UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 15-7522-JFW (RAOx)** Date: February 10, 2023

Title: Consumer Financial Protection Bureau -*v*- CashCall, Inc., et al.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER GRANTING PLAINTIFF'S MOTION TO AMEND FINDINGS, CONCLUSIONS, AND JUDGMENT ON REMAND [filed 9/19/2022; Docket No. 349];**

ORDER DENYING DEFENDANTS' MOTION FOR LEAVE TO FILE A MOTION FOR JUDGMENT ON THE PLEADINGS, TO MODIFY JUDGMENT, AND TO ENJOIN THE CFPB'S PROSECUTION OF THIS ACTION [filed 11/7/2022; Docket No. 363]

On September 19, 2022, Plaintiff Consumer Financial Protection Bureau ("Plaintiff" or the "CFPB") filed a Motion to Amend Findings, Conclusions, and Judgment on Remand ("Motion to Amend"), and Defendants CashCall, Inc., WS Funding, LLC, Delbert Services Corporation, and J. Paul Reddam (collectively, "Defendants" or "CashCall") filed their Opening Brief. On October 3, 2022, the CFPB and Defendants each filed their Responses. On October 17, 2022 and October 21, 2022, the CFPB and Defendants filed their respective Replies.

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

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

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are well-known to the parties and are set forth in detail in the Court's summary judgment order and findings of fact and conclusions of law, and in the Ninth Circuit's opinion. *CFPB v. CashCall*, 35 F.4th 734 (9th Cir. 2022); 2018 WL 485963 (C.D. Cal. Jan. 19, 2018); 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016). In summary, the CashCall defendants made unsecured high interest loans to consumers through a tribal lending program in an effort to avoid state usury and licensing laws. 35 F.4th at 739. This Court granted partial summary judgment in the CFPB's favor, finding that the loans made to borrowers in certain Subject States[1] were void under those states' laws, and that the CashCall defendants had engaged in deceptive acts and practices in violation of the Consumer Financial Protection Act (CFPA). 2016 WL 4820635, *9-10.

The Court conducted a bench trial to determine the appropriate remedies, after which it awarded the CFPB a tier-one civil money penalty of $10,283,886, but denied the CFPB's requests for restitution and injunctive relief. Both parties appealed. The Ninth Circuit affirmed in part and reversed in part, concluding that the Court correctly found liability but erred in determining the penalty and in its denial of restitution. 35 F.4th at 738, 751. With respect to the Court's tier-one penalty award, the Ninth Circuit held that CashCall's conduct was reckless beginning in September 2013, which would require a tier-two penalty award for violations beginning that month. 35 F.4th at 748. With respect to the Court's decision that restitution was not an appropriate remedy, the Ninth Circuit held that the Court erred in considering whether CashCall acted in bad faith, and whether consumers received the benefit of their bargain. 35 F.4th at 751. The Ninth Circuit also held that, in calculating the appropriate amount of restitution, the Court failed to properly consider the principles set forth in *CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016) and related cases.

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

II. DEFENDANTS' MOTION FOR LEAVE

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

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

Defendants raised this argument for the first time in the Ninth Circuit in a post-oral-argument letter dated May 11, 2022. Ninth Circuit Case No. 18-55407, Docket No. 101. In that letter, Defendants cited, as they do here, *Freytag v. Commissioner*, 501 U.S. 868, 878-79 (1991) for the proposition that their argument falls within the "category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." In addressing Defendants' argument, the Ninth Circuit concluded as follows:

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

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

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

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

> Generally, we do not consider an issue not passed upon below. This general rule has exceptions, but invocation of those exceptions is discretionary.
>
> We decline to exercise our discretion here. The preemption issue was not fully briefed on appeal by either party . . . .
>
> Thus, we leave it to the district court on remand to decide in the first instance to what

Initials of Deputy Clerk sr

extent, if at all, the state law use claims are federally preempted.

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

In any event, even if the law of the case doctrine (or rule of mandate) did not foreclose the Court's review of this issue, this Court, like the Ninth Circuit, declines to exercise its discretion to consider this issue. Defendants first raised this issue more than eight years after this litigation commenced. Although the Fifth Circuit only recently issued its opinion in *Community Financial Services Association of America v. CFPB*, 51 F.4th 616 (5th Cir. 2022), the argument regarding the CFPB's funding structure is not novel and has long been available to Defendants. *See, e.g., CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014) (rejecting argument that "the structure of the CFPB … violate[s] the Appropriations Clause"). Moreover, as recognized by the Fifth Circuit itself, the Fifth Circuit decision runs counter to the view of "every [other] court to consider" the validity of the CFPB's statutory funding provisions. *See Community Financial Services Association of America v. CFPB*, 51 F.4th 616, 641 (5th Cir. 2022).

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

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

III. CIVIL PENALTIES

The Ninth Circuit instructed this Court to reassess the civil penalties the Court imposed on

---

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

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

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

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

In imposing the maximum tier-two penalty, the Court has considered the Ninth Circuit's determination that "the danger that CashCall's conduct violated the statute was so obvious that CashCall must have been aware of it." *CashCall*, 35 F.4th at 749. In reaching this determination, the Ninth Circuit stated:

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

> even after this litigation began, CashCall continued collecting fees and interest until it lost at summary judgment in August 2016.

Id.

With respect to mitigating factors, CashCall has never claimed that it would be unable to pay any penalty. Trial Tr. vol. 3, 367:4-5, Oct. 18, 2017. Moreover, although this action may be Defendants' first violation of the CFPA, CashCall previously engaged in a similar rent-a-bank scheme that it was forced to terminate due to enforcement actions by two states and regulatory pressure from the FDIC. *See CFPB v. CashCall, Inc.*, 35 F.4th at 739. And, with the benefit of the Ninth Circuit's decision, the Court now concludes that CashCall's violations were serious and imposed substantial risks to consumers. As the Ninth Circuit concluded, the nature of the CashCall's deceptive practice was not that "the consumers were denied the loan proceeds or that they entered into the loan agreements against their will. Rather, ... CashCall harmed consumers by deceiving them about a major premise underlying their bargain: that the loan agreements were legally enforceable." *Id.* at 751. When properly framed in this manner, CashCall's conduct harmed tens of thousands of consumers.

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

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

IV. RESTITUTION

The Ninth Circuit also instructed this Court to determine if an award of restitution was appropriate, and if so, the amount of that restitution.

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

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

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

restitution is appropriate and consistent with the objectives of the CFPA.

As noted by the Ninth Circuit, one of the statute's express objectives is to ensure that "consumers are protected from unfair, deceptive, or abusive acts and practices." 12 U.S.C. § 5511(b)(2). An additional objective is "to promote transparency in the markets for consumer financial products and services." *CashCall*, 35 F.4th at 750; 12 U.S.C. § 5511(b)(5). In particular, restitution, "serves to ensure that consumers are made whole when they have suffered a violation of the statute." *CashCall*, 35 F.4th at 750. And, as held by the Ninth Circuit, scienter is not required for an award of restitution, and whether consumers received the benefit of their bargain is irrelevant. *CashCall*, 35 F.4th at 750-51.

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

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

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

In *Liu*, the Supreme Court limited the scope of equitable remedies, whether labeled as disgorgement, restitution, or otherwise, to a wrongdoer's net profits. 140 S. Ct. at 1943 ("Decisions from this Court confirm that a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts."); *CFPB v. Consumer First Legal Grp., LLC*, 6 F.4th 694, 710 (7th Cir. 2021) (*"Liu*'s reasoning is not limited to disgorgement; instead, the opinion purports to set forth a rule applicable to all categories of equitable relief, including restitution.").

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

F.3d 1234, 1237-38 (9th Cir. 2003).

In this case, the CFPB has continuously sought, what by its nature is, legal restitution. Specifically, the CFPB has always sought restitution of the interest and fees that consumers paid CashCall on Western Sky loans. In essence, the CFPB seeks to "impose general personal liability on a defendant for money allegedly owed to the plaintiff" rather than "to restore to the plaintiff particular funds in the defendant's possession." *Bayer v. Neiman Marcus Group, Inc.*, 861 F.3d 853, 866 (9th Cir. 2017).

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

Notably, even the Supreme Court has acknowledged that its earlier precedent had failed to appropriately distinguish between restitution at law and restitution in equity. *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 214-15. And, under the circumstances of this case, before the Supreme Court's decision in *Liu*, there was little or no reason to differentiate between the two forms of restitution. *See CFPB v. Mortg. Law Group, LLP*, 2022 WL 3027031, at *3 (W.D. Wis. Aug. 1, 2022) ("[D]uring the earlier stages of this lawsuit through entry of final judgement in 2019, the question of whether the restitution award should be characterized as equitable or legal was not even before this court, largely because the distinction did not make a difference until the Supreme Court's *Liu* decision changed the law in 2020, at least with respect to how equitable restitution should be calculated."). Accordingly, it is understandable that the CFPB referred to the restitution it sought as equitable.

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

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

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

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

> Applying that framework, we have held that restitution may be measured by the full amount lost by consumers rather than limiting damages to a defendant's profits. In other words, a district court may use a defendant's net revenues as a basis for measuring unjust gains. Net revenues are typically the amount consumers paid for the product or service minus refunds and chargebacks. An award of net revenues differs from an award of net profits, which allows a defendant to deduct legitimate expenses. We have held that there are instances in which a defendant does not ultimately reap any profits from his wrongful conduct, and others where even though the defendant obtained some profit, the loss suffered by the victim is greater than the unjust benefit received by the defendant.

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

Applying these principles and based on the evidence presented at trial, the Court concludes that CFPB has met its initial burden at the first step of the framework and has demonstrated a reasonable approximation of Defendants' unjust gains, i.e., net revenues. More specifically, the evidence at trial demonstrated that consumers paid Cash Call $218,394,771.89 in interest, $3,722,561.74 in fees, and $8,840,800.26 in origination fees[3] on subject loans made on or after July 21, 2011 in 13 Subject States. *See* Trial Exhibits 219 and 219a. The CFPB also presented evidence of Defendants' "refunds," in the form of restitution payments already made to consumers

[3]Although the CFPB originally sought restitution of $24,407,325.00 in origination fees on subject loans, it has since revised that amount to $8,840,800.26. At trial and on appeal, Defendants disputed that all origination fees should be included in an award of restitution. Because Defendants did not account for the origination fee on a particular loan as paid until all principal on that loan had been repaid, Defendants argued that some borrowers never actually paid the origination fee. *See, e.g.*, Meeks Decl. (Docket No. 271) ¶ 20 ("The origination fee was not paid until the borrower paid more than what was disbursed to him or her."). The CFPB now agrees with Defendants that only paid origination fees should be included in restitution, and has revised the amount of restitution it seeks for origination fees to $8,840,800.26. To calculate the paid origination fees, the CFPB compared the principal paid, the loan amount, and the origination fee in Trial Ex. 219. For consumers who paid more in principal than their loan amount less the origination fee, the CFPB calculated that the consumer had paid part or all of the origination fee. In addition, for 182 Subject Loans, CashCall's data indicates that consumers paid more in principal than the total loan amount, which accounts for a total overpayment of $26,385. The CFPB did not include those excess principal amounts in its revised restitution calculation.

in Subject States to settle state-level proceedings. Joint Pre-Trial Order (Docket No. 280-1) at 2. Defendants stipulated to these amounts, which totaled $33,609,444.13 for six states. *Id.* As a result, the CFPB currently requests that the Court award restitution in the amount of $197,357,689.89.

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

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

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

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

V. CONCLUSION

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

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

IT IS SO ORDERED.