil money penalty. *See* 12 U.S.C. § 5565(c)(3)(A) (stating that "good faith" is a mitigating factor to be evaluated in determining an appropriate penalty amount). This was true during the first hearing, where Enforcement Counsel explicitly sought civil money

[7] Enforcement Counsel notes that it intends to move for summary disposition, and Respondents have indicated that they will as well. Of course, if the matter is fully decided on summary disposition, there would be no need to consider witness credibility at all. If, following summary disposition, claims that were not addressed in the prior hearing remain undecided, the ALJ can determine how to proceed at that point.

penalties in the Notice of Charges, and Respondents were not prevented from introducing such evidence. Instead, they elected not to do so, asserted attorney-client privilege in response to questioning about the loan agreement, and expressly disavowed that Mr. Carnes would assert that he reasonably relied on advice of counsel. Indeed, during the prior hearing Mr. Carnes's counsel stated:

> I think his testimony has not been I relied on counsel . . . [I]f Mr. Carnes wrote a loan agreement and said my lawyers told me it was okay to write this loan agreement that would be a reliance on counsel defense. That is analytically distinct from what Mr. Carnes testified to, he has not waived privilege nor has he even put that at issue.

Tr. I at 230:12-24. *See also* Tr. II at 26:13-29:5 (previous counsel for Mr. Carnes repeatedly objecting to questioning of Mr. Foster about Integrity Advance's loan agreement on attorney-client privilege grounds). Respondents made this decision on their own volition at a time when this evidence was just as relevant as it is now; they did not make it as a result of any rulings by the prior ALJ. Respondents cite to no authority that would permit them to change their position now, and they should not be allowed to use this remand proceeding to revisit prior strategic decisions. *See Intercollegiate Broad. Sys.*, 796 F.3d at 122,126.

2. There has been no change in the law necessitating new evidence of reasonable reliance on advice of counsel.

Although Respondents argue that evidence of their reliance on advice of counsel is newly relevant to the question of whether restitution should be awarded, there has not been a change in the law that provides good cause to now introduce that evidence. Respondents' purported good faith is just as relevant to issues of restitution today as it was during the prior hearing—it has no relevance at all.

First, Enforcement Counsel seeks legal restitution here, *see* 12 U.S.C. § 5565(a) (authorizing the Bureau to grant "any appropriate legal or equitable relief," including restitution), which is not subject to discretion. Legal restitution is a judgment imposing "'a merely personal

liability upon [Respondents] to pay a sum of money,'" as opposed to equitable restitution, which seeks to recover traceable, "identifiable assets in [a wrongdoer's] possession." *See FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 601 (9th Cir. 2016) (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002)). Unlike with equitable relief, there is generally no discretion to deny "legal" relief on any grounds. Indeed, the Supreme Court has held that while an equitable remedy is "committed to the discretion of the trial judge", for an award of damages "there is no comparable discretion" because that is not "equitable relief." *See Curtis v. Loether*, 415 U.S. 189, 197 (1974); *see also United States v. City of Hayward*, 36 F.3d 832, 839 (9th Cir. 1994) (citing *Curtis*, 415 U.S. 189); *EEOC v. Baltimore Cnty.*, 904 F.3d 330, 332-33, 335-36 (4th Cir. 2018) (explaining that the remedy of back pay is a "discretionary *equitable* remedy" in the context of Title VII, but a mandatory legal remedy in the context of the ADEA that a court must award upon the finding of liability). Rather, where a plaintiff seeking legal relief proves both a violation and resulting harm, it "is entitled to judgment for that amount." *Curtis*, 415 U.S. at 197; *see also* Dan B. Dobbs, *Law of Remedies* at 12, § 1.2 (2d ed. 1993) (a "legal remedy" is awarded "as a matter of course when the right [is] established").

Second, even if the restitution that Enforcement Counsel seeks here were subject to the ALJ's discretion, good faith would still be irrelevant. Whether Respondents acted in good faith or not, they still improperly took money from consumers without telling consumers they would have to pay those amounts. No equitable principle supports allowing Respondents to keep that money even if they thought they were acting within the bounds of the law. Indeed, it is well established that it is inappropriate to deny even discretionary relief for reasons "contrary to the purposes" of the underlying statute. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994) (holding that it is legal error to deny restitution under FTC Act for reasons that are "contrary to the purposes of the Act"); *see also, e.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (holding that

although decision to award equitable backpay under Title VII was left to court's discretion, "[a] court must exercise this power in light of the large objectives of the Act").

Denying restitution on the grounds that Respondents did not act in bad faith or reasonably relied on advice of counsel would flatly contradict the CFPA's purpose and thus be inappropriate. As the Supreme Court explained in *Albemarle Paper Co.*, considering a defendant's good faith in the context of Title VII's compensatory remedies would render the remedy "a punishment for moral turpitude, rather than a compensation for workers' injuries" and "read the 'make whole' purpose right out of [the statute], for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'" 422 U.S. at 422. This reasoning applies to the CFPA, which authorizes relief to consumers, including restitution, without limiting it to those who have violated the law in bad faith. *See* 12 U.S.C. § 5565(a).[8] In fact, the CFPA provides that "[a]ny person that violates . . . any provision of Federal consumer financial law shall . . . pay a civil penalty," 12 U.S.C. § 5565(c)(1), including those who acted in good faith. *See* 12 U.S.C. § 5565(c)(2)(A) (establishing a penalty cap for those who violated the law without doing so recklessly or knowingly).[9] It strains credulity that Congress would permit a person to avoid paying compensatory remedies to consumers on account of good faith while still authorizing penalties for the same conduct.

Because it is inconsistent with these principles, the district court decision in *CFPB v. CashCall, Inc.*, which is under appeal and is not binding precedent, was incorrectly decided, and does not represent a change in the law. *See* No. CV 15-07522-JFW(RAOx), 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018), *appeal pending*, No. 18-55407 (9th Cir.). And the decision in *CFPB*

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[8] *See* S. Rep. No. 111-176, at 177 (2010) (explaining that this section "provides for relief for consumers").

[9] Of course, a person's good faith may provide a reason to mitigate any civil penalty. *See id.* § 5565(c)(3)(A).

v. Nationwide Biweekly Administration, Inc., also under appeal, does not in any way suggest there has been a change in the law on this issue, as it did not purport to deny restitution based on the defendants' good faith or reasonable reliance on advice of counsel. *See* Case No. 15-cv-02106-RS, 2017 WL 3948396, *11-12 (N.D. Cal. Sept. 8, 2017), *appeal pending*, No. 18-15431 (9th Cir.). (declining to award restitution for a variety of reasons, none of them involving claims of defendants' good faith or reliance on advice of counsel).

D. Respondents Lack Good Cause to Introduce New Evidence of their Expenses

Respondents also seek an opportunity to introduce for the first time evidence of their expenses. Respondents had an opportunity to present evidence on expenses previously, but on their own volition, failed to do so. And they lack a valid reason for introducing this evidence now, as the law has not changed since the original hearing. Today, as then, expenses have no place in the proper calculation of restitution. Thus, Respondents lack good cause to introduce this evidence. *See Intercollegiate Broad. Sys.*, 796 F.3d at 122, 126.

Under the CFPA, "[r]estitution may be measured by the full amount lost by consumers rather than limiting damages to a defendant's profits." *CFPB v. Gordon*, 819 F.3d 1179, 1195 (9th Cir. 2016).[10] Consumer loss is calculated without consideration of Respondents' expenses. *See CFPB v. Mortg. Law Grp., LLP*, 196 F. Supp. 3d 920, 948-49 (W.D. Wis. 2016) (holding that "the appropriate measure for restitution . . . is defendants' net revenue . . . less any refunds that the

[10] Courts also measure restitution awarded under the FTC Act by consumers' losses. *See FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997); *FTC v. Kuykendall*, 371 F.3d 745, 765-66 (10th Cir. 2004). Although some courts have measured restitution by a defendant's unjust gains rather than consumers' losses, *see e.g., FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006), such a distinction is irrelevant here, where consumers made payments directly to Integrity Advance. *See id*. at 68 (explaining that unjust gains "will be equal to the consumer's loss" in cases where "the consumer buys goods or services directly from the defendant" but may differ in cases in which a consumer paid fees to a middleman). And, besides, even those courts make defendants liable for the full amounts they took from consumers, without allowing the defendants to deduct their expenses. *See, e.g., FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011).

consumers have received," and declining to include defendants' expenses in calculation). Excluding expenses from a calculation of restitution is consistent with the approach taken universally by federal courts of appeal. *See, e.g., Commerce Planet*, 815 F.3d at 603; *FTC v. Washington Data Res. Inc.*, 704 F.3d 1323, 1327 (11th Cir. 2013); *Febre*, 128 F.3d at 536.

Using net revenue to calculate restitution is consistent with the "well established" principle that defendants "are not entitled to deduct costs associated with committing their illegal acts." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011) (discussing equitable disgorgement). Here, Respondents unjustly gained revenue from consumers irrespective of any costs they may have incurred. Permitting them to deduct those costs would undercut the purpose of restitution by "making the consumer bear the [Respondents'] expenses." *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008); *see also United States. v. Universal Mgmt. Servs., Corp.*, 191 F.3d 750, 763-64 (6th Cir. 1999) ("Appellants, who disobeyed the law, should not have his expenses covered by consumers."). It would thus undermine Congress's goal of providing relief for consumers injured by unlawful practices, as evidenced by the CFPA's broad grant of authority for the Bureau to obtain "any appropriate legal or equitable relief" for violations of federal consumer financial law." 12 U.S.C. § 5565(a)(1); *see also* S. Rep. No. 111-176, at 177 (2010) (explaining that this section "provides for relief for consumers"). And it would interfere with enforcement of the CFPA by permitting wrongdoers to avoid the full cost of their illegal conduct. Indeed, if Respondents are able to deduct expenses such as salaries from any award of restitution, Mr. Carnes's may even *benefit* from the illegal conduct by deducting and then keeping the annual $250,000 he was paid as Integrity Advance's chief executive. *See* Tr. I 167:11-17.

Respondents ignore this consistent body of law, and instead rely upon a recent district court's off-hand suggestion in a decision that is under appeal that restitution must be "netted to account for expenses." *See CFPB v. CashCall, Inc.*, No. CV 15-07522-JFW(RAOx), 2018 WL

485963, at *13 (C.D. Cal. Jan. 19, 2018), *appeal pending*, No. 18-55407 (9th Cir.) (acknowledging that net revenue is the proper measure of restitution, but suggesting that certain expenses should fit into that calculation). Contrary to Respondents' suggestion, *CashCall* did not change the law. To the extent that it even held that expenses of the type that Respondents seek to deduct are relevant to restitution, it would be incorrect, contrary to the binding precedent from its own circuit, *see e.g., Commerce Planet*, 815 F.3d at 603, and contrary to the weight of authority discussed above. Because *CashCall* has not changed the law and evidence of expenses remains irrelevant to the calculation of restitution, Respondents have not shown good cause to supplement the record with that evidence.

IV. Conclusion

Respondents have failed to demonstrate that there is good cause to supplement the existing record, and their motion to open the record should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April 2020, I caused a copy of the foregoing Enforcement Counsel's Opposition to Respondents' Motion to Open the Record for New Hearing to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on Respondents' counsel at the following addresses:

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