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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-ctr-defendant - Appellee,

v.

NATIONWIDE BIWEEKLY ADMINISTRATION, INC.; LOAN PAYMENT ADMINISTRATION LLC; DANIEL S. LIPSKY,

Defendant-ctr-claimants - Appellants.

No. 24-5940
D.C. No. 3:15-cv-02106-RS

MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, Chief District Judge, Presiding

Submitted November 10, 2025[**]
San Francisco, California

Before: CALLAHAN, BUMATAY, and VANDYKE, Circuit Judges.

Nationwide Biweekly Administration, Inc., Loan Payment Administration LLC, and Daniel S. Lipskey (collectively, "Nationwide") appeal from a bench trial in which they were held liable and assessed penalties for deceptive and abusive practices under the Consumer Financial Protection Act of 2010 ("CFPA"). We previously remanded this case to the district court to consider the effect of relevant Supreme Court and Ninth Circuit opinions issued while the first appeal was pending. *Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc.*, No. 18-15431, 2023 WL 566112 (9th Cir. Jan. 27, 2023).

As the parties are familiar with the facts, we do not recount them here. We review the district court's

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

findings of facts for clear error, *Yu v. Idaho State Univ.*, 15 F.4th 1236, 1241 (9th Cir. 2021), interpretations of law de novo, *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 618 (9th Cir. 2018), and evidentiary rulings for abuse of discretion, *Balla v. Idaho*, 29 F.4th 1019, 1024 (9th Cir. 2022). We AFFIRM.

1. Nationwide first argues that the district court's factual findings, which underpinned its CFPA liability, were clearly erroneous. It claims that (1) findings that customers were led astray by representations of "immediate" savings were insufficiently supported by evidence, (2) findings that reasonable customers could have been deceived by promises of specific amounts of monthly or yearly savings were incompatible with other findings, (3) findings that customers were confused as to whether Nationwide was affiliated with their lenders were contradicted by other evidence, and (4) findings that some reasonable customers would have been misled into believing Nationwide's services were unique were based on illogical assumptions about the sophistication of typical mortgage holders.

Nationwide's arguments fail under the deferential standard of review applicable in this case. Factual findings will not be upset on clear-error review unless the record compels "a definite and firm conviction" that the district court was mistaken. *Wash. Mut., Inc. v. United States*, 856 F.3d 711, 721 (9th Cir. 2017) (quoting *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002)). Here, upon a careful review of the trial record, substantial evidence supports each of the district court's findings. Moreover, because the district

court was sitting as a trier of fact, it was within its discretion to discount Nationwide's expert witnesses and studies regarding customer sophistication. Finally, even if some of the district court's factual findings were not perfectly harmonious, they were not so contradictory as to compel "a definite and firm conviction" that a mistake was made.

2. Nationwide next argues that the civil enforcement action against it was invalid because of the Consumer Finance Protection Bureau ("CFPB") director's unconstitutional for-cause removal protections between 2015 and 2020. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 213, 238 (2020) (striking down the CFPB director's for-cause removal protections as unconstitutional). Nationwide argues the enforcement action here is void because (1) it was harmed specifically by the CFPA's unconstitutional for-cause removal provision in effect when this suit was filed, and (2) there was no valid after-the-fact ratification of the enforcement action by a CFPB director subject to direct Presidential oversight.

We need not address the second argument because Nationwide fails on the first under binding precedent. *See Consumer Fin. Prot. Bureau v. Cashcall, Inc.*, 35 F.4th 734, 742 (9th Cir. 2022) (citing *Collins v. Yellen*, 594 U.S. 220 (2021)). Nationwide claims that the CFPB exhibited a culture of "recklessness," caused by the CFPA's for-cause removal protections, which was contrary to then-President Barack Obama's wishes. It further argues that the CFPB would not have pursued the

enforcement action here were it not for such a culture. But Nationwide merely relies on non-specific evidence from publicly available executive orders, Congressional testimony, speeches by agency heads, and news articles, along with an audio recording of a private-sector bank employee generally criticizing the CFPB. None of this evidence shows that President Obama would not have pursued the specific investigation of Nationwide at issue here. Nor is such generic evidence sufficient to prove Nationwide suffered other constitutional harms under any standard.

3. Nationwide next argues that this enforcement action is void because the statute of limitations had run before the CFPB filed suit on May 11, 2015. The statute of limitations would have run if the CFPB had either discovered or reasonably should have discovered the violations at issue here before May 11, 2012. *See* 12 U.S.C. § 5564(g)(1) (providing that CFPA enforcement actions must be brought within three years of "discovery" of a violation); *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010) (holding that statutes of limitations based on "discovery" are triggered as of the date of actual discovery of necessary facts or as of the date by which a reasonably diligent litigant would have discovered such facts). The district court found neither condition applied, a finding which we review for clear error. *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008).

The district court did not clearly err. First, Nationwide points to a March 3, 2012, online customer complaint to the CFPB generally alleging that

Nationwide was "deceptive in its business practices," and claiming that the author thought that Nationwide was affiliated with his lender. But there is no evidence that, based on the single online complaint, the CFPB discovered or reasonably should have discovered the specific violations that were reflected in its 2015 lawsuit within the few months between March 3 and May 10, 2012. Second, Nationwide points to Richard Cordray's 2011 appointment as the CFPB's enforcement head. It claims that the statute of limitations began running at that point because of Cordray's previous involvement with state-law actions against Nationwide as Ohio's state attorney general. But, even assuming that Cordray's prior personal knowledge could be imputed to the CFPB upon his appointment, no record evidence shows Cordray had sufficient personal knowledge from his time in the Ohio state attorney general's office to support the later-in-time violations reflected in the CFPB enforcement action here.

4. Nationwide next argues that the district court's findings were not properly specified in its Fed. R. Civ. P. 52(a) order. But Nationwide did not make a timely motion below to amend the district court's findings. *See* Fed. R. Civ. P. 52(b) (providing that motions to amend findings must be brought within 28 days of the entry of judgment). The failure to do so forfeits on appeal arguments that district court findings are not sufficiently specific. *See Hollinger v. United States*, 651 F.2d 636, 640–41 (9th Cir. 1981).

5. Nationwide next argues that it was not a "seller" covered by the Telemarketing and Consumer

Fraud and Abuse Prevention Act ("TCFAPA") because it does not cold-call customers or execute contracts or payment over the phone for its services. The Act defines "telemarketing" as "a plan, program, or campaign which is conducted to induce purchases of goods or services . . . by use of one or more telephones and which involves more than one interstate telephone call." 15 U.S.C. § 6106(4). Regulations define a "seller" as any "person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration." 16 C.F.R. § 310.2(ee).

Nationwide was a "seller" because its activities were encompassed within the TCFAPA's plain statutory and regulatory text. As to statutory language, Nationwide engaged in "telemarketing" because it sent out mailers and operated a call center that fielded millions of telephone calls, all to induce callers to sign up for its services. *See* 15 U.S.C. § 6106(4). And it was a "seller" under the TCFAPA's regulations because it "offer[ed] to provide" financial services to customers who called it. 16 C.F.R. § 310.2(ee). Moreover, Nationwide's attempt to limit the TCFAPA's reach only to sales conducted exclusively by phone fails considering the statute's explicit, narrower exemption for sales conducted by phone if customers call in response to a mailed, written catalogue. *See* 15 U.S.C. § 6106(4); *see also Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) (relying on the interpretive canon that where a broad statutory term includes enumerated exceptions, courts should not imply unwritten ones).

6. Nationwide finally argues that its counterclaims against the CFPB were improperly rejected and that supportive evidence was impermissibly excluded. Nationwide's counterclaims alleged, in essence, that the CFPB's issuance of a press release about its 2015 enforcement action violated Nationwide's due process rights because it destroyed Nationwide's relationships with banking partners. The district court denied the counterclaims at trial because Nationwide pointed to no evidence that the banks were specifically motivated by the CFPB's press release to discontinue their relationships with Nationwide.

On appeal, Nationwide argues that the district court applied the wrong legal standard in holding that the CFPB did not violate Nationwide's due process rights. Pointing to various Ninth Circuit cases, Nationwide argues only a "connection" between wrongful government conduct and reputational harm is needed to show a due process violation under the governing "stigma-plus" test, rather than "causation." *See Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002) ("[Under the stigma-plus test], a plaintiff must show the public disclosure of a stigmatizing statement by the government, the accuracy of which is contested, plus the denial of some more tangible interest such as employment, or the alteration of a right or status recognized by state law.") (collecting cases) (simplified). But Nationwide's arguments fail even under the more lenient "connection" standard it proposes, because the CFPB's press release was not wrongful conduct, nor did Nationwide introduce any evidence of a connection between the press release and the banks' terminations

of their relationship with Nationwide.

Nationwide also argues that the district court abused its discretion in excluding a set of proffered exhibits and expert testimony. "A district court abuses its discretion when it applies the incorrect legal standard or if, . . . its 'application of the correct legal standard was illogical, implausible, or without support . . . in the record.'" *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 52 F.4th 1054, 1063 (9th Cir. 2022) (quoting *United States v. Liu*, 538 F.3d 1078, 1085 (9th Cir. 2008)). As to the exhibits—congressional letters, reports, news articles, and other documents about government efforts to restrict private-sector financial services offered to disfavored industries—the district court correctly ruled that they were inadmissible because they were irrelevant without evidence that a banking institution had relied on them to stop servicing Nationwide. Fed. R. Evid. 402 ("Irrelevant evidence is not admissible."). And as to Nationwide's expert, who opined that Nationwide's banking partners terminated their relationships because of pressure from the CPFB, the district court did not abuse its discretion in excluding his testimony for lack of foundation. Expert testimony must be helpful to the trier of fact because of "the expert's scientific, technical, or other specialized knowledge," must be "based on sufficient facts or data," must be "the product of reliable principles and methods," and must "reflect[] a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702. But the expert report here rested only on litigation documents and news reports, without any additional scholarly or technical sources and without any expert

methodologies (such as surveys). The district court thus did not abuse its discretion in excluding Nationwide's expert.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff,

v.

NATIONWIDE BIWEEKLY ADMINISTRATION, INC., et al.,
Defendants.

Case No. 15-cv-02106-RS

ORDER SUPPLEMENTING, MODIFYING, AND REAFFIRMING PRIOR FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING REMAND, AND REAFFIRMING JUDGMENT

I. INTRODUCTION

This is a civil enforcement action brought by the Consumer Financial Protection Bureau (CFPB) against entities and an individual whom the CFPB contends misled consumers. Defendants sold a financial services product that purportedly allowed consumers to save significant sums they would otherwise pay in mortgage interest. CFPB contended that few, if any, consumers would come out ahead

financially, given the effect of the fees defendants charged. CFPB challenged several aspects of defendants' marketing as allegedly misleading.

After a seven-day bench trial, the Court entered an Opinion and Order comprising the findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52(a). Then, following consideration of briefing as to the appropriate form of a judgment and a motion for reconsideration, a monetary judgment was entered against defendants Nationwide Biweekly Administration, Inc., its wholly owned subsidiary Loan Payment Administration ("LPA")[1], and Daniel Lipsky, the founder, president, sole officer, and sole owner of Nationwide. The joint and several judgment was in the amount of $7,930,000, representing a civil penalty under 12 U.S.C. § 5565(c)(1). The judgment also included a permanent injunction against various specified marketing practices.

Proceedings on appeal were protracted as the result of the fact that other cases addressing potentially dispositive issues were percolating through the appellate process. Ultimately, the Ninth Circuit issued a memorandum decision in this action stating: "we vacate the district court's order and remand, allowing it to reassess the case under the changed legal landscape since its initial order and opinion." Although the Ninth Circuit expressly identified several potentially relevant questions and precedents, it also

[1] LPA functioned essentially as a second name under which Nationwide marketed its services.

emphasized that it did not intend to "limit the issues for consideration on remand." The court stated:

> In addition to these questions, the parties may raise, and the district court may consider, other issues raised on appeal. Our framing of the questions above should not be taken to provide our view of their merits. The parties and the district court are free to reframe the questions as they wish.

Following that remand, the parties were invited to report what further proceedings they believed should take place in light of the Ninth Circuit's mandate. See Dkt. No. 382. The parties jointly responded that they "agree that no issues besides those explicitly identified by the Ninth Circuit in its January 27, 2023 Memorandum Disposition (Dkt. 380) should be briefed and decided by the Court." The parties labeled those three questions as: (1) the *Seila Law* issue identified in the Memorandum Disposition at pages 3-4, (2) the restitution issue identified in the Memorandum Disposition at pages 4-5, and (3) the issue of the constitutionality of the CFPB's funding mechanism. Defendants have subsequently withdrawn the third issue, in light of the Supreme Court's ruling earlier this year in *Community Financial Services Association of America v. Consumer Financial Protection Bureau,* No. 22-448, rejecting the argument that the CFPB's funding mechanism is unconstitutional.

Accordingly, the only issues to be decided are defendants' challenge to the validity of the judgment

in light of the *"Seila Law* issue," and CFPB's contention that the judgment should include restitution, in addition to the civil penalty previously awarded.[2] No party has suggested that it would be appropriate to reopen proceedings to take additional evidence on either of these issues, or made any request to do so. The decision will therefore be based on the briefing and on the evidence admitted at trial.[3]

II. DISCUSSION

A. *SeilaLaw*

In post-trial briefing prior to the appeal, defendants raised an argument that the CFPB's institution of this action was "void" because the "CFPB is an unconstitutional entity." Dkt. No. 295 at p. 15. Defendants cursorily advanced both the contention that the CFPB director was impermissibly insulated from removal without cause, and that the funding structure of the agency was constitutionally flawed. *Id.* The prior Opinion and Order rejected those underdeveloped arguments, given the state of then-existing precedent. *See* Dkt. No. 315, p. 17 n. 23. As noted above, the Supreme Court has since rejected the

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[2] Also under submission is defendants' motion for release of $409,685.99 held in escrow pursuant to an agreement between the parties reached during the pendency of the appeal. That motion is addressed in section C of the discussion below.

[3] Plaintiff expressly states it does not request a hearing, and defendants do not state otherwise. The matter is suitable for disposition without oral argument, and no hearing will be set.

claim that the CFPB's funding mechanism is improper.

During the pendency of the cross-appeals in this action, however, the Supreme Court held the CFPB Director's for-cause removal protection violated the Constitution. *See Seila Law LLC v. CFPB,* 140 S. Ct. 2183, 2211 (2020) *("Seila Law I"*). The Court severed the offending statutory provisions, and remanded to the Ninth Circuit to consider whether the CFPB' s pursuit of the civil investigative demand in dispute in that proceeding had subsequently been validly ratified by an acting director and/or by a director who acknowledged she served at-will. *Id.*

Shortly after *Seila Law I* issued, the CFPB director in office at the time, Kathleen L. Kraninger, expressly ratified the agency's prior decision to file *this* lawsuit, and to pursue its cross-appeal. The Ninth Circuit held argument on the cross-appeals in this action, but following that argument, it vacated submission of the matter pending resolution of the *Seila Law* remand.

The Circuit subsequently held in *Seila Law II,* 997 F.3d 837 (9th Cir. 2021) that the CFPB's actions in that matter had been validly ratified. *Id.* at 846. A decision on the appeals in this action, however, was further held pending the outcome of another CFPB case, which ultimately resulted in a published opinion, *CFPB v. CashCall, Inc.,* 35 F.4th 734 (9th Cir. 2022). Additionally, while the cross-appeals were being held in abeyance, the Supreme Court decided *Collins v. Yellen,* 141 S. Ct. 1761 (2021), which addressed remedies for constitutional separation-of-powers

violations.

In remanding this case, the Circuit stated:

> Nationwide believes that this case is distinguishable from *Seila Law II* and *CashCall* and that it is entitled to dismissal for the CFPB Director's unconstitutional for-cause removal provision. Nationwide argues that Director Kraninger' s ratification was untimely and therefore invalid and that it can show "actual" or "compensable harm" entitling it to relief. See *CashCall,* 35 F.4th at 742--43; *Collins,* 141 S. Ct. at 1788-89. On remand, the district court should determine the correct application of *Seila Law II, CashCall,* and *Collins,* in deciding these issues. The inquiries into the validity of the CFPB's ratification and Nationwide's showing of harm "turn[] on case-specific factual and legal questions" that should be resolved in the first instance by the district court. *Seila Law I,* 140 S. Ct. at 2208.

In their post-remand briefing, defendants argue ratification is no longer an issue, in light of *Collins* and *CashCall.* In *CashCall,* the Ninth Circuit held that it did not need to decide the validity of ratification, because the Supreme Court made clear in *Collins* "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." *CashCall,* 35 F.4th at 742. While the CFPB argues Director Kraninger's ratification provides an

additional reason to reject defendants' claim that they are entitled to a remedy for the constitutional infirmity in the statute as drafted, it acknowledges there is no need to reach the ratification issue. *See* Dkt. No. 401, ECF p. 16

With ratification put to the side, defendants insist they have shown they are entitled to dismissal here under the following observations of the *CashCall* court:

> 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,* 32 F.4th 843, 849 (9th Cir. 2022); *see also Collins,* 141 S. Ct. at 1788-89.

35 F.4th at 742-43.

Defendants' effort to show they suffered actual harm as a result of the unconstitutional removal provision is perhaps hobbled by the fact that they first raised the constitutional argument in post-trial briefing. Their claim that they were harmed by the provision was not pleaded or the subject of discovery during the litigation. No evidence or argument specifically on the point was presented at trial.

Defendants have instead cobbled together an argument that "a culture of recklessness" existed at

CFPB, citing to various arguments and some evidence they presented at trial in connection with their defense on the merits and/or their counterclaims. Defendants' presentation, however, falls woefully short of what would be necessary to support a factual finding that they suffered cognizable harm as a consequence of the provision purporting to insulate the CFPB director from removal at will by the President. Even assuming there was merit to one or more of defendants' criticisms of how the CFPB operated, it is sheer speculation that this litigation would not have been pursued, or that it would have been pursued in a different manner, had the CFPB directors known from the outset that the removal provision was unconstitutional. Indeed, while the validity of ratification may no longer be a critical issue, the fact that this litigation has continued to be pursued vigorously by the CFPB under multiple directors who were fully aware that they were not insulated from removal at the discretion of the President, supports a conclusion to the contrary.

CashCall offered that "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." 35 F.4th at 743. Defendants have not even argued that occurred here. While *CashCall* did not suggest that was the only way to show harm, defendants' failure to make any comparable showing dooms their claim that they are entitled to dismissal, or any other remedy based on the unconstitutional removal provision.

B. Restitution

The Ninth Circuit described the restitution issue as follows:

> On cross-appeal, the CFPB urges this court to reverse the district court's denial of restitution, which the CFPB maintains is mandatory and should be ordered in the amount of $73,955,169. We remand to allow the district court to consider the effect, if any, of *CashCall* and *Liu v. SEC,* 140 S. Ct. 1936 (2020) (discussing the bounds of equity practice), and whether the CFPB waived its claim to legal restitution by characterizing it only as a form of equitable relief before the district court. See *CashCall,* 35 F.4th 734 at 750.

Memorandum Disposition at pages 4-5

The CFPB is now unambiguously claiming a right to *legal* restitution, as opposed to *equitable* restitution. The Supreme Court has explained restitution "'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-Western 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)). Accordingly, where a plaintiff cannot "assert title or right to possession of particular property" but instead has "just grounds for recovering money to pay for some benefit the defendant had

received from him, the claim is for legal restitution." *Id.* Equitable restitution, applies "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. See also CashCall* at 750 (citing *Great-Western).* The Supreme Court acknowledged, however, that its cases had "not previously drawn this fine distinction between restitution at law and restitution in equity." *Great-Western,* 534 U.S. at 214.

In post-trial briefing, the CFPB labeled restitution as one form of "appropriate equitable relief" that was available. *See* Dkt. No. 294, ECF p. 28. The Opinion and Order similarly included language suggesting CFPB's claim for restitution was subject to equitable considerations. Because the CFPB was never attempting to recover "particular funds or property," however, its claim necessarily was for legal restitution, not equitable restitution. Furthermore, despite the passing references to restitution as a form of equitable relief, the CFPB presented no argument that turned on any distinction between equitable and legal relief. Indeed, as the district court observed following remand in *CashCall,* "before the Supreme Court's decision in *Liu,* there was little or no reason to differentiate between the two forms of restitution." *Consumer Fin. Prot. Bureau v. CashCall, Inc.,,* 2023 WL 2009938, at *7 (C.D. Cal. Feb. 10, 2023) *("CashCall II").*

Under these circumstances, there is no basis to conclude the CFPB waived its claim to legal restitution. *See CashCall II,* 2023 WL 2009938, at *7 (reaching same conclusion where CFPB also had

previously referred to the restitution it sought as equitable). Although defendants apparently argued waiver during the appellate proceedings, they have not pursued that contention on remand. Accordingly, the issue is whether legal restitution should be awarded, and any statements in the prior Opinion and Order addressing points that would only apply to a claim for equitable restitution are no longer relevant.

Furthermore, because the claim is for legal restitution, the CFPB is correct that the principles discussed in *Liu* and its holding have no direct application here. *See CashCall II,* 2023 WL 2009938, at *7 ("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.") Defendants do not contend *Liu* has any impact here except to the extent that it should be seen, in defendants' opinion, as supporting the general principle that "words used by Congress that limit the authority of a regulatory agency should be enforced in full measure to protect the rights of citizens," and as an exemplar of how the Supreme Court will act to curb agency overreach. Whatever merit that generalized characterization may have, *Liu* provides no particular guidance on the issues in this case.

The remaining issue identified by the Ninth Circuit's remand is "the effect, if any, of *CashCall."* In *CashCall,* the district court had denied restitution on grounds that the CFPB had not shown the defendants "intended to defraud consumers or that consumers did not receive the benefit of their bargain." 35 F.4th 750. While the *CashCall* court "emphasize[d] at the outset"

that it was not holding restitution was necessarily appropriate in the case, or deciding what amount, if it were warranted," it did find that intent to defraud was not a relevant consideration. *Id.* The circuit court then remanded for the district court to apply the circuit's two-step burden-shifting framework for calculating restitution. *See Consumer Fin. Prot. Bureau v. Gordon,* 819 F.3d 1179, 1195 (9th Cir. 2016)

Under that framework, 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.* (citation omitted). 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.* Furthermore, a district court may use a defendant's net revenues as a basis for measuring unjust gains. *Id.*

The prior Opinion and Order in this case did not reject restitution on the grounds that defendants had acted in good faith, so that aspect of *CashCall* is not directly implicated. As mentioned, however, the order included some language regarding equitable considerations. Not only should that language be disregarded to the extent it is inapplicable to legal restitution, in light of *CashCall* it cannot support denying restitution, insofar as it may have reflected considerations similar to good faith.

Additionally, the prior Opinion and Order reflected a concern that at least some of defendants' customers derived benefits from the services defendants provided. *CashCall* flatly states that

restitution may not be denied simply because "consumers received the benefit of their bargain." 35 F.4th at 751. That said, precedent is less clear as to when and how a restitutionary award should account for any valuable benefits some consumers may have obtained, to avoid a windfall to those individuals. *See, e.g. CashCall II,* 2023 WL 2009938, at *9 ("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 .... 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."); *F.T.C.* v. *Figgie Int'l, Inc.,* 994 F.2d 595, 606 (9th Cir. 1993) ("The district court's order creates no windfall for Figgie's customers .... Those consumers who decide, after advertising which corrects the deceptions by which Figgie sold them the heat detectors, that nevertheless the heat detectors serve their needs, may then make the informed choice to keep their heat detectors instead of returning them for refunds."); *F.T.C.* v. *Amy Travel Serv., Inc.,* 875 F.2d 564,572 (7th Cir. 1989),("The magistrate correctly acknowledged the existence of satisfied customers in computing the amount of defendants' liability-customers who actually took vacation trips were excluded when the magistrate computed the amount of restitution awarded.")

Regardless of if, when, and how a restitutionary award should be adjusted to account for benefits some consumers may have received notwithstanding deceptive marketing, it appears to be an issue on which defendant bears the burden of proof at step two

of the framework. *See Cash Call IL* 2023 WL 2009938, at *9. Here, defendants offered evidence suggesting many of their customers were satisfied with their services, but as CFPB points out, defendants failed to show how many, if any, of those supposedly satisfied customers had become aware of the misrepresentations in the marketing process. More fundamentally, defendants failed to offer any evidence to quantify any benefit its customers received, such that any restitutionary award could be adjusted on that basis. Accordingly, any suggestion in the prior order that restitution was properly denied because defendants' customers may have obtained some benefits ceases to be applicable.

All that said, the CFPB still has not met its burden to establish that the restitutionary award it seeks is warranted, for reasons alluded to throughout the prior Opinion and Order, though perhaps with insufficient clarity. As the Opinion and Order observed, the CFPB asked for restitution in an amount representing the setup fees *all* of Nationwide's customers paid in the relevant time period, deducting only those refunds previously made. Of the various marketing practices and representations found to be false or misleading, however, the only category that implicated Nationwide's entire customer base, were the representations regarding the timing of the savings customers would realize from utilizing defendants' program.

Relying in part on the analysis of the CFPB 's expert, and in part on the text of the representations, the Opinion and Order found that at least some of the

representations were "likely to mislead consumers acting reasonably under the circumstances." That finding was sufficient to support defendants' *liability,* and therefore the civil penalties and the injunctive relief. The Opinion and Order also found, however, that defendants' approach to calculating savings was consistent with the method lenders must use in describing interest in Truth In Lending Act disclosures, and that, with some exceptions, the representations could be characterized as literally truthful. While not spelled out in the prior decision, the implication was that while some customers were likely to be misled for the reasons explained, others likely were not. To establish liability, the CFPB was not required to prove that all, or virtually all consumers would be misled by defendants' marketing, and the CFPB did not so prove.

As the CFPB correctly asserts, under *Figgie,* a court must presume that consumers relied on the defendant's misrepresentations in paying for a product once a government enforcement agency "has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *Figgie,* 994 F.2d at 605-06. Presuming reliance on an unambiguously false representations, however, does not answer the question of what percentage of consumers were actually mislead by a literally truthful representation that only had the *capability* to mislead.

The CFPB acknowledges that at step one of the *Gordon* framework, it "bears the burden of proving that the amount it seeks in restitution reasonably

approximates the defendant's unjust gains." 819 F.3d at 1195. It has not met that burden here, because it is seeking restitution for its *entire* customer base, when it did not prove that the representations in issue likely misled all or virtually all of its customers. All its customers can be presumed to have relied on the representations, but they cannot all reasonably be presumed to have been *misled* by the representations, which were largely literally true and consistent with interest calculations in truth-in-lending disclosures.

The CFPB has not offered an approach for correlating any restitution award to the numbers of customers who were actually misled. Accordingly, while the liability finding remains supported, and the previously imposed civil penalties and injunctive relief are warranted, the CFPB has failed to show this is a case where an award of restitution is "appropriate." *See* 12 U.S.C. § 5565(a) ("The court ... 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 .... ").[4]

C. Motion for release of funds in escrow

While these matters were pending, defendants

[4] Defendants renew their argument that CFPB cannot recover both civil penalties and restitution. Although of no consequence given the denial of restitution, that argument fails for the reasons stated in the prior Order and Opinion.

filed a motion for "return of property" in which they sought to recover approximately $410,000 that was paid to CFPB under an agreement among the parties when defendants sold their prior headquarters building in Ohio. Defendants represent they were forced to sell the building to pay overdue mortgage and tax obligations. The CFPB had filed abstracts of the judgment in this action in several Ohio counties, thereby encumbering all of defendants' real property in those places.

The CFPB 's judgment lien on the former headquarters building was, of course, junior to the mortgage and tax liabilities, but defendants could not deliver clear title to the buyer without satisfying the CFPB's lien. After an exchange of various proposals, the parties reached an agreement that net sale proceeds would be paid into the CFPB 's Civil Penalty Fund, where they could "be held and returned if a final judgment is entered in favor of Mr. Lipsky and Nationwide." The transferred net proceeds would "be considered civil money penalties under the November 8, 2017 judgment and deposited in the Civil Penalty Fund of the Bureau as required by 12 U.S.C. § 5497(d)." The agreement further provided, "[i]f Defendants prevail on their appeal of this action and any court order makes clear that the Bureau cannot retain the funds as civil money penalties, the Bureau will comply with the terms of such an order."

The effect of the present order, of course, is to reaffirm the prior judgment. Any argument that defendants were entitled to return of the monies between the issuance of the Ninth Circuit's mandate

and this decision fails. First, defendants' insistence that the mandate itself somehow required return of the monies, or compelled this court to order such a return, is belied by the terms of the mandate, which was silent as to the status of the judgment, or any funds previously collected thereunder. The mandate said nothing other than that the previously entered judgment of the court of appeal had taken effect as of the date of the mandate. Dkt. No. 381. The judgment of the court of appeal, embodied in its memorandum opinion, was stated as "we vacate the district court's order and remand, allowing it to reassess the case under the changed legal landscape since its initial order and opinion." Dkt. No. 380.

It is therefore at best unclear as to whether the prior judgment was vacated, as opposed to merely the order. Assuming, however, that the better reading is that both the order and the judgment were vacated, that would not somehow automatically entitle defendants to return of the funds. Had defendants not sold the property and entered into an agreement with the CFPB regarding disposition of the sales proceeds, defendants would have had whatever remedies Ohio law provides (or does not provide) under circumstances like these to have the lien removed pending a new final judgment. Instead, the question is effectively one of contract-the agreement the parties reached when defendants wished to sell the property governs when and if defendants may become entitled to return of the funds.

It is not self-evident this court even has jurisdiction to decide what is effectively a breach of

contract claim brought by defendants against the CFPB regarding the funds. Assuming, however, that the court has ancillary jurisdiction because the matter relates to enforcement of the judgment, defendants' contention that they became entitled to return of the funds when the mandate issued fails under the clear terms of the parties' agreement. Despite defendants' efforts to characterize aspects of the remand as favorable to them, at this juncture they cannot be said to have "prevailed on appeal" and no final judgment in their favor has been entered.

Defendants' further argument that the retention of the funds constitutes an unconstitutional taking borders on frivolous. Thus, to the extent not mooted by the outcome in this order, defendants' motion for return of property is denied.

III. CONCLUSION

Subject to the modifications and supplemental findings discussed above, the prior Order and Opinion is reaffirmed. A separate judgment in the same form as the prior judgment will be entered.

IT IS SO ORDERED.

Dated: August 28, 2024

/s/
RICHARD SEEBORG
Chief United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff,

v.

NATIONWIDE BIWEEKLY ADMINISTRATION, INC., et al.,
Defendants.

Case No. 15-cv-02106-RS

OPINION AND ORDER

I. INTRODUCTION

This is a civil enforcement action brought by the Consumer Financial Protection Bureau (CFPB) against entities and an individual whom the CFPB contends misled consumers. In defendants' view, the financial services product they sell provides their customers the chance to save thousands and thousands of dollars that they might otherwise pay in mortgage interest. CFPB insists, in contrast, that few, if any, consumers will come out ahead financially, given the effect of the fees defendants charge. CFPB challenges several aspects of defendants' marketing as allegedly misleading. After the completion of a seven

day bench trial, the parties submitted post-trial briefing and proposed findings of fact and conclusions of law, before returning to present closing arguments.[1]

After carefully considering the sufficiency, weight, and credibility of the testimony of the witnesses, their demeanor on the stand, the documentary evidence admitted at trial, and the post-trial submissions of the parties, the Court finds that CFPB has adequately shown that some, but not all, of defendants' challenged marketing statements were false or misleading. For reasons explained below, the Court finds that CFPB has not met its burden to show that the restitutionary relief it proposes is warranted, but a civil penalty will be imposed, as well as injunctive relief. The parties will be directed to meet and confer to present a proposal or proposals as to the exact terms of the injunctive relief. Defendants in turn, failed to meet their burden to establish the validity of their counterclaims. This Opinion and Order comprises the findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52(a).

II. LIABILITY

A. The "Interest Minimizer" Program

Defendants are Nationwide Biweekly

[1] Although this opinion differs substantially in form and substance from both parties' proposed findings and conclusions, those submissions were nonetheless very helpful for purposes of tracking and understanding the evidence and the parties' respective contentions.

Administration, Inc. ("Nationwide"), its wholly-owned subsidiary Loan Payment Administration ("LPA"), and Daniel Lipsky, the founder, president, sole officer, and sole owner of Nationwide. LPA functions essentially as a second name under which Nationwide markets its services.

The subject of this action, which formed the core of defendants' business, is a financial service product known as the Interest Minimizer Program ("the IM program"). A customer who signs up for the IM program, in its most typical form, agrees that every two weeks Nationwide will automatically debit from the customer's bank account an amount equal to one-half of the customer's monthly home mortgage payment. Nationwide then forwards the funds to the customer's lender on a monthly basis. Because this results in 26 debits per year of an amount equal to one-half of a mortgage payment, the customer effectively makes one extra mortgage payment each year (26 half payments = 13 full payments). Apart from an initial set-up fee, discussed below, these "extra" payments each year are applied by lenders to the principal of the loan balance, thereby reducing it more quickly than would be the case if only twelve payments were made per year. With the loan principal being paid off more quickly, the total interest charges a borrower will pay over the life of the loan are reduced.[2]

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[2] Nationwide offers other options, such as weekly payments, and provides certain other services as part of the IM program, discussed below. The option of other payment schedules does not affect the analysis. For convenience, this opinion and

Nationwide obtains its customers by first purchasing names and addresses from certain companies that use public records to compile lists of persons who have recently taken out home mortgages, and then sending those persons mailers. At the height of its operations, Nationwide sent out approximately 300,000 mailers per week, some under the Nationwide name, and some under the LPA name. While there were 50 to 60 different versions of the mailers used during the time period relevant to this case, the parties are in agreement many of the changes from version to version were minor, and that the exemplars they put into evidence at trial fairly present the subjects of dispute.

The Nationwide mailers generally had two sides (see Trial Exh. 36), whereas the LPA mailers typically were single-sided and conveyed less information about the IM program (see Trial Exh. 57). The mailers were transmitted in window envelopes typically bearing bold, colored, text such as "Payment Information Enclosed," "Mortgage Information Enclosed (Accelerated Reduction in your Principal Balance), and "Mortgage Payment Information Enclosed." See Trial Exhs. 76-81. Ordinarily, the name of the lender would appear on the mailer immediately above the consumer's name and address, with the result that the lender's name would be visible through the envelope window. In those instances, the envelopes also bore a notice that "Nationwide Biweekly Administration is

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order will hereafter refer only to the bi-weekly payment structure, which is also what the parties focused on at trial.

not affiliated with the lender." Defendants' witnesses explained that some states prohibit using the lender name, and that in those states the envelopes did not include the disclaimer.

Although the percentage of persons who responded was always very small, given the volume of mailers sent out, Nationwide fielded millions of incoming telephone calls at its call center.[3] Among those who ultimately enrolled in the IM program, the telephone calls typically would last between 30 minutes and one hour. During the calls, Nationwide's representatives used prepared "scripts" to explain and sell the product, and to respond to any questions customers might have. Nationwide introduced evidence that it trained its representatives to follow the scripts as closely as possible, that it monitored representatives' performance, and that it imposed discipline if a representative failed to make any of the disclosures called for by the scripts. In this action, CFPB is not attempting to impose any liability based on what representatives from time to time may or may not have added to, or omitted from, the scripts. CFPB's position is that the sales presentation included false or misleading statements, and that there were material omissions, even where representatives followed the scripts scrupulously.

The evidence adduced at trial showed that the

[3] Nationwide did not make outgoing telephone sales calls, other than in response to inquiries received from potential customers.

scripts and mailers were all largely written by Lipsky himself. Lipsky personally reviewed and approved all or virtually all changes in language to any of the documents. It was undisputed that Lipsky was intimately involved in managing all aspects of the business on a day-to-day basis.

B. Legal standards

CFPB's complaint sets out four counts. First, CFPB contends defendants' conduct violates the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531 ("CFPA"), as "abusive." An act or practice is "abusive" if, among other things, defendants have taken "unreasonable advantage of the consumer's lack of understanding of the material risks, costs, or conditions" of, the service or product they are selling. *See* 12 U.S.C. § 5531(d)(2)(A).

At trial, and in most of the briefing over the course of this action, CFPB has placed primary emphasis on the second count of it complaint, which seeks to impose liability under the prong of the CFPA that prohibits "deceptive" practices. *See* 12 U.S.C. § 5536(a) ("It shall be unlawful . . . to engage in any unfair, deceptive, or abusive act or practice."). An act or practice is "deceptive" if: (1) there is a representation, 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 (9th Cir. 2016). To determine whether a representation or practice is likely to mislead, courts examine the overall "net

impression" that it leaves on a reasonable consumer. *Id.*

Defendants urge the court not to follow the articulation of the standard for deceptiveness set out in *Gordon*, which that court expressly acknowledged it was borrowing from jurisprudence under the FTC act. *See* 819 F.3d 1193 n.7. Even assuming *Gordon* was not binding here, however, defendants have not made a persuasive showing that some other standard should apply.

Moreover, the standard defendants propose is not materially different from that set out in *Gordon.* Defendants have offered only two minor additions to the *Gordon* language. First, defendants would expressly state that to be deceptive, the challenged representations or omissions must be likely to mislead "*a significant portion of targeted* consumers . . . ." The concept that "deception" requires something that misleads more than only the most gullible or inattentive is already embedded in the borrowed FTC definition—"likely to mislead consumers *acting reasonably under the circumstances*." *See also*, *F.T.C. v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) (upholding finding of deception where "overwhelming number of consumers" were misled.)

Second, defendants would add an express element that consumers be misled "to their financial detriment." As defendants point out in arguing for such an element, in the absence of an injury-in-fact that is "concrete and particularized," there is no standing under Article III of the Constitution. *Spokeo,*

Inc. v. Robins, 136 S. Ct. 1540 (2016). Even assuming the FTC act allows for claims based on concrete and particularized *non-monetary* injuries, and that the CFPA for some reason applies only where consumers have suffered *monetary* losses, there is no occasion to draw that distinction here, where the claim is that consumers were deceived in connection with signing up for services offered by defendants for a fee—a financial detriment.[4] Accordingly, while there are no grounds to depart from the definition of "deceptive" provided in *Gordon*, the result here would be the same even under the standard proposed by defendants.

The third count of CFPB's complaint asserts

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[4] Defendants appear to believe that if a "financial detriment" element is added, they can argue there was no "deceptiveness" here because, under their view of how the IM program works, all or virtually all consumers will financially benefit from participating, even if only for a short period of time. Even if that is factually accurate, it would not mean there is no financial detriment. The basic claim here is not that the IM program never could provide a financial benefit, but that consumers are misled into enrolling through misrepresentations and omissions as to the nature and timing of those benefits, and as to how easily similar benefits might be available from other sources at lower cost. If a seller of Blackacre misrepresents some material fact in connection with the sale of the property, it is entirely conceivable that the buyer might still realize an overall financial benefit from the property. If the buyer's gain is less than it would have been had the representations been true, or if the investment would have been more profitable if made elsewhere, however, there still is a cognizable financial detriment resulting from the fraud. Any definition of "deception" that excludes such circumstances merely because a buyer has a net financial gain is not a viable standard.

defendants have violated the Telephone Sales Rule, 16 C.F.R. § 310.2(dd) ("TSR"), a regulation implementing the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6105(d). Finally, the fourth count alleges that defendants' violation of the TSR by definition constitutes a violation of the CFPA.[5]

C. Alleged Misrepresentations

CFPB contends it has proven that defendants committed four basic misrepresentations or omissions in the mailers and/or the phone scripts, involving a number of sub-misrepresentations or omissions.

(1) The existence and/or amount of the "set up fee"

Prior to some point in 2011, Nationwide charged $245 as a one-time set up fee to participate in the IM program. That precise dollar amount was expressly disclosed during the phone enrollment call, and paid for by consumers during the call. In 2011, Nationwide switched to a "deferred fee" model, where consumers were not required to pay a set-up fee at the time of enrolling in the IM program. Instead, the amount of the fee was set to be equal to one of the biweekly

[5] As such, the fourth claim is wholly derivative of the third. CFPB has identified no additional consequences that might flow from labeling any violation of the TSR as also constituting a violation of the CFPB. Indeed, CFPB has not sought any separate remedies under the TSR at all, under either the third or the fourth claim.

payments the consumer was agreeing to make, and Nationwide simply kept for itself the first "extra" payment that the consumer made.[6] Nationwide capped the fee at $995.[7]

CFPB first contends defendants did not adequately disclose the existence of the setup fee, and/or its amount in the mailers. The statements CFPB points to, however, more reasonably are characterized as misrepresentations regarding the actual savings achievable in light of the fee, rather than a failure to disclose the fee. Indeed, the "distinctive, eye-catching bold text" stating "NO UPFRONT FEE" serves as an implied warning that there likely were some fees, rather than deception.[8] As

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[6] Consumers had the ability to select which day of the week the payment would be deducted every other week. In every calendar year there are always four months that have five occurrences of any given day of the week. For example, in 2017, there are five Mondays in January, May, July, and October. There are five Fridays in March, June, September, and December. The length of time until a customer would make the first "extra" payment therefore would depend on when he or she signed up, and which day of the week was selected for the automatic withdrawals. It could happen as early as the first month after enrollment (or possibly even in the same month), or could be a few months later.

[7] When Nationwide first switched to the deferred fee, the cap was much higher. The parties have not assigned any significance to that fact.

[8] CFPB's contention to the contrary that "no upfront fee" would leave reasonable consumers with the impression that there are *no* fees is not persuasive. Although a Nationwide customer

CFPB points to no rule that requires fee details to be disclosed in those initial written solicitations, the mailers present no basis to hold defendants liable for failure to disclose the set-up fee adequately.[9]

CFPB further contends that the existence and/or amount of the set-up fee was deliberately concealed and/or inadequately disclosed in the phone conversations when consumers called in response to the mailers. Indeed, the scripts, and the directions for using them, were plainly designed to minimize the attention a consumer likely would pay to the set-up fee. CFPB particularly objects to the fact that the amount of the fee is not stated in dollars, but is instead merely referenced as "one bi-weekly payment."

The dollar amount of the bi-weekly payments is clearly disclosed. Moreover, because it is the amount a consumer who enrolls in the program will thereafter be expecting to have withdrawn from his or her account every two weeks, any consumer acting reasonably under the circumstances will have that dollar figure well in mind. CFPB's insistence that it is too much to ask the consumer to "cross-reference" the set-up fee amount to the known amount of the bi-weekly payment is not persuasive.

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testified at trial that she drew that conclusion, her testimony is not sufficient credible evidence standing alone to establish that a reasonable consumer likely would be misled by the language "no upfront fee" into believing there was no fee.

[9] Similarly, there is no requirement that defendants disclose the amount of the setup fee in promotional videos.

After the point in time that the amount of the bi-weekly payment has been calculated and disclosed to the consumer, the scripts direct Nationwide's representatives as follows:

> Your one-time deferred set-up fee, which covers your lifetime program enrollment, is equal to just one standard biweekly debit . . . . We will simply deduct it from the first extra biweekly debit that occurs on the program within the first 6 months. The remaining extra biweekly debits will go 100% to the principal of your loan. (Pause here.) Do you have any questions? (Make sure customer understands this specific point.)

See Trial Exh. 13.[10]

Nationwide's representatives are also directed to read that paragraph in response to any question from a potential customer as to what the program costs if the bi-monthly payment amount has already been calculated. If not, the representative is directed to do that analysis with the customer first, and then to read the paragraph. See Trial Exh. 15.

The enrollment contact every Nationwide customer is required to sign states:

> SETUP FEE. By signing below, I

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[10]

> acknowledge that I agree to a nonrefundable deferred setup fee equivalent to one bi-weekly debit and 10 As noted, the precise wording of the scripts varied to some degree at different points in time. This language is representative. that I currently owe that amount to NBA; and I authorize NBA to collect such amount by deducting it from the amount it collects from my Designated Account. In addition, if I cancel my enrollment in the Program for any reason before I have paid such amount in full, I authorize NBA to collect the unpaid balance by electronically debiting the Designated Account.

This paragraph regarding the setup fee appears directly below a paragraph setting out the bi-weekly debit amount. See Trial Exh. 88. Consumers enrolling in the IM program must check a box labeled "I agree" appearing immediately below the setup fee paragraph.[11] Accordingly, CFPB has failed to show that the disclosure of the setup fee is inadequate, or that defendants have made actionable misrepresentations or omissions with respect to the existence or amount of the setup fee, or the cost of the

[11] Consumers were also charged $3.50 per automatic debit. CFPB does not contend this fee was inadequately disclosed. Indeed, CFPB argues that defendants deliberately emphasized the debt fees as part of their effort to downplay the setup fee. While that undoubtedly is the case, it does not render the disclosures of the setup fee inadequate.

IM program.[12]

(2) Defendants' affiliation with consumer's lenders

CFPB contends that defendants' mailers and phone scripts create a misleading impression as to the relationship between Nationwide (or LPA) and the potential customers' lenders. As noted above, the mailer envelopes that revealed the lender's name through the window also included a notice that Nationwide/LPA was not affiliated with the lender. The mailers themselves typically contained a more robust disclaimer that Nationwide/LPA was not "affiliated, connected, associated with, sponsored, or approved by the lender." Although those disclaimers appeared at the bottom of the page, they were printed in the same size font as the body of text. *Cf*, *F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006)("Fine print" disclaimers on the *reverse* side of mailers insufficient to preclude misleading effect.).

Additionally, other portions of the marketing materials and the telephone scripts would necessarily make clear to consumers that Nationwide was independent from the lender, including the fact that

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[12] That said, in their response to CFPB's request for injunctive relief, defendants have volunteered that upon resuming operations, they will disclose the setup fee as a specific dollar amount in future scripts and contracts. Because doing so will put defendants' practices on more solid ground, they will be held to that promise, and it should be incorporated into the parties' proposal for the terms of the injunctive relief.

Nationwide's representatives had to obtain monthly payment figures from the customers, and various statements by which Nationwide contrasted itself from the lender. At least by the time of enrollment, no reasonable consumer could have been laboring under any misunderstanding that Nationwide was the lender, or even directly affiliated with the lender.

The law is clear, however:

> A later corrective written agreement does not eliminate a defendant's liability for making deceptive claims in the first instance. *See Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir.1975) (per *curiam*) (explaining that advertising is deceptive "if it induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract").

Gordon, *supra*, 819 F.3d at 1194 (9th Cir. 2016).

Here, the disclaimers on the mailer envelopes and at the bottom of the mailers ordinarily will be sufficient to preclude any reasonable consumer from believing that Nationwide actually was the lender, or meaningfully affiliated with the lender. Nevertheless, a reasonable consumer likely would be confused—and therefore misled—by the net impression created by many of the mailers, which contained additional language designed to instill in potential customers a sense that they had some kind of existing obligation by virtue of their loan to respond to the mailers.

Examples include mailers marked "Second Notice," and those including statements such as "*If you waive the biweekly option*, you will be asked to confirm that you understand you are voluntarily waiving the interest saving and loan term reduction achieved with the biweekly option." See, *e.g.*, Trial Exh. 42. Indeed, even the name "Loan Payment Administration," while perhaps an accurate description of the service defendants provide, potentially creates an initial impression that the consumer is being contacted by some arm or department of the lender. That some of the mailers actually create a misleading impression is evidenced by the fact that Nationwide's scripts include responses to be given to callers who ask whether Nationwide is, or is affiliated with, the lender.[13] Accordingly, CFPB has adequately shown that some, but not all, of the mailers are likely to mislead consumers acting reasonably under the circumstances. The record does not contain a basis for determining how many of Nationwide's customers would have been impacted by this issue.[14] As such, these

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[13] CFPB faults Nationwide's scripts for not directing representatives to eliminate any possible ambiguity by answering with a simple "no." The scripted response is sufficiently accurate to preclude finding liability based thereon. Nevertheless, an arguably better practice would be for the scripts to direct representatives to give a "no, but . . ." answer, rather than never clearly saying "no." A "no, but . . ." response would not necessarily have to include the word "but." It could be any answer that begins with a "no" and is followed immediately with a more fulsome explanation.

[14] Because CFPB has shown there were other misrepresentations affecting all of Nationwide's customers, the

misrepresentations contribute to the liability finding, and must be addressed in the injunctive relief. They provide less support for monetary relief, however, than do the misrepresentations and omissions that can be presumed to have been material to virtually all Nationwide customers.

(3) Timing and amount of interest savings

Second only to the question of whether the set-up fee was adequately disclosed, the parties' focused most heavily on whether Nationwide's representations as to the timing and amount of interest savings were false or misleading. CFPB relied on the testimony of its expert witness, Neil Librock, who opined that given the setup fee and the per-debit fees, the typical Nationwide customer would not reach a "break-even" point until after making approximately nine years' worth of payments under the IM program. CFPB further argues that because consumers on average stay in a specific mortgage for only four and a half years, most will end up having paid more to Nationwide in fees than they will ever realize in savings.

Librock and CFPB do not dispute that a consumer who participates in the IM program until the loan is

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failure to quantify the number implicated by this issue is not critical. It would, however, preclude awarding restitution to all customers based only on these misrepresentations, were restitution otherwise appropriate. As such, this issue contributes to the conclusion set out below that CFPB has not shown a restitutionary award to be warranted.

paid in full, (1) will pay off the loan sooner, and therefore, (2) will pay less in total interest charges. Librock's analysis is premised on looking at how much total interest a borrower will have already paid as of a particular time under the IM program, contrasted with how much total interest he or she would have already paid at the same point in time without the IM program. Under that mode of analysis, the total decrease in interest payments already made will not exceed the total fees paid until approximately the ninth year, given a loan amount and interest rate that is typical of Nationwide customers.

Apart from certain quibbles not affecting the analysis, defendants do not challenge Librock's math. Rather, they and their expert Harvey Rosen, reject Librock's theoretical approach to the question.[15] Defendants argue that the interest savings resulting from making *any* extra payment towards principal can only be meaningfully measured by looking at the total interest amount that will have been paid by the end of the loan term, given the extra principal payments, and comparing that to what the total interest would have been absent those payments. Defendants point out that Truth in Lending Act disclosures lenders must provide at loan initiation calculate interest exactly that way, and show what the total interest paid will have been assuming monthly payments are timely made over the full term of the loan. Rosen testified

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[15] Because of illness, Rosen was unable to testify at trial. The parties stipulated to admission of his deposition transcript in lieu of live testimony.

that even if a Nationwide customer made only one extra principal payment prior to dropping out of the IM program, the reduction in total interest paid over the full term of the loan would exceed the setup fee and the charge for the one automatic debit.

Defendants further argue that looking at it from the perspective of a reduction in the total interest obligation, it becomes irrelevant that many consumers may refinance before the loan term ends, or even before the "break-even" point claimed by Librock. Because the amount refinanced will be a lower principal balance, the interest savings will automatically carry through to the new loan (although the precise amount of savings may vary, depending on differences in interest rates as between the loans).[16]

The problem with defendants' position is even if they are technically correct, at least some portions of their marketing materials are "likely to mislead consumers acting reasonably under the circumstances." *Gordon*, 819 F.3d at 1192. Using their calculations for savings over the full loan term, defendants divide that by the number of months and repeatedly represent to potential customers that they will save an "average" of some specific dollar amount per month. Under the same reasoning, defendants make representations that customers will save

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[16] Of course, as defendants also point out, the IM program is fully-transferable to any new loan, without a requirement that another setup fee be paid. There was little evidence, though, as to how often Nationwide's customers took advantage of that option.

amounts such as $1500 in the first year, and $5000 after only two years. Defendants also use the same approach in calculating figures they tout as the total savings its customers have already achieved.

A reasonable consumer is likely to misunderstand how defendants are using "average" in this context, and is likely to assume the "average" is a caveat to address minor variations or imprecisions in the numbers from month to month.[17] A reasonable consumer is likely not to understand that in terms of actual out-of-pocket dollars being applied as interest each month, the reduction will be minimal until much later in the term of the loan, and that the total "savings" will be even less in light of the fees. In other words, a reasonable consumer is likely to understand the promises of "average monthly savings" or of the savings in the first year in a manner more congruent with the approach taken by Librock. Upon being told, for example, that there will be $1500 in interest savings the first year, a reasonable consumer can be misled into believing that his or her actual interest payments to the lender *that year* will be $1500 less than if he or she elects not to buy the IM program.

To be sure, defendants often included disclaimers explaining that their figures were based on the "life of

[17] Additionally, at least some mailers did not use the term "average" and instead merely stated a "monthly interest savings" amount. See *e.g.* Trial Exh. 70.

the loan."[18] Those caveats, however, are insufficient to offset the misleading effect of the assertions about monthly savings, or savings in the first and second year. *See Cyberspace.Com*, *supra*, 453 F.3d at 1200 ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures.").

Additionally, even under defendants' approach, they are forced to concede there is no reduction in the lifetime interest obligation at any time before Nationwide "submits the first extra biweekly debit to the lender that is directly applied to the principal." As that may not occur for several months, and certainly does not occur for some time after Nationwide collects the set-up fee, any and all representations regarding "immediate" savings are misleading.[19]

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[18] Defendants also stated that the figures were "net of fees," which ordinarily means the fees have already been deducted from the numbers given. There is some implication in the briefing that defendants may be using the term to mean that the claimed savings do *not* reflect the fees a customer will have to pay to achieve those savings. If defendants in fact deducted the fees when calculating the stated savings figures, there is not an additional problem. If, however, they are using "net of fees" to mean its opposite, this is another misleading aspect of the marketing materials.

[19] Additionally, Nationwide by policy offers only a seven day period in which to cancel, although there was evidence it would waive the setup fee in some other circumstances. In the event Nationwide retains the setup fee even where a customer leaves the program before making the first extra payment towards principal, the "guarantee" of savings will not be realized.

Plainly, defendants cannot be precluded from offering projected savings calculations under the same method that lenders are required to use when disclosing lifetime interest savings. Nor is it inherently misleading or unreasonable to use a "life of the loan" assumption, regardless of the fact that most consumers may refinance long before either the original term of the loan, or the shortened payoff period that will result under the IM programs. Thus, except for the problem of customers who cancel after seven days but before an extra principal payment has been made, CFPB has not shown it to be wrongful for Nationwide to "guarantee" savings, or to use savings figures that compare total interest on the same loan over its full term with total interest on the same loan under the IM program. Where defendants went astray was in reducing that to "monthly" and "yearly" savings figures that likely would mislead a reasonable consumer, even if not literally false.

Finally, in what may have been a holdover from the time that Nationwide collected the setup fee upon enrollment, some of the marketing materials represented that "100%" of the "extra" payments went to reducing the loan principal. This, of course, was false insofar as the first "extra" payment was retained by Nationwide as the setup fee. While the setup fee itself was adequately disclosed elsewhere, that cannot excuse this misrepresentation.

(4) Consumers' ability to achieve similar savings without the IM program

Defendants' telephone scripts and promotional

videos included multiple statements suggesting to potential customers that, with few exceptions, the only way to achieve savings through making bi-weekly payments was to enroll in the IM program, or perhaps through some other third party "administrator." For example, defendants claimed that "[o]nly a small percentage of lenders actually offer a bi-weekly mortgage program to their customers . . . . The few lenders who do offer a bi-weekly program require you to set it up through an administrator like us."[20]

For customers whose loans are with lenders who in fact do not offer a biweekly payment option, any inaccuracy in defendants' representations on this issue is immaterial. The evidence shows, however, that defendants actively compiled and maintained a list of lenders who *do* offer some form of a biweekly payment plan, and that some, or perhaps many, of Nationwide's customers had loans with those lenders.

The record is unclear as to how many lenders offer a biweekly payment option that is functionally

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[20] No one suggests that a sufficiently self-disciplined consumer could not follow a biweekly payment plan, even where the lender does not accept biweekly payments. For example, the consumer could make transfers of half the monthly mortgage amount from his or her main checking account into another account on a biweekly basis, and then make monthly payments to the lender from that second account—i.e., doing exactly what Nationwide does, but without either the setup fee or the per debit fee. That possibility, however, does not mean the IM program is without value, as it plainly provides both convenience and a substitute for self-discipline that a reasonable consumer might very much like to have.

equivalent to the IM program—*i.e.*, a program in which one-half the ordinary monthly payment is automatically deducted from the consumer's account, with the result that the loan principal is decreased by the equivalent of one "extra" monthly payment each year. Additionally, under the IM program, payment of the setup fee entitled consumers to use the biweekly payment program indefinitely—*i.e.*, even on different loans if they refinanced later. Payment of the fee also entitled the consumer to use the program on other debts, *e.g.* credit cards. Finally, the fee also entitled consumers to receive the purported benefits of "payment audits." While there was very little evidence as to the degree to which any consumers actually used these other services or as to the value they actually provided, at least in theory they distinguish the IM program from the programs some lenders offer, and therefore could serve as a basis for consumers to elect the IM program.

That said, CFPB has adequately shown that defendants' representations to the effect a consumer must use the IM program, or perhaps a similar program from another third party administrator, were materially misleading when made in the course of enrollment telephone calls with potential customers whose loans were with lenders known to CFPB to offer a functionally-equivalent biweekly payment plan. CFPB has not shown, however, how many of Nationwide's customers fell into that class. As such, these misrepresentations, like those relating to lender affiliation, contribute to the liability finding, and must be addressed in the injunctive relief. Again, however, they provide less support for monetary relief than do

the misrepresentations and omissions affecting all the customers.

D. Statute of limitations

Defendants contend this entire action is barred by the three-year statute of limitations of the CFPA. *See* 12 U.S.C. § 5564(g)(1) ("Except as otherwise permitted by law or equity, no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates.") Defendants argue the statute began to run on March 3, 2012, when CFPB received a relevant consumer complaint alleging that Nationwide engaged in misleading marketing practices. This action was filed on May 11, 2015, just over two months late, in defendants' view.[21]

The notion that mere receipt of a consumer complaint can trigger the statute of limitations as against CFPB is unsupported by any authority and would be unworkable. At most, a credible and specific consumer complaint might in some circumstances serve as a "storm warning" and put the CFPB on "inquiry notice" that it should begin investigating. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 653 (2010). As

[21] Defendants also suggest that the statute was running as early as 2010, based on information learned by CFPB director Richard Cordray in his prior capacity as Attorney General for the State of Ohio. Defendants have not shown that the Ohio Attorney General's office in 2010 had knowledge of the matters on which the CFPB's claims in this action are based. Indeed, it is undisputed the change to the deferred set-up fee lying at the heart of the present case did not occur until 2011.

the *Merck* court made clear, however, "discovery" of facts that would prompt a reasonably diligent plaintiff to begin investigating is not equivalent to discovery of the facts constituting the violation, and "does not automatically begin the running of the limitations period." *Id.*

Thus, even assuming the receipt of an unverified complaint from a consumer containing allegations somewhat similar to the claims later pursued by CFPB was sufficient to create a duty for CFPB to begin investigating those allegations, the statute did not begin to run until CFPB "thereafter discover[ed] or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation.'" *Id.*[22] Nothing in the record suggests that CFPB actually discovered the facts, or that a reasonably diligent plaintiff would have discovered the facts, in less than the two-plus months between March 3, 2012 and May 10, 2012—the date three years prior to filing. Accordingly, there is no basis to conclude this action is time-barred.[23]

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[22] For the statute of limitations to be running, CFPB necessarily would have to be in possession of sufficient facts to file suit. Had CFPB rushed into court on March 4, 2012 with a complaint based on no information other than the consumer complaint received the prior day, it would have been a clear violation of Rule 11. Plainly the statute was not yet running.

[23] Defendants' post-trial briefing raises an additional contention in the nature of an affirmative defense, not previously advanced in this action, that the CFPB is unconstitutional. The arguments defendants make were accepted in *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), but that opinion was vacated when rehearing *en banc* was granted, and no new decision has yet

III. REMEDIES

A. Restitution

The CFPA vests the court with broad authority to impose appropriate remedies for any violations.[24] It provides, in pertinent part:

> The court . . . 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 . . . .
>
> Relief under this section may include, without limitation—
>
> (A) rescission or reformation of contracts;
>
> (B) refund of moneys or return of real property;

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issued. Remaining authority is in accord that the arguments are not tenable. *See Consumer Fin. Prot. Bureau v. Navient Corp.*, 2017 WL 3380530, at *13-18 (M.D. Pa. Aug. 4, 2017)(surveying cases).

[24] The conclusions set forth above that defendants made certain misrepresentation and omissions is sufficient to support liability under both the "abusive" and "deceptive" prongs of the CFPA and under the TSR. There is no suggestion that separate remedies for those violations would be appropriate.

(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 . . . .

12 U.S.C. § 5565(a).[25]

Here, CFPB seeks "restitution" on behalf of consumers from Nationwide and LPA, in the amount of $73,955,169, which it established at trial represents revenue from setup fees (less refunds) paid by approximately 126,500 consumers who participated in the IM Program from July 21, 2011 to December 31,

[25] Defendants suggest that under 12 U.S. Code § 5564(a) CFPB is required to elect between civil penalties or "all appropriate legal and equitable relief." Although the statute uses the term "or," in context it plainly is listing non-exclusive options CFPB is permitted to pursue, as is confirmed by the listing of the available remedies set out in § 5565(a).

2015.[26] To the extent such restitution is not paid, CFPB also seeks "disgorgement" from Lipsky in the amount of $33,039,299, representing shareholder distributions he received from 2011 to 2015, discussed below.[27] At trial, defendants presented no evidence or argument calling into question the accuracy of these dollar figures. The question, therefore, is only whether restitution, and potentially disgorgement, in these amounts is otherwise appropriate.

Much of Ninth Circuit case law has arisen in the context of egregious frauds where the issue is what the upper limits are on restitution awards. Relatively little guidance exists as to how a court should exercise discretion in circumstances where appropriate equitable relief may be less than the full measure that would theoretically be available. As the discussion above reflects, CFPB has not proved that defendants engaged in the type of fraud commonly connoted by the well-worn phrase "snake oil salesmen." Defendants have not shown, and could not show, that the IM

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[26] At argument, CFPB initially was hard-pressed to identify the rationale on which it selected refund of the setup fee as an appropriate remedy to seek. Ultimately, however, it explained that the setup fee effectively represents the purchase price of the financial services product, which consumers were misled into purchasing—even assuming the setup fee itself was adequately disclosed. Under that reasoning CFPB likely could have also sought refund of the debit charges. Its election not to do so, however, does not warrant rejecting refund of the setup fee as a theoretically appropriate remedy.

[27] CFPB additionally seeks civil monetary penalties, as also discussed below.

Program never provides a benefit to consumers, or that no fully-informed consumer would ever elect to pay to participate in the program.

The law is nonetheless clear that it is not automatically a defense to claim a consumer realized some benefit from a product that he or she would not have bought, absent misrepresentations. The Ninth Circuit explains:

> [I]t is dishonest to represent that rhinestone jewelry is actually diamond, and to charge diamond prices for it. A district court may properly find that a rhinestone merchant who engages in such practices has behaved in a way that a reasonable person in the circumstances would have known was dishonest or fraudulent.

F.T.C. v. Figgie Int'l, Inc., 994 F.2d 595, 604 (9th Cir. 1993).

The *Figgie* court went on to observe:

> 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 *or to refunds for each detector that is not useful to them*.

994 F.2d at 606 (emphasis added).

Thus, in the abstract, *Figgie* arguably would support awarding the restitutionary measure that CFPB requests here—complete refund of all of the setup fees Nationwide's customers paid in the relevant time period, deducting only those refunds previously made. As noted above, however, some of the matters found to constitute misrepresentations or omissions did not apply to all customers. It is also of some consequence that CFPB did not succeed in proving that the setup fee itself was not adequately disclosed. Additionally, the one category of misleading representations that affected all or virtually all Nationwide customers – the timing of savings—involved statements that had an articulable basis in fact. While the literal truth of nearly all of those statements does not absolve defendants of liability for the misleading way they chose to present the savings calculations, it does further undercut the appropriateness of requiring refund of all setup fees customers paid.

Finally, it is worth noting that even in *Figgie*, the restitutionary award was structured in a way that those customers who elected to retain the benefits of the products they had purchased (however minimal) would not receive the windfall of both the benefit and a refund. *See* 994 F.2d at 606 ("The district court's order creates no windfall for Figgie's customers . . . . Those consumers who decide, after advertising which corrects the deceptions by which Figgie sold them the heat detectors, that nevertheless the heat detectors serve their needs, may then make the informed choice to keep their heat detectors instead of returning them for refunds."). While such a structure may not be

legally required in every instance, it further underscores that restitution is an equitable remedy, to be applied with as much fairness as is feasible.[28]

Accordingly, taking into account all of the circumstances present here and balancing the equities, the conclusion that follows is CFPB has failed to show restitution of all customers' setup fees is appropriate. Furthermore, CFPB has not offered a basis for any restitution that might be limited in some way so as to make it a just result. Thus, no restitutionary award will issue.

B. Disgorgement from defendant Lipsky

The CFPB sought disgorgement from individual defendant Lipsky, but acknowledged that if the corporate entities complied with a judgment requiring them to make the full measure of restitution requested, disgorgement would be cumulative, and Lipsky would have no obligation to disgorge the shareholder distributions he derived during the relevant time periods. In light of the fact that no restitutionary award is being made, an order for disgorgement by Lipsky is likewise unwarranted.

C. Statutory Penalties

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[28] Although *Figgie* involved a tangible product that customers could simply keep if they desired to do so, there could be circumstances under which a similar remedy could be fashioned even where services, as opposed to tangible goods, are at issue.

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). The statute provides for a basic penalty of up to $5000 per day, with reckless or knowing violations at progressively higher maximum rates. In setting the penalty amount, a court may consider the following mitigating factors:

> (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.

Here, CFPB is requesting the maximum first tier penalty of $5000 per day from July 21, 2011, through November 23, 2015, for a total award of $7,930,000. While it may be that CFPB only sought first tier penalties because it believed the restitutionary award would be large, under all the circumstances that penalty figure is appropriate. The record plainly supports an inference that defendants sought to use the most effective sales tactics possible to market the

IM program, and that in doing so they were willing to push up against the legal limits. The record also shows, however, that defendants took affirmative steps such as training, quality control, and seeking legal counsel, in an effort to stay on the right side of the line. As such, imposing a penalty at the higher tiers for reckless or knowing violations is not warranted. The aggressiveness with which defendants pushed the line, however, supports imposition of the first tier maximum.

Finally, CFPB proposes that the award be made against "each" defendant, without specifying whether it intends joint and several liability for the $7,930,000 amount, or three separate penalties, each in that amount. Although Nationwide, LPA, and Lipsky are legally three separate persons, there is not a sufficient basis to impose a total penalty of almost $24 million. Accordingly, a single penalty of $7,930,000 will be imposed, for which defendants are jointly and severally liable.

D. Injunctive relief

The parties are hereby ordered to meet and confer to negotiate as to the form and content of appropriate injunctive relief, which will govern any future operation by defendants of the IM program or any substantially similar program, regardless of how it may be named. Within 30 days of the date of this opinion and order, the parties shall submit a joint proposal, or to the extent they cannot agree, separate proposals. Generally speaking, the injunctive relief should permit defendants to resume operation of the

IM program, provided they make changes to the mailers, phone scripts, and promotional videos sufficient to eliminate each of the misleading or deceptive points addressed above.

IV. COUNTERCLAIMS

Defendants' counterclaims allege, in essence, that CFPB acted wrongfully by engaging in extra-judicial "back-room pressure tactics" designed to coerce Nationwide's banking partners to cease doing business with it. The counterclaims were the subject of two rounds of motions to dismiss, and a motion for summary judgment. The first motion to dismiss was granted because Nationwide had failed to set out sufficient plausible facts to show (1) that CFPB had participated in allegedly wrongful conduct as part of the so-called "Operation Chokepoint" program,[29] or (2) that the banks terminated their relationships with Nationwide as the result of any such participation by CFPB in Operation Chokepoint, or any other allegedly wrongful extra-judicial conduct. A second motion to dismiss, however, was denied, because defendants presented additional factual allegations—and arguments regarding the inferences reasonably to be drawn from those averments—that a decision on the basis of the pleadings alone would not have been appropriate.

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[29] Nationwide alleged "Operation Chokepoint," was a campaign initiated by the United States Department of Justice to force banks to terminate their business relationships with payday lenders, and speculated that the campaign had been extended to other businesses such as its own.

Then, summary judgment was also denied. The order observed that "the direct evidence tying the CFPB to any actionable wrongs remains thin," but concluded defendants had pointed to enough inferences potentially arising from all the circumstances under which their banking partners terminated the relationships that it would be premature to conclude as a matter of law no reasonable fact finder could find in their favor.

Sitting now as a trier of fact, the Court concludes the evidence at trial—no more robust than that previously presented—does not warrant drawing an inference in this case that CFPB engaged in any "back-room pressure tactics" as part of "Operation Chokehold" or otherwise, or that the banks terminated their relationships with defendants based on any such wrongful conduct by CFPB. Rather, the evidence supports a conclusion that while the filing of this action itself—a privileged and non-actionable act—may have contributed to the termination of the banking relationships, those relationships were already strained for reasons unrelated to any conduct by CFPB. Lipsky's testimony on the point demonstrates that defendants lack any facts to support the claim of wrongful extra-judicial pressure. Rather, Lipsky testified he has drawn his own conclusion that the banks terminated the relationships because of CFPB's mere identity as the plaintiff in this action. Defendants submitted no evidence from the banks sufficient to establish the factual predicates for their counterclaims, even assuming "extra-judicial" pressure might, in some circumstances, support a claim under the legal theories advanced. Accordingly, the

counterclaims fail for lack of proof.

V. CONCLUSION

On the complaint, CFPB is entitled to judgment in its favor for a statutory penalty of $7,930,000, as against defendants Nationwide, LPA, and Lipsky jointly and severally. CFPB is further entitled to injunctive relief consistent with the findings above, the exact terms of which shall be determined after the parties engage in meet and confer and present their joint or separate proposals, which shall be submitted within 30 days of the date of this opinion and order. CFPB is also entitled to judgment in its favor on the counterclaims.

IT IS SO ORDERED.

Dated: September 8, 2017

/s/
RICHARD SEEBORG
United States District Judge

APPENDIX D

12 U.S.C. § 5515 - SUPERVISION OF VERY LARGE BANKS, SAVINGS ASSOCIATIONS, AND CREDIT UNIONS

(a) SCOPE OF COVERAGE. This section shall apply to any covered person that is—

(1) an insured depository institution with total assets of more than $10,000,000,000 and any affiliate thereof; or

(2) an insured credit union with total assets of more than $10,000,000,000 and any affiliate thereof.

(b) SUPERVISION

(1) IN GENERAL. The Bureau shall have exclusive authority to require reports and conduct examinations on a periodic basis of persons described in subsection (a) for purposes of—

(A) assessing compliance with the requirements of Federal consumer financial laws;

(B) obtaining information about the activities subject to such laws and the associated compliance systems or procedures of such persons; and

(C) detecting and assessing associated risks to consumers and to markets for consumer financial products and services.

APPENDIX E

12 U.S. Code § 5564 - LITIGATION AUTHORITY

(a) IN GENERAL

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