No. _____

In the
Supreme Court of the United States

CASHCALL, INC.; WS FUNDING, LLC;
DELBERT SERVICES CORP.; J. PAUL REDDAM,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has held that equitable restitution can be awarded without a jury but is capped at "a defendant's net profits," *Liu v. SEC*, 591 U.S. 71, 87 (2020), whereas legal relief may exceed net profits but triggers the right to a jury trial, *SEC v. Jarkesy*, 603 U.S. 109, 122-25 (2024). Despite that clear dichotomy, the Ninth Circuit holds that claims for "legal" restitution in excess of net profits do *not* "trigger[] the right to a jury trial." App.7. That aberrant rule, which the district court here invoked to impose $134 million in "restitution" for a loan program that *lost* money, "dilutes the jury trial right" and "puts [the Ninth Circuit] at odds with" this Court and circuits that faithfully follow its precedents. App.19, 27 (Nelson, J., concurring). The court of appeals' effort to sidestep this clear conflict by deeming petitioners to have "waived" their jury-trial rights "during the initial district court proceedings," App.2, only makes matters worse, as it flouts this Court's teachings and implicates another circuit split. Most circuits sensibly hold that a party cannot waive a right that is foreclosed by clear circuit precedent. But the court here held that petitioners waived jury-trial rights that do not exist in the Ninth Circuit—and, by so holding, managed to preserve that erroneous and rights-denying precedent.

The questions presented are:

1. Whether a claim for legal restitution triggers the Seventh Amendment right to a jury trial.

2. Whether a litigant may validly waive a constitutional right at a time when binding circuit precedent clearly forecloses any exercise of that right.

PARTIES TO THE PROCEEDING

Petitioners are CashCall, Inc., WS Funding, LLC, Delbert Services Corp., and J. Paul Reddam. They were defendants-appellants below.

Respondent, the Consumer Financial Protection Bureau, was plaintiff-appellee below.

CORPORATE DISCLOSURE STATEMENT

CashCall, Inc., and Delbert Services Corporation have no parent corporation and no publicly held corporation owns 10% or more of their stock.

WS Funding, LLC, 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.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. 23-55259 (9th Cir.), judgment entered January 3, 2025, amended opinion issued and rehearing denied April 24, 2025.
- *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, Nos. 18-55407, 18-55479 (9th Cir.), judgment entered May 23, 2022.
- *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. 15-cv-7522 (C.D. Cal.), original judgment entered January 26, 2018 (subsequently reversed by the Ninth Circuit); amended judgment entered February 21, 2023.

Petitioners are not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

The framers left no doubt about the importance of the jury-trial right, complaining about its absence in the Declaration of Independence and ensuring its presence in the Bill of Rights. The Ninth Circuit needs a reminder.

Consistent with the framers' vision, this Court has long cautioned that "any seeming curtailment of the right" to a jury trial "should be scrutinized with the utmost care." *SEC v. Jarkesy*, 603 U.S. 109, 121 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). The decision below cannot begin to withstand that scrutiny. By perpetuating the Ninth Circuit's own confusion about the nature of restitution, the decision below upheld a nine-figure award of legal restitution—an award nine figures larger than equity would allow—imposed without a jury trial. In the process, the court not only vindicated a massive bait-and-switch by the Consumer Financial Protection Bureau ("CFPB"), but devalued a fundamental constitutional guarantee, all while entrenching two circuit splits. The case for certiorari could hardly be clearer.

Under this Court's caselaw, a claim for monetary relief (whether labeled disgorgement, restitution, or otherwise) falls on the legal side of the law/equity divide and triggers "the Seventh Amendment right to jury trial" if it seeks an amount "in excess of a defendant's net profits from wrongdoing." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-17 (2002); *Liu v. SEC*, 591 U.S. 71, 85 (2020). That is the law of the land—except in the Ninth Circuit, which holds that "no form of restitution triggers the right to

a jury trial." App.7. Under Ninth Circuit caselaw, labels trump constitutional guarantees, and claims for restitution *never* implicate the right to a jury trial, even if a plaintiff seeks far more than the defendant's ill-gotten gains. In line with that aberrant view, the Ninth Circuit allowed CFPB to recover $134 million in restitution from petitioners, who *actually lost millions* on the loan program at issue, without having to prove its case to a jury.

The panel below could not bring itself to actually defend the Ninth Circuit's no-jury-trial-for-anything-labeled-restitution rule or reconcile it with *Liu* or bedrock Seventh Amendment principles. Instead, it tried to avoid reconciling Ninth Circuit law with this Court's teachings by manufacturing an antecedent waiver issue, essentially blaming petitioners for not invoking a jury-trial right plainly foreclosed by circuit law. But that dodge succeeded only in deepening a separate circuit split. Most circuits hold that "a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made." *E.g.*, *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135-36 (2d Cir. 2014). The Fifth and Eleventh Circuits have expressly rejected that rule, holding that a party can validly waive a constitutional right even if the right was unavailable at the time of the purported waiver. The decision below adopts the latter approach, holding that petitioners waived their right to a jury trial at a time when, under circuit law, *they had no such right*. According to the Ninth Circuit, petitioners "made an express, knowing, and voluntary waiver of [their] right to trial by jury" during the initial district-court proceedings, when Ninth Circuit law was crystal clear

that the relief CFPB sought—which CFPB expressly described as "equitable" at the time—did not confer a jury-trial right on petitioners. App.8.

Nothing about the decision below is consistent with this Court's caselaw or first principles. The net effect of the Ninth Circuit's two errors was to leave in place a longstanding circuit rule that wrongly eliminates Seventh Amendment rights, while blaming petitioners for not invoking their Seventh Amendment rights in the face of that longstanding circuit rule. This Court should grant review, resolve two firmly entrenched circuit splits, and reverse.

OPINIONS BELOW

The Ninth Circuit's opinion, as amended upon denial of rehearing, 135 F.4th 683, is reproduced at App.1-29. The district court's opinion on remand, 2023 WL 2009938, is reproduced at App.30-51. The Ninth Circuit's first opinion, 35 F.4th 734, is reproduced at App.52-82. The district court's first opinion, 2018 WL 485963, is reproduced at App.83-124.

JURISDICTION

The court of appeals issued its amended opinion and denied petitioners' timely petition for rehearing on April 24, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment is reproduced at App.127. Relevant provisions of the Consumer Financial Protection Act are reproduced at App.127-128.

STATEMENT OF THE CASE

A. Legal Background

1. Since the earliest days of our Republic, the right to a jury trial has served as a bedrock protection for civil litigants. The Framers enshrined this protection in the Seventh Amendment, which provides that "the right of trial by jury shall be preserved" in "Suits at common law." U.S. Const. amend. VII. And, "[s]ince Justice Story's time," this Court has understood the Seventh Amendment to apply in all "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830)).

It is not always obvious whether a given claim or remedy falls on legal or equitable side of the line, and that is particularly true when it comes to restitution. In the 1980s and 1990s, a handful of this Court's decisions characterized "restitution" as an "equitable" remedy. *See, e.g.*, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993); *Teamsters v. Terry*, 494 U.S. 558, 570 (1990); *Tull v. United States*, 481 U.S. 412, 424 (1987). Upon closer scrutiny, however, this Court concluded in *Great-West* that restitution has historically been "available in certain cases at law, and in certain others in equity." 534 U.S. at 212. The Court explained that whether restitution "is legal or equitable in a particular case … depend[s] on the nature of the relief sought." *Id.* at 215. If an award of restitution "restore[s] to the plaintiff particular funds or property in the defendant's possession," which "belong[] in good

conscience to the plaintiff," it is equitable; in contrast, if it "impos[es] a merely personal liability upon the defendant to pay a sum of money," it is legal. *Id.* at 213-14. The Court further explained that the distinction between equitable and legal restitution mirrors the test for whether a particular remedy implicates "the Seventh Amendment right to jury trial." *Id.* at 217.

2. In March 2016—more than a decade after *Great-West*—the Ninth Circuit resolved an appeal involving violations of a provision of the Federal Trade Commission Act that "prohibits unfair or deceptive business practices." *FTC v. Com. Planet, Inc.*, 815 F.3d 593, 597 (9th Cir. 2016), *abrogated on other grounds by AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67 (2021). The defendant there argued that the district court had awarded "what amounts to 'legal' restitution" and thus "the Seventh Amendment afforded him the right to have his case tried to a jury." *Id.* at 602. The Ninth Circuit disagreed. Citing Justice Ginsburg's dissent in *Great-West* (but not the majority opinion), the Ninth Circuit averred in *Commerce Planet* that this Court "has consistently stated that restitution is an equitable remedy for Seventh Amendment purposes, without drawing any distinction between the legal and equitable forms of that relief." *Id.* Even though *Great-West* instructed courts to draw that very distinction, the Ninth Circuit maintained that *all* restitution—even when "imposed as a merely personal liability upon the defendant"—is "an equitable [remedy] for Seventh Amendment purposes and thus confers no right to a jury trial." *Id.*

Shortly after deciding *Commerce Planet*, the Ninth Circuit resolved another case, this time involving provisions of the Consumer Financial Protection Act ("CFPA") that similarly prohibit "unfair and deceptive practices." *CFPB v. Gordon*, 819 F.3d 1179, 1186 (9th Cir. 2016). Following a bench trial, the district court awarded "an equitable monetary judgment" of $11.4 million, which represented all funds that the defendant and his associate had collected from consumers through their scheme. *Id.* In rejecting the bulk of the defendant's objections, the Ninth Circuit held that equitable restitution "may be measured by the 'full amount lost by consumers rather than [being limited] to a defendant's profits." *Id.* at 1195.

In 2020, this Court corrected that erroneous view of federal courts' equitable authority, reversing a Ninth Circuit decision awarding "disgorgement" in an amount that failed to account for the defendants' business expenses. *See Liu*, 591 U.S. at 78-87. The Court explained that "scholars and courts" have "us[ed] various labels" for equitable monetary relief, including "disgorgement," "an accounting," and "restitution." *Id.* at 79. It proceeded to hold that "longstanding principles of equity" prohibit courts from awarding equitable monetary relief that exceeds a defendant's "net profits from wrongdoing after deducting legitimate expenses." *Id.* at 84-85, 87.

B. Factual Background

The present litigation arises from a short-lived, unprofitable lending program that netted defendants zero profits (but resulted in $33 million in civil fines no longer at issue, App.51). CashCall, Inc.,

established the program in 2009 through a partnership with a Native American-owned business called Western Sky Financial, LLC. Western Sky agreed to originate loans from a Sioux reservation, and CashCall purchased and serviced the loans. Petitioners—CashCall; two of its affiliates; and its President and CEO, J. Paul Reddam—relied on legal advice that "the loans would be made under the laws of the tribe and would not have to comply with licensing and usury laws in states where borrowers resided." App.90; *see also* App.107 (petitioners were repeatedly advised by their then-counsel "that the Tribal Lending Model was defensible").

In 2010, the Western Sky program kicked off. It offered loans ranging from $700 to $10,000, geared toward borrowers with steady income but relatively low credit scores and limited or no access to traditional sources of credit. App.89-90, 93. The loans were unsecured and charged only simple interest; there were no prepayment penalties; and borrowers were encouraged to repay their loans early. App.93-98. Although the loans carried high interest rates (to balance the anticipated high rates of default), the default rate exceeded expectations; in fact, approximately 10% of borrowers never made a single repayment of principal. D.Ct.Dkt.316 at 317:7-318:10. In addition, CashCall had numerous business expenses, including the cost of financing paid to third parties who provided the capital for the loans, the expenses to service the loans, and overhead costs. *See* D.Ct.Dkt.271 ¶¶24-29. All told, CashCall lost nearly $30 million on the program, which stopped making loans by September 2013. D.Ct.Dkt.271 ¶31; App.108.

C. Procedural History

1. On December 16, 2013, respondent CFPB initiated a federal enforcement action against petitioners on the theory that Western Sky loans to consumers in 16 states were "unfair, deceptive, or abusive" within the meaning of the CFPA, 12 U.S.C. §5536(a)(1)(B), because they (allegedly) were invalid under state law. In their answer, petitioners timely demanded a jury trial. App.126.

In August 2016, the district court awarded CFPB partial summary judgment as to liability. *CFPB v. CashCall, Inc.*, 2016 WL 4820635, at *9-11 & n.8 (C.D. Cal. Aug. 31, 2016). The court imposed individual liability on Mr. Reddam because he owned and led CashCall and its affiliates. *Id.* at *11-12.

On September 7, 2016, the district court held a pretrial hearing during which it asked what remedies CFPB sought and whether they conferred a "right to a jury trial." D.Ct.Dkt.217 at 11:10-19. Government counsel responded that CFPB intended to "seek restitution of interest and fees," describing this as "an equitable remedy" that "would be the Court's … to decide." App.8. That response correctly stated Ninth Circuit law under *Gordon* and *Commerce Planet*, which together foreclosed any argument that this relief implicated the Seventh Amendment. *See* pp.5-6, *supra*. Given that reality, petitioners agreed to proceed with a bench trial. App.8-9.

On January 19, 2018, the district court issued an order denying CFPB's request for restitution. It found restitution not "appropriate" because petitioners reasonably relied on the advice of counsel in structuring the program and did not "act[] in bad faith,

resort[] to trickery or deception," or commit "fraud." App.116. Alternatively, the court held that CFPB failed to prove that the $235 million sum it requested reasonably approximated CashCall's unjust gains. App.117-18. The court denied CFPB's request for injunctive relief, but imposed a civil penalty of $10.28 million. App.124.

2. Both sides appealed. While the cross-appeals were pending, this Court decided *Liu*, which held that, *contra Gordon*, equitable monetary remedies must be limited to the alleged wrongdoer's "net profits … after deducting legitimate expenses." *Liu*, 591 U.S. at 84. Shortly thereafter, petitioners filed a supplemental brief explaining that *Liu* foreclosed CFBP's effort to obtain "equitable" restitution in the amount of all interest and fees paid by consumers—a proposition for which the agency had previously cited *Gordon*. *See* CA9.No.18-55407, Dkt.74 at 18-20. In response, CFPB argued that *Liu* was inapplicable because—contrary to the agency's explicit representations in district court—its request for "restitution" of all interest and fees paid by consumers was "best characterized as legal rather than equitable," and thus was not limited to net profits. CA9.No.18-55407, Dkt.77 at 18 n.6. Following CFPB's about-face, petitioners argued that CFPB had "forfeited the right to seek anything other than an equitable remedy" because, by describing the relief as "equitable," CFPB had obtained "a bench trial rather than a jury trial, which would be required on a legal remedy." CA9.No.18-55407, Tr. of Oral. Arg. at 18:11-38.

On May 23, 2022, the Ninth Circuit issued a decision vacating the district court's denial of

restitution because it rested on legally irrelevant considerations, ordered a heightened civil penalty, and remanded for further proceedings. App.52-82. The court declined to address "whether [CFPB] … waived a claim to legal restitution or how, if at all, *Liu* might limit equitable restitution," leaving those issues for the district court. App.79.

3. On remand, the parties joined issue over whether, post-*Liu*, CFPB could reframe its request for monetary relief as "legal" rather than equitable. Petitioners again argued that if the district court were to enter a "legal" restitution award that "exceed[ed]" their (non-existent) "net profits," it would "necessarily … implicate[] [their] Seventh Amendment rights" and require a jury trial. D.Ct.Dkt.352 at 7:5-7.

The district court disagreed, holding that the Ninth Circuit's *Commerce Planet* decision dictates that *no* form of restitution triggers the jury-trial right. The court recognized that petitioners had "relied on the CFPB's characterization of the restitution as equitable in proceeding with a bench trial rather than a jury trial." App.46. But it concluded that the legal/equitable characterization did not matter because, under the law of the Ninth Circuit, "an action seeking restitution (whether characterized as legal or equitable) does not trigger the right to a jury trial." App.46. The court suggested that this Court may need to review whether *Commerce Planet*'s Seventh Amendment holding is correct, but deemed itself "bound" to follow it. App.46. The court proceeded to impose a $134-million "legal" restitution award, plus a $33-million civil penalty. App.47, 51.

4. Petitioners appealed the restitution award but not the civil penalty. At oral argument, Judge Nelson aptly described the $134-million restitution award—for a program that netted a $30-million *loss*—as "shocking." CA9.No.23-55259, Tr. of Oral.Arg. at 17:35-37. He added: "When we decided this case two years ago, I never in a million years would have thought that this would come back with a $134 million restitution award." *Id.* at 17:25-35.

The Ninth Circuit nonetheless affirmed. While the court acknowledged *Commerce Planet* as a "precedent" that stands for the proposition that "no form of restitution triggers the right to a jury trial," App.7, it did not rest on the district court's holding. Instead, the court "assum[ed]"—*contra Commerce Planet*—"that [petitioners] had a Seventh Amendment right to a jury trial," but held that petitioners (somehow) "waived that right during the initial district court proceedings," App.2, 7, when they *plainly had no such right* under binding circuit law. Judge Nelson wrote a concurrence arguing that "*Commerce Planet* was wrong the day it was decided," "dilutes the jury trial right," and should be repudiated "root and branch." App.19, 28.

5. Petitioners timely sought en banc rehearing. On April 24, 2025, the Ninth Circuit denied rehearing but issued an amended opinion deleting an erroneous statement that a "second bench trial" was held on remand. App.1-2; *cf. CFPB v. CashCall, Inc.*, 124 F.4th 1209, 1217 (9th Cir.) (original opinion).

REASONS FOR GRANTING THE PETITION

The decision below perpetuates an indefensible abridgement of Seventh Amendment rights by

adopting the head-scratching position that litigants may "knowingly" waive a constitutional right at a time when the only thing they could have known was that the right was categorically unavailable in the Ninth Circuit. Under entrenched Ninth Circuit precedent, "restitution" awards—even those seeking relief well in excess of net profits and therefore available only at law—do not trigger the Seventh Amendment, full stop. App.7. "[B]ound" by this (errant) precedent, the district court held that petitioners were "not … entitled to a jury trial" on CFPB's claim for $134 million in "legal" restitution, even though that amount exceeded the equitable relief allowed by *Liu* by some $134 million. App.46. That holding is flatly inconsistent with this Court's precedents, which limit equitable restitution to net profits and guarantee a jury trial when the government pursues a larger amount as "legal" restitution.

Yet the Ninth Circuit neither denied the glaring conflict with this Court's caselaw nor did anything to explain it away or ameliorate it. Instead, the Ninth Circuit sidestepped any need to reconcile its precedent with this Court's teachings and instead affirmed the district court's decision and $134-million award by faulting petitioners for waiving a Seventh Amendment right that to this very day Ninth Circuit precedent forecloses. That result is not only Kafkaesque and radically underprotective of the fundamental jury-trial right, but contravenes a separate line of this Court's cases, under which any "effective waiver of a constitutional right" must involve "a *known* right." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (emphasis added) (quoting *Johnson v.*

Zerbst, 304 U.S. 458, 464 (1938)). As this Court has explained, it makes scant sense to find "a *knowing* waiver" of a constitutional right at a time when "there was strong precedent" foreclosing any exercise of that right. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 142-45 (1967) (four-Justice plurality); *accord id.* at 172 (two-Justice concurrence in no-waiver holding). But that is exactly what the Ninth Circuit did here.

The decision below is wrong on both questions presented, and it implicates two separate circuit splits—each of which warrants this Court's review. First, the Ninth Circuit's position that "no form of restitution triggers the right to a jury trial," App.7, directly conflicts with decisions from the Second, Fifth, and Eleventh Circuits, which faithfully follow this Court's teachings on the Seventh Amendment. That position is so squarely foreclosed by this Court's precedents that the panel did not even deign to defend it. Second, the Ninth Circuit's waiver holding implicates another recognized split. At least seven circuits have held that a party cannot waive rights that were not known to be available at the time they could have been asserted, because, for example, the right was foreclosed by circuit precedent. On the other side, the Fifth and Eleventh Circuits have repeatedly held, as the Ninth Circuit did here, that a party *does* waive a constitutional right under these circumstances.

The Ninth Circuit's two errors reinforce each other. Indeed, their net effect is to leave in place circuit precedent that forecloses petitioners' Seventh Amendment rights while blaming petitioners for failing to invoke the rights foreclosed by that same

precedent. Moreover, both questions presented are important. As Judge Nelson emphasized in his separate opinion, the Ninth Circuit's anomalous view that legal restitution does not trigger the Seventh Amendment "dilutes the jury trial right," App.19—a fundamental right this Court has jealously guarded since the Founding. It also provides an easy way to circumvent *Liu* in agency enforcement actions, as it empowers courts to grant monetary awards that far exceed their equitable power while rejecting jury demands. Adding insult to injury, the Ninth Circuit's waiver holding will unfairly deprive litigants of constitutional rights they never had any option to exercise, while simultaneously encouraging litigants to wastefully advance arguments that are squarely foreclosed by binding precedent. This Court should grant review, resolve both circuit splits in one fell swoop, and restore petitioners' (and other similarly situated parties') fundamental rights.

I. The Ninth Circuit's Rule That "No Form of Restitution Triggers The Right To A Jury Trial" Is Plainly Incorrect And Conflicts With Decisions From Multiple Circuits.

A. Claims for Legal Restitution Trigger the Constitutional Right to a Jury Trial.

Although the Seventh Amendment by its terms "preserve[s]" "the right of trial by jury" "[i]n Suits at common law," U.S. Const. amend. VII, it is established beyond cavil that the civil-jury-trial right "is not limited to the 'common-law forms of action recognized' when the Seventh Amendment was ratified," *Jarkesy*, 603 U.S. at 122 (quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974)). Rather, "[t]he Seventh Amendment

extends to a particular statutory claim if the claim is 'legal in nature.'" *Id.* (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). To determine the "nature" of a statutory claim, a court must "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity," and "examine the remedy sought and determine whether it is legal or equitable in nature." *Granfinanciera*, 492 U.S. at 42. The second factor—the nature of the remedy sought—is "the 'more important' consideration"; indeed, it often will be "all but dispositive." *Jarkesy*, 603 U.S. at 122-23.

Legal restitution is, as its name suggests, "a 'prototypical common-law remedy.'" App.27 (Nelson, J., concurring) (quoting *Jarkesy*, 603 U.S. at 123)). Just like money damages, legal restitution "impos[es] … personal liability upon the defendant to pay a sum of money." *Great-West*, 534 U.S. at 213. What is more, the test for determining whether a restitution claim is legal or equitable in nature is identical to the test for determining whether a claim triggers the Seventh Amendment. *See id.*; App.22-23 (Nelson, J., concurring). As a result, civil actions seeking *legal* restitution in excess of the defendants' net profits from the alleged wrongdoing are, by definition, "suits 'at common law'" as to which the Seventh Amendment "guarantee[s] a jury trial." App.23 (Nelson, J., concurring).

Except in the Ninth Circuit. Under Ninth Circuit caselaw, *all* restitution is treated as "an equitable remedy for Seventh Amendment purposes." *Com. Planet*, 815 F.3d at 602. "[I]n other words, no form of restitution triggers the right to a jury trial." App.7;

see also App.19 (Nelson, J., concurring) ("[U]nder our precedent … claims for restitution, even when understood as actions at law, never trigger the Seventh Amendment's guarantee").

As Judge Nelson cogently explained, "*Commerce Planet* was wrong the day it was decided." App.19. Years earlier, this Court made clear in *Great-West* "that restitution is 'not an exclusively equitable remedy,'" 534 U.S. at 215, and that there are important "difference[s] between legal and equitable forms of restitution," *id.* at 218. *Great-West* teaches that "the test for whether restitution 'is legal or equitable'" is "the same" as the "test for invoking the Seventh Amendment right." App.22 (Nelson, J., concurring); *see Great-West*, 534 U.S. at 212-13, 217. The Ninth Circuit's rule that even "'legal' restitution" is "an equitable [remedy] for Seventh Amendment purposes and thus confers no right to a jury trial," *Com. Planet*, 815 F.3d at 602, has never been consistent with this Court's precedents.

This Court's more recent decisions eliminate any possible justification for the Ninth Circuit's rule. In *Liu*, this Court held that equitable monetary remedies must be limited to a defendant's "net profits … after deducting legitimate expenses." *Liu*, 591 U.S. at 84. That directly contradicts *Commerce Planet*'s blithe assertion that there is no meaningful "distinction between the legal and equitable forms" of restitution, 815 F.3d at 602. This case well illustrates the point, in that there is a $134-million difference between the relief available to CFPB via equitable restitution and legal restitution. Again, except in the Ninth Circuit.

This Court's decision in *Jarkesy* "is even more instructive." App.26 (Nelson, J., concurring). There, the fact that the plaintiff was seeking "a type of remedy" that historically "could only be enforced in courts of law" "effectively decide[d] that th[e] suit implicates the Seventh Amendment right." *Jarkesy*, 603 U.S. at 125. *Jarkesy* thus confirms that when, as here, the plaintiff seeks "restitution" in an amount in excess of profits that (post-*Liu*) can only be characterized as "legal," the suit triggers the right to a jury trial, full stop. App.26 (Nelson, J., concurring).

Tellingly, no one at any point in this litigation has offered a substantive defense of the Ninth Circuit's still-governing contrary rule. CFPB made no effort in its briefs to reconcile *Commerce Planet*'s "Seventh Amendment holding" with *Great-West* or *Liu*; the agency just argued that the courts below were bound to follow it because it "remains the law of the Circuit." CA9.No.23-55259, Dkt.23 at 29; *accord* D.Ct.Dkt.353 at 6. The district court agreed that it was "bound" by *Commerce Planet*'s holding that even "legal" restitution "does not trigger the right to a jury trial," while observing that this Court "may ultimately need to reconsider [it]." App.46. And the panel took the extraordinary step of "assuming without deciding" that legal restitution *does* trigger the right to a jury trial, App.7—contrary to its own precedent—with Judge Nelson writing separately to urge that *Commerce Planet* should be overruled, *see* App.19-29. In sum, the district judge and all three circuit judges recognized *Commerce Planet*'s Seventh Amendment holding as the current law of the Ninth Circuit, App.7; App.19 (Nelson, J., concurring); App.46, but none of

them made any effort to defend it—presumably because it is indefensible.

B. Ninth Circuit Law Conflicts With Decisions From Multiple Other Circuits.

The Ninth Circuit's position that claims for "legal restitution" that seek amounts in excess of a defendant's net profits do not implicate the Seventh Amendment is not only egregiously wrong, but also in open conflict with decisions from the Second, Fifth, and Eleventh Circuits faithfully applying this Court's precedents.

As Judge Nelson observed, *Commerce Planet* puts the Ninth Circuit squarely "at odds with the Fifth Circuit, which interprets *Great-West* to require a jury trial on statutory claims for legal restitution." App.27. In *United States v. ERR, LLC*, 35 F.4th 405 (5th Cir. 2022), the government sought "restitution" of the amount it had paid to a third party for oil-spill remediation under the Oil Pollution Act. *Id.* at 408-09. The Fifth Circuit analyzed the nature of the restitution sought and determined that it was "akin to restitution *at law*," as the government was not "seeking particular property or funds in the defendant's possession" or trying to recover the defendant's "net profits." *Id.* at 413. Because the test for whether restitution is legal or equitable is "the exact same inquiry Supreme Court precedent requires for the Seventh Amendment," the court's determination that the government was pursuing "restitution at law" meant that the claim "trigger[ed]" the "Seventh Amendment right to a jury." *Id.* at 414.

The Ninth Circuit is also at odds with the Eleventh Circuit. In *AcryliCon USA, LLC v. Silikal*

GmbH, 985 F.3d 1350 (11th Cir. 2021), the plaintiff obtained a jury award of $1.5 million on a breach-of-contract claim, but the court of appeals held that it "failed to prove actual damages from [the defendant's] breach." *Id.* at 1368. The defendant nevertheless argued that the award could be upheld under the rubric of "disgorgement" or "restitution." *Id.* at 1373-74. The Eleventh Circuit rejected that argument, explaining that, even framed as "restitution," the award would still be "legal as opposed to equitable," and "swapping out the jury's actual-damages award for a [*legal*] restitution award" "would run afoul of the Seventh Amendment[]." *Id.* at 1374 & n.45; *accord Hughes v. Priderock Cap. Partners, LLC.*, 812 F.App'x 828, 836 (11th Cir. 2020) (holding that the plaintiff "had a right to a jury trial under the Seventh Amendment" because he sought "restitution in a purely legal sense").

The Second Circuit has similarly recognized that claims for legal restitution implicate the Seventh Amendment, whereas claims for equitable restitution (limited to defendants' net profits) do not. In *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005), for example, the district court denied the defendants' jury demand on the ground that the plaintiff "was seeking the equitable remedy of restitution." *Id.* at 335. The Second Circuit reversed and remanded for a jury trial, holding that the requested "restitution" was actually "legal" in nature (and tantamount to "compensatory damages") because it was measured by the plaintiff's "loss, not [the defendant]'s unjust gain." *Id.* at 340; *accord AMW Materials Testing, Inc. v. Town of Babylon*, 584 F.3d 436, 452 (2d Cir. 2009) (noting that

if a statutory claim for "restitution" is "legal[] in nature," it "entitle[s] [the] plaintiffs to a jury trial").[1]

In sum, as far as petitioners are aware, every court outside the Ninth Circuit to consider the question post-*Liu* (and many pre-*Liu*) has held that claims for restitution seeking more than net profits—like the $134-million award here—trigger the right to a jury trial. There is no realistic chance that the Ninth Circuit rule can withstand the careful scrutiny demanded by this Court of decisions curtailing Seventh Amendment rights. And there is no valid reason to defer that scrutiny or award CFPB one last nine-figure windfall. The Court should grant certiorari and correct the Ninth Circuit's anomalous rule.

II. The Ninth Circuit's Waiver Holding Is Equally Incorrect And Likewise Conflicts With Decisions From Multiple Circuits.

The Ninth Circuit attempted to sidestep this glaring Seventh Amendment issue by holding that petitioners waived a jury-trial right that all agree Ninth Circuit precedent squarely foreclosed. That

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[1] The Ninth Circuit's position also conflicts with district court decisions from the Third and Seventh Circuits. *See, e.g.*, *N.J. Dep't of Env't Prot. v. Amerada Hess Corp.*, 2018 WL 2317534, at *11 (D.N.J. May 22, 2018) (holding that claims "seek[ing] legal restitution" confer "a right to trial by jury under the Seventh Amendment"); *Belfor USA Grp., Inc. v. Chicago's Best, LLC*, 2015 WL 225401, at *9 (W.D. Wis. Jan. 16, 2015) ("Because this form of restitution is a legal remedy, a jury trial is warranted on that claim."); *Underwood v. Kohl's Dep't Stores, Inc.*, 2019 WL 13075589, at *2-3 (E.D. Pa. Feb. 14, 2019) (similar); *Sivolella v. AXA Equitable Funds Mgmt., LLC*, 2013 WL 4096239, at *3 (D.N.J. July 3, 2013) (similar).

holding is equally erroneous and equally worthy of this Court's review.

Relying on this Court's longstanding precedents, multiple circuits hold that a litigant cannot validly waive a constitutional right when binding circuit precedent denied the right at the time of the purported waiver. That view is hard to argue with; after all, it makes no sense to say that a party *knowingly* waives a constitutional right when the only thing the party could reasonably have known is that it enjoyed no such right at the time. Yet two circuits (the Fifth and Eleventh) disagree, and the decision below followed their minority approach in holding that petitioners validly waived their Seventh Amendment rights at a time when Ninth Circuit precedent gave them no rights to waive. This Court should grant certiorari to resolve this circuit split and clarify what is needed for a knowing and valid waiver of a constitutional right.

A. A Party Cannot Validly Waive a Constitutional Right When Binding Precedent Forecloses Its Exercise.

1. This Court has long held that any "effective waiver of a constitutional right" must involve "a *known* right." *Coll. Sav. Bank*, 527 U.S. at 682 (emphasis added) (quoting *Zerbst*, 304 U.S. at 464). As numerous cases recognize, a litigant can hardly be said to have knowingly relinquished a right that he does not even know is available. *See, e.g.*, *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 685 (2015) (whether "express or implied," waivers of constitutional right to Article III adjudicator "must" be "knowing and voluntary"); *Berghuis v. Thompkins*, 560 U.S. 370, 384-85 (2010) (waivers of constitutional

rights are "general[ly]" premised on the litigant having a "full understanding of his or her rights"); *United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987) (due process does not allow courts to accept "waivers of … rights to appeal" that are "not considered or intelligent"); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (defendant may waive Sixth Amendment rights to jury trial and counsel only "if he knows what he is doing and his choice is made with eyes open").

As a corollary of that principle, this Court has repeatedly held that a litigant cannot waive a constitutional right at a time when binding precedent forecloses any exercise of that right. *See, e.g.*, *Leary v. United States*, 395 U.S. 6, 27-28 (1969) (no waiver where "the Court of Appeals … had recently rejected an identical [constitutional] claim"); *Smith v. Yeager*, 393 U.S. 122, 126 (1968) (per curiam) (no waiver "when the right or privilege was of doubtful existence at the time of the supposed waiver"). In *Curtis Publishing*, for example, this Court held that the failure to invoke a constitutional right "prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground." 388 U.S. at 143 (plurality). There, a publisher argued that it had not "knowing[ly] waive[d]" its First Amendment defense to a libel claim by failing to assert it at a time when "there was strong precedent indicating that civil libel actions were immune from general constitutional scrutiny." *Id.* at 143-45. Six Justices agreed that the publisher did not waive his First Amendment rights because it reasonably did not know they were implicated until an intervening decision from this Court made that clear.

See id. at 145 (four-Justice plurality); *accord id.* at 172 n.1 (two-Justice concurrence).

2. The decision below cannot be squared with these precedents. The Ninth Circuit concluded that petitioners waived their Seventh Amendment right back "during the initial district court proceedings," App.2, but those proceedings took place before *Liu* was decided, at a time when Ninth Circuit precedent unequivocally barred petitioners from obtaining a jury trial on CFPB's claim for "restitution in the form of the 'total amount of interest and fees paid' by consumers on [allegedly] invalid loans," App.11.

On September 26, 2016—the date of the supposed waiver—petitioners had no "known right" to a jury trial. To the contrary, any such right was definitively foreclosed six months earlier when the Ninth Circuit held that CFPB could obtain "equitable" restitution for CFPA violations "measured by the 'full amount lost by consumers rather than limiting [the award] to the defendant's profits.'" *Gordon*, 819 F.3d at 1195. That decision foreclosed any argument in the Ninth Circuit that CFPB's claim for restitution against petitioners was actually legal in nature, notwithstanding CFPB's description of it as an "equitable remedy" that "would be the Court's remedy to decide," App.8 (quoting D.Ct.Dkt.217 at 7:20, 11:20-24). Furthermore, even if CFPB's restitution claim *had* been viewed as legal, petitioners still would have no Seventh Amendment right to invoke. One month before deciding *Gordon*, the Ninth Circuit had expressly held that claims for "legal" restitution "confer[] no right to a jury trial." *Com. Planet*, 815 F.3d at 602; *see* Part I, *supra*. Accordingly, when petitioners agreed to proceed with

a bench trial, they had no "known" Seventh Amendment right to waive.

In fact, petitioners did not have a jury-trial right in the Ninth Circuit even when the case was on remand to the district court from June 2022 to April 2023. To be sure, by that point *Liu* had been decided—making clear that equitable restitution is limited to a defendant's net profits—and to avoid that limit CFPB had conveniently reframed its claim under the rubric of "legal" restitution. *See* p.9, *supra*. Petitioners therefore invoked the Seventh Amendment, arguing that if a restitution award "exceed[s] the net-profits standard, it is beyond a court's equitable powers and necessarily … implicates a defendant's Seventh Amendment rights." D.Ct.Dkt.352 at 7:5-7. But to no avail. "[B]ound by" *Commerce Planet*, the district court rejected this argument as futile. App.46. It did not find any previous or contemporaneous waiver of their jury-trial right; it held only that, under Ninth Circuit law even post-*Liu*, they "would not have been entitled to a jury trial" in the first place. App.46.

In sum, throughout *all* the proceedings below, petitioners had no "known right" to a jury trial. Under *Commerce Planet*, they still do not. Accordingly, under this Court's precedents, there could be no effective waiver of that non-existent right.

3. The Ninth Circuit erred in holding otherwise. The court asserted that a waiver is "knowing[]" and "voluntar[y]" so long as the party is aware of the relevant facts, even if it misunderstands how the law applies to those facts. *See* App.10-12. And, according to the panel, petitioners were aware of the relevant *facts*—i.e., that CFPB was seeking "restitution in the

form of the 'total amount of interest and fees paid' by consumers on invalid loans"—but made a "legal error" by failing to perceive that CFPB's request for an award exceeding their net profits "was more properly characterized as legal" (despite CFPB's contemporaneous description of it as an "equitable remedy"). App.10-11.

As of 2016, however, this was not a legal error; petitioners *correctly* believed that Ninth Circuit precedent allowed CFPB to obtain restitution of all interest and fees remedy under the rubric of equitable relief. *See Gordon*, 819 F.3d at 1195. Not until 2020 did "subsequent developments in the law"—specifically, this Court's decision in *Liu*—"reveal[]" that "the [CFPB]'s characterization of the remedy it sought was incorrect." App.9. But, even today, the clarification that CFPB was seeking legal restitution did not entitle petitioners to a jury trial in the Ninth Circuit, which continues to deem the legal/equitable distinction immaterial: Under *current* Ninth Circuit precedent, "no form of restitution triggers the right to a jury trial." App.7 (citing *Com. Planet*, 815 F.3d at 602).

The Ninth Circuit further erred in asserting that CashCall's position is "inconsistent with the settled understanding that a party can waive the right to a jury trial simply by doing nothing." App.11. While the right to a jury trial may be waived (or, perhaps more accurately, forfeited) if not timely asserted, *see* Fed. R. Civ. P. 38, petitioners *did* make a timely jury demand, *see* App.126; p.8, *supra*. They maintained their jury demand for nearly a year, and they promptly invoked the Seventh Amendment shortly after CFPB began

asserting that it was actually seeking a "legal" remedy, despite its initial statements to the contrary. *See* pp.9-10, *supra*. Those facts readily distinguish cases holding "that 'oversight or inadvertence,' including 'a good faith mistake of law,' does not excuse the failure to make a timely jury-trial demand." App.11-12.

The Ninth Circuit's decision also defies the long-settled principle that courts must "indulge every reasonable presumption against waiver" of "fundamental" constitutional rights, including the Seventh Amendment "right of jury trial." *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937); *accord Hodges v. Easton*, 106 U.S. 408, 412 (1882). There is simply no way that petitioners could have known, back in 2016, that they had a right to a jury trial, as then-recent Ninth Circuit precedents expressly allowed "equitable" restitution in amounts far exceeding defendants' net profits and held that *no* form of restitution "confers [the] right to a jury trial." *Com. Planet*, 815 F.3d at 602; *see Gordon*, 819 F.3d at 1195. But even assuming there were ambiguity on that point, this Court's precedents require it to be resolved *against* waiver.

B. The Ninth Circuit's Waiver Holding Implicates a Deep and Entrenched Circuit Split.

The Ninth Circuit's waiver holding not only is profoundly flawed, but also exacerbates a circuit split involving most federal courts of appeals. A majority of the circuits have followed this Court's lead in adopting the rule that "a party cannot be deemed to have waived objections or defenses which were not known

to be available at the time they could first have been made." *E.g.*, *Gucci*, 768 F.3d at 135-36. But the Fifth and Eleventh Circuits have expressly rejected that approach. *See United States v. Ardley*, 273 F.3d 991, 996 (11th Cir. 2001) (Tjoflat, J., dissenting from denial of rehearing en banc) (noting that panel decision "created a circuit split" on this issue); *Martinez v. Texas Dep't of Crim. Just.*, 300 F.3d 567, 574 (5th Cir. 2002) (discussing the split).

1. No less than seven federal courts of appeals have held that a litigant cannot "knowingly waive[] a constitutional right" at a time when "raising the issue would have been futile in light of then-applicable precedent." *United States v. Rogers*, 118 F.3d 466, 471 (6th Cir. 1997); *accord Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004); *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009); *United States v. Chittenden*, 896 F.3d 633, 639-40 (4th Cir. 2018); *Ackerberg v. Johnson*, 892 F.2d 1328, 1333 (8th Cir. 1989); *Gray v. Phillips Petrol. Co.*, 971 F.2d 591, 593 (10th Cir. 1992); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 813 n.9 (D.C. Cir. 1988); *Forshey v. Principi*, 284 F.3d 1335, 1356-57 (Fed. Cir. 2002). These courts have reasoned that it is "illogical" to find that a litigant has "relinquish[ed] … a known right, in a situation in which no right existed," and that such a rule would perversely incentivize litigants "to file motions they knew to be futile." *Ackerberg*, 892 F.2d at 1333.

The Fourth Circuit's decision in *Chittenden* is illustrative. There, the defendant "was convicted of bank fraud and conspiracy to commit bank and mail fraud for her role in a fraudulent mortgage scheme."

896 F.3d at 635. Although she "received only $231,000 in proceeds from these crimes, the district court ordered her to forfeit over $1 million to cover proceeds that her co-conspirators had received and dissipated." *Id.* Following this Court's intervening decision in *Honeycutt v. United States*, which held that forfeiture under a similar statute "is limited to property the defendant himself actually acquired as the result of the crime," 581 U.S. 443, 454 (2017), the defendant argued (on appeal) that she could not be required to "forfeit" her co-conspirators' gains. The government maintained that she had waived this argument, but the Fourth Circuit disagreed, explaining that her "initial concession" on this point "was … reasonable, and even wise" because circuit precedent had previously "foreclosed any [such] argument." *Chittenden*, 896 F.3d at 639-40. Accordingly, the court was unable to "fault her … for relying on [its] precedent and not prophesying *Honeycutt*." *Id.* at 640.

2. On the other side of the split, at least two circuits have expressly held that litigants may validly waive a constitutional right at a time when binding precedent squarely forecloses any exercise of that right. In *United States v. Ardley*, the defendant was convicted of drug crimes and received a sentence that exceeded the statutory maximum. 202 F.3d 287 (11th Cir. 1999) (unpublished table decision). Before his sentence was final, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The defendant promptly raised an *Apprendi*

issue, but the Eleventh Circuit found that he had abandoned it by failing to raise it earlier. *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) (per curiam). Two Eleventh Circuit judges dissented from the denial of rehearing en banc, explaining that *Ardley* "created a circuit split" on whether a litigant may validly waive (or "abandon[]") a constitutional right where invoking the right would have "r[u]n counter to circuit precedent at the time." *United States v. Ardley*, 273 F.3d 991, 996 (11th Cir. 2001) (Tjoflat, J., dissenting from denial of rehearing en banc); *see id.* at 1002-03 (explaining that the Eleventh Circuit's outlier rule "will [also] have deleterious consequences in civil cases").

One year later, in *Martinez*, the Fifth Circuit sided with the Eleventh. The plaintiff in that case sued a state agency, which removed the action to federal court and asserted Eleventh Amendment immunity. *Martinez*, 300 F.3d at 570. While the appeal was pending, this Court held that when a state removes a case to federal court, it waives Eleventh Amendment immunity. *Id.* at 573 (citing *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002)). The Fifth Circuit began by noting the lopsided circuit split on whether "an intervening change in the law, recognizing an issue not previously available," creates an "exception" to otherwise-applicable waiver rules. 300 F.3d at 573-74. It went on to pick the shallow end of the split and side with the Eleventh Circuit, concluding that an intervening decision by this Court provides "no sound reason to depart … from" ordinary rules of waiver. *Id.* at 574-75.

In the years since *Ardley* was decided, the Eleventh Circuit has "repeatedly" reaffirmed it. *See, e.g.*, *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1265-66 (11th Cir. 2013) (Tjoflat, J., dissenting) (collecting cases). In *United States v. Levy*, 379 F.3d 1241 (11th Cir. 2004) (per curiam), for example, the Eleventh Circuit held that a plaintiff waived any "claim that he had a Sixth Amendment right to a jury trial on his federal sentencing enhancements," *id.* at 1242, even though the plaintiffs' claim was "likely" foreclosed by en banc precedent at the time of the supposed waiver, *United States v. Levy*, 391 F.3d 1327, 1332 (11th Cir. 2004) (Hull, J., concurring in denial of rehearing en banc). The court found a valid waiver even though the litigant "was unaware of a Sixth Amendment right to a jury trial on his federal sentencing enhancements" until this Court issued an intervening decision clarifying the scope of that right, and thus had no "known right" at the time of the purported waiver. *Id.* at 1341-42 (Tjoflat, J., dissenting from the denial of rehearing en banc). The Fifth Circuit has likewise reaffirmed its position that a litigant *can* validly "waive[] a right that was unknown at the time of his waiver." *United States v. Barnes*, 953 F.3d 383, 386-87 (5th Cir. 2020); *see also, e.g.*, *United States v. Jones*, 134 F.4th 831, 837-38 (5th Cir. 2025); *Anderson v. Jackson State Univ.*, 675 F.App'x 461, 464 (5th Cir. 2017) (per curiam).

3. Although the Ninth Circuit had previously held that "a defendant cannot be deemed to waive [a] right … if the defendant reasonably did not know [it] was available at the time of the purported waiver," *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1119 (9th Cir. 2022), the decision below is aligned with the Fifth

and Eleventh Circuits' contrary position. Regardless of which side of the split the Ninth Circuit lies, there is an entrenched split that merits this Court's review. That said, the panel's departure from the prior law of the Ninth Circuit on waiver leaves the impression that the waiver finding was less a coherent theory of waiver and more of an excuse to fail to confront the inconsistency of Ninth Circuit precedent with the Seventh Amendment and this Court's precedent. The simple reality is that Ninth Circuit precedent affirmatively told petitioners that they had no Seventh Amendment rights to assert. For the Ninth Circuit to turn around and fault petitioners for failing to raise what the Ninth Circuit itself would deem a futile objection is not a result that should be allowed to stand.

III. The Questions Presented Are Important And Cry Out For This Court's Resolution.

A. Both questions presented implicate substantial legal issues that amply warrant this Court's attention.

1. As the Court recently reaffirmed, "[t]he right to trial by jury is 'of [great] importance,'" occupying a "firm … place in our history and jurisprudence." *Jarkesy*, 603 U.S. at 121 (quoting *Dimick*, 293 U.S. at 486). The Founders cited the English practice of "try[ing] Americans without juries" as one prominent "justification for severing our ties to England." *Id.* at 122. By enacting the Seventh Amendment, "they 'embedded' the [jury-trial] right in the Constitution, securing it 'against the passing demands of expediency or convenience.'" *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 10 (1957) (plurality)). Accordingly, "any seeming curtailment of the right' has always been and 'should

be scrutinized with the utmost care.'" *Id.* at 121 (quoting *Dimick*, 293 U.S. at 486).

That principle calls out for this Court's plenary review. *Commerce Planet* unquestionably "dilutes the jury trial right." App.19 (Nelson, J., concurring). In other circuits, government agencies and other plaintiffs seeking restitution have a clear choice: They may seek equitable restitution, but must content themselves with an award that, under *Liu*, cannot exceed defendant's net profits; or they may seek greater amounts of legal restitution, but they must also be ready to prove their case before a jury. In the Ninth Circuit, however, as things now stand, plaintiffs—including federal agencies such as CFPB and SEC—can have it both ways. They may obtain "restitution" that far exceeds the limits on federal courts' equitable powers while evading protections of the Seventh Amendment. The unfairness of that rule is on full display in this case, where CFPB obtained a nine-figure award over petitioners' repeated objections that it should have had to prove its case to a jury.

2. The waiver question is important in its own right. Litigants need clarity on whether they may take circuit precedent as a given or whether they need to raise Seventh Amendment demands or invoke other constitutional rights in filings that are plainly futile and borderline frivolous under circuit precedent. No one benefits from such a rule, as it creates needless filings and traps for the unwary that threaten the loss of important constitutional rights. But if waiver doctrine really requires such futile filings, litigants should be put on clear notice, and the rules should be

uniform across circuits. Keeping the waiver rules murky allows courts to selectively invoke waiver doctrines to avoid reconciling circuit precedent with more recent teaching from this Court. Again, this is a case in point. No member of the panel could bring himself to defend the Ninth Circuit's all-restitution-evades-Seventh-Amendment-rights rule laid down in *Commerce Planet*. And no member of the panel denied that invoking Seventh Amendment rights would have been futile in the Ninth Circuit because of *Commerce Planet*. Yet *Commerce Planet* remains the law of the Ninth Circuit, and petitioners face the prospect of paying a nine-figure restitution order, based on the slippery status of waiver principles within the Ninth Circuit and nationwide.

B. This case is an ideal case to resolve both issues. The Ninth Circuit held that petitioners waived their Seventh Amendment right at a time at a time when binding precedent unambiguously foreclosed its exercise, expressly rejecting petitioners' argument that this was not—and could not possibly have been—a "knowing" waiver. App.7-13. And while the Ninth Circuit rested on the waiver rationale, the district court held that petitioners were "not … entitled to a jury trial" under *Commerce Planet*, App.46, and the panel recognized *Commerce Planet* as "precedent" under which "no form of restitution triggers the right to a jury trial," App.7; *accord* App.19 (Nelson, J., concurring).

Finally, neither issue would benefit from further percolation. Despite the clear flaws in *Commerce Planet*'s Seventh Amendment holding, the Ninth Circuit is clearly unwilling to reconsider it en banc.

See App.2 (denying reconsideration with no noted dissents). And the Fifth Circuit and Eleventh Circuit are similarly dug in on the waiver issue, as each has reaffirmed its position in recent years. *See* p.30, *supra*. Given the entrenched circuit splits on each issue and the significant ramifications for constitutional rights, this Court should grant certiorari and reverse the Ninth Circuit on both questions presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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September 19, 2025

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55259

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellee,

v.

CASHCALL, INC.; WS FUNDING LLC; DELBERT SERVICES CORPORATION; J. PAUL REDDAM,

Defendants-Appellants.

Argued and Submitted: Mar. 20, 2024
Filed: Jan. 3, 2025
Amended: Apr. 24, 2025

Before: John B. Owens, Ryan D. Nelson, and Eric D. Miller, Circuit Judges.

ORDER AND AMENDED OPINION

ORDER

The opinion filed on January 3, 2025, and published at 124 F.4th 1209, is hereby amended. The amended opinion will be filed concurrently with this order.

The panel voted to deny appellants' petition for rehearing and petition for rehearing en banc. The full

court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petitions for rehearing and rehearing en banc are DENIED. No future petitions for rehearing or rehearing en banc will be entertained.

OPINION

MILLER, Circuit Judge:

CashCall, Inc., a consumer lender, returns to us following our remand to the district court in a prior appeal. *See CFPB v. CashCall, Inc.* (*CashCall I*), 35 F.4th 734 (9th Cir. 2022). Last time, we agreed with the Bureau that CashCall had engaged in an "unfair, deceptive, or abusive act or practice," in violation of 12 U.S.C. § 5536(a)(1)(B), by attempting to collect interest and fees to which it was not legally entitled. 35 F.4th at 743-47. We also held that the district court's order denying restitution rested on a legal error, so we vacated and remanded for further proceedings. *Id.* at 749. On remand, the district court ordered CashCall to pay more than $134 million in legal restitution.

CashCall appeals again. Its primary contention is that the district court's order of legal restitution triggered its Seventh Amendment right to a jury trial. But CashCall waived that right during the initial district court proceedings, in which it voluntarily participated in a bench trial. Because CashCall's other challenges to the district court's order also lack merit, we affirm.

I

CashCall is a California corporation that makes unsecured, high-interest loans to consumers. *See generally CashCall I*, 35 F.4th at 738-40. In an effort to expand its operations to other States while avoiding state usury laws, it set up a lender incorporated under the laws of the Cheyenne River Sioux Tribe. That lender issued loans whose terms included choice-of-law provisions stating that they would be governed by tribal law. CashCall then purchased the loans and collected payments from consumers.

The Bureau believed that CashCall's attempts to collect payments were illegal because the loans—including the choice-of-law provisions—were invalid under state law, so they did not create legally enforceable obligations. In 2013, the Bureau brought an enforcement action against CashCall, its CEO, and several affiliated companies, alleging that CashCall's lending scheme was an "unfair, deceptive, or abusive act or practice," in violation of 12 U.S.C. § 5536(a)(1)(B). CashCall filed an answer to the complaint, in which it demanded a jury trial.

Thereafter, the district court granted partial summary judgment to the Bureau on liability, and, after the parties filed a joint status report stating that they "agreed to waive their right to a jury," the court conducted a bench trial to determine the appropriate remedy. In addition to a civil penalty, the Bureau sought restitution in the amount of the total interest and fees paid on the void loans. The district court imposed a civil penalty of $10.3 million but declined to order restitution. *CashCall I*, 35 F.4th at 738.

Both sides appealed. CashCall contested the finding of liability, and the Bureau argued that the civil penalty should have been larger and that it was entitled to restitution. *CashCall I*, 35 F.4th at 738. While the appeal was pending, the Supreme Court decided *Liu v. SEC*, in which it surveyed principles of equity jurisprudence and explained that "equity practice long authorized courts to strip wrongdoers of their ill-gotten gains" but "restricted the remedy to an individual wrongdoer's net profits." 591 U.S. 71, 79 (2020). In the wake of *Liu*, CashCall argued that because the Bureau had sought equitable restitution, any award of restitution would have to be limited to its net profits. Despite having previously characterized the restitution it sought as equitable, the Bureau responded by asserting that "in substance the restitution that we ... sought here was legal restitution, not equitable restitution."

We affirmed the district court's finding of liability but vacated the civil penalty and remanded with instructions for the district court to impose a higher penalty based on a determination that CashCall had acted recklessly. *CashCall I*, 35 F.4th at 749. We also vacated the denial of restitution, holding that the district court had relied on impermissible considerations in denying restitution. We expressly declined to resolve "whether the Bureau has waived a claim to legal restitution or how, if at all, *Liu* might limit equitable restitution." *Id.* at 750. Instead, we left those issues for the district court to consider on remand. *Id.*

On remand, the parties disputed whether the district court could order legal as opposed to equitable

restitution. As it had argued in this court, the Bureau insisted that "the nature of the restitutionary remedy that [it] has sought throughout this lawsuit is legal" because it sought only the return of "consumer losses, measured by the interest and fees that CashCall had illegally collected." CashCall replied that, based on what the Bureau said during the initial proceedings, the court could award only equitable restitution, and that an award in excess of net profits is "beyond a court's equitable powers and necessarily then implicates a defendant's Seventh Amendment rights." But CashCall did not challenge the validity of the jury-trial waiver that it had made during the initial proceedings before the district court.

The district court determined that the Bureau was not precluded from seeking legal restitution, explaining that whether relief "qualifies as legal or equitable depends not on the [Bureau]'s characterization, but rather on the nature of the underlying remedies sought." The district court reasoned that the Bureau "has continuously sought, what by its nature is, legal restitution." And it concluded that "[b]ecause the Supreme Court's decision in *Liu* did not purport to limit the scope of legal restitution," it was unnecessary to "limit the restitution in this case to net profits."

The district court then applied this court's two-step burden-shifting framework to calculate the restitution award. *CashCall I*, 35 F.4th at 751. Under that framework, the Bureau "bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gains." *Id.* (quoting *CFPB v. Gordon*, 819 F.3d 1179,

1195 (9th Cir. 2016)). If the Bureau makes such a showing, then "the burden shifts to the defendant to demonstrate that the net revenues figure overstates the defendant's unjust gains." *Id.* (quoting *Gordon*, 819 F.3d at 1195).

At step one, the district court concluded that the Bureau had "met its initial burden." After deducting payments CashCall had already made to consumers in state proceedings, the court concluded that CashCall's unjust gains could reasonably be approximated as $197 million. At step two, however, the district court found that CashCall had shown that this figure overstated its unjust gains. The amount of restitution, the court explained, "should not include the interest and fees paid by any consumer who paid CashCall less than that consumer received in principal." After making the necessary adjustments, the district court ordered CashCall to pay more than $134 million in restitution. Because "[r]estitution may be measured by the 'full amount lost by consumers rather than limiting damages to a defendant's profits,'" the court declined to deduct any expenses that CashCall incurred in administering its lending scheme. *CashCall I*, 35 F.4th at 751 (alteration in original) (quoting *Gordon*, 819 F.3d at 1195).

II

The Seventh Amendment guarantees the right to a jury trial "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. "In construing this language," the Supreme Court has "noted that the right is not limited to the 'common-law forms of action recognized' when the Seventh Amendment was ratified." *SEC v.*

Jarkesy, 144 S. Ct. 2117, 2128 (2024) (quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974)). The right to a jury trial "extends to a particular statutory claim if the claim is 'legal in nature,'" considered in light of "the cause of action and the remedy it provides." *Id.* at 2128-29 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). "[T]he remedy [is] the 'more important' consideration." *Id.* at 2129 (quoting *Tull v. United States*, 481 U.S. 412, 421 (1987)); *see also FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 602 (9th Cir. 2016), *abrogated on other grounds by AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67 (2021).

The parties debate whether this case involves legal remedies that are within the scope of the Seventh Amendment guarantee. Our precedent suggests that the answer is no: In *Commerce Planet*, we stated that "restitution is an equitable remedy for Seventh Amendment purposes, without drawing any distinction between the legal and equitable forms of that relief"—in other words, no form of restitution triggers the right to a jury trial. 815 F.3d at 602. But CashCall argues that *Commerce Planet* does not apply outside of its specific statutory context (the Federal Trade Commission Act) and, in any event, that it has been abrogated by more recent decisions of the Supreme Court, including *Liu*. We need not resolve that debate here. Instead, assuming without deciding that CashCall had a Seventh Amendment right to a jury trial, we conclude that it waived that right.

Like other constitutional rights, the Seventh Amendment right can be waived. *United States v. Moore*, 340 U.S. 616, 621 (1951). To be valid, a waiver "must be made knowingly and voluntarily based on

the facts of the case." *Palmer v. Valdez*, 560 F.3d 965, 968 (9th Cir. 2009) (quoting *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 222 (3d Cir. 2007)).

Here, CashCall made an express, knowing, and voluntary waiver of its right to trial by jury. At the pretrial hearing, the Bureau stated that it intended to "seek restitution of interest and fees." The Bureau explained that such an award would be "an equitable remedy that, unless the Court wanted to give it to an advisory jury, ... would be the Court's remedy to decide," adding that, based on the Bureau's "discussion with defense counsel," the parties "would be willing to waive [a] jury for any further proceedings." For its part, CashCall stated that it "generally agree[d] with everything that [the Bureau] has represented to the Court." The district court said, "I don't know and I haven't done the research to know whether or not [CashCall is] entitled to a jury trial," and it requested a joint status report setting out the parties' position on a jury-trial waiver. That joint status report stated, in no uncertain terms, that "[t]he parties have agreed to waive their right to a jury and proceed with a bench trial to determine the appropriate relief, should trial be necessary."

Thereafter, in a supplemental brief, the Bureau again explained the nature of the remedy that it sought: It believed that "[r]estitution of the full amount lost by consumers [was] necessary to achieve complete justice ... because [CashCall's] deceptive conduct caused consumers to pay interest and fees on loans that were legally void." According to the Bureau, that meant that consumers "are all entitled to

restitution based on the total amount of interest and fees paid." CashCall responded by contesting the Bureau's calculation methodology, arguing that the proposed restitution "calculation would create an impermissible windfall for" borrowers who defaulted or paid less in interest and fees than they received in loan funds. Further, CashCall argued that the Bureau was seeking "an equitable monetary award" that did "not account for the expenses incurred by CashCall to run" its lending program— which, in CashCall's view, inappropriately transformed the proposed remedy into a punitive sanction. *See* 12 U.S.C. § 5565(a)(3) (disallowing punitive damages).

At no point before trial did CashCall suggest that it was entitled to a jury trial or seek to withdraw its waiver. The case proceeded to a bench trial, in which CashCall participated without objection.

CashCall does not dispute that it waived its jury trial right but insists that it did so only in reliance on the Bureau's statements that the Bureau was seeking equitable restitution. As subsequent developments in the law have revealed, the Bureau's characterization of the remedy it sought was incorrect.

Restitution may be either legal or equitable, and "whether it is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (alteration in original) (quoting *Reich v. Continental Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994)). In general, "restitution is legal when the plaintiff cannot 'assert title or right to possession of particular property,'" but it "is equitable 'where money or property identified as

belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.'" *CashCall I*, 35 F.4th at 750 (quoting *Great-West Life*, 534 U.S. at 213).

In *Liu*, which was decided during the pendency of the first appeal in this case, the Supreme Court acknowledged that "[e]quity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names." 591 U.S. at 79. But, the Court explained, traditional principles of equity do not permit "an equitable remedy in excess of a defendant's net profits from wrongdoing." *Id.* at 85. Although the Court made that statement in the context of disgorgement, we agree with the Seventh Circuit that "*Liu*'s reasoning is not limited to disgorgement; instead, the opinion purports to set forth a rule applicable to all categories of equitable relief, including restitution." *CFPB v. Consumer First Legal Grp., LLC*, 6 F.4th 694, 710 (7th Cir. 2021).

Liu suggests that the Bureau was incorrect to characterize the restitution it sought as equitable. Instead, because that restitution was not limited to CashCall's net profits and did not seek "to restore to the [consumers] particular funds or property in [CashCall]'s possession," it was more properly characterized as legal. *Great-West Life*, 534 U.S. at 214.

The Bureau's error was perhaps understandable because the Supreme Court had not "previously drawn [a] fine distinction between restitution at law and restitution in equity." *Great-West Life*, 534 U.S. at 214. More importantly, it was a legal error shared by both

parties: CashCall told the district court that it "generally agree[d] with everything" the Bureau had said about the remedy it was seeking—including that it would be "an equitable remedy that ... would be the Court's remedy to decide." And CashCash separately told the district court that it understood the Bureau to be seeking "an equitable monetary award." It made those statements not because it was confused about the *substance* of the relief the Bureau was seeking—restitution in the form of the "total amount of interest and fees paid" by consumers on invalid loans—but because it shared the Bureau's mistaken understanding of the appropriate characterization of that relief. (Of course, it may also have made a strategic judgment that, having been found liable for employing deceptive practices to victimize thousands of consumers, it might fare poorly before a jury.)

CashCall's waiver was valid even if CashCall would not have made it absent the parties' mistaken characterization of the relief the Bureau sought. We have never held that a party's legal error can vitiate its waiver of a jury-trial right, or that a party must demonstrate a correct understanding of the law for its waiver to be effective. Such a rule would be inconsistent with the settled understanding that a party can waive the right to a jury trial simply by doing nothing: Federal Rule of Civil Procedure 38 provides that a party who wants a jury trial must demand one in writing "no later than 14 days after the last pleading directed to the issue is served," and that "[a] party waives a jury trial unless its demand is properly served and filed." Fed. R. Civ. P. 38. Applying that rule, we have held that "'oversight or inadvertence,'" including "a good faith mistake of law,"

does not excuse the failure to make a timely jury-trial demand. *Zivkovic v. Southern Cal. Edison Co.*, 302 F.3d 1080, 1086 (9th Cir. 2002) (quoting *Pacific Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001)). And even after a party complies with Rule 38, its "knowing participation in a bench trial without objection is sufficient to constitute a jury waiver." *Palmer*, 560 F.3d at 968 (quoting *White v. McGinnis*, 903 F.2d 699, 703 (9th Cir. 1990) (en banc)).

CashCall invokes *Connolly v. United States*, in which we held that the defendants were entitled to a new trial after they waived a jury and then, for the first time in closing argument, the government said that it was seeking a statutory penalty. 149 F.2d 666, 668 (9th Cir. 1945). We explained that the defendants "could not waive their right to a jury trial on a law point not in issue." *Id.* at 669. That rule does not help CashCall, which was aware all along of the relief that the Bureau was seeking but simply misunderstood how the Seventh Amendment might apply to it. An effective waiver requires only that a party "knowingly and voluntarily" waive its jury-trial right "based on the *facts* of the case." *Palmer*, 560 F.3d at 968 (emphasis added) (quoting *Tracinda Corp.*, 502 F.3d at 222). CashCall did so here.

After CashCall voluntarily participated in the bench trial, an objection on remand could not have revived its jury right. *See* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2321, at 334 (4th ed. 2020) ("Once the opportunity to demand a jury trial has been waived, the right is not revived by a reversal on appeal or by the grant of a

new trial."). But even on remand—after *Liu* had been decided, after the Bureau reiterated that the relief it sought was the return of "consumer losses, measured by the interest and fees that CashCall had illegally collected," and after the Bureau expressly denied that it "sought equitable relief such as the return of particular funds or property ... or disgorgement of profits, or an accounting for profits"—CashCall still did not demand a jury trial. At oral argument in this appeal, when asked about the position it took on remand, CashCall answered that it had demanded a jury trial "in sort of a back-handed way" by arguing that an award in excess of net profits would implicate its Seventh Amendment rights. That argument was both too little and too late to undo CashCall's waiver.

III

CashCall also contends that the doctrines of judicial estoppel and waiver should have precluded the Bureau from seeking an award of legal restitution. According to CashCall, because the Bureau initially said that it wanted an award of equitable restitution, it is estopped from seeking—or has waived any entitlement to—an award of legal restitution. The district court rejected both theories, and we review its decision for abuse of discretion. *See Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 558 (9th Cir. 2016) (judicial estoppel); *Gordon*, 819 F.3d at 1187 (waiver). We see none.

Judicial estoppel is an equitable doctrine based on the principle that, once a party takes a certain position, it "may not thereafter ... assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by

him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). The Supreme Court has set out three factors to guide courts in applying the doctrine. First, a "party's later position must be 'clearly inconsistent' with its earlier position." *Id.* at 750 (quoting *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999)). Second, the court should consider "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" *Id.* (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)). And third, the court should determine "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751.

None of those factors favors CashCall for the simple reason that the Bureau's position has remained consistent throughout this case. The district court recognized that the Bureau had indeed labeled its preferred remedy as "equitable" throughout the initial proceedings. But it also noted that whether the relief being sought was equitable or legal "depends not on the [Bureau's] characterization, but rather on the nature of the underlying remedies sought." That was correct. The Supreme Court in *Liu* warned against "elevat[ing] form over substance" in distinguishing between legal and equitable remedies. 591 U.S. at 76 n.1 (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214 (2004)). And here, the nature of the remedy is—and always has been—legal restitution: a money

judgment to compensate borrowers for the money that CashCall collected but borrowers did not owe.

For much the same reason, CashCall's waiver argument fails as well. The Bureau has consistently asserted its right to the same remedy. It did not waive the right to seek that remedy simply because it—like CashCall—attached the wrong label to that remedy during the initial proceedings below.

IV

CashCall argues that even if some award of legal restitution was appropriate, the district court overstated CashCall's unjust gains. The basis of its argument is that the district court's award of $134 million does not restore consumers to the status quo because some consumers who received loans did not repay all the principal they received from CashCall. Those unpaid amounts were reflected on CashCall's ledgers as a loss of $93 million—a loss that CashCall insists should be deducted from any award of restitution.

We have stated that restitution awards are reviewed for abuse of discretion, *see CashCall I*, 35 F.4th at 749, but we have not specifically addressed the standard for legal restitution. CashCall argues that such awards are subject to de novo review. Assuming without deciding that de novo review applies, we conclude that CashCall's argument fails nonetheless.

As we have explained, equitable remedies must be capped at net profits—meaning that "courts must deduct [a defendant's] legitimate expenses" from any award of equitable restitution. *Liu*, 591 U.S. at 91; *see also Consumer First*, 6 F.4th at 710. But the same is

not true of legal restitution, in which a plaintiff seeks to recover a defendant's unjust gains. *See Great-West Life*, 534 U.S. at 213 (explaining that restitution at law allows a plaintiff to "recover[] money to pay for some benefit the defendant had received from him" (quoting 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 4.2(1), at 571 (2d ed. 1993))). Legal "[r]estitution may be measured by the 'full amount lost by consumers rather than limiting damages to a defendant's profits.'" *CashCall I*, 35 F.4th at 751 (quoting *Gordon*, 819 F.3d at 1195). That means that a "district court may use a defendant's net revenues as a basis for measuring unjust gains." *Id.* (quoting *Gordon*, 819 F.3d at 1195).

That is exactly what the district court did here. At step one of the two-step burden-shifting framework set out in *Gordon*, it found that the Bureau had met its initial burden of demonstrating "a reasonable approximation of [CashCall's] unjust gains, i.e., net revenues." After deducting amounts CashCall had already paid in state enforcement actions, the district court concluded that the Bureau could request $197 million. The burden then shifted to CashCall to prove that this overstated its unjust gains—a burden that the district court concluded CashCall met. *See CashCall I*, 35 F.4th at 751. The Bureau had argued that the restitution award should include any interest and fees paid by *any* consumer, including those who paid CashCall less than what they received in the form of loan principal. This amount would be in addition to the interest and fees that other consumers paid in excess of the amount of loan principal CashCall disbursed to them. The district court agreed with CashCall's challenge to that approach, noting our

statement in the prior appeal: "Restitution ... serves to ensure that consumers *are made whole*," not to grant them a windfall. *Id.* at 750 (emphasis added). But the district court also concluded that it did not need to deduct anything else, including CashCall's expenses.

CashCall now argues that this was error. It insists that the district court should have deducted "the initial outlays of loan principal" that CashCall disbursed to consumers but which some consumers never fully repaid—an amount totaling $93 million. But deducting the $93 million in unpaid principal would serve to deduct one of CashCall's expenses, which is necessary only when restitution is awarded in equity, not at law. *See Liu*, 591 U.S. at 91-92. Furthermore, the amount of unjust gains that CashCall received from consumers who paid more than they got in loan proceeds has nothing to do with the success or failure of CashCall's dealings with *other* borrowers. If CashCall had $100 in unjust gains from a transaction with consumer A, it should pay $100 in restitution. It should not get away with paying less just because it lost $50 in a separate transaction with consumer B.

A restitution award "should be measured to reflect the substantive law purpose that calls for restitution in the first place." Restatement (Third) of Restitution and Unjust Enrichment § 49, Comment *a* (2011) (quoting 1 Dobbs § 4.5(1), at 629). Here, one of the purposes of the statute is "to ensure that 'consumers are protected from unfair, deceptive, or abusive acts and practices.'" *CashCall I*, 35 F.4th at 750 (quoting 12 U.S.C. § 5511(b)(2)). The reduction in the award that CashCall seeks would frustrate that

purpose by ensuring that borrowers who paid CashCall more than they received are not made whole.

V

Finally, CashCall contends that all the Bureau's actions in this case were unlawful because the Bureau does not receive annual appropriations from Congress but instead is authorized to draw from the Federal Reserve System whatever amount it deems "reasonably necessary to carry out" its duties, a funding scheme that CashCall says violates the Appropriations Clause. 12 U.S.C. § 5497(a)(1); U.S. Const. art. I, § 9, cl. 7. That argument is squarely foreclosed by recent Supreme Court precedent holding that the Bureau's statutory funding mechanism is consistent with the Appropriations Clause. *See CFPB v. Community Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 421 (2024).

AFFIRMED.

R. NELSON, Circuit Judge, concurring:

I agree that CashCall, Inc. waived any Seventh Amendment right to a jury trial on the Consumer Financial Protection Bureau's claims for restitution. Op. at 9-11. But even if CashCall had not waived a jury, it still would not have been entitled to one under our precedent. In *FTC v. Commerce Planet, Inc.*, we held that claims for restitution, even when understood as actions at law, never trigger the Seventh Amendment's guarantee. 815 F.3d 593, 602 (9th Cir. 2016), *abrogated on other grounds by AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67 (2021); *see* U.S. Const. amend. VII ("preserv[ing]" the right to trial by jury "[i]n Suits at common law"). *Commerce Planet* was wrong the day it was decided. And its flaws have become even clearer since. I write separately to explain why *Commerce Planet* dilutes the jury trial right, and why, in the appropriate case, we should reconsider it en banc.

I

A

The civil jury right was not always a given. The original Constitution, as ratified in 1788, guaranteed a jury only in criminal cases. *See* U.S. Const. art. III, § 2, cl. 3. Debates about extending the same right to civil matters colored much of the ratification period, with the Anti-Federalists insisting that juries promote "an open and public discussion of all causes" free from "secret and arbitrary proceedings." *SEC v. Jarkesy*, 144 S. Ct. 2117, 2144 (2024) (Gorsuch, J., concurring) (quoting Letter from a Federal Farmer (Jan. 18, 1788), *in* 2 The Complete Anti-Federalist 320 (H. Storing ed. 1981)); *see also Parsons v. Bedford*, 28 U.S. (3 Pet.)

433, 446 (1830) ("One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases."). Some Federalists were more skeptical. Despite the jury's importance in the criminal context, the Federalists doubted "the essentiality of" a civil jury right, at least as a matter of federal constitutional law. The Federalist No. 83 (Alexander Hamilton); *see In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 420 (9th Cir. 1979). That view did not carry the day for long. By 1791, the Anti-Federalists had prevailed, and the right to civil trial by jury was enshrined in the Seventh Amendment as part of the Bill of Rights.

Although the Seventh Amendment "preserve[s]" the "right of trial by jury" in "[s]uits at common law," it has been interpreted to extend beyond the "common-law forms of action recognized" in 1791. *Curtis v. Loether*, 415 U.S. 189, 192-93 (1974) (quoting U.S. Const. amend. VII). The Amendment equally applies to statutory actions that are "legal in nature," rather than claims that traditionally arose in equity. *Jarkesy*, 144 S. Ct. at 2128 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). In determining whether a suit is "legal in nature," courts "consider the cause of action and the remedy it provides." *Id.* at 2129; *see Tull v. United States*, 481 U.S. 412, 417-18 (1987). The second factor—the remedy—is "more important." *Jarkesy*, 144 S. Ct. at 2129 (quoting *Tull*, 481 U.S. at 421). Put simply, the Constitution "preserves the right to trial by jury of all legal claims," including those that are statutory. *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 170 (9th Cir.

1989). But "no right to a jury exists" for equitable claims. *Id.*

B

The Supreme Court, for much of its history, described restitution as arising in equity. In *Mertens v. Hewitt Associates*, the Court noted that restitution is "a remedy traditionally viewed as 'equitable.'" 508 U.S. 248, 255 (1993). And in *Teamsters v. Terry*, the Court characterized "damages as equitable when they are restitutionary." 494 U.S. 558, 570 (1990); *see also, e.g.*, *Tull*, 481 U.S. at 424 (restitution "traditionally considered an equitable remedy"). Thus, the Supreme Court, until 20 years ago, generally characterized restitution as equitable relief.

Then came *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). *Great-West* addressed whether a provision of the Employee Retirement Income Security Act (ERISA) authorizing "appropriate equitable relief" includes claims for restitution. 534 U.S. at 209, 212 (quoting 29 U.S.C. § 1132(a)(3)(B)). The Court explained that while restitution often sounds in equity, that is not always the case. *Id.* at 212. "In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity." *Id.* (citing 1 D. Dobbs, Law of Remedies § 1.2, at 11 (2d ed. 1993)). Legal restitution involved cases in which a plaintiff lacked title over a piece of property but could "show just grounds for recovering money to pay for some benefit the defendant had received from him." *Id.* at 213 (quoting 1 Dobbs § 4.2(1), at 571). On the other hand, a plaintiff could seek equitable restitution where money or objects that the plaintiff owned "could

clearly be traced to particular funds or property in the defendant's possession." *Id.*

The Court clarified that the test for whether restitution "is legal or equitable" ultimately "depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought." *Id.* (quoting *Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994)) (cleaned up). That's the same test for invoking the Seventh Amendment right. *See, e.g.*, *Jarkesy*, 144 S. Ct. at 2129 ("To determine whether a suit is legal in nature, we directed courts to consider the cause of action and the remedy it provides."). These similarities were not lost on the Court. Parsing the "law-equity dichotomy," it explained, "is an inquiry ... that we are accustomed to pursuing, and will always have to pursue, in other contexts," including the Seventh Amendment's right to a civil jury. *Great-W.*, 534 U.S. at 217 (citing *Curtis*, 415 U.S. at 192). As others have recognized, "neither the correctness nor the persuasiveness of *Great-West Life*'s description of restitution at law and in equity turns on the particular context in which Justice Scalia performed it." *United States v. ERR, LLC*, 35 F.4th 405, 414 (5th Cir. 2022); *see also Liu v. SEC*, 591 U.S. 71, 81 (2020) (invoking the Supreme Court's "'transsubstantive guidance on broad and fundamental' equitable principles" (quoting *Romag Fasteners, Inc. v. Fossil, Inc.*, 590 U.S. 212, 217 (2020))). So while *Great-West* happened to involve ERISA, its discussion of legal and equitable restitution illustrates the scope of the Seventh Amendment right. After all, claims for legal restitution are, in their nature, suits "at common law."

So they guarantee a jury trial. Claims for equitable restitution trigger no such guarantee.

II

We decided *Commerce Planet* against this backdrop. You wouldn't know it though, considering how little weight our decision gave to *Great-West*. Rather than grapple with the difference between legal and equitable restitution, as the Supreme Court did, *Commerce Planet* asserted that the Court has labeled *all* restitution as equitable relief that necessarily falls outside the Seventh Amendment's scope. 815 F.3d at 602. Thus, the restitution remedy—in any form—"confers no right to a jury trial." *Id.* That could not be further from the truth.

A

First, *Commerce Planet* anchored its holding not in the *Great-West* majority opinion, but in Justice Ginsburg's dissent. According to the panel, the Supreme Court "has consistently stated that restitution is an equitable remedy *for Seventh Amendment purposes*, without drawing any distinction between the legal and equitable forms of that relief." *Id.* (citing *Great-W.*, 534 U.S. at 229 (Ginsburg, J., dissenting)) (emphasis added). Only part of that statement is correct. Granted, Justice Ginsburg recognized, like the *Great-West* majority, that the Supreme Court historically "described restitutionary relief as 'equitable' without even mentioning, much less dwelling upon, the ancient classifications" between the remedy's legal and equitable forms. *Great-W.*, 534 U.S. at 229 (Ginsburg, J., dissenting); *see id.* at 214-15 (maj. op.) ("Admittedly, our cases have not previously drawn

this fine distinction between restitution at law and restitution in equity ...."). But Justice Ginsburg then acknowledged that the majority's test for distinguishing between legal and equitable restitution is also used "in the context of the Seventh Amendment." *Id.* at 232 (Ginsburg, J., dissenting). She even cited the majority's invocation of the Seventh Amendment as an example of the legal-equitable dichotomy at work. *Id.* (citing 534 U.S. at 217). With *Great-West* holding that there's a difference between legal and equitable restitution, and Justice Ginsburg conceding that the majority's test for teasing out that difference coincides with the Seventh Amendment analysis, not even the *Great-West* dissent supports *Commerce Planet*.

Commerce Planet also relied on the Supreme Court's decision in *Teamsters*. There, the Court noted that "we have characterized damages as equitable where they are restitutionary." 494 U.S. at 570. That sentence, according to *Commerce Planet*, "strongly suggests" that restitution "is considered equitable under the Seventh Amendment even if imposed as a merely personal liability upon the defendant." 815 F.3d at 602. Whatever the meaning of the line from *Teamsters*, it's hardly a definitive statement about how to understand a constitutional right. And in any event, it was expressly disclaimed in—wait for it—*Great-West*. As the majority explained, "[W]hile we noted" in *Teamsters* that "'we have characterized damages as equitable where they are restitutionary,' we did not (and could not) say that *all* forms of restitution are equitable." *Great-W.*, 534 U.S. at 218 n.4 (quoting *Teamsters*, 494 U.S. at 570). *Commerce Planet* simply ignores that language.

To sum up: *Commerce Planet* bucks the Supreme Court's decision in *Great-West*. And its reliance on *Teamsters* is also misplaced. We practically conceded as much; the panel wrote that the Supreme Court's prior precedent on restitution and the Seventh Amendment "may need to be reconsidered in light of *Great-West*'s holding." *Com. Planet*, 815 F.3d at 602. Although the panel viewed "that as a matter the Supreme Court must resolve," *id.*, it's hard to see how the *Great-West* majority could have been clearer: "[N]ot all relief falling under the rubric of restitution is available in equity," 534 U.S. at 212; *see id.* at 217 (analogizing to the Seventh Amendment analysis). Yes, earlier cases suggested that restitution is an exclusively equitable remedy. *See, e.g.*, *id.* at 214-16. But our job is to ensure that our law tracks *current* Supreme Court precedent.[1] *See, e.g.*, *Miller v.*

[1] That is not to say we can treat Supreme Court precedent as "implicitly overruled." *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) (quotation omitted). "As a circuit court, even if recent Supreme Court jurisprudence has perhaps called into question the continuing viability of its precedent, we are bound to follow a controlling Supreme Court precedent until it is explicitly overruled by that Court." *Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011) (en banc) (cleaned up). That rule does not apply here. *Great-West* was clear that existing precedent only told part of the story when it comes to legal versus equitable restitution. 534 U.S. at 214-15 ("[O]ur cases have not previously drawn this fine distinction between restitution at law and restitution in equity, *but neither have they involved an issue to which the distinction was relevant*." (emphasis added)). So *Great-West* did not overrule or cabin those cases, implicitly or otherwise. *See id.* at 215 ("*Mertens* did not purport to change the well-settled principle that restitution is 'not an *exclusively* equitable remedy' ....") (quoting *Reich*, 33 F.3d at 756)). It merely developed another nuance that the Court had not considered.

Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). And when the Court makes a clear statement distinguishing its prior cases—as it did in *Great-West*—we cannot bury our head in the sand until the Justices have been even clearer.

B

Recent cases highlight *Commerce Planet*'s flaws. In *Liu*, the Supreme Court performed the "familiar" task of distinguishing equitable remedies, concluding that traditional equity courts could not award relief that exceeded "a defendant's net profits from wrongdoing." 591 U.S. at 78, 85. And as we hold today, *Liu*'s reasoning applies "to all categories of equitable relief, including restitution." Op. at 12 (quoting *CFPB v. Consumer First Legal Grp., LLC*, 6 F.4th 694, 710 (7th Cir. 2021)). It follows from *Liu* that when claims for restitution exceed net profits, that restitution is "more properly characterized as legal." Op. at 12. Yet *Commerce Planet* treats legal and equitable restitution the same under the Seventh Amendment, declining to address the distinction that the Supreme Court reaffirmed in *Liu*. 815 F.3d at 602.

The Supreme Court's recent decision in *Jarkesy* is even more instructive. The issue in *Jarkesy* was whether the Seventh Amendment is implicated when the Securities and Exchange Commission seeks civil penalties against a defendant in an in-house adjudication. 144 S. Ct. at 2127. Answering yes, the Court found that the remedy in that case (civil penalties) was "all but dispositive." *Id.* at 2129. By seeking a "prototypical common law remedy," the Court reasoned, the SEC triggered the civil jury right. *Id.* at 2129-30; *see Tull*, 481 U.S. at 422 ("A civil

penalty was a type of remedy at common law that could only be enforced in courts of law."). Legal restitution, like a civil penalty, is a "prototypical common law remedy." As the Court explained in *Great-West*, the right to legal restitution "derived from the common-law writ of assumpsit." 534 U.S. at 213 (citing 1 Dobbs § 4.2(1), at 571). Putting all this together, if *Jarkesy* counsels that a request for common law remedies "effectively decides" the Seventh Amendment question, and if *Great-West* says that legal (not equitable) restitution is a common law remedy, then *Commerce Planet*'s Seventh Amendment holding cannot stand. *See Jarkesy*, 144 S. Ct. at 2130.

C

Finally, *Commerce Planet* puts us at odds with the Fifth Circuit, which interprets *Great-West* to require a jury trial on statutory claims for legal restitution. In *ERR*, the Fifth Circuit addressed whether the Seventh Amendment guarantees a jury trial on the government's claims for removal costs under the Oil Pollution Act. 35 F.4th at 407. Pointing to *Great-West*'s distinction between legal and equitable restitution, the court held that oil removal costs "are most analogous to restitution at law." *Id.* at 412-13 (emphasis removed). The court expressly rejected the argument—so central to *Commerce Planet*—that "restitution *always* sounds in equity." *Id.* at 416 (citing *Hatco Corp. v. W.R. Grace & Co. Conn.*, 59 F.3d 400, 412 (3d Cir. 1995)). "Whatever the truth of that premise" before 2002, the court explained, "it has been squarely foreclosed by subsequent Supreme Court precedent." *Id.* (citing *Great-W.*, 534 U.S. at 212, 215);

see id. at 414 ("[W]e're obligated to follow *Great-West Life*.").

The Fifth Circuit concluded that *Great-West* thus compelled a jury trial on the government's claims, given that the Supreme Court conducted "the exact same inquiry [its] precedent requires for the Seventh Amendment." *Id.* at 414; *see also Pereira v. Farace*, 413 F.3d 330, 340 (2d Cir. 2005) ("Like our sister circuits, we are compelled to read *Great-West* as broadly as it is written."). The Fifth Circuit got it right.

III

The Seventh Amendment right is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" must "be scrutinized with the utmost care." *Jarkesy*, 144 S. Ct. at 2128 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). *Commerce Planet* did not scrutinize the Seventh Amendment carefully. And the Supreme Court has whittled away at *Commerce Planet*. *See AMG Cap. Mgmt.*, 593 U.S. at 71, 75 (abrogating *Commerce Planet*'s holding regarding restitution awards as "ancillary relief"); *see also FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417, 437 (9th Cir. 2018) (O'Scannlain, J., specially concurring) ("Our decision in *Commerce Planet* is therefore a relic of that *ancien regime* that the Court over the last few decades has expressly and repeatedly repudiated."), *rev'd*, 593 U.S. 67 (2021). It's time to put the final nail in the coffin.

This is not the case for that final nail since CashCall waived a jury trial. *See* Op. at 9-11. But in the right case, the en banc court should get rid of *Commerce Planet* root and branch. In the meantime,

future three-judge panels should not extend its defective reasoning.

Appendix B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 15-cv-7522

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff,
v.
CASHCALL, INC., et al.,
Defendants.

Filed: Feb. 10, 2023

Proceedings (In Chambers)

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND FINDINGS, CONCLUSIONS, AND JUDGMENT ON REMAND

ORDER DENYING DEFENDANTS' MOTION FOR LEAVE TO FILE A MOTION FOR JUDGMENT ON THE PLEADINGS, TO MODIFY JUDGMENT, AND TO ENJOIN THE CFPB'S PROSECUTION OF THIS ACTION

On September 19, 2022, Plaintiff Consumer Financial Protection Bureau ("Plaintiff" or the "CFPB") filed a Motion to Amend Findings,

Conclusions, and Judgment on Remand ("Motion to Amend"), and Defendants CashCall, Inc., WS Funding, LLC, Delbert Services Corporation, and J. Paul Reddam (collectively, "Defendants" or "CashCall") filed their Opening Brief. On October 3, 2022, the CFPB and Defendants each filed their Responses. On October 17, 2022 and October 21, 2022, the CFPB and Defendants filed their respective Replies.

On November 7, 2022, Defendants filed a Motion for Leave to File a Motion for Judgment on the Pleadings, to Modify Judgment, and to Enjoin the CFPB's Prosecution of this Action ("Motion for Leave"). On November 21, 2022, the CFPB filed its Opposition. On November 28, 2022, Defendants filed a Reply.

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found these matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are well-known to the parties and are set forth in detail in the Court's summary judgment order and findings of fact and conclusions of law, and in the Ninth Circuit's opinion. *CFPB v. CashCall*, 35 F.4th 734 (9th Cir. 2022); 2018 WL 485963 (C.D. Cal. Jan. 19, 2018); 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016). In summary, the

CashCall defendants made unsecured high interest loans to consumers through a tribal lending program in an effort to avoid state usury and licensing laws. 35 F.4th at 739. This Court granted partial summary judgment in the CFPB's favor, finding that the loans made to borrowers in certain Subject States[1] were void under those states' laws, and that the CashCall defendants had engaged in deceptive acts and practices in violation of the Consumer Financial Protection Act (CFPA). 2016 WL 4820635, *9-10.

The Court conducted a bench trial to determine the appropriate remedies, after which it awarded the CFPB a tier-one civil money penalty of $10,283,886, but denied the CFPB's requests for restitution and injunctive relief. Both parties appealed. The Ninth Circuit affirmed in part and reversed in part, concluding that the Court correctly found liability but erred in determining the penalty and in its denial of restitution. 35 F.4th at 738, 751. With respect to the Court's tier-one penalty award, the Ninth Circuit held that CashCall's conduct was reckless beginning in September 2013, which would require a tier-two penalty award for violations beginning that month. 35 F.4th at 748. With respect to the Court's decision that restitution was not an appropriate remedy, the Ninth Circuit held that the Court erred in considering whether CashCall acted in bad faith, and whether consumers received the benefit of their bargain. 35 F.4th at 751. The Ninth Circuit also held that, in

[1] The Subject States are Arizona, Arkansas, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, and Ohio. Trial Ex. 219a.

calculating the appropriate amount of restitution, the Court failed to properly consider the principles set forth in *CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016) and related cases.

Accordingly, the Ninth Circuit remanded this action for the Court to: (1) reassess the civil penalty, "with the penalty for the period beginning in September 2013 being based on tier two;" (2) re-evaluate whether restitution is appropriate in a manner consistent with the CFPA; and (3) if the Court determines that restitution is appropriate, calculate the amount of restitution in a manner consistent with the principles set forth in *Gordon* and related cases.

II. DEFENDANTS' MOTION FOR LEAVE

As an initial matter, the Court denies Defendants' request for leave to file a Motion for Judgment on the Pleadings, to Modify Judgment, and to Enjoin the CFPB's Prosecution of this Action, on the grounds that the CFPB's funding structure violates the separation of powers principles contained in the Appropriations Clause of the U.S. Constitution as the Fifth Circuit recently held in *Community Financial Services Association of America v. CFPB*, 51 F.4th 616 (5th Cir. 2022). *See also CFPB v. All American Check Cashing, Inc.*, 33 F.4th 220-242 (5th Cir. 2022) (en banc) (Jones J. concurring).

Defendants raised this argument for the first time in the Ninth Circuit in a post-oral-argument letter dated May 11, 2022. Ninth Circuit Case No. 18-55407, Docket No. 101. In that letter, Defendants cited, as they do here, *Freytag v. Commissioner*, 501 U.S. 868, 878-79 (1991) for the proposition that their argument falls within the "category of nonjurisdictional

structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." In addressing Defendants' argument, the Ninth Circuit concluded as follows:

> [O]ffering a new theory months after oral argument—and more than eight years after this litigation first began—CashCall asks us to hold that the Bureau's structure violates the Appropriations Clause of the Constitution. *See CFPB v. All Am. Check Cashing, Inc.*, No. 18-60302, 33 F.4th 218, 220-21 (5th Cir. May 2, 2022) (Jones, J., concurring). CashCall forfeited that argument twice over by failing to present it to the district court or in its briefing before us on appeal. *See Hawkins v. Kroger Co.*, 906 F.3d 763 (9th Cir. 2018). CashCall suggests that the argument somehow affects our subject-matter jurisdiction, but that erroneously conflates "the [Bureau's] authority to execute the laws (Article II) with the United States' interest in the case (Article III)." *Gordon*, 819 F.3d at 1189. Because CashCall elected to wait until long after oral argument to raise this theory, we decline to consider it.

CFPB v. CashCall, Inc., 35 F.4th 734, 743 (9th Cir. 2022). In other words, in concluding that Defendants forfeited the argument, the Ninth Circuit rejected Defendants' claim that this was "one of those rare cases in which [it] should exercise [its] discretion to hear" Defendants' belated challenge to the CFPB's funding structure. *See Freytag*, 501 U.S. at 879.

Accordingly, given the Ninth Circuit's conclusion that Defendants' challenge to the CFPB's funding structure can be and has been forfeited, the law of the case doctrine forecloses this Court's review of the issue. *See United States v. Real Prop. Located at 25445 via Dona Christa, Valencia, Cal.,* 138 F.3d 403, 409 (9th Cir. 1998) (holding that, where the court had concluded in a previous appeal that "Claimant's due process argument was waived," "the law of the case doctrine forecloses review of the issue" in a subsequent appeal), *opinion amended on denial of reh'g*, 170 F.3d 1161 (9th Cir. 1999); *Magnesystems, Inc. v. Nikken, Inc.*, 933 F. Supp. 944, 949-50 (C.D. Cal. 1996) ("[A]n issue or factual argument waived at the trial level before a particular order is appealed, or subsequently waived on appeal, cannot be revived on remand. In essence, the party's waiver becomes the law of the case.").

Defendants argue that the Ninth Circuit's citation to *Hawkins v. Kroger Co.*, 906 F.3d 763 (9th Cir. 2018) demonstrates that the Circuit's intention "was only to decline to consider the issue on appeal, not to preclude this Court from considering it in the first instance on remand." Reply (Docket No. 366) at. In *Hawkins*, the Ninth Circuit stated in relevant part:

> Generally, we do not consider an issue not passed upon below. This general rule has exceptions, but invocation of those exceptions is discretionary.
>
> We decline to exercise our discretion here. The preemption issue was not fully briefed on appeal by either party ....

> Thus, we leave it to the district court on remand to decide in the first instance to what extent, if at all, the state law use claims are federally preempted.

Hawkins v. Kroger Co., 906 F.3d 763, 773 (9th Cir. 2018). Notably, in *Hawkins* (unlike here), the Ninth Circuit specifically directed: "On remand, the district court shall consider whether the use claims are preempted."[2] In contrast, the Ninth Circuit's remand to this Court contains no such direction. Rather, the scope of the Ninth Circuit's mandate is limited to the following three issues: (1) how much Defendants should pay as a civil penalty; (2) whether Defendants should pay restitution to consumers; and (3) if so, how much should Defendants pay.

In any event, even if the law of the case doctrine (or rule of mandate) did not foreclose the Court's review of this issue, this Court, like the Ninth Circuit, declines to exercise its discretion to consider this issue. Defendants first raised this issue more than eight years after this litigation commenced. Although the Fifth Circuit only recently issued its opinion in *Community Financial Services Association of America v. CFPB*, 51 F.4th 616 (5th Cir. 2022), the argument regarding the CFPB's funding structure is not novel

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[2] Moreover, the defendant in *Hawkins* had raised the issue in the first instance before the district court. *See* Kroger Company's Motion to Dismiss the Complaint, *Hawkins v. Kroger Company*, Case No. 3:15-CV-2320 (S.D. Cal. Nov. 30, 2015), Docket No. 11. The district court simply did not reach the issue because it dismissed the case on other grounds. *Hawkins v. Kroger Company*, Case No. 3:15-CV-2320, 2016 WL 11728964 (S.D. Cal. Mar. 17, 2016)

and has long been available to Defendants. *See, e.g.*, *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014) (rejecting argument that "the structure of the CFPB … violate[s] the Appropriations Clause"). Moreover, as recognized by the Fifth Circuit itself, the Fifth Circuit decision runs counter to the view of "every [other] court to consider" the validity of the CFPB's statutory funding provisions. *See Community Financial Services Association of America v. CFPB*, 51 F.4th 616, 641 (5th Cir. 2022).

Finally, even if the Court were to consider Defendants' belated argument, the Court would need no further briefing on the issue and would follow the line of cases concluding that the CFPB's funding structure does not violate the separation of powers principles contained in the Appropriations Clause of the U.S. Constitution. *See, e.g., PHH Corp. v. CFPB*, 881 F.3d 75, 95-96 (D.C. Cir. 2018) (en banc), abrogated on other grounds by *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020)); *CFPB v. Fair Collections & Outsourcing, Inc.*, 2020 WL 7043847, at *7-9 (D. Md. Nov. 30, 2020); *CFPB v. Think Finance LLC*, 2018 WL 3707911, at *1-2 (D. Mont. Aug. 3, 2018); *CFPB v. Navient Corp.*, 2017 WL 3380530, at *16 (M.D. Pa. Aug. 4, 2017); *CFPB v. ITT Educ. Services, Inc.*, 219 F. Supp. 3d 878, 896-97 (S.D. Ind. 2015); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014); *CFPB v. TransUnion*, 2022 WL 17082529, at *5 (N.D. Ill. Nov. 18, 2022). *See also* Petition for a Writ of Certiorari, *CFPB v. Community Financial Services Association of America*, No. 22-448, 2022 WL 16951308, *11-23 (U.S. Nov. 14, 2022).

For the foregoing reasons, Defendants' Motion for Leave is **DENIED**. The Court will now address the issues the Ninth Circuit specifically remanded for this Court's determination.

III. CIVIL PENALTIES

The Ninth Circuit instructed this Court to reassess the civil penalties the Court imposed on Defendants. The CFPA imposes penalties in three tiers depending on the defendant's level of culpability. 12 U.S.C. § 5565(c)(2). A first-tier penalty requires no showing of scienter; a second-tier penalty applies to "any person that recklessly engages in a violation" of the CFPA; and a third-tier penalty applies to "any person that knowingly violates" the CFPA. *Id.* § 5565(c)(2)(A)-(C). Each penalty tier provides a maximum penalty "for each day during which [a] violation continues," and each maximum penalty is periodically adjusted for inflation. When enacted, the CFPA set the maximum tier-one penalty at $5,000 per day, and the maximum tier-two penalty at $25,000 per day. For civil penalties assessed after January 15, 2022, based on violations that occurred on or after November 2, 2015, the maximum tier-one penalty is $6,323 for each day a violation continues, and the maximum tier-two penalty is $31,616 for each day a violation continues. 12 C.F.R § 1083.1. In determining the amount of the penalty, a court should consider the following mitigating factors: (1) the size of financial resources and good faith of the person charged; (2) the gravity of the violation or failure to pay; (3) the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided; (4) the history of previous

violations; and (5) such other matters as justice may require. 12 U.S.C. § 5565(c)(3).

Given the Court's prior calculation and the Ninth Circuit's guidance, the Court concludes that a $33,276,264 penalty is appropriate. In its prior calculation, the Court counted each day of the Western Sky program during which the CFPA's penalty provisions were effective—July 21, 2011 through August 31, 2016—and imposed a maximum tier-one penalty per day for that time period. The Ninth Circuit did not disturb this calculation for the 773 days beginning on July 21, 2011, and ending on August 31, 2013 (inclusive). The maximum tier-one penalty, $5,000, multiplied by 773 days equals $3,865,000. Defendants do not request any adjustment to the penalty for this time period.

Pursuant to the Ninth Circuit's decision, the Court must impose a tier-two penalty from September 1, 2013, through August 31, 2016. Consistent with its earlier decision to impose a maximum penalty, the Court now imposes a maximum tier-two penalty of $25,000 per day from September 1, 2013 through November 1, 2015 (792 days), and an inflation-adjusted maximum tier-two penalty of $31,616 per day from November 2, 2015, through August 31, 2016 (304 days). As a result, the total tier-two penalty for September 1, 2013, through November 1, 2015, is $19,800,000, and the total tier-two penalty for November 2, 2015, through August 31, 2016, is $9,611,264.

In imposing the maximum tier-two penalty, the Court has considered the Ninth Circuit's determination that "the danger that CashCall's

conduct violated the statute was so obvious that CashCall must have been aware of it." *CashCall*, 35 F.4th at 749. In reaching this determination, the Ninth Circuit stated:

> By September 2013, however, things had changed. In August, counsel recommended that the program cease because "the regulatory and litigation environments have risen from dangerous to near extinction." That opinion prompted CashCall to shut down the program and stop buying new loans. But despite the intense regulatory scrutiny, and despite shuttering the tribal lending program for new loans, CashCall continued to collect on existing loans. CashCall modified loans in States in which it had already reached settlements with regulators. But otherwise, even after this litigation began, CashCall continued collecting fees and interest until it lost at summary judgment in August 2016.

Id.

With respect to mitigating factors, CashCall has never claimed that it would be unable to pay any penalty. Trial Tr. vol. 3, 367:4-5, Oct. 18, 2017. Moreover, although this action may be Defendants' first violation of the CFPA, CashCall previously engaged in a similar rent-a-bank scheme that it was forced to terminate due to enforcement actions by two states and regulatory pressure from the FDIC. *See CFPB v. CashCall, Inc.*, 35 F.4th at 739. And, with the benefit of the Ninth Circuit's decision, the Court now concludes that CashCall's violations were serious and

imposed substantial risks to consumers. As the Ninth Circuit concluded, the nature of the CashCall's deceptive practice was not that "the consumers were denied the loan proceeds or that they entered into the loan agreements against their will. Rather, ... CashCall harmed consumers by deceiving them about a major premise underlying their bargain: that the loan agreements were legally enforceable." *Id.* at 751. When properly framed in this manner, CashCall's conduct harmed tens of thousands of consumers.

Nevertheless, Defendants ask the Court to impose a low-end tier-two penalty, relying primarily on the Court's prior analysis imposing a tier-one penalty. The Ninth Circuit, however, clearly rejected that analysis. In fact, the Ninth Circuit even seriously questioned whether CashCall's recklessness had commenced before September 2013, but in light of the deferential standard, did not disturb the Court's imposition of a tier-one penalty prior to that date.

Accordingly, because Defendants' conduct approached a knowing violation of the CFPA, and after considering all of the relevant mitigating factors, the Court imposes a maximum tier-two penalty for the time period of September 1, 2013 through August 31, 2016, which equals $29,411,264. Thus, adding that amount to the $3,865,000 tier-one penalty that the Court imposed for the time period of July 21, 2011 through August 31, 2013, the Court imposes a total penalty of $33,276,264 for CashCall's violations.

IV. RESTITUTION

The Ninth Circuit also instructed this Court to determine if an award of restitution was

appropriate, and if so, the amount of that restitution.

A. The Court concludes that an award of restitution is appropriate.

As the Ninth Circuit stated, the CFPA permits the CFPB to seek "any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law," which "may include, without limitation ... restitution; [and] disgorgement or compensation for unjust enrichment." 12 U.S.C. § 5565(a)(1), (2)(C), (2)(D) (emphasis added); *CashCall*, 35 F.4th at 749-50.

Although the CFPB previously referred to the restitution it seeks as equitable, it now contends that the restitution it seeks is legal. The CFPB contends that legal restitution is awarded "as a matter of course," whereas equitable restitution is discretionary. *See* CFPB's Motion to Amend (Docket No. 39) at 7; *see also CashCall*, 35 F.4th at 750. Regardless of whether the restitution in this case is characterized as legal or equitable, the Court concludes that an award of restitution is appropriate and consistent with the objectives of the CFPA.

As noted by the Ninth Circuit, one of the statute's express objectives is to ensure that "consumers are protected from unfair, deceptive, or abusive acts and practices." 12 U.S.C. § 5511(b)(2). An additional objective is "to promote transparency in the markets for consumer financial products and services." *CashCall*, 35 F.4th at 750; 12 U.S.C. § 5511(b)(5). In particular, restitution, "serves to ensure that consumers are made whole when they have suffered a violation of the statute." *CashCall*, 35 F.4th at 750.

And, as held by the Ninth Circuit, scienter is not required for an award of restitution, and whether consumers received the benefit of their bargain is irrelevant. *CashCall*, 35 F.4th at 750-51.

Considering the objectives of the CFPA and in light of the Ninth Circuit's opinion, the Court now concludes that an award of restitution is appropriate to ensure that consumers are made whole and protected from deceptive practices. As the Ninth Circuit held, "CashCall harmed consumers by deceiving them about a major premise underlying their bargain: that the loan agreements were legally enforceable." *CashCall*, 35 F.4th at 751. Accordingly, consumers paid interest and fees to Defendants that they had no legal obligation to pay. An award of restitution will compensate consumers for their losses, and will promote future transparency in the markets for consumer financial products and services.

B. The CFPB did not waive its right to seek legal restitution.

The CFPB argues in relevant part that it seeks legal restitution, and not equitable restitution, and thus that the restitution it seeks is not limited by the principles set forth in *Liu v. Securites and Exchange Commission*, 140 S. Ct. 1936 (2020).

In *Liu*, the Supreme Court limited the scope of equitable remedies, whether labeled as disgorgement, restitution, or otherwise, to a wrongdoer's net profits. 140 S. Ct. at 1943 ("Decisions from this Court confirm that a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts."); *CFPB v. Consumer First Legal Grp., LLC*, 6 F.4th 694, 710 (7th Cir. 2021) ("*Liu*'s reasoning

is not limited to disgorgement; instead, the opinion purports to set forth a rule applicable to all categories of equitable relief, including restitution.").

Liu, however, did not limit the scope of *legal* restitution. As the Supreme Court has held, restitution may be either legal or equitable: "'[R]estitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case,' and whether it is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (second and third alterations in original) (quoting *Reich v. Continental Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994)). "[R]estitution is legal when the plaintiff cannot 'assert title or right to possession of particular property' but is nevertheless 'able to show just grounds for recovering money to pay for some benefit the defendant had received from him.'" *CashCall*, 35 F.4th at 750 (quoting *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 213). "'In contrast,' restitution is equitable 'where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.'" *Id.* In other words, restitution is equitable where there is an identifiable *res* and legal where there is no identifiable *res*. *See Honolulu Joint Apprenticeship & Training Comm. of United Ass'n Loc. Union No. 675 v. Foster*, 332 F.3d 1234, 1237-38 (9th Cir. 2003).

In this case, the CFPB has continuously sought, what by its nature is, legal restitution. Specifically, the CFPB has always sought restitution of the interest

and fees that consumers paid CashCall on Western Sky loans. In essence, the CFPB seeks to "impose general personal liability on a defendant for money allegedly owed to the plaintiff" rather than "to restore to the plaintiff particular funds in the defendant's possession." *Bayer v. Neiman Marcus Group, Inc.*, 861 F.3d 853, 866 (9th Cir. 2017).

Defendants do not dispute that the nature of the remedy sought by the CFPB is legal restitution. Rather, they argue that the CFPB forfeited or waived its right to legal restitution, or should be judicially estopped from seeking legal restitution. The Court disagrees. Whether the relief sought by the CFPB qualifies as legal or equitable depends not on the CFPB's characterization, but rather on the nature of the underlying remedies sought. *See Great-West Life & Annuity Ins. Co.*, 534 U.S. at 213. And, the nature of that remedy is legal.

Notably, even the Supreme Court has acknowledged that its earlier precedent had failed to appropriately distinguish between restitution at law and restitution in equity. *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 214-15. And, under the circumstances of this case, before the Supreme Court's decision in *Liu*, there was little or no reason to differentiate between the two forms of restitution. *See CFPB v. Mortg. Law Group, LLP*, 2022 WL 3027031, at *3 (W.D. Wis. Aug. 1, 2022) ("[D]uring the earlier stages of this lawsuit through entry of final judgement in 2019, the question of whether the restitution award should be characterized as equitable or legal was not even before this court, largely because the distinction did not make a difference until the Supreme Court's

Liu decision changed the law in 2020, at least with respect to how equitable restitution should be calculated."). Accordingly, it is understandable that the CFPB referred to the restitution it sought as equitable.

Nevertheless, Defendants contend that, because they and this Court relied on the CFPB's characterization of the restitution as equitable in proceeding with a bench trial rather than a jury trial, the Court should hold CFPB to its past statements that it sought restitution as an equitable remedy. Defendants' contention, however, rests on an incorrect premise. The Ninth Circuit has held, relying on Supreme Court precedent, that an action seeking restitution (whether characterized as legal or equitable) does not trigger the right to a jury trial. *FTC v. Commerce Planet*, 815 F.3d 593, 602 (9th Cir. 2016), *abrogated on other grounds by AMG Capital Mgmt. v. FTC*, 141 S. Ct. 1341 (2021) ("[T]he Court has consistently stated that restitution is an equitable remedy for Seventh Amendment purposes, without drawing any distinction between the legal and equitable forms of that relief."). Although the Ninth Circuit or Supreme Court may ultimately need to reconsider this position, this Court is bound by the prior decisions of the Ninth Circuit and Supreme Court. *See Commerce Planet*, 815 F.3d at 602 ("That view may need to be reconsidered in light of *Great-West*'s holding, but we regard that as a matter the Supreme Court must resolve."). Accordingly, regardless of whether CFPB previously sought legal or equitable restitution, Defendants would not have been entitled to a jury trial on that issue.

For the foregoing reasons, the Court concludes that the CFPB has not waived its right to seek legal restitution. Because the Supreme Court's decision in *Liu* did not purport to limit the scope of legal restitution, the Court need not limit the restitution in this case to net profits.

C. The Court awards $134,058,600 in restitution.

The Ninth Circuit applies a two-step burden-shifting framework for calculating restitution. *CashCall*, 35 F.4th at 751. At step one, the CFPB "bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gains." *Id.* (quoting *CFPB v. Gordon*, 819 F.3d 1170, 1195 (9th Cir. 2016)). If the CFPB makes that threshold showing, then "the burden shifts to the defendant to demonstrate that the net revenues figure overstates the defendant's unjust gains." *Id.* On appeal in this case, the Ninth Court explained this framework as follows:

> Applying that framework, we have held that restitution may be measured by the full amount lost by consumers rather than limiting damages to a defendant's profits. In other words, a district court may use a defendant's net revenues as a basis for measuring unjust gains. Net revenues are typically the amount consumers paid for the product or service minus refunds and chargebacks. An award of net revenues differs from an award of net profits, which allows a defendant to deduct legitimate expenses. We have held that there are

> instances in which a defendant does not ultimately reap any profits from his wrongful conduct, and others where even though the defendant obtained some profit, the loss suffered by the victim is greater than the unjust benefit received by the defendant.

35 F.4th at 751 (quotations and citations omitted).

Applying these principles and based on the evidence presented at trial, the Court concludes that CFPB has met its initial burden at the first step of the framework and has demonstrated a reasonable approximation of Defendants' unjust gains, i.e., net revenues. More specifically, the evidence at trial demonstrated that consumers paid Cash Call $218,394,771.89 in interest, $3,722,561.74 in fees, and $8,840,800.26 in origination fees[3] on subject loans

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[3] Although the CFPB originally sought restitution of $24,407,325.00 in origination fees on subject loans, it has since revised that amount to $8,840,800.26. At trial and on appeal, Defendants disputed that all origination fees should be included in an award of restitution. Because Defendants did not account for the origination fee on a particular loan as paid until all principal on that loan had been repaid, Defendants argued that some borrowers never actually paid the origination fee. *See, e.g.*, Meeks Decl. (Docket No. 271) ¶ 20 ("The origination fee was not paid until the borrower paid more than what was disbursed to him or her."). The CFPB now agrees with Defendants that only paid origination fees should be included in restitution, and has revised the amount of restitution it seeks for origination fees to $8,840,800.26. To calculate the paid origination fees, the CFPB compared the principal paid, the loan amount, and the origination fee in Trial Ex. 219. For consumers who paid more in principal than their loan amount less the origination fee, the CFPB calculated that the consumer had paid part or all of the origination fee. In addition, for 182 Subject Loans, CashCall's data indicates that consumers paid more in principal than the

made on or after July 21, 2011 in 13 Subject States. *See* Trial Exhibits 219 and 219a. The CFPB also presented evidence of Defendants' "refunds," in the form of restitution payments already made to consumers in Subject States to settle state-level proceedings. Joint Pre-Trial Order (Docket No. 280-1) at 2. Defendants stipulated to these amounts, which totaled $33,609,444.13 for six states. *Id.* As a result, the CFPB currently requests that the Court award restitution in the amount of $197,357,689.89.

The Court, however, concludes that Defendants have met their burden, at step two, to demonstrate that this number overstates Defendants' unjust gains. Although the CFPB argues otherwise, the Court concludes that the amount of restitution should not include the interest and fees paid by any consumer who paid CashCall less than that consumer received in principal. As set forth in the Ninth Circuit's opinion, one of the primary purposes of restitution under the CFPA is to compensate consumers for their injuries or to make consumers whole. *See CashCall*, 35 F.4th at 750 ("Restitution ... serves to ensure that consumers are made whole when they have suffered a violation of the statute."); *id.* at 751 (holding that this Court's prior approach to restitution would make the restitutionary remedy "punishment for moral turpitude, rather than a compensation for consumers' injuries," which would "frustrate Congress's objective of compensating consumers who suffered harm on account of CashCall's deceptive practices"). Although

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total loan amount, which accounts for a total overpayment of $26,385. The CFPB did not include those excess principal amounts in its revised restitution calculation.

Defendants are prohibited from collecting the principal on the subject loans under state law, state law does not control the amount the Court awards as restitution. Failing to adjust the restitution amount for consumers who paid Defendants less than they received from CashCall would result in a windfall to consumers and overcompensate them for their loss. Instead, restitution should return consumers to their status quo before entering into the loans.

In anticipation of the Court's ruling on this issue, the CFPB, using Trial Exhibit 219, calculated that the award of restitution would be $134,058,600 after deducting the interest and fees paid by consumers who paid CashCall less than they received. In order to assure itself that this number was accurately calculated, on February 3, 2023, the Court ordered the CFPB to specifically identify how this number was calculated. After reviewing the CFPB's Reponse to that Order (Docket No. 371), the Court is satisfied that the $134,058,600 represents the "total amount that consumers paid in subject states for consumers who paid more than they received in subject loan proceeds," and only includes the amount those consumers paid over the amount they received (minus the stipulated amount in "refunds"). As demonstrated by the CFPB, this number was readily calculated using simple math based on Trial Exhibit 219.[4] Accordingly, the Court awards $134,058,600 in restitution.

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[4] The Court rejects Defendants' argument that such a calculation can only be submitted through a qualified expert witness subject to cross-examination.

For the reasons stated in the CFPB's Response (Docket No. 353) and CFPB's Reply (Docket No. 355), the Court rejects Defendants' remaining arguments with respect to the amount of restitution. Under Ninth Circuit precedent, "[r]estitution may be measured by the 'full amount lost by consumers rather than limiting damages to a defendant's profits.'" *CashCall*, 35 F.4th at 751 (quoting *CFPB v. Gordon,* 819 F.3d 1179, 1195 (9th Cir. 2016)). The Court need not deduct Defendants' legitimate expenses. *Id.*

V. CONCLUSION

For the foregoing reasons, Defendants' Motion for Leave is DENIED. The CFPB's Motion to Amend is GRANTED. The Court awards a civil penalty against Defendants in the amount of $33,276,264, and restitution in the amount of $134,058,600.

The parties shall meet and confer and prepare a joint proposed Amended Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before February 20, 2023. In the unlikely event that counsel are unable to agree upon a joint proposed Amended Judgment, the parties shall each submit separate versions of a proposed Amended Judgment, along with a declaration outlining their objections to the opposing party's version, no later than February 20, 2023.

IT IS SO ORDERED.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 18-55407, 18-55479

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellant / Cross-Appellee,

v.

CASHCALL, INC.; WS FUNDING LLC; DELBERT SERVICES CORPORATION; J. PAUL REDDAM,

Defendants-Appellees / Cross-Appellants.

Argued and Submitted: Sept. 9, 2019
Submission Withdrawn: Oct. 21, 2019
Argued and Resubmitted: Sept. 23, 2021
Filed: May 23, 2022

Before: John B. Owens, Ryan D. Nelson, and Eric D. Miller, Circuit Judges.

OPINION

MILLER, Circuit Judge.

CashCall, Inc., made unsecured, high-interest loans to consumers throughout the country. After attracting unwanted attention from regulators, it

sought to avoid state usury and licensing laws by using an entity operating on an Indian reservation. CashCall paid for that entity to issue loans and then purchased the loans days later. The loan agreements contained a choice-of-law provision calling for the application of tribal law, so they would not be subject to the law of borrowers' home States, which would have prohibited the loans. CashCall sought advice from a scholar of federal Indian law, who opined that the scheme "should work but likely won't."

His concern proved well founded. The Consumer Financial Protection Bureau brought this action against CashCall, its CEO, and several affiliated companies, alleging that the scheme was an "unfair, deceptive, or abusive act or practice," 12 U.S.C. § 5536(a)(1)(B), because CashCall demanded payment from consumers under the pretense that the loans were legally enforceable obligations, when in fact they were invalid under state law. The district court found the defendants liable and imposed a civil penalty of $10.3 million, but the court declined to order restitution.

The Bureau appeals, arguing that the civil penalty should have been larger and that the district court should have ordered restitution. CashCall cross-appeals the finding of liability. We conclude that the district court correctly found liability but erred in assessing the penalty and in evaluating whether to grant restitution. We therefore affirm in part, vacate in part, and remand for further proceedings.

I

CashCall, Inc., is a California corporation that makes high-interest consumer loans. Until 2006,

California was its primary market. CashCall sought to expand beyond California, but it was concerned that complying with usury laws in other States would make its operations unprofitable. It decided to pay two federally insured state-chartered banks to make loans, which it then purchased and serviced. Under federal law, those banks were exempt from out-of-state usury limits. *See* 12 U.S.C. § 1831d(a) (permitting a federally insured state-chartered bank to charge interest "at the rate allowed by the laws of the State ... where the bank is located").

The arrangement drew regulatory scrutiny. In 2009, Maryland authorities ordered CashCall to pay a civil penalty of $5.6 million for what they characterized as a "rent-a-bank" scheme, in which "a payday lender partners with a federally insured bank to take advantage of the bank's exemption from state usury caps." *CashCall, Inc. v. Maryland Comm'r of Fin. Regul.*, 139 A.3d 990, 995-96 & n.12 (Md. 2016). West Virginia also imposed a large civil penalty. *CashCall, Inc. v. Morrisey*, No. 12-1274, 2014 WL 2404300, at *1 (W. Va. May 30, 2014). Under pressure from the Federal Deposit Insurance Corporation, the state-chartered banks ceased their partnerships with CashCall. CashCall's last purchase of a loan from a bank was in November 2008.

CashCall then decided to pursue a similar arrangement with a lender operating under the laws of an Indian tribe. In 2009, a member of the Cheyenne River Sioux Tribe formed Western Sky Financial, LLC, as a South Dakota limited liability company with its offices located on the Cheyenne River Sioux Reservation. CashCall and Western Sky entered into

an assignment agreement and a service agreement. Under the assignment agreement, CashCall used a subsidiary, WS Funding, LLC, to set up an account with funds that Western Sky used to make loans. CashCall agreed to purchase all of the loans that Western Sky made; it did so just days after the loans were made, before the borrowers had made any payments. All economic benefits and risks then passed to CashCall, which also agreed to indemnify Western Sky for any expenses associated with legal or regulatory action. CashCall serviced the loans, together with Delbert Services Corporation, a company that CashCall created to collect on defaulted loans.

Western Sky offered loans of up to $10,000 at interest rates ranging from 89 to 169 percent. None of the borrowers resided on the Tribe's reservation. The borrowers did not apply for loans on tribal land; instead, they applied online or by telephone. At first, the calls were handled by CashCall loan agents in California, but eventually those duties transitioned to Western Sky loan agents on tribal land. Borrowers signed the loan agreement electronically on Western Sky's website, which was hosted by CashCall's servers in California. Borrowers made all payments from their home States.

Borrowers signed a loan agreement with Western Sky that identified Western Sky as the lender. The agreement contained a choice-of-law provision calling for the application of tribal law:

> This Agreement is governed by the Indian Commerce Provision of the Constitution of the United States of America and the laws of

> the Cheyenne River Sioux Tribe.... Neither this Agreement nor Lender is subject to the laws of any state of the United States of America.

By early 2011, several state authorities had initiated enforcement actions against CashCall or Western Sky. In September 2013, CashCall discontinued its purchase of Western Sky loans; without CashCall, Western Sky ceased its operations.

In December 2013, the Bureau brought this enforcement action against CashCall, WS Funding, and Delbert Services (collectively, "CashCall"). The complaint also named as a defendant J. Paul Reddam, CashCall's founder, CEO, and sole owner.

The Bureau alleged a violation of the Consumer Financial Protection Act (CFPA), which makes it unlawful for any "covered person"—defined as anyone who "engages in offering or providing a consumer financial product or service"—or any service provider "to engage in any unfair, deceptive, or abusive act or practice." 12 U.S.C. §§ 5481(6)(A), 5536(a)(1)(B). The complaint focused on 16 States (later narrowed to 13 States) in which CashCall, using Western Sky, made loans to consumers that were unlawful either because they had excessively high interest rates or because CashCall lacked a license to operate in the State. According to the complaint, CashCall engaged in deceptive acts by "represent[ing], expressly or impliedly, that the entire loan balance was owed ... and that consumers were legally obligated to pay the full amount collected or demanded," when in fact "the loans, or some parts thereof, were void or not

subject to a repayment obligation" under applicable state law.

The parties filed cross-motions for summary judgment, and the district court granted summary judgment to the Bureau on liability. The court observed that the Bureau's theory of liability "rests entirely on its argument that the Court should disregard the tribal choice-of-law provision in the loan agreements, and apply the law of the borrowers' home states." The court agreed that state law governed. Although the loan agreements called for the application of tribal law, the court found that provision to be unenforceable because CashCall, not Western Sky, was the true lender and real party in interest to the loan agreements, so the Tribe did not have a substantial relationship to the parties or the transactions. The court also concluded that applying tribal law would violate the fundamental public policy of the States involved. After determining that the choice-of-law provision was unenforceable, the district court then concluded that the borrowers' home States had the most significant relationships to the parties and the transactions, so it applied the law of those States. And under state law, the court determined that "the Western Sky loans are void or uncollectible."

The district court concluded that CashCall "engaged in a deceptive practice ... [b]y servicing and collecting on Western Sky loans, ... [which] created the 'net impression' that the loans were enforceable and that borrowers were obligated to repay the loans in accordance with the terms of their loan agreements." That impression, the court explained, was "patently false." CashCall objected that the Bureau's

enforcement action improperly federalized state-law violations by using them as the basis for identifying a violation of the CFPA. The district court rejected that argument, reasoning that "while Congress did not intend to turn every violation of state law into a violation of the CFPA, that does not mean that a violation of a state law can never be a violation of the CFPA."

The district court also determined that Reddam was individually liable for CashCall's violation of the CFPA. It found that he had "participated directly in and had the authority to control CashCall's ... deceptive acts." In addition, it concluded that the undisputed facts demonstrated that "Reddam had the requisite factual knowledge to subject him to individual liability" and that, "[a]t the very least," he "was recklessly indifferent to the wrongdoing."

The district court then held a bench trial to determine the appropriate remedy. The CFPA provides for three tiers of civil penalties depending on a defendant's level of culpability. 12 U.S.C. § 5565(c)(2). A first-tier penalty requires no showing of scienter; a second-tier penalty applies to "any person that recklessly engages in a violation" of the CFPA; and a third-tier penalty applies to "any person that knowingly violates" the CFPA. *Id.* § 5565(c)(2)(A)-(C). The district court concluded that CashCall's violation was neither knowing nor reckless, so it imposed a first-tier civil penalty, which amounted to approximately $10.3 million.

The Bureau also sought a restitution award of approximately $235.6 million, reflecting the total interest and fees on the void loans. The district court

declined to order restitution because, in its view, the Bureau "did not show that Defendants intended to defraud consumers or that consumers did not receive the benefit of their bargain from the Western Sky Loan Program." The court observed that the Bureau "did not present testimony from a single consumer that suggests that a borrower would not have entered into a loan transaction if they had known that CashCall—not Western Sky—was the true lender." The court also determined that even if restitution were warranted, the Bureau had not shown that the amount of restitution it sought was appropriate. Noting that the requested amount did not account for expenses, the court concluded that it "would create a windfall for borrowers, including those who may not have made any payments on their loans."

II

Before we consider whether CashCall violated the CFPA or what remedy would be appropriate for any violation, we must address a more fundamental issue. CashCall argues that the Bureau lacked authority to bring this action because the Bureau is unconstitutionally structured. By statute, the Bureau is headed by a single Director, who is appointed by the President with the advice and consent of the Senate, and who serves a five-year term during which the President may remove him only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(b)-(c). In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020), the Supreme Court held "that the [Bureau's] leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers."

Anticipating that decision, CashCall argued in the district court and in its brief to us that the Bureau was unconstitutionally structured. By the time we first heard oral argument, this circuit had considered and rejected that theory in *CFPB v. Seila Law LLC*, 923 F.3d 680 (9th Cir. 2019), *vacated*, 140 S. Ct. 2183 (2020). But shortly after we heard oral argument, the Supreme Court granted certiorari in *Seila Law*, so we withdrew submission pending the Court's decision.

Seila Law involved a challenge to a civil investigative demand issued by the Bureau. 140 S. Ct. at 2194. After determining that the restrictions on the removal of the Director were unconstitutional, the Supreme Court severed the removal provision and remanded the case to this court to determine whether the demand had been validly ratified "by an Acting Director accountable to the President" and to determine whether any such ratification would be "legally sufficient to cure the constitutional defect in the original demand." *Id.* at 2208 (plurality opinion); *id.* at 2224 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

Following the Supreme Court's decision, then-Director Kathleen Kraninger expressly ratified the civil investigative demand. *CFPB v. Seila Law LLC*, 997 F.3d 837, 846 (9th Cir. 2021). On remand, this court concluded that because "[a] Director well aware that she may be removed by the President at will [had] ratified her predecessors' earlier decisions," any constitutional injury that Seila Law suffered had been remedied. *Id.*

Here, as in *Seila Law*, Director Kraninger issued a statement formally ratifying the Bureau's "decisions

to file the original and amended complaints against Defendants, and to file the notice of appeal to the U.S. Court of Appeals for the Ninth Circuit." We called for supplemental briefing on the effectiveness of the ratification, and we set this case for reargument. The Bureau argues that, just as in *Seila Law*, the ratifications were effective and cured the constitutional violation. But CashCall argues that Director Kraninger's ratification of the appeal was ineffective because it came after the deadline for filing a notice of appeal had expired. *See* 28 U.S.C. § 2107; *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). Similarly, CashCall argues that her ratification of the action was ineffective because it came after the statute of limitations had expired. *See* 12 U.S.C. § 5564(g)(1).

We find it unnecessary to consider ratification because a more recent decision of the Supreme Court has made clear that despite the unconstitutional limitation on the President's authority to remove the Bureau's Director, the Director's actions were valid when they were taken. In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Court considered a statutory restriction on the President's authority to remove the Director of the Federal Housing Finance Agency. The restriction paralleled that applicable to the Bureau's Director, and the Court held that it was unconstitutional based on "[a] straightforward application of our reasoning in *Seila Law*." *Id.* at 1784. But the Court went on to hold that the unconstitutionality of the removal restriction did *not* invalidate any actions taken by the Director: "All the officers who headed the [agency] during the time in question were properly appointed," and even though

"the statute unconstitutionally limited the President's authority to remove the confirmed Directors, there was no constitutional defect in the statutorily prescribed method of appointment to that office." *Id.* at 1787 (emphasis omitted). The Court explained that *Seila Law*'s holding does not mean that actions taken by an officer unconstitutionally insulated from removal "are void *ab initio* and must be undone." *Id.* at 1788 n.24. It saw "no basis for concluding that any head of the [agency] lacked the authority to carry out the functions of the office." *Id.* at 1788.

The same is true here. CashCall does not dispute that both the complaint and the notice of appeal were filed while the Bureau was headed by a lawfully appointed Director, Richard Cordray. *See CFPB v. Gordon*, 819 F.3d 1179, 1185, 1190-91 (9th Cir. 2016). As in *Collins*, "the unlawfulness of the removal provision does not strip the Director of the power to undertake the other responsibilities of his office." 141 S. Ct. at 1788 n.23.

That is not to say that the unlawfulness of a removal provision can never be a reason to regard an agency's action as void. *See Collins*, 141 S. Ct. at 1788. But at a minimum, the "party challenging an agency's past actions must ... show how the unconstitutional removal provision *actually harmed* the party." *Kaufmann v. Kijakazi*, No. 21-35344, 2022 WL 1233238, at *5 (9th Cir. Apr. 27, 2022); *see also Collins*, 141 S. Ct. at 1788-89. For example, a party might demonstrate harm by showing that the challenged action was taken by a Director whom the President wished to remove but could not because of the statute. *Kaufmann*, 2022 WL 1233238, at *5. No

one suggests that anything of the sort happened here. Under *Collins*, "there is no reason to regard any of the actions taken by the [Bureau] in relation to the [enforcement action] as void." 141 S. Ct. at 1787.

Here, because Director Cordray exercised power that he lawfully possessed, "there is no basis for concluding that [he] lacked the authority to carry out the functions of [his] office." *Collins*, 141 S. Ct. at 1788. With or without Director Kraninger's ratification, this action was validly initiated, and the notice of appeal was validly filed.

Finally, offering a new theory months after oral argument—and more than eight years after this litigation first began—CashCall asks us to hold that the Bureau's structure violates the Appropriations Clause of the Constitution. *See CFPB v. All Am. Check Cashing, Inc.*, No. 18-60302, 2022 WL 1302488, at *2 (5th Cir. May 2, 2022) (Jones, J., concurring). CashCall forfeited that argument twice over by failing to present it to the district court or in its briefing before us on appeal. *See Hawkins v. Kroger Co.*, 906 F.3d 763 (9th Cir. 2018). CashCall suggests that the argument somehow affects our subject-matter jurisdiction, but that erroneously conflates "the [Bureau's] authority to execute the laws (Article II) with the United States' interest in the case (Article III)." *Gordon*, 819 F.3d at 1189. Because CashCall elected to wait until long after oral argument to raise this theory, we decline to consider it.

III

The district court found that CashCall had engaged in a deceptive practice by collecting payments on loans that were invalid under state law. CashCall

challenges that conclusion in two ways. First, it argues that the loans were valid because they were subject to tribal law, not state law. Second, it argues that CFPA liability for a deceptive practice cannot be predicated on a violation of state law. Because the district court resolved the issue of liability on summary judgment, we review de novo. *Stephens v. Union Pac. R.R. Co.*, 935 F.3d 852, 854 (9th Cir. 2019). We find neither of CashCall's arguments persuasive.

A

Although the loans were valid under the law of the Cheyenne River Sioux Tribe, CashCall does not dispute that they were invalid under the laws of the States in which the customers resided, whether because the interest rates were usurious or because neither CashCall nor Western Sky was licensed in those States. The validity of the loans thus depends on which law applies.

The district court determined that the choice-of-law question is governed by federal common law because the court's jurisdiction was based on a federal question. CashCall does not challenge that holding on appeal, nor does it suggest that the application of state or tribal choice-of-law rules would change the result. In the absence of any specific guidance in the CFPA, we apply federal common law. *See Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) (explaining that when federal jurisdiction is not based on diversity of citizenship, "federal common law choice-of-law rules apply"); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003 (9th Cir. 1987). We have looked to "the approach outlined in the Restatement

(Second) of Conflict of Laws" as a description of the federal common law rule. *Huynh*, 465 F.3d at 997.

All of the loan agreements contained a choice-of-law provision specifying the law of the Cheyenne River Sioux Tribe. When parties contract for the application of a particular jurisdiction's law, their choice normally controls. Restatement (Second) of Conflict of Laws § 187 (1971). But where the "issue is one which the parties could not have resolved by an explicit provision in their agreement," including, as here, because of substantive limits on their ability to contract, federal common law recognizes two circumstances in which the parties' choice does not control: (1) if "the chosen [jurisdiction] has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice," or (2) if "application of the law of the chosen [jurisdiction] would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen [jurisdiction]" and which "would be the state of the applicable law in the absence of an effective choice of law by the parties." *Flores v. American Seafoods Co.*, 335 F.3d 904, 917 (9th Cir. 2003) (quoting Restatement (Second) of Conflict of Laws § 187(2)). The district court determined that both exceptions were satisfied. We agree with the district court that the first exception is satisfied, so we do not consider whether applying tribal law would be contrary to fundamental state policies.

The district court correctly determined that the Cheyenne River Sioux Tribe "has no substantial relationship to the parties" to the loans. Restatement (Second) of Conflict of Laws § 187(2)(a); *see Industrial*

Indem. Ins. Co. v. United States, 757 F.2d 982, 987-88 (9th Cir. 1985). To be sure, Western Sky was nominally a party to the loans, and a jurisdiction ordinarily has a substantial relationship to a transaction if one of the parties has its principal place of business there, as Western Sky did. Restatement (Second) of Conflict of Laws § 187 cmt. f; *see PAE Gov't Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007); *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1323 (9th Cir. 2012). But assessing whether a jurisdiction has a "substantial relationship" to a transaction requires looking at the substance of the transaction, not merely its form. *Cf. Abramski v. United States*, 573 U.S. 169, 184-85 (2014). After all, the reason the parties' choice of law is not always controlling is that there are some issues "which the parties could not have resolved by an explicit provision." Restatement (Second) of Conflict of Laws § 187(2). Parties cannot circumvent substantive limits on their ability to contract simply by applying the law of a jurisdiction that does not have those limits. *Id.* cmt. d ("Permitting the parties in the usual case to choose the applicable law is not, of course, tantamount to giving them complete freedom to contract as they will."). Similarly, parties cannot circumvent limits on their ability to specify the governing law simply by structuring their agreement so that it has some nominal—but entirely artificial—relationship to the desired jurisdiction. *Cf. Industrial Indem. Ins. Co.*, 757 F.2d at 987-88. We therefore follow the "standard practice, evident in many legal spheres ..., of ignoring artifice when identifying the parties to a transaction." *Abramski*, 573 U.S. at 184-85.

In substance, all of the loan transactions at issue here were conducted by CashCall, not Western Sky. As the district court observed, "the entire monetary burden and risk of the loan program was placed on CashCall." Western Sky was formed for the purpose of making loans for CashCall, and it amounted to little more than a shell for CashCall's operations. Through a subsidiary, CashCall provided the money with which Western Sky made loans. CashCall agreed to purchase the loans that Western Sky made, and it did in fact purchase all of Western Sky's loans, just a few days after they were made and before the borrowers had made any payments. From then on, it bore all economic risk and benefits of the transactions. It also agreed to indemnify Western Sky for any legal or regulatory expenses. And even in the act of originating the loans, Western Sky's involvement was limited: At least at the beginning of the program, CashCall hosted Western Sky's website and phone number, and CashCall employees handled communications with customers. In sum, Western Sky's involvement in the transactions was economically nonexistent and had no purpose other than to create the appearance that the transactions had a relationship to the Tribe.

Nor is there any other basis for finding a relationship between the Tribe and the transactions. Western Sky was organized under South Dakota law, not tribal law, and it was neither owned nor operated by the Tribe. And the borrowers applied online or over the phone, never set foot on tribal land, and made payments from their home States, not the reservation. The only reason for the parties' choice of tribal law was to further CashCall's scheme to avoid state usury and licensing laws.

Because the Tribe had no substantial relationship to the transactions, and because there is no other reasonable basis for the parties' choice of tribal law, the district court correctly declined to give effect to the choice-of-law provision in the loan agreements. Instead, the court applied the law of the jurisdiction with "the most significant relationship to the transaction and the parties," which it found to be the borrowers' home States. Restatement (Second) of Conflict of Laws § 188(1)-(2). And for the States at issue in this case, application of state law means that the loans were invalid.

CashCall does not dispute the district court's determination that the borrowers' home States had the most significant relationship to the transactions. Instead, it invokes the rule that if a loan is valid when made, it does not become usurious upon transfer to an assignee in a different jurisdiction. *See Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 109 (1833). But these loans were *not* valid when made because there was never any basis for applying the law of the Tribe in the first place, and they were invalid under the applicable laws of the borrower's home States. CashCall also objects that the district court phrased its conclusion in terms of a determination that CashCall was the "true lender," a concept that CashCall says "would disrupt lending markets and undermine the secondary loan market." To the extent that CashCall invokes cases involving banks, we note that banks present different considerations because federal law preempts certain state restrictions on the interest rates charged by banks. *See, e.g.*, 12 U.S.C. § 1831d (permitting state-chartered banks to charge the interest rate allowed in their home State). We do not consider how the result

here might differ if Western Sky had been a bank. And we need not employ the concept of a "true lender," let alone set out a general test for identifying a "true lender." To answer the choice-of-law question, it suffices to examine the economic reality of these loans. As we have explained, doing so reveals that the Tribe had no substantial relationship to the transactions.

B

CashCall does not dispute that if the loans were governed by state law, they were void because (depending on the State) the interest rates were usurious or CashCall and Western Sky lacked required licenses. Nor does it dispute that it demanded payment from consumers under the pretense that the consumers had a valid obligation to pay. Instead, it argues that a finding of a deceptive practice under the CFPA is impermissible when the deception involves state law.

CashCall's argument finds no support in the text of the CFPA. The statute grants the Bureau broad authority to "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." 12 U.S.C. § 5511(a). It makes it unlawful for a covered person to "to engage in any unfair, deceptive, or abusive act or practice." *Id.* § 5536(a)(1)(B). The statute does not define "unfair," "deceptive," or "abusive," so we give those terms their ordinary meaning. *Wall v. Kholi*, 562 U.S. 545, 551 (2011). A "deceptive" practice is one "tending to deceive," that is, "to cause to believe the false"—a

meaning that easily encompasses leading a consumer to believe that an invalid debt is actually a legally enforceable obligation. *Webster's Third New International Dictionary* 584-85 (2002) (defining "deceive" and "deceptive").

In this case, of course, the reason that the debts were invalid happens to involve state law. But we see no reason why that should make the statute inapplicable. In this respect, the CFPA is similar to the Fair Debt Collection Practices Act (FDCPA), which prohibits using "unfair or unconscionable means ... to collect any debt." 15 U.S.C. § 1692f. In accord with the uniform view of other courts of appeals, we have held that a debt collector violates the FDCPA when it attempts to collect a debt that state law has made invalid. *See Kaiser v. Cascade Cap., LLC*, 989 F.3d 1127, 1133-34 (9th Cir. 2021); *see also Madden v. Midland Funding, LLC*, 786 F.3d 246, 254 (2d Cir. 2015); *Currier v. First Resol. Inv. Corp.*, 762 F.3d 529, 534-35 (6th Cir. 2014); *Johnson v. Riddle*, 305 F.3d 1107, 1121 (10th Cir. 2002). Likewise, other circuits have held that a debt collector violates the FDCPA's prohibition on threatening "to take any action that cannot legally be taken," 15 U.S.C. § 1692e(5), by threatening an action that is prohibited under state law. *See, e.g.*, *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1192 (11th Cir. 2010) (per curiam); *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001).

The Sixth Circuit's analysis in *Currier* is particularly instructive. There, the plaintiff alleged that a debt collector had violated the FDCPA by filing a lien against her home when the lien was invalid under state law. 762 F.3d at 532. The debt collector

argued that "a violation of state law is not a per se violation of the FDCPA." *Id.* at 536. The court agreed with that proposition but explained that it "does not mean that a violation of state law can never *also* be a violation of the FDCPA." *Id.* at 537. "The proper question ... is whether the plaintiff alleged an action that falls within the broad range of conduct prohibited by" federal law, and in answering that question, "[t]he legality of the action taken under state law may be relevant." *Id.*

CashCall asserts that the FDCPA is different from the CFPA. Citing provisions of the FDCPA that refer to the "legal status" of a loan and to collection activities that are "permitted by law," 15 U.S.C. §§ 1692e(2)(A), 1692f(1), CashCall says that that statute, unlike the CFPA, "explicitly incorporates state law." The claim is puzzling. To *explicitly* incorporate state law, Congress would need, at a minimum, to explicitly reference state law, which the cited provisions in the FDCPA do not do. Instead, courts have read the general language of those statutory provisions to refer to state law by accounting for the background principle that, in our federal system, state law defines property and contractual rights. *See Richards v. PAR, Inc.*, 954 F.3d 965, 969-70 (7th Cir. 2020). That principle is equally applicable to the provision of the CPFA at issue here.

CashCall points to other provisions of the CFPA that mention state law, and it argues that they suggest, by negative implication, that a deceptive-practice claim cannot be based on a deception about state law. We find no such implication in the statute, which creates a co-regulatory regime between the

States and the federal government. It directs the Bureau to cooperate with state regulators, and vice-versa. *See* 12 U.S.C. §§ 5495; 5552(b)(1)(A). Its preemption clause does not modify or limit state law, except to that extent that state law is inconsistent with the CFPA. *Id.* § 5551(a)(1). Nothing in those provisions suggests that deceptions involving state law are somehow exempt from the prohibition on deceptive practices.

And although the CFPA prohibits establishment of a federal usury rate, 12 U.S.C. § 5517(o), the Bureau has not established a federal usury limit here. Each state's usury and licensing laws still apply, and lenders must fairly and transparently represent to consumers the requirements of applicable state law. *See id.* § 5511(a). That is not federalizing state usury law, as CashCall would have it; it is simply applying the CFPA's prohibition on deceptive acts.

CashCall argues that applying the CFPA here would raise constitutional concerns because it would "federalize an area of state regulation." In the cases on which CashCall relies, the Supreme Court applied a presumption that Congress does not lightly interfere with State authority over "punishment of local criminal activity." *Bond v. United States*, 572 U.S. 844, 858 (2014); *see also Cleveland v. United States*, 531 U.S. 12, 25 (2000); *Jones v. United States*, 529 U.S. 848, 858 (2000). But the CFPA is not a criminal statute. More importantly, CashCall's conduct was hardly "local"—it was a multi-jurisdictional lending scheme. That interstate commercial conduct is at the heart of Congress's regulatory authority under the Commerce Clause, and applying the CFPA to cover it

raises no substantial constitutional questions. *See United States v. Lopez*, 514 U.S. 549, 558 (1995).

CashCall worries that the Board will convert a "dizzying array" of state-law violations into CFPA violations, offering examples of state laws requiring "that contracts be bilingual, in 12-point font, or notarized." But we have already held that a CFPA violation requires that a "representation, omission, or practice" be not only "likely to mislead consumers acting reasonably under the circumstances" but also "material." *Gordon*, 819 F.3d at 1192-93 & n.7 (quoting *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994)); *Currier*, 762 F.3d at 534 (emphasizing that the conduct at issue "was not a mere technical violation of Kentucky law"). CashCall's examples would not necessarily qualify, but CashCall's actual conduct clearly does. CashCall led borrowers to believe that they had an obligation to pay, when in fact under their States' laws they did not. That is the deceptive act pursued by the Bureau, and it falls within the prohibition of the statute.

IV

We next consider the Bureau's argument that the district court should have imposed a tier-two civil penalty, which requires a finding that CashCall acted recklessly, rather than a tier-one penalty, which does not. The district court's assessment of whether a party acted recklessly is a factual finding that we review for clear error. *United States v. Luna*, 21 F.3d 874, 884 (9th Cir. 1994).

In general, "[a] person acts recklessly ... when he consciously disregards a substantial and unjustifiable risk attached to his conduct, in gross deviation from

accepted standards." *Borden v. United States*, 141 S. Ct. 1817, 1824 (2021) (quotation marks and citations omitted). We have described reckless conduct "as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger ... that is either known to the [actor] or is so obvious that the actor must have been aware of it." *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1063 (9th Cir. 2000) (quoting *Hollinger v. Titan Cap. Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990) (en banc)).

The district court determined that CashCall did not act recklessly because it "sought out highly regarded regulatory counsel to assist [it] with structuring the Western Sky Loan Program"; counsel opined that the program was lawful; and "there was no case law that clearly established that the Tribal Lending Model was not a lawful model." Although that conclusion is debatable, we conclude that it is not clearly erroneous—but only as it applies to the early stages of CashCall's scheme. From September 2013, CashCall's conduct was reckless.

From the beginning, CashCall understood that to expand outside of California and make a profit, it would need to avoid state licensing and usury laws. To that end, it sought to work with state-chartered banks. But that approach received significant regulatory scrutiny from authorities in West Virginia and Maryland, leading to enforcement actions and large civil judgments. CashCall then pursued a tribal lending program that was nearly identical in structure to CashCall's state-chartered banking program that

had already landed it in legal trouble. And over time, CashCall faced escalating regulatory scrutiny of the tribal program. In January 2011, Colorado sued Western Sky; in February, Maryland brought an administrative action against Western Sky; and in August, Washington brought an enforcement action against CashCall based on its servicing of Western Sky loans. Of the 13 States at issue here, seven ultimately brought enforcement actions against CashCall. In September 2013, CashCall stopped buying loans from Western Sky, which then shut down.

None of this should have been a surprise: Counsel had told CashCall that its plan faced "significant" risk, and one expert advised that the plan "should work but likely won't" because the "lower courts will shun our model and ... if we reach the Supreme Court, ... we will lose." Nevertheless, the district court was correct that CashCall had "secured multiple formal and informal opinions" from legal counsel stating "that the structure of the Western Sky Loan Program was viable." Given the uncertainty reflected in counsel's advice, the district court might have concluded that CashCall's conduct was reckless even at that point. But clear error is a deferential standard, and we are unable to say that the district court's contrary determination was clearly erroneous. *See In re United States Dep't of Educ.*, 25 F.4th 692, 698 (9th Cir. 2022).

By September 2013, however, things had changed. In August, counsel recommended that the program cease because "the regulatory and litigation environments have risen from dangerous to near extinction." That opinion prompted CashCall to shut

down the program and stop buying new loans. But despite the intense regulatory scrutiny, and despite shuttering the tribal lending program for new loans, CashCall continued to collect on existing loans. CashCall modified loans in States in which it had already reached settlements with regulators. But otherwise, even after this litigation began, CashCall continued collecting fees and interest until it lost at summary judgment in August 2016.

We conclude that from September 2013 on, the danger that CashCall's conduct violated the statute was "so obvious that [CashCall] must have been aware of it." *Howard*, 228 F.3d at 1063 (quoting *Hollinger*, 914 F.2d at 1569). The district court's contrary conclusion was clearly erroneous. We therefore vacate the civil penalty and remand with instructions that the district court reassess it, with the penalty for the period beginning in September 2013 being based on tier two.

V

Reddam argues that the district court erred in finding him personally liable. We have held that an individual is liable for a corporation's violation of the CFPA if "(1) he participated directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Gordon*, 819 F.3d at 1193 (quoting *FTC v. Stefanchick*, 559 F.3d 924, 931 (9th Cir. 2009)). Reddam does not dispute that the first component of that test was satisfied because, as CEO, he had

authority to control CashCall's acts. Thus, Reddam's liability turns on whether he had the requisite knowledge or acted recklessly.

Reddam argues that he lacked the necessary mental state because he relied on the advice of counsel. But as the district court correctly observed, we have held that "reliance on advice of counsel [is] not a valid defense on the question of knowledge required for individual liability." *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1102 (9th Cir. 2014) (quotation marks and citation omitted) (alteration in original). In any event, even taking account of counsel's preliminary advice, continuing to collect loans after September 2013 was reckless for the reasons we have already explained. The district court did not err in holding Reddam personally liable.

VI

The Bureau argues that the district court erred in denying restitution. We review the district court's order on restitution for abuse of discretion, *Gordon*, 819 F.3d at 1187, and a district court necessarily abuses its discretion if it makes an error of law, *Koon v. United States*, 518 U.S. 81, 100 (1996). We agree with the Bureau that the district court's decision rested on a legal error, so we vacate the order denying restitution and remand for further proceedings. We emphasize at the outset that we do not hold that restitution is necessarily appropriate in this case, or if so, in what amount, but leave those questions to be resolved by the district court.

The CFPA permits the Bureau to seek "any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law," which

"may include, without limitation ... restitution; [and] disgorgement or compensation for unjust enrichment." 12 U.S.C. § 5565(a)(1), (2)(C), (2)(D). Restitution may be either legal or equitable. "'[R]estitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case,' and whether it is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (second and third alterations in original) (quoting *Reich v. Continental Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994)). Thus, restitution is legal when the plaintiff cannot "assert title or right to possession of particular property" but is nevertheless "able to show just grounds for recovering money to pay for some benefit the defendant had received from him." *Id.* (citation omitted). "In contrast," restitution is equitable "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.*

The Bureau argues that while equitable restitution may be discretionary, the district court lacked discretion to deny legal restitution. *See Curtis v. Loether*, 415 U.S. 189, 197 (1974). CashCall responds that the Bureau waived this theory by arguing below that restitution was discretionary. CashCall also relies on the Supreme Court's recent decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), which CashCall says limited the scope of equitable restitution by establishing "that equitable remedies—whether labeled disgorgement, restitution, accounting, or otherwise—must be limited to a

wrongdoer's 'net profits,'" not the larger award sought by the Bureau.

We do not decide whether the Bureau has waived a claim to legal restitution or how, if at all, *Liu* might limit equitable restitution. The district court may consider those issues on remand; we confine ourselves to the issues it has already addressed. The district court relied on its conclusion that the Bureau did not show that CashCall "intended to defraud consumers or that consumers did not receive the benefit of their bargain." First, noting that CashCall had relied on the advice of counsel, it saw "no evidence that [CashCall] decided to embark on an unlawful scheme to structure the Western Sky Loan Program to defraud borrowers." Second, it found that "consumers received the benefit of their bargain—i.e., the loan proceeds." Neither of those considerations was an appropriate basis for denying restitution.

First, while a district court may award restitution when "appropriate," 12 U.S.C. § 5565(a)(1), its decision must be made consistent with the statute. *See Pantron I*, 33 F.3d at 1103; *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (holding that a court deciding whether to award backpay under Title VII "must exercise this power in light of the large objectives of the Act" (quotation marks and citation omitted)). One of the statute's express objectives is to ensure that "consumers are protected from unfair, deceptive, or abusive acts and practices." 12 U.S.C. § 5511(b)(2). Another is to promote transparency in the markets for consumer financial products and services. *Id.* § 5511(b)(5). The statute authorizes the Bureau to initiate civil litigation and seek remedies to

achieve those objectives. *See id.* §§ 5531, 5564(a). Restitution is one of those remedies, and it serves to ensure that consumers are made whole when they have suffered a violation of the statute. *See id.* § 5565(a)(2).

Significantly, although scienter is required for an award of heightened civil penalties under the CFPA, 12 U.S.C. § 5565(c)(2)(B)-(C), it is not required for an award of restitution. *Id.* § 5565(a)(2). In giving dispositive weight to CashCall's lack of bad faith, the district court employed an approach that would make the restitutionary remedy "punishment for moral turpitude, rather than a compensation" for consumers' injuries. *See Albermarle Paper*, 422 U.S. at 422. That approach would frustrate Congress's objective of compensating consumers who suffered harm on account of CashCall's deceptive practices.

Second, whether consumers received the benefit of their bargain is not relevant. The Bureau did not allege that the consumers were denied the loan proceeds or that they entered into the loan agreements against their will. Rather, the Bureau alleged that CashCall harmed consumers by deceiving them about a major premise underlying their bargain: that the loan agreements were legally enforceable. The district court misunderstood the nature of CashCall's deceptive practice when it treated consumers' receipt of the benefits of that bargain as a reason to deny restitution.

The district court also determined that the Bureau did not establish the amount of restitution that would be appropriate. Specifically, the court stated that the "proposed restitution amount [should

be] netted to account for expenses." That statement is inconsistent with our precedent, which establishes a two-step burden-shifting framework for calculating restitution. *See Gordon*, 819 F.3d at 1195. At step one, the Bureau "bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gains." *Id.* (citation omitted). If the Bureau makes that threshold showing, then "the burden shifts to the defendant to demonstrate that the net revenues figure overstates the defendant's unjust gains." *Id.*

Applying that framework, we have held that "[r]estitution 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 (quoting *Stefanchik*, 559 F.3d at 931). In other words, "[a] district court may use a defendant's net revenues as a basis for measuring unjust gains." *Id.* Net revenues are "typically the amount consumers paid for the product or service minus refunds and chargebacks." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016), *abrogated on other grounds by AMG Cap. Mgt., LLC v. FTC*, 141 S. Ct. 1341 (2021). An award of net revenues differs from an award of net profits, which allows a defendant to "deduct legitimate expenses." *Liu*, 140 S. Ct. at 1950. We have held that "there are instances in which a defendant does not ultimately reap any profits from his wrongful conduct, and others where even though the defendant obtained some profit, the 'loss suffered by the victim is greater than the unjust benefit received by the defendant.'" *CFTC v. Crombie*, 914 F.3d 1208, 1216 (9th Cir. 2019) (quoting *FTC v. Figgie*

Int'l, Inc., 994 F.2d 595, 606 (9th Cir. 1993) (per curiam)); *see also Stefanchik*, 559 F.3d at 931.

Perhaps net revenues would overstate CashCall's unjust gains, but if so, that was CashCall's burden to prove. On remand, if the district court determines that an award of restitution is appropriate, it should take these principles into account in calculating the award.

AFFIRMED in part, VACATED in part, and REMANDED.

Appendix D

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 15-cv-7522

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff,
v.
CASHCALL, INC., et al.,
Defendants.

Filed: Jan. 19, 2018

Proceedings (In Chambers)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Consumer Financial Protection Bureau (the "CFPB") brings this action under the Consumer Financial Protection Act (the "CFPA") against CashCall, Inc. ("CashCall"), WS Funding, LLC ("WS Funding"), Delbert Services Corporation ("Delbert Services"), and J. Paul Reddam ("Reddam") (collectively, "Defendants"). On August 31, 2016, the Court granted the CFPB's Motion for Partial Summary Judgment finding Defendants violated the

CFPA.[1] The remaining issues to be tried came before the Court for a non-jury trial on October 17, 2017. Owen P. Martikan, Leanne E. Hartmann, and Christina S. Coll appeared on behalf of the CFPB. Thomas J. Nolan of Latham & Watkins LLP and Caroline Van Ness, Joseph L. Barloon, Allen L. Lanstra, Julia M. Nahigian, and Kasonni M. Scales of Skadden, Arps, Slate, Meagher & Flom LLP appeared on behalf of Defendants. Post-trial briefing was completed on November 30, 2017.

After considering the testimony presented at trial, the exhibits admitted, the parties' written submissions, and the applicable law, the Court makes the following findings of fact and conclusions of law:

Findings of Fact[2]

A. The Parties

The CFPB is a federal agency that was created by Congress in 2010 when it enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of

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[1] In the Court's Order granting the CFPB's Motion for Partial Summary Judgment, it was unnecessary for the Court to discuss in detail the history of CashCall's business or its consumer lending practices. However, in light of the damage theories advanced by the CFPB and Defendants' defenses to those theories, it has become necessary for the Court to make extensive findings of fact regarding CashCall's business and lending practices.

[2] The Court has elected to issue its decision in narrative form because a narrative format more fully explains the reasons behind the Court's conclusions. Any finding of fact that constitutes a conclusion of law is hereby adopted as a conclusion of law, and any conclusion of law that constitutes a finding of fact is hereby adopted as a finding of fact. *See In re Bubble Up Delaware, Inc.*, 684 F.2d 1259, 1262 (9th Cir. 1982).

2010. The CFPB acts as both the rule-making body and the federal enforcement agency for federal consumer law previously entrusted to multiple agencies. The CFPB enforces the provisions of the CFPA, which became effective on July 21, 2011.

CashCall is an S-corporation organized under California law. CashCall began doing business as a consumer lender in 2003 to provide a lower-cost alternative to payday loans for individual borrowers and, a few years later, for small businesses. Daniel Baren ("Baren") is CashCall's General Counsel and has served in that position since 2003. Delbert O. Meeks ("Meeks") has been CashCall's Chief Financial Officer since 2004.

Reddam is CashCall's President and Chief Executive Officer. Reddam has approximately 30 years of experience in consumer lending. Reddam also owned Delbert Services and served as its CEO from January 1, 2010 until August 13, 2013. Before Delbert Services ceased operations in 2015, it serviced, for a fee, charged-off loans owned by CashCall and other unrelated companies.

WS Funding is a wholly owned subsidiary of CashCall that was established as a holding company to purchase consumer loans. Reddam is the President of WS Funding. WS Funding operates as a pass-through entity and, therefore, it does not separately report its financial results.

B. CashCall's Initial Unsecured Consumer Loan Business

Reddam founded CashCall to meet a perceived need in the market between payday loans and second mortgage loans. Specifically, Reddam determined

there was a gap in the market for people who were employed with good-paying jobs but who had an immediate need for a few thousand dollars to help them through a financial "pinch." Through CashCall, Reddam sought to offer consumer installment loans that mimicked second mortgages except that they were unsecured. CashCall analyzed borrowers' credit scores and incomes in its overall evaluation of the borrowers' ability to repay the loans and targeted consumers who were employed but were not necessarily the most conservative with their use of money. In Reddam's view, these consumers were most likely to find themselves in an occasional financial "pinch" with an immediate need for cash, and, thus, Reddam developed a business plan whereby CashCall would loan money to these consumers quickly and easily via telephone or the Internet.

In 2003, CashCall began making unsecured loans to California residents under a California lender license that it obtained from the California Department of Corporations.[3] Initially, CashCall offered only one product—an unsecured $10,000 loan at an annual prime interest rate of 24% with a 10 year term. However, Reddam believed there was an opportunity to serve consumers in the sub-prime market because very few applicants could satisfy the strict underwriting guidelines required to obtain

[3] CashCall also obtained lending licenses in fourteen other states, including licenses in three states—New Mexico, Colorado, and Arizona—that are on the list of Subject States in this action. Although Alabama was originally on the list of Subject States, the CFPB removed it from the list because CashCall had obtained a lending license in Alabama by July 21, 2011, which was the date the CFPA became effective.

prime interest rate loans. As a result, CashCall began offering an assortment of loan products with interest rates that varied according to borrowers' creditworthiness.

From its inception, CashCall's loan portfolio was geographically concentrated in California. In the fall of 2005, Merrill Lynch, which was considering providing financing to CashCall, and its counsel recommended that CashCall diversify its portfolio nationally. Merrill Lynch's counsel suggested that CashCall should contact Claudia Callaway, a regulatory attorney who, at that time, was a partner at Paul, Hastings, Janofsky & Walker LLP in its Washington D.C. office. Baren subsequently met with Callaway, and she represented herself as someone who could "facilitate relationships" and provide opportunities for CashCall to diversify and structure a lending model within requirements of law to "avoid enforcement actions by state and federal regulators."

Based on these discussions, CashCall and Reddam retained Callaway. Callaway, working with Baren, assisted CashCall with structuring its Bank Lending Model by partnering with First Bank & Trust of Milbank ("FBT"), a federally insured state-chartered bank in South Dakota. Pursuant to the partnership, CashCall created a national lending program whereby CashCall received out-of-state loan applications, which were accepted and sent to FBT. FBT then underwrote and funded the loans from South Dakota, complying with South Dakota's laws governing interest rates and other terms. Three days after FBT funded the loans, they were purchased by CashCall. In October of 2006, CashCall entered into a

similar relationship with First Bank of Delaware ("FBD"). Because CashCall believed that FBD could handle more volume than FBT, it eventually wound down its relationship with FBT, and it relied exclusively on FBD to fund the loans.

As CashCall became heavily involved in loans originated under the Bank Lending Model, its relationship with Callaway expanded. Because Baren was not an expert in regulatory compliance, he relied on Callaway's expertise in its direct consumer lending business. When Callaway moved to Manatt, Phelps & Phillips, LLP ("Manatt"), CashCall retained Manatt to handle more of its regulatory and litigation work. By the middle of 2007, Callaway and Manatt were handling all of CashCall's lending-related business and litigation.

In June of 2008, FBD informed CashCall that it was terminating its partnerships with all non-bank assignees due to pressure from the Federal Deposit Insurance Corporation ("FDIC"). Callaway advised Baren that the global financial crisis had severely impacted the ability of the banks to engage in any lending activity, including partnerships with unsecured consumer lenders. Although Callaway attempted to find other banks to partner with CashCall, she was ultimately unsuccessful. Accordingly, CashCall purchased its last loan under the Bank Lending Model from FBD in November of 2008.

C. CashCall Begins Mortgage Loan Business

In 2009, because the financial crisis had a detrimental effect on CashCall's unsecured consumer

lending business, Reddam decided to focus on CashCall's prime mortgage loan business. According to Reddam, CashCall began selling loans to conduits like "Citi and Wells Fargo" and established lines of credit with several large banks. By August of 2011, CashCall largely resold mortgage loans to Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac"). CashCall's mortgage business was very successful and quickly outpaced its consumer installment lending business. At the beginning of 2015, CashCall's mortgage business was sold to Impac Mortgage Holdings, Inc.

D. The Western Sky Loan Program

In January of 2009, Callaway advised CashCall that the Bank Lending Model was no longer viable because of pressure from regulators and, therefore, she was advising her consumer lending clients to switch to a similar business model, which involved partnering with an Indian tribal entity or member who would act in the same capacity as a state-chartered bank (the "Tribal Lending Model"). According to Callaway, under the Tribal Lending Model, a lender operating on a reservation would make loans to borrowers, after which the loans would be assigned to a non-tribal financial services company, like CashCall, for servicing and collection. Callaway also advised that the Tribal Lending Model contemplated two structures: "Arm of the Tribe Lending" and "Tribe Member Lending." In the Arm of the Tribe Lending structure, the lending entity would be incorporated under tribal law and operated by the tribe. In the Tribe Member Lending structure, the

lending entity would be owned by a tribe member and may or may not be incorporated under tribal law. Callaway further advised that because the loans made pursuant to the Tribal Lending Model were originated by a tribe or tribal member, the loans would be made under the laws of the tribe and would not have to comply with licensing and usury laws in states where borrowers resided.

1. CashCall Adopts the Tribal Lending Model

After several discussions with Callaway, CashCall expressed an interest in switching to the Tribal Lending Model. Specifically, CashCall wanted to continue to diversify its lending geographically without regard to the usury and licensing laws of borrowers' home states. Baren asked Callaway to recommend a potential tribal partner. In response, Callaway introduced Baren and Reddam to Martin A. "Butch" Webb, who was a member of the Cheyenne River Sioux Tribe ("CRST") in South Dakota. At the time, Webb was President of Western Dakota Bank and had operated payday lending companies from the CRST Reservation for several years using the Tribal Lending Model. In April of 2009, Baren met with Webb on the CRST Reservation to discuss a potential partnership and business terms. During the visit, Baren also met with Webb's counsel, Cheryl Bogue ("Bogue") of Bogue & Bogue, who specialized in CRST law. Bogue elaborated on the Tribal Lending Model and advised Baren that an assignee of the loans would be able to enforce loans made by a tribal member.

During their discussions, Baren told Webb that CashCall was not interested in merely purchasing

payday loans made by Webb's companies. Instead, CashCall wanted to focus on longer-term, fully-amortized, unsecured consumer loans. Although this business plan was different from Webb's other operations, Webb was receptive to becoming involved with these types of loans. According to Webb, the unemployment rate on the CRST Reservation was very high and a partnership with CashCall would allow him to reduce the unemployment rate. Webb informed Baren that he would need CashCall's assistance with training employees for the new venture. Baren and Webb ultimately reached an agreement on the business terms of an arrangement pursuant to which a new lending entity would be created and owned by Webb—ultimately called Western Sky Financial, LLC ("Western Sky")—and it would make loans to consumers, and the loans would be purchased by WS Funding three days after they were originated (the "Western Sky Loan Program"). After agreeing on the business terms, Webb and Barren relied on counsel to structure the relationship, which included the creation of new entities (WS Funding and Western Sky) and the structuring of the Tribal Lending Model.

The parties agreed to the Tribe Member Lending structure in large part because of the absence of any CRST law that would allow for the incorporation or creation of a new lending entity. As a result, on May 13, 2009, Webb's counsel formed Western Sky, a limited liability corporation, under the laws of South Dakota. Webb was the sole member of Western Sky, and it obtained a general business license from the CRST.

In July of 2009, Callaway joined the law firm of Katten Muchin & Rosenman LLP ("Katten"), and Baren agreed to move all of CashCall's regulatory work—including work related to the Western Sky Loan Program—as well as CashCall's corporate work and a few pending litigation matters to Katten.

2. Western Sky Loan Program Operations

In 2010, the Western Sky Loan Program became fully operational and consumers could apply for loans via the website www.westernsky.com. At the beginning of 2010, CashCall formed WS Funding, a wholly owned subsidiary, to serve as a holding company to purchase the unsecured loans originated by Western Sky. In February of 2010, Western Sky originated its first unsecured consumer installment loans and sold the loans to WS Funding pursuant to an Agreement for the Assignment and Purchase of Promissory Notes ("Assignment Agreement"). Pursuant to the Assignment Agreement, WS Funding paid Western Sky the amount disbursed to the borrower and a premium of 5.145% depending on the nature of the loan.

In addition, Western Sky and CashCall entered into an Agreement for Services ("Services Agreement"). Pursuant to the Services Agreement, Western Sky engaged CashCall to provide certain services related to the Western Sky Loan Program. In exchange, CashCall received 2% of the face value of each loan transaction. Among the services that Cash Call provided were: inbound and outbound customer service support, underwriting review, marketing services, website hosting, use of a toll free phone

number and fax number, electronic communications with borrowers, security monitoring, and complaint resolution.

At the beginning of the Western Sky Loan Program, Western Sky had very limited staff. As a result, CashCall handled Western Sky's loan applicant calls from its offices in Orange County, California. Final underwriting and funding of the loans, however, was done from Western Sky's facilities on the CRST Reservation. As Western Sky added more employees, it was able to handle a larger number of calls from the call center located on the CRST Reservation. Eventually, CashCall handled only overflow calls from loan applicants.

After the origination process was complete and Western Sky had funded the loans, WS Funding purchased the loans pursuant to the terms in the Assignment Agreement, within three business days after the loan was funded. When a loan was sold to WS Funding, the borrower was provided with a notice of assignment informing the borrower that WS Funding now owned the loan and that all payments on the loan must be made to CashCall. The notice of assignment also provided the borrower with a thirty-day window upon receipt of the notice to dispute the validity of the debt.

During the course of the program, Western Sky offered six loan products: $700, $850, $1,500, $2,600, $5,075, and $10,000, with interest rates between 89% and 169%. Neither Bogue nor Callaway expressed any concern about the high interest rates charged for the loans or CashCall's servicing of loans with these interest rates.

3. Western Sky Consumer Loan Agreements and Disclosures to Consumers

Every borrower who entered into a loan transaction with Western Sky executed a document called the "Western Sky Consumer Loan Agreement" ("Consumer Loan Agreement"), which contained numerous written disclosures, including the key terms that governed the loan transaction. Although Baren prepared the initial draft of the Consumer Loan Agreement using the agreement that had governed loans subject to the Bank Lending Model as a template, he solicited and received advice from Callaway and Bogue before the Consumer Loan Agreement was finalized.

The very first page of every Consumer Loan Agreement provided (in bolded language):

> This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation. By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound by the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and further agree that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.

Exhibit 503, A-J, at 1.

In addition, every Consumer Loan Agreement contained a "Choice of Law" provision that identified the governing law. This provision stated:

> This Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe. We do not have a presence in South Dakota or any other states of the United States. Neither this Agreement nor Lender is subject to the laws of any state of the United States of America.

Exhibit 503, A-J, at 3.

Every Consumer Loan Agreement also contained a provision that clearly disclosed, (pursuant to the Truth in Lending Act) the Annual Percentage Rate on the loan, the amount financed, the dollar amount of the finance charge, and the dollar amount of the total amount of payments the borrower would have paid after all scheduled payments were made. In addition, every Consumer Loan Agreement contained a payment schedule that outlined the amount of all required payments. Every Consumer Loan Agreement also explained that borrowers would be charged a late fee each time a payment was not made within 15 days of the due date, as well as a fee if a payment was returned due to insufficient funds.

Exhibit 503, A-J, at 1.

The Western Sky loans could be paid off at any time without any penalty for early repayment and every Consumer Loan Agreement contained a provision that fully explained the right to pay off the loan at any time. Moreover, Western Sky specifically encouraged borrowers to pay the loans off early to

avoid incurring the high interest charges. For example, the loan agreements executed by borrowers between February 2010 and July 2010 and October 2010 and August 2013 contained a provision that provided (in bolded language):

> THIS LOAN CARRIES A VERY HIGH INTEREST RATE. YOU MAY BE ABLE TO OBTAIN CREDIT UNDER MORE FAVORABLE TERMS ELSEWHERE. EVEN THOUGH THE TERM OF THE LOAN IS 42 MONTHS, WE STRONGLY ENCOURAGE YOU TO PAY OFF THE LOAN AS SOON AS POSSIBLE. YOU HAVE THE RIGHT TO PAY OFF ALL OR ANY PORTION OF THE LOAN AT ANY TIME WITHOUT INCURRING ANY PENALTY. YOU WILL, HOWEVER, BE REQUIRED TO PAY ANY AND ALL INTEREST THAT HAS ACCRUED FROM THE FUNDING DATE UNTIL THE PAYOFF DATE.

E.g., Exhibit 503, A at 5.

Western Sky also charged a loan origination fee. This fee was subtracted from the proceeds disbursed to the borrower when the loan was funded. The origination fee became part of the overall note and was not paid until the borrower paid more than the amount that was disbursed. This fee was disclosed and described to borrowers as a "Prepaid Finance Charge." Indeed, every Consumer Loan Agreement contained a section that identified the amount financed, the amount paid to a borrower directly, and the amount of the pre-paid finance charge/origination fee. For

example, a provision in a Consumer Loan Agreement for a $2,600 loan clearly stated:

ITEMIZATION OF AMOUNT FINANCED	
Amount Financed:	$2,525.00
Amount Paid Directly to Borrower:	$2,525.00
Prepaid Finance Charge/Origination Fee:	$75.00

E.g., Exhibit 503, A at 2. The Consumer Loan Agreement also provided: "You promise to pay to the order of Western Sky or any subsequent holder of this Note the sum of **$2,600**, together with interest calculated at **135.00%** per annum and any outstanding charges or late fees, until the full amount of this Note is paid." Exhibit 503, A at 2. The Consumer Loan Agreement further provided, "The Prepaid Finance Charge disclosed above is fully earned upon loan origination and is not subject to rebate upon prepayment or acceleration of this Note." Exhibit 503, A at 2.

Every Consumer Loan Agreement also contained an assignment provision. This provision advised the borrower that Western Sky "may assign or transfer this Loan Agreement or any of our rights under it at any time to any party." *E.g.*, Exhibit 503, A-J, at 3. Although none of the variations of the Consumer Loan Agreement stated that the loan would be assigned to WS Funding or contained any specific references to WS Funding or CashCall, within three days of a loan being sold to WS Funding, borrowers received a notice of assignment informing them that WS Funding now owned the loan and that all payments should be submitted to CashCall.

In addition to the disclosures in the Consumer Loan Agreement, borrowers received other oral and written disclosures regarding CashCall's involvement in the Western Sky Loan Program. For example, during the period of time that CashCall assisted with processing loan applications, a recorded disclaimer was played to individuals calling Western Sky who were routed to CashCall loan agents explaining that CashCall had been hired to help Western Sky process the loan applications. Loan applicants were also notified via email that CashCall was assisting Western Sky.

Moreover, twenty-four hours after a loan was sold to WS Funding, a notice of assignment was sent to the borrower, notifying the borrower that WS Funding now owned the loan, and that all payments must be remitted to CashCall. The notice of assignment gave the borrower a thirty-day window after receiving the notice to dispute the validity of the debt. The notice of assignment also stated that if a borrower did not dispute the validity of the assignment during the thirty-day time frame, CashCall would assume the debt to be valid. The notice of assignment was sent after a borrower had received the loan proceeds but before any payment was due on the loan.

Many borrowers who obtained Western Sky loans were repeat customers, meaning that once they paid off one Western Sky loan after it had been sold to WS Funding and serviced by CashCall, they applied for and received an additional loan from Western Sky. Indeed, over the course of the Western Sky Loan Program, over 15% of the loans issued to consumers were made to borrowers who had previously borrowed

from Western Sky and repaid the loan, notwithstanding the assignment to WS Funding.

E. Third Party Financing and Defense of the Tribal Lending Model

In order for CashCall to purchase the Western Sky loans pursuant to the Assignment Agreement, it required substantial outside funding from third-party lenders. In September of 2009, CashCall approached Jefferies & Company ("Jefferies"), an investment banking firm, and other lenders about entering into a financing agreement to provide necessary funds for CashCall's mortgage loan business as well as its purchase of Western Sky loans. CashCall retained Callaway's law firm to prepare an opinion letter regarding the Western Sky Loan Program that could be shared with prospective financing partners. Callaway prepared an initial draft opinion letter, which was provided to Baren and Jefferies for their review. In the draft letter, Callaway discussed the tribal immunity doctrine and opined that because Western Sky was "chartered by the CRS[T] and [was] not completely independent of the tribe", the "Loan Agreements [would] not be subject to United States federal consumer protection law, or state limiting rates." Callaway also advised that she was aware of two state appellate decisions in which state regulatory authorities had unsuccessfully attempted to enforce state licensing laws against Indian tribal lenders. At the time, both appellate courts had instructed the relevant trial courts to determine whether the named lenders qualified as "arms of the tribe" and were, therefore, entitled to tribal immunity protection.

Jefferies' counsel reviewed the draft opinion letter and, on September 6, 2009, raised several concerns about the Tribal Lending Model and its ability to withstand attack from courts and regulators. Jefferies' counsel advised that she wanted the final draft of the opinion letter to directly address three concerns. First, Jefferies' counsel pointed out that the Supreme Court had previously held that although the doctrine of sovereign immunity protects Indian tribes, it does not protect individual tribal members or agents of the tribes. Thus, Jefferies' counsel wanted Callaway's opinion letter to directly opine on whether the doctrine of sovereign immunity would protect non-Indian tribe third parties that may assist tribes in activities that violate state law. Jefferies' counsel also pointed out that Callaway's statement in the draft opinion letter that the "Loan Agreements [would] not be subject to United States federal consumer protection law, or state limiting rates" needed additional substantiation. According to Jefferies' counsel's research of Supreme Court case law, "even if Western Sky successfully" asserted the doctrine of sovereign immunity as a "defense to suit, federal and state law would likely still apply to the Loan Agreements" which meant that "Western Sky could not enforce a contract that [did] not comply with applicable state or federal law in court." Finally, Jefferies' counsel noted that Callaway's draft opinion assumed that Western Sky, for purposes of the sovereign immunity doctrine, would be recognized as an Indian tribe by the United States, and it questioned whether there was any support from any federal court or a state supreme court for the proposition that Western Sky would enjoy

tribal sovereign immunity in the same way as a recognized Indian tribe.

Baren also reviewed Callaway's initial draft opinion letter, and he advised Callaway that her letter contained several errors, including the erroneous statement that Western Sky was "organized under the laws of the CRS[T]." Callaway advised Baren that the draft opinion letter had included a "wish list" of assumptions—e.g., that Western Sky would be organized under the laws of the CRST, not South Dakota—and she promptly revised the letter to accurately state that Western Sky "is owned exclusively by Butch Webb, an enrolled Cheyenne River Sioux Nation member." In the revised draft, Callaway also removed the discussion of the Indian sovereign immunity doctrine and, instead, added an opinion that the Choice of Law provision in the Consumer Loan Agreement stating that CRST law governed the transaction would be enforceable in 46 states as well as the District of Columbia and Puerto Rico.

Although Jefferies was unable to financially close the transaction with CashCall, Baren moved forward with the Western Sky Loan Program relying on Callaway's advice that state usury and licensing laws would not govern the loans made by Western Sky.

In October of 2009, after Callaway had additional discussions with Bogue about the Tribal Lending Model and, specifically, the issue of whether Indian-owned businesses would be subject to state usury and licensing laws, Bogue sent Callaway a memorandum explaining the Tribal Lending Model in more detail. After receiving Bogue's memorandum, Callaway

advised Baren that "for belts and suspenders" Webb's company should be a tribal corporation so that they could represent that it was an "arm of the tribe". Callaway also encouraged Bogue to organize Western Sky under CRST law, but Bogue could not do so because there was no mechanism for such organization or incorporation under tribal law. Bogue indicated to Callaway, however, that such a mechanism may be "in the works".

In March of 2010, Callaway advised Bogue and Baren that she wanted to revisit restructuring the Western Sky Loan Program to quell CashCall's lenders' concerns about the Tribe Member Lending structure. According to Callaway, moving to an Arm of the Tribe Lending structure would facilitate CashCall's ability to obtain future financing and also allow Katten to represent to state regulators that Western Sky was organized under tribal law. Despite Callaway's suggestion that CashCall should consider restructuring to an Arm of the Tribe Lending structure, she never advised CashCall that the Tribe Member Lending structure was no longer defensible, and she never withdrew her opinion that the CRST choice of law provision was valid and enforceable. Indeed, in April of 2010, Katten issued an opinion letter to third-party lender Centurion Credit Resources stating that the choice of law provision designating CRST as the applicable law was enforceable in 48 states as well as the District of Columbia and Puerto Rico. In addition, in May of 2010, Callaway advised Baren that there was "good law" supporting the proposition that state and federal laws would not apply to transactions entered into with a tribal member's business entity.

On May 14, 2010, Western Sky's counsel, Bogue, also opined that CRST law applied to the Western Sky loans and that the loans were enforceable. Exhibit 502, A. According to Bogue, Western Sky was an "entity duly and lawfully licensed by the [CRST] to make and issue such loans" and, therefore, the provisions in the Consumer Loan Agreement stating that CRST law applied were enforceable. Exhibit 502, A.

As the Western Sky Loan Program grew, CashCall became involved in many financing transactions whereby sophisticated third-party lenders—including financial services companies, investment funds, and speciality finance companies—provided hundreds of millions of dollars in financing to CashCall to facilitate WS Funding's purchase of loans from Western Sky. Katten regularly issued two opinion letters for each of the transactions: a general corporate opinion and a regulatory opinion. The regulatory opinion focused on the legality of CashCall's ability to purchase and enforce the loans issued by Western Sky at the very high interest rates and terms stated in the loan agreements. In addition, Bogue issued opinions—which were referenced in and relied on in Katten's opinion letters—that opined on Western Sky's ability to make loans under CRST law and transfer the loans to CashCall and on CashCall's ability to collect or enforce the loans. Indeed, Bogue provided multiple opinion letters stating that the "fees and rates contained within [the Western Sky loans] are in compliance with any applicable requirements of the Cheyenne River Sioux Tribe." Exhibits 502a-502m. In addition, both Bogue and Callaway continued to maintain that CRST law applied to the

loan agreements and that CashCall was able to enforce the terms of the loan agreements.

Although Callaway advised Baren in February of 2011 that she "felt more strongly than ever that Western Sky" needed to "firm up its structure to fit in the arm of the tribe box", she never withdrew or changed her opinion that the Tribe Member Lending structure was legally defensible or specifically advised CashCall that it was absolutely necessary to change to an Arm of the Tribe Lending structure. Although Baren agreed that Western Sky "should be formed with the tribe for 100 different reasons" and he stated that he expected "to have that done in a week or so," he testified that he did not think the "arm of the tribe" issue was crucial to CashCall's ability to adequately respond to inquiries by state regulators. Callaway generally agreed with Baren's assessment and indicated that her concern about the "arm of the tribe" issue was really "about the longevity of the product" and the "domino effect" that a negative finding may have on CashCall.

Indeed, Callaway continued to opine that the choice of law provision in the Consumer Loan Agreement was enforceable. For example, on December 31, 2012, Katten issued an opinion letter to several third-party lenders stating the choice of law provision in the Consumer Loan Agreement designating CRST law as the applicable law was enforceable and that, pursuant to the Assignment Agreement, CashCall would acquire all rights Western Sky enjoyed as the lender. In the letter, Katten also relied on an opinion from Bogue, dated December 28, 2012, stating that the loans were not

subject to state or federal law. Similarly, in connection with a financing transaction that CashCall entered into with third-party lenders on January 31, 2013, Katten, again, issued an opinion letter stating that the choice of law provision in the Consumer Loan Agreement designating CRST law as the applicable law was enforceable and that, pursuant to the Assignment Agreement, CashCall would acquire all rights Western Sky enjoyed as the lender. In the letter, Katten also referenced and relied on Bogue's opinion letter, dated January 30, 2012, opining that the loans were not subject to state or federal law.[4]

F. Regulatory Actions Against Defendants and the Winding Down of the Western Sky Loan Program

In August of 2011, the state of Washington filed an enforcement action against CashCall, alleging violations of Washington state law, based on CashCall's servicing of Western Sky loans.[5]

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[4] During cross-examination, Baren understandably could not locate Bogue's January 30, 2012 letter because it was not offered by either party. However, Baren testified that the January 30, 2012 letter was probably a "cookie cutter" of Bogue's December 12, 2011 letter.

[5] By this time, regulators had also commenced lawsuits against Western Sky and Webb challenging whether they were protected by Indian sovereign immunity. On January 27, 2011, the Attorney General of Colorado filed a lawsuit in Colorado state court naming Western Sky and Webb, alleging that Western Sky's issuance of installment loans to Colorado consumers violated state laws because Western Sky had failed to obtain a lender license and the interest on the loans exceeded the maximum rate allowed under Colorado law. In addition, on February 15, 2011, the Commissioner of Financial Regulations in Maryland filed an administrative action against Western Sky,

Regulators in several other states subsequently filed similar actions against CashCall. As a result, beginning in 2012, CashCall decided to stop purchasing Western Sky loans issued to borrowers who resided in those states.

On March 6, 2013, Reddam and Baren met with Callaway and two other lawyers at Katten to discuss the increasing number of regulatory investigations and litigation challenging CashCall's Tribal Lending Model. During the meeting, Callaway reassured Baren and Reddam that she believed that the Tribal Lending Model was legally sound despite the unfavorable shift in the regulatory climate.

On March 25, 2013, Callaway contacted Baren via e-mail to suggest possible changes to the Tribal Lending Model. Callaway explained that in her experience, states were "accepting [of] an arm-of-the-tribe lending model" because they acknowledged "that they cannot regulate tribes or their arms." Exhibit 528 (internal quotation marks omitted). Callaway explained, however, that CashCall's business competitors were challenging the "arm-of-the-tribe" lending model and suggesting that service providers using this model be challenged for "aiding and abetting illegal lending." Exhibit 528 (internal quotation marks omitted). As a result, Callaway recommended that CashCall limit its lending activities to one of three areas: (1) lending funds to the tribe to make the loans; (2) providing services to the

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Webb, and three payday lending companies owned by Webb. Like Colorado, Maryland alleged that Western Sky and Webb violated state law by failing to obtain a lender license and making loans with interest rates exceeding the rates allowed under state law.

tribe (e.g., marketing, underwriting, software, collections overflow); or (3) purchasing a participation interest in the loans made by the tribe so that the tribe retained ownership of the loans and would be able to argue for sovereign immunity based on its ownership. Exhibit 528. Notwithstanding that advice, Callaway never specifically withdrew or modified her previous opinion that the Tribal Lending Model was defensible and that the Choice of Law provision in the Consumer Loan Agreement was enforceable. Indeed, Katten and Callaway continued to represent CashCall in several pending and subsequently filed lawsuits involving the Western Sky Loan Program and vigorously defended the Tribe Member Lending structure.

In August of 2013, CashCall became increasingly concerned about the viability of the Western Sky Loan Program. Accordingly, Baren consulted with Dr. Gavin Clarkson—an expert in Indian Law, Tribal Entrepreneurship, and Indian Finance—regarding the structure of the Western Sky Loan Program. Dr. Clarkson opined that because Western Sky was owned by a member of the CRST, it was entitled to the rights and immunities of a tribal member, including protection from state regulation. Dr. Clarkson further opined that Western Sky's sales of the loans to WS Funding did not change the character of the loans or his view that state laws were not applicable. Dr. Clarkson's opinions were entirely consistent with the advice provided by Callaway and Bogue.

In August of 2013, the New York Attorney General (the "NYAG") filed a high-profile lawsuit naming CashCall, Reddam, and WS Funding and alleging violations of New York's usury and licensing

laws. The NYAG sought penalties and restitution of all loan payments made by New York residents who had obtained loans from Western Sky. Although Callaway and Bogue continued to defend the Tribal Lending Model, the number of regulatory actions convinced Reddam that it was in CashCall's best interest to end the program. Specifically, Baren and Reddam credibly testified that the publicity surrounding the NYAG's lawsuit was extremely detrimental to CashCall's mortgage lending business, which was separate from the Western Sky Loan Program. Baren further testified that Freddie Mac immediately terminated its relationship with CashCall, and CashCall ultimately voluntarily suspended sales to Fannie Mae in light of pressure from the NYAG lawsuit. As a result of the NYAG's action and other regulatory actions filed in other states, CashCall made a business decision to discontinue purchasing loans from Western Sky. Accordingly, in September of 2013, CashCall notified Western Sky that it would stop purchasing all Western Sky loans and the Western Sky Loan Program ended.

G. Defendants Terminate Their Relationship with Katten and Callaway

On September 30, 2013, Callaway prepared a memorandum to Baren attempting to memorialize that Baren had told Katten "that the Western Sky entity structure was to be an arm of the tribe structure" and that both Callaway and Katten had repeatedly urged Baren, orally and in writing, to "have the structure changed." According to Baren's e-mail response to Callaway, he was "shocked" at the sudden

change in Callaway's position. Baren concluded that Callaway was being dishonest given that she had introduced him to Webb and knew that Western Sky could not be structured as an "arm of the tribe" entity under CRST law. As a result, CashCall terminated Callaway and Katten and hired another law firm to take over of CashCall's litigation matters.

H. The CFPB Files This Action

The CFPB filed this action against Defendants on December 16, 2013. It filed the First Amended Complaint ("FAC") on March 21, 2014. In the FAC, the CFPB alleges that Defendants have engaged in unfair, deceptive, and abusive acts and practices in violation of the CFPA. On June 30, 2016, the CFPB filed a Motion for Partial Summary Judgment as to liability only. On August 31, 2016, the Court granted the CFPB's Motion finding Defendants violated the CFPA.

Conclusions of Law

I. Jurisdiction and Venue

The Court has subject matter jurisdiction over this action because it presents a federal question and is brought by an agency of the United States. *See* 28 U.S.C. §§ 1331, 1345. The Central District of California is the appropriate venue because a substantial part of the events that gave rise to this action occurred here and Defendants do business here. 28 U.S.C. §§ 1391(b)(2), 5564(f).

II. Discussion

In the FAC, the CFPB alleged that Defendants have engaged in unfair, deceptive, and abusive acts and practices in violation of the CFPA. Under Section 5536(a)(1)(B) of the CFPA, it is unlawful for any

covered person "to engage in any unfair, deceptive, or abusive act or practice." Pursuant to the CFPA, an "act or practice is deceptive if: (1) there is a misrepresentation, omission, or practice that, (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material." *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1192-93 (9th Cir. 2016) (internal citation and quotation marks omitted). In its Order granting the CFPB's Motion for Partial Summary Judgment, the Court held that CashCall was the true lender and, therefore, CashCall, WS Funding, and Delbert engaged in a deceptive practice within the meaning of the CFPA when servicing and collecting on Western Sky loans by creating the false impression that the loans were enforceable and that borrowers were obligated to repay the loans in accordance with the terms of their loan agreements. The Court also held that Reddam is individually liable under the CFPA because he participated directly in and had the ability to control CashCall's, Delbert's, and WS Funding's deceptive acts. Accordingly, the sole issue remaining for trial was the appropriate remedy for Defendants' violation of the CFPA. The CFPB seeks restitution in the amount of $235,597,529.74, a statutory penalty in the amount of $51,614,708, and a permanent injunction.

A. Restitution

The Court has "broad authority to impose appropriate remedies", including restitution, "for any violations" of the CFPA. 12 U.S.C. § 5565(a). However, a Court is not required to award restitution merely because a defendant violates the CFPA. *See Consumer*

Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc., 2017 WL 3948396, at *1, 11 (N.D. Cal. Sept. 8, 2017). Rather, the CFPB bears the burden of proving that restitution is an appropriate remedy and that the amount of restitution it seeks represents a defendant's unjust gains. *Id.* Based on the testimony and exhibits received in evidence at trial, the Court concludes that the CFPB did not satisfy its burden of proving that restitution is an appropriate remedy in this action.

1. The CFPB Did Not Show that Restitution Is an Appropriate Remedy In this Action

At trial, the CFPB attempted to prove that restitution is an appropriate remedy because Defendants engaged in a deliberate scheme to evade consumer protection laws with loans that were deceptive towards consumers in violation of the CFPA. CFPB's Post-Trial Brief at 1-2. The CFPB also claims that Defendants concealed their involvement in the Western Sky Loan Program from consumers so that borrowers would not realize that CashCall was the true lender and, therefore, the loans were illegal and potentially uncollectible. *Id.* at 4. According to the CFPB, restitution is appropriate when a contract is procured by fraud or is otherwise unenforceable. *Id.* at 2. Because Defendants collected interest and fees on Western Sky loans that may have been void or unenforceable under state usury and licensing laws, the CFPB argues that fairness dictates that Defendants return this money to consumers. *Id.* at 3. However, although the CFPB advances several arguments in support of restitution, it failed to prove

by a preponderance of the credible evidence that restitution is appropriate.

The CFPB did not show that Defendants intended to defraud consumers or that consumers did not receive the benefit of their bargain from the Western Sky Loan Program. The majority of case law in the Ninth Circuit addressing the CFPA and the appropriateness of restitution stems from cases in which a defendant has engaged in a type of fraud that is akin to what is commonly referred to as that of a "snake oil salesman." *See Nationwide*, 2017 WL 3948396, at *11. In these cases, a defendant's scheme to defraud typically uses fraudulent misrepresentations to dupe consumers into believing they are purchasing something other than what they actually receive. *See F.T.C. v. Figgie, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993) ("the seller's misrepresentations tainted the customers' purchasing decisions. If they had been told the truth, perhaps they would not have bought rhinestones at all or only some .... The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds for each [product] that is not useful to them."). However, these cases are inapposite. The CFPB failed to present any evidence that Defendants set out to deliberately mislead consumers as to the nature of the Western Sky Loan Program or otherwise intended to defraud them or that consumers anticipated receiving a benefit that they did not actually receive under the loan agreements. Although the CFPB attempts to equate Defendants' actions with those of the defendants in *Figgie* by arguing that Defendants' concealment of the true lender of the Western Sky loans tainted borrowers' decisions to

enter into the loans, it did not present any evidence to establish this fact. Indeed, the CFPB did not present testimony from a single consumer that suggests that a borrower would not have entered into a loan transaction if they had known that CashCall—not Western Sky—was the true lender.

The CFPB relied heavily on evidence that Defendants created the Western Sky Loan Program to avoid state licensing and usury laws in an attempt to prove that Defendants acted fraudulently; however, this evidence is not sufficient to meet its burden of proof. Indeed, companies frequently structure business operations and transactions to minimize exposure to unfavorable laws and regulations. *See Ratzlaf v. United States*, 510 U.S. 135,146 (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.") (internal citation and quotation marks omitted); *see also Costa v. Keppel Singmarine Dockyard PTE, Ltd.*, 2003 WL 24242419, at *11 (C.D. Cal. April 24, 2003) ("Beech exercised its right to structure its affairs in a manner calculated to shield it from the general jurisdiction of the courts of other states such as Texas, carefully requiring the negotiation, completion, and performance of all contracts in Kansas. Beech has not afforded itself the benefits and protections of the laws of Texas, but instead has calculatedly avoided them"). For example, businesses commonly seek to avoid unfavorable tax laws by structuring transactions to minimize tax liability. As the Supreme Court has stated, businesses are generally free to structure their affairs as they see fit, including using lawful structuring, such as creating holding companies, to

minimize taxes, which is analogous to what Defendants did in this case. *See CIR v. First Sec. Bank of Utah NA*, 405 US 394, 400 (1972).

There simply was no evidence that Defendants decided to embark on an unlawful scheme to structure the Western Sky Loan Program to defraud borrowers. On the contrary, Reddam saw a legitimate need for these types of loans and set out to establish a program that would permit Defendants to lawfully enter this market. 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. Although this Court has previously held that advice of counsel is not a defense to liability, it is relevant to the determination of whether restitution is an appropriate remedy. *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 owner-drivers were eligible to participate in the plan weighs against restitution."). In this case, the uncontradicted testimony established that Reddam and Baren relied on Callaway's advice when structuring the Western Sky Loan Program, which was virtually identical to the unchallenged Bank Lending Model, and that they continued to rely on her advice throughout the duration of the program. Notwithstanding the extensive cross-examination of Baren by the CFPB's counsel, Baren consistently and credibly defended the Western Sky Loan Program and CashCall's reliance on outside counsel in adopting the Tribal Lending Model. Specifically, during cross-examination, Baren

acknowledged that several early drafts of Callaway's opinion letters contained errors but also pointed out that by the time the program was ready to launch, those errors, with the exception of one minor mistake—that Western Sky was recognized as an Indian Tribe by the United States of America—had been corrected.

Moreover, the evidence established that it was reasonable for CashCall to rely on Callaway's advice because at the time, no court had ruled on the Tribal Lending Model or concluded that it was unlawful. Indeed, it was not until this Court's true lender determination that Defendants could have known that the program violated the CFPA. As Defendants' point out, the CFPB's theory of enforcement in this action is "unique", and the Court's finding of liability was premised solely on its determination of the discrete issue that CashCall was the true lender under the structure of the Western Sky Loan Program.

In addition, the CFPB contends that the terms of the loan agreements were deceptive and that the deceptive terms, themselves, constitute additional fraud in the selling of the product, which justifies restitution. However, the CFPB did not present credible evidence to support this assertion. For example, there was no testimony from consumers that they were confused about the terms of the loans or the fees. In contrast, Defendants presented credible and persuasive evidence that they made every effort to inform consumers about all material aspects of the loans. For instance, every Consumer Loan Agreement clearly and plainly disclosed the terms of the loans—including the exorbitant interest rates and relevant

fees. In addition, every Consumer Loan Agreement also stated that Western Sky may assign the loans and once WS Funding purchased the loans, consumers received a notice of assignment informing them that their loans had been sold and would be serviced by CashCall.

Finally, the evidence indicated quite clearly that consumers received the benefit of their bargain—i.e., the loan proceeds. As previously discussed, Defendants plainly and clearly disclosed the material terms of the loans to consumers—including fees and interest rates—before the loan were funded. Accordingly, the Court cannot conclude that Defendants acted in bad faith, resorted to trickery or deception, or have been guilty of fraud in connection with the origination of the loans that are issue in this case. As a result, the Court finds that the CFPB did not carry its burden of proving that restitution is appropriate in this case.

2. The CFPB Did Not Prove that the Amount of Restitution It Seeks Is Appropriate

The Court also concludes that even if the CFPB could have established that restitution is an appropriate remedy (which it did not), the CFPB did not show that the amount of restitution it seeks is appropriate. The Ninth Circuit has adopted a two-step burden shifting framework for calculating restitution awards under the Federal Trade Commission Act ("FTCA") and has applied this test to actions brought under the CFPA. *See Gordon*, 819 F.3d at 1195. First, the CFPB must prove that the amount it seeks in restitution reasonably approximates the defendant's

unjust gains. *Id.* If the CFPB makes this threshold showing, the burden shifts to the defendant to demonstrate that the net revenue figure overstates the defendant's unjust gains. *Id.*

The CFPB seeks an enormous restitution award in the amount of $235,597,529.74. However, the CFPB failed to present credible evidence demonstrating this is the appropriate amount of restitution. Indeed, its only witness, Ryan Thomas, specifically admitted that he did not make any attempt to determine whether this amount was appropriate for restitution. Trial Tr. 410:21-24, 411:21-25. Nevertheless, the CFPB argues that the Court should simply accept this amount because it represents the total interest and fees Defendants collected on the void loans at issue in this case, less any previous settlement payments. Although a "district court may use a defendant's net revenues as a basis for measuring" restitution, there was no credible evidence that this number represents Defendants' net revenues from the loans issued through the Western Sky Loan Program to borrowers in the relevant states. *See Gordon*, 819 F.3d at 1195. In fact, Thomas admitted on cross-examination that he did not believe that the CFPB's proposed restitution amount was netted to account for expenses. Trial Tr. 419:7-24.

In addition, the CFPB also failed to present any evidence that its proposed restitution approximates Defendants' unjust gains. *See F.T.C. v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016) (explaining that when analyzing whether the amount of a restitution award is appropriate, a court should not focus on what a consumer lost, but rather, the

defendants' unjust gains.); *F.T.C. v. Zamani*, 2011 WL 2222065, at *13 (C.D. Cal. June 5, 2011) ("it 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.") (internal citation and quotation marks omitted). As Thomas admitted on cross-examination, he did not examine or even review the relevant states' usury laws or undertake any analysis of the payment status of individual loans. Trial Tr. 420:8-19, 421:1-12. Thomas also conceded that he did not attempt to analyze whether the CFPB's proposed restitution award would create a windfall for borrowers, including those who may not have made any payments on their loans. Trial Tr. 421:23-422:2, 437:4-12. Indeed, it is clear from Thomas's testimony that he did not perform any analysis of the data presented to him. In 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. Tr. Transcript 441:12-16. In contrast, Defendants presented substantial credible evidence that the CFPB's proposed restitution award does not approximate Defendants' unjust gains. Accordingly, the Court concludes that the CFPB did not meet its burden of proving that the amount of restitution it requests represents Defendants' unjust gains.

B. Statutory Penalties

The CFPA provides: "Any person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil

penalty ....” 12 U.S.C. § 5565(c)(1).[6] The statute provides three tiers of penalties and the amount of the penalty imposed depends on a defendant’s level of culpability. The First Tier, which imposes a penalty of no more than $5,000 (later adjusted for inflation to $5,526 by regulation) for each day that a violation continues, does not require a mental state. The Second Tier, which imposes a penalty of no more than $25,000 (later adjusted for inflation to $27,631 by regulation) for each day that a violation continues, applies where a defendant acts recklessly in violating the CFPA. The Third Tier, which imposes a penalty of no more than $1,000,000 (later adjusted for inflation to $1,105,241 by regulation) for each day that a violation continues, applies where a defendant knowingly violates the CFPA. In determining the amount of the penalty, a court should also consider the following mitigating factors: (1) the size of financial resources and good faith of the person charged; (2) the gravity of the violation or failure to pay; (3) the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided; (4) the history of previous violations; and (5) such other matters as justice may require.

The CFPB contends that Defendants knowingly violated the CFPA. However, after taking into account mitigating factors, the CFPB only requests that the

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[6] When drafting the CFPA, Congress stated that courts “may” grant restitution for a violation of the statute and that a monetary civil penalty “shall” be imposed on anyone that violates the statute. *See* 12 U.S.C. §§ 5565(a), (c). Accordingly, in light of its finding that Defendants violated the CFPA, although the Court may refuse to award restitution, it does not have discretion and must impose a civil penalty.

Court impose the maximum Second Tier penalty of $27,631 per day for the 1,861 days Defendants violated the CFPA (July 21, 2011 through August 31, 2016), for a total penalty of $51,614,708. The Court declines to impose the Second Tier penalty and concludes that, based on all of the evidence, a First Tier penalty in the amount of $10,283,886 is appropriate.

Although the CFPA does not define the terms "knowingly" or "recklessly", the FTCA provides some guidance.[7] In the context of the FTCA, the term "knowing" means "actual knowledge or knowledge fairly implied ... on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." 15 U.S.C. § 45(m)(1)(A); *Consumer Fin. Prot. Bureau v. D&D Mktg.*, 2016 WL 8849698, at *12 (C.D. Cal. Nov. 17, 2016). The term recklessness refers to conduct that leads to "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *D&D Mktg.*, 2016 WL 8849698, at *12 n.3 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68-69 (2007)).

After a careful review of all of the evidence in the record, the Court concludes that the CFPB failed to prove by a preponderance of the evidence that

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[7] The Ninth Circuit has recognized the FTCA as an important analog for interpreting undefined terms in the CFPA. *See Gordon*, 819 F.3d at 1193 n.7 (9th Cir. 2016) (adopting the meaning of "deceptive act or practice" from the FTCA in recognition of Congress' reliance on the FTCA in drafting the CFPA); *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068, 1072 n.3 (9th Cir. 2016) (recognizing that the CFPB shares concurrent federal authority with the Federal Trade Commission to enforce the FTCA and that the missions of the laws overlap).

Defendants knowingly violated the CFPA. The evidence at trial failed to demonstrate that Defendants knew at the time they decided to implement the Western Sky Loan Program that the structure of the program would subject them to liability under the CFPA. Indeed, at its inception, there was nothing inherently unlawful about the Western Sky Loan Program. It was not until this Court found that CashCall—not Western Sky—was the true lender that Defendants could have understood that they may be liable under the CFPA.

In addition, the uncontroverted testimony results in the conclusion that Defendants did not recklessly violate the CFPA. As discussed in greater detail above, although Defendants clearly sought at the outset to avoid state licensing requirements and usury laws, there was no evidence they decided to create and implement an unlawful scheme to defraud consumers, which would have been relatively easy to accomplish given their sophistication and experience in the lending business. Instead, Defendants sought out highly regarded regulatory counsel to assist them with structuring the Western Sky Loan Program to lawfully accomplish this objective. At the time, there was no case law that clearly established that the Tribal Lending Model was not a lawful model or that any attempt to adopt and implement the Tribal Lending Model would subject Defendants to liability under the CFPA. Indeed, Defendants secured multiple formal and informal opinions from both Callaway and Bogue opining that the structure of the Western Sky Loan Program was viable and would provide Defendants with Indian sovereign immunity, precluding the enforcement of state and federal laws.

The evidence also showed that Callaway and Bogue never revoked their opinions. Even when the regulatory climate had dramatically shifted and regulators began to closely scrutinize the Tribal Lending Model, Callaway and Bogue did not change their original opinions that Defendants would not be subject to relevant state and federal laws. Although both Reddam and Baren are very sophisticated individuals, they are not regulatory experts. Thus, the Court cannot conclude that Defendants should have known that the structure of the Western Sky Loan Program would subject them to liability under the CFPA or that it was obvious they would be subject to such liability. At best, the CFPB established that Defendants were willing to accept the business risks associated with structuring a lending model that would avoid relevant state and federal laws and employed legal counsel to assist with this endeavor. Accordingly, the Court finds that a Tier One penalty is appropriate. Although Defendants argue there are mitigating factors that should reduce the amount of the Tier One penalty, the Court does not find Defendants' argument or evidence persuasive in light of their willingness to continue the Western Sky Loan Program in the face of increased regulatory pressure and advice from their counsel that the model was becoming increasingly susceptible to attack. Accordingly, the Court concludes the maximum Tier One penalty, in the amount of $10,283,886.00, is

appropriate and that Defendants are jointly and severally liable for payment of the penalty.[8]

C. Injunctive Relief

"As a general rule, past wrongs are not enough for the grant of an injunction; an injunction will only issue if the wrongs are ongoing or likely to recur." *F.T.C. v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985). Although the CFPB argues that there is a cognizable danger that Defendants will violate the CFPA in the future, the CFPB did not present any evidence to support this assertion. Indeed, there was no evidence that Defendants are currently purchasing loans from Western Sky or continuing to service those loans. Even if, as the CFPB points out, Defendants informed a few borrowers after this Court's August 31, 2016 Order that their loans were governed by the CRST, which Baren testified was inadvertent, that does not merit a permanent injunction because there was no evidence that Defendants are continuing to collect on the loans. Accordingly, upon reviewing the totality of the evidence presented, the Court does not find that Defendants' conduct warrants the requested injunctive relief.

III. Conclusion

In light of the foregoing, the Court concludes that the CFPB failed to meet its burden of proving that either restitution or a permanent injunction is an appropriate remedy and, therefore, the Court will not award restitution or impose a permanent injunction.

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[8] $10,283,886.00 represents the maximum amount of the Tier One penalty ($5,526) for the 1,861 days Defendants violated the CFPA.

The Court also concludes that a Tier One statutory penalty in the amount of $10,283,886 is appropriate. Accordingly, the Court issues judgment in favor of the CFPB in the amount of $10,283,886 and finds that Defendants are jointly and severally liable. Counsel for the parties are ordered to meet and confer and prepare a joint proposed Judgment which is consistent with this Order. The parties shall file the proposed Judgment with the Court by **January 26, 2018**. In the unlikely event that counsel are unable to agree upon a joint proposed Judgement, the parties shall each submit separate versions of a proposed Judgment along with a Joint Statement setting forth their respective positions no later than **January 26, 2018**.

IT IS SO ORDERED.

Appendix E

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 15-cv-7522

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

v.

CASHCALL, INC., et al.,

Defendants.

Filed: Oct. 7, 2015

DEFENDANTS' ANSWER TO FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Defendants CashCall, Inc. ("CashCall"), WS Funding, LLC ("WS Funding"), Delbert Services Corp. ("Delbert"), and J. Paul Reddam ("Mr. Reddam") (collectively, "Defendants"), by and through their attorneys, answer the March 21, 2014 First Amended Complaint ("Amended Complaint") of plaintiff Consumer Financial Protection Bureau ("Bureau"). Defendants answer the allegations in the like-numbered paragraphs and subparagraphs of the Amended Complaint as set forth below.

The Bureau's Amended Complaint alleges Defendants violated the Dodd-Frank prohibition of unfair, deceptive, or abusive acts or practices

("Federal UDAAP Law") based **solely** on alleged violations of state law. The Federal UDAAP Law cannot be read so broadly. Allowing a federal agency to enforce state laws—even when states have demonstrated that they are perfectly capable of enforcing their own laws, and in fact are doing so—would violate fundamental principles of federalism. Federal law does not incorporate state law unless the Congress clearly provides for such incorporation. The Congress did not do so here. To the contrary, the Congress unambiguously provided that the Bureau shall enforce only federal law. At its core, the Bureau's lawsuit is really not about Defendants, who have already settled cases with several states asserting violations of the same laws cited in the Amended Complaint and are litigating the interpretation of state laws with several other states. Instead, this lawsuit is simply the Bureau's attempt to establish precedent that would enable it to transform violations of state consumer law into violations of federal law subject to its enforcement authority.

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DEMAND FOR JURY TRIAL

Defendants demand that the claims asserted in the Amended Complaint be tried by a jury to the extent authorized by law.

Dated: October 7, 2015

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Appendix F

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

12 U.S.C. §5536. Prohibited acts.

(a) In general

It shall be unlawful for--

(1) any covered person or service provider--

(A) to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law; or

(B) to engage in any unfair, deceptive, or abusive act or practice;

(2) any covered person or service provider to fail or refuse, as required by Federal consumer financial law, or any rule or order issued by the Bureau thereunder--

(A) to permit access to or copying of records;

(B) to establish or maintain records; or

(C) to make reports or provide information to the Bureau; or

(3) any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 5531 of this title, or any rule or order issued thereunder, and notwithstanding any provision of this title, the provider of such substantial assistance shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided.

(b) Exception

No person shall be held to have violated subsection (a)(1) solely by virtue of providing or selling time or space to a covered person or service provider placing an advertisement.

12 U.S.C. §5565. Relief available

(a) Administrative proceedings or court actions

(1) Jurisdiction

The court (or the Bureau, as the case may be) in an action or adjudication proceeding brought under Federal consumer financial law, shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law.

(2) Relief

Relief under this section may include, without limitation--

(A) rescission or reformation of contracts;

(B) refund of moneys or return of real property;

(C) restitution;

(D) disgorgement or compensation for unjust enrichment;

(E) payment of damages or other monetary relief;

(F) public notification regarding the violation, including the costs of notification;

(G) limits on the activities or functions of the person; and

(H) civil money penalties, as set forth more fully in subsection (c).

(3) No exemplary or punitive damages

Nothing in this subsection shall be construed as authorizing the imposition of exemplary or punitive damages.

(b) Recovery of costs

In any action brought by the Bureau, a State attorney general, or any State regulator to enforce any Federal consumer financial law, the Bureau, the State attorney general, or the State regulator may recover its costs in connection with prosecuting such action if the Bureau, the State attorney general, or the State regulator is the prevailing party in the action.

(c) Civil money penalty in court and administrative actions

(1) In general

Any person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty pursuant to this subsection.

(2) Penalty amounts

(A) First tier

For any violation of a law, rule, or final order or condition imposed in writing by the Bureau, a civil penalty may not exceed $5,000 for each day during which such violation or failure to pay continues.

(B) Second tier

Notwithstanding paragraph (A), for any person that recklessly engages in a violation of a Federal consumer financial law, a civil penalty may not exceed $25,000 for each day during which such violation continues.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), for any person that knowingly violates a Federal consumer financial law, a civil penalty may not exceed $1,000,000 for each day during which such violation continues.

(3) Mitigating factors

In determining the amount of any penalty assessed under paragraph (2), the Bureau or the court shall take into account the appropriateness of the penalty with respect to--

(A) the size of financial resources and good faith of the person charged;

(B) the gravity of the violation or failure to pay;

(C) the severity of the risks to or losses of the consumer, which may take into account the

number of products or services sold or provided;

(D) the history of previous violations; and

(E) such other matters as justice may require.

(4) Authority to modify or remit penalty

The Bureau may compromise, modify, or remit any penalty which may be assessed or had already been assessed under paragraph (2). The amount of such penalty, when finally determined, shall be exclusive of any sums owed by the person to the United States in connection with the costs of the proceeding, and may be deducted from any sums owing by the United States to the person charged.

(5) Notice and hearing

No civil penalty may be assessed under this subsection with respect to a violation of any Federal consumer financial law, unless--

(A) the Bureau gives notice and an opportunity for a hearing to the person accused of the violation; or

(B) the appropriate court has ordered such assessment and entered judgment in favor of the Bureau.