UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	ORDER DENYING IN PART RESPONDENTS' MOTION TO OPEN RECORD FOR A NEW HEARING
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

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 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

[1] The issues related to the Statute of Limitations have already been adjudicated and will not be addressed further in this Order.
[2] *Lucia v. SEC*, 128 S. Ct. 2044 (2018).

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 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 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]

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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.
[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,

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). 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

2020) (finding *de novo* record review appropriate to remedy an Appointments Clause violation, absent specific reason to reopen record for further evidence).

[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.

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 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

[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).

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

[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.

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.

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, 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

[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).

[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.

> 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 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 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

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

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

[15] Doc. 141.

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 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 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

[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).

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 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 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

[17] *Chase v. Trs. of W. Conference of Teamsters Pension Trust Fund*, 753 F.2d 744, 753 (9th Cir. 1985).
[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.
[19] *See* Doc. 263, at 11 n.9.

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.

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 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.

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

Christine L. Kirby

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

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.