UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	**ENFORCEMENT COUNSEL'S ANSWERING BRIEF**
INTEGRITY ADVANCE, LLC, and JAMES R. CARNES,	
Respondents.	

Table of Contents

Table of Authorities

Cases

Statutes & Regulations

I. Introduction

Over the course of this proceeding, Enforcement Counsel proved that Respondents ran a payday loan operation that consistently violated federal law. Respondents failed to accurately disclose the cost of their loans, forced consumers into electronic payments, and when consumers realized that they were being overcharged and withdrew authorization for electronic payments, used an obscure financial product, which Respondents failed to accurately disclose, to continue withdrawing consumer funds. After almost five years of litigation, during which Administrative Law Judge ("ALJ") Christine L. Kirby considered the full record and dozens of briefs, the ALJ issued a Recommended Decision that found both Respondents liable for millions of dollars.

Respondents now appeal virtually every part of the ALJ's Recommended Decision and most of the rulings that preceded it, arguing that the ALJ misconstrued the evidence and failed to apply the law correctly. Respondents are mistaken. The findings reflected in the Recommended Decision and other rulings are well-grounded in both case law and the facts established through this proceeding, including a review of the witnesses' testimony and the many exhibits introduced. At bottom, Respondents failed to refute the overwhelming evidence proving the gravamen of the Notice of Charges: Integrity Advance did not disclose the actual costs of its loans, consumers were harmed as a result, and Respondent James Carnes knew this was happening and could have stopped it. The ALJ, therefore, rightly granted summary disposition to Enforcement Counsel. The Director should affirm the ALJ's factual findings and liability determinations in her Final Decision.[1]

---

[1]Because the presentation of facts and legal arguments in the briefs and record is clear, Enforcement Counsel respectfully submits that the decisional process would not be "significantly aided by oral argument," and requests that the Director consider Respondents' appeal "on the basis of the papers filed by the parties without oral argument." 12 C.F.R. § 1081.404(a).

II. The ALJ Properly Granted Enforcement Counsel Summary Disposition on Each of Its Claims and Properly Awarded Remedies

In the Recommended Decision, the ALJ properly assessed the undisputed material facts and found that summary disposition was appropriate on each of Enforcement Counsel's claims. She also appropriately awarded restitution to harmed consumers, civil money penalties that take into consideration Respondents' illegal practices and all mitigating factors, and a limited and tailored injunction to help consumers obtain redress. As discussed below, Respondents failed to present evidence that disproved or disputed Enforcement Counsel's claims and failed to rebut Enforcement Counsel's proof of consumer harm. They instead resorted to conclusory assertions, which is insufficient at summary disposition. *See Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006). Because Respondents failed to establish the "genuine and material" factual disputes that would have been necessary for them to prevail, summary disposition was proper. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); Recommended Decision (Aug. 4, 2020) [Dkt. 293] ("RD") at 3-4.

A. Integrity Advance Violated the Truth in Lending Act

The ALJ properly found that Integrity Advance violated the Truth in Lending Act ("TILA") and Regulation Z by inaccurately disclosing a multi-payment loan as a single-payment one. RD at 22-29. Regulation Z mandates that creditors disclose "the terms of the legal obligation between the parties," 12 C.F.R. § 1026.17(c); *id.* § 1026.17(a); *see* 15 U.S.C. § 1601(a), including the loan's finance charge, annual percentage rate, due date, and series of payments scheduled to repay the total of payments. 12 C.F.R. §§ 1026.17(a), 1026.18; Official Staff Comments, 12 C.F.R. pt. 1026, Supp. I, 1026.17(c)(1) cmt. 1.

Integrity Advance failed to disclose consumers' legal obligations. Although it disclosed its loans as if they were single-payment loans, *see* Resps. Answer and Affirmative Defenses

(Dec. 14, 2015) [Dkt. 21] ("Ans.") ¶ 26; RD at 7 ¶ 31, Integrity Advance structured its agreements to automatically extract multiple payments from consumers. RD at 10 ¶¶ 61-62, 69. That happened by default unless the consumer called three business days before payment was due to "change the terms of the loan." Ans. ¶ 29; RD at 8 ¶¶ 35-38. Absent that change in terms, Integrity Advance auto-renewed the loan and debited a payment from the consumer equal to the first finance charge from the consumer's account. RD at 8 ¶ 40; *see also* Ans. ¶ 29. After doing that four times, it placed the loan into an auto-workout in which it continued to debit new finance fees in addition to $50 towards principal. Ans. ¶ 30; RD at 8 ¶¶ 41-42. This violates TILA. *See FTC v. AMG Servs., Inc.*, 29 F. Supp. 3d 1338, 1343, 1345-46, 1354-55 (D. Nev. 2014), *aff'd sub nom. FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018), *cert. granted* No. 19-508 (July 9, 2020); RD at 22-29.[2]

Respondents insist that the loan agreement required a consumer to select a payment option, but that is incorrect.[3] If consumers did not select a payment option, Integrity Advance just debited the default auto-renewal and then auto-workout payments. Ans. ¶¶ 29-31. If consumers did select another payment option, that changed the default terms. Thus, Respondents' argument about post-consummation changes is misguided. The required disclosures did not become inaccurate because of some later-occurring event. A consumer could – without breaching the loan's terms – take no action and pay the multiple auto-renewal and

---

[2] Respondents' efforts to distinguish *AMG Services* are unavailing. The TILA box in that case, as here, disclosed multi-payment loans as single-payment ones. *See* RD at 27-29. Respondents' loan agreement is arguably worse because it never disclosed the total cost of a loan. *See* RD at 8 ¶ 47.

[3] Also, Respondents' argument that the loan agreement is presumptively TILA-compliant is a red herring. *See* Resps. Opening Appeal Br. (Sept. 3, 2020) [Dkt. 295] ("Resps. Br.") at 19 n.15. The TILA claim concerns the inaccurate contents of the disclosures, not the format.

auto-workout payments, so the disclosures were inaccurate when made. *See* 12 C.F.R. § 1026.17(e); 12 C.F.R. pt. 1026, Supp. I, 1026.17(e) cmt. 1.[4] Holding otherwise would permit a creditor to disclose virtually any multi-payment loan with a prepayment option as a single-payment obligation with default rollovers.[5]

B. Respondents' Loan Agreements Were Deceptive

Respondents' loan agreements were facially deceptive because they misrepresented the cost of the loan. *See* RD at 37-41. Respondents argue that this misrepresentation is immaterial, that the loan's net impression was not deceptive, and that the ALJ should have considered the import of repeat customers. Resps. Br. at 21-23. But cost is presumptively material, the agreement was facially deceptive, and the bare existence of repeat customers, without more, is not relevant.

Consistent with both common sense and well-established law, the ALJ held that information about a loan's cost is material. RD at 32-34. Each aspect of the TILA disclosures go directly to the cost of the loans and thus are relevant and material to consumers. *See Steele v. Ford Motor Credit Co*., 783 F.2d 1016, 1019-20 (11th Cir. 1986); *see also FTC v. Figgie Int'l, Inc*., 994 F.2d 595, 608 (9th Cir. 1993). Indeed, it is well-established that cost is presumptively

[4] Each case cited by Respondents on this point involves a party breaching a contractual obligation and is inapposite. *Jasper Cty. Sav. Bank v. Gilbert* involves a consumer who became delinquent on a promissory note and then protested the omission of delinquency charges from the TILA disclosures. 328 N.W.2d 287, 291 (Iowa 1982). And in *Stein v. TitleMax of Georgia, Inc.*, the lender permissibly charged a lien recording fee but then failed to actually record the lien and pay the fee. Case No. 19-cv-00669-WMR-WEJ, 2019 WL 5549265, at *9 (N.D. Ga. July 25, 2019).

[5] Under Respondents' faulty logic, a home mortgage company would not be able to disclose the total cost of a 30-year fixed-rate mortgage because it could not predict a consumer's subsequent pre-payment behavior. Of course, home mortgage companies can and must accurately disclose the total cost of a loan, even if consumers end up paying less than that amount.

material. *Novartis Corp. v. FTC*, 223 F.3d 783, 786-87 (D.C. Cir. 2000); *Sanctuary Belize Litig.*, Civ. No. PJM 18-3309, 2020 WL 5095531, at *11 (D. Md. Aug. 28, 2020); *see also Thompson Med. Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *FTC v. Crescent Publ'g Grp., Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (explaining that "[i]nformation concerning prices or charges for goods or services is material, as it is 'likely to affect a consumer's choice of or conduct regarding a product'"). Rather than offering evidence to rebut the presumption, Respondents cite the absence of consumer testimony or survey evidence, but Enforcement Counsel needs neither to prevail. *See* RD at 35, 39-40.[6]

The ALJ also properly found that the net impression of Integrity Advance's loan agreement was deceptive. RD at 35-41. A court can grant summary judgment based on a facial analysis of a document, *see FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200-01 (9th Cir. 2006); *AMG Capital*, 910 F.3d at 423, 426, and the ALJ did that after conducting a close review of the loan agreement. *See* RD at 37-38. That conclusion is well-supported by existing caselaw. In *AMG Capital*, the Ninth Circuit held that a loan agreement very similar to the one at issue here was deceptive because "it did not accurately disclose the loan's terms" and "a reasonable consumer might expect to pay only" the amount disclosed in the TILA box's disclosed total of payments. 910 F.3d at 423. As with that loan agreement, the fine print following the deceptive

[6] In support of these arguments, Respondents incorporate by reference prior briefing on this issue, *see* Resps. Br. at 22, 23, thereby introducing additional arguments while still nominally adhering to Rule 403(b)'s page limitation. 12 C.F.R. § 1081.403(b). If the Director considers those arguments, Enforcement Counsel respectfully points her to its previous responses thereto. *See* EC Opp'n to Resps. MSD (June 4, 2020) [Dkt. 281] at 8-11; EC Reply re MSD (June 10, 2020) [Dkt. 284] at 3-4. Respondents have also previously pointed to generalized statements made by their expert. *See* Resps. Opp'n to EC MSD (June 4, 2020) [Dkt. 278] at 13-14. These statements, part of a broad critique of Enforcement Counsel's expert, do not create a factual dispute, *see Akzo Nobel Coatings, Inc. v. Dow Chem. Co.*, 811 F.3d 1334, 1343 (Fed. Cir. 2016), and cannot overcome the presumption of materiality.

TILA box in Respondents' loan agreement does not reasonably clarify the deceptive statements. In fact, Integrity Advance's loan agreement did not state in any place the full and accurate cost of the company's loans. *See* RD at 8 ¶ 47.[7]

Respondents argue that they took steps to ensure that consumers understood and appreciated the terms of the loan agreement, but the ALJ considered these steps and concluded they were immaterial. RD at 38-39. Respondents required consumers to sign the loan agreement in multiple locations, but that is irrelevant when the loan agreement does not disclose loan costs. *Id.* at 38. The loan agreement included a "special notice" stating that the loan was for short-term needs rather than long-term needs, but that "gave no information about the intended length of the loan term." *Id.*[8] And although the loan agreement indicated that additional fees could accrue if the loan were rolled over, it never clearly disclosed those fees. *Id.* Finally, the ALJ reviewed Respondents' origination processes and concluded they were insufficient to cure the loan agreement's deceptive misrepresentations. *Id.* at 39.[9] Respondents fail to show error in any of this reasoning.

---

[7] Respondents argue that the ALJ misapplied the summary disposition standard in reviewing the loan agreement. *See* Resps. Br. at 16 n.13. But the ALJ properly assessed the form of the loan agreement. *See, e.g.*, RD at 4 (explaining that ALJ has "adhered to the exact language of" exhibits), 22-25, 37-38, 47, 62. Any aspects of the loan agreement that Respondents have argued render it non-deceptive are either irrelevant to the loan's cost or, worse, reinforce the deceptive nature of the agreement. *See, e.g.*, *id.* at 28 (explaining that the bolded and capitalized auto-renewal and auto-workout provisions "would merely seem to reinforce" the deceptive impression of the loan agreement); *see also id.* at 24, 25-26, 38.

[8] Indeed, the parts of the loan agreement that Respondents have suggested adequately inform consumers reinforce the agreements' deceptive nature. *See, e.g.*, RD at 24, 25-26, 28, 38.

[9] Contrary to Respondents' contention, *see* Resps. Br. at 16 n.13, the ALJ properly applied the summary disposition standard here, as well. The bare evidence that customers were "called and talked to," without evidence regarding the actual content of those calls, including whether they informed consumers of the loans' cost or the auto-renewal and auto-workout process, is immaterial. *See* RD at 39.

Finally, Respondents point to the existence of repeat customers as evidence that the loan agreement was not deceptive.[10] But, as the ALJ explained, in light of "other plausible explanations for a repeat customer's behavior," the existence of repeat customers is not "evidence that indicates one way or another whether repeat customers were actually deceived." *Id.* at 33-34 (quoting *AMG Capital*, 910 F.3d at 428). Whether Integrity Advance's consumers later took out another loan does not entitle Respondents to an inference that consumers understood the terms of Integrity Advance's loans and were satisfied with them, particularly when the loan agreement – like this one – is facially deceptive. *AMG Capital*, 910 F.3d at 423-424; *see Cyberspace.com*, 453 F.3d at 1201. There are myriad reasons why a consumer might take out a new loan from Integrity Advance, but Respondents presented no evidence on any of them.[11] Speculation about customer experience with a facially deceptive loan agreement cannot remedy this. *See* RD at 34.[12]

---

[10] Contrary to Respondents' suggestion that the ALJ improperly considered the issue of repeat customers, Resps. Br. at 14-16, the ALJ fully considered and properly disregarded Respondents' arguments. *See* RD at 31-34, 78-82.

[11] There is no basis for receiving additional evidence about repeat customers, and Respondents' argument for a hearing on this topic is disingenuous. Resps. Br. at 15-16. They had an obligation to present any additional evidence at summary disposition rather than holding it for a hearing. *See* 12 C.F.R. § 1081.212(d)(2). And there is no evidence to introduce, as Respondents themselves already explicitly stated. *See* Resps. Mot. for Summ. Disp. (May 15, 2020) [Dkt. 272] ("Resps. MSD") at 32, 32 n.8.

[12] Respondents fail to distinguish *FTC v. National Urological Group, Inc.* on the facts. *See* Resps. Br. at 15. In *National Urological Group, Inc.*, the defendants made a logically indistinct argument from Respondents: the court should exclude repeat customers from restitution because "those customers were obviously influenced by their actual experience with the product and not the advertisement." 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008). But because the defendants did "not introduce any evidence of what actually influenced the customers' decisions," the court had no basis for reducing the amount of restitution. *Id.* Here too, Respondents failed to introduce *any* evidence that repeat customers did not rely on their deceptive disclosures and simply assume that repeat customers relied instead on their past experience.

C. Respondents' Failure to Disclose Their Loans' Costs Was Unfair

Respondents' loan agreement failed to disclose the costs of the loan. RD at 22-29, 32-41. Consumers taking out loans from Respondents on or after July 21, 2011 (the effective date of the CFPA's prohibition on unfair, deceptive, and abusive practices) collectively paid over $38 million more than Respondents disclosed. RD at 9 ¶ 57. Given the misrepresentations in the loan agreements, consumers had no reason to anticipate Respondents would charge them more than disclosed until it actually happened. Thus, as the ALJ properly held, the practice of failing to disclose the loans' costs was unfair. *See* RD at 44-50.[13]

Respondents' practice was unfair because it was likely to cause substantial injury to consumers that is not reasonably avoidable by consumers or outweighed by countervailing benefits to consumers or competition. *See* RD at 41 (citing 12 U.S.C. § 5531(c)(1)), 44-50. None of the evidence cited by Respondents undercuts this conclusion. It is undisputed that consumers paid more than the agreement disclosed. This monetary harm constitutes substantial injury. *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985). Respondents allege that consumers understood they would pay more than disclosed in the loan agreement, but they have failed to support that claim with any evidence. That consumers took out more than one loan is not evidence that consumers actually understood the cost of the loans, *see* Section II.B., *supra*, and what Respondents suggest is a low number of complaints only permits speculation of what non-complaining consumers might have understood.

[13] There is no basis to find that Enforcement Counsel is estopped from bringing this claim. Enforcement Counsel's previous decision to drop Count IV was made in reliance on a decision of the previous ALJ. *See* Stipulated Mot. to Withdraw Count IV (July 11, 2016) [Dkt. 127] (referencing ALJ McKenna's Summary Disposition Order). Neither that decision, nor the decision dismissing Count IV (Dkt. 133) have any effect. *See* Order Directing Remand to Bureau's Administrative Law Judge (May 29, 2019) [Dkt. 216] ("Remand Order") at 9.

Respondents also have failed to offer evidence refuting that the harm was not reasonably avoidable. They suggest consumers could have rescinded or pre-paid their loans, Resps. Br. at 24, but as the ALJ explained, RD at 47, harm is not reasonably avoidable unless the consumer anticipates it. *See Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988). To avoid injury, consumers would have had to take action before Respondents auto-renewed their loans, but because Respondents never disclosed the loans' total costs, consumers could not have anticipated the harm until the first auto-renewal at the earliest. *See* RD at 47. Finally, Respondents' arguments on the countervailing benefits are meritless. Hiding the total cost of loans from consumers cannot plausibly provide a legitimate benefit to consumers or competition, and Respondents do not suggest otherwise or explain why they could not have offered loans with truthful disclosures. *See* RD at 49.

D. Respondents' Use of Remotely Created Checks Was Unfair

On 602 occasions after July 21, 2011, Respondents relied on a buried and inscrutable sentence in their ACH authorization form for authority to debit consumer accounts using remotely created checks ("RCCs") where those consumers had both paid the disclosed cost and withdrawn their ACH authorization. This practice caused substantial injury in the form of consumer losses totaling $115,024.50. *See* RD at 60-61; *FTC v. Amazon.com, Inc.*, 71 F. Supp. 3d 1158, 1164 (W.D. Wash. 2014). Respondents argue that consumers consented, but their signatures cannot evidence informed consent, *see id.* at 1163, when "[i]t is not apparent from [the sentence in the ACH agreement] that IA could prepare a check without the consumer's knowledge or signature." RD at 62.

Because the provision was not clear and conspicuous, consumers could not reasonably avoid the harm. *See FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008). Respondents' suggestion that consumers could have provided payment through another method misses the point: after paying the amount disclosed, these consumers took steps to stop Integrity Advance from taking more from them. Making a payment through another method would not mitigate that harm. *See* RD at 63. Finally, Respondents' argument that RCCs allow lenders to extend credit to otherwise-ineligible consumers does not address their unfair practice. Any benefits RCCs may offer cannot justify their use in circumstances where essential information about the payment mechanism and loan costs have been obscured. RD at 63-64.

E. Integrity Advance Violated the Electronic Funds Transfer Act

Integrity Advance unlawfully conditioned offers of credit on preauthorized electronic repayments in violation of the Electronic Funds Transfer Act ("EFTA") and Regulation E, which prohibit requiring consumers to agree to repay a loan via preauthorized electronic fund transfers ("EFTs") in order to receive credit. 15 U.S.C. § 1693k; 12 C.F.R. § 1005.10(e). To apply for and receive an Integrity Advance loan, consumers needed to sign a form authorizing both the deposit and withdrawals of payments via ACH.[14] That form provided Integrity Advance with the authority to debit the entire series of default auto-renewal and auto-workout payments from consumers' accounts without any further action or authorization. RD at 10 ¶ 69.

Respondents argue that because this form did not explicitly require repayment by ACH, it could not have violated EFTA. But that is not the law. Even if consumers could have repaid loans with another payment method, Integrity Advance still required its customers to consent to preauthorized EFTs, and that violates EFTA. *See FTC v. PayDay Fin. LLC*, 989 F. Supp. 2d 799, 812 (D.S.D. 2013); *O'Donovan v. CashCall, Inc.*, No. C 08-03174 MEJ, 2009 WL 1833990, at

[14] Respondents suggest that the ACH authorization form must not have been required because some customers did not sign it. But the undisputed evidence in the record shows consumers who did not sign it were an anomaly, and the loan agreement did not state in any place that it was optional. *See* RD at 55.

*3 (N.D. Cal. June 24, 2009). In *O'Donovan*, plaintiffs stated a claim because consumers applying for loans needed to provide authorization to collect payments by EFT, even if a consumer could later cancel it. 2009 WL 1833990, at *1, *3. And in *PayDay Financial*, only some of the contracts included language requiring repayment by EFT, but all the contracts violated EFTA because consumers needed to sign an EFT agreement in order to obtain loan proceeds. 989 F. Supp. 2d at 812. Because Integrity Advance required consumers to complete such an authorization in order to obtain a loan, it too violated EFTA.

F. Carnes Is Liable for Respondents' Deceptive and Unfair Acts and Practices

An individual is liable for unfair or deceptive acts or practices when: "(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." *CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016) (quoting *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)). The ALJ properly assessed the undisputed evidence in holding Carnes liable for Integrity Advance's deceptive and unfair acts and practices.

There is overwhelming evidence that Carnes had authority to control the deceptive and unfair practices. RD at 70-71. He was Integrity Advance's President and CEO, was the ultimate decision maker for the company's business decisions and policies and procedures, directly or indirectly supervised everyone involved with Integrity Advance, and participated intimately in the company's day-to-day business. *Id.* Rather than disputing this, Respondents argue that Carnes did not draft, edit, or substantively review the loan agreement or personally make the decision to use RCCs. *See* Resps. Br. at 16-17. But those assertions go to whether Carnes directly participated in the illegal practices, not his authority to control them. *See* RD at 69. Having proven that Carnes had authority over Integrity Advance, Enforcement Counsel does not also need to show direct participation. *See Gordon*, 819 F.3d at 1193.[15] Indeed, courts routinely hold individuals liable for deceptive content the individuals did not author. *See, e.g.*, *FTC v. World Media Brokers*, 415 F.3d 758, 764-66 (7th Cir. 2005) (holding that individual who assumed corporate duties had authority to control misrepresentations even though he may not have "personally made" them); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 539 (S.D.N.Y. 2000).

As the ALJ held, Carnes also possessed the knowledge necessary for personal liability. Establishing knowledge of a misrepresentation requires establishing "the requisite factual knowledge" of acts or practices that are deceptive or unfair. *See CFPB v. CashCall, Inc.*, No. CV 15-07522-JFW (RAOx), 2016 WL 4820635, at *12 (C.D. Cal. Aug. 31, 2016). It does not require evidence that the individual knew the acts or practices violate the law, *see id.* at *11-12, or evidence that the individual "intended to defraud" consumers. *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1102 (9th Cir. 2014); *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 320 (S.D.N.Y. 2008). The evidence satisfies this second prong. Carnes testified that he understood how the loan agreement disclosed cost (e.g., $130 for a $100 loan), how the auto-renewal and auto-workout process worked in practice, that a majority of Integrity Advance customers experienced rollovers,[16] and that Integrity Advance used RCCs to extract payments from consumers who had withdrawn ACH authorization. RD at 72-73. Enforcement Counsel did not need to establish that Carnes had intimate familiarity with the whole loan agreement because

[15] Respondents' citation to *CFPB v. Mortgage Law Group, LLP*, 196 F. Supp. 3d 920, 946-947 (W.D. Wis. 2016) is inapposite. Resps. Br. at 17. There, the court analyzed the individual defendant's knowledge of a company's misrepresentations, not his authority to control them.

[16] Contrary to Respondents' suggestion, *see* Resps. Br. at 16 n.13, the ALJ properly accounted for Carnes's knowledge of rollovers, explaining that although he testified "the 90% number was not in his head [while] he was the CEO," he undisputedly understood the majority of customers experienced rollovers. *See* RD at 72, 72 n.16.

these facts establish his knowledge of Integrity Advance's practices. *See CashCall*, 2016 WL 4820635, at *12 (holding a lender's president liable for deceptive conduct without relying on the individual's authorship or review of the deceptive communications because he knew of the deceptive statements). At the least, Carnes was recklessly indifferent. *See* RD at 76. Respondents do not explicitly challenge this conclusion, *see* Resps. Br. at 17-18, which is sufficient to establish Carnes's liability.

None of the facts asserted by Respondents change Carnes's knowledge. Whether outside counsel created the loan agreement is irrelevant because reliance on advice of counsel is no defense to individual liability. *See CashCall*, 2016 WL 4820635, at *12; *see also Grant Connect*, 763 F.3d at 1102; *Cyberspace.com*, 453 F.3d at 1202. Carnes did not need to directly participate in the practices to know about them. And, because Carnes's intent is immaterial, evidence that he may have relied on Delaware regulators, repeat consumers, or supposedly low levels of complaints is irrelevant. *See Grant Connect*, 763 F.3d at 1102; *United States v. Johnson*, 541 F.2d 710, 712 (8th Cir. 1976).

G. Respondents' Objections to the Proposed Relief Are Unfounded

Consumers should receive back the money they paid beyond what Respondents disclosed, and the ALJ properly calculated that amount in recommending an award of restitution. Respondents have argued restitution is only appropriate if Enforcement Counsel shows either that consumers did not receive the benefit of their bargain or that Respondents intended to defraud consumers. *See* Resps. MSD at 31; Resps. Br. at 27. Even if this argument were correct,[17] there is no equitable basis for withholding redress from consumers.

Based on the undisputed evidence, the ALJ correctly concluded that consumers did not receive the benefit of the bargain and are entitled to restitution. As is apparent from the face of Respondents' loan agreements and transactional data, consumers obtained loan proceeds at a much higher cost than Respondents disclosed. *See* RD at 80, 84-85. None of the evidence Respondents point to is probative of consumer understanding or undermines that conclusion. *Id.* at 80. *CashCall*, upon which Respondents rely, supports restitution here. There, the court denied restitution to consumers because the loan agreements, unlike Respondents', "plainly and clearly disclosed" the loans' costs. *CFPB v. CashCall, Inc.*, No. CV 15-07522-JFW (RAOx), 2018 WL 485963, at *13 (C.D. Cal. Jan. 19, 2018). Restitution is merited here. *See* RD at 80.

Since consumers did not receive the benefit of their bargain, even under Respondents' argument it is unnecessary to consider good faith. *See* Resps. MSD at 31. Also, restitution cannot be denied on the ground that Respondents (purportedly) did not intend to defraud consumers. A wrongdoer's good or bad faith is not relevant to whether restitution – relief designed to compensate injured consumers – is warranted. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975) (holding that defendant's lack of "bad faith" was "not a sufficient reason for denying backpay" because that would conflict with the remedy's "'make whole' purpose").

---

[17] Respondents' position is incorrect because restitution here is legal and mandatory. 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, 213 (2002)). There is generally no discretion to deny "legal" relief on any grounds, so if a plaintiff proves a violation and resulting harm, it is "entitled to judgment for that amount." *See Curtis v. Loether*, 415 U.S. 189, 197 (1974).

The ALJ also properly calculated the appropriate amount of restitution as the amount that consumers paid over what Respondents disclosed minus refunds, *see* RD at 84-85, and Respondents' arguments for denying or reducing it are contrary to law.[18] Their costs are irrelevant because restitution is "the full amount lost by consumers," and is not limited to "a defendant's profits." *Stefanchik*, 559 F.3d at 931. Here, where there is no evidence that consumers paid money to a middle-man, consumer loss is equal to Respondents' unjust gains. *See FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 68 (2d Cir. 2006).[19] And there is also no basis to preclude repeat customers from receiving restitution. Once Enforcement Counsel establishes that the loan agreement is deceptive, it is entitled to a "presumption of actual reliance," *see FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993), which Respondents can overcome only by offering evidence of non-reliance. *See Gordon*, 819 F.3d at 1195-1196. Respondents' conclusory suggestion that returning customers were not deceived fails to meet this burden. *See AMG Capital*, 910 F.3d at 428.[20]

Finally, there is no basis to exclude redress for pre-transfer-date TILA violations. Granting restitution for TILA violations that occurred before July 21, 2011, does not have an

---

[18] Respondents now argue – without explanation and for the first time since remand – that certain fees should be deducted from restitution. Resps. Br. at 29, 29 n.21. Respondents had an obligation at summary disposition to show that Enforcement Counsel's restitution approximation was unreasonable, and they failed to raise this issue then. The Director should find that Respondents have waived this issue.

[19] In dicta, the court in *CashCall* handled the question of whether expenses should be netted out of restitution in a cursory and internally inconsistent way, and the case is not persuasive authority on this point. *See CashCall*, 2018 WL 485963, at *13; Order Denying in Part Resps. Mot. to Open Record for a New Hr'g (Apr. 24, 2020) [Dkt. 269] ("Order re Record Reopening") at 10.

[20] Respondents cite inapposite cases on this point. In *FTC v. Publishers Business Services, Inc.*, 540 F. App'x 555 (9th Cir. 2013), the court made the unremarkable instruction that on remand the district court could consider arguments about repeat customers, but did not evaluate evidence. *Id.* at 558. And in *FTC v. Kuykendall*, 371 F.3d 745 (10th Cir. 2004), the court recited the burden-shifting standard in restitution that Respondents failed to satisfy here. *See id.* at 766.

impermissible retroactive effect because the FTC could have obtained the same relief for those violations. 15 U.S.C. §§ 53(b), 1607(c). Section 13(b) of the FTC Act has authorized the FTC to seek restitution for violations of "any provision of law enforced by the [FTC]," including TILA. 15 U.S.C. § 53(b)(1); *see also, e.g.*, *Commerce Planet*, 815 F.3d at 598. That Enforcement Counsel seeks restitution in an administrative forum does not change the analysis. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994). Whether relief may be sought in a particular forum is a purely procedural question, *see Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997), and does not make the rule's application retroactive. *Landgraf*, 511 U.S. at 275.

H. The Recommended Decision's Penalty Award Was Appropriate

The ALJ recommended Integrity Advance pay a $7.5 million penalty for using a loan agreement that was deceptive, unfair, and violated TILA, for requiring electronic repayment in violation of EFTA, and for its unfair RCC practice. She recommended Carnes pay $5 million for the first and third practices. These amounts, which are less than Enforcement Counsel requested, should not be reduced. Respondents' argument that they should not be penalized for the third practice because Enforcement Counsel did not identify the number of days they used RCCs, Resps. Br. at 30, ignores that it was Respondents' unfair *practice* to use them until they ceased servicing loans on July 9, 2013. RD at 56, 72. There is no need to count only the days Respondents actually printed RCCs. *See* 12 U.S.C. §§ 5536(a)(1)(B), 5565(c)(2)(A).

Maximum tier-one penalties are appropriate in this matter. Respondents built a business on a deceptive loan agreement and illegally extracted more than $100 million from harmed consumers. Regardless of any reliance on counsel or past regulatory review, they knew how their loans operated. RD at 92-93. They were also subject to a state enforcement action for their practices, and lack of subsequent regulatory sanctions should carry no weight since they have not operated since initiation of this proceeding. RD at 94.

I. The Injunctive Relief Ordered by the Recommended Decision Was Proper

The ALJ held that monetary relief can remedy consumers' injuries, *see* RD at 88, but this can't happen if consumers never receive restitution. The ALJ therefore recommended a limited injunction requiring that Respondents cooperate with the Bureau as it provides restitution. *Id.* at 89. The equities support such relief. Without cooperation, consumers may never be made whole. And Respondents fail to explain how their current status prevents them from cooperating.

III. Statutes of Limitation Do Not Bar the Bureau's Claims

The ALJ granted in part Respondents' motion to reopen the record relating to their statute of limitations defense, calling for briefing on the applicability of statutes of limitations to the claims in this proceeding. *See* Order Denying Further Discovery on SOL Issue (Oct. 28, 2019) [Dkt. 238] ("Order re Subpoena") at 9-10.[21] Following complete briefing and oral argument, the ALJ properly denied in its entirety Respondents' motion to dismiss on statute of limitations grounds. *See* Order Denying Resps. Mot. to Dismiss and/or for Summ. Disp. (Jan. 24, 2020) [Dkt. 249] ("Order re SOL"). Respondents' objections to this ruling are unfounded.

A. The Bureau's CFPA Claims Against Carnes Were Timely Filed

The Consumer Financial Protection Act's ("CFPA") statute of limitations provides that "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." 12 U.S.C. § 5564(g)(1). No court has found that the CFPA's statute of limitations applies in administrative proceedings, but the ALJ assumed without deciding that it does apply to the CFPA claims in this proceeding. *See* Order re SOL at

[21] Respondents do not dispute the timeliness of Counts III, IV, or VII against Integrity Advance.

12-14.[22] Therefore, to satisfy their burden of proving that the Bureau's claims against Carnes were not timely filed, Respondents needed to demonstrate that Enforcement Counsel discovered all the necessary elements of the violations underlying claims against Carnes before November 18, 2012 (that is, three years before the Notice of Charges was filed on November 18, 2015). *See Merck & Co. v. Reynolds*, 559 U.S. 633, 648-49 (2010) (holding that limitations period does not begin to run until plaintiff discovers facts suggesting all necessary elements of violation); Order re SOL at 14-15. The ALJ determined that because Carnes could not be held liable unless "he participated directly in or had actual knowledge of the misrepresentations involved," Order re SOL at 15, the Bureau did not discover Carnes's violations until it discovered those facts – which was in June 2014 at the earliest, when it took Carnes's testimony and after Respondents responded to Civil Investigative Demands. *See id.* at 19-23. Since June 2014 is well within the three-year limitations period, the Notice of Charges was timely filed as to Carnes.

Rather than addressing this head on, Respondents fault the ALJ for refusing to adopt a novel interpretation of the CFPA's statute of limitations that would ask not when the Bureau *actually* discovered the violations, but when a hypothetical government agency constructively discovered – or *should have* discovered – the violations. *See* Resps. Br. at 5-7. But the ALJ closely analyzed the law on this issue and properly rejected Respondents' invitation to rewrite the CFPA's statute of limitations, finding that the plain language of the statute does not call for a constructive discovery inquiry and that the case law cited by Respondents provides no support for incorporating such a standard into the statute. *See* Order re SOL at 15-19.

[22] Respondents declare, without explanation or analysis, that the ALJ should have ruled that the CFPA's statute of limitations applies here. Resps. Br. at 5. Since all claims would be timely under the CFPA's statute of limitations, its application would not affect this proceeding's outcome, and thus it is unnecessary to determine whether it applies. *See* Order re SOL at 13-14.

To support their argument that "discovery" necessarily refers to when a plaintiff discovered or should have discovered a violation, Respondents point to *Merck & Co. v. Reynolds*. *See* Resps. Br. at 5-7. But *Merck* provides no support for reading "discovery" to encompass when a plaintiff "should have" discovered the violations where, as here, the plaintiff is a government enforcement agency acting in a law-enforcement capacity, rather than a private plaintiff vindicating its own rights. *See* Order re SOL at 16-17. In *Merck*, the Supreme Court interpreted a statute of limitations that required private plaintiffs to bring certain securities law claims within "2 years after the discovery of facts constituting the violation." *Merck*, 559 U.S. at 648. In light of the "history and precedent surrounding the use of the word 'discovery' in the limitations context," the Court held that "'discovery' as used in that statute encompassed not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known." *Id.* But that "history and precedent" involved only statutes of limitations that applied to *private* plaintiffs. *Id.* at 644-48. As the Supreme Court later noted in *Gabelli v. SEC*, those precedents decidedly do not apply to government enforcement actions. 568 U.S. 442, 449 (2013).[23]

[23] Respondents state that three courts "have applied this general rule to the CFPB," Resps. Br. at 5-6, but none of those courts analyzed whether constructive discovery is the proper standard or applied it to the facts in those cases. *See* Order re SOL at 17-18. In *CFPB v. NDG Financial Corp.*, a district court suggested that a constructive discovery rule would apply to claims brought by the Bureau under the CFPA, but it provided no analysis on that point, relied on a Second Circuit case involving private plaintiffs and a different statute, and did not apply the standard to any set of facts. *See* No. 15-CV-5211 (CM), 2016 WL 7188792, at *19 (S.D.N.Y. Dec. 2, 2016) (citing *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1042 (2d Cir. 1992)). In *CFPB v. Nationwide Biweekly Administration, Inc.*, the court simply assumed without explanation that the constructive discovery rule from *Merck* applied to actions brought by the Bureau. *See* Case No. 15-cv-02106-RS, 2017 WL 3948396, at *10 (N.D. Cal. Sept. 8, 2017). And in *CFPB v. Ocwen Financial Corp.*, the court merely cited without explanation the unsupported standard announced in the *NDG* case, and did not analyze the issue or apply a constructive discovery standard to the facts in that case. *See* Case No. 17-80495-CIV-MARRA/MATTHEWMAN, 2019 U.S. Dist. LEXIS 152336, at *65 (S.D. Fla. Sept. 5, 2019).

Respondents also brush aside the ALJ's well-grounded finding that various practical considerations suggest that a constructive discovery standard should not be read into a statute of limitations applying only to the government. *See* Resps. Br. at 6-7; Order re SOL at 17-19. There can be a host of reasons why "[a]n agency may experience problems in detecting statutory violations." *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994) (declining to read a discovery rule into a statute of limitations provision that runs from the "accrual" of the government's claim). And "[c]onducting administrative or judicial hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities" is "not a workable or sensible method of administering any statute of limitations." *Id.* This is especially true because it is "unclear whether and how courts should consider agency priorities and resource constraints in applying [the constructive discovery] test to Government enforcement actions." *Gabelli*, 568 U.S. at 452-453.[24]

The ALJ also correctly determined that even if a constructive discovery standard did apply here, Respondents failed to demonstrate that a reasonably diligent government agency plaintiff would have discovered Carnes's violations before November 18, 2012. *See* Order re SOL at 23-26. Before reaching her conclusion, the ALJ considered each piece of Respondents' evidence individually and as part of a whole. *See* Order re SOL at 19-23 (analyzing purported evidence of actual discovery), 23-26 (analyzing purported evidence of constructive discovery). Respondents fail to show now how a reasonably diligent government plaintiff should have

[24] In addition to creating these practical difficulties, interpreting "discovery" in the CFPA to incorporate constructive discovery would run afoul of Supreme Court precedent requiring statutes of limitation to receive strict construction in favor of the government. *See Badaracco v. Comm'r*, 464 U.S. 386, 391-392 (1984).

discovered Carnes's violations prior to the limitations period.[25] Instead, they continue to focus on the wrong question of whether the Bureau, in fact, acted diligently. That is irrelevant, because even where a constructive discovery standard applies, a limitations period begins at the earlier of actual discovery or when a reasonably diligent plaintiff "would have discovered" the violation, "irrespective of whether the actual plaintiff undertook a reasonably diligent investigation." *Merck*, 559 U.S. at 653; *see also* Order re SOL at 26. Respondents therefore would have to show that a hypothetical government enforcement agency would have discovered Carnes's violations before November 18, 2012. They did not, so the ALJ reached the correct conclusion.

B. The Bureau's TILA and EFTA Claims, and Related CFPA Claims, Against Integrity Advance Were Timely Filed

Respondents also contend that the ALJ erred when she found that a one-year statute of limitation does not apply to the Bureau's TILA claim (Count I), EFTA claim (Count V), or the related claims under CFPA Section 1036(a)(1)(A) (Counts II, VI). *See* Resps. Br. at 9. Respondents do not, however, explain how the ALJ erred or what part of her analysis is supposedly flawed. *See* Order re SOL at 27-31. Instead, Respondents continue to ignore that the one-year limitations periods apply only to actions "under this section," which in both statutes refers to sections authorizing suits by private plaintiffs (15 U.S.C. §§ 1640 and 1693m, respectively), not suits by the Bureau (which are separately authorized by 15 U.S.C. §§ 1607 and 1693o). They also continue to elide the fact that the CFPA claims, while related to the TILA and

[25] Respondents do not even attempt to explain how the combined evidence demonstrates that the Bureau discovered Carnes's violations prior to the limitations period. They instead simply state the conclusion as fact, advance an unsupported and irrelevant theory that the Bureau failed to follow certain internal procedures, and attempt to incorporate by reference earlier briefing on this issue. *See* Resps. Br. at 7-8. If the Director considers those incorporated arguments, Enforcement Counsel respectfully points her to its previous responses thereto. *See* EC Opp'n to Resps. MTD re SOL (Dec. 6, 2019) [Dkt. 242] at 10-13, 16-18.

EFTA claims, assert distinct violations of a separate CFPA prohibition set forth in 12 U.S.C. § 5536(a)(1)(A), and therefore are not subject to the TILA and EFTA limitations provisions for that additional reason. As the ALJ explained, the Bureau's TILA, EFTA, and related claims are not bound by the one-year limitations provisions in those statutes that apply to private plaintiffs. *See* Order re SOL at 27-31. All four of these counts against Integrity Advance were timely filed.

IV. The Bureau Has Authority to Pursue CFPA Claims Against Respondents

Respondents argue, without explanation, that the Bureau has no authority to pursue CFPA claims against them because they were never "covered persons." *See* Resps. Br. at 7.[26] Respondents' contention is as unsupported as it is nonsensical. They are undeniably "covered persons" because, as they do not dispute, they extended consumer credit. *See* 12 U.S.C. § 5481(5)(A), (15)(A)(i).[27] Respondents appear to argue that they were not "covered persons" subject to the CFPA at the time they were extending credit (and violating the CFPA) because, at that time, no Bureau official had authority to bring an enforcement proceeding against them. But being required to comply with a law and being potentially subject to an enforcement action by a government agency are two distinct issues. And even if it were true that the Bureau could not have enforced the law against Respondents at that time (which Enforcement Counsel does not concede), it would not follow that Respondents get off scot-free forever. Their conduct was undeniably unlawful at the time, and the Bureau had authority to enforce the law against them when it filed the Notice of Charges against them. *See* RD at 19 n.4.

---

[26] Respondents again state a legal argument as a fact and attempt to incorporate by reference their previous briefing on the subject. If the Director considers these arguments, Enforcement Counsel respectfully points her to its previous responses thereto. *See* EC Opp'n to Resps. Mot. to Dismiss and Resps. Mot. to Amend Answer (Apr. 9, 2020) [Dkt. 264] at 5-9.

[27] In addition, Carnes is a "covered person" because he is an "officer," "employee charged with managerial responsibility for," and "controlling shareholder" of Integrity Advance, and is thus a "related person" deemed to be a "covered person." 12 U.S.C. § 5481(25)(B), (C).

V. The ALJ's Rulings on Reopening the Record Did Not Violate Respondents' Due Process Rights

Respondents argue that several rulings the ALJ made prior to the Recommended Decision denied them due process. Instead of explaining how any of the ALJ's rulings constitute such violations, Respondents just provide a laundry list of rulings with which they disagree. These conclusory assertions do not demonstrate that the ALJ committed legal error.

A. The ALJ Did Not Err When She Denied Respondents' Request to Reopen the Record Regarding Their Statute of Limitations Defense

Respondents argue the ALJ erred when she denied their request for a subpoena seeking additional evidence relating to their statute of limitations defense. *See* Resps. Br. at 10-12; Resps. Request for Issuance of Subpoena (Aug. 23, 2019) [Dkt. 232]; Order re Subpoena at 5-9. In support, Respondents first contend that the ALJ erred by finding that their request for consumer complaints and external correspondence regarding Respondents was unreasonable. *See* Resps. Br. at 10-11. But as the ALJ explained, the request was unreasonable because Enforcement Counsel had already produced consumer complaints and external correspondence. *See* Order re Subpoena at 5-6; 12 C.F.R. § 1081.208(d). Respondents attempt to manufacture error by arguing that Enforcement Counsel only produced materials obtained by the Office of Enforcement, *see* Resps. Br. at 10-11, but that is not true. Enforcement Counsel produced any complaints or external correspondence relating to Respondents upon which the Office of Enforcement might have relied when investigating and prosecuting this case, regardless of whether they were first received by some other office within the Bureau. Indeed, Enforcement Counsel's production complied with both the letter and the spirit of Rule 206, which was intended to require production not only of materials obtained by the Office of Enforcement directly, but also "documents obtained by other elements of the Bureau from persons not employed by the Bureau and later provided to the Office of Enforcement for its use 'in connection with the investigation leading to the institution of proceedings.'" CFPB Rules of Practice for Adjudication Proceedings (Final Rule), 77 Fed. Reg. 39058, 39073 (June 29, 2012) (quoting 12 C.F.R. § 1081.26(a)(1)). Together, these documents and information contain "the material facts underlying enforcement counsel's decision to recommend the commencement of enforcement proceedings." *Id.* Between the Rule 206 disclosures and the facts to which the parties jointly stipulated, *see* Joint Update on Fact Development Regarding Statute of Limitations Issue (Sept. 11, 2019) [Dkt. 234] at 3-4, Respondents already possessed all the facts necessary to present their statute-of-limitations defense. The ALJ therefore was well within her discretion to find Respondents' duplicative request unreasonable and deny issuance of a subpoena for those categories of documents.

With respect to their request to subpoena internal Bureau communications and reports, Respondents argue that the ALJ's denial was not "proper," that the Bureau was not ordered to confirm the existence of responsive documents, and that the ALJ did not review potentially responsive documents. *See* Resps. Br. at 11. They also suggest, incorrectly, that the only reason she denied their request was because the materials could be withheld pursuant to Rule 206(b). *See id.* While this alone would be a valid reason for denying the request, the ALJ in fact also explained at length why the materials Respondents sought would be protected by the attorney-client privilege and work product protection, even if Rule 206(b) didn't exist. *See* Order re Subpoena at 7. She also explained that certain facts Respondents sought to establish were already known to Respondents through the Bureau's Rule 206 production and through facts to which the parties jointly stipulated, *see id.* at 7-8, and that other facts Respondents sought to establish were not relevant to their statute of limitations defense. *See id.* at 8. To make these findings the ALJ did not need to see privileged and protected Bureau materials or require that the Bureau certify their existence. The ALJ was within her discretion to deny a request for materials that was so clearly unreasonable and excessive in scope.

Finally, Respondents argue that the ALJ abused her discretion when she declined to mandate that the Bureau produce a withheld document list. *See* Resps. Br. at 11-12. Rule 206 gives the ALJ wide discretion when deciding whether the Office of Enforcement must produce such a list. *See* 12 C.F.R. § 1081.206(c). Respondents, however, fail to properly characterize the ALJ's ruling and make no effort to explain how she abused her discretion. For the reasons the ALJ explains in her ruling, requiring the Bureau to compile and produce even a categorical withheld document list would be "an unnecessary and dilatory exercise." *See* Order re Subpoena at 9-10. Respondents offer no valid reason to revisit that conclusion.

B. The ALJ Did Not Err When She Denied Certain Requests to Reopen the Record and to Amend Respondents' Answer

Respondents argue that the ALJ erred when she denied several motions seeking to reopen the factual record, amend their answer, and introduce evidence they previously chose not to present. *See* Resps. Br. at 12-14. Respondents cite to these rulings as evidence that the ALJ denied them a "new hearing" and thus due process. *See id.* The record, however, demonstrates that the ALJ went to extraordinary lengths to ensure that Respondents received a new hearing, and that they were heard (and often reheard) on the numerous grounds they asserted for reopening the factual record. That the ALJ carefully considered and ultimately rejected Respondents' arguments, effectively rejecting their request to ignore the established factual record, does not constitute error.

Respondents contend that the Supreme Court's holding in *SEC v. Lucia*, 128 S. Ct. 2044 (2018), the Remand Order, and the Bureau's rules mandated a new hearing different from the one afforded them by the ALJ. *See* Resps. Br. at 12-14. But as the ALJ's order responding to these assertions made clear, none of those sources support Respondents' attempt to discard the record from the original hearing. *See* Order re Record Reopening. The ALJ determined that it would be "inefficient and imprudent to totally discard everything that has been done to create the extensive record in this matter," that she would "conduct a *de novo* review of the record," and that she would "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." *Id.* at 4, 5.

While *Lucia* and the Director's Remand Order required a "new hearing," neither defined that phrase to require jettisoning an already-established factual record.[28] 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); *Philip Trimble*, HPA Docket No. 15-0097, 2019 WL 2345419, at *2 (U.S.D.A. Feb. 19, 2019). Such a proceeding permitted the ALJ to properly regulate the course of the proceeding, *see* 12 C.F.R. § 108.104(b)(5), and consider the record without giving weight to, nor presuming the correctness of, the previous ALJ's opinions, orders, or rulings. *See* Remand Order at 9. It also prevented Respondents from obtaining a procedural windfall through which – with the benefit of hindsight – they could seek to change previous litigation decisions that had not been tainted by the previous ALJ (such as the contents of Respondents' Answer). Respondents disagree with the ALJ's interpretation of the *Intercollegiate* case and suggest without explanation that the case was

[28] Indeed, the Remand Order contemplated that the ALJ would determine how the remand should proceed upon receiving submissions from the parties. *See* Remand Order at 9.

"effectively overruled" by *Lucia*, *see* Resps. Br. at 12-13, but the ALJ analyzed and roundly rejected those arguments. She properly determined that Respondents had misstated the D.C. Circuit's analysis in *Intercollegiate* and that the cases cited by Respondents did not support the "extreme measure[s]" they were advocating. *See* Order re Record Reopening at 2, 3-5.

Respondents also reiterate their previous assertions that the record should have been reopened so they could introduce evidence of good faith and their expenses, take supplemental live witness testimony, and amend their answer to add new defenses, but they provide no new argument or explain how the ALJ's previous analysis and rulings were deficient. *See* Resps. Br. at 13-14. The ALJ already considered each of these arguments and unequivocally rejected them. *See* Order re Subpoena; Order re Record Reopening at 8-10 (good faith evidence), 10-11 (expenses/restitution evidence), 5-7 (live testimony); Order Denying Resps. Mot. to Amend Answer (Apr. 24, 2020) [Dkt. 267]. Respondents are just wrong when they contend that the ALJ did not properly consider whether she must allow previous witnesses to re-testify so she could personally evaluate the witness' demeanor, or that she "disregarded" supposed developments in the law relating to a good faith defense and the relevance of expenses when calculating restitution. *See* Resps. Br. at 13-14. She considered each of these issues in detail and determined that reopening the factual record was unwarranted. Respondents offer nothing to warrant reconsideration of those rulings.[29] Nor do they show how any of the rulings prejudiced them.[30]

[29] Respondents offer bare assertions that the ALJ's rulings constituted legal error and attempt to incorporate by reference their previous briefs. *See* Resps. Br. at 14. If the Director considers those arguments, Enforcement Counsel respectfully points her to its previous responses thereto. *See* EC Opp'n to Resps. Mot. to Open Record for New Hr'g (Apr. 9, 2020) [Dkt. 263] at 8-14.

[30] Indeed, Respondents could not make such a showing. The ALJ granted summary disposition so she did not need to resolve any credibility disputes; good faith is not a defense to liability, and is irrelevant to restitution; Respondents' expenses are irrelevant to restitution; and their proposed fair-notice defense is futile. *See, e.g.*, *CFPB v. Think Finance, LLC*, No. CV-17-127-GF-BMM, 2018 WL 3707911, at *3 (D. Mont. Aug. 3, 2018).

VI. The Invalid Statutory Restriction on the President's Authority to Remove the Bureau's Director Provides No Basis for Dismissal Because the Director May Ratify the Action

Respondents err in contending that the proceeding against them must be dismissed because, under *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), the Director who initially approved the notice of charges against them was unconstitutionally insulated from removal by the President. *See* Resps. Br. at 1-4. Respondents will face no liability here unless and until the Director, who Respondents concede is now fully accountable to the President, *see* Resps. Notice of Supplemental Authority and Req. for Recons. (July 6, 2020) [Dkt. 285] at 2, enters a final order against them. If she does, that decision will "necessarily" amount to a ratification of the notice of charges that Respondents complain was invalidly filed. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213 (D.C. Cir. 1998), *superseded by statute on other grounds, as recognized in Guedes v. Bur. of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019). It is well established that such a ratification can cure a separation-of-powers problem with the initial filing of an enforcement proceeding. *See Gordon*, 819 F.3d at 1190-91; *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708-09 (D.C. Cir. 1996); *cf. also Doolin*, 139 F.3d at 213-14 (declining to vacate cease-and-desist order where properly appointed Director entered the final order in, and thus ratified, enforcement proceeding initiated by Director who may have been improperly appointed).

Respondents' various arguments that the Director cannot ratify this proceeding all lack merit. First, no statute of limitations precludes the Director from ratifying this proceeding. Even assuming that the CFPA's three-years-from-discovery statute of limitations applies to Enforcement Counsel's claims here, the ratification would not be not time-barred, both (1) because the limitations provision does not apply by its terms and (2) because, even if it did, the limitations period would be equitably tolled.

The CFPA's limitations provision does not, by its terms, limit the time for any ratification. That provision states that "no action *may be brought*" later than the specified period. 12 U.S.C. § 5564(g)(1). That time limit was satisfied when the Bureau "brought" this proceeding in 2015. Nothing in the statute suggests that actions must be brought *by a Director removable at will* within the specified period, or that actions cannot be *ratified* later – nor is there any other reason to believe Congress meant for the limitations provision to forever bar the Bureau from pursuing the many violations it discovered while its Director was insulated from removal.

In any event, even if the statute of limitations did apply to a ratification, and not just the bringing of a suit, the limitations period would be equitably tolled here. The CFPA expressly permits otherwise time-barred actions if "otherwise permitted by law or equity," 12 U.S.C. § 5564(g)(1) – and, here, equity surely permits a fully accountable Director to ratify claims that the agency already brought during the limitations period. Equitable tolling is available where a plaintiff (1) "pursue[s] his rights diligently" and (2) "some extraordinary circumstance" beyond the plaintiff's control "prevent[s] timely filing." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755-56 (2016). There can be no serious dispute that the Bureau pursued its rights diligently by filing charges in 2015,[31] or that the unconstitutionality of a provision of the Bureau's organic statute qualifies as an "extraordinary circumstance" beyond the Bureau's control.[32] Statutes of limitations are meant to "assure fairness to defendants" by putting them "on

[31] Respondents' suggestion that the Bureau was not diligent, *see* Resps. Br. at 2, relates to their distinct and separate argument that the original 2015 filing was not timely. That argument is wrong, *see* Section II.A., *supra*, and in any event is irrelevant to the issue here: whether the Bureau lacked diligence in pursuing its claims until the time of any ratification. Respondents do not and cannot offer any argument that the Bureau lacked diligence in that respect.

[32] Contrary to Respondents' contention, *see* Resps. Br. at 2-3, this is doubtless an "extraordinary" circumstance regardless of whether the removal restriction caused the Bureau to be "unconstitutionally structured" when this action was initially filed.

notice to defend within the period of limitation." *Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424, 428 (1965). Respondents cannot claim any "[un]fairness" from having to defend against claims they have known about (and litigated) for years.

Second, precedent forecloses Respondents' contention that this proceeding cannot be ratified because the agency itself lacked authority initially. In *FEC v. Legi-Tech, Inc.*, the D.C. Circuit upheld the ratification of an enforcement action that the Federal Election Commission initially "had no authority to bring" due to its unconstitutional composition. 75 F.3d 704, 706, 709 (D.C. Cir. 1996). Here, even if the provision unconstitutionally protecting the Bureau's Director from removal somehow stripped *the Bureau* (and not just the improperly insulated Director) of "authority" before (it did not), ratification would still be an "adequate remedy" for the prior constitutional violation, just as it was in *Legi-Tech*. *Id.* at 709.

Finally, there is no merit to Respondents' contention that they are entitled to dismissal just because the Director has not ratified this proceeding yet. Respondents will face no liability unless and until a fully accountable Director ratifies the charges against them. *See Doolin*, 139 F.3d at 213. Whatever "expense and annoyance" Respondents face in "defending [themselves] in [these] adjudicatory proceedings" in the meantime is just "part of the social burden of living under government," not a harm entitling them to escape liability for their unlawful conduct. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (quotations omitted).

Dated: October 5, 2020

Respectfully submitted,

Attorneys for Plaintiff
Bureau of Consumer Financial Protection

THOMAS G. WARD
Enforcement Director

DEBORAH MORRIS
Deputy Enforcement Director

ALUSHEYI J. WHEELER
Assistant Litigation Deputy

/s/ Stephen C. Jacques
Stephen C. Jacques
Enforcement Attorney
stephen.jacques@cfpb.gov
202-435-7368

Benjamin J. Clark
Enforcement Attorney
benjamin.clark@cfpb.gov
202-435-7871

Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Enforcement Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October 2020, I caused a copy of the foregoing Enforcement Counsel's Answering Brief 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:

Richard J. Zack, Esq.
richard.zack@troutman.com

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

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

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

/s/ Stephen C. Jacques
Stephen C. Jacques