Nos. 18-55407 & 18-55479

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff/Appellant/Cross-Appellee,

v.

CASHCALL, INC., WS FUNDING, LLC, DELBERT SERVICES CORPORATION, AND J. PAUL REDDAM,
Defendants/Appellees/Cross-Appellants.

On Appeal and Cross-Appeal from the United States District Court
for the Central District of California (Hon. John F. Walter)

DEFENDANTS/APPELLEES/CROSS-APPELLANTS' COMBINED RESPONSE BRIEF AND PRINCIPAL CROSS-APPEAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, CashCall, Inc. and Delbert Services Corporation certify that they have no parent corporation and no publicly held corporation owns 10% or more of their stock.

WS Funding, LLC certifies that it is a wholly owned subsidiary of CashCall, Inc., and no publicly held corporation owns 10% or more of its stock.

J. Paul Reddam is an individual.

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JURISDICTIONAL STATEMENT

The District Court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345. CashCall, Inc. ("CashCall"), WS Funding, LLC ("WS Funding"), Delbert Services Corporation ("Delbert"), and J. Paul Reddam ("Reddam") (collectively, "Defendants") cross-appeal from the District Court's December 30, 2015 order denying their motion for judgment on the pleadings, and the District Court's August 31, 2016 order granting the Consumer Financial Protection Bureau's ("Plaintiff," "Bureau," or "CFPB") motion for partial summary judgment and denying Defendants' motion for summary judgment. Final judgment was entered on January 26, 2018, after a bench trial on remedies. ER321:2.[1] The Court, therefore, has appellate jurisdiction under 28 U.S.C. § 1291. Plaintiff appealed on March 27, 2018. ER325:2. Defendants cross-appealed on April 10, 2018. SER2. This cross-appeal is timely pursuant to Federal Rule of Appellate Procedure 4(a)(3).

STATEMENT OF THE ISSUES

Plaintiff's Appeal

1. Whether the District Court abused its discretion by not awarding restitution.

[1] Citations are abbreviated as follows: Excerpts of Record, Dkt. 21 ("ER"); CFPB's Opening Brief, Dkt. 20 ("OB"); Defendants' Supplemental Excerpts of Record, filed concurrently ("SER").

2. Whether the District Court clearly erred by not awarding a higher civil money penalty.

Defendants' Cross-Appeal[2]

1. Whether the CFPB is unconstitutionally structured.
2. Whether collecting on loans that are later deemed unenforceable under state law constitutes a deceptive act or practice under the Consumer Financial Protection Act ("CFPA").
3. Whether the District Court erred by determining at the summary judgment stage that the lender's assignee was the "true lender" to an agreement between the lender and the borrower.
4. Whether the District Court erred by determining at the summary judgment stage that an individual is liable for corporate violations because he had "knowledge" or was "recklessly indifferent to the truth or falsity" of misrepresentations by the corporation about the enforceability of loans, in the face of evidence that the corporation and individual sought, received, and reasonably relied on advice from experienced counsel that the loans were legally enforceable.

[2] Defendants' cross-appeal is conditional on the appeal. If the District Court is affirmed as to Plaintiff's appeal or Plaintiff withdraws its appeal, then the cross-appeal is withdrawn. *See Celador Int'l, Inc. v. Am. Broad. Cos., Inc.*, 499 F. App'x 721, 723 n.1 (not reaching conditional cross-appeal).

STATUTORY AUTHORITIES

All pertinent statutory authorities appear in the addenda to this brief and the Opening Brief of Appellant/Cross-Appellee CFPB, Dkt. 20.

STATEMENT OF THE CASE

I. Parties

The CFPB is a federal agency. CashCall is a California S-corporation that lends to consumers and businesses. WS Funding is a wholly owned subsidiary of CashCall and was formed as a holding company to purchase consumer loans. Delbert serviced charged-off loans owned by CashCall and unrelated companies until ceasing operations in 2015. Reddam is CashCall's President and CEO; he owned Delbert and once served as its CEO. ER319:2.

II. Factual Background

A. CashCall Expands Consumer Lending Beyond California

Reddam founded CashCall in 2003 to fill a void in the consumer lending market between payday loans and second mortgages. ER282:2(¶5), 319:2. CashCall's loan portfolio was initially concentrated in California. ER319:3. In 2005, Merrill Lynch was considering providing financing to CashCall and recommended national diversification, referring CashCall to regulatory attorney Claudia Callaway. ER319:3. Callaway promoted that she could "facilitate relationships," provide diversification opportunities, and structure legal lending

models that would prevent enforcement actions by state and federal regulators. ER319:3.

CashCall and Reddam retained Callaway.[3] ER319:3. Neither Reddam nor CashCall's general counsel, Dan Baren, is an expert in financial regulatory compliance, so they relied on Callaway's expertise and counsel for the direct consumer lending business. ER319:3, 19.

B. The Bank Lending Model

To allow CashCall to expand geographically and offer a uniform loan product without having a license in each state, Callaway advised using a "Bank Lending Model" and helped CashCall partner with a federally insured state-chartered bank in South Dakota. ER213:2, 319:3; SER175(¶37). Under that model, CashCall accepted out-of-state loan applications that were sent to the bank, which underwrote and funded the loans and then sold them to CashCall for servicing. ER319:3.

C. The Tribal Lending Model

In June 2008, Callaway advised her clients to shift away from the Bank Lending Model because the global financial crisis was severely impacting the

[3] Callaway initially practiced at Paul, Hastings, Janofsky & Walker LLP, joined Manatt, Phelps & Phillips, LLP in 2007, and then Katten Muchin Rosenman LLP in 2009. ER282:4-6(¶¶12, 14, 20), 319:5.

ability of banks to engage in lending activity, including through partnerships with lenders to unsecured consumers. ER319:3-4. In November 2008, CashCall purchased its last loan under the Bank Lending Model. ER319:4.

By January 2009, Callaway was advising her consumer lending clients to move to a "Tribal Lending Model," which involved partnering with an Indian tribal entity or member instead of a state-chartered bank. ER319:4. She explained that a lender operating on an Indian reservation could make loans to borrowers, and then assign the loans for servicing. ER319:4. Callaway counseled that loans originated by a tribe or tribal member could be made pursuant to the laws of the tribe, and would not have to comply with the licensing and usury laws in states where borrowers resided. ER319:4.

Callaway introduced CashCall to Martin "Butch" Webb, a member of the Cheyenne River Sioux Tribe ("CRST") in South Dakota and the President of Western Dakota Bank. ER319:4. Webb had operated lending companies from the CRST Reservation using the Tribal Lending Model for several years. ER319:4. Baren later visited Webb on the Reservation to discuss partnering and business terms, and met Cheryl Bogue, Webb's counsel who specialized in CRST law. ER319:4. Bogue elaborated on the Tribal Lending Model and confirmed that an assignee could enforce loans made by a company owned by a tribal member like Webb. ER319:4-5.

A business arrangement was ultimately reached. To structure the relationship, the parties relied on their respective counsel—Callaway and Webb. ER319:5; SER178-79(¶49). Webb created Western Sky Financial, LLC ("Western Sky") as a South Dakota corporation (as the CRST did not provide for incorporation), and obtained a CRST general business license, allowing it to make consumer loans on the Reservation. ER319:5. Under an "Assignment Agreement," WS Funding bought loans from Western Sky for servicing, paying Western Sky the amount disbursed to the borrower and a premium of up to 5.145%.[4] ER319:5. Separately, under a "Services Agreement," CashCall provided certain services to Western Sky for 2% of the face value of each involved loan transaction. ER319:5.

D. Western Sky Loan Agreements and Disclosures to Borrowers

In February 2010, Western Sky began originating unsecured consumer installment loans. ER319:5. The loans provided money to borrowers with good income but lower credit ratings, who thus had limited or no access to traditional sources of credit. ER271:3(¶8), 319:2.

[4] Representing that WS Funding "fronted the money that Western Sky used to make loans" (OB6), Plaintiff cites a disputed fact at summary judgment (ER163-3:15-16(¶50)), which was not supported by evidence or proven to the Court. *See* ER319:6 (finding that "[f]inal underwriting and funding of the loans, however, was done from Western Sky's facilities on the CRST Reservation" and "Western Sky had funded the loans").

Borrowers entered into a "Western Sky Consumer Loan Agreement" ("Loan Agreement"), which contained numerous written disclosures and the key terms governing the loan, such as the fees and interest rates. ER319:6-7. The loans were not secured by collateral and charged only simple interest; there were no prepayment penalties; and borrowers were encouraged to repay their loans early. ER319:7. As is common in lending, Western Sky had the right to assign the loan at any time. ER319:8; SER105-06.

E. Third-Party Financing and Opinion Letters

CashCall required substantial funding to facilitate WS Funding's purchase of loans from Western Sky and, thus, it engaged in transactions with numerous sophisticated third parties that provided hundreds of millions of dollars in financing. ER319:9-10. Callaway prepared opinion letters regarding the Western Sky loan program to provide to prospective financing partners, and her firm issued two opinion letters for each transaction: a general corporate opinion and a regulatory opinion. ER319:10.

F. CashCall Lost Money on the Western Sky Loan Program

The Western Sky loans carried high interest rates to balance the anticipated high rate of defaults, but defaults were even higher than expected and the Western Sky loan program proved unprofitable. SER66:18-22; SER171(¶18). For example, one-tenth of borrowers never made a single payment. SER66:18-22. Program-

wide, CashCall lost $29.75 million. ER271:11(¶31). For the thirteen states for which Plaintiff sought restitution at trial (the "Subject States"), CashCall lost $12.27 million. SER55(¶255).

G. The End of the Western Sky Loan Program

Starting in August 2011, regulators in certain states commenced enforcement actions alleging violations of state law based on CashCall's servicing of the Western Sky loans. ER319:11-13. Therefore, beginning in 2012, CashCall stopped purchasing Western Sky loans issued to borrowers who resided in those states and, by September 2013, to all borrowers. ER319:12-13.

Of the sixteen states originally at issue in Plaintiff's case, nine pursued state-level enforcement actions against at least one Defendant based on the same underlying state licensing and usury laws relied on by Plaintiff. ER282:30-31(¶111). By the time of trial in this case, Defendants had settled with seven of them. ER282:31(¶112). Through settlements with Subject States, non-Subject States, and borrowers who brought civil actions, Defendants paid over $83.3 million of restitution to borrowers—and provided over $116 million more in other monetary relief, including cancellation of outstanding debt. ER282:32(¶120).

III. Procedural Background

Plaintiff filed the complaint on December 16, 2013, and the operative First Amended Complaint on March 21, 2014. ER0:10, 0:13.

On November 18, 2015, Defendants moved for judgment on the pleadings, which was denied on December 30, 2015. ER0:22-23; SER6.

On June 30, 2016, Defendants moved for summary judgment and Plaintiff moved for partial summary judgment as to liability. ER0:26-28. On August 31, 2016, the District Court granted Plaintiff's motion and denied Defendants' motion. ER213:16.

On December 5, 2016, Defendants moved for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and a stay pending its resolution. ER0:36. On January 3, 2017, the District Court granted the motions (SER225), which meant it found that controlling questions presented substantial ground for difference of opinion. SER225; *see* 28 U.S.C. § 1292(b). On April 20, 2017, this Court denied Defendants' petition for interlocutory appeal. SER224.

A bench trial on remedies commenced on October 17, 2017. Plaintiff sought restitution of $235,597,529.74, a Tier Two civil money penalty of $51,614,708, and injunctive relief. ER319:14-18. On January 19, 2018, the District Court issued Findings of Fact and Conclusions of Law. ER319:1. It found that Plaintiff failed to meet its burden to show that restitution and an injunction were appropriate, but awarded the maximum Tier One penalty allowed under the CFPA, $10,283,886. ER319:19-20.

ARGUMENT SUMMARY

I. Response to Plaintiff's Appeal

Plaintiff argues that the District Court lacked any discretion regarding whether to award restitution. OB24-27. However, Plaintiff repeatedly agreed below that the District Court had such discretion and that "[r]estitution is not mandated by the CFPA," which is precisely the framework by which the trial proceeded. SER56(¶262). The claim of error is thus foreclosed by judicial estoppel and waiver. (*Infra* pp. 16-24.)

Regardless, the argument is wrong. Plaintiff's attempt to distinguish "equitable restitution" as discretionary and "legal restitution" as mandatory rests upon Plaintiff's erroneous equating of monetary restitution with the legal remedy of damages. Under the bedrock principles of restitution and unjust enrichment, restitution is discretionary. Further, Congress prescribed both "restitution" and "damages" as available CFPA remedies. 12 U.S.C. § 5565(a)(2). Thus, it did not authorize a novel, hybrid remedy that excuses the government of the burdens of a plaintiff seeking damages by allowing "mandatory restitution"—a concept with less demanding proof, as articulated by Plaintiff, and which is foreign to the law. Moreover, the CFPA confirms that awarding restitution is discretionary, as it authorizes a court to "grant ***any appropriate*** legal or equitable relief with respect to

a violation of Federal consumer financial law," which "***may*** include . . . restitution." 12 U.S.C. § 5565(a) (emphasis added). (*Infra* pp. 24-28.)

The District Court did not abuse its discretion in determining that Plaintiff failed to meet its burden to prove that restitution was appropriate. Among other things, it found that borrowers got the benefit of the bargain they struck when they took out the Western Sky loans under clear and fully disclosed terms, and that Defendants did not embark on any fraudulent scheme nor intend to defraud borrowers. Moreover, the District Court found that Defendants reasonably relied on counsel, who designed the Western Sky loan program and repeatedly advised that it was legal and proper. (*Infra* pp. 32-36.)

The District Court also did not abuse its discretion in alternatively determining that, even if restitution were appropriate, Plaintiff failed to reasonably approximate any unjust gains under the test for restitution applied in *CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016). The District Court made factual findings, supported by the record, that Plaintiff did not meet its burden through credible evidence. Contrary to Plaintiff's misunderstanding, the law does not demand that the amount of restitution be based off net revenues. Furthermore, Defendants put forward credible evidence demonstrating that Plaintiff's proposed restitution amount did not represent unjust gains. (*Infra* pp. 40-47.)

The District Court did not clearly err in finding that Defendants did not act "recklessly" (Tier Two) or "knowingly" (Tier Three). Indeed, Plaintiff has not even attempted to confront the specific factual findings the District Court made, which led to its conclusion that only a Tier One penalty was warranted under the CFPA. (*Infra* pp. 47-50.)

In short, Plaintiff urged the District Court to apply its equitable discretion, but then did not meet its burden of proof at trial to obtain restitution. Plaintiff did not have a single consumer testify, did not present any evidence that borrowers were injured or denied the benefit of their bargains, called only a summary witness (a Bureau employee who was not found credible), and found its pre-trial theories on certain documents disproven by the actual testimony and evidence presented at trial. The District Court's findings are indisputably supported by the record. Indeed, Plaintiff's brief effectively ignores the District Court's factual findings, evidentiary analyses, and credibility assessments, and instead presents Plaintiff's trial-rejected theories as the "facts."

As to the law, Plaintiff openly seeks a "do over" by presenting arguments that are barred by judicial estoppel and waiver. No "do over" should be afforded. The government plaintiff had the trial it requested, and then failed to meet its burden and convince the fact-finder. The District Court's decision on Plaintiff's claim for restitution and the civil monetary penalty should be affirmed.

II. Defendants' Cross-Appeal

The District Court incorrectly decided a constitutional question of great consequence. Under Supreme Court precedent, the CFPB is unconstitutionally structured because, for the first time in the nation's history, it operates as an independent agency with substantial executive power vested in a single director. Since that structure is at the heart of its enabling legislation, its unconstitutionality cannot be cured by severing it. (*Infra* pp. 52-55.)

The District Court also erred by allowing Plaintiff to impermissibly rest its action entirely on alleged violations of state licensing and usury statutes. No independent UDAAP violations of federal law are asserted, as required by Congress. Thus, Plaintiff's action violates the principles of federalism and the legislation upon which this action was prosecuted. Indeed, Congress expressly precluded the CFPB from establishing a usury limit—which is what it effectuated here. (*Infra* pp. 55-62.)

The District Court committed two additional reversible errors, which led it to erroneously grant Plaintiff summary judgment on liability. First, the District Court erroneously looked past the transactional loan documents and determined—as a matter of fact and law—that the "true lender" to the Loan Agreements was an assignee (CashCall). This "true lender" test has no basis in law and, moreover, the

facts relevant to such a test could not support summary judgment because there were genuine issues of material fact. (*Infra* pp. 62-64.)

Second, at summary judgment, Reddam was held individually liable on the ground that he had knowledge of, or was recklessly indifferent to the truth or falsity of, the corporate "misrepresentation" that the Loan Agreements were enforceable upon assignment. The evidence showed that Reddam's knowledge—informed by and founded on counsel's advice—was that the Loan Agreements were legal and enforceable upon assignment. The District Court mistakenly held that "advice of counsel" could not be considered, which led to a default conclusion that Reddam had the requisite knowledge to be held individually liable because he was aware of the existence of the loan program and its general operations. Where a non-lawyer has an understanding of a legal question based only upon the advice of a lawyer, that advice is indissoluble from his knowledge. Reddam was not asserting ignorance of the law as a defense; he was presenting evidence of his knowledge about, and proof he was not recklessly indifferent to, the enforceability of the loans that CashCall serviced. (*Infra* pp. 65-69.)

STANDARDS OF REVIEW

A restitution order is "review[ed] for an abuse of discretion." *Gordon*, 819 F.3d at 1187 ("We review for an abuse of discretion a district court's grant of equitable monetary and injunctive relief."). When reviewing for abuse of

discretion, "the first step . . . is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested." *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009). If it did, there is abuse only if "the trial court's application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" *Id.* at 1262 (citation omitted).

The District Court's findings of fact supporting its conclusion that Tier Two and Tier Three penalties were not warranted under the CFPA are reviewed under the "significantly deferential" clear-error standard, whereby findings are accepted unless the Court is "left with the definite and firm conviction that a mistake has been committed." *F.T.C. v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004) (citation omitted). Conclusions of law are reviewed de novo. *Id.*

Reviewed de novo, a "[j]udgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law." *3550 Stevens Creek Assocs. v. Barclays Bank of California*, 915 F.2d 1355, 1357 (9th Cir. 1990). A decision on cross-motions for summary judgment is reviewed de novo. *See Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). Appellate review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). Viewing the

evidence in the light most favorable to the nonmoving party, the Court determines whether there are any genuine issues of material fact and whether the District Court correctly applied the substantive law. *See Frudden v. Pilling*, 877 F.3d 821, 828 (9th Cir. 2017). The Court may not "weigh the evidence or determine the truth of the matter." *See Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999).

ARGUMENT

I. Response to Plaintiff's Appeal

A. Plaintiff Cannot Argue That Awarding Restitution Is Not Discretionary

Having failed to prevail on the merits at trial and convince the District Court to award restitution, Plaintiff first argues that the District Court lacked discretion to decide whether restitution was appropriate. OB24-27. Plaintiff cannot appeal on this ground because it consistently, repeatedly, and successfully advanced the exact opposite position below—specifically, that awarding restitution is left to the broad discretion of the District Court and is not the automatic result of a CFPA violation. *See, e.g.*, SER156(¶130) (admitting "Plaintiff carries the burden to prove that it should be granted affirmative relief on its claims"); SER57(¶268) (admitting "Plaintiff carries the burden to prove that it should be granted affirmative relief on its claims"), at SER56(¶262) (admitting "[r]estitution is not mandated by the CFPA, nor is it the automatic result of a violation of the CFPA's UDAAP provision"). Indeed, Plaintiff agreed that the primary inquiry to be determined at the bench trial

was "whether restitution should be awarded at all."[5] SER57(¶271); SER228:20-24 ([Plaintiff's counsel]: "As far as restitution . . . [w]e'd agree that is an equitable remedy"); SER126:16-22 ("[T]he parties actually agree, I think, that restitution is discretionary. And the Court is not required to award restitution simply because the defendants, as I found in my August 31st, 2016, order, violated the Act. Agreed? [Plaintiff's counsel]: Correct, Your Honor. [Defendants' counsel]: Correct, Your Honor."); SER189 ("Restitution is a form of equitable monetary relief that the Court has broad authority to award as 'necessary to accomplish complete justice.'") (citation omitted).

1. Judicial Estoppel Precludes Claiming Error

"Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir. 2008) (citation omitted). It is "intended to protect the integrity of the judicial process by preventing a litigant from playing fast and loose with the courts." *Id.* (citation omitted). The Court

[5] The District Court also emphasized the discretionary framework throughout pre-trial proceedings, without contest from Plaintiff. *See* SER125:6-9 (inquiring about "the evidence that the plaintiff is going to put on to convince the trier of fact, which in this case is me, ***that restitution is an appropriate remedy in this case***") (emphasis added).

typically considers the following factors in determining whether to apply the doctrine:

> (1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has successfully persuaded the court of the earlier position; and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party.'

United States v. Liquidators of European Fed. Credit Bank, 630 F.3d 1139, 1148 (9th Cir. 2011) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)).

Plaintiff concedes the first two factors. Citing *In re Hoopai*, 581 F.3d 1090, 1097 (9th Cir. 2009), Plaintiff argues only that "Defendants cannot show that considering this argument now would allow the Bureau to 'derive an unfair advantage or impose an unfair detriment' on Defendants." OB27(n.6). This is wrong. First, this Court in *Hoopai* excused estoppel because the appellant could not have benefitted in the first instance from the original argument and, "[m]ore importantly," the appellee herself asserted the second argument in the lower court. 581 F.3d at 1097. Neither of those determinative circumstances is present here.

Moreover, here, Plaintiff *is* seeking to "derive an unfair advantage" through a "do over" under different rules. Plaintiff actively sought to leverage the District Court's discretion—particularly after viewing the decidedness of the summary judgment order—by seeking restitution and avoiding the burden of proving damages to a jury. After that strategy backfired, Plaintiff now takes the position

that the District Court never had the discretion that Plaintiff tried to leverage. *See Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1134 (9th Cir. 2012) (estopping plaintiff from trying to make her claim "significantly stronger, giving her an unfair advantage over her opponent," with new contradictory assertion); *Marx v. Loral Corp.*, 87 F.3d 1049, 1056 (9th Cir. 1996) ("This about-face by the plaintiffs is, at best, inventive, especially given their earlier disavowal of an equitable estoppel theory. As a result, the plaintiffs should be barred from asserting this theory on appeal."), *overruled on other grounds by Lacey v. Maricopa County*, 693 F.3d 896, 926-28 (2012).

To suggest that an "unfair detriment" would not be imposed on Defendants is absurd. Not only did Defendants prevail on the merits under the discretionary framework, Defendants also endured the time and resources of the remedies phase based on the Parties' shared position—and indisputable law—that whether restitution should be awarded was properly left to the broad discretion of the District Court. *See Liquidators of European Fed. Credit Bank*, 630 F.3d at 1148-49 (finding that "judicial estoppel bars the government from effecting its sleight of hand" to the third-party claimants' detriment after the government argued "directly contradictory positions").

2. The Issue Was Waived

As Plaintiff concedes (OB27(n.6)), the issue was waived and thus not preserved for appeal. *See, e.g.*, *McMillan v. United States*, 112 F.3d 1040, 1047 (9th Cir. 1997) (refusing to address arguments raised for the first time on appeal). Accordingly, this Court should not entertain it. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) (declining to review claim that was waived below); *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994) (unequivocal agreement with trial court's procedure precludes appeal). "Asking the court of appeals to decide issues that were not raised below effectively asks it to depart from its essential role as an appellate court, which is to review claims of error by an inferior judicial body." David G. Knibb, *Federal Court of Appeals Manual* § 32.7 (6th ed. 2013). This Court does not "reframe an appeal to review what would be in effect a different case than the one decided by the district court." *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) (citation omitted); *see also Castro v. County of Los Angeles*, 833 F.3d 1060, 1074 n.7 (9th Cir. 2016) (appellants did not preserve argument but "argued the very opposite").

Plaintiff nonetheless asks this Court to consider its waived argument, asserting that "'the issue presented is purely one of law and . . . does not depend on the factual record developed below.'" OB27(n.6) (quoting *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012)). Unlike here, the Court in *Ruiz* held

that the argument was ***not*** waived, but actually preserved. 667 F.3d at 1322. Thus, *Ruiz* does not aid Plaintiff's cause. Regardless, the question of the District Court's discretion to award restitution is *not* "purely one of law [that] does not depend on the factual record developed below." *Id.* at 1322 (citation omitted). To the contrary, the factual record developed below was based on the Parties' presentation of evidence and witnesses *focused on* whether the District Court should exercise its discretion to award restitution. *See, e.g.*, SER87-89. Thus, this Court cannot supply finality to the issue, given the trial record.

Moreover, under Plaintiff's theory, non-discretionary restitution is effectively compensatory damages. *See* OB29-34. Here, since Plaintiff did not meet its burden to obtain the discretionary relief of restitution, it certainly did not meet the burden for the more precise and demanding proof of damages. *See Gordon*, 819 F.3d at 1195 (Restitution "is a form of ancillary relief" that a court can order "[i]n the absence of proof of 'actual damages.'") (alterations in original) (citation omitted). Plaintiff did not make any attempt to assess its harm, much less the particular harm to each borrower, which would have been required to prove damages. *See* Dan B. Dobbs, *Law of Remedies* § 3.1, at 278 (2d ed. 1993) ("Damages differs from restitution in that damages is ***measured by the plaintiff's loss***; restitution is measured by the defendant's unjust gain.") (emphasis added).

Further, Plaintiff maintained below that restitution should be tried to the District Court because it was equitable, not legal, in nature. *See, e.g.*, SER228:20-24. Consequently, the "restitution is a legal remedy" position Plaintiff now asserts is not "purely one of law" because a trial on a legal remedy is tried to a jury—not to a court as a matter of equity. *See Gough v. Rossmoor Corp*., 533 F.2d 453, 455 (9th Cir. 1976) (stating that damages was an issue properly presented to the jury). And the legal framework and burden of proof would thus differ, implicating "all sorts of factual issues . . . that would have changed the way the record was developed." *A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 339 (9th Cir. 1996) ("After examining the record and the arguments, we cannot rule out the possibility that A-1 might be right and that the merits of the contract argument cannot be resolved without further hearings before the district court. Therefore, we lack the power to consider the contract argument in this appeal."); *see also Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014) ("no exception would permit us to consider the mixed factual and legal question") (citation omitted).

Thus, the record below does not permit this Court to overlook Plaintiff's waiver, because the relief Plaintiff now claims it seeks would necessitate a new record and, in fact, a new trier of fact. Simply declaring that the District Court lacked discretion about whether restitution was appropriate does not end the monetary remedies dispute and, in fact, restarts it from the beginning. *See*

Gabrielian v. Lafayette Life Ins. Co., 669 F. App'x 889, 890 (9th Cir. 2016) (not addressing claim where the factual "record ha[d] not been fully developed" below); *In re Home Am. T.V.-Appliance Audio, Inc*., 232 F.3d 1046, 1052 (9th Cir. 2000) (because a party would be "prejudiced by not having had the opportunity to so develop the record if we were to entertain the . . . new argument on appeal, this case is not appropriate for such exercise of . . . discretion").

Moreover, there is not a compelling reason for the Court to exercise its discretion to excuse Plaintiff's waiver. The District Court inquired as to the standard and, without debate, the Parties agreed it had discretion. SER125-26. *See Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) (refusing to consider issue not raised below because it "robs" appellee of opportunity to respond). This Court's exercise of its waiver discretion should protect against parties sandbagging their opponents. *See Lopez v. Pac. Maritime Ass'n*, 657 F.3d 762, 766-67 (9th Cir. 2011) ("To allow Plaintiff to make this argument now, after the case has been litigated, appealed, briefed, submitted, and decided, would deprive us of the assistance of our colleague below and would deprive Defendant of the opportunity to meet Plaintiff's new argument in the proper course."). "[T]he party against whom the issue is raised must not be prejudiced by it. Thus, if he might have tried his case differently either by developing new facts in response to or advancing distinct legal arguments against the issue, it should not be permitted to be raised for the first time

on appeal." *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978). Indeed, Plaintiff's gamesmanship is not only prejudicial to Defendants, it is unfair to the District Court that endured the bench trial under the framework agreed to by Plaintiff.

Similarly, the "invited error doctrine" also forecloses Plaintiff's argument. A party should not be permitted to complain on appeal "of errors below for which he [or she] is responsible." *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (citations omitted); *see also In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386 (9th Cir. 2010) (plaintiff cannot "invite the district court to err and then complain of that very error"); *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992) ("The doctrine of invited error prevents a [party] from complaining of an error that was his own fault."). Here, because Plaintiff affirmatively put forward an argument that restitution was discretionary, it invited the purported error and thus cannot now claim foul.

B. The Award of Restitution Is Discretionary

1. Relief Is Not Automatic under the CFPA

CFPA remedies are permissive, as the district court is authorized to "grant ***any appropriate*** legal or equitable relief with respect to a violation of Federal consumer financial law," which "***may*** include . . . restitution." 12 U.S.C. § 5565(a) (emphasis added). "***May*** is not generally considered to mean ***shall*** unless the

legislative history clearly so indicates. . . . [W]e should take Congress at its word when it uses ***may*** and treat it as permissive when, as here, the legislative history is not clearly to the contrary." *Sierra Club v. Johnson*, 614 F. Supp. 2d 998, 1003 (N.D. Cal. 2008). This is especially true "when the same [statutory] provision uses both 'may' and 'shall,' in which case the 'normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory.'" *Sauer v. U.S. Dep't of Educ.*, 668 F.3d 644, 651 (9th Cir. 2012) (citation omitted). Here, in the same section, Congress chose "may" relating to restitution and "shall" relating to civil money penalties. 12 U.S.C. § 5565(a), (c). Thus, section 5565(a) is permissive and grants courts "***broad authority*** to impose ***appropriate*** remedies." *CFPB v. Nationwide Biweekly Admin., Inc.*, 2017 WL 3948396, at *10 (N.D. Cal. Sept. 8, 2017) (emphasis added); *see also* ER319:14, 18(n.6); SER11-13, 61-62(¶¶263, 266), 156-57(¶¶131, 133), 210-11.

2. Restitution Is an Equitable Remedy and Thus Discretionary

Unlike damages, restitution "is a creature of equity," whereby "a claimant can prevail only by showing that it will offend 'equity and good conscience' if the other party is permitted to retain the disputed funds." *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 874 (1st Cir. 1995) (citing *Atl. Coast Line R.R. Co. v. Florida*, 295 U.S. 301, 309 (1935)). In other words, restitution "is [a remedy] *ex gratia*, resting in the exercise of a sound discretion; and the court will

not order it where the justice of the case does not call for it." *Atl. Coast Line R.R. Co.*, 295 U.S. at 310 (citations omitted).

Therefore, restitution is *not* an automatic, inescapable consequence of a liability finding. *See Nationwide*, 2017 WL 3948396, at *12 (finding UDAAP liability but, under the circumstances and balancing the equities, denying restitution because the CFPB could not prove the type of conduct justifying such relief); *CFTC v. JBW Capital, LLC*, 812 F.3d 98, 112 (1st Cir. 2016) (affirming the district court's "exercise of discretion" to deny restitution because "the CFTC presented 'no evidence . . . with regard to the amount of retained profits or ill-gotten gains'") (alteration in original) (citation omitted).

3. Plaintiff Distorts the Nature of Restitution to Incorrectly Propose That It Is Mandatory

Misreading authority regarding the nature of restitution and improperly infusing principles of the legal remedy of damages, Plaintiff argues that "[r]estitution may be legal or equitable," and that it sought "legal, not equitable restitution" because it "did not seek identifiable assets in Defendants' possession, but rather a judgment ordering Defendants to pay a sum of money—*i.e.*, legal restitution." OB17, 24-25. It then erroneously concludes: "Courts do not have discretion to deny legal relief based on equitable factors." OB17.

To manufacture its argument, Plaintiff cites (1) the Restatement (Third) of Restitution and Unjust Enrichment § 4 (adopted 2010) ("Restatement"); (2) the remedies section of the CFPA; (3) case law on actual damages; and (4) case law where the court exercised its discretion to award restitution. OB24-27. These do not support Plaintiff's position.

The Restatement explains that the distinction of legal restitution is largely "of merely historical interest." Restatement § 4 cmt. a.[6] The part of the CFPA remedies section cited by Plaintiff states only that "[t]he court . . . shall have jurisdiction to grant any appropriate legal or equitable relief," 12 U.S.C. § 5565(a)(1), which does not mean restitution is legal. To attempt to draw a distinction between legal and equitable restitution, Plaintiff slips in case law about damages. *See* OB25 (citing *Curtis v. Loether*, 415 U.S. 189, 197 (1974)). "*[R]estitution* is not *damages*; restitution is a restoration required to prevent unjust enrichment." Dan B. Dobbs, *Law of Remedies* § 4.1, at 557 (emphasis in original). Finally, Plaintiff relies on case law where the court exercised its discretion to award restitution. *See* OB24. In *F.T.C. v. Commerce Planet, Inc.*, 815 F.3d 593

[6] "As posed today in American courts, the question whether restitution is legal or equitable is essentially artificial. It has a historical answer . . . but if it were not for extraneous, nonhistorical concerns, the question would scarcely be asked. Lawyers and judges who address the question are invariably trying to answer a different one: whether there is a right to jury trial of a particular issue, or whether a particular remedy is available under a statute that authorizes 'equitable relief.'" Restatement § 4 cmt. c.

(9th Cir. 2016), however, this Court did not hold that restitution was mandatory and outside the trial court's discretion. To the contrary, this Court confirmed the viability of the trial court's "inherent *equitable* power to order payment of restitution." 815 F.3d at 599 (emphasis added). No authority supports Plaintiff's proposition that restitution is mandatory and outside the District Court's discretion.

C. The District Court Did Not Abuse Its Discretion by Denying Restitution

1. Plaintiff Must Prove Restitution Is Appropriate

The District Court correctly placed the burden on Plaintiff to prove that restitution was an appropriate remedy. ER319:14. Plaintiff accepted that burden. SER57(¶268) (admitting it "carries the burden to prove that it should be granted affirmative relief on its claims"); SER56(¶262) (admitting "[r]estitution is not mandated by the CFPA, nor is it the automatic result of a violation of the CFPA's UDAAP provision"). Attempting to meet that burden at trial, Plaintiff decided to set out to prove that Defendants: (1) engaged in a deliberate scheme to evade consumer protection laws with loans whose terms were deceptive, and (2) acted in bad faith by committing fraud. SER87-89; ER319:14. The District Court held that Plaintiff did not prove either and did not otherwise meet its burden to show that restitution should be awarded. ER319:14-16.

Having lost on the merits, Plaintiff now asserts that the District Court should not have considered what Plaintiff tried to prove at trial to justify restitution—bad

faith and deception as to the terms of the loans. OB29-37. That is, Plaintiff now argues that the equitable considerations *it decided to present* at trial conflict with the CFPA's remedial scheme and undermine its effective enforcement.[7] OB29. It asserts that "although district courts have discretion when awarding equitable relief, they may not deny relief for reasons 'contrary to the purposes' of the underlying statute," and "denying restitution on defendants' lack of bad faith improperly undermines the compensatory purpose of that remedy." OB27, 29 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-23 (1975)).[8]

For starters, Plaintiff is judicially estopped from making this argument, and the argument was waived. Thus, the Court should not entertain it. (*See supra* pp. 16-24.) Moreover, the argument is simply a variation of its precluded attempt to

[7] Plaintiff brazenly blames its trial strategy on the District Court, admitting that it attempted to make these showings but only "in response to remarks by the district court indicating that it thought such evidence was relevant." OB35(n.8). That is false. In response to the District Court's inquiry to Plaintiff about how it intended to establish that restitution was appropriate, Plaintiff announced that it would do so by showing that Defendants engaged in deception about the loan terms and acted in bad faith. SER87-90; ER319:14.

[8] Plaintiff improperly suggests that by denying restitution, the District Court "den[ied] restitution of the fruits of a deceptive practice," OB35, thereby allowing Defendants to "keep more than $200 million." OB1. Plaintiff provides no support for this conclusion, because none exists. The undisputed record evidence confirms that Defendants had no gains and, indeed, lost millions of dollars. ER271:11(¶31) ($29.75 million total lost); SER55(¶255) ($12.27 million lost on loans in 13 Subject States).

strip the District Court of its discretion—this time under the cover of eliminating the specific equitable considerations that Plaintiff pursued, but lost, at trial.

The argument is also wrong. Plaintiff fatally relies on case law concerning federal statutes that are unique and distinctive from the CFPA. OB27-34.[9] In *Albemarle Paper*, the Supreme Court was not confronted with a statute that provided for "restitution" along with other available remedies including "damages," like the CFPA. *See* 12 U.S.C. § 5565(a)(2)(C), (E). Rather, Title VII of the Civil Rights Act created a hybrid remedy of "backpay," to be equitably awarded only by a court. *Albemarle Paper*, 422 U.S. at 415-16 n.9 (citing 42 U.S.C. § 2000e-5(g)). That novel remedial design, including its "make whole" purpose and the unavailability of damages as a remedy,[10] and the "transcendant

[9] Plaintiff also lodges new arguments based on "common law restitution principles," including that restitution is available for "payments resulting from a misunderstanding of the extent or existence of a valid contractual obligation." OB36-37. Plaintiff is precluded from bringing these arguments for the first time on appeal. (*Supra* pp. 20-24.)

[10] *See id.* at 441-43 (Rehnquist, J., concurring) (distinguishing other provisions of Title VII that provide for actual damages and explaining that "to the extent that an award of backpay is thought to flow as a matter of course from a finding of wrongdoing, and thereby becomes virtually indistinguishable from an award for damages," whether each side could demand its Seventh Amendment right to a jury trial would be at issue); *see also F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1102-03 (9th Cir. 1994) (holding that the trial court applied erroneous legal principles by denying restitution because the consumer injuries were only economic, the injury involved only a modest amount, and the defendant offered a money-back guarantee).

[sic] legislative purposes" of Title VII, led the Supreme Court to declare that backpay is not conditioned upon a showing of bad faith. 422 U.S. at 413-23.

Similarly, the Fair Labor Standards Act cases do not aid Plaintiff's cause, as they also concern a unique and distinctive federal statute. Under the FLSA, an employee may bring an action for damages but such right is terminated if the Secretary of Labor brings suit in equity to recover backpay for the employee. *See* 29 U.S.C. § 216(b)-(c). In *Mitchell v. Robert DeMario Jewelry, Inc.* ("*Mitchell*"), the Supreme Court held that the district courts have "jurisdiction to order an employer to reimburse employees . . . for wages lost because of [violative] discharge or discrimination." 361 U.S. 288, 296 (1960). The Supreme Court reasoned that "[s]uch a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. . . . When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Id.* at 291-92. Contrary to Plaintiff's suggestion, *Mitchell* thus does ***not*** limit or eliminate a court's discretion and mandate an award of backpay under the FLSA.[11]

[11] Likewise, the other FLSA cases do not aid Plaintiff's argument given the unique remedial scheme of the FLSA, as articulated in *Mitchell*, as well as those cases' distinguishing factual circumstances. *See Marshall v. Chala Enters., Inc.*, 645

The CFPA does not share the unique remedial schemes that Congress designed for the landmark legislation of Title VII and the FLSA. Rather, the CFPA expressly sets forth a traditional remedial scheme—including rescission, reformation, refunds, restitution, disgorgement, and damages. *See* 12 U.S.C. § 5565(a)(2). Accordingly, Plaintiff's attempt to rely on the unique Title VII and FLSA jurisprudence to alter the scope of the District Court's discretionary and equitable authority under the CFPA is misplaced.

2. The District Court Did Not Err in Concluding That Plaintiff Failed to Meet Its Burden for Restitution

Plaintiff advanced several reasons at trial that restitution was appropriate, but failed to prove them. Therefore, the District Court did not abuse its discretion by declining to award restitution.

(a) Defendants Did Not Embark on an Unlawful Scheme

Plaintiff first argued that Defendants engaged in a deliberate scheme to violate consumer protection laws and fraudulently avoid state licensing and usury laws. ER319:14. However, Plaintiff presented no evidence—much less a preponderance—that Defendants decided to embark on an unlawful scheme to

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F.2d 799, 800, 802 (9th Cir. 1981) (citing *Mitchell* and addressing the district court's reasoning that "the compensation paid by the defendants to their employees was reasonable"); *Wirtz v. Malthor, Inc.*, 391 F.2d 1, 2-3 (9th Cir. 1968) (noting that because the Secretary of Labor filed an action against the employer, the employees lost their right to sue for the unpaid wages and overtime compensation).

structure the Western Sky loan program to defraud borrowers. ER319:15. At trial, Plaintiff attempted to establish such impropriety through questioning, but the witnesses testified contrary to Plaintiff's suggestions and the District Court credited that testimony. ER319:16.

The District Court found that Defendants participated in the Western Sky loan program only after prominent legal counsel advised that it was lawful, ER319:15, and correctly held that counsel's advice was relevant. ER319:15-16. *See Chase v. Trs. of W. Conference of Teamsters Pension Tr. Fund*, 753 F.2d 744, 753 (9th Cir. 1985) ("The trustees' reliance on counsel's determination that the owner-drivers were eligible to participate in the plan weighs against restitution.").

Further, contrary to Plaintiff's theory, Defendants were not the proverbial "snake oil salesmen." *See Nationwide*, 2017 WL 3948396, at *11. Plaintiff introduced no evidence that Defendants sought to swindle any consumers, much less based on a Loan Agreement approved by counsel and only later deemed unenforceable. ER319:6, 15-16. Instead, the District Court found that Defendants legitimately sought to merely "structure business operations and transactions to minimize exposure to unfavorable laws and regulations." ER319:15. *See Ratzlaf v. United States*, 510 U.S. 135, 145 (1994) ("Courts have noted 'many occasions' on which persons, without violating any law, may structure transactions 'in order to avoid the impact of some regulation or tax.'") (citation omitted); *Costa v. Keppel*

Singmarine Dockyard PTE, Ltd., 2003 WL 24242419, at *11 (C.D. Cal. Apr. 24, 2003) (recognizing entity's "right to structure its affairs in a manner calculated to shield it from the general jurisdiction of the courts of other states") (citation omitted).

(b) Defendants Did Not Intend to Defraud Borrowers

Plaintiff also theorized that Defendants concealed their involvement in the Western Sky loan program so that borrowers would not realize that CashCall was the "true lender." ER319:14. The District Court, however, found that Plaintiff failed to show that Defendants intended to defraud borrowers or that consumers were actually defrauded. ER319:15-16.

Plaintiff attempted to equate Defendants' actions with those of the defendants in cases such as *F.T.C. v. Figgie Int'l, Inc*., 994 F.2d 595 (9th Cir. 1993). ER319:15. In *Figgie*, this Court reasoned that "[c]ustomers who purchased rhinestones sold as diamonds should have the opportunity to get all of their money back." *Id*. at 606. Here, however, Plaintiff made no allegation and there was no finding that "[t]he seller's misrepresentations tainted the customers' purchasing decisions." *Id*. Rather, Plaintiff acknowledged, and the District Court found, there were significant efforts made to provide fulsome disclosures to borrowers ***before*** they accepted the terms and entered into the Loan Agreements. ER319:16. It was only after the District Court's summary judgment order (finding

the choice-of-law provision invalid because of a determination that CashCall was the "true lender") that Defendants could have known that the CFPA had been violated since the loans contained no misrepresentations concerning interest rates or fees. ER213:11, 319:16.

Notably, Plaintiff did not call any consumers to testify they would not have entered into the Loan Agreement if Western Sky was not the true lender, and there is no evidence that any borrowers would have declined the loans if Western Sky had indicated loans would be immediately sold to CashCall. ER319:15. Indeed, the Court found that the Loan Agreement contained an assignment provision that "advised the borrower that Western Sky 'may assign or transfer'" the loan "at any time to any party." ER319:8. The borrower was also provided with a timely notice of assignment indicating that payments must be made to CashCall, and providing the borrower with 30 days to dispute the validity of the debt. ER319:6.

(c) There Was No Fraud in the Selling

Plaintiff also argued that restitution should be awarded where a contract is procured by fraud or otherwise unenforceable. ER319:14. But such cases are fact-dependent, and starkly distinguishable from the findings of fact here. For example, in *Figgie*, 994 F.2d at 606, the defendant misrepresented the value of a product (rhinestones as diamonds) and this Court concluded that "[t]he fraud in the selling" entitled the consumers to full refunds through restitution. The District Court found

that CashCall never tricked consumers into a purchase, marketed a product as having more value than it did, or deprived the consumer of the benefit of the bargain. ER319:15-16. The evidence showed that the Loan Agreements clearly advised borrowers that: (1) the interest rate was "very high"; (2) they "may be able to obtain credit under more favorable terms elsewhere"; (3) there was no prepayment penalty; and (4) borrowers should pay back their loans early to avoid the payment of the full amount of interest in the amortization schedule. ER319:7.

Plaintiff presented no consumer testimony regarding confusion about the terms of the loans or the fees. Meanwhile, Defendants presented "credible and persuasive evidence that they made every effort to inform consumers about all material aspects of the loans." ER319:16. The District Court thus found that "every Consumer Loan Agreement clearly and plainly disclosed the terms of the loans." ER319:16.

3. The District Court Additionally Found That Defendants Presented Credible and Persuasive Evidence That Restitution Was Not Appropriate

(a) Defendants Reasonably Relied on Advice from Counsel

Defendants presented evidence that CashCall and Reddam relied upon expert regulatory counsel, who consistently gave advice and confirmed the legality of the Western Sky loan program. ER319:15-16. The District Court correctly held that the advice of counsel is pertinent to an equitable restitution award. ER319:16.

See Chase, 753 F.2d at 753 ("The trustees' reliance on counsel's determination that the owner-drivers were eligible to participate in the plan weighs against restitution.").[12]

Contrary to Plaintiff's unsupported contentions at trial, the evidence demonstrated Defendants' effort to lawfully enter the market. ER319:15. The District Court found credible evidence that: (1) Defendants relied on counsel to structure the relationship between CashCall and Western Sky and for the structuring of the Tribal Lending Model (ER319:15); (2) Defendants relied on Callaway's advice that state usury and licensing laws would not govern the loans made by Western Sky (ER319:16); (3) Callaway advised Defendants that there was "good law" that state and federal laws would not apply to transactions entered into with an entity owned by a tribal member and issued opinion letters stating the same in connection with financings totaling "hundreds of millions of dollars" (ER10-11); (4) Callaway never withdrew or changed her opinion that the Tribal Lending Model was legally defensible (ER319:10); and (5) even after several state regulatory actions were commenced, Callaway continued to represent Defendants and vigorously defend the Tribal Lending Model (ER319:12).

[12] Plaintiff fails to address the relevance of Defendants' reliance on the advice of counsel in the context of equity, asserting only that the statement in *Chase* was made "in passing" and "carries little weight here given the notable differences in the purposes of ERISA and the CFPA," a distinction neither explained nor supported. OB33-34.

The evidence also established that Defendants conditioned participation in the Western Sky loan program upon the advice of counsel and they were reasonable in relying on such advice. ER282:17, 319:16. At the time, no court had addressed the Tribal Lending Model or concluded it was unlawful. ER319:16. Plaintiff had not yet been created by Congress when Callaway began advising CashCall on the Western Sky loan program and, as the Court acknowledged, its "theory of enforcement" in this action is a "unique" application of the CFPA. ER319:15-16. As the District Court found and held, "it was not until this Court's true lender determination that Defendants could have known that the program violated the CFPA." ER319:16.

(b) Borrowers Received the Benefit of the Bargain

CashCall did not trick consumers into a purchase or market a product as having more value than it did, and thus deprive any consumer of the benefit of the bargain. ER319:15-16. *See Figgie*, 994 F.2d at 606 ("Customers who purchased rhinestones sold as diamonds should have the opportunity to get all of their money back."). Among other factors, the FTC Act framework that the District Court applied (at Plaintiff's urging) allowed it to consider that consumers used and retained the full benefit of Defendants' services. *See F.T.C. v. Zamani*, 2011 WL 2222065, at *14 (C.D. Cal. June 6, 2011) (excluding amounts paid by consumers who "received the intended benefit of the bargain" from unjust enrichment

calculation); *F.T.C. v. Amy Travel Serv., Inc*., 875 F.2d 564, 572 n.7 (7th Cir. 1989) (affirming trial court's conclusion that "[c]ustomers, satisfied or unsatisfied, who took trips were excluded from the computation of relief" and "limit[ing] . . . relief to those customers who received *nothing of value*" from the defendants' services) (emphasis added); *JBW Capital*, 812 F.3d at 112 (no restitution "under the facts of th[e] case, where the CFTC presented 'no evidence . . . with regard to the amount of retained profits or ill-gotten gains'") (alteration in original) (citation omitted).

In the FTC Act cases that Plaintiff uses to support its position (OB40-41), restitution was based upon the fact that the consumers received *nothing* of value from the defendants, did not receive the value that was advertised, or were not informed of the costs they incurred.[13] Here, it was undisputed that all borrowers received the benefit of the bargain and received loan proceeds after agreeing to the fully disclosed terms of the Loan Agreements. ER319:16.

[13] *See, e.g.*, *Gordon*, 819 F.3d at 1186 (defendant's loan modification program not only failed to confer the advertised benefit upon consumers but "actually left them in a far worse position"); *Commerce Planet*, 815 F.3d at 597 (defendants advertised a "free starter kit" but "[b]uried in the fine print" that consumers were signing up for a recurring monthly membership fee); *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 369 (2d Cir. 2011) (affirming the district court's finding that because the products "provided none of their advertised benefit to consumers, none of [defendant's] gains from the sale of these products could be considered 'just'"); *F.T.C. v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1274-75 (M.D. Fla. 2012) (noting defendants deceptively advertised loan modification services as a "guarantee" and "convinced thousands of cash-strapped homeowners facing imminent foreclosure to front $2,000 in cash" for the service), *aff'd*, 704 F.3d 1323 (11th Cir. 2013).

4. The District Court Did Not Abuse Its Discretion in Concluding That Plaintiff Failed to Prove That Its Restitution Amount Reasonably Approximated Defendants' "Unjust Gains"

The District Court correctly applied the *Gordon* test and held that, even if Plaintiff had proven that restitution was an appropriate remedy, Plaintiff failed to satisfy its "burden of proving that the amount it [sought] in restitution reasonably approximate[d] the defendant's unjust gains." *Gordon*, 819 F.3d at 1195 (citation omitted). ER319:17. In so holding, the District Court did not abuse its discretion.[14] *See JBW Capital*, 812 F.3d at 111-12.

The FTC Act framework that Plaintiff urged the District Court to adopt required Plaintiff to prove that the amount of restitution it sought "reasonably approximates . . . unjust gains." ER319:17. The framework is not robotic, but rather embraces the "broad equity powers" that courts possess "in determining the appropriate measure of equitable relief." *CFPB v. Gordon*, 2013 WL 12116365, at *5 (C.D. Cal. June 26, 2013), *aff'd in part*, *vacated in part*, 819 F.3d 1179 (9th Cir. 2016).

[14] Plaintiff does not dispute that the two-step framework set forth in *Gordon* was the appropriate test for its restitution claim. OB38.

(a) The District Court Was Not Required to Use "Net Revenues" as a Basis for Measuring Restitution

The District Court correctly concluded that, under the circumstances of this case, Plaintiff's purported "net revenue" figure did not satisfy its burden under *Gordon* to demonstrate "unjust gains." ER319:17. *See Gordon*, 819 F.3d at 1195 ("[D]istrict court ***may*** use a defendant's net revenues as a basis for measuring unjust gains.") (emphasis added); *Commerce Planet*, 815 F.3d at 603 ("Unjust gains ***in a case like this one*** are measured by the defendant's net revenues.") (emphasis added).

Plaintiff asserts that it met its burden simply by presenting evidence that purported to show "net revenues." OB39. However, the District Court correctly held that more was required: the framework requires Plaintiff to prove that the "overall gains" are "unjust." ER319:17 ("[T]he CFPB failed to present any evidence that its proposed restitution approximates Defendants' unjust gains."); *see also Zamani*, 2011 WL 2222065, at *13 ("Only *unjust* gains are subject to restitution . . . .") (emphasis in original). The focus is not solely on what consumers allegedly "lost." ER319:17 (citing *Commerce Planet*, 815 F.3d at 603). "[I]t is error to simply conclude that the 'total amount paid by consumers'

constitutes [a] defendant's unjust enrichment without accounting for refunds and actual services rendered."[15] *Zamani*, 2011 WL 2222065, at *13.

There was no credible evidence that Plaintiff's net revenue figure—the total interest and fees that Defendants purportedly collected on the loans, less any previous settlement payments—represented Defendants' ***unjust gains***.[16] ER319:17.

(b) The District Court Did Not Abuse Its Discretion in Finding Plaintiff's Evidence Deficient

Plaintiff's case-in-chief on restitution was presented through a lone summary witness, Ryan Thomas, whose testimony the District Court found did not provide credible evidence. ER319:17. Thomas did not address the appropriateness of restitution, and as to the proposed amount, he merely repeated Plaintiff's counsel's rote computation. ER319:17. The District Court concluded that the evidence that

[15] Notably, Plaintiff's "net revenues" even failed to account for the loan proceeds disbursed to borrowers. SER78:5-9, 91.

[16] At the same time that Plaintiff argues that the amount it sought constituted "net revenues" and "reasonably approximated Defendants' unjust gains" (OB38), it concedes that this figure included money that "Defendants ***did not actually receive***." OB43 (emphasis added). This concession confirms that Plaintiff failed to meet its burden. Plaintiff asserts that although this was "erroneous," the ***District Court*** had the burden to correct Plaintiff's error. OB44. Plaintiff cites to *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115 (9th Cir. 2000), which held that it was erroneous to deny a fee application instead of computing a lodestar figure, and *F.T.C. v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010), which ordered a lower restitution amount than was sought by the FTC, commensurate with the narrower scope of liability found. Neither case supports Plaintiff's extraordinary request that the District Court and this Court relitigate its case for it or assemble evidence for Plaintiff to meet its burden.

Plaintiff proffered in support of restitution was woefully inadequate under the applicable test. ER319:17.

The District Court also found Thomas's testimony on the amount of restitution unreliable. ER319:17. At the premeditated direction of Plaintiff's counsel, Thomas failed to perform an actual, much less independent, analysis of the select and limited data that counsel provided to him. ER319:17. Thomas also made no effort to account for the facts in this case to determine whether the amount that Plaintiff was seeking, in fact, reasonably approximated Defendants' "unjust gains." ER319:17. Consequently, the District Court determined that numerous flaws permeated Thomas's conclusions. ER319:17. For example, Thomas's "summary exhibit" included sums of money as "restitution" that had not even been paid out of pocket by borrowers, including borrowers who paid back money categorized as "interest" or "fees," but whose payments were less in total than the amount disbursed to them when they entered into the loan. ER319:17; SER78:5-9. Tellingly, Plaintiff now even concedes that the restitution amount for which Thomas was proffered to parrot at trial erroneously included a sum of origination fees, which are associated with each loan but which were not always paid by borrowers or received by Defendants. OB43-44; ER319:7.

After receiving Thomas's testimony and the deficient evidence introduced by Plaintiff, the District Court concluded that there was no credible evidence to

demonstrate that the $235,597,529.74 sought was a reasonable approximation of an appropriate amount of restitution. ER319:17. The District Court noted that Thomas "specifically admitted that he did not make any attempt to determine whether this amount was appropriate for restitution" and that, "[i]n a telling admission, Thomas testified that he simply 'was just adding up total amount of principal that someone paid, the amount of interest that someone paid, and the amount of fees that someone paid' without any consideration of the underlying data." ER319:17.

Plaintiff cannot identify any clear error in the District Court's finding, and the District Court did not abuse its discretion in concluding that Plaintiff's evidence was insufficient. Where a plaintiff who seeks a relief award fails to meet its burden at trial by advancing "only a demonstrative exhibit reflecting inflated calculations," a denial of that award should be affirmed. *E.g.*, *Showcase Mall Joint Venture v. Boxing Hall of Champions LLC*, 268 F. App'x 622, 623-24 (9th Cir. 2008) (holding that "[g]iven the paucity of evidence that [the plaintiff] set forth, the district court properly concluded that [the plaintiff] did not meet its burden").

(c) Defendants Presented Credible Affirmative Evidence Demonstrating That Plaintiff's Restitution Figure Did Not Represent the Unjust Gains

In addition, Defendants provided affirmative evidence that Plaintiff's approximation of unjust gains was not correct and, thus, not reasonable. ER319:17

("In contrast, Defendants presented substantial credible evidence that the CFPB's proposed restitution award does not approximate Defendants' unjust gains."). For example, they presented evidence of expenses incurred as a result of the Western Sky loan program. ER271:8-11(¶¶23-29).

Contrary to Plaintiff's suggestion (OB41(n.11)), evidence of profitability is relevant to an assessment of a restitution award.[17] "Restitution ***may*** be measured by the 'full amount lost by consumers rather than limiting damages to a defendant's profits.'" *Gordon*, 819 F.3d at 1195 (emphasis added) (citing *F.T.C. v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)).[18] Accounting for expenses is thus consistent with the purpose of a restitution award, which targets "unjust ***gains***."[19] *Gordon*, 819 F.3d at 1195 (emphasis added).

[17] Plaintiff's assertion that the District Court held that there was a "requirement that Defendants' expenses be deducted" is false. OB41. The District Court held that it "'***may*** use a defendant's net revenues as a basis for measuring' restitution." ER319:17 (emphasis added) (citation omitted).

[18] The district court in *Gordon* noted that the defendant had failed to present any admissible evidence of expenses, but nowhere concluded that it was barred from considering such evidence. *Gordon*, 2013 WL 12116365, at *5.

[19] The CFPA's prohibition on awarding relief that is "exemplary or punitive" is consistent with considering evidence regarding a defendants' losses and expenses. 12 U.S.C. § 5565(a); *see also F.T.C. v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (discussing the Ninth Circuit's interpretation of identical language in section 19(b) of the FTC Act prohibiting "exemplary or punitive damages"); *Figgie*, 994 F.2d at 607 (When "Congress expressly prohibit[s] exemplary or punitive damages . . . we know that its intent was not to punish deceptive trade practices."). An award that exceeds Defendants' actual profits stemming from the

Case law supports the proposition that Defendants' profits should be considered in the second step of the *Gordon* test. Even in the FTC Act context, which typically proceeds under section 13(b) of the FTC Act, this Court has not foreclosed consideration of defendant's profits, but rather has acknowledged that the *facts* have frequently supported an award that was not limited to profits. *See Stefanchik*, 559 F.3d at 931 ("[B]ecause the FTC Act is designed to protect consumers from economic injuries, courts have ***often*** awarded the full amount lost by consumers rather than limiting damages to a defendant's profits.") (emphasis added); *cf. Bronson*, 654 F.3d at 375 ("[W]here the profits from fraud and the defendant's ill-gotten gains diverge, the district court ***may*** award the larger sum.") (emphasis added); *F.T.C. v. Magui Publishers, Inc*., 1991 WL 90895, at *12 (C.D. Cal. Mar. 28, 1991) (restitution award equaled gross sales less production costs), *aff'd*, 9 F.3d 1551 (9th Cir. 1993).

Defendants presented uncontested evidence of costs that were (1) related to the benefits that were conferred upon, and knowingly accepted by, the Western Sky borrowers, and (2) shown to have been a direct result of the high costs associated with the unsecured loans at issue in this case. *See* SER53-55(¶¶248-49,

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particular conduct the District Court found deceptive—servicing unsecured loans later ruled unenforceable—would do just that. *See Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1645 (2017) ("Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid." (quoting Restatement § 51 cmt. h at 216)).

252-54); ER271:3(¶¶8-31). On loans made to borrowers in the thirteen Subject States, CashCall lost $12.27 million. SER55(¶255).[20]

Accordingly, the District Court did not commit clear error in its findings, nor abuse its discretion in declining to award restitution.

D. The District Court Correctly Found and Concluded That Tier Two and Tier Three Penalties Were Not Warranted

The CFPA sets forth criteria for determining the civil monetary penalty for a violation, which is divided into tiers based on the defendant's scienter. A defendant receives a penalty under the "[f]irst tier . . . [f]or any violation of a law, rule, or final order or condition imposed in writing by the [CFPB]." 12 U.S.C. § 5565(c). A defendant may only receive a "[s]econd tier" penalty upon a finding that the defendant "recklessly" violated Federal consumer financial law, and a "[t]hird tier" penalty upon a finding that the defendant "knowingly" did so. *Id*.

A defendant "recklessly" engages in a violation by making "highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading [consumers] which is either

[20] Plaintiff's argument that deducting expenses would "leave consumers uncompensated" is misplaced. OB41. Plaintiff could have attempted to prove a remedy focused on consumers' losses by presenting a case on damages, but instead it elected to avoid the burdens associated with a damages case and pursue a remedy based on ***Defendants' unjust gains***.

known to the defendant or is so obvious that the defendant must have been aware of it." *CFPB v. Universal Debt & Payment Sols., LLC*, 2015 WL 11439178, at *7 (N.D. Ga. Sept. 1, 2015) (citations omitted), *reconsideration denied*, 2017 WL 3887187 (N.D. Ga. Aug. 25, 2017); *see also* Ninth Circuit Manual of Model Jury Instructions – Civil 18.5 (2017) ("'Reckless' means highly unreasonable conduct that is an extreme departure from ordinary care, presenting a danger of misleading investors, which is either known to the defendant or is so obvious that the defendant must have been aware of it."). A defendant "knowingly" engages in a violation if he acts with *actual knowledge* that such conduct violates the law. 12 U.S.C. § 5565(c)(2)(C); *see also* Ninth Circuit Manual of Model Jury Instructions – Civil 18.5 (2017) ("A defendant acts knowingly when [he] makes an untrue statement with the knowledge that the statement was false . . . .").

The District Court made specific findings of fact regarding whether Defendants "recklessly" or "knowingly" committed the CFPA violations, findings which Plaintiff has not established were clearly erroneous. ER319:18-19. Among other things, Defendants retained prominent regulatory counsel to structure the Western Sky loan program. ER319:15-16 ("The evidence presented demonstrated that Baren and Reddam only agreed to participate in the Western Sky Loan Program after consulting with prominent legal counsel and receiving advice that the structure of the Western Sky Loan Program was not unlawful."). Defendants

presented credible evidence that: (1) Callaway consistently gave advice regarding the legality of the Western Sky loan program, verbally, in written correspondence, and in opinion letters, and demonstrated her full awareness of the structure of the program (ER282:22-24(¶¶85, 88); 314:8-9(108:24-109:09); SER84:8-13); (2) Callaway advised that a tribal lender could assign the loans to CashCall, CashCall could stand in the shoes of the tribal lender, and the terms and conditions of the loan, as-issued, would be fully enforceable by CashCall (ER282:7(¶26)); (3) though Callaway had raised other structures in the past, those conversations never included any conclusion or advice that the structure, as Callaway and Katten designed it, was unlawful (ER282:28(¶102)); (4) Callaway never once retracted her approval of the way the loan program was structured (ER314:8-9(108:24-109:09); 282:22(¶¶85-86)); (5) Defendants did not believe that actions brought by certain states indicated that the Western Sky loan program was unlawful or that the Western Sky loans were unenforceable (SER67:1-2; SER70:20-72:8); (6) Reddam only entered into the arrangement upon the trusted advice of counsel (SER71:5-25; ER282:17(¶71)), and he maintained a belief in the legality of the Western Sky loan program (SER182-83(¶64)); and (7) Reddam held a continued belief that the Western Sky loan program was lawful following his receipt of a law professor's

analysis (SER41-52(¶¶24, 101, 102, 114, 115, 140-41, 155), 68:4-17, 69:12-19, 182(¶63), 281).[21]

Additionally, the District Court concluded that at the time that Defendants decided to engage in the Western Sky loan program at the advice of counsel, "there was nothing inherently unlawful about [it]." ER319:19. Consequently, as the District Court itself recognized, it was not until the District Court held that CashCall was the "true lender" that Defendants understood that they were liable under the CFPA. ER319:19.

On appeal, Plaintiff merely recycles its view of documents and simply states its disagreement with the District Court's contrary findings, which were based on the totality of the evidence and testimony. *See* OB44-51. Plaintiff has not shown, however, that the District Court committed clear error in its findings that Defendants did not recklessly or knowingly violate the CFPA (*see* ER319:19), as required to impose Tier Two or Tier Three penalties, 12 U.S.C. § 5565(c)(2)(B)-(C).

[21] The CFPB also conceded Bogue verbally provided an opinion that an assignee could enforce loans made by an entity owned by a tribal member; neither Bogue nor Callaway expressed concern about CashCall servicing the loans at their stated interest rates; and Bogue provided several opinion letters confirming that "the fees and rates contained within [the loans] are in compliance with any applicable requirements of the [CRST]." ER319:11, 282:8(¶33), 282:14-15(¶58); SER42, 44 (¶¶31, 51), 83:16-21, 294, 302-03, 310, 321, 329.

II. Principal Arguments in Support of Cross-Appeal

The District Court held a bench trial on remedies because, at the summary judgment stage, it held that Defendants were liable under the CFPA. Defendants should not have been found liable, and the District Court's finding of liability should be reversed for multiple, independent reasons.

First, as recognized in multiple cases, the unprecedented restrictions on the President's authority to remove the Bureau's director—who singularly exercises vast power with virtually no accountability—renders the CFPB's structure unconstitutional, thereby barring it from continuing to prosecute this action. Second, reflective of the concerns of a single person ruling over substantial governmental power, the CFPB in this case is breaching the principles of federalism and effectively is enforcing the regulatory licensing and usury laws of a select number of states—and in the face of a congressional directive prohibiting it from touching usury limits. Third, the District Court's summary judgment ruling was based on a non-precedential analysis that an assignee of a loan is the "true lender," a premise that, if adopted, will have a swift and detrimental effect on the lending structures of our economy. Fourth, on summary judgment, the District Court erroneously held Reddam individually liable for corporate acts and practices based solely on his knowledge of the corporation's operations and in disregard of

his actual knowledge that the operations were lawful, which knowledge was formed by seeking and relying on the advice of legal counsel.

A. The CFPB's Structure Is Unconstitutional

The District Court erred by holding that the CFPB's structure is constitutional. *See* ER213:16. Placing vast authority to regulate the financial system in a single official removable only for cause is unprecedented and a definitive violation of the constitutionally calibrated separation of powers.

Because the Constitution "has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary," courts must carefully scrutinize restrictions on the President's removal power. *See, e.g.*, *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483-84 (2010). An agency's "novel structure" renders constraints on removal presumptively unconstitutional. *See id.* at 483, 496 (noting that such a configuration can be sustained only where the government establishes special "circumstances" justifying the structure); *see also Myers v. United States*, 272 U.S. 52, 122 (1926) (recognizing the President's constitutional power to supervise, direct, and remove at-will subordinate officers in the Executive Branch).

Measured against this standard, the Bureau's structure plainly violates the Constitution. "Never before has an independent agency exercising substantial executive authority been headed by just one person." *PHH Corp. v. CFPB*, 881

F.3d 75, 166 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). "[T]he lack of historical precedent" for the Bureau's leadership structure is "the most telling indication of the severe constitutional problem" with the agency. *Free Enter. Fund*, 561 U.S. at 505. Concentration of "power that is massive in scope . . . in a single person, . . . unaccountable to the President," poses an existential "threat to individual liberty" and unlawfully "diminishes the President's Article II authority." *PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting). Strikingly, the United States agrees that the Bureau's structure is unconstitutional. *See, e.g.*, Brief for Respondent in Opposition to Pet. for Writ of Cert., *State Nat'l Bank of Big Spring v. Mnuchin*, No. 18-307, 2018 WL 6504249, at *13 (S. Ct. Dec. 10, 2018) ("[T]he statutory restriction on the President's authority to remove the Director violates the constitutional separation of powers."). Thus, "based on considerations of history, liberty, and presidential authority, . . . the CFPB 'is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director.'" *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018) (quoting *PHH Corp.*, 881 F.3d at 198 (Kavanaugh, J., dissenting)), *appeal filed*, No. 18-2743 (2d Cir. Oct. 23, 2018).

The Bureau cannot point to any special "circumstances" capable of saving the structure from invalidation under straightforward separation-of-powers principles. *See Free Enter. Fund*, 561 U.S. at 483-84. Courts have approved

limited restrictions on a President's power to remove officials. But such restrictions are constitutional only where they are accompanied by critical safeguards, such as the diffusion of authority in a multi-member commission or board, *see, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 619-620, 624 (1935); or the granting of only limited tenure and narrow authority to the official whose removal is constrained, *see, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 671-73, 695-97 (1988); *see also PHH Corp.*, 881 F.3d at 138 (Henderson, J., dissenting).[22] The Bureau—where a single official exercises sweeping authority—lacks any meaningful safeguards necessary to protect liberty and preserve presidential authority and, consequently, its structure is unconstitutional and must be invalidated.

The Court cannot constitutionalize the CFPB by reforming it pursuant to its severability clause, 12 U.S.C. § 5302. "[T]he presumption of severability is rebutted here. A severability clause 'does not give the court power to amend' a statute. Nor is it a license to cut out the 'heart' of a statute." *PHH Corp.*, 881 F.3d at 163-64 (Henderson, J., dissenting) (citations omitted) ("Because section

[22] Examples of agencies with such safeguards include the Federal Trade Commission, Federal Communications Commission, Securities and Exchange Commission, National Labor Relations Board, and Federal Energy Regulatory Commission. *See Free Enter. Fund*, 561 U.S. at 549 (Breyer, J., dissenting).

5491(c)(3) is at the heart of Title X [Dodd-Frank], I would strike Title X in its entirety").

For these reasons, Plaintiff "lacks authority to bring [an] enforcement action," *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993), and judgment should be entered for Defendants. *See Ryder v. United States*, 515 U.S. 177, 182-83 (1995) (holding that "one who makes a timely challenge to the constitutional validity" of government authority "is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred"); *see also SW Gen., Inc. v. NLRB*, 796 F.3d 67, 79 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017).

B. The District Court Erred in Holding That Plaintiff Could Rest UDAAP Claims on State Laws

Through this action, the CFPB is enforcing a selection of state laws, without which, there would be no UDAAP claims here. In holding that a practice or act could be "unfair, deceptive or abusive" under the CFPA based on a violation of state licensing or state usury laws, the District Court violated a fundamental tenet of federalism that a federal proscription does not incorporate state law absent a clear statement from Congress. SER5-6; ER213:15-16. Here, not only did Congress make no such statement, it expressed a contrary intent.

1. Federalizing State Law Requires Clear Legislative Intent

"In our federal system . . . [t]he States have broad authority to enact legislation for the public good" while "the National Government possesses only limited power." *Bond v. United States*, 572 U.S. 844, 854 (2014) ("*Bond II*"). If Congress intends to federalize an area of state regulation, it "[must be] reasonably explicit about it" or else the "constitutional balance" between the federal government and the states will be disturbed—damaging federalism's "protect[ion] [of] the liberty of the individual from arbitrary power." *Id*. at 858, 863 (quoting *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 544 (1994), and *Bond v. United States*, 564 U.S. 211, 222 (2011)).

Indeed, this Court has held that even where a federal statute expresses that a violation can be predicated on a violation of state law, which is not the case here, great care is needed to ensure that the Court does not "transform innumerable state crimes and torts into federal crimes" and thereby "alter sensitive federal-state relationships." *United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't, AFL-CIO*, 770 F.3d 834, 840 n.4, 843 (9th Cir. 2014) (citations omitted) ("Even if a state labels particular conduct extortion, 'it cannot qualify as a predicate offense for a RICO suit unless it is capable of being generically classified as extortionate'" under federal law.); *see also Jones v. United States*, 529 U.S. 848, 859 (2000) (refusing to federalize arson). Further, even where statutory language

signals a broad reach, there must be a clear indication of congressional intent "before interpreting the statute's expansive language in a way that intrudes on the police power of the States." *Bond II*, 572 U.S. at 860. Deciding when and how state laws should be enforced belongs to the state itself, absent a clear statement from Congress. *See, e.g.*, *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 475 (7th Cir. 2007) ("[F]ederal judges ought not use this ambulatory language [in a federal statute] to displace decisions consciously made by state legislatures and courts about how . . . [to enforce] state law."); *Olive v. Comm'r*, 792 F.3d 1146, 1150 (9th Cir. 2015) ("Application of the [federal] statute does not depend on . . . illegality . . . under state law; the only question Congress allows us to ask is whether [the conduct is] 'prohibited by Federal law.'") (citation omitted).

Business licensing has long been recognized to fall firmly within the heart of the state police power. *See Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 604 (2011) ("Regulating in-state businesses through licensing laws has never been considered . . . an area of dominant federal concern."). Thus, Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance'" such as state licensing and regulation. *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *see also Cleveland v. United States*, 531 U.S. 12, 24 (2000) (refusing to apply the federal

mail fraud statute to false statements made in a state licensing application because licensing and permitting is "conduct traditionally regulated by state and local authorities," and the Court cannot "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress").

Congress did *not* incorporate state law into the CFPA. Notably, such provision is noticeably absent from the section titled "Relation to State Law," 12 U.S.C. § 5551. More pointedly, Congress explicitly protected state usury laws from Plaintiff's authority. *See* 12 U.S.C. § 5517(o) ("No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authored by law."); *see also Illinois v. CMK Invs., Inc.*, 2014 WL 6910519, at *7 n.5 (N.D. Ill. Dec. 9, 2014) (holding that the Bureau cannot "challenge the account protection fee under the [CFPA] for being usurious, for the CFPB has no authority 'to establish a usury limit applicable to an extension of credit'") (citation omitted). Indeed, Congress considered but rejected an amendment to the CFPA that would have established a federal usury rate that would be the same as the usury rate in the state where a borrower resides. *See* SER276-80.

2. The Claims Against Defendants Rely upon Violations of State Law, Contrary to Congressional Intent

To camouflage its federalization of state law, Plaintiff employed syllogism by arguing that: (1) the CFPA prohibits an "unfair, deceptive, or abusive" act or practice; (2) acting in violation of state law is "unfair, deceptive, or abusive"; and therefore, (3) violating state law violates the CFPA. ER27:25(¶¶59-61); SER250. The District Court erred in ceding to this logic. SER6; ER213:5, 13. It incorrectly accepted Plaintiff's contention that "the Complaint does not allege that Defendants violated the CFPA *because* they violated state law, but because their conduct in taking and demanding payment from consumers for purported loan debts that they did not owe satisfies the requisite elements of the UDAAP prohibitions under the CFPA." SER6. Simply alleging that an act or practice violates a particular state's laws does not amount to an unfair, deceptive, or abusive act or practice under federal law. *See Beler*, 480 F.3d at 473-74 (rejecting effort to "take a state-law dispute and move it to federal court" by permitting government to establish "unfair or unconscionable" practices in the collection of a debt under the FDCPA, 15 U.S.C. § 1692f, based upon violation of Illinois law because the FDCPA "does not so much as hint at being an enforcement mechanism for other rules of state . . . law").

Plaintiff's theory of liability that consumers "did not owe" the payments does not exist *but for* the state laws. Indeed, tellingly, Western Sky loans were

made to residents in 47 states (SER236(¶44)), but Plaintiff only brought UDAAP claims pertaining to 16 of those states (which Plaintiff reduced to 13 by trial). ER27:11-12(¶18), 319:3(n.3). That is because there was no *federal* UDAAP violation that could be applied across the entire nation—only the laws of 13 states could be used by Plaintiff. Relatedly, Plaintiff's theory contravenes a central purpose of the CFPA, which is to "seek to implement and, where applicable, enforce *Federal consumer financial law consistently*."[23] 12 U.S.C. § 5511(a) (emphasis added). This is for "the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." *Id.*

Meanwhile, the CFPA authorizes Plaintiff to "prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice ***under Federal law*** in connection with any transaction with a consumer for a consumer financial product or service." 12 U.S.C. § 5531(a)

[23] Further, the state laws are different. In many states, "[t]he word 'void' frequently means in reality 'voidable' at the option of the injured party." *Collier v. Gen. Exch. Ins. Corp.*, 118 P.2d 74, 77 (Ariz. 1941) (citation omitted); *see also Hall v. Montaleone*, 348 N.E.2d 196, 198 (Ill. App. Ct. 1976) ("[E]ven as to the borrower, for whose benefit the statute was enacted, a usurious contract is not void but only voidable."). As a further example, Idaho imposes no licensing requirements and provides no penalty for usury. *See, e.g., Carter v. Warde Capital Corp.*, 838 P.2d 327, 329 (Idaho Ct. App. 1992) (acknowledging "the repeal of the usury statute in 1983").

(emphasis added). Plaintiff did not even attempt to argue any UDAAP violation under any independent ***federal*** laws, policies or rules. Indeed, it avoided that argument because usury limits are expressly outside Bureau authority. *See* 12 U.S.C. § 5517(o).

The infringement on the states is particularly marked here because the CFPA authorizes state attorneys general to bring actions under the CFPA. *See* 12 U.S.C. § 5552(a)(1). If a UDAAP violation can be predicated solely upon a violation of state law (such that the federal violation does not lie but for the state violation), state enforcement officials would not be limited by their own state laws because they could simply invoke the federal UDAAP law. For example, the CFPA contains its own statute of limitations and remedial provisions—provisions that would substantially, and in some cases dramatically, change the terms of liability and exposure for state-law conduct.[24]

[24] The CFPA provides that "no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g)(1). Some states have shorter statutes of limitations. *See, e.g.*, Ohio Rev. Code Ann. § 1345.07(E) (two years after violation); Va. Code Ann. § 6.2-305(A) (two years after earlier of date of last scheduled loan payment or date of payment of loan in full). Likewise, the CFPA authorizes penalties of up to $1,000,000 per day, which is exponentially bigger than the penalties authorized under state law for the same conduct. *Compare* 12 U.S.C. § 5565(c)(2)(C) (authorizing fines up to $1,000,000 per day), *with, e.g.*, Ark. Code § 4-88-113(a)(3) (authorizing fines up to $10,000 per violation), and N.Y. Gen. Bus. Law § 350-d (authorizing fines up to $5,000 per violation).

Plaintiff is also displacing the public policy of the states by allowing the CFPB to effectively overrule the states' enforcement of their own laws. As demonstrated by this case, some states have enforced their own laws against Defendants, and some states have exercised their prosecutorial discretion, legal interpretation, or policy preference to not bring any action against Defendants. Again, if Congress intended Plaintiff to enforce state law, it was required to say so explicitly. *See Bond II*, 572 U.S. at 864-65 ("[W]e have traditionally viewed the exercise of state officials' prosecutorial discretion as a valuable feature of our constitutional system.") (citation omitted); *see also Archie v. City of Racine*, 847 F.2d 1211, 1218 (7th Cir. 1988) ("[A] rule created by the states should be enforced by the states."); *Commonwealth v. Mayfield*, 2006 WL 2092584, at *1 (E.D. Pa. July 25, 2006) ("One of the defining ingredients of the sovereignty of the several states is that each state has the prerogative, and the corresponding responsibility, of enforcing its own laws, criminal and civil, in its own courts.").

C. The District Court Erred in Applying a True Lender Test That Looked Past the Documents of the Loan Transactions

The District Court erred by concluding that the choice of law provision in the Loan Agreements, providing that CRST usury law applied, was unenforceable based on its determination that CashCall, not Western Sky, was the "true lender" in the agreements, despite the undisputed fact that Western Sky was the party to the

Loan Agreements. ER213:6, 8. Admittedly based on no binding precedent, the District Court adopted an "economic substance" test that would effectively rock the lending markets in this country. ER213:7. Other courts have adopted the traditional approach, which would have precluded the District Court's grant of summary judgment to the government on liability.

For example, in *Sawyer v. Bill Me Later, Inc.*, the plaintiff alleged that the defendant should be deemed the "true lender" because the state-chartered bank originating the loan assigned the credit to the defendant. 23 F. Supp. 3d 1359, 1367 (D. Utah 2014). The court, on a motion to dismiss, accepted plaintiff's claim that this was "an obvious effort to circumvent state usury laws," but nevertheless rejected plaintiff's attempt to cast the defendant as the "true lender." *Id*. In so holding, the court considered several factors, including that the bank-originator was named as the creditor in the loan agreements, disbursed the funds, and held the loans for at least two days before selling them—essentially the same fact pattern here. *Id*. at 1369.

The *Sawyer* court also distinguished *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190 (N.D. Cal. 2012), one of the cases relied upon by the District Court (ER213:7), recognizing that *Ubaldi* was only the denial of a motion to dismiss and did not hold that the originating bank was not the true lender. *Sawyer*, 23 F. Supp. 3d at 1369. Other courts have explicitly rejected the notion that courts should look

beyond the face of the transaction to determine whether state usury laws should apply. *See Beechum v. Navient Sols., Inc.*, 2016 WL 5340454, at *7-8 (C.D. Cal. Sept. 20, 2016) (holding that under California law, "the Court must look only to the face of a transaction when assessing whether it falls under a statutory exemption from the usury prohibition and not look to the intent of the parties") (citations omitted); *Hudson v. Ace Cash Express, Inc.*, 2002 WL 1205060, at *3-4, *6 (S.D. Ind. May 30, 2002) (holding the identity of the legal lender should not be based on the "subjective purpose of those engaged in the transaction" and that adoption of such a "true lender" test would lead to "uncertain and unpredictable" results).

As the right to sell or assign a loan is common in lending agreements, the "economic substance" test would disrupt lending markets and undermine the secondary loan market. SER105-06. Tellingly, the United States itself has argued against holding that a valid loan originated by a bank could be rendered invalid by assignment to a non-bank. *See* Brief for the United States as Amicus Curiae, *Midland Funding, LLC v. Madden*, 136 S. Ct. 2505 (2016) (No. 15-610), 2016 WL 2997343, at *8. The Solicitor General defended the "long-established 'valid-when-made' rule" that "if the interest-rate term in a bank's original loan agreement was nonusurious, the loan does not become usurious upon assignment, and so the assignee may lawfully charge interest at the original rate." *Id*. It explained that the

principle underpins the broader right of banks to issue loans and "sell those loans to others"—and ensure the assignee can charge interest at the original rate, even if the bank "retained no control over (or financial stake in)" the assignee's "efforts to collect" the debt. *See id*. at *11-12; *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 148-49 (5th Cir. 1981) ("The non-usurious character of a note should not change when the note changes hands.").

D. The District Court Erred in Finding Reddam Individually Liable under the CFPA

On Plaintiff's motion for summary judgment, the District Court erred in finding Reddam individually liable by (a) misinterpreting and incorrectly applying the test articulated in *Gordon*, and (b) failing to take the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See* ER213:14-15.

The test outlined in *Gordon* posits three scenarios in which an individual may have the requisite knowledge to be held individually liable for corporate conduct under the CFPA: (a) the individual had "knowledge of the misrepresentations"; (b) the individual was "recklessly indifferent to the truth or falsity of the misrepresentation"; or (c) the individual "was aware of a high probability of fraud" and intentionally avoided the truth. 819 F.3d at 1193. Courts interpreting and applying this test in the FTC Act context have held that it is for

determining an individual's *mens rea* with regard to the alleged deceptive conduct. *See F.T.C. v. Grant Connect, LLC*, 763 F.3d 1094, 1101-02 (9th Cir. 2014) ("[T]he FTC must also show that the individual 'had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct.'") (citations omitted); *Zamani*, 2011 WL 2222065, at *14 (holding the FTC failed to show a CEO "had the *mens rea* required for restitutionary liability").

Thus, the "relevant inquiry" is "what did the individual know when making the claims at issue?" *Garvey*, 383 F.3d at 901. Such an inquiry necessarily requires the court to consider an individual's good faith belief at the time of making the alleged corporate misrepresentations. *See F.T.C. v. Medicor LLC*, 2001 WL 765628, at *3 (C.D. Cal. June 26, 2001) (denying motion to strike good faith defenses "[b]ecause good faith is relevant to determine whether to issue a permanent injunction and whether to hold Defendants individually liable"); *see also F.T.C. v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 320 (S.D.N.Y. 2008) ("good-faith belief in the truth of a representation . . . may be relevant"). This is because the inquiry at hand is what did the individual *know*.

The District Court, however, ignored what Reddam actually had in his head by refusing to consider uncontroverted evidence that Reddam believed the Western Sky loans were enforceable, based on legal opinions he received from counsel

confirming their legal validity.[25] SER238-41(¶¶109-12); ER213:15; *supra* pp. 3-7. In doing so, the District Court committed reversible error.

The District Court cited *Grant Connect* for the proposition that "[r]eliance on advice of counsel is not a valid defense on the question of knowledge." ER213:15 (alteration in original). In *Grant Connect*, the Court pointed to the defendant's prior troubles with the FTC for deceptively marketed products, the defendant's declared understanding and knowledge of the "'[language on the deceptive landing pages],'" and recruitment of personnel involved in his prior deceptive marketing schemes in affirming the lower court's finding of knowledge or reckless indifference sufficient for individual liability. *See* 763 F.3d at 1102 (alteration in original) (citation omitted). In that context, the Court rejected the defendant's attempt to excuse his knowledge through an advice of counsel defense, holding that "'reliance on advice of counsel [is] not a valid defense on the question of knowledge' required for individual liability." *Id.* (alteration in original) (citation omitted). Reddam, however, did not raise "reliance on advice of counsel" as a *defense* to his individual liability, but rather as evidence that he lacked any

[25] *See* SER232(¶21) ("In March of 2009, Callaway recommended that CashCall purchase loans made by a tribal lender, stating that loans originated by a tribal lender would not be subject to state licensing or usury laws or federal laws."), SER233(¶22) ("In early 2009, Callaway introduced Baren to Martin A. 'Butch' Webb and encouraged CashCall to enter into a business relationship with a lending entity owned by Webb.").

"knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct." *Id*. at 1101 (citations omitted). That is, it was the advice of counsel that informed his knowledge, and his retention of and reasonable reliance on counsel that precluded any finding that he was recklessly indifferent.

In *Jerman v. Carlisle*, which the District Court also cited, the Supreme Court noted that Congress can incorporate a mistake-of-law defense to civil liability into a statute, and cited as an example the FTC Act's administrative-penalty provisions—which apply only when a debt collector acts with "'actual knowledge or knowledge fairly implied on the basis of objective circumstances' that its action was 'prohibited by the [FDCPA].'" 559 U.S. 573, 583-84 (2010) (alteration in original) (citation omitted). In *Jerman*, the Supreme Court interpreted Section 813(c) of the FDCPA, 15 U.S.C. § 1692k(c), which provides that a debt collector is not liable in an action brought under the FDCPA if he or she can show "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 559 U.S. at 576 (citing 15 U.S.C. § 1692k(c)). In that context, the Supreme Court found that this narrow *exception* to liability did not encompass mistake of law. *Id*. at 625. In this case, however, individual liability is not presumed, but rather must be deduced from facts showing either actual knowledge, reckless indifference to the truth or falsity of a statement, or awareness of a high probability of fraud.

Grant Connect, LLC, 763 F.3d at 1102. In that regard, Reddam presented evidence of advice of counsel to show that he did not have the requisite knowledge or reckless indifference to any corporate misrepresentations. *See Med. Billers*, 543 F. Supp. 2d at 320 ("Because of the knowledge requirement for individual liability, a defendant's good-faith belief in the truth of a representation, . . . may be relevant to whether that defendant can be held individually liable for these misrepresentations.").

In addition, the District Court misapplied the test setting forth the knowledge requirement for individual liability by focusing on Reddam's alleged awareness of facts pertaining to the structure of the Western Sky loan program, facts which were only relevant to the court's erroneous *legal* conclusion that CashCall, and not Western Sky, was the true lender. ER213:6-8, 15; *see supra* pp. 62-65. Reddam could be held individually liable for a knowing misrepresentation only if Reddam knew or was recklessly indifferent to the possibility that (a) CashCall was the true lender and (b) the District Court would invalidate the choice of law provision applying a choice of law analysis. *See Furnace v. Sullivan, Co.*, 705 F.3d 1021, 1026 (9th Cir. 2013) ("Summary judgment is appropriate only if, taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.") (citation omitted).

CONCLUSION

Defendants respectfully request that the Court affirm the District Court's denial of the Plaintiff's claim for restitution and award of the Tier One monetary penalty of $10,283,886.

In the alternative, Defendants request the Court (a) reverse the District Court's denial of Defendants' Motion for Judgment on the Pleadings and Defendants' Motion for Summary Judgment, and remand for an order dismissing the Complaint, and (b) reverse the District Court's grant of Plaintiff's Motion for Partial Summary Judgment.

DATED: December 19, 2018 LATHAM & WATKINS LLP

By: s/ *Thomas J. Nolan*
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 18-55407 & 18-55479

The undersigned attorney or self-represented party states the following:

- (●) I am unaware of any related cases currently pending in this court.
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 18-55407 & 18-55479

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This brief contains 16,418 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
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Nos. 18-55407 & 18-55479

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff/Appellant/Cross-Appellee,

v.

CASHCALL, INC., WS FUNDING, LLC, DELBERT SERVICES CORPORATION, AND J. PAUL REDDAM,
Defendants/Appellees/Cross-Appellants.

On Appeal and Cross-Appeal from the United States District Court
for the Central District of California (Hon. John F. Walter)

DEFENDANTS/APPELLEES/CROSS-APPELLANTS' ADDENDUM TO COMBINED RESPONSE BRIEF AND PRINCIPAL CROSS-APPEAL BRIEF

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STATUTORY ADDENDUM

In accordance with Ninth Circuit Rule 28-2.7, except for the following provisions, all pertinent statutes are contained in the Opening Brief of Appellant/Cross-Appellee CFPB, Dkt. 20.

United States Code Annotated
Title 12. Banks and Banking
Chapter 53. Wall Street Reform and Consumer Protection

12 U.S.C.A. § 5302

§ 5302. Severability

Effective: July 22, 2010
Currentness

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

CREDIT(S)

(Pub.L. 111-203, § 3, July 21, 2010, 124 Stat. 1390.)

12 U.S.C.A. § 5302, 12 USCA § 5302
Current through P.L. 115-231. Also includes P.L. 115-233 to 115-281. Title 26 current through P.L. 115-309.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

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

12 U.S.C.A. § 5511

§ 5511. Purpose, objectives, and functions

Effective: July 21, 2010
Currentness

(a) Purpose

The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.

(b) Objectives

The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services--

(1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions;

(2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;

(3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;

(4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and

(5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

(c) Functions

The primary functions of the Bureau are--

(1) conducting financial education programs;

(2) collecting, investigating, and responding to consumer complaints;

(3) collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets;

(4) subject to sections 5514 through 5516 of this title, supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law;

(5) issuing rules, orders, and guidance implementing Federal consumer financial law; and

(6) performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.

CREDIT(S)

(Pub.L. 111-203, Title X, § 1021, July 21, 2010, 124 Stat. 1979.)

12 U.S.C.A. § 5511, 12 USCA § 5511
Current through P.L. 115-231. Also includes P.L. 115-233 to 115-277 and 115-279. Title 26 current through P.L. 115-279.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

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

12 U.S.C.A. § 5517

§ 5517. Limitations on authorities of the Bureau; preservation of authorities

Effective: December 19, 2014
Currentness

(a) Exclusion for merchants, retailers, and other sellers of nonfinancial goods or services

(1) Sale or brokerage of nonfinancial good or service

The Bureau may not exercise any rulemaking, supervisory, enforcement or other authority under this title with respect to a person who is a merchant, retailer, or seller of any nonfinancial good or service and is engaged in the sale or brokerage of such nonfinancial good or service, except to the extent that such person is engaged in offering or providing any consumer financial product or service, or is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.

(2) Offering or provision of certain consumer financial products or services in connection with the sale or brokerage of nonfinancial good or service

(A) In general

Except as provided in subparagraph (B), and subject to subparagraph (C), the Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority under this title with respect to a merchant, retailer, or seller of nonfinancial goods or services, but only to the extent that such person--

(i) extends credit directly to a consumer, in a case in which the good or service being provided is not itself a consumer financial product or service (other than credit described in this subparagraph), exclusively for the purpose of enabling that consumer to purchase such nonfinancial good or service directly from the merchant, retailer, or seller;

(ii) directly, or through an agreement with another person, collects debt arising from credit extended as described in clause (i); or

(iii) sells or conveys debt described in clause (i) that is delinquent or otherwise in default.

(B) Applicability

Subparagraph (A) does not apply to any credit transaction or collection of debt, other than as described in subparagraph (C)(i), arising from a transaction described in subparagraph (A)--

(i) in which the merchant, retailer, or seller of nonfinancial goods or services assigns, sells or otherwise conveys to another person such debt owed by the consumer (except for a sale of debt that is delinquent or otherwise in default, as described in subparagraph (A)(iii));

(ii) in which the credit extended significantly exceeds the market value of the nonfinancial good or service provided, or the Bureau otherwise finds that the sale of the nonfinancial good or service is done as a subterfuge, so as to evade or circumvent the provisions of this title, or

(iii) in which the merchant, retailer, or seller of nonfinancial goods or services regularly extends credit and the credit is subject to a finance charge.

(C) Limitations

(i) In general

Notwithstanding subparagraph (B), subparagraph (A) shall apply with respect to a merchant, retailer, or seller of nonfinancial goods or services that is not engaged significantly in offering or providing consumer financial products or services.

(ii) Exception

Subparagraph (A) and clause (i) of this subparagraph do not apply to any merchant, retailer, or seller of nonfinancial goods or services--

(I) if such merchant, retailer, or seller of nonfinancial goods or services is engaged in a transaction described in subparagraph (B)(i) or (B)(ii); or

(II) to the extent that such merchant, retailer, or seller is subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H, but the Bureau may exercise such authority only with respect to that law.

(D) Rules

(i) Authority of other agencies

No provision of this title shall be construed as modifying, limiting, or superseding the supervisory or enforcement authority of the Federal Trade Commission or any other agency (other than the Bureau) with respect to credit extended, or the collection of debt arising from such extension, directly by a merchant or retailer to a consumer exclusively for the purpose of enabling that consumer to purchase nonfinancial goods or services directly from the merchant or retailer.

(ii) Small businesses

A merchant, retailer, or seller of nonfinancial goods or services that would otherwise be subject to the authority of the Bureau solely by virtue of the application of subparagraph (B)(iii) shall be deemed not to be engaged significantly in offering or providing consumer financial products or services under subparagraph (C)(i), if such person--

(I) only extends credit for the sale of nonfinancial goods or services, as described in subparagraph (A)(i);

(II) retains such credit on its own accounts (except to sell or convey such debt that is delinquent or otherwise in default); and

(III) meets the relevant industry size threshold to be a small business concern, based on annual receipts, pursuant to section 3 of the Small Business Act (15 U.S.C. 632) and the implementing rules thereunder.

(iii) Initial year

A merchant, retailer, or seller of nonfinancial goods or services shall be deemed to meet the relevant industry size threshold described in clause (ii)(III) during the first year of operations of that business concern if, during that year, the receipts of that business concern reasonably are expected to meet that size threshold.

(iv) Other standards for small business

With respect to a merchant, retailer, or seller of nonfinancial goods or services that is a classified on a basis other than annual receipts for the purposes of section 3 of the Small Business Act (15 U.S.C. 632) and the implementing rules thereunder, such merchant, retailer, or seller shall be deemed to meet the relevant industry size threshold described in clause (ii)(III) if such merchant, retailer, or seller meets the relevant industry size threshold to be a small business concern based on the number of employees, or other such applicable measure, established under that Act.

(E) Exception from State enforcement

To the extent that the Bureau may not exercise authority under this subsection with respect to a merchant, retailer, or seller of nonfinancial goods or services, no action by a State attorney general or State regulator with respect to a claim made under this title may be brought under subsection 5552(a) of this title, with respect to an activity described in any of clauses (i) through (iii) of subparagraph (A) by such merchant, retailer, or seller of nonfinancial goods or services.

(b) Exclusion for real estate brokerage activities

(1) Real estate brokerage activities excluded

Without limiting subsection (a), and except as permitted in paragraph (2), the Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority under this title with respect to a person that is licensed or registered as a real estate broker or real estate agent, in accordance with State law, to the extent that such person--

(A) acts as a real estate agent or broker for a buyer, seller, lessor, or lessee of real property;

(B) brings together parties interested in the sale, purchase, lease, rental, or exchange of real property;

(C) negotiates, on behalf of any party, any portion of a contract relating to the sale, purchase, lease, rental, or exchange of real property (other than in connection with the provision of financing with respect to any such transaction); or

(D) offers to engage in any activity, or act in any capacity, described in subparagraph (A), (B), or (C).

(2) Description of activities

The Bureau may exercise rulemaking, supervisory, enforcement, or other authority under this title with respect to a person described in paragraph (1) when such person is--

(A) engaged in an activity of offering or providing any consumer financial product or service, except that the Bureau may exercise such authority only with respect to that activity; or

(B) otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H, but the Bureau may exercise such authority only with respect to that law.

(c) Exclusion for manufactured home retailers and modular home retailers

(1) In general

The Director may not exercise any rulemaking, supervisory, enforcement, or other authority over a person to the extent that--

(A) such person is not described in paragraph (2); and

(B) such person--

(i) acts as an agent or broker for a buyer or seller of a manufactured home or a modular home;

(ii) facilitates the purchase by a consumer of a manufactured home or modular home, by negotiating the purchase price or terms of the sales contract (other than providing financing with respect to such transaction); or

(iii) offers to engage in any activity described in clause (i) or (ii).

(2) Description of activities

A person is described in this paragraph to the extent that such person is engaged in the offering or provision of any consumer financial product or service or is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.

(3) Definitions

For purposes of this subsection, the following definitions shall apply:

(A) Manufactured home

The term "manufactured home" has the same meaning as in section 5402 of Title 42.

(B) Modular home

The term "modular home" means a house built in a factory in 2 or more modules that meet the State or local building codes where the house will be located, and where such modules are transported to the building site, installed on foundations, and completed.

(d) Exclusion for accountants and tax preparers

(1) In general

Except as permitted in paragraph (2), the Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority over--

(A) any person that is a certified public accountant, permitted to practice as a certified public accounting firm, or certified or licensed for such purpose by a State, or any individual who is employed by or holds an ownership interest with respect to a person described in this subparagraph, when such person is performing or offering to perform--

(i) customary and usual accounting activities, including the provision of accounting, tax, advisory, or other services that are subject to the regulatory authority of a State board of accountancy or a Federal authority; or

(ii) other services that are incidental to such customary and usual accounting activities, to the extent that such incidental services are not offered or provided--

(I) by the person separate and apart from such customary and usual accounting activities; or

(II) to consumers who are not receiving such customary and usual accounting activities; or

(B) any person, other than a person described in subparagraph (A) [1] that performs income tax preparation activities for consumers.

(2) Description of activities

(A) In general

Paragraph (1) shall not apply to any person described in paragraph (1)(A) or (1)(B) to the extent that such person is engaged in any activity which is not a customary and usual accounting activity described in paragraph (1)(A) or incidental thereto but which is the offering or provision of any consumer financial product or service, except to the extent that a person described in paragraph (1)(A) is engaged in an activity which is a customary and usual accounting activity described in paragraph (1)(A), or incidental thereto.

(B) Not a customary and usual accounting activity

For purposes of this subsection, extending or brokering credit is not a customary and usual accounting activity, or incidental thereto.

(C) Rule of construction

For purposes of subparagraphs (A) and (B), a person described in paragraph (1)(A) shall not be deemed to be extending credit, if such person is only extending credit directly to a consumer, exclusively for the purpose of enabling such consumer to purchase services described in clause (i) or (ii) of paragraph (1)(A) directly from such person, and such credit is--

(i) not subject to a finance charge; and

(ii) not payable by written agreement in more than 4 installments.

(D) Other limitations

Paragraph (1) does not apply to any person described in paragraph (1)(A) or (1)(B) that is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.

(e) Exclusion for practice of law

(1) In general

Except as provided under paragraph (2), the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law.

(2) Rule of construction

Paragraph (1) shall not be construed so as to limit the exercise by the Bureau of any supervisory, enforcement, or other authority regarding the offering or provision of a consumer financial product or service described in any subparagraph of section 5481(5) of this title--

(A) that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship; or

(B) that is otherwise offered or provided by the attorney in question with respect to any consumer who is not receiving legal advice or services from the attorney in connection with such financial product or service.

(3) Existing authority

Paragraph (1) shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H.

(f) Exclusion for persons regulated by a State insurance regulator

(1) In general

No provision of this title shall be construed as altering, amending, or affecting the authority of any State insurance regulator to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by a State insurance regulator. Except as provided in paragraph (2), the Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by a State insurance regulator.

(2) Description of activities

Paragraph (1) does not apply to any person described in such paragraph to the extent that such person is engaged in the offering or provision of any consumer financial product or service or is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.

(3) State insurance authority under Gramm-Leach-Bliley

Notwithstanding paragraph (2), the Bureau shall not exercise any authorities that are granted a State insurance authority under section 6805(a)(6) of Title 15 with respect to a person regulated by a State insurance authority.

(g) Exclusion for employee benefit and compensation plans and certain other arrangements under Title 26

(1) Preservation of authority of other agencies

No provision of this title shall be construed as altering, amending, or affecting the authority of the Secretary of the Treasury, the Secretary of Labor, or the Commissioner of Internal Revenue to adopt regulations, initiate enforcement proceedings, or take any actions with respect to any specified plan or arrangement.

(2) Activities not constituting the offering or provision of any consumer financial product or service

For purposes of this title, a person shall not be treated as having engaged in the offering or provision of any consumer financial product or service solely because such person is--

(A) a specified plan or arrangement;

(B) engaged in the activity of establishing or maintaining, for the benefit of employees of such person (or for members of an employee organization), any specified plan or arrangement; or

(C) engaged in the activity of establishing or maintaining a qualified tuition program under section 529(b)(1) of Title 26 offered by a State or other prepaid tuition program offered by a State.

(3) Limitation on Bureau authority

(A) In general

Except as provided under subparagraphs (B) and (C), the Bureau may not exercise any rulemaking or enforcement authority with respect to products or services that relate to any specified plan or arrangement.

(B) Bureau action pursuant to agency request

(i) Agency request

The Secretary and the Secretary of Labor may jointly issue a written request to the Bureau regarding implementation of appropriate consumer protection standards under this title with respect to the provision of services relating to any specified plan or arrangement.

(ii) Agency response

In response to a request by the Bureau, the Secretary and the Secretary of Labor shall jointly issue a written response, not later than 90 days after receipt of such request, to grant or deny the request of the Bureau regarding implementation of appropriate consumer protection standards under this title with respect to the provision of services relating to any specified plan or arrangement.

(iii) Scope of Bureau action

Subject to a request or response pursuant to clause (i) or clause (ii) by the agencies made under this subparagraph, the Bureau may exercise rulemaking authority, and may act to enforce a rule prescribed pursuant to such request or response, in accordance with the provisions of this title. A request or response made by the Secretary and the Secretary of Labor under this subparagraph shall describe the basis for, and scope of, appropriate consumer protection standards to be implemented under this title with respect to the provision of services relating to any specified plan or arrangement.

(C) Description of products or services

To the extent that a person engaged in providing products or services relating to any specified plan or arrangement is subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H, subparagraph (A) shall not apply with respect to that law.

(4) Specified plan or arrangement

For purposes of this subsection, the term "specified plan or arrangement" means any plan, account, or arrangement described in section 220, 223, 401(a), 403(a), 403(b), 408, 408A, 529, 529A, or 530 of Title 26, or any employee benefit or compensation plan or arrangement, including a plan that is subject to Title I of the Employee Retirement Income Security Act of 1974, or any prepaid tuition program offered by a State.

(h) Persons regulated by a State securities commission

(1) In general

No provision of this title shall be construed as altering, amending, or affecting the authority of any securities commission (or any agency or office performing like functions) of any State to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by any securities commission (or any agency or office performing like functions) of any State. Except as permitted in paragraph (2) and subsection (f), the Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by any securities commission (or any agency or office performing like functions) of any State, but only to the extent that the person acts in such regulated capacity.

(2) Description of activities

Paragraph (1) shall not apply to any person to the extent such person is engaged in the offering or provision of any consumer financial product or service, or is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.

(i) Exclusion for persons regulated by the Commission

(1) In general

No provision of this title may be construed as altering, amending, or affecting the authority of the Commission to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by the Commission. The Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by the Commission.

(2) Consultation and coordination

Notwithstanding paragraph (1), the Commission shall consult and coordinate, where feasible, with the Bureau with respect to any rule (including any advance notice of proposed rulemaking) regarding an investment product or service that is the same type of product as, or that competes directly with, a consumer financial product or service that is subject to the jurisdiction of the Bureau under this title or under any other law. In carrying out this paragraph, the agencies shall negotiate an agreement to establish procedures for such coordination, including procedures for providing advance notice to the Bureau when the Commission is initiating a rulemaking.

(j) Exclusion for persons regulated by the Commodity Futures Trading Commission

(1) In general

No provision of this title shall be construed as altering, amending, or affecting the authority of the Commodity Futures Trading Commission to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by the Commodity Futures Trading Commission. The Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by the Commodity Futures Trading Commission.

(2) Consultation and coordination

Notwithstanding paragraph (1), the Commodity Futures Trading Commission shall consult and coordinate with the Bureau with respect to any rule (including any advance notice of proposed rulemaking) regarding a product or service that is the same type of product as, or that competes directly with, a consumer financial product or service that is subject to the jurisdiction of the Bureau under this title or under any other law.

(k) Exclusion for persons regulated by the Farm Credit Administration

(1) In general

No provision of this title shall be construed as altering, amending, or affecting the authority of the Farm Credit Administration to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by the Farm Credit Administration. The Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by the Farm Credit Administration.

(2) Definition

For purposes of this subsection, the term "person regulated by the Farm Credit Administration" means any Farm Credit System institution that is chartered and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.).

(l) Exclusion for activities relating to charitable contributions

(1) In general

The Director and the Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority, including authority to order penalties, over any activities related to the solicitation or making of voluntary contributions to a tax-exempt organization as recognized by the Internal Revenue Service, by any agent, volunteer, or representative of such organizations to the extent the organization, agent, volunteer, or representative thereof is soliciting or providing advice, information, education, or instruction to any donor or potential donor relating to a contribution to the organization.

(2) Limitation

The exclusion in paragraph (1) does not apply to other activities not described in paragraph (1) that are the offering or provision of any consumer financial product or service, or are otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.

(m) Insurance

The Bureau may not define as a financial product or service, by regulation or otherwise, engaging in the business of insurance.

(n) Limited authority of the Bureau

Notwithstanding subsections (a) through (h) and (l), a person subject to or described in one or more of such provisions--

(1) may be a service provider; and

(2) may be subject to requests from, or requirements imposed by, the Bureau regarding information in order to carry out the responsibilities and functions of the Bureau and in accordance with section 5512, 5562, or 5563 of this title.

(o) No authority to impose usury limit

No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.

(p) Attorney General

No provision of this title, including section 5514(c)(1) of this title, shall affect the authorities of the Attorney General under otherwise applicable provisions of law.

(q) Secretary of the Treasury

No provision of this title shall affect the authorities of the Secretary, including with respect to prescribing rules, initiating enforcement proceedings, or taking other actions with respect to a person that performs income tax preparation activities for consumers.

(r) Deposit insurance and share insurance

Nothing in this title shall affect the authority of the Corporation under the Federal Deposit Insurance Act or the National Credit Union Administration Board under the Federal Credit Union Act as to matters related to deposit insurance and share insurance, respectively.

(s) Fair Housing Act

No provision of this title shall be construed as affecting any authority arising under the Fair Housing Act.

CREDIT(S)

(Pub.L. 111-203, Title X, § 1027, July 21, 2010, 124 Stat. 1995; Pub.L. 113-295, Div. B, Title I, § 102(e)(7), Dec. 19, 2014, 128 Stat. 4062.)

Footnotes

1 So in original. Probably should be followed by a comma.

12 U.S.C.A. § 5517, 12 USCA § 5517

Current through P.L. 115-231. Also includes P.L. 115-233 to 115-277 and 115-279. Title 26 current through P.L. 115-279.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

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

12 U.S.C.A. § 5531

§ 5531. Prohibiting unfair, deceptive, or abusive acts or practices

Effective: July 21, 2010
Currentness

(a) In general

The Bureau may take any action authorized under part E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

(b) Rulemaking

The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.

(c) Unfairness

(1) In general

The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that--

(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and

(B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

(2) Consideration of public policies

In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

(d) Abusive

The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice--

(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

(2) takes unreasonable advantage of--

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

(e) Consultation

In prescribing rules under this section, the Bureau shall consult with the Federal banking agencies, or other Federal agencies, as appropriate, concerning the consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies.

(f) Consideration of seasonal income

The rules of the Bureau under this section shall provide, with respect to an extension of credit secured by residential real estate or a dwelling, if documented income of the borrower, including income from a small business, is a repayment source for an extension of credit secured by residential real estate or a dwelling, the creditor may consider the seasonality and irregularity of such income in the underwriting of and scheduling of payments for such credit.

CREDIT(S)

(Pub.L. 111-203, Title X, § 1031, July 21, 2010, 124 Stat. 2005.)

12 U.S.C.A. § 5531, 12 USCA § 5531
Current through P.L. 115-231. Also includes P.L. 115-233 to 115-277 and 115-279. Title 26 current through P.L. 115-279.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

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

12 U.S.C.A. § 5551

§ 5551. Relation to State law

Effective: July 21, 2010
Currentness

(a) In general

(1) Rule of construction

This title, other than sections 1044 through 1048, may not be construed as annulling, altering, or affecting, or exempting any person subject to the provisions of this title from complying with, the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title, and then only to the extent of the inconsistency.

(2) Greater protection under State law

For purposes of this subsection, a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title. A determination regarding whether a statute, regulation, order, or interpretation in effect in any State is inconsistent with the provisions of this title may be made by the Bureau on its own motion or in response to a nonfrivolous petition initiated by any interested person.

(b) Relation to other provisions of enumerated consumer laws that relate to State law

No provision of this title, except as provided in section 1083, shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the application of a law in effect in any State with respect to such Federal law.

(c) Additional consumer protection regulations in response to State action

(1) Notice of proposed rule required

The Bureau shall issue a notice of proposed rulemaking whenever a majority of the States has enacted a resolution in support of the establishment or modification of a consumer protection regulation by the Bureau.

(2) Bureau considerations required for issuance of final regulation

Before prescribing a final regulation based upon a notice issued pursuant to paragraph (1), the Bureau shall take into account whether--

(A) the proposed regulation would afford greater protection to consumers than any existing regulation;

(B) the intended benefits of the proposed regulation for consumers would outweigh any increased costs or inconveniences for consumers, and would not discriminate unfairly against any category or class of consumers; and

(C) a Federal banking agency has advised that the proposed regulation is likely to present an unacceptable safety and soundness risk to insured depository institutions.

(3) Explanation of considerations

The Bureau--

(A) shall include a discussion of the considerations required in paragraph (2) in the Federal Register notice of a final regulation prescribed pursuant to this subsection; and

(B) whenever the Bureau determines not to prescribe a final regulation, shall publish an explanation of such determination in the Federal Register, and provide a copy of such explanation to each State that enacted a resolution in support of the proposed regulation, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives.

(4) Reservation of authority

No provision of this subsection shall be construed as limiting or restricting the authority of the Bureau to enhance consumer protection standards established pursuant to this title in response to its own motion or in response to a request by any other interested person.

(5) Rule of construction

No provision of this subsection shall be construed as exempting the Bureau from complying with subchapter II of chapter 5 of Title 5.

(6) Definition

For purposes of this subsection, the term "consumer protection regulation" means a regulation that the Bureau is authorized to prescribe under the Federal consumer financial laws.

CREDIT(S)

(Pub.L. 111-203, Title X, § 1041, July 21, 2010, 124 Stat. 2011.)

12 U.S.C.A. § 5551, 12 USCA § 5551
Current through P.L. 115-231. Also includes P.L. 115-233 to 115-277 and 115-279. Title 26 current through P.L. 115-279.

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Proposed Legislation

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

12 U.S.C.A. § 5552

§ 5552. Preservation of enforcement powers of States

Effective: July 21, 2010
Currentness

(a) In general

(1) Action by State

Except as provided in paragraph (2), the attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State in any district court of the United States in that State or in State court that is located in that State and that has jurisdiction over the defendant, to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law. A State regulator may bring a civil action or other appropriate proceeding to enforce the provisions of this title or regulations issued under this title with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law (except as provided in paragraph (2)), and to secure remedies under provisions of this title or remedies otherwise provided under other provisions of law with respect to such an entity.

(2) Action by State against national bank or Federal savings association to enforce rules

(A) In general

Except as permitted under subparagraph (B), the attorney general (or equivalent thereof) of any State may not bring a civil action in the name of such State against a national bank or Federal savings association to enforce a provision of this title.

(B) Enforcement of rules permitted

The attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State against a national bank or Federal savings association in any district court of the United States in the State or in State court that is located in that State and that has jurisdiction over the defendant to enforce a regulation prescribed by the Bureau under a provision of this title and to secure remedies under provisions of this title or remedies otherwise provided under other law.

(3) Rule of construction

No provision of this title shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the authority of a State attorney general or State regulator to enforce such Federal law.

(b) Consultation required

(1) Notice

(A) In general

Before initiating any action in a court or other administrative or regulatory proceeding against any covered person as authorized by subsection (a) to enforce any provision of this title, including any regulation prescribed by the Bureau under this title, a State attorney general or State regulator shall timely provide a copy of the complete complaint to be filed and written notice describing such action or proceeding to the Bureau and the prudential regulator, if any, or the designee thereof.

(B) Emergency action

If prior notice is not practicable, the State attorney general or State regulator shall provide a copy of the complete complaint and the notice to the Bureau and the prudential regulator, if any, immediately upon instituting the action or proceeding.

(C) Contents of notice

The notification required under this paragraph shall, at a minimum, describe--

(i) the identity of the parties;

(ii) the alleged facts underlying the proceeding; and

(iii) whether there may be a need to coordinate the prosecution of the proceeding so as not to interfere with any action, including any rulemaking, undertaken by the Bureau, a prudential regulator, or another Federal agency.

(2) Bureau response

In any action described in paragraph (1), the Bureau may--

(A) intervene in the action as a party;

(B) upon intervening--

(i) remove the action to the appropriate United States district court, if the action was not originally brought there; and

(ii) be heard on all matters arising in the action; and

(C) appeal any order or judgment, to the same extent as any other party in the proceeding may.

(c) Regulations

The Bureau shall prescribe regulations to implement the requirements of this section and, from time to time, provide guidance in order to further coordinate actions with the State attorneys general and other regulators.

(d) Preservation of State authority

(1) State claims

No provision of this section shall be construed as altering, limiting, or affecting the authority of a State attorney general or any other regulatory or enforcement agency or authority to bring an action or other regulatory proceeding arising solely under the law in effect in that State.

(2) State securities regulators

No provision of this title shall be construed as altering, limiting, or affecting the authority of a State securities commission (or any agency or office performing like functions) under State law to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or authority.

(3) State insurance regulators

No provision of this title shall be construed as altering, limiting, or affecting the authority of a State insurance commission or State insurance regulator under State law to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or regulator.

CREDIT(S)

(Pub.L. 111-203, Title X, § 1042, July 21, 2010, 124 Stat. 2012.)

12 U.S.C.A. § 5552, 12 USCA § 5552
Current through P.L. 115-231. Also includes P.L. 115-233 to 115-277 and 115-279. Title 26 current through P.L. 115-279.

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Proposed Legislation

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

12 U.S.C.A. § 5564

§ 5564. Litigation authority

Effective: July 21, 2010
Currentness

(a) In general

If any person violates a Federal consumer financial law, the Bureau may, subject to sections 5514, 5515, and 5516 of this title, commence a civil action against such person to impose a civil penalty or to seek all appropriate legal and equitable relief including a permanent or temporary injunction as permitted by law.

(b) Representation

The Bureau may act in its own name and through its own attorneys in enforcing any provision of this title, rules thereunder, or any other law or regulation, or in any action, suit, or proceeding to which the Bureau is a party.

(c) Compromise of actions

The Bureau may compromise or settle any action if such compromise is approved by the court.

(d) Notice to the Attorney General

(1) In general

When commencing a civil action under Federal consumer financial law, or any rule thereunder, the Bureau shall notify the Attorney General and, with respect to a civil action against an insured depository institution or insured credit union, the appropriate prudential regulator.

(2) Notice and coordination

(A) Notice of other actions

In addition to any notice required under paragraph (1), the Bureau shall notify the Attorney General concerning any action, suit, or proceeding to which the Bureau is a party, except an action, suit, or proceeding that involves the offering or provision of consumer financial products or services.

(B) Coordination

In order to avoid conflicts and promote consistency regarding litigation of matters under Federal law, the Attorney General and the Bureau shall consult regarding the coordination of investigations and proceedings, including by negotiating an agreement for coordination by not later than 180 days after the designated transfer date. The agreement under this subparagraph shall include provisions to ensure that parallel investigations and proceedings involving the Federal consumer financial laws are conducted in a manner that avoids conflicts and does not impede the ability of the Attorney General to prosecute violations of Federal criminal laws.

(C) Rule of construction

Nothing in this paragraph shall be construed to limit the authority of the Bureau under this title, including the authority to interpret Federal consumer financial law.

(e) Appearance before the Supreme Court

The Bureau may represent itself in its own name before the Supreme Court of the United States, provided that the Bureau makes a written request to the Attorney General within the 10-day period which begins on the date of entry of the judgment which would permit any party to file a petition for writ of certiorari, and the Attorney General concurs with such request or fails to take action within 60 days of the request of the Bureau.

(f) Forum

Any civil action brought under this title may be brought in a United States district court or in any court of competent jurisdiction of a state in a district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to enjoin such person and to require compliance with any Federal consumer financial law.

(g) Time for bringing action

(1) In general

Except as otherwise permitted by law or equity, no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates.

(2) Limitations under other Federal laws

(A) In general

An action arising under this title does not include claims arising solely under enumerated consumer laws.

(B) Bureau authority

In any action arising solely under an enumerated consumer law, the Bureau may commence, defend, or intervene in the action in accordance with the requirements of that provision of law, as applicable.

(C) Transferred authority

In any action arising solely under laws for which authorities were transferred under subtitles F and H, the Bureau may commence, defend, or intervene in the action in accordance with the requirements of that provision of law, as applicable.

CREDIT(S)

(Pub.L. 111-203, Title X, § 1054, July 21, 2010, 124 Stat. 2028.)

12 U.S.C.A. § 5564, 12 USCA § 5564
Current through P.L. 115-231. Also includes P.L. 115-233 to 115-277 and 115-279. Title 26 current through P.L. 115-279.

End of Document

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate court's CM/ECF system.

DATED: December 19, 2018 LATHAM & WATKINS LLP

By: s/ *Thomas J. Nolan*
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