UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	**RESPONDENTS' REPLY BRIEF IN SUPPORT OF APPEAL**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	ORAL ARGUMENT REQUESTED
Respondents.	)	

RESPONDENTS' REPLY BRIEF IN SUPPORT OF APPEAL

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I. INTRODUCTION AND SUMMARY

This is an appeal from an enforcement action brought years after Respondents Integrity Advance, LLC and James R. Carnes ceased operations and through which CFPB Enforcement Counsel ("EC") sought and obtained summary disposition without an evidentiary hearing recommending restitution of $132,580,041.06, penalties of $7,500,000 against Integrity Advance and $5,000,000 against Mr. Carnes, and injunctive relief. In its response brief, EC asserts that there are no material factual disputes in this matter and that the state of the law is well-settled in its favor. Neither is true.[1]

First, there are significant factual disputes that should have resulted in a ruling in favor of Respondents or, at the very least, precluded summary disposition and required an evidentiary hearing so that the ALJ could make credibility findings. This is most apparent in the dispute regarding Mr. Carnes' knowledge of the allegedly misleading loan disclosures, and the ALJ's disregard of the evidence that nearly half of Integrity Advance's consumers were satisfied customers who returned to take out additional loans. In granting summary disposition, the ALJ failed to view this evidence in the light most favorable to the nonmoving party, Respondents, as she was required to do.

Additionally, EC and the ALJ misinterpreted the law on key issues. This includes (1) the ability of the Director to ratify this action to cure the constitutional harm recognized by the Supreme Court in *Seila Law*; (2) the meaning of "new hearing" after *SEC v. Lucia*; (3) the definition of "discovery" in statutes of limitations and the appropriateness of discovery on this issue; (4) the import of *FTC v. AMG* in analyzing loan agreements with auto-renewal provisions;

[1] EC also asserted that the Director need not hear oral argument in this matter. EC Br. at 1 n.1. However, given the dispute on both facts and law and the severity of the recommended sanctions, oral argument is appropriate.

(5) the plain language of the EFTA; and (6) the relevance of the advice of counsel and good faith issues to the appropriateness of restitution and civil monetary penalties.

II. ARGUMENT

A. Issues of Factual Dispute

The ALJ recommended granting summary disposition in favor of the CFPB on all counts for both Respondents. *See generally* Dkt. 293. In so holding, the ALJ failed to view the evidence in the light most favorable to the nonmoving party and improperly weighed the evidence. Her recommended decision should be rejected. *See, e.g.*, *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (reversing summary judgment where court "failed to view the evidence . . . in the light most favorable to [the non-moving party] with respect to the central facts of th[e] case" and noting that "[b]y failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party").

The ALJ's failure to consider the evidence in the light most favorable to Respondents is most apparent in the ALJ's conclusions regarding Mr. Carnes' individual liability and her treatment of the evidence of repeat customers.

1. *Mr. Carnes' knowledge was not proven.*

To find Mr. Carnes' liable at the summary disposition stage, the ALJ must have found based on undisputed facts that: "(1) he participated directly in the deceptive acts or had the authority to control them; and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016). The record contains significant evidence showing that Mr. Carnes did not have the requisite knowledge to meet the second prong.[2] The ALJ failed to credit this evidence, and instead improperly resolved factual disputes in favor of the CFPB without holding the necessary evidentiary hearing to make credibility determinations and resolve factual disputes.

Contrary to the ALJ's holding, the evidence establishes that Mr. Carnes acted as a reasonably prudent CEO. He hired Edward Foster to be Integrity Advance's Executive Vice President and General Counsel, and, as of June 2010, Mr. Foster served as Chief Operations Officer. Dkt. 273 ¶ 87;[3] Dkt. 293 at 13 ¶¶ 97-98. Mr. Carnes and Mr. Foster hired other employees who were charged with various aspects of Integrity Advance's business. Dkt. 293 at 13-14 ¶¶ 105-08, 117-19, 127-30. Integrity Advance retained outside counsel to draft the Loan Agreement to ensure compliance with Delaware and federal law. *Id.* at 16 ¶ 149. Mr. Carnes may have "flipped through" the Loan Agreement but he did not substantively review it or discuss its text with outside or in-house counsel. *Id.* at 16 ¶¶ 148-51; Dkt. 273 at ¶¶ 97-101. Instead, as a business person without expertise in consumer finance law, he relied on Integrity Advance's counsel to ensure it was compliant. Dkt. 273 at ¶¶ 39-41. Integrity Advance contracted with a third party call center to administer the Loan Agreement, and Mr. Carnes understood that the call

[2] The record also contains significant factual disputes about the first prong - Mr. Carnes' purported "authority to control" the terms of the Loan Agreement. For example, EC asserted that Mr. Carnes "directly or indirectly supervised everyone involved with Integrity Advance." EC Br. at 11. However, key functions related to the Loan Agreement were performed by third parties who were not under Mr. Carnes' chain of command, including the third party call center employees who administered the loans and the outside counsel who drafted the Loan Agreement. *See* Dkt. 293 at 16 ¶¶ 140, 149. Additionally, EC claims that Mr. Carnes "participated intimately in the company's day-to-day business." EC Br. at 11. But, the facts show that Mr. Carnes ran multiple companies and that he spent only a fraction of his time on Integrity Advance, particularly as time went on. *See* Dkt. 293 at 5 ¶¶ 7-8; *id.* at 12 ¶¶ 90-91; *id.* at 13 ¶ 104. Further, as discussed in this section, Mr. Carnes did not have knowledge of the disclosures in the Loan Agreement. It is unreasonable to conclude that Mr. Carnes had the "authority to control" loan terms that he did not know about.

[3] Although the ALJ was required to consider the evidence presented by the nonmoving party as true for purposes of summary disposition, she excluded certain relevant evidence presented by Respondents. For example, the ALJ disregarded facts about Integrity Advance's submission of its Loan Agreement to the Delaware regulators and the legal duty of Delaware regulators to thoroughly review applicants. *See* Dkt. 273 ¶¶ 27-40; *contra* Dkt. 293 at 6 ¶¶ 12-16. That evidence is relevant to show that Mr. Carnes had no reason to know the Loan Agreement was misleading, whether or not the Delaware regulator actually thoroughly reviewed the Loan Agreement. Therefore, Respondents cite to their own Statement of Facts (Dkt. 273), where the ALJ excluded relevant evidence.

center representatives explained the terms of the loan to consumers both by phone and email. Dkt. 293 at 7 ¶¶ 23-24; *id.* at 16 ¶ 140. Additionally, Mr. Carnes had no reason to believe that the Loan Agreement terms were allegedly misleading, as there was a high rate of repeat customers who repaid their loans and returned to Integrity Advance for the same loan product. *Id.* at 9 ¶¶ 53-54. At the same time, the record reflects that there were relatively few customer complaints and they generally did not reach Mr. Carnes' attention. *Id.* at ¶ 47; Dkt. 277 at ¶¶ 70-71, 93-94. Further, Integrity Advance supplied a copy of the Loan Agreement to Delaware regulators for their review, and received approval to operate annually. Dkt. 273 at ¶ 38; Dkt. 293 at 6 ¶ 12. Integrity Advance was not permitted to change its Loan Agreement without submitting it to the Delaware regulators for approval. Dkt. 273 at ¶ 29. Finally, while Mr. Carnes was the CEO of Integrity Advance, he also was the CEO of the parent company HIP. Dkt. 293 at 5 ¶¶ 7-8; *id.* at 12 ¶ 88. Particularly as time went on, Mr. Carnes spent only a fraction of his time on Integrity Advance's business. *Id.* at 12 ¶¶ 90-91; *id.* at 13 ¶ 104. These facts, at the very least, create a genuine factual dispute about whether Mr. Carnes knew that the Loan Agreement terms allegedly misled consumers.[4]

Further, although EC's case for deception and unfairness is based on the disclosures in the Loan Agreement, EC asserts that it does not have to show that Mr. Carnes was familiar with the terms of that very document. EC Br. at 12-13 (arguing that it "did not need to establish that Carnes had intimate familiarity with the whole loan agreement because these facts establish his knowledge of Integrity Advance's practices"). But the "practices" that the ALJ found to be unfair or deceptive were the disclosures within the Loan Agreement. *See* Dkt. 293 at

[4] As EC points out, this standard also can be met based on "reckless indifference." *See* EC Br. at 13; *see also Gordon*, 819 F.3d at 1193. But these facts also show that Mr. Carnes was not "recklessly indifferent" to purported misrepresentations in the Loan Agreement disclosures.

45, 53 (finding unfairness and deception based on the face of the Loan Agreement). Therefore, EC must establish Mr. Carnes' knowledge of those disclosures.

EC's citation to *CashCall* also is unavailing because, as EC acknowledges, the court found that the company's president "knew of the deceptive statements." EC Br. at 13 (citing *CFPB v. CashCall, Inc.*, No. CV 15-07522-JFW (RAOx), U.S. Dist. LEXIS 9057 (C.D. Cal. Jan. 19, 2018)). In contrast, here, the evidence establishes that Mr. Carnes did not know about the disclosures in the Loan Agreement, with one exception. The only disclosure of which there is any evidence that Mr. Carnes had knowledge was the amount of "Total of Payments" in the TILA box. *See* Dkt. 293 at 72. That single fact, which pertains to only one part of the Loan Agreement, cannot support a finding that Mr. Carnes knew that the Loan Agreement was misleading. There is no evidence that Mr. Carnes knew how the Loan Agreement otherwise disclosed the costs or the auto-renewal and auto-workout processes.

The lack of evidentiary support is particularly egregious with respect to the finding that Mr. Carnes had knowledge of the purportedly unfair use of RCCs, which are a legal payment mechanism. *See id.* at 84; *see also* Dkt. 273 at ¶¶ 54-57. As EC acknowledged, the use of RCCs was unfair only if the Loan Agreement did not adequately explain RCCs to consumers when they authorized their use.[5] *See* EC Br. at 9-10. Mr. Carnes would, therefore, need to know how RCCs were disclosed in the Loan Agreement, not simply that RCCs were used, to be found liable. Neither EC nor the ALJ cite to *any* evidence suggesting that Mr. Carnes knew how RCCs were disclosed in the Loan Agreement. *See* EC Br. at 11-13; Dkt. 293 at 76.

[5] The ALJ found that Integrity Advance's use of RCCs was unfair by improperly drawing inferences in favor of EC and finding: "[i]t is reasonable to conclude that consumers who attempted to block IA's access to their bank accounts did not consent to IA's use of RCCs to withdraw the money." Dkt. 293 at 60. However, that is simply a description of the circumstances in which any lender might use an RCC – because the consumer refused to repay his or her loan through any other previously agreed-upon means. Contrary to the ALJ's conclusion, and as conceded by EC, any finding that RCCs were used unfairly would necessarily need to be rooted in a finding that RCCs were not adequately disclosed to consumers in the Loan Agreement.

Summary disposition should have been denied as to Mr. Carnes' liability. Further, for the reasons set forth in Respondents' Opening Brief, Counts III, IV and VII should be dismissed as to Mr. Carnes. *See* Dkt. 295 at 16-18.

2. *The ALJ disregarded the evidence of the high rate of repeat customers.*

From July 21, 2011 onward, 26,129 customers took out two or more loans from Integrity Advance. Dkt. 293 at 9 ¶¶ 53-54. This constituted 48% of Integrity Advance's total customer base during that time. *Id.* Further, during this period, Integrity Advance's customers took out an average of 3.18 loans per person. *Id.* The ALJ should have drawn the reasonable inference from these facts that Integrity Advance's customers were satisfied with how the loan worked and, therefore, had not been misled into paying more for the loan than they expected. Instead, she committed legal error by concluding that "neither party has established what actually motivated a repeat customer to take out a subsequent loan[.]" *Id.* at 34.

EC attempts to undermine this obvious inference by citing to inapposite case law. EC Br. at 7. For example, EC cite to *AMG*, but that court concluded it could not draw an inference regarding repeat customers because there was no evidence "that repeat borrowers across loan portfolios knew they were dealing with the same enterprise." *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 425 (9th Cir. 2018), *cert. granted*, No. 19-508 (July 9, 2020). Here, there is no allegation that Integrity Advance had differing loan portfolios, nor is there any evidence to support the notion that a consumer would not understand he or she was dealing with the same company. Instead, it is undisputed that Integrity Advance had a single loan product. Dkt. 293 at 6 ¶ 19. Further, Integrity Advance used only two substantially similar versions of the loan application and Loan Agreement template for its entire existence. *Id.* at 6 ¶¶ 17-18. Therefore, there is no reason to infer that a repeat customer did not know he or she was dealing with the same company. EC also cites to *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201

(9th Cir. 2006). However, that case does not appear to address the evidentiary value of repeat customers. *Id.*[6]

The ALJ improperly disregarded the evidence of the high rate of repeat customers, which was relevant to the substantive deception and unfairness claims, Mr. Carnes' knowledge for purposes of individual liability, the appropriateness of restitution, and the calculation of penalties. The ALJ's recommendation on all of those points should be rejected.

B. Incorrect Legal Conclusions

1. *The Director should dismiss this action in light of the Supreme Court's recent decision in Seila Law.*

This action was brought against Respondents by an unconstitutionally-structured agency. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020). EC is wrong that it is "well established" that the Director may remedy this constitutional harm by simply "ratifying" this action. EC Br. at 28-30. Instead, the Supreme Court recognized that whether ratification can cure a separation of powers violation "turns on case-specific factual and legal questions" and declined to rule on the issue in *Seila Law*, leaving it to be addressed in the first instance by the lower courts. *See Seila Law*, 140 S. Ct. at 2208. Consistent with that mandate, the issue is presently being briefed in front of the Ninth Circuit, with Seila Law recently submitting a supplemental brief explaining why, like here, the CFPB cannot cure the constitutional harm by "ratifying" the action. *See* Suppl. Br. of Seila Law, No. 17-56234 (9th Cir., Dkt. 64, filed Sept. 30, 2020) (attached hereto as Exhibit A). The issue currently is being litigated in multiple other circuits as well. *See generally CFPB v. RD Legal Funding, LLC*, No. 18-2743 (2d Cir.); *CFPB v. All Amer. Check Cashing, Inc.*, No. 18-60302 (5th Cir.); *CFPB v.*

[6] EC also cites to *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008). However, as Respondents previously explained, the circumstances of that case, which involve a weight loss drug, are distinguishable. *See* Dkt. 295 at 24.

Navient, Corp., No. 3:17-cv-00101-RDM (M.D. Pa.). The Director should reject EC's attempt to treat the law as well settled in an area where it clearly is not.

In any event, EC is wrong on the merits. As Respondents explained previously, the Director cannot ratify this action because the applicable statutes of limitation have lapsed, and there is no basis for equitably tolling the statute of limitations here. *See* Dkt. 295 at 2 (citing *Gordon*, 819 F.3d at 1191 ("'[I]t is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*.') (quoting *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (emphasis in original); *see also id.* at 1-3 (explaining why ratification would be ineffective and would not cure the constitutional injury to Respondents). The Director also should reject EC's argument, raised for the first time, that the CFPA's statute of limitations does not prevent the Director from ratifying this action because "[n]othing 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[.]" EC Br. at 29 (emphasis deleted). There is no reason why Congress would include language on ratification in a statute of limitations, which deals with the time period in which actions may be brought. However, the fact that the CFPB would be time barred from bringing the action means that it is barred from ratifying the action. *See NRA Political Victory Fund*, 513 U.S. at 98-99 (finding that the Solicitor General's attempted ratification of a filing decision "simply came too late in the day to be effective" because the time period for filing had already passed). The Director should find that any attempt to ratify this action would be ineffective in light of the running of the applicable statutes of limitation and dismiss this action.

2. *The ALJ failed to conduct a new hearing as required by SEC v. Lucia.*

In its brief, EC continues to misinterpret the requirement for a new hearing after an Appointments Clause violation, as set forth in *SEC v. Lucia*, 138 S. Ct. 2044, 2055 (2018).

See EC Br. at 26. Even the D.C. Circuit in *Intercollegiate*, upon which EC relies, acknowledged the distinction between a "new hearing" and a "*de novo* review of the record." *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 119 (D.C. Cir. 2015). There, the plaintiff, relying on two earlier Supreme Court cases, asserted that "the only way to remedy the exercise of judicial authority by invalidly appointed judges is for the new judges to 'conduct a new *hearing*, not merely a *de novo* review of the record assembled by the constitutionally invalid tribunal.'" *Id.* (emphasis in original). The *Intercollegiate* court rejected the plaintiff's argument, finding that "[n]either case stands for that proposition." *Id*. However, since this decision, the Supreme Court has made clear that, in fact, a new hearing before a new judge *is* required after an Appointments Clause violation. *Lucia*, 138 S. Ct. at 2055 (proper remedy for an Appointments Clause violation is a "new hearing before a properly appointed official") (internal citations omitted). Both parties previously agreed that *Lucia* applies to this case. *See* Dkt. 216 at 1. Respondents were entitled to a new hearing but were denied one.

EC also cites to two United States Department of Agriculture ("USDA") decisions in support of its contention that a *de novo* record review is sufficient. *See* EC Br. at 26 (citing *Philip Trimble*, HPA Docket No. 15-0097, 2019 WL 2345419, at *2 (U.S.D.A. Feb. 19, 2019); *Stearns Zoological Rescue & Rehab Ctr., Inc.*, AWA Docket No. 15-0146, 2020 WL 836672, at *4-5 (U.S.D.A. Feb. 7, 2020)). However, in *Philip Trimble*, the USDA's Judicial Officer ruled that a *de novo* record review would be sufficient even though it "is not specifically contemplated by the Rules of Practice." *Philip Trimble*, 2019 WL 2345419, at *2. Additionally, in *Stearns Zoological*, a USDA ALJ held that all of the prior ALJ's decisions and rulings would stand, with the exception of the final Decision and Order. *Stearns Zoological*, 2019 WL 2345419, at *2 ("[N]o rulings aside from those that were contained in the now vacated Decision and Order are overturned."). These holdings stand in contrast to the Director's Orders in this case that the new hearing be conducted "in accordance with the Bureau's Rules of Practice for Adjudication Proceedings" and that the ALJ was to "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by" the prior ALJ. *See* Dkt. 216 at 2; Dkt. 217 at 1. Therefore, the USDA proceedings post-*Lucia* are not analogous to CFPB proceedings. Instead, the CFPB Director's Orders are consistent with those made by the Securities and Exchange Commission ("SEC"). Just like the CFPB Director, the SEC ruled that all post-*Lucia* proceedings are new hearings to be conducted pursuant to the SEC's Rules. *See In re: Pending Administrative Proceedings*, Release Nos. 33-10536, et al., Commission Opinion, at 2 (Aug. 22, 2018) (The SEC's "Rules of Practices. . . shall govern all pending proceedings."). Consistent with this order, the SEC's Chief ALJ issued an order assigning new ALJs to preside over all new hearings except "where the parties waived their right to a new hearing and requested that the Commission decide their petitions for review on the present record." *In re: Pending Administrative Proceedings*, File Nos. 3-15006, et al., Chief Administrative Law Judge's Order Assigning Proceedings Post *Lucia v. SEC* (Sep. 12, 2018). Since then, the SEC ALJs have conducted the new hearings consistent with SEC procedural rules including live testimony. *See, e.g., In re: Anton & Chia, LLP, et al.*, File No. 3-18292, Order (Mar. 15, 2019) (ordering procedural schedule). Respondents should have been provided a new evidentiary hearing.

3. *The ALJ misinterpreted the term "discovery" in the CFPA's statute of limitations.*

EC incorrectly asserts that Respondents are advancing a "novel interpretation" of the CFPA's three-year statute of limitations. EC Br. at 18. To the contrary, Respondents are interpreting the statute of limitations in light of the well-established rule that the term "discovery" generally means "the date on which the plaintiff 'first knows *or with due diligence* *should know* facts that will form the basis for an action.'" *Merck & Co. v. Reynolds*, 559 U.S. 633, 644-647 (2010) (citation and internal quotation marks omitted) (emphasis in original); *see also id.* ("discovery" is a "term of art" that "has long been understood to include discoveries a reasonably diligent plaintiff would make"). EC's attempt to distinguish *Merck* fails. The Supreme Court did not draw any distinctions between private and government plaintiffs in ruling that a statute using similar language[7] "encompasse[d] not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known," and it based that conclusion, in part, on "the history and precedent surrounding the use of the word 'discovery' in the limitations context *generally*." *Merck*, 559 U.S. at 648 (emphasis added). The main case on which EC relies—*Gabelli v. SEC*, 568 U.S. 442, 452 (2013)—is distinguishable because the issue before the Court in that case was whether to infer a discovery rule into a statute of limitations keyed to the date of *occurrence*, not discovery, of a violation. In keeping with the general rule that statutes of limitations using the phrase "discovery" encompass a "knew or should have known" standard, at least three courts have used that standard in cases involving the CFPB, a fact which EC acknowledges. *See* EC Br. at 19 n.23 (citing cases).

EC has not cited any case law in which the phrase "date of discovery" in a statute of limitations has ever been interpreted to exclude the "knew or should have known" standard, for a government plaintiff or otherwise. Accordingly, the Director should construe the term "discovery" according to its usual meaning and find that the claims against Mr. Carnes are time barred because they were brought more than three years after the CFPB knew or should have known of the alleged violations. *See* Dkt. 295 at 5-8. At the very least, Mr. Carnes was entitled to take targeted discovery on this issue, and the ALJ improperly denied his discovery requests.

[7] *See* 28 U.S.C. § 1658 (barring certain actions brought more than "2 years after the discovery of the facts constituting the violation").

4. *Loan agreements with auto-renewal provisions are not automatically unlawful, and the Director should find that the ALJ erred in concluding that Integrity Advance's Loan Agreement failed to comply with TILA and the CFPA.*

EC treats *FTC v. AMG Servs., Inc.*, as if it created a *per se* rule. 29 F. Supp. 3d 1338 (D. Nev. 2014), *aff'd sub nom. FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018), *cert. granted*, No. 19-508 (July 9, 2020). It did not. Though the *AMG* court granted summary judgment in favor of the FTC on a TILA claim, it did so based on the specific facts of that case. And, as Respondents argued previously, the facts in *AMG* differ in multiple material respects from the facts of this case. *See* Dkt. 295 at 20-21; Dkt. 278 at 6-9. Most notably—unlike the Loan Agreement at issue in this case—the loan agreement in *AMG* obscured key information about the loan, including the provision that made loan renewal automatic. Dkt. 295 at 20-21. In contrast, Integrity Advance's Loan Agreement displayed the auto-renewal provision directly below the TILA box, and used short paragraphs, bolded important terms, bolded and all-caps headers, and up to eight signature points throughout the Loan Agreement to ensure that consumers understood the terms of the loan. *Id.* at 21. There were numerous other facts in that led the *AMG* court to conclude that the loan agreement in was misleading as a matter of law, including evidence of an exorbitant amount of consumer complaints and evidence from the defendant company's own employees that they knew "that the loan terms [we]re confusing and should be changed." *AMG*, 29 F. Supp. 3d at 1362.

EC presented no such evidence here. The Director should decline to rely on the *AMG* court's fact-specific ruling, as it provides no support to the CFPB's claims in this case. To the contrary, when the Director evaluates the specific facts of this case, it is clear that the ALJ erred in finding that the Loan Agreement failed to comply with TILA and the CFPA. As argued previously, the Loan Agreement clearly and conspicuously disclosed consumers' legal obligation at the time of loan consummation, and the undisputed facts, including the high rate of repeat customers and low rate of consumer complaints, demonstrate that the CFPB is not entitled to summary disposition on its TILA and CFPA claims. *See* Dkt. 295 at 18-24.

5. *The ALJ's interpretation of the EFTA is erroneous.*

Additionally, like the ALJ, EC misreads the plain language of the EFTA in arguing that Integrity Advance "unlawfully conditioned offers of credit on preauthorized electronic repayments." EC Br. at 10. Requiring that consumers "provide[] Integrity Advance with the authority," *id.*, to withdraw payments via ACH, but allowing consumers to select a non-electronic payment method, *see* Dkt. 295 at 25, is not the same thing as requiring that consumers make payments electronically, which is what the EFTA prohibits. 15 U.S.C. § 1693k(a)(1) ("No person may condition the extension of credit to a consumer on such consumer's repayment by means of preauthorized electronic fund transfers"); 12 C.F.R. § 1005, Supp. I, 1005.10(e)(1) ("Creditors may not require repayment of loans by electronic means on a preauthorized, recurring basis."). The purpose of the EFTA's prohibition on preauthorized electronic repayments is to "protect consumers' ability to choose their payment method." *Kemply v. Cashcall, Inc.*, No. 08-CV-03174-MEJ, 2016 WL 1055251, at *7 (N.D. Cal. Mar. 16, 2016). The undisputed facts establish that Integrity Advance offered that choice. *See* Dkt. 295 at 25.

The cases cited by EC are inapposite. In *FTC v. PayDay Financial LLC*, the court granted summary judgment in favor of the FTC on an EFTA claim where the loan agreement *required* consumers to make payments electronically but allowed consumers to later revoke that authorization. 989 F. Supp. 2d 799, 812 (D.S.D. 2013) (providing that payments "*shall* be made by us [meaning the Defendant lender] effecting one or more ACH debit entries to your Account at the Bank.") (alteration in original) (emphasis added). Moreover, the evidence in that case established that "[t]he lending Defendants ha[d] never issued a consumer loan without the consumer initially entering into a loan agreement containing an EFT clause." *Id.* In contrast, here, the undisputed evidence demonstrates that a number of consumers received loans without even signing the ACH authorization. Dkt. 295 at 25.

Similarly, in *O'Donovan v. CashCall, Inc.*, the court found that the plaintiffs had stated an EFTA claim where they alleged that the defendant company required consumers to make payments electronically but gave consumers the option of later cancelling those electronic payments. No. C 08-03174 MEJ, 2009 WL 1833990, at *3 (N.D. Cal. June 24, 2009). EC's reliance on that case is misplaced because, here, the undisputed facts establish that Integrity Advance's consumers were not obligated to make ***any*** payments via electronic means; rather, they were given the choice required by the EFTA. *See* Dkt. 295 at 25; *Kemply*, 2016 WL 1055251, at *7. The Director should find that Integrity Advance did not violate the EFTA.

6. *The ALJ erred in failing to consider good faith/reliance on counsel in determining the appropriateness of restitution.*

EC also continues to sidestep the court's ruling in *CashCall* to argue that Respondents' good faith reliance on counsel is not relevant to restitution.[8] EC Br. at 14. Similarly, the ALJ held that she need not consider whether Respondents intended to defraud customers because she found that consumers did not receive the benefit of their bargain. Dkt. 293 at 80. However, the *CashCall* court expressly held that a defendant's reliance on the advice of counsel is relevant to determining whether restitution is appropriate in a CPFB enforcement action. *CashCall*, U.S. Dist. LEXIS 9057 at *40 ("Although this Court has previously held that

[8] Earlier in this proceeding, EC took the position that the ALJ had "broad authority" to determine the appropriate remedy and award restitution. *See* Dkt. 162 at 30-31. Then, after two federal court decisions regarding the appropriateness of restitution in CFPB enforcement actions, EC changed course and began to declare it was seeking non-discretionary "legal" restitution. *See* Dkt. 263 at 9-10; *see also CashCall*, U.S. Dist. LEXIS 9057; *Nationwide Biweekly*, U.S. Dist. LEXIS 145923. EC should be estopped from changing its position in this manner. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (*quoting Pegram* v. *Herdrich*, 530 U.S. 211, 227, n.8 (2000)) (judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."); *see also United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1148 (9th Cir. 2011) (finding that "judicial estoppel bars the government from effecting its sleight of hand" by taking "directly contradictory positions"). Additionally, EC cites to no authority for the proposition that restitution in CFPB enforcement matters is mandatory.

advice of counsel is not a defense to liability, it is relevant to the determination of whether restitution is an appropriate remedy.”). Accordingly, the ALJ erred by failing to consider Respondents’ reliance on advice of counsel and good faith.[9]

EC’s citation to *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) is unavailing. EC Br. at 14. In that case, the Supreme Court was considering the award of back pay in a Title VII employment discrimination action. *Id.* As the Supreme Court noted, in that context, “the finding of an unfair labor practice and discriminatory charge is presumptive proof that some back pay is owed by the employer.” *Id.* at 420 n.12 (citation omitted). There is no such presumption for CFPB actions to enforce the CFPA, for which the CFPB bears the burden of showing that restitution is appropriate separate and apart from its burden to prove a violation. *See CashCall*, U.S. Dist. LEXIS 9057 at *35-*36; *see also CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-02106-RS, 2017 U.S. Dist. LEXIS 145923, at *31 (N.D. Cal. Sep. 8, 2017) (denying restitution where the CFPB failed to show that the restitution it sought was appropriate). For CFPB enforcement actions, the award of restitution is not automatic, and Respondents’ good faith reliance on counsel should have been taken into account.[10]

III. CONCLUSION

For the foregoing reasons and for the reasons stated in Respondents’ previous filings, the Director should decline to adopt the Recommended Decision and enter an order directing that this matter be dismissed with prejudice or remanding this matter to the ALJ for an evidentiary hearing.

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[9] For this reason, the ALJ also erred in denying Respondents’ request for an evidentiary hearing to present testimony about the advice of counsel and good faith issues from its former outside and in-house counsel. Dkt. 269 at 9.

[10] For all other arguments raised by EC in their Answering Brief that are not addressed here, Respondents rely on their Opening Brief. *See generally* Dkt. 295.

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Respectfully submitted,

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

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

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

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

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

Counsel for Respondents Integrity Advance LLC and James R. Carnes

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October 2020, I caused a copy of the foregoing Respondents' Reply in Support of Appeal to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on opposing counsel at the following addresses:

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

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

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

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

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