Appeal No. 21-9521

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

INTEGRITY ADVANCE, LLC AND JAMES R. CARNES

Petitioners,

v.

THE CONSUMER FINANCIAL PROTECTION BUREAU

Respondent.

On Appeal From The Consumer Financial Protection Bureau
(File No. 2015-CFPB-0029)

PETITIONERS' OPENING BRIEF

Respectfully submitted,

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Dated: June 2, 2021

Oral Argument is requested.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners provide the following corporate disclosure statement:

Integrity Advance, LLC was a wholly-owned subsidiary of Hayfield Investment Partners, LLC, but has since dissolved. There is no publicly-owned corporation that owns 10% or more of Integrity Advance's stock.

Respectfully submitted,

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Dated: June 2, 2021

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STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to 10th Cir. R. 28.2(C)(3), there are no prior or related appeals.

ADMINISTRATIVE PROCEEDINGS DOCKET CITATIONS[1]

Dkt. 1	Notice of Charges (filed Nov. 18, 2015)
Dkt. 127	Stipulated Motion to Withdraw Count IV with Prejudice (filed July 11, 2016)
Dkt. 150	Reporter's Official Transcript of Proceedings Hearings Volume I (under seal) (filed July 29, 2016)
Dkt. 151	Reporter's Official Transcript of Proceedings Hearings Volume II (under seal) (filed July 29, 2016)
Dkt. 152	Reporter's Official Transcript of Proceedings Hearings Volume III (under seal) (filed July 29, 2016)
Dkt. 172	Reporter's Official Transcript of Proceedings Hearings Volume I (public) (filed Sept. 26, 2016)
Dkt. 173	Reporter's Official Transcript of Proceedings Hearings Volume II (public) (filed Sept. 26, 2016)

[1] Pursuant to 10th Cir. R. 17.2, no separate appendix has been filed. *See* 10th Cir. R. 17.2 ("Because the appendix requirement of Rule 30.1 applies only to appeals from district courts, it does not apply to cases under this Rule."). However, all administrative proceeding docket citations are included in Section I ("Docket") of the CFPB's Certified List of the Contents of the Administrative Record. The docket is also publicly available at: https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/integrity-advance/. Furthermore, pursuant to Local Rule 28.2(A)(1), Petitioners have attached copies of the following docket entries as exhibits to this brief: Exhibit 1 – Dkt. 308; Exhibit 2 – Dkt. 309; Exhibit 3 – Dkt. 238; Exhibit 4 – Dkt. 267; Exhibit 5 – Dkt. 269; Exhibit 6 – Dkt. 293.

Dkt. 176	Recommended Decision (filed Sept. 27, 2016)
Dkt. 189A	Frachette Declaration, Exhibit A (filed Dec. 5, 2016)
Dkt. 200	Joint June 2, 2014 Tolling Agreement (filed Feb. 8, 2017)
Dkt. 201	Joint March 16, 2015 Tolling Agreement (filed Feb. 8, 2017)
Dkt. 212	Joint Statement of the Parties (filed Aug. 14, 2018)
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Dkt. 232	Request for Issuance of Subpoena to CFPB (filed Aug. 23, 2019)
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Dkt. 238	Order Denying Further Discovery on Statute of Limitations Issue (filed Oct. 28, 2019), attached as **Exhibit 3**
Dkt. 240	Respondents' Statement of Undisputed Facts ISO Their Motion to Dismiss and/or For Summary Disposition on Grounds Limited to October 28, 2019 Order (filed Nov. 15, 2019)
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Dkt. 309	Final Order (filed Jan. 11, 2021), attached as **Exhibit 2**

INTRODUCTION

This administrative action against Petitioners Integrity Advance, LLC and James R. Carnes ("Petitioners") has been plagued by constitutional errors from the outset, which can only be remedied by this Court dismissing this action or, at the very least, remanding the action for a fair and appropriate rehearing. The Consumer Financial Protection Bureau ("CFPB") itself was unconstitutionally structured in violation of separation of powers until the Supreme Court rectified the error in June 2020 in *CFPB v. Seila Law*. Additionally, an Administrative Law Judge ("ALJ"), who was unconstitutionally appointed in violation of the Appointments Clause, initially heard this case. The CFPB has recognized these constitutional violations but its attempts to remedy them have been inadequate. As a result, the constitutional harms have not been cured

For example, after appointing a new ALJ, Petitioners were denied due process because the new ALJ improperly denied them the opportunity to obtain discovery and present evidence on statute of limitations, individual liability, and restitution and disgorgement issues all of which the ALJ ultimately decided against them. At the conclusion of the flawed proceedings, CFPB Director Kathleen Kraninger ("the Director") improperly ordered Petitioners to pay over **$50 million** in restitution, disgorgement, and civil penalties. This Court should now vacate the Decision and Order of the Director.

I. JURISDICTIONAL STATEMENT

The CFPB action on review, *In the Matter of Integrity Advance and James Carnes,* Decision of the Director, Docket No. 308, and Final Order, Docket No. 309, was issued on January 11, 2021 ("Decision and Order"). Petitioners timely filed a petition for review on February 10, 2021. Integrity Advance LLC had its principal office in Kansas. This Court has jurisdiction pursuant to 12 U.S.C. § 5563(b)(4).

II. ISSUES PRESENTED FOR REVIEW

1. Whether the Decision failed to remedy the constitutional harm of the CFPB's unconstitutional structure in violation of separation of powers because the Director attempted to ratify the action after the statute of limitations had lapsed.

2. Whether the Decision denied Petitioners a "new hearing" in violation of the Supreme Court's directive in *Lucia v. SEC*, thereby failing to remedy the constitutional Appointments Clause violation caused by the improperly appointed Administrative Law Judge.

3. Whether the Decision violated due process by finding the charges were timely filed, while at the same time denying Petitioners discovery relevant to the statute of limitations, and whether the finding of timeliness was unsupported by substantial evidence.

4. Whether the Decision erred by finding Petitioner Carnes personally liable at the summary disposition phase where there were significant factual disputes.

5. Whether the Decision and Order erred by ordering restitution without consideration of Petitioners' good faith, and ordering civil money penalties, after denying Petitioners request to present evidence of good faith reliance on advice of counsel.

6. Whether the Order erred by ordering disgorgement, without support in the Decision and without consideration of net profits or Petitioners' unjust enrichment.

III. STATEMENT OF THE CASE

Integrity Advance, LLC was a nonbank lender that offered short-term, small-dollar loans to consumers between May 2008 and December 2012. Dkt. 240 ¶¶ 1-3.[2] Integrity Advance stopped offering loans to consumers almost nine years ago, in December 2012. *Id.* ¶ 3. James R. Carnes was the CEO of Integrity Advance's parent company and the de facto CEO of Integrity Advance. Dkt. 293 at 5 ¶¶ 7-8; *id.* at 12 ¶ 88.

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[2] Documents identified in Section I ("Docket") of the CFPB's Certified List of the Contents of the Administrative Record" are referred to by the docket number of the underlying administrative proceeding as "Dkt. __." The full title of the document is contained in the Docket Citation glossary at pages vii – ix.

Throughout its active operations, the Delaware State Bank Commissioner issued and renewed a license allowing Integrity Advance to operate as a nonbank lender. Dkt. 273 ¶ 1. Under Delaware law, Integrity Advance could only obtain and maintain a Delaware lending license once the State Bank Commissioner determined "that the financial responsibility, experience, character and general fitness of the applicant. . . and of the officers and directors thereof are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently." *Id.* ¶ 28 (citing Del. Code Ann. tit. 5 § 2204). Consistent with the requirements of Delaware law, Integrity Advance had to renew its license regularly. *Id.* ¶ 29 (citing Del. Code Ann. tit. 5 § 2207). Integrity Advance used a Loan Agreement that was drafted by experienced outside legal counsel who were retained to create the loan document and ensure it was legally compliant. *Id.* ¶¶ 40-41. As Mr. Carnes testified, he did not draft, revise, or substantively review or approve the Loan Agreement, but instead relied on this legal counsel. *Id.* ¶¶ 98-101.

A. Investigation by the CFPB.

On January 19, 2012, the CFPB, through its then Director Cordray, publicly announced that the CFPB intended to focus on the payday lending industry. Dkt. 240 ¶¶ 4-5 (citing Remarks by Richard Cordray at the Payday Loan Field

Hearing in Birmingham, AL (Jan. 19, 2012)).[3] The next day, on January 20, 2012, the CFPB entered into a Memorandum of Understanding with the Federal Trade Commission ("FTC") requiring the agencies to cooperate and share information, including regarding consumer complaints and enforcement activity. *Id.* ¶¶ 6-7; Dkt 189A (Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission (Jan. 20, 2012), at 3, 10). Approximately two months later, on March 29, 2012, CFPB senior enforcement attorney Kara Miller ran a search in the FTC consumer complaint database for "Integrity Advance," which returned complaints. Dkt. 240 ¶¶ 14-15; Dkt. 241A. A similar search was conducted on August 14, 2012, resulting in additional complaints. Dkt. 241B. Some of these consumer complaints describe exactly the type of conduct alleged more than three years later in the Notice of Charges.

The CFPB's policies and procedures reflect that, before a formal "investigation" is launched, employees must conduct a "research matter" that typically lasts two months. Dkt. 240 ¶ 12 (citing Office of Enforcement Policies and

[3] Available at https://www.consumerfinance.gov/about-us/newsroom/remarks-by-richard-cordray-at-the-payday-loan-field-hearing-in-birmingham-al/

Procedures Manual (May 5, 2017)) ("Enforcement Manual").[4] During the research phase, the CFPB employee is to "collect and analyze easily obtainable information in order to . . . [d]etermine whether the relevant conduct likely violates federal consumer financial law and the Bureau likely has jurisdiction." *Id.* ¶ 10. Among other things, employees must gather evidence through "non-identifiable internet searching, review of consumer complaints, media sources, legal research, and contact with other law enforcement agencies and consumers." *Id.* ¶ 11. Only after the CFPB employee's "initial research" reveals, among other things, "a plausible set of facts that, if proven, would amount to a violation of one or more federal consumer financial laws" does the matter proceed to the "investigation" phase. *Id.* ¶ 13. Based on the above, the CFPB would have or should have discovered the alleged violations well before November 2012. However, CFPB did not file the Notice of Charges until November 18, 2015. Dkt. 1.

B. CFPB's Notice of Charges.

The Notice of Charges alleged that Integrity Advance violated the Truth in Lending Act ("TILA") (Count I), the Electronic Funds Transfer Act ("EFTA") (Count V), and the Consumer Financial Protection Act ("CFPA") (Counts II, III, IV,

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[4] Available at https://files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf.

VI, and VII). The CFPB also alleged that Mr. Carnes violated the CFPA (Counts III, IV, and VII). The CFPB based the Notice of Charges, essentially in its entirety, on the terms of the Integrity Advance Loan Agreement document itself and the fact that Mr. Carnes was the company's CEO.

At the time the Notice of Charges was issued, the CFPB did not have its own ALJ. Dkt. 216 at 1. Ultimately, through an inter-agency agreement ALJ Parlen L. McKenna was appointed to the case.

C. The Underlying Proceedings.

1. Initial hearing with ALJ whose appointment violated the Appointments Clause.

In July 2016, Judge McKenna held a three-day evidentiary hearing. Dkt. 150-152. Thereafter, ALJ McKenna issued his Recommended Decision on September 27, 2016. Dkt. 176. In his Conclusions of Law, the ALJ held that the CFPB had established violations in six of the counts of the Notice of Charges. Dkt. 216 at 3. Earlier in the proceedings, the CFPB withdrew Count IV with prejudice. Dkt. 127. The ALJ recommended an award of restitution of $38 million and civil money penalties of $8.1 million against Integrity Advance and $5.4 million against Mr. Carnes. Dkt. 176 at 74.

On June 21, 2018, the United States Supreme Court held that the Securities and Exchange Commission's ("SEC") ALJ had not been appointed in a manner consistent with the Constitution's Appointments Clause. *See Lucia v. SEC,* 138 S. Ct. 2044 (2018). On May 29, 2019, in light of the Supreme Court's ruling in *Lucia,* the CFPB found that ALJ McKenna's appointment was inconsistent with the Appointments Clause and entered an "Order Directing a Remand to Bureau's Administrative Law Judge" for a new hearing. Dkt. 216.

2. ALJ's Decision after Remand.

After the remand, the CFPB appointed Christine L. Kirby as the new ALJ. ALJ Kirby denied Petitioners' request for a new hearing instead opting to "conduct a *de novo review of the record* – to the extent possible" and requiring argument if the parties sought to augment or strike portions of the record. Dkt. 269 at 5. The ALJ then denied multiple requests by Petitioners to present evidence or legal argument where they were not part of the existing record from the first proceeding, including on issues relating to statute of limitations, individual liability, and restitution and disgorgement. Dkts. 238, 267, 269. The parties filed cross motions for summary disposition on May 15, 2020. Dkts. 272-274; 275-277.

On June 29, 2020, the U.S. Supreme Court found that the CFPB was unconstitutionally structured in violation of separation of powers. *CFPB v. Seila Law*, 140 S. Ct. 2183 (2020). On August 4, 2020, the ALJ filed her Recommended Decision. Dkt. 293. In her decision, the ALJ recommended summary disposition on both liability and remedies in favor of the CFPB. *Id.* Notably, the recommendation failed to consider certain evidence in the light most favorable to

Petitioners, the non-moving party, disregarded certain factual disputes, and relied on incorrect legal standards. Petitioners timely appealed the Recommended Decision and the ALJ's other faulty rulings to the CFPB Director. Dkts. 294, 295. Petitioners took exception to the Recommended Decision in its entirety, including but not limited to, all findings of lability, all relief recommended by the ALJ, and the ALJ's decision to deny Respondents' motion for Summary Disposition. Dkt. 294.

3. The Director's Decision.

The matter reached a final resolution on January 11, 2021, when the Director issued her Decision and Order. Dkts. 308, 309. In the Decision and Order, the Director adopted the ALJ's decision nearly wholesale, found Petitioners liable for violating TILA, the CFPA, and the EFTA and ordered Petitioners to pay more than $50 million in restitution, disgorgement, and civil penalties within 30 days. *Id*. The Director concluded that the proceedings conducted by the ALJ were constitutionally sufficient. *Id.* The Director further concluded that, although the CFPB was unconstitutionally structured at the time it filed its Notice of Charges, the Director could ratify the Notice of Charges even though the statute of limitations had since run. *Id.* The Director further concluded the action was timely under the applicable statute of limitations, that Petitioners were not denied due process, and that restitution, civil money penalties, and disgorgement were appropriate. *Id.* The Director denied Petitioners' Motion to Stay, and Petitioners timely filed this appeal.

IV. SUMMARY OF THE ARGUMENT

First, the Director failed to remedy the constitutional separation of powers violation recognized by the Supreme Court in *CFPB v. Seila Law*, 140 S. Ct. 2183 (2020). The Director attempted to remedy the harm by ratifying the filing and prosecution of this action in her January 11, 2021 Decision. However, the Director could not cure the harm through ratification because the applicable statute of limitations expired *before* the purported ratification. For ratification to be effective, the ratifier must have authority to take the underlying action "at the time the ratification was made." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994).

Second, the Director failed to remedy an Appointments Clause violation as directed by the Supreme Court in *Lucia*, 138 S. Ct. at 2055, by failing to afford Petitioners a new hearing. Although the Director initially ordered that Petitioners be provided a new hearing before a properly appointed ALJ, the ALJ did not conduct a new hearing but instead relied on the existing record and routinely denied Petitioners' requests to present evidence or assert arguments that were not raised in the first proceeding, even where other courts recognized new issues relating to statute of limitations, individual liability, and restitution and disgorgement. The Director improperly upheld the ALJ's manner of conducting the proceedings.

Third, the Director violated Petitioners' right to due process by finding that the charges against Respondent were timely filed, while at the same time denying Petitioners' request for discovery on that very issue. The Director's finding on statute of limitations was not supported by substantial evidence.

Fourth, the Director improperly found Mr. Carnes personally liable for CFPA violations by way of summary disposition despite significant factual disputes, particularly as to whether Mr. Carnes had the requisite level of knowledge for individual liability.

Finally, the Director erred in awarding remedies. The Director denied Petitioners due process where she awarded restitution and civil money penalties, but upheld the denial of Petitioners' request to present evidence of good faith reliance on advice of counsel, which is relevant to the award of both restitution and civil money penalties in CFPB enforcement actions. *See CFPB v. CashCall, Inc.,* No. 15-07522, 2018 U.S. Dist. LEXIS 9057, at *40 (C.D. Cal. Jan. 19, 2018) (finding "advice of counsel . . . is relevant to the determination of whether restitution is an appropriate remedy."), *appeal filed, CashCall, Inc., et al.*, No. 18-55407 (9th Cir.); 12 U.S.C. § 5565(c)(3)(A) (good faith is a mitigating factor for civil money penalties). Finally, the Director erred by ordering disgorgement, without support in her Decision and without consideration of "net profits."

V. STANDARD OF REVIEW

Constitutional challenges to agency actions are reviewed de novo. *See People for the Ethical Treatment of Prop. Owners v. United States Fish & Wildlife*

Serv., 852 F.3d 990, 999-1000 (10th Cir. 2017) ("Although we generally grant considerable deference to agency action, '[w]e review de novo claims alleging constitutional abuse by an agency.'") (internal citation omitted). Further, "deference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999).

Courts otherwise give deference to agency interpretations of the agency's own enacting statute and regulations. *See Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.,* 467 U.S. 837 (1984). Courts set aside agency factual findings where they are "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E); *see also Keenan, Hopkins, Suder, & Stowell Contrs. Inc. v. Dep't of Labor*, No. 20-9537, 2021 U.S. App. LEXIS 10787, at *16 (10th Cir. Apr. 15, 2021) ("We will uphold an ALJ's factual finding if it is supported by substantial evidence.")

VI. ARGUMENT

A. The Director's purported ratification of this action did not remedy the separation of powers violation because it was untimely under the applicable statutes of limitations.

This action was brought against Petitioners by an unconstitutionally-structured CFPB that violated separation of powers. *See Seila Law*, 140 S. Ct. at 2197 (holding that the structure of the CFPB was unconstitutional based on its "leadership by a single individual removable only for inefficiency, neglect, or malfeasance.") The Director held that this constitutional violation was remedied because she ratified the decision to bring the Notice of Charges in her January 11, 2021 Decision. Dkt. 308 at 19 ("This provides [Petitioners] with an appropriate remedy for the CFPA's unconstitutional removal restriction.") However, for a ratification to be effective, "it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (holding that ratification was ineffective when it came after the statutory time period for filing had already passed) (emphasis in original).

Here, the Director's January 11, 2021 purported ratification, "came too late in the day to be effective" because the applicable statutes of limitations already had lapsed.[5] *Id.*; *see also* Restatement (Second) of Agency §90, cmt. a ("The bringing of an action, or of an appeal, by a purported agent can not be ratified after the cause of action or right to appeal has been terminated by lapse of time."); *Benjamin v. V.I. Port Auth.*, 684 F. App'x 207, 212 (3d Cir. 2017) (concluding that

[5] The statute of limitations in the Consumer Financial Protection Act ("CFPA") provides that "no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g). It is clear that the CFPB "discovered" the alleged violations more than three years before the date of ratification, as these proceedings have been ongoing for six years.

"any attempts at ratification were either untimely or improper" because the attempted ratification occurred after the statute of limitations had expired). This principle has been applied in two recent district court decisions finding that, absent the extraordinary remedy of equitable tolling, the Director cannot ratify agency actions taken when the CFPB was unconstitutionally-structured after the applicable statutes of limitations has run. *See CFPB v. Nat'l Collegiate Master Student Loan Trust*, No. 17-1323, 2021 U.S. Dist. LEXIS 58013, at *12-13 (D. De. Mar. 26, 2021) (holding that "ratification is, in general, not effective when it takes place after the statute of limitations has expired"); *CFPB v. Navient Corp.,* No. 3:17-cv-101, 2021 U.S. Dist. LEXIS 6640, at *30 (M.D. Pa. Jan. 13, 2021) (finding that "assuming that the CFPB discovered the violations more than three years prior to the July, 2020, ratification, Director Kraninger would not now have the 'power' to reconsider the prior decision to bring suit, as the statute of limitations has expired.")

The Director attempted to justify her ratification after the statute of limitations had lapsed by stating that the statute of limitations had been "equitably tolled." Dkt. 308 at 19-20. However, the extraordinary remedy of equitable tolling should not be applied here for multiple reasons. "[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe* *of Wis. v. United States,* 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida,* 560 U.S. 631, 649 (2010)). Neither of these situations apply.

First, the CFPB cannot establish that it has pursued its rights diligently. Importantly, despite knowing that its constitutionality was in question and actually *agreeing* that the agency was unconstitutional as of fall 2019, *see* Dkt. 254A, the CFPB took no steps in this matter to attempt to preserve its ability to timely ratify. *See Nat'l Collegiate Master Student Loan Trust*, 2021 U.S. Dist. LEXIS 58013, at *17 ("[I]t is difficult to interpret the Bureau's passivity in the face of the inevitable constitutional challenge as diligence."). Additionally, the CFPB was dilatory in filing the initial Notice of Charges and used an unconstitutionally appointed ALJ to conduct the first stage of the proceedings as described in Sections B and C below. Further, although the Supreme Court's decision in *Seila Law* occurred in June 2020, the Director did not ratify this action until January 2021. *See* Dkt. 308 at 19 ("I ratify the Bureau's decision to file the Notice of Charges and prosecute this action.") The Director provided no justification for this seven-month delay, during which she ratified other pending CFPB actions. *See, e.g.*, *CFPB v. CashCall, Inc.*, Nos. 18-55407, 18-55479 (Dkt. 61) (9th Cir. July 10, 2020); *CFPB v. RD Legal Funding, LLC*, No. 18-2743 (Dkt. 237) (2d Cir. July 10, 2020); *CFPB v. Navient Corp. et al.*, No. 3:17-cv-00101-RDM (Dkt. 506) (M.D. Pa. July 14, 2020). These factors are similar to those analyzed in *Nat'l Collegiate Master Student Loan Trust*, in which the district court declined to equitably toll the statute of limitations and dismissed the complaint for lack of enforcement authority because the CFPB was not diligent and held "the complaint, initially filed by a Director unconstitutionally insulated from removal, cannot still be enforced." 2021 U.S. Dist. LEXIS 58013, at *15-18.[6]

Second, the Director reasoned that equitable tolling was appropriate here because of the extraordinary circumstance presented by the unconstitutionality of the for-cause removal provision, "a circumstance over which the Bureau had no control." Dkt. 308 at 19. However, this circumstance alone is arguably not "extraordinary." *See Navient,* 2021 U.S. Dist. LEXIS 6640, at *38 ("Although this, without more, arguably may not constitute the basis for a finding of an 'extraordinary circumstance' . . . ."). Further, the CFPB *did* have control over this circumstance because the agency defended its structure as constitutional in multiple litigations for years until approximately fall of 2019 when it changed its position and conceded its own unconstitutionality. *See* Dkt. 254A; *see also Nat'l Collegiate Master Student*

[6] Another district court applied equitable tolling, though the instant circumstances are distinguishable from that case and are instead aligned with the analysis of the United States District Court for the District of Delaware in *Nat'l Collegiate Master Student Loan Trust*. *See Navient Corp.,* 2021 U.S. Dist. LEXIS 6640, at *32 (finding the statute of limitations tolled where the CFPB diligently pursued its rights, the action was promptly ratified after the *Seila Law* decision, and the circumstances were out of the CFPB's control). The *Navient* decision was certified for an interlocutory appeal to the Court of Appeals for the Third Circuit at U.S. Dist. LEXIS 36142 (M.D. Pa. Feb. 26, 2021) on the equitable tolling issue and is pending.

Loan Trust, 2021 U.S. Dist. LEXIS 58013, at *15-16 (listing cases in which the CFPB's constitutionality was challenged). The extraordinary remedy of equitable tolling in the CFPB's favor is not warranted.

The Director further reasoned that her ratification was effective because the CFPA's statute of limitations did not expressly include a provision that the CFPB must be a constitutionally-structured agency when the action is brought. Dkt. 308 at 19 ("Nothing in the CFPA's statute of limitation suggests that it can be satisfied only if the action is brought at a time when the Bureau is headed by a Director who can be removed by the President at will."). But there is no reason why Congress would include such language in a statute of limitations; the Director's attempted ratification is an improper attempt to sidestep the express holding of *NRA Political Victory Fund,* which requires that the ratifier be able to take the underlying action (in this case, filing a Notice of Charges) at the time of the ratification. The Director could not do so because it would be time-barred. *See Nat'l Collegiate Master Student Loan Trust*, 2021 U.S. Dist. LEXIS 58013, at *14 ("The problem with this argument, however, is that it confuses the timeliness requirements for filing the original complaint with the timeliness requirements for ratification.")

The Director further asserted that the statute of limitations had not lapsed because the CFPB could not have discovered the violation while the agency was unconstitutionally structured. Dkt. 308 at 19 ("Respondents essentially contend that the Bureau was constitutional enough to discover their violations . . . but not constitutional enough to issue a Notice of Charges"). This again runs counter to the express holding of *NRA Political Victory Fund*, as recently explained by a district court:

> In light of the clear language in *NRA Political Victory Fund* and the Restatement (Second) of Agency (as well as the Restatement (Third) of Agency), this Court must reject the CFPB's argument that the statute of limitations could not have run until the CFPB was made aware of its unconstitutional structure following *Seila*.

Navient Corp., 2021 U.S. Dist. LEXIS 6640, at *27-28.

Finally, there is significant doubt that ratification can be an effective remedy, regardless of the passing of the statute of limitations, because the structure of the entire agency was unconstitutional at the time the charges were filed. *See Seila Law*, 2020 U.S. App. LEXIS 42243, at *15 (9th Cir. May 14, 2021) (J. Bumatay, joined by J. Callahan, J. Ikuta, J. Vandyke, dissenting) ("With no agency empowered to enforce the laws at the time of the CPFB's prior actions, no ratification is permissible."); *mot. to stay pending pet. for writ of cert,* No. 17-56324, Dkt. 86 (9th Cir. June 1, 2021); *see also NRA Political Victory Fund*, 513 U.S. at 98 (holding that the ratifying party must have authority to act "at the time the act was done" in addition to the time of ratification). The CFPB as an agency was untethered from the control of the Executive in violation of separation of powers and, therefore, lacked authority to act. *Seila Law*, 2020 U.S. App. LEXIS 42243, at *26 (J.

Bumatay, joined by J. Callahan, J. Ikuta, J. Vandyke, dissenting) ("[S]o long as the CFPB was not accountable to the President and, through him, to the people, the agency did not 'ha[ve] the authority to bring the action' on behalf of the Executive branch.") (citing *CFPB v. Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016)). That defect cannot be cured by ratification after the fact. *Id.*

Parties who are injured by unconstitutional government actions are "entitled to relief." *Lucia,* 138 S. Ct. at 2055. That relief must be meaningful. *Id.* The constitutional harm identified by the Supreme Court in *Seila Law* has not and cannot be remedied by ratification, where the agency itself was unconstitutional and the statute of limitations has long since passed. The Notice of Charges, therefore, should be dismissed.

B. The Director denied Petitioners a "new hearing" as required by the Supreme Court's holding in *Lucia v. SEC* and failed to remedy the Appointments Clause violation

Even if ratification had been proper, the Director failed to remedy a violation of the Appointments Clause as directed by the Supreme Court in *Lucia*, 138 S. Ct. at 2055 by failing to afford Petitioners a new hearing after the first ALJ was unconstitutionally appointed. Instead, the second ALJ relied on the existing record and denied Petitioners' requests to present evidence or assert arguments that were not raised in the first proceeding.

In *Lucia v. SEC*, the Supreme Court held that SEC ALJs are Officers of the United States who must be appointed in accordance with the Appointments Clause, and that the proper remedy for a proceeding conducted by an unconstitutionally appointed ALJ is a "new hearing before a properly appointed official." 138 S. Ct. at 2055.

Courts have routinely distinguished between a "de novo review" of the existing record and a "new hearing." *See United States v. Raddatz*, 447 U.S. 667, 674 (1980) (noting "the statute calls for a *de novo* determination, not a *de novo* hearing"); *Azis v. United States IRS*, 552 F. App'x. 770, 773 (11th Cir. 2013) ("*De novo* review does not require a new hearing of witness testimony. . ."); *McCloud v. Goodyear Dunlop Tires N. Am., Ltd.*, No. 04-cv-1118, 2011 U.S. Dist. LEXIS 41813, at *7 (C.D. Ill. April 18, 2011) ("A *de novo* review does not require a new hearing . . ."). Accordingly, the SEC's Chief ALJ issued an order assigning new, properly appointed ALJs to preside over new hearings in all pending SEC matters except "where the parties waived their right to a new hearing and requested that the Commission decide their petitions for review on the present record." *In re: Pending Administrative Proceedings*, File Nos. 3-15006, et al., Chief Administrative Law Judge's Order Assigning Proceedings Post *Lucia v. SEC* (Sept. 12, 2018).

At the time of the Supreme Court's ruling in *Lucia*, the instant matter already had proceeded through a hearing before an improperly appointed ALJ. *See* Dkt. 176. The CFPB and Petitioners agreed that the first ALJ had been unconstitutionally appointed and that the holding of *Lucia v. SEC* applied to this proceeding. *See* Dkt. 212 at 1. The Director ordered that Petitioners be granted a "new hearing" before a properly-appointed ALJ "in accordance with the Bureau's Rules of Practice for Adjudication Proceedings." Dkt. 216 at 2, 9; *see also* 12 C.F.R. § 1081 ("the CFPB Rules"). Despite this order, Petitioners were not in fact afforded a new hearing. Instead, the new ALJ held that "it is my intent to conduct a de novo review of the record - to the extent possible" and required that Petitioners make argument for portions of the record to be augmented or struck. *See* Dkt. 269 at 5. The Director improperly upheld the manner in which the ALJ conducted the proceedings. Dkt. 308 at 23-24.[7]

In accordance with her stated intent to rely on the existing record, the ALJ repeatedly denied Petitioners' requests to present evidence and assert defenses where they were not part of the record from the first hearing.[8] For example, the ALJ

[7] Petitioners appealed the ALJ's conduct of the case to the CFPB Director, including the ALJ's failure to allow Petitioners to present evidence or legal arguments not raised in the first proceeding. Dkt. 295 at 12-14; Dkt. 297 at 8-10. The Director upheld the proceedings, primarily on the grounds that the ALJ granted summary disposition so a live hearing was not required. Dkt. 308 at 23-24. However, the Director's ruling did not address the heart of Petitioners' appeal on this issue.

[8] At the same time, the ALJ permitted the CFPB to revive Count IV, despite the fact that the CFPB stipulated to its withdrawal with prejudice during the first proceeding. Dkt. 249 at 9-11; Dkt. 127.

denied Petitioners' request to introduce evidence of good faith reliance on counsel for purposes of determining the appropriateness of restitution because it was not in the existing record, even though the law on the issue had developed since the first proceeding. Dkt. 269 at 8-10; *see CashCall, Inc.,* 2018 U.S. Dist. LEXIS 9057, at *40 (finding "advice of counsel . . . is relevant to the determination of whether restitution is an appropriate remedy."); *see also CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-02106, 2017 U.S. Dist. LEXIS 145923 (N.D. Cal. Sept. 8, 2017) (finding that the CFPB had not met its burden to show restitution was an appropriate remedy). The ALJ similarly denied Petitioners' request to introduce evidence of expenses for purposes of calculating restitution. Dkt. 269 at 10-11. The ALJ further denied Petitioners' requests to amend their answer for good faith reliance on advice of counsel and the defense that the UDAAP claims are unconstitutionally vague. Dkt 267 at 2-4. Finally, contrary to established law, the ALJ ruled that she did not need to conduct a live hearing because a factfinder's observation of witness demeanor is not a "reliable" way to judge credibility, stating "I do not plan to consider [demeanor] to determine credibility in this matter." Dkt. 269 at 6; *contrast Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.").

The proceedings were conducted in violation of the Supreme Court's directive in *Lucia* and therefore failed to remedy the Appointments Clause violation. Even if this action is not dismissed, at the very least, Petitioners should be afforded a new hearing.

C. The ALJ denied Petitioners due process by finding that the CFPB timely filed the Notice of Charges while denying Petitioners discovery related to when the CFPB knew or should have known of the alleged violations.

1. The Director's finding that the statute of limitations had not run is unsupported by substantial evidence.

The Director erred in finding that the CFPA claims at Counts III, IV and VII were timely filed as to Petitioner Carnes.[9] The CFPA's statute of limitations provides that "no action may be brought under this title more than 3 years after the ***date of discovery*** of the violation to which an action relates." 12 U.S.C. § 5564(g) (emphasis added). The CFPA's statute of limitations applies to enforcement actions brought by the CFPB in the administrative setting. *See PHH Corp. v. CFPB*, 839 F.3d 1, 52 (D.C. Cir. 2016), *reinstated on statute of limitation grounds and reversed on other grounds by en banc panel*, 881 F.3d 75 (D.C. Cir. 2018)) (holding that the

[9] The CFPB entered into tolling agreements with Petitioner Integrity Advance on June 2014 and March 2015, so the CFPA statute of limitations did not run before the filing of the Notice of Charges as to Integrity Advance. The CFPB sought no such tolling agreement from Mr. Carnes. *See* Dkt. 200 and 201 (Tolling Agreements).

statutes of limitations of the "various federal consumer protection laws it is charged with enforcing" apply to CFPB administrative proceedings).

In the context of statutes of limitations, the term "discovery" is a "term of art" that generally means the date on which the plaintiff "first knows *or with due diligence should know* facts that will form the basis for an action" and "has long been understood to include discoveries a reasonably diligent plaintiff would make." *Merck & Co. v. Reynolds*, 559 U.S. 633, 644-647 (2010) (citation and internal quotation marks omitted) (emphasis in original). At least three courts have applied this general rule to CFPB enforcement actions. *See Nationwide Biweekly Admin., Inc.*, 2017 U.S. Dist. LEXIS 145923, at *27 ("[T]he statute did not begin to run until CFPB 'thereafter discover[ed] or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation."); *see also CFPB v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 U.S. Dist. LEXIS 177756, at *58 (S.D.N.Y. Dec. 2, 2016) ("The date of discovery is the date when the plaintiff 'obtains actual knowledge of the facts giving rise to the action or notice of the facts, which in the exercise of reasonable diligence, would have led to actual knowledge.'"); *CFPB v. Ocwen Fin. Corp.*, No. 17cv--80495, 2019 U.S. Dist. LEXIS 152336, at *65 (S.D. Fla. Sept. 5, 2019) (citing the standard in *NDG Fin. Corp.*, 2016 U.S. Dist. LEXIS 177756).

For CFPA actions, personal liability cannot be imposed unless (among other elements), the individual "had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation[s], or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Gordon*, 819 F.3d at 1193. In her Decision, the Director found that the CFPB did not discover the facts "proving" Mr. Carnes' knowledge before November 18, 2012, three years before the Notice of Charges was filed on November 18, 2015, and that the charges were therefore timely filed.[10] Dkt. 308 at 18 (citing *Merck*, 559 U.S. at 648-649). However, in *Merck*, the court found that "facts related to scienter" or "facts suggesting scienter" are among those that must be discovered, not that *all* such facts must be discovered. *Merck*, 559 U.S. at 649. Based on information publicly available at the time, the CFPB would have (or should have) known that Mr. Carnes was the CEO of Integrity Advance. As with any CEO, all employees would have reported directly or indirectly to him and he would have had ultimate authority over the company. These facts, while certainly not dispositive, "relate to" or "suggest" Mr. Carnes' knowledge of Integrity Advance's practices. Under *Merck*, that is sufficient for purposes of calculating when the CFPB discovered the alleged violations.

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[10] Based on the Director's flawed analysis, the CFPB could not have discovered such facts until it conducted an investigational hearing of Mr. Carnes in June 2014. Dkt. 308 at 18.

The above conclusion also is consistent with this Court's holding that a plaintiff only need know facts showing a "probability," not definitive "proof," of scienter for the statute of limitations clock to begin to run:

> The probability of the [defendant's] participation in the fraudulent transaction started the statute running as to him, even though Ohio had no proof of scienter. Although scienter is a necessary element of a § 10(b) private action, in many cases scienter will emerge only as an inference from the facts before the jury. This circumstance cannot be used as a basis for emasculating the statute of limitations.

Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 695 (10th Cir. 1981) (internal citation omitted). In contrast, under the Director's flawed construction, the statute of limitations would not begin to run until the CFPB had fully completed its investigation and had all of the evidence at its disposal. Dkt. 308 at 18-19. This Court has disagreed with that proposition:

> Appellant argues that the complaints filed by other plaintiffs contained mere allegations of fraud by [the defendant], and that Ohio cannot be charged with discovery of the fraud until such allegations and suspicions are supported by hard evidence. We disagree. Discovery under the equitable tolling doctrine merely starts the limitations period running. From that point on, appellant had three years to find the minimum support necessary for filing a complaint.

Ohio, 651 F.2d at 695.

Based on multiple undisputed facts, it is clear that the CFPB discovered (i.e., knew or should have known with reasonable diligence) the alleged violations by Mr. Carnes more than three years before the Notice of Charges was filed on November 18, 2015. *See* Dkt. 1. First, on January 19, 2012, then-CFPB Director Cordray publicly announced that the CFPB intended to focus on the payday lending industry. Dkt. 240 ¶¶ 405. The next day, on January 20, 2012, the CFPB entered into a Memorandum of Understanding with the Federal Trade Commission ("FTC") requiring the agencies to cooperate and share information, including regarding consumer complaints and enforcement activity. *Id.* ¶¶ 6-7; Dkt 189A. Then, on March 29, 2012, CFPB senior enforcement attorney Kara Miller ran a search in the FTC consumer complaint database for "Integrity Advance," indicating that the CFPB was already made aware of Integrity Advance and was proactively seeking consumer complaints about the company. Dkt. 240 ¶¶ 14-15; Dkt. 241A. Multiple complaints in the database at the time of the search described the same type of alleged conduct that the CFPB later included in the Notice of Charges. *Compare* Dkt. 1 at 32, *with* Dkt. 241A at 13. Then, on August 14, 2012, the CFPB again conducted a search of the FTC consumer complaint database resulting in additional complaints. Dkt. 241B. Some of these consumer complaints also described the exact type of conduct alleged in the Notice of Charges. *Id.* at 3, 5.

The CFPB's policies and procedures provide further evidence that the CFPB already knew (or should have known) of the alleged violations before November 18, 2012. *See* Dkt. 240 ¶¶ 8-13 (citing Office of Enforcement Policies and Procedures Manual (May 5, 2017)) ("Enforcement Manual").[11] According to the CFPB's Enforcement Manual, before a formal "investigation" is launched, employees are directed to conduct a "research matter" that typically lasts two months. *Id.* ¶ 12. During the research phase, the CFPB employee is to "collect and analyze easily obtainable information" such as "non-identifiable internet searching, review of consumer complaints, media sources, legal research, and contact with other law enforcement agencies and consumers." *Id.* ¶ 10-11. Only after the CFPB employee's "initial research" reveals, among other things, "a plausible set of facts that, if proven, would amount to a violation of one or more federal consumer financial laws" does the matter proceed to the "investigation" phase. *Id.* ¶ 13. In this matter, the CFPB's Notice of Charges was based, almost entirely, on the terms of the Integrity Advance loan agreement document itself and the fact that Petitioner Carnes was the company's CEO – both of which were readily publicly available in 2012 and would have been or should have been discovered with reasonable diligence during the research phase.

Therefore, based on its own directives, the CFPB had gathered or should have gathered the factual predicate for its Notice of Charges by, at the latest,

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[11] Available at https://files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf.

approximately two months after conducting its initial March 29, 2012 search. The CFPB then had *three years* to complete its investigation and timely bring the Notice of Charges. The CFPB failed to do so and did not file until November 18, 2015.

The Director erred in finding that the CFPA charges were timely filed as to Mr. Carnes. Instead, the CFPA's statute of limitations ran well before the Notice was filed, and, therefore, the charges against Mr. Carnes should be dismissed.

2. The Director's denial of discovery related to the statute of limitations was a denial of due process.

The Director's statute of limitations ruling also was a violation of Petitioners' due process rights because, at the same time that the Director ruled that Petitioners "failed to establish" that the statute of limitations had run, she also denied Petitioners' requests for discovery on this very issue. Dkt. 308 at 17-23.

Consistent with the CFPB's Rules, Petitioners requested a subpoena for records, limited to the time period prior to November 18, 2012 and narrowly-tailored to four categories of records regarding Petitioners – consumer complaints, external correspondence, internal correspondence, and internal reports. *See* Dkt. 232 and 232A; *see also* 12 C.F.R. § 1081.208; 12 C.F.R. § 1081.206(a)(3). The purpose of the request was to determine what the CFPB knew about Integrity Advance and Mr. Carnes before November 18, 2012. Unless the subpoena was found to be "unreasonable, oppressive, excessive in scope, or unduly burdensome," the hearing officer was required to grant the request. *See* 12 C.F.R. § 1081.208(d) ("The hearing officer *shall* promptly issue any subpoena requested pursuant to this section. . . ") (emphasis added).[12] Despite the CFPB Rules, and despite the fact that Petitioners' discovery request related directly to a potentially dispositive issue, the ALJ improperly denied the request, and the Director improperly upheld the denial. Dkt. 308 at 20-23.

In so ruling, the Director found that she could not "assume" the documents responsive to the first two requests (consumer complaints and external correspondence) would be "relevant to their statute of limitations argument" and that the request "flouts the purpose" of the mandatory discovery rule found at 12 CFR § 1081.206. *Id.* at 20-21. Neither of these reasons justified denial. The Director was not obligated to assume any document's relevance as the whole purpose of discovery is to determine whether relevant documents exist. *See, e.g., CFPB v. Borders & Borders*, PLC, No. 3:13-cv-1047, 2015 U.S. Dist. LEXIS 189661, at *14 (W.D. Ky. Apr. 28, 2015) ("a request for discovery should be considered to be seeking relevant information if there is any possibility that the information sought may be relevant to

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[12] The CFPB Rules provide that respondents may seek discovery from the CFPB by way of subpoena. 12 C.F.R. § 1081.206(a)(3) ("Nothing in paragraph (a) of this section [relating to affirmative disclosures the CFPB must make] . . . shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena."); *see also* Dkt. 236 at 12-13.

the claim or defense of any party in the action."). Second, the request did not "flout" the CFPB's mandatory discovery rules as the CFPB Rules expressly provide for such requests in addition to mandatory discovery. *See* 12 C.F.R. § 1081.208; 12 C.F.R. § 1081.206(a)(3) ("[n]othing in paragraph (a) of this section [relating to affirmative disclosures the CFPB must make] . . . shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena."). That is consistent with the commentary to the CFPB Rules, which expressly recognizes not only that a party may seek additional relevant documents through subpoena, but that a respondent may seek such documents from the CFPB. *See* 77 Fed. Reg. 39058, 39071 ("Paragraph (a)(3) is intended to make clear that the affirmative disclosure obligation set forth in paragraphs (a)(1) and (a)(2) does not preclude the availability of subpoenas as separately provided by § 1081.208."); *id.* at 39073 ("Section 1081.208 permits a respondent to seek other documents from the Bureau through subpoena"). The Director's denial was an abuse of discretion and, under the circumstances, a denial of Petitioners' due process rights.

The Director also denied the third and fourth subpoena requests (internal correspondence and reports) because the CFPB may be permitted to withhold such documents under Rule 206(b). Dkt. 308 at 22-23; 12 C.F.R. § 1081.206(b) ("The Office of Enforcement *may* withhold . . .") (emphasis added).

While the CFPB may withhold some of these documents in some instances, they are the very categories of documents that would tend to show when the agency "discovered" the alleged violations. Therefore, the Director denied Petitioners due process by failing to require the agency provide the documents (or, at a minimum, redacted documents) in this instance. In the alternative, Petitioners requested, if some or all of these documents were withheld based on an applicable privilege or the statutory grounds found in Rule 206(b), that the CFPB provide a privilege or withheld documents log. *See* Dkt. 232A; Dkt. 236 at 13; *see also* 12 C.F.R. § 1081.206(c) ("The hearing officer may require the Office of Enforcement to produce a list of documents or categories of documents withheld . . . .") The purpose of such a log would be to allow Petitioners to determine, at least, whether such documents exist, the volume of such documents, and the dates of such documents, all of which would have been relevant to the statute of limitations issue. However, the ALJ also denied this request which the Director improperly upheld without justification other than the purported privileged nature of the documents. Dkt. 308 at 23 ("[T]he ALJ correctly denied the request because there is no question that the documents requested by specifications 3 and 4 are privileged.")

The Director's refusal to afford Petitioners discovery on a potentially dispositive issue, while at the same time finding that Petitioners had not established they were entitled to relief on that issue, was a violation of Petitioners' due process rights.

D. The Director erred in granting summary disposition as to Mr. Carnes' personal liability.

The Director erred in finding Mr. Carnes personally liable for CFPA violations at the summary disposition stage where there were significant factual disputes, particularly regarding whether Mr. Carnes had the requisite knowledge for individual liability. *See* Dkt. 308 at 14-16.

To find an individual liable for CFPA violations, a fact-finder must conclude: "(1) he participated directly in the deceptive acts or had the authority to control them; and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Gordon*, 819 F.3d at 1193. To make such a finding at the summary disposition level, it must be based on undisputed facts viewed in the light most favorable to the non-moving party. *See, e.g.*, *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (reversing summary judgment where court "failed to view the evidence . . . in the light most favorable to [the non-moving party] with respect to the central facts of th[e] case" and noting that "[b]y failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party").

Given the evidence presented by Petitioners, there were significant factual disputes that precluded summary disposition – particularly as to the second prong of the *Gordon* test regarding Mr. Carnes' knowledge of the alleged misrepresentations in Integrity Advance's loan agreement.[13] Nonetheless, the Director improperly weighed the evidence in favor of the CFPB. For example, the Director found that Mr. Carnes approved Integrity Advance's loan agreement. Dkt. 308 at 14 (citing Dkt. 172 at 232 ("Q. But isn't it true that they had your approval to implement this loan agreement? . . . A. Did they have my approval to use the loan agreement? Yes.")). In so finding, the Director had to disregard other evidence that Mr. Carnes did not substantively approve the loan agreement and instead relied on outside counsel. *See* Dkt. 172 at 231:23-232:3 ("[W]e hired an outside counsel to come up with the loan agreement. We trusted that that was the best thing to do and we used it. I don't know, you know there was no stamp, I wasn't stamping my approval on it. I just assumed that they knew what they were doing.").

Additionally, the Director found that Mr. Carnes "knew that IA's loan agreement made disclosures as if IA's loans were single-payment loans." Dkt. 308

[13] As discussed in Section E.2. below, the ALJ also denied Petitioners the opportunity to present additional evidence relevant to Mr. Carnes' knowledge, such as testimony about the role and advice of Integrity Advance's outside counsel. For this reason alone, the Director should not have granted summary disposition, and this action should be remanded for a new evidentiary hearing.

at 14 (citing Dkt. 173 at 50-51). In so finding, the Director pointed to testimony regarding Mr. Carnes' knowledge of one portion of the loan agreement – the "Total of Payments" disclosure within the "TILA box" – not the loan agreement as a whole. *Id.* Additionally, the Director had to disregard other evidence that, while Mr. Carnes may have "flipped through" the Loan Agreement, he did not substantively review it or discuss its text with outside or in-house counsel. Dkt. 273 at ¶¶ 97-101.

The Director also had to disregard other evidence establishing that Mr. Carnes did not know, nor have reason to know, that the loan agreement was purportedly misleading. For example, Mr. Carnes hired Edward Foster to be Integrity Advance's Executive Vice President and General Counsel, and, as of June 2010, Mr. Foster served as Chief Operations Officer. Dkt. 273 ¶ 87; Dkt. 293 at 13 ¶¶ 97-98. Integrity Advance contracted with a third party call center to administer the Loan Agreement on a day to day basis, and Mr. Carnes understood that the call center representatives explained the terms of the loan to consumers both by phone and email and sent payment reminder emails. Dkt. 293 at 7 ¶¶ 23-25; *id.* at 16 ¶ 140. Mr. Carnes had no reason to believe that the Loan Agreement terms were allegedly misleading, as there was a high rate of repeat customers who repaid their loans and returned to Integrity Advance for the same loan product. *Id.* at 9 ¶¶ 53-54. In fact, 48% of Integrity Advance customers since July 21, 2011 took out two or more loans with Integrity Advance. *Id.* Of the 82,980 loans originated on or after July 21, 2011, 66% were loans to repeat customers. *Id.* At the same time, the record reflects that there were relatively few customer complaints and those complaints generally did not reach Mr. Carnes' attention. *Id.* at ¶ 47; Dkt. 277 at ¶¶ 70-71, 93-94. Further, Integrity Advance supplied a copy of the Loan Agreement to Delaware regulators for their review, and received approval to operate annually. Dkt. 273 at ¶ 38; Dkt. 293 at 6 ¶ 12. Integrity Advance was not permitted to change its Loan Agreement without submitting it to the Delaware regulators for approval. Dkt. 273 at ¶ 29. Additionally, Delaware regulators conducted annual audits of Integrity Advance, including coming to the physical location. *Id.* at ¶ 30-31. Finally, while Mr. Carnes was the CEO of Integrity Advance, he also was the CEO of the parent company HIP. Dkt. 293 at 5 ¶¶ 7-8; *id.* at 12 ¶ 88. Particularly as time went on, Mr. Carnes spent only a fraction of his time on Integrity Advance's business. *Id.* at 12 ¶¶ 90-91; *id.* at 13 ¶ 104. These facts, at the very least, create a genuine factual dispute regarding Mr. Carnes' knowledge of the alleged CFPA violations.

The Director's summary disposition ruling that Mr. Carnes is personally liable was improper and should be vacated.

E. The Director erred in awarding remedies.

1. The Director erred in awarding restitution without considering Petitioners' good faith and denying Petitioners' request to introduce evidence of good faith reliance on counsel.

The Director erred in awarding restitution, while failing to consider the evidence of Petitioners' lack of fraudulent intent and upholding the ALJ's ruling that Petitioners could not introduce evidence of good faith reliance on counsel. *See* Dkt. 308 at 23-24, 36; Dkt. 269 at 8-9. In so holding, the Director disregarded recent district court decisions regarding the appropriateness of awarding restitution in CFPB enforcement actions. In *CashCall,* the district court expressly held that a defendant's reliance on the advice of counsel is relevant to determining whether restitution is appropriate in a CFPB enforcement action. *See CashCall, Inc.,* 2018 U.S. Dist. LEXIS 9057, at *40 ("Although this Court has previously held that advice of counsel is not a defense to liability, it is relevant to the determination of whether restitution is an appropriate remedy."); *see also Nationwide Biweekly Admin., Inc.*, 2017 U.S. Dist. LEXIS 145923, at *3 (finding that the CFPB had not met its burden to show restitution was an appropriate remedy where it had not shown fraud).

For CFPB enforcement actions, the award of restitution is not automatic, and Petitioners' good faith and reliance on counsel must be taken into account. Accordingly, the Director erred by failing to consider Petitioners' good faith even though there is developing case law holding that such evidence is relevant

CFPB enforcement actions. The Director further denied Petitioners due process by upholding the ALJ's decision to deny Petitioners the opportunity to introduce evidence regarding their reliance on counsel. The restitution award should be vacated.

2. The CFPB erred in awarding civil money penalties while denying Petitioners' request to introduce evidence of good faith reliance on counsel.

Similarly, the Director also erred in awarding civil money penalties in the full statutory amount for First Tier penalties, while upholding the denial of Petitioners' request to introduce evidence of good faith reliance on counsel. Dkt. 308 at 23-24, 38; Dkt. 269 at 8-9; *see also* 12 U.S.C. § 5565(c)(2)(A) (First Tier penalties "may not exceed $5,000 for each day during which such violation . . . continues").

In her Decision, the Director considered Petitioners' "good faith" as one of the statutory mitigating factors that would reduce civil money penalties below the maximum. Dkt. 308 at 39; 12 U.S.C. § 5565(c)(3)(A) ("In determining the amount of any penalty assessed under paragraph (2), the Bureau or court shall take into account the appropriateness of the penalty with respect to . . .good faith of the person charged.") The Director then "decline[d] to conclude the [Petitioners] acted in good faith. . ." Dkt. 308 at 39. In light of the fact that Petitioners requested, and were denied, the opportunity to introduce evidence of good faith advice of counsel, this constituted a denial of due process. The civil money penalty award should be vacated.

3. The Director erred in ordering disgorgement without consideration of 'unjust enrichment.'

Throughout the proceedings, the CFPB sought restitution rather than disgorgement. In the Decision, the Director did not mention or analyze the appropriateness of awarding disgorgement. Dkt. 308. Nonetheless, in the Order, the Director ordered that "the Bureau will deposit any remaining funds in the U.S. Treasury as disgorgement" after restitution amounts are transferred to individual consumers. Dkt. 309 at 1. However, disgorgement awards are typically designed to prevent unjust enrichment and, therefore, are "restricted . . . to an individual wrongdoer's net profits." *See Liu v. SEC,* 140 S. Ct. 1936, 1942 (2020). Courts have "consistently restricted awards to net profits from wrongdoing after deducting legitimate expenses." *Id.* at 1946. However, Petitioners were expressly denied the opportunity to introduce evidence of their expenses for purposes of calculating the remedy. Dkt. 269 at 10-11. Therefore, Director did not consider Petitioners' "net profits" in ordering disgorgement as she was required to do.

Further, the Order provides that restitution and disgorgement are ordered joint-and-severally, without consideration or evidence of what (if any) profits of the alleged misconduct went to Mr. Carnes individually. That is not appropriate for a profits-based remedy. *Liu*, 140 S. Ct. at 1945 ("The rule against joint-and-several liability for profits that have accrued to another appears throughout equity cases awarding profits. “). The disgorgement order should be vacated.

VII. CONCLUSION

For the foregoing reasons, the Decision and Order should be vacated. Petitioners respectfully request that the matter be dismissed with prejudice or, in the alternative, remanded for a new hearing.

Petitioners respectfully request oral argument because this case presents important issues involving constitutional errors that occurred throughout this proceeding and which ultimately prevented Petitioners from receiving guaranteed due process.

Respectfully submitted,

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Dated: June 2, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I certify that the foregoing Opening Brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The Motion contains 9,540 words (does not exceed 13,000 words), excluding the parts exempted by Rule 32(f).

Dated: June 2, 2021

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CERTIFICATE OF DIGITAL SUBMISSION

In accordance with the Court's CM/ECF User's Manual, I hereby certify that:

1) All required privacy redactions have been made per Tenth Circuit Rule 25.5;
2) Hard copies of this pleading that may be required to be submitted to the Court are exact copies of the ECF filing;
3) The ECF submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection version 14.0.3876.1100 and, according to the program, is free of viruses; and
4) The pleading complies with applicable type volume limits referenced in Fed. R. App. P. 32(g)(1). There are 9,540 words in this document, exclusive of the cover page, disclosure statement, signature block, certificate of service, and other items excluded from the length limitation by Fed. R. App. 32(f).

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Dated: June 2, 2021

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2021, I electronically filed the foregoing Opening Brief with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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Dated: June 2, 2021

Exhibit 1

Dkt. 308 – Decision of the Director
(filed Jan. 11, 2021)

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of

INTEGRITY ADVANCE, LLC and
JAMES R. CARNES.

DECISION OF THE DIRECTOR

INTRODUCTION

When lenders fail to comply with all applicable consumer protection statutes, consumers can suffer substantial harms. Integrity Advance (IA) was a payday lender, and it violated the law. In particular, it failed to comply with the Truth in Lending Act (TILA), the Consumer Financial Protection Act (CFPA), and the Electronic Fund Transfer Act (EFTA). IA violated TILA by making disclosures as if its loans were single payment loans, but then structuring its loan agreements so that the loans functioned as multi-payment installment loans. IA violated the CFPA through its unfair and deceptive loan disclosure practices, as well as by using remotely created checks (RCCs) to withdraw funds from the accounts of consumers who had attempted to block access. And it violated EFTA by conditioning its loans on repayment by preauthorized electronic fund transfers.

The Consumer Financial Protection Bureau (Bureau) initiated this case by filing a Notice of Charges in November 2015 naming both IA and its CEO, James Carnes, as Respondents. In 2016, Administrative Law Judge Parlen L. McKenna conducted a trial. However, after he had issued his Recommended Decision (and both Respondents and the Bureau's Enforcement Counsel had filed appeals), this case was put on hold pending the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). As a result of that decision, it was apparent that Judge McKenna had not been appointed in a manner that was consistent with the Constitution's Appointments Clause. Accordingly, in May 2019, I directed that this case be remanded to Administrative Law Judge Christine Kirby (ALJ), who was then the Bureau's Administrative Law Judge, and who had been appointed in a manner consistent with the Constitution. In the course of the proceedings before Judge Kirby, both parties filed motions for summary disposition. She resolved those motions when she issued her Recommended Decision on August 4, 2020, granting the motion filed by Enforcement Counsel, and denying the motion filed by Respondents. She held that IA had violated TILA and EFTA. She also held that both Respondents had violated the CFPA.

Respondents appealed the ALJ's Recommended Decision, and both parties filed briefs. Case Documents (Docs.) 295-297.[1] On December 8, 2020, the parties presented oral argument.

I affirm the ALJ's conclusion that IA violated both TILA and EFTA. I also affirm her holding that both Respondents violated the CFPA. With respect to the appropriate remedy, I conclude that Respondents should be jointly and severally liable for restitution amounting to $38,453,341.62. I further hold that IA is liable for a civil penalty of $7.5 million, and Mr. Carnes is liable for a civil penalty of $5 million. With respect to injunctive relief, I order that Respondents assist the Bureau in identifying and locating the consumers who are entitled to redress.

To the extent that the ALJ's findings and conclusions are consistent with this decision, I adopt them as my own.

FINDINGS OF FACT AND LEGAL BACKGROUND

The following facts are not disputed.

A. Integrity Advance and James Carnes

IA was licensed by the state of Delaware as a short-term, small-dollar lender. Case Document (Doc.) 273 at 1. It had a single store in Delaware, but made most of its loans online. Enforcement Counsel Exhibit (ECX) 68at 10, 24; Doc. 173 at 42.[2] These loans ranged in amount from $100 to $1000. Doc. 56 at 2. IA offered only one product – consumer loans – and these loans were its sole source of revenue. Doc. 172 at 94-95. IA made its first consumer loan in May of 2008, and its last in December of 2012, but it continued processing loan payments until July of 2013. Doc. 173 at 132-33, Doc. 273 at 2. IA was a wholly owned subsidiary of Hayfield Investment Partners, Doc. 165 at 1, but had no employees of its own, Doc. 173 at 6. Instead, it was operated by individuals who, for the most part, were paid by Hayfield. *Id.* At the time IA began making loans to consumers, it was operated by four Hayfield employees. Doc. 172 at 53. When it reached its maximum size in 2010 or 2011, approximately 20 employees operated IA. ECX 68 at 11-12. Although Hayfield owned other companies, most of its profits came from IA. Doc. 172 at 114-115. IA is no longer offering loans. ECX 68 at 9.

Respondent James Carnes was both a founder of IA and its de facto CEO. Doc. 172 at 94. He owned more than 50% of IA. Doc. 172 at 100-103. Mr. Carnes was the ultimate decision maker for IA, *id.* at 51, and he had the responsibility for approving everything related to IA's business, *id.* at 209. For example, he had final say over what appeared on IA's website, *id.* at 217; he made the final decision regarding IA's underwriting policies, *id.* at 59; and he was involved in the decision as to which call center IA would use, *id.* at 64. As he explained, he had authority to make all decisions

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[1] Documents on the docket of this case are available at https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/integrity-advance/.

[2] In her Scheduling Conference Order (Doc. 227), the ALJ indicated that she would rely on exhibits that were admitted during the hearing conducted by Judge McKenna. The parties have not objected to this, and I will rely on those exhibits as well.

regarding IA's policies and procedures, *Id.* at 209. Mr. Carnes' role with respect to IA did not change throughout the time period relevant to this proceeding. *Id.* at 52.

B. IA's loans

IA provided short-term loans to consumers. Doc. 56 at 2. To get a loan, the consumer had to provide IA with employment information, length of pay period, and pay dates. Doc. 88B at 2. Consumers were also required to provide an ACH authorization. ECX 2. This authorization gave IA access to the consumer's bank account, thereby allowing IA to deposit the money that the consumer borrowed directly in the consumer's bank account, and also allowing IA to make withdrawals directly from that account. Nearly all payments on IA loans were made automatically through ACH authorization. Doc. 87D at 3.

IA had a standard price for its loans. It charged new customers $30 per hundred dollars borrowed, and it charged repeat customers $24 per hundred dollars borrowed. ECX 1. To illustrate, the following is a portion of IA's loan agreement, including the TILA disclosure and description of the consumer's obligation to repay, that IA provided to a first-time borrower who was borrowing $300:

FEDERAL TRUTH IN LENDING DISCLOSURES

ANNUAL PERCENTAGE RATE **The cost of your credit as a yearly rate.** **644.12%**	**FINANCE CHARGE** **The dollar amount the credit will cost you.** **$90.00**	**Amount Financed** **The amount of credit provided to you or on your behalf.** **$300.00**	**Total of Payments** **The amount you will have paid after you have made all payments as scheduled.** **$390.00**

Your Payment Schedule will be: One (1) payment of **$390.00** due on **7/15/2011** ("Payment Due Date").
Security: You are giving a security interest in the ECHECK/ACH Authorization.
Prepayment: If you pay off early, you will be entitled to a refund of the unearned portion of the finance charge.

See the terms of the Loan Agreement below for any additional information about nonpayment, default, and prepayment refunds.

Itemization of Amount Financed: Amount given to you directly: **$300.00** . Amount paid on Loan#: [redacted] with us: **$390.00**.

PAYMENT OPTIONS: You <u>must</u> select your payment option at least three (3) business days prior to your Payment Due Date by contacting us at (800) 505-6073. At that time, you may choose:

(a) <u>Payment in full</u>: You may pay the Total of Payments shown above, plus any accrued fees, to satisfy your loan in full. When you contact us and choose this option, we will debit Your Bank Account (defined below) for the Total of Payments plus any accrued fees, in accordance with the ACH Authorization below; OR

(b) <u>Renewal</u>: You may renew your loan (that is, extend the Payment Due Date of your loan until your next Pay Date[1]) by authorizing us to debit Your Bank Account for the amount of the Finance Charge, plus any accrued fees. If you choose this option, your new Payment Due Date will be your next Pay Date[1], and the rest of the terms of the Loan Agreement will continue to apply.

AUTO-RENEWAL: If you fail to contact us to confirm your Payment Option at least three (3) business days prior to any Payment Due Date, or otherwise fail to pay the loan in full on any Pay Date, Lender may automatically renew your loan as described under (b) above, and debit Your Bank Account on the Payment Due Date or thereafter for the Finance Charge and any accrued fees. Your new Payment Due Date will be your next Pay Date[1], and the rest of the terms of the Loan Agreement will continue to apply. You must contact us at least three (3) business days prior to your new Payment Due Date to confirm your payment option for the Renewal. If you fail to contact us, or otherwise fail to pay the loan in full on your new Payment Due Date, we may automatically renew the loan until your next Pay Date.[1] After your initial loan payment, you may obtain up to four (4) Renewals. All terms of the Loan Agreement continue to apply to Renewals. All Renewals are subject to Lender's approval. Under Delaware law, if you qualify, we may allow you to enter into up to four (4) Renewals, also known as a "refinancing" or a "rollover". The full outstanding balance shall be due upon completion of the term of all Renewals, unless you qualify for Auto-Workout, as described below.

AUTO-WORKOUT. Unless you contact us to confirm your option for Payment in Full prior to your Fourth Renewal Payment Due Date, your loan will automatically be placed into a Workout Payment Plan. Under the Workout Payment Plan, Your Bank Account will automatically be debited on your Pay Date[1] for accrued finance charges plus a principal payment of $50.00, until all amounts owed hereunder are paid in full. This does not limit any of Lender's other rights under the terms of the Loan Agreement. All Workout Payment Plans are subject to Lender's approval

ECX 2. (Footnote "1" in the loan agreement refers to the following sentence that appears several pages later: "The term 'Pay Date' refers to the next time following the Payment Due Date, that you receive regular wages or salary from your employer. Because Renewals are for at least fourteen (14) days, if you are paid weekly, your loan will not be Renewed until the next Pay Date that is at least fourteen days after the prior Payment Due Date.")

As the above example shows, IA calculated and disclosed the annual percentage rate (APR), the finance charge, and the total of payments based on the assumption that the loan would be paid off in a single payment on the consumer's next payday. But as a result of the way in which IA structured repayment options, that rarely happened. Although the line captioned "Your Payment Schedule" described a one-payment loan, the "Payment Options" paragraph described things somewhat differently. That paragraph explained that the consumer must, at least three days prior to the payment due date, select one of two payment options. If the consumer selected the "Payment in full" option, then IA would debit the consumer's account for the full amount of the principal and finance charge on the due date in a single payment.

If the borrower made no selection (or selected the "renewal" option), then the loan defaulted to "auto-renewal" status. The loan agreement provides that when a loan went into auto-renewal status, IA would debit the consumer's account for only the finance charge ($90 in the above example), and would then renew the loan until the consumer's next pay date. *See* Doc. 172 at 219-220. There is no indication in the record that IA would provide the consumer with new TILA disclosures when it "renewed" the loan and began withdrawing multiple payments.

At the end of this first renewal, *i.e.*, the consumer's next payday, the pattern would repeat unless the consumer took affirmative action: IA would again debit the finance charge from the consumer's account and would again "renew" the loan for another term. *Id.* Unless the consumer took affirmative action to stop the process, IA would automatically renew the loan four times. (Delaware law precludes any additional renewals. 5 Del. Admin. Code 2210-3.1.2; *see* Doc. 172 at 219-220.) If the consumer continued to take no action after four renewals, the loan would automatically switch from "auto-renewal" status into "auto-workout" status. Doc. 172 at 220. This meant that IA would debit the consumer's account for the finance charge plus $50 of principal (*i.e.*, $140 in the above example). Doc. 88D at 239. And if the consumer continued to take no action, then IA would continue, each subsequent payday, to debit the (declining) finance charge and $50 of principal until the loan was paid in full. *Id.*

Although the loan agreement described two payment options (Payment in full; Renewal), IA sent borrowers a "welcome email" that described the options differently. Doc. 91A at 24. IA sent this email after approving loans, but before disbursing loan proceeds. Doc. 90 at 2. This email described three repayment options:

Dear CUSTOMER_FIRST_NAME,

CONGRATULATIONS! Your loan for LOAN_AMOUNT has been approved. This email confirms your loan has been processed. It will be sent to your bank tonight and the funds will be available to you within 1 to 2 business days. Your first due date will be LOAN_DUE_DATE.

Remember you have 3 options of paying the loan back:

*1) **YOU CAN LET THE LOAN AUTOMATICALLY RENEW**. All renewals are on your pay dates. After the **first** initial payment, the next 4 renewals will only require payment of the finance charge. Starting with the 5th renewal, in addition to the finance charge, we will also take out $50 of principal. This will continue until the loan is repaid in full, unless of course you select either option 2 or 3 below. **NOTE: PLEASE REMEMBER, YOU CAN SELECT OPTIONS 2 OR 3 AT ANYTIME DURING YOUR LOAN REPAYMENT PROCESS***

*2) **PAY THE LOAN DOWN IN PART**. If you want to increase your payment so you pay the loan back faster, you may do so in any amount ($50 increments required) which will bring down the principal of your loan. Just call us 3 business days in advance of your pay date so we can make the change.*

*3) **PAY THE LOAN IN FULL**. Once again, just call us 3 business days in advance so we may make the change on your account. If you pay your loan off before your next pay date, you only pay the finance charge for the days the loan remains unpaid.*

Thank You and Have a Great Day!

Integrity Advance
Cust Svc: (800) 505-6073
Fax: (800) 581-8148

Doc. 91A at 24. But just like the loan agreement, if the consumer took no action, the loan would renew four times, and then go into auto-workout status. The following chart shows the debits that IA would deduct from the consumer's account (assuming a $300 loan to a first-time borrower) if the consumer took no action:

PAYDAY	PAYMENT	FINANCE CHARGE (30% OF REMAINING PRINCIPAL BALANCE)	AMOUNT APPLIED TO PRINCIPAL	REMAINING PRINCIPAL BALANCE	TOTAL PAID TO DATE
1	$90	$90	$0	$300	$90
2	$90	$90	$0	$300	$180
3	$90	$90	$0	$300	$270
4	$90	$90	$0	$300	$360
5	$90	$90	$0	$300	$450
6	$140	$90	$50	$250	$590
7	$125	$75	$50	$200	$715
8	$110	$60	$50	$150	$825
9	$95	$45	$50	$100	$920
10	$80	$30	$50	$50	$1000
11	$65	$15	$50	$0	$1065
TOTAL	**$1065**	**$765**	**$300**	-	**$1065**

See Doc. 1 at 6; Doc. 21 at 5. Thus, this table shows that, if the consumer took no action with respect to the loan, the total amount of the finance charge and the total of payments that the consumer would ultimately pay would far exceed the amounts disclosed on the TILA disclosure.

To get a loan from IA, a borrower had to initial or sign the loan agreement in seven places. *See* ECX 2. The borrower's fourth signature accepted the ACH authorization. That portion of the agreement included the following paragraph:

> You agree that we may re-initiate a debit entry for the same amount if the ACH debit entry is dishonored or payment is returned for any reason. The ACH Authorizations set forth in the Loan Agreement are to remain in full force and effect for this transaction until your indebtedness to us for the Total of Payments, plus any other charges or fees incurred and described in the Loan Agreement, is fully satisfied. You may only revoke the above authorizations by contacting us directly. If you revoke your authorization, you agree to provide us with another form of payment acceptable to us and you authorize us to prepare and submit one or more checks drawn on Your Bank Account so long as amounts are owed to us under the Loan Agreement.

ECX 2. Pursuant to this paragraph, if the consumer attempted to revoke the ACH authorization, IA could create paper checks (remotely created checks or RCCs) ("you authorize us to prepare and submit one or more checks drawn on Your Bank Account") and use them to withdraw payments from the consumer's account. *See* Doc. 172 at 235-236. The consumer would not prepare or sign the RCC, nor would the consumer even see the RCC. *See* ECX 94 at 1-2.

C. Procedural history

1. The Notice of Charges

The Bureau's Enforcement Counsel filed its Notice of Charges with the Bureau's Office of Administrative Adjudication on November 18, 2015. Doc. 1. The Notice contained seven counts. Count I alleged that IA violated TILA because it based its TILA disclosures on the assumption that the consumer would pay off the loan in a single payment on the consumer's first post-loan payday, even though that would happen only if the consumer took affirmative action. Count II alleged that IA's violations of TILA also violated the CFPA. Count III alleged that both IA and Mr. Carnes had engaged in a deceptive act or practice in violation of the CFPA because the net impression created by the loan agreement misled consumers to believe that the finance charge and the total of payments were lower than the amounts consumers would actually pay. Count IV alleged that both IA and Mr. Carnes had prevented consumers from assessing the actual costs of the loans they entered into, and that this was unfair, in violation of the CFPA. Count V alleged that, by requiring consumers to accept the ACH authorization as a condition of getting a loan, IA had conditioned its loans and the extension of credit on repayment by preauthorized electronic fund transfer, in violation of EFTA and its implementing Regulation E (Reg. E). Count VI alleged that IA's violations of EFTA and Reg. E also violated the CFPA. Count VII alleged that IA and Mr. Carnes had committed an unfair practice in violation of the CFPA when they used RCCs to withdraw money from the accounts of consumers who believed they did not owe money to IA.

The Notice sought a variety of remedies, including a permanent injunction prohibiting future violations of TILA, its implementing Regulation Z, EFTA, its implementing Reg. E, the CFPA, and any other federal consumer financial law. The Notice also sought an award of restitution to compensate injured consumers, as well as disgorgement, and a civil penalty.

2. Proceedings before Judge McKenna

This matter was originally assigned to the Administrative Law Judge Office of the U.S. Coast Guard because in 2015 the Bureau did not have an administrative law judge of its own. Doc. 8. The matter was then heard by Coast Guard Administrative Law Judge Parlen McKenna. At the conclusion of several days of hearings, Judge McKenna issued his Recommended Decision. Doc. 176. Both IA and the Bureau's Enforcement Counsel filed notices of appeal. Docs. 177, 178. However, resolution of those appeals was delayed, first pending a decision by the D.C. Circuit in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), and then pending a decision by the Supreme Court in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). Docs. 208, 210. As a result of the Court's decision in *Lucia*, I concluded that Judge McKenna had not been constitutionally appointed. Doc. 216. Accordingly, I directed that the matter be remanded to the Bureau's Administrative Law Judge, Christine Kirby, for a new hearing and Recommended Decision. *Id.* I further directed that Judge Kirby "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna." *Id.*

3. Proceedings before the Bureau's ALJ, Christine Kirby

On October 28, 2019, the ALJ issued an order denying further discovery regarding Respondents' statute of limitations argument. Doc. 238. Then, on January 24, 2020, she issued an order denying IA's Motion to Dismiss. Doc. 249. Finally, she issued her Recommended Decision on August 4, 2020. Doc. 293. All three of these decisions are relevant to this appeal.

a. Order denying further discovery

On October 28, 2019, the ALJ denied Respondents' motion for additional discovery. Doc. 238. Respondents had requested that the ALJ issue a subpoena requiring Enforcement Counsel to provide 1) all consumer complaints regarding IA; 2) all external correspondence regarding IA; 3) all internal correspondence regarding IA; and 4) any other internal documents regarding IA. With respect to the first two requests, the ALJ concluded that Enforcement Counsel had already provided those documents to Respondents when it fulfilled its obligation to make disclosures pursuant to Bureau Rule 206, 12 C.F.R. § 1081.206. She denied the third and fourth requests because she concluded that Respondents were seeking documents that were privileged and could be withheld pursuant to Rule 206.

b. Order denying IA's motion to dismiss

On November 15, 2019, Respondents filed a Motion to Dismiss and/or for Summary Disposition. Doc. 239. On January 24, 2020, the ALJ denied that motion in its entirety. Doc. 249. First, she rejected Respondents' argument that Enforcement Counsel were precluded from asserting the allegations in Count IV of the Notice of Charges. (Count IV alleged that IA's loan disclosures were unfair in violation of the CFPA.) During the proceedings before Judge McKenna, Respondents and

Enforcement Counsel filed a joint stipulation agreeing to dismiss Count IV with prejudice. Doc. 127. A week before the parties filed the stipulation, Judge McKenna had entered an order granting in part Enforcement Counsel's motion for summary disposition. Doc. 111. In that order, he granted summary disposition with respect to Count III of the Notice of Charges, which alleged that IA's loan agreement was deceptive. In the stipulation, the parties agreed that the consumer harm resulting from Count III was coextensive with the harm caused by Count IV. Accordingly, in the interest of judicial economy, the parties agreed to the dismissal of Count IV. Judge Kirby observed that the stipulation was based on Judge McKenna's order on the motion for summary disposition, and that, pursuant to my remand (Doc. 216), I had directed that she give no weight to that order. Because the parties had agreed to the dismissal based on an order that no longer has any effect, the ALJ held that Enforcement Counsel was not precluded from pursuing the allegations in Count IV.

Next, Judge Kirby addressed Respondents' contention that the three counts in the Notice of Charges that applied to Mr. Carnes (Counts III, IV, and VII) were time-barred. (Counts that apply to IA were not time-barred because Enforcement Counsel had entered into tolling agreements with IA that tolled the statute of limitations with respect to IA, but those agreements did not apply to Mr. Carnes. *See* Docs. 200, 201.) The relevant statute of limitations, 12 U.S.C. § 5564(g)(1), provides that the Bureau may not bring an action "more than 3 years after the date of discovery of the violation." Respondents argued that the statute of limitations should be interpreted to run for three years from the time the Bureau discovers, *or should have discovered*, the violations. The ALJ declined to decide whether the statute of limitations incorporates a constructive discovery rule. Doc. 249 at 23. However, she held that even if it did, the statute of limitations had not expired with respect to Mr. Carnes by November 18, 2015, when the Bureau filed its Notice of Charges. She recognized that, prior to November 18, 2012 (three years before the Bureau filed its Notice of Charges), the Bureau had information regarding IA's violations. But it was only after that date that the Bureau either knew, or should have known, of evidence supporting the conclusion that Mr. Carnes was liable for IA's misrepresentations. This was, in part, because IA took 11 months to comply with the Bureau's civil investigative demand. Finally, the ALJ concluded that the CFPA's statute of limitations also applied to the allegations that IA violated TILA and EFTA (Counts I, V), as well as to Counts II and VI, which alleged CFPA violations derived from the TILA and EFTA violations.

c. Recommended decision

On May 15, 2020, both Enforcement Counsel and Respondents filed motions for summary disposition. Docs. 272, 275. On August 4, 2020, the ALJ issued her Recommended Decision granting Enforcement Counsel's motion and denying the one filed by Respondents. Doc. 293. With respect to the first two counts of the Notice of Charges, the TILA count and the associated CFPA count, the ALJ concluded that, because IA's loans would automatically roll over unless the consumer took affirmative steps, the loan was actually a multi-payment loan. Because IA made disclosures as if the loan were a single payment loan, it violated TILA, and thus also committed the associated violation of the CFPA. *Id.* at 22-29.

Next, the ALJ concluded that, not only did IA's loan disclosures violate TILA, but they were also deceptive and unfair (Counts III and IV). She held that the net impression of the loan agreement was that the loan was a single payment loan, thereby misrepresenting the costs of the loan. She concluded that this misrepresentation of costs was material. With respect to unfairness, she held that consumers were injured when they paid more than they expected to pay, that they could not avoid the injury because the costs were never revealed to them, and that IA's disclosure practices did not benefit consumers. *Id.* 29-50.

Counts V and VI alleged a violation of EFTA and an associated CFPA violation. The parties agreed that, by signing the ACH authorization in the loan agreement, the consumer was thereby agreeing to a preauthorized electronic fund transfer in the form of both credits to, and debits from, the consumer's bank account. The ALJ observed that there was nothing in the loan agreement indicating that the ACH authorization was optional. Further, IA disbursed funds electronically and provided no alternate means whereby consumers could receive the money they borrowed. This meant that consumers had to sign the ACH authorization to receive funds. As a result, the ALJ concluded that IA had conditioned its loans on consumers' repayment by preauthorized electronic fund transfer, thereby violating EFTA and the CFPA. *Id.* at 50-56.

The ALJ held that IA's use of remotely created checks (RCCs) was unfair, as alleged in Count VII. She held that, because IA used RCCs only when consumers attempted to block IA from accessing their bank accounts, RCCs substantially harmed consumers. She held that consumers could not avoid the injury caused by the RCCs because the single sentence in the loan agreement that authorized RCCs was unclear. She also held that RCCs did not provide offsetting benefits when used to collect payments for loans whose costs were never adequately disclosed. *Id.* at 56-64.

The ALJ next held that Mr. Carnes could be held liable for IA's violations of the CFPA as alleged in Counts III, IV, and VII. She reviewed undisputed facts and concluded that there was overwhelming evidence that Mr. Carnes had authority to control both IA and the practices at issue in those three counts. She also concluded that Mr. Carnes knew and understood the contents of the loan agreement, knew that the TILA boxes disclosed the loans that IA offered as if they were single payment loans, and also knew that the vast majority of loans would default into auto-renewal and auto-workout status. Accordingly, she held that Mr. Carnes had both the requisite authority to control and the knowledge sufficient to hold him liable for IA's violations. *Id.* at 64-76.

Finally, the ALJ addressed the appropriate remedy. She held that IA should be held liable for restitution related to its TILA violations, and that this restitution should be used to provide redress for consumers who borrowed from IA because they did not get the benefit of the bargain they thought they had entered into – they paid a substantially higher cost for loans than disclosed by IA. She rejected Respondents' contention that repeat borrowers were not entitled to restitution because she concluded that there was insufficient evidence for her to conclude that repeat customers understood those costs any better than first-time borrowers. She also held that Enforcement Counsel did not have to show that a particular consumer had suffered actual damages before that consumer could receive restitution. She held that the appropriate amount of restitution was the amount that each consumer had paid over and above the amount disclosed in the loan agreement, and that, because the FTC could have obtained restitution for TILA violations committed prior to July 21, 2011 (the date that TILA enforcement authority transferred to the Bureau), IA should be held liable for restitution for all the loans that it made going back to 2008. This amount totaled $132.5 million. Mr. Carnes' liability for restitution was different because he was only named in Counts III and IV, which alleged violations of the CFPA. The FTC could not enforce the CFPA and as a result, no restitution was appropriate with respect to these counts for violations that occurred before July 21, 2011. Thus, the ALJ recommended that Mr. Carnes be held jointly liable with IA for $38.4 million. (This did not increase IA's liability because consumers who were entitled to redress pursuant to Counts III and IV were also entitled to redress as a result of IA's TILA violation. Thus, IA was liable for $94.1 million for consumers who entered into loans before July 21, 2011, and was jointly liable with Mr. Carnes for $38.4 million with respect to consumers who borrowed after that date.) She also recommended that Mr. Carnes and IA be held jointly liable for restitution for the amount of the RCCs – $115,024.50. *Id.* at 76-86.

The ALJ denied most of Enforcement Counsel's request for injunctive relief because she concluded that monetary relief would be adequate to remedy Respondents' violations. However, she did recommend that Respondents be ordered to assist the Bureau in identifying and locating consumers who are entitled to restitution. *Id.* at 89.

Finally, the ALJ held that there were three distinct practices that warranted civil money penalties: 1) the use of a loan agreement that violated TILA and that was deceptive and unfair; 2) the EFTA violations; and 3) the use of RCCs. She held that IA was liable for all three practices, and Mr. Carnes was liable for the first and third. The relevant time period for each of the violations was 500 days (from July 21, 2011, until IA ceased offering loans in December 2012) and the appropriate penalty was $5000 per day. Accordingly, she recommended that IA be liable for a civil penalty of $7.5 million and Mr. Carnes be liable for $5 million. *Id.* at 90-94.

c. Respondents' Appeal

On August 11, 2020, Respondents filed their Notice of Appeal. Doc. 294. Respondents argued that: 1) the ALJ erred in holding that I could ratify this action; 2) the ALJ erred by failing to hold that the statute of limitations had expired with respect to all claims against Mr. Carnes, and all but three of the claims against IA; 3) the ALJ denied Respondents due process; 4) the ALJ's holding that Respondents were "covered persons" was erroneous; 5) the ALJ erred in concluding that summary disposition was appropriate with respect to all seven counts of the Notice of Charges; and 6) the ALJ's recommendations with respect to remedies were erroneous. Respondents' Opening Appeal Brief, Doc. 295. Enforcement Counsel filed an Answering Brief, Doc. 296, and Respondents filed their Reply, Doc. 297. Respondents requested the opportunity to present oral argument, and I conducted an argument on December 8, 2020.

ANALYSIS

I. STANDARD OF REVIEW

As explained in the Decision of the Director in *In the Matter of PHH Corp.*, File No. 2014-CFPB-0002 (June 4, 2015), *rev'd on other grounds sub nom. PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), the Bureau's rules provide that when a party appeals an ALJ's recommended decision, "the Director will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will to the extent necessary or desirable, exercise all powers which he or she could have exercised if he or she had made the recommended decision." 12 C.F.R. 1081.405(a). That means my review as to both facts and law is *de novo*.

Pursuant to the CFPA, the Bureau conducts its administrative adjudications "in the manner prescribed by chapter 5 of Title 5, United States Code." 12 U.S.C. § 5563(a). That is, this adjudication is on the record, and is governed by a preponderance of the evidence standard. *See*

Steadman v. SEC, 450 U.S. 91, 95-102 (1981) (holding that when hearings are held on the record, the Administrative Procedure Act requires a preponderance of the evidence standard).

II. LIABILITY

Respondents have appealed the ALJ's Recommended Decision. They raise nineteen separate arguments, challenging the Bureau's authority, the ALJ's holdings with respect to liability, and the recommended relief. I disagree with most of Respondents' arguments, although I agree that it should not be held liable for violations that occurred prior to the date that enforcement authority was transferred to the Bureau.

A. Preliminary arguments

1. Mr. Carnes may be held liable for IA's violations of the CFPA as alleged in Counts III, IV, and VII of the Notice of Charges

Count III alleges that IA's disclosures were deceptive, Count IV alleges that those disclosures were also unfair, and Count VII alleges that IA's use of RCCs was unfair. Each of those counts named not only IA but also Mr. Carnes. Before I address IA's liability with respect to those allegations, I will explain why Mr. Carnes may be held liable.

a. Standard of liability

In *CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016), the court held that an individual may be held liable for a corporation's violations of the CFPA:

> if "(1) he participated directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud along with an intentional avoidance of the truth."

Id. at 1193, quoting *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). In *Gordon*, as well as in other cases brought by the Bureau, courts have held that cases interpreting the FTC Act provide guidance as to when an individual may be held liable under the CFPA. *See*, *e.g.*, *CFPB v. Mortg. L. Grp., LLP*, 366 F. Supp. 3d 1039, 1058 (W.D. Wis. 2018); *CFPB v. NDG Fin. Corp*., No. 15-cv-5211, 2016 WL 7188792, at *17 (S.D.N.Y. Dec. 2, 2016). Indeed, the parties have also relied on FTC Act cases to assess Mr. Carnes' liability. *See* Enforcement Counsel's Answering Brief, Doc. 296 (EC Br.) at 11-13; Doc. 272 at 35-36. I will do so as well.

As the court explained in *FTC v. Amy Travel Services, Inc*. 875 F.2d 564, 574 (7th Cir. 1989), it is not appropriate for an individual to enjoy benefits from violating the FTC Act, but then insulate himself from liability by contending that he did not participate directly in the illegal conduct. Accordingly, the court established a two-part test to determine individual liability for corporate violations. That test is described in detail in *FTC v. Freecom Communications, Inc*, 401 F.3d 1192 (10th Cir. 2005), where the court explained the significance of both parts. Once the FTC has shown that the corporate defendants had violated the FTC Act, "it only had to show [that the individual defendant] had the authority to control [the corporate] defendants to establish its case for injunctive relief against [the individual]." *Id*. at 1205. Thus, if the FTC, or the Bureau, establishes that a corporation has violated the law, and also establishes that an individual has the authority to control the corporation's wrongful acts, the FTC, or the Bureau, is entitled to forward-looking injunctive relief against the individual.

As to the second part of the test, *Freecom* held that:

> to hold an individual personally liable for consumer redress, the FTC must show a heightened standard of awareness beyond the authority to control. This awareness, however, need not rise to the level of an intent to defraud. In particular, the FTC need only show the individual had or should have had knowledge or awareness of defendants' misrepresentations. The FTC may fulfill its burden by showing the individual had actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.

Id. at 1207. Thus, to obtain monetary relief from an individual defendant, the FTC or the Bureau must make an additional showing: that the individual knew, or should have known of, the corporate defendant's wrongful acts. As the court explained in *Amy Travel*, this means that the FTC (or the Bureau) must show that "the individual had some knowledge of the practices." 875 F.2d at 573. But if the Bureau can show that the individual knew of the acts or practices that constitute the violation of the CFPA, that is, the elements of the violation, the Bureau need not also show that the individual knew that the acts or practices violated the law. *See id.* at 575.

b. Mr. Carnes is liable for IA's unfair and deceptive practices

The ALJ held that Mr. Carnes satisfied the first part of the test – participation in, or authority to control IA's unlawful conduct – and I agree. As explained above, the evidence shows that Mr. Carnes had ultimate control over all aspects of IA's business, even though he was not necessarily directly involved in every aspect. *See*, *e.g*., Doc. 172 (Hearing Transcript) at 51 (testimony of Timothy Madsen) ("any large decision [at IA] would have been made by Mr. Carnes"); *id.* at 221 (testimony of James Carnes) ("I had ultimate authority over the company"); *id.* at 228 (testimony of James Carnes) ("Q. As CEO, did you have to approve the loan agreement template? A. Again, as CEO you are ultimately approving everything"); ECX 68 (Deposition Transcript of James Carnes) at 32 ("Q. As the CEO, I assume you had ultimate say over the company's policies and procedures; is that correct? A. Yes.").

With respect to the first part of the test, IA argues that Mr. Carnes did not have the authority to control IA's violations because he "did not draft, edit, or substantively review the loan agreement." Respondents' Opening Appeal Brief (Resp. Br.) at 16; Transcript of Proceedings on Appeal, Dec. 8, 2020 (Appeal Tr.), at 8-9. But this argument focuses only on the "participation" element of the first part of the test. Thus, Respondents have not disputed that Mr. Carnes had control over IA's conduct. *See also* Respondents' Reply Brief in Support of Appeal (Resp. Reply) at 3 n.2 (focusing on who wrote the loan agreement). The fact that Mr. Carnes could control IA's conduct (and, in particular, that he authorized use of IA's loan agreement) is sufficient to satisfy the first part of the test. *See FTC v. AMG Servs., Inc.*, No. 2:12-cv-0536, 2016 WL 5791416, at *6 (D. Nev. Sept. 30, 2016), *aff'd* 910 F.3d 417 (9th Cir. 2018), *cert. granted*, No. 19-508, 141 S. Ct. 194 (2020) ("[a]n individual's position as a corporate officer … is sufficient to show requisite control").

I also agree with the ALJ that Enforcement Counsel has shown that Mr. Carnes had sufficient knowledge to hold him liable for monetary relief. IA offered only one product, short-term consumer loans, and that product was its sole source of revenue. Doc. 172 at 94-95 (testimony of James Carnes). Although Mr. Carnes did not personally draft the loan agreement that IA used for those loans, he approved its use. Doc. 172 (testimony of James Carnes) at 232 ("Q. But isn't it true that they had your approval to implement this loan agreement? … A. Did they have my approval to use the loan agreement? Yes.") Mr. Carnes knew that IA's loan agreement made disclosures as if IA's loans were single-payment loans. Doc. 173 (Hearing Transcript) (testimony of James Carnes) at 50-51 ("A. Are you saying, did I understand that on the – in the TILA box [for a consumer who borrowed $100] that it said, sum of payments was $130? … Yes.") He was aware that, unless a consumer took affirmative action, the loans would not be paid off in a single payment, but would renew, and would continue to renew, until the loans went into auto-workout status. Doc. 172 at 218-220; Appeal Tr., at 10 (Mr. Carnes "was aware of the structure of the loan"). Mr. Carnes also knew that a large portion of IA's loans would renew at least once, Doc. 172 at 222, and that as a result of those renewals, consumers would pay more than the amount disclosed in the loan agreement. ECX 68 at 245 ("Q. And in most cases they would pay substantially more than the amount that's reflected in the total amounts of payments box; is that right? A. They would pay more."). As explained below, I have concluded that IA's loan agreement was deceptive on its face. Because Mr. Carnes' testimony establishes that he was aware of the elements of IA's deceptive conduct – that the loan agreement made disclosures as if the loan were a single payment loan when the loan was actually a multi-payment loan – Mr. Carnes had sufficient knowledge to hold him personally liable for IA's unfair and deceptive practices.

Mr. Carnes also had sufficient knowledge to hold him liable for the unfair acts or practices that resulted from IA's use of RCCs. He testified that he knew what RCCs were, he knew that IA used RCCs, and he knew the circumstances in which IA used RCCs. Doc. 173 at 84-85 (testimony of James Carnes). In particular, he knew that IA used RCCs when consumers revoked ACH authorization and IA was unable to induce payment by any other means. *Id*.

Thus, I conclude that Mr. Carnes had sufficient knowledge to hold him liable for monetary relief as a result of the conduct challenged in Counts III, IV, and VII of the Notice of Charges.

None of the arguments raised by IA convinces me otherwise. IA's central argument is that Mr. Carnes did not know the specific contents of the loan agreement. Resp. Br. at 17; Resp. Reply at 5; Appeal Tr. at 12 (Mr. Carnes reviewed the loan agreement for the first time in connection with the trial of this proceeding). But as explained above, Mr. Carnes had ample knowledge of how IA's loans worked. In particular, he was aware that the disclosures in the loan agreement did not comport with the default repayment process that the vast majority of IA's borrowers experienced. That is the basis of Counts III and IV, and it is sufficient knowledge to hold Mr. Carnes liable for restitution.

Respondents also argue that, because the loan agreement was drafted by an attorney (in 2008), Mr. Carnes was entitled to assume that the agreement complied with all laws, even the CFPA (which was not enacted until 2010). Based on this, Respondents claim that Mr. Carnes did not have sufficient knowledge to hold him liable for IA's violations. Doc. 173 at 27-28 (testimony of IA's vice president, Edward Foster) (the loan agreement was drafted by outside counsel); Resp. Br. at 18, Resp. Reply at 3; Appeal Tr. at 10. While Respondents resist the label, *see* Doc. 172 at 230, this is an advice-of-counsel defense. But no such defense is available here. *See CFPB v. CashCall, Inc.*, No. 15-cv-7522, 2016 WL 4820635, at *12 (C.D. Cal. Aug. 31, 2016) ("'reliance on advice of counsel is not a valid defense on the question of knowledge required for individual liability'"), quoting *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1102 (9th Cir. 2014); *FTC v. J.K. Publ'ns, Inc*. 99 F. Supp. 2d 1176, 1206 (C.D. Cal. 2000) (court held individual defendant liable even though she claimed that she had not read the documents she signed); *Amy Travel*, 875 F.2d at 575 ("reliance on advice of counsel was not a valid defense on the question of knowledge"). The reason for this is that the relevant question is whether Mr. Carnes "had some knowledge of the practices" that harmed consumers, *Amy Travel*, 875 F.2d at 573, not whether he knew that those practices violated the law. *See CFPB v. CashCall*, 2016 WL 4820635, at *12 ("'We have long recognized the common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally'"), quoting *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010). As explained above, there is ample evidence that Mr. Carnes knew that IA's loan agreement misrepresented the amount that consumers were likely to pay, and also knew that consumers were likely to pay more than the amount disclosed unless they took affirmative action. Thus, he was aware of the essential facts that form the basis of the violations of the CFPA alleged in Counts III and IV. It is irrelevant that he may have (incorrectly) believed that the loan agreement complied with the law, and it also irrelevant that he reached this belief because the agreement was drafted by a lawyer.[3] What counts is what he knew would occur, not what he believed regarding the law.

Respondents also argue that Mr. Carnes did not have sufficient knowledge because state regulators reviewed IA's loan agreement as a part of Delaware's annual licensing process. Resp. Reply at 3 & n.3; Appeal Tr. at 10. But just as Mr. Carnes cannot escape liability because a lawyer drafted the loan agreement, he cannot escape liability for the deception in IA's loan agreement merely because it was reviewed by an employee of the Office of the State Bank Commissioner of Delaware. This would be so even if Delaware had reviewed the agreement for compliance with the CFPA, and there is no evidence that it did.

Finally, Respondents argue that it was reasonable for Mr. Carnes to conclude that IA's customers were not deceived because IA had so many repeat customers. Resp. Reply at 4; Appeal Tr. at 8. But this argument assumes its own conclusion – that if a consumer sought a second loan from IA, then that consumer was not deceived. This argument also ignores that IA had a substantial number of customers who were one-time customers. Indeed, there were more than 120,000 customers who borrowed once, but only once, from IA. Doc. 173 (testimony of Robert Hughes) at 158. Even if it

[3] Even if advice of counsel were a valid defense, that defense has been waived by Respondents. Throughout the administrative trial in this matter, they repeatedly asserted attorney-client privilege and refused to permit the disclosure of any advice they were actually given by their outside counsel who drafted the loan agreement, or by IA's in-house general counsel. *See*, *e.g.*, Doc. 172 at 230; Doc. 173 at 20, 22, 27-28, 86, 95. The attorney-client privilege "may not be used both as a sword and a shield." *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc*., 259 F.3d 1186, 1196 (9th Cir. 2001). By repeatedly asserting the privilege, they waived the defense. *See id.*

were proper for Mr. Carnes to assume that repeat customers were not deceived (but see the discussion of repeat customers below), he could not make the same assumption regarding IA's one-time customers. What is relevant is that Mr. Carnes had sufficient knowledge of facts that established that customers were likely to be deceived by IA's loan agreement. Thus, he may be held liable for IA's violations even if there may have been some customers who were not deceived.[4]

Similarly, Respondents argue that Mr. Carnes did not have sufficient knowledge to hold him liable for the RCCs because he was not familiar with how RCCs were disclosed in the loan agreement. Resp. Br. at 18; Resp. Reply at 5. As explained above, the authorization for RCCs was set forth in one sentence of the loan agreement that was buried in the ACH authorization. But Mr. Carnes was aware that IA used RCCs, and he knew the circumstances under which they were used. Doc. 173 at 84-85. That is, he knew that IA used RCCs in situations where consumers had withdrawn ACH authorization, presumably to block IA from gaining access to their bank accounts, and that IA used the RCCs to evade that block. While Mr. Carnes asserts that as CEO he was not familiar with the details of IA's loan agreement, I conclude that he was at least recklessly indifferent to those details, and that is sufficient to hold him liable. *Amy Travel*, 875 F.2d at 574.

2. The Bureau's TILA and EFTA claims are not time-barred

Respondents contend that both TILA and EFTA impose a one-year statute of limitations on Bureau enforcement actions and that as a result, the Bureau's TILA and EFTA claims (Counts I and V) are time-barred. Resp. Br. at 9, citing 15 U.S.C. § 1640(e) (TILA) and 15 U.S.C. § 1693m(g) (EFTA). Respondents claim that these one-year limitations periods also apply to the two CFPA claims brought under 12 U.S.C. § 5536(a)(1)(A) (Counts II and VI) that derive from IA's violations of TILA and EFTA. These arguments fail because both 15 U.S.C. § 1640(e) and 15 U.S.C. § 1693m(g) specify that the prescribed one-year statute of limitations applies only to actions "under this section." Administrative enforcement actions of TILA and EFTA are governed by different sections of those statutes. *See* 15 U.S.C. § 1607 ((TILA); *id.* § 1693*o* (EFTA); *see also BCFP v. Citizens Bank, N.A.*, No. 20-cv-044, 2020 WL 7042251, at *6 (D.R.I. Dec. 1, 2020) ("In sum, TILA's plain language dictates that § 1640 governs civil suits brought by individuals and state attorneys general, while § 1607 provides the cause of action for federal enforcement agencies such

[4] Respondents claim that Mr. Carnes did not receive customer complaints. Resp. Reply at 4; *see* Doc. 172 (testimony of James Carnes) at 233 ("Q. So you were unaware personally of any complaints? A. I wasn't aware of complaints."). However, when Enforcement Counsel sought to probe whether consumer complaints had been brought to Mr. Carnes attention, Respondents asserted the attorney-client privilege and refused to provide any information. Doc. 173 (testimony of Edward Foster) at 29-31. Respondents may not argue that Mr. Carnes never received consumer complaints when they refuse to provide necessary evidence to support or refute that argument. In any event, although knowledge of consumer complaints may be probative of an individual's knowledge, there are other ways to establish knowledge, and there is ample evidence here showing that Mr. Carnes was well aware of the essential facts of IA's violations. *See also FTC v. NHS Sys., Inc.*, 936 F. Supp. 2d 520, 535 (E.D. Pa. 2013) (individual defendant, who may not have had actual knowledge of misrepresentations, was nonetheless liable because of his degree of involvement in corporate affairs).

as the CFPB."). Respondents do not claim that either § 1607 or § 1693*o* restricted Enforcement Counsel's ability to bring any of the claims asserted in the Notice of Charges.[5]

Even if the one-year statute of limitations in § 1640(e) or § 1693m(g) somehow applied to Bureau enforcement actions notwithstanding the clearly contrary statutory text, the Bureau's related claims (Counts II and VI), which are brought under 12 U.S.C. § 5536(a)(1)(A), would not be affected. Actions brought by the Bureau are governed by the CFPA's general three-year limitations period, *id.* § 5564(g)(1), unless those actions are brought "solely under" one of the other laws (such as TILA or EFTA) that the Bureau enforces, *id.* § 5564(g)(2)(A). But actions brought under § 5536(a)(1)(A) (such as Counts II and VI), do not arise "solely under" TILA or EFTA. Accordingly, these claims are governed by the CFPA's general three-year limitations period, *see id.* § 5564(g)(1).

3. The Bureau satisfied the statute of limitations with respect to Mr. Carnes

Respondents argue that the CFPA's three-year statute of limitations bars Enforcement Counsel's claims against Mr. Carnes because the Bureau either discovered or should have discovered Mr. Carnes' violations more than three years before the filing of the Notice of Charges.[6] I disagree. Like the ALJ, I find that Respondents have failed to demonstrate that there is a genuine question whether the Bureau discovered or with due diligence should have discovered Mr. Carnes' violations three years before the Notice of Charges was filed on November 18, 2015. As a result, I do not need to address the question of whether the CFPA's statute of limitations begins to run when a reasonably diligent agency plaintiff could have discovered a violation as opposed to when the Bureau actually discovered the violation.

Under 12 U.S.C. § 5564(g)(1), "no action may be brought under [the CFPA] more than 3 years after the date of discovery of the violation to which an action relates." Here, as discussed more fully above, Mr. Carnes' violations of the CFPA were based on his liability for IA's deceptive and unfair conduct. To obtain consumer redress for Mr. Carnes' violations of the CFPA on this theory, the Bureau had to prove that "(1) he participated directly in the deceptive acts or had the authority to

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[5] Respondents have not, for instance, claimed that relief sought pursuant to Counts I and II is restricted by 15 U.S.C. § 1607(e). I find that Respondents have intentionally waived any such arguments by failing to present them either to the ALJ or in their appeal. A finding of waiver is particularly appropriate because Respondents have long been on notice that § 1607(e) could potentially be relevant, *see, e.g.*, Doc. 193 at 1; Doc. 199 at 1, and because any effect of § 1607(e) might have depended on factual matters that, due to Respondents' waiver, were not addressed by the ALJ or by the parties on this appeal, *see, e.g.*, 15 U.S.C. § 1607(e)(3)(C) (setting time limitation on certain relief except with respect to "a willful violation which was intended to mislead the person to whom credit was extended").

[6] Respondents have not identified any evidence concerning the Bureau's discovery of IA's unfair practices in connection with RCCs, let alone Mr. Carnes' knowledge or participation in that conduct. As a result, even if I accepted Respondents' arguments regarding the Bureau's discovery of Mr. Carnes' violations related to the loans' costs, Mr. Carnes would still be liable for IA's use of RCCs. Mr. Carnes would also be liable for restitution (and the related injunctive relief) for all of IA's unfair and deceptive conduct that occurred after November 18, 2012.

control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Gordon*, 819 F.3d at 1193; *see also* Resp. Br. at 17.

Because it is undisputed that the Bureau could not recover from Mr. Carnes (or obtain injunctive relief requiring Mr. Carnes to cooperate in identifying consumers entitled to redress) without proving participation in or authority over the unlawful conduct as well as his knowledge, recklessness, or intentional avoidance of the truth, I find that these are important and necessary elements of the "violation" that must be discovered before the statute of limitations clock begins to run. *See Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648-49 (2010) (holding that scienter is a fact constituting a § 10(b) securities violation because it is "an important and necessary element" of such a violation without which "[a] plaintiff cannot recover"); Doc. 249 at 19 ("[T]he CFPB claims against Respondent Carnes could not have accrued until the CFPB discovered evidence that he participated directly in or had actual knowledge of the misrepresentations involved, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud and intentionally avoided learning the truth.").

Respondents have not identified any reason to suggest that the Bureau discovered, or that a reasonably diligent agency would have discovered, Mr. Carnes' violations of the CFPA before November 18, 2012 (*i.e.* three years before the filing of the Notice of Charges). Instead, Respondents identify evidence that pertains, at most, to the discovery of *IA*'s violations. Respondents point to five pieces of evidence, one concerning the Bureau's focus on the payday lending industry, one about the Office of Enforcement's general investigatory policies, and three related to the Bureau's awareness of consumer complaints about IA's conduct. *See* Resp. Br. at 7-8; *accord* Appeal Tr. at 15-16. Because Respondents failed on appeal to identify a genuine factual issue concerning the Bureau's discovery of Mr. Carnes' violations, I find that Mr. Carnes' affirmative statute of limitations defense fails.

In their brief to the ALJ (but not on appeal), Respondents asserted that the Bureau obtained IA's loan agreement and learned that Mr. Carnes' was IA's CEO (or should have done so) before November 2012. Doc. 239 at 9-10. Even if these arguments had not been waived for failure to press them on appeal, they do not suggest that the Bureau discovered (or should have discovered) Mr. Carnes' liability, *i.e.*, his participation in, or knowledge of, IA's violations more than three years before the filing of the Notice of Charges. Indeed, as the ALJ explained (and Respondents have failed to dispute in this appeal), Mr. Carnes' individual liability "would not have been evident merely from the loan agreement, Carnes' title as CEO of the company, and complaints against Integrity Advance." Doc. 249 at 24. Instead, such a conclusion "required further documentation and investigational testimony." *Id.*

Under the CFPA, the Bureau obtains that kind of documentation and investigational testimony through administrative subpoenas. Here, the Bureau sent IA an administrative subpoena on January 7, 2013. Doc. 234, ¶ 3. IA provided an initial, partial production on October 25, 2013, and a largely complete production in December 2013. *Id.* ¶ 5. Enforcement counsel conducted investigational hearings in June 2014. *Id.* ¶¶ 7-8. As a result, I find that even based on their arguments to the ALJ, IA failed as a matter of law to show that the Bureau discovered Mr. Carnes' violation before November 18, 2012. I likewise find that Respondents did not show that a reasonably diligent agency in the Bureau's position would have discovered Mr. Carnes' violations

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before November 18, 2012. After all, even if the Bureau had sent IA an administrative subpoena as fast as possible – for instance, immediately after an enforcement attorney accessed complaints concerning IA's conduct on March 29, 2012, *id.* ¶ 2 – the Bureau would not have even had any documents relevant to Mr. Carnes liability until 2013 given the time it took IA to respond to the Bureau's administrative subpoena.

4. Ratification provides Respondents with an appropriate remedy for the CFPA's unconstitutional for-cause removal provision

As is apparent from the conclusions I have reached here, I ratify the Bureau's decision to file the Notice of Charges and to prosecute this action. *See Guedes v. BATFE*, 920 F.3d 1, 13 (D.D.C. 2019). This provides Respondents with an appropriate remedy for the CFPA's unconstitutional removal restriction. *See FEC v. Legi-Tech, Inc*., 75 F.3d 704, 708 (D.C. Cir. 1996).

Respondents cite *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994), and argue that I cannot ratify this action because, if the Bureau were to bring this action now, the statute of limitations would have expired. This is incorrect for three reasons. As explained above, the statute of limitations in the CFPA is satisfied once the Bureau has "brought" an action. 12 U.S.C. § 5564(g)(1). Nothing in the CFPA's statute of limitations suggests that it can be satisfied only if the action is brought at a time when the Bureau is headed by a Director who can be removed by the President at will. Here, the Bureau brought an action against Respondents when it filed the Notice of Charges in 2015. Because the Bureau has already satisfied the statute of limitations, my ratification is timely.

Second, if the Bureau did not satisfy the statute of limitations when it filed the Notice of Charges, then the statute of limitations has not yet expired. Pursuant to the CFPA, the limitations period is triggered by the date that the Bureau discovers the violation. By tying the limitations period to the discovery of the violation, Congress indicated that it did not want violations of the CFPA to be placed beyond the reach of the Bureau's diligent enforcement efforts. Respondents' argument flies in the face of Congress's will. Respondents essentially contend that the Bureau was constitutional enough to discover their violations and thereby begin the ticking of the statute of limitations clock, but not constitutional enough to issue a Notice of Charges that would satisfy the limitations period. There is no reason to believe that Congress intended this kind of heads-I-win, tails-you-lose result. Accordingly, if the statute of limitations was not satisfied when the Bureau issued the Notice of Charges, then the limitations period has yet to expire, and my ratification is timely.

Third, the CFPA's statute of limitations expressly states that the limitations period applies "[e]xcept as otherwise permitted … by equity." 12 U.S.C. § 5564(g)(1). So even if the statute of limitations might have otherwise run, the limitations period should be equitably tolled. *See Holland v. Fla.*, 560 U.S. 631, 649 (2010) (holding that a party is entitled to equitable tolling if it pursued its rights diligently and some extraordinary circumstance prevented timely filing). As I have explained above, the Bureau has pursued its rights diligently. Indeed, it filed a timely Notice of Charges. And, to the extent that the filing did not satisfy the statute of limitations, that was only because of an extraordinary circumstance – the unconstitutionality of the for-cause removal provision, a circumstance over which the Bureau had no control.

Respondents argue that the equitable tolling of the statute of limitations would be to their detriment. Resp. Br. at 3. But "statutes of limitations are designed to insure fairness to defendants by preventing the revival of stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise." *Johnson v. Ry. Express Agency, Inc*., 421 U.S. 454, 473 (1975) (Marshall, J., concurring in part, dissenting in part). None of those purposes would be served here since Respondents have long had notice of the Bureau's claims. Accordingly, if the statute of limitations has not been satisfied, but has nonetheless expired, it should be equitably tolled.

Respondents cite the district court's decision in *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018), *vacated and remanded for further proceedings*, No. 18-2743, 2020 WL 6372988 (2d Cir. Oct. 30, 2020), and argue that ratification would be impossible because the Bureau's structure was unconstitutional at the time of the filing of the Notice of Charges. Resp. Br. at 4. But the district court in *RD Legal* reached that decision because it concluded that, as a result of the for-cause removal provision, the entire CFPA should be struck down. The Supreme Court rejected this conclusion in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). Indeed, it held that even though the for-cause removal provision was unconstitutional (and severable from the remainder of the CFPA), "[t]he provisions of the [CFPA] bearing on the [Bureau's] structure and duties remain fully operative." *Id.* at 2209 (emphasis added); *see BCFP v. Citizens Bank, N.A*., No. 20-cv-044, 2020 WL 7042251, at *8 (D.R.I. Dec. 1, 2020) ("This Court thus interprets the Supreme Court's use of the word 'structure' to refer to attributes of the CFPB's top brass, not deeper issues with the authority or makeup of the Bureau as a whole."). That is, despite the unconstitutional removal restriction, the Bureau had the authority to file the Notice of Charges.

5. Respondents have not been denied due process

Respondents make two arguments in which they contend they were denied due process. First, they argue that they were denied due process when the ALJ refused to grant their request for additional discovery. Second, they contend that they were denied due process because the ALJ did not conduct a new hearing with witnesses and an opportunity for cross-examination. I reject both of those arguments.

a. Respondents' request for issuance of a subpoena

First, on August 23, 2019, Respondents filed a request with the ALJ pursuant to Bureau Rule 208, 12 C.F.R. § 1081.208, seeking to have her issue a subpoena directed to the Bureau that required the production of:

> 1) All consumer complaints received by the Bureau from July 21, 2011, to November 18, 2012, regarding IA or Mr. Carnes;
>
> 2) Records of all communications (from July 21, 2011, to November 18, 2012) between anyone employed by the Bureau and any other person regarding IA or Mr. Carnes;
>
> 3) Records of all internal Bureau communications (from July 21, 2011, to November 18, 2012) regarding IA or Mr. Carnes;

4) Any document drafted by any Bureau employee regarding IA or Mr. Carnes.

Doc. 232. Respondents argue that they sought this information in support of their contention that, by the time the Bureau filed its Notice of Charges, the statute of limitations had expired. Appeal Tr. at 17, 43. They contend that their proposed subpoena was narrowly tailored, and that pursuant to the Bureau's rules, the ALJ was required to issue the subpoena unless the subpoena was "unreasonable, oppressive, excessive in scope, or unduly burdensome." Resp. Br. at 10.

As explained above, I have concluded that the statute of limitations set forth in the CFPA applies to all the violations alleged in the Notice of Charges. On June 2, 2014, and on March 16, 2015, the Bureau and IA entered into tolling agreements. Docs. 200, 201. Because enforcement authority was not transferred to the Bureau until July 21, 2011, and because the Bureau entered into the tolling agreements less than three years after that date, the statute of limitations did not expire with respect to IA. However, the Bureau and Mr. Carnes never entered into a tolling agreement. So the issue is whether the ALJ's denial of Respondents' subpoena request denied them due process with respect to their argument that the statute of limitations had expired as to Mr. Carnes.

Bureau Rule 206, 12 C.F.R. § 1081.206, seeks "to ensure that respondents have prompt access to the non-privileged documents underlying enforcement counsel's decision to commence enforcement proceedings, while eliminating much of the expense and delay often associated with pre-trial discovery in civil matters." 77 Fed. Reg. 39058, 39059 (June 29, 2012). Rule 206 therefore required Enforcement Counsel to make available to Respondents those documents obtained by the Bureau's Office of Enforcement from outside sources in connection with its investigation of Respondents. Enforcement Counsel state (and Respondents do not dispute) that they complied with Rule 206 and provided Respondents all consumer complaints and all external correspondence upon which Enforcement Counsel might have relied, regardless of which office in the Bureau initially received those documents. EC Br. at 23. Nonetheless, Respondents now speculate that other offices at the Bureau might have received consumer complaints or other documents regarding IA and Mr. Carnes, that these documents might never have come to the attention of the Office of Enforcement, and that if these other offices had received these documents, this might have triggered the running of the statute of limitations.

Respondents' request for additional discovery is based on far too many assumptions. They ask me to assume: 1) that there are consumer complaints (or other external communications) regarding IA or Mr. Carnes that were received by the Bureau but that never came to the attention of the Office of Enforcement (and thus were not turned over to Respondents pursuant to Rule 206); 2) that these documents contained information regarding Mr. Carnes' role as the CEO of IA; and 3) that the Bureau received these documents prior to November 18, 2012 (*i.e.*, more than three years before the Bureau filed its Notice of Charges). Even assuming that there are complaints or other external documents that never came to the attention of Enforcement Counsel, I am unwilling to assume that these documents might have contained the sort of information regarding Mr. Carnes that would be relevant to Respondents' statute of limitations argument. Pursuant to Rule 206, Respondents have already received complaints and other communications that came from external sources. And yet, Respondents have not pointed to anything in those documents to support the claim that the Bureau did discover or should have discovered Mr. Carnes' violations (as opposed to IA's violations) before November 18, 2012. There is thus no reason for me to assume that any documents responsive to the first two specifications of Respondents' proposed subpoena, documents that are of the same character as the documents that Respondents have already received, would be relevant to their statute of limitations argument. Respondents' request flouts the purpose of Rule 206. Accordingly, these two specifications are excessive in scope and unreasonable.

The third and fourth specifications of Respondents' proposed subpoena seek internal Bureau communications and documents. Pursuant to Bureau Rule 206(b), as part of its initial production to Respondents, the Office of Enforcement was not required to provide privileged documents, internal memoranda, other notes or writings prepared by Bureau employees, or documents subject to the work-product privilege. Respondents do not dispute that the documents requested by the third and fourth specifications are exempt from disclosure under Rule 206. Instead, they argue that the exemptions in Rule 206 do not apply to documents requested by subpoena pursuant to Rule 208, and that even if the documents are exempt, the ALJ should have required Enforcement Counsel to provide a privilege log for those documents. Resp. Br. at 11.

As the Bureau explained when it issued Rule 206, the purpose of that rule is to:

> provide the respondent with access to, in effect, the documents they would likely seek and obtain in the course of a protracted discovery period soon after service of the notice of charges. … By automatically providing respondents with the factual information gathered by the Office of Enforcement in the course of the investigation leading to the institution of proceedings, this provision helps ensure that respondents have a complete understanding of the factual basis for the Bureau's action and can more accurately and efficiently determine the nature of their defenses or whether they wish to seek settlement. Because this approach renders traditional document discovery largely unnecessary, it will lead to a faster and more efficient resolution of Bureau administrative proceedings, saving both the Bureau and respondents the resources typically expended in the civil discovery process.

77 Fed. Reg. 39058, 39070 (June 29, 2012). By seeking a subpoena for documents that do not have to be disclosed under Rule 206, Respondents seek to thwart the purpose of that rule. Such a subpoena undermines the goal of a faster and more efficient resolution of the administrative proceeding. Thus, to the extent that a respondent seeks issuance of a subpoena to obtain from Enforcement Counsel documents that are specifically protected from disclosure by Rule 206, that subpoena is "excessive in scope" pursuant to Rule 208, and a request for issuance of such a subpoena is properly denied.

In connection with their request for a subpoena, Respondents also requested that, if the ALJ were not willing to issue a subpoena, she should require Enforcement Counsel to provide a list of withheld documents. Resp. Br. at 11-12. The ALJ denied that request because she concluded that requiring Enforcement Counsel to produce such a list would be "an unnecessary and dilatory exercise." Doc. 238 at 9. I agree. Bureau Rule 206(c) states that the administrative law judge "may require the Office of Enforcement to produce a list of documents or categories of documents" that were not provided to the respondent in connection with the disclosures required by Rule 206. It is not clear to me whether Respondents' request is even appropriate when it is made not at the time Enforcement Counsel complied with Rule 206, but in conjunction with a meritless request for a subpoena pursuant to Rule 208. In any event, the ALJ correctly denied the request because there is no question that the documents requested by specifications 3 and 4 are privileged. Respondents claim that if Enforcement Counsel provided the date of each of the requested documents, this would be relevant to when the Bureau discovered Respondents' violations. Resp. Br. at 11. But disclosure of the date on which documents responsive to specifications 3 and 4 were created would not advance Respondents' argument regarding when the Bureau should have discovered Mr. Carnes' role in connection with IA's violations. Nor would it advance this argument even if Respondents were able to show that the Bureau had access to IA's loan agreement prior to November 2012, *see* Resp. Br. at 11 n.9, because the loan agreement does not reveal Mr. Carnes' role. Accordingly, the ALJ did not err when she denied IA's request for issuance of a subpoena, and Respondents were not thereby denied due process.

b. Respondents' request for a second evidentiary hearing

On May 29, 2019, I remanded this matter to the ALJ "for a new hearing and recommended decision in accordance with Part 1081 of the Bureau's Rules." Doc. 216. I further directed that the ALJ was to "seek submissions from the parties regarding the conduct of further proceedings." *Id.* The ALJ ultimately resolved this matter based on the parties' cross motions for summary disposition. However, Respondents argue that they were denied due process because the ALJ did not conduct a second evidentiary hearing "with the opportunity for both sides to present evidence and examine witnesses." Resp. Br. at 12; *see* Appeal Tr. at 44. (Respondents had an evidentiary hearing before Judge McKenna, and the transcript of that hearing is part of the record of this proceeding. *See* Docs. 172-174.) Respondents contend that *Lucia v. SEC*, 138 S. Ct. 2044 (2018), entitles them to such a hearing. Resp. Br. at 12-13.

In *Lucia*, the Court held that the appropriate remedy for an administrative adjudication conducted by an administrative law judge who had not been appointed in a manner consistent with Article II of the Constitution was a new hearing before a properly appointed official. 138 S. Ct. at 2055. But the Court did not indicate the nature of the new hearing that the properly appointed official was required to conduct. *See Kornman v. SEC*, 592 F.3d 173, 181-82 (D.C. Cir. 2010) (upholding SEC's use of summary disposition as consistent with statutory requirement for an "opportunity for hearing"). Indeed, the Constitution does not automatically require an in-person evidentiary hearing whenever an agency such as the Bureau makes an adjudicative determination. *See Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010). Rather, "[a]dministrative summary judgment is not only widely accepted, but also intrinsically valid." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994). Respondents received the process due under the Constitution: notice of the charges against them and a meaningful opportunity to be heard before an impartial tribunal. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Nor did my order require the ALJ to conduct the sort of hearing that Respondents seek. It is true that the hearing Respondents seek is provided for by Bureau Rules 300-306, 12 C.F.R. §§ 1081.300-306. But my order directed the ALJ to "seek submissions from the parties regarding the conduct of further proceedings." Doc. 216. I thus implicitly left it to her to determine the scope of further proceedings, so long as those proceedings were consistent with the Bureau's rules. Those rules permit an administrative law judge to resolve a proceeding on motions for summary disposition. 12 C.F.R. § 1081.212(c). Here, both Respondents and Enforcement Counsel filed such motions. *See* Docs. 272, 275. A motion for summary disposition may be supported by "documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position." 12 C.F.R. § 1081.212(d). Thus, it was wholly appropriate, and consistent with Bureau Rule 212(d), for the ALJ to consider documentary evidence from the proceedings in this matter held before Administrative Law Judge McKenna. Respondents complain that the ALJ was not able to consider the demeanor of the witnesses who testified at the evidentiary hearing held before Judge McKenna. Resp. Br. at 13-14. Nothing in the Bureau's rules required that she do so. *Puerto Rico Aqueduct*, 35 F.3d at 606 ("Due process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way."). In any event, Respondents have not raised any argument that calls the veracity of any witness into question.

B. IA violated TILA (Counts I and II)

As relevant here, TILA requires that before closed-end credit is extended, the creditor must disclose to the consumer the "finance charge," and the "total of payments" (which is the sum of the amount the consumer financed and the finance charge). 15 U.S.C. § 1638(a)(2)(A), (3), (5). Accurate disclosure of the finance charge and total of payments is foundational to the Congressional scheme: A primary purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uniformed used of credit." *Id.* § 1601(a).

Regulation Z specifies that these required "disclosures shall reflect the terms of the legal obligation between the parties." 12 CFR § 1026.17(c)(1). The Bureau's official interpretation of Regulation Z further clarifies that "[t]he disclosures shall reflect the terms to which the consumer and creditor are legally bound as of the outset of the transaction." Comment 17(c)(1)-1.

In this case, IA disclosed the finance charge and the total of payments as if consumers were obligated to repay the loans in full by the consumer's next pay date. I find that consumers were not under any such obligation.

Under IA's contract, immediate repayment was purely optional. The contract says that the consumer "may choose" either the "option" of fully repaying the loan by her next pay date "OR" the "option" of "renew[ing] [the] loan," which meant "extend[ing]" the payment due date until the consumer's following pay date. When consumers entered into an agreement with IA, they were not obligated to immediately repay the loan in full. Instead, consumers would only have that obligation if they affirmatively chose the immediate repayment option by contacting IA three business days before the payment due date. As a result, IA's TILA disclosures did not "reflect the terms of the legal obligation between the parties," 12 C.F.R. § 1026.17(c)(1), "as of the outset of the transaction," comment 17(c)(1)-1. *See United States v. Moseley*, 980 F.3d 9, 26 (2d Cir. 2020) (affirming TILA conviction because the evidence showed that "the 'total of payments' disclosure included just one finance charge in addition to the loan principal amount … notwithstanding Moseley's knowledge (and in fact, his intention) that, unless the borrower acted, the total she would pay would amount to much more than a single finance charge").[7]

[7] At argument, Respondents attempted to distinguish *Moseley* by claiming that the rest of IA's contract clearly disclosed the consumer's obligations. Appeal Tr. at 15. But even if that were true

Respondents argue that IA's TILA disclosures were lawful because "consumers had a legal obligation to pay the loan in full on the Payment Due Date or to set up an alternative payment option, including electing to renew the loan, by contacting IA." Resp. Br. at 19. This argument is wrong. Consumers did not have a legal obligation to pay the loan in full on the payment due date because, as Respondents concede, unless consumers took affirmative action, IA automatically renewed the loans and deducted multiple payments from their accounts. Thus, consumers' legal obligation was to pay the loan according to the contractually-defined renewal and auto-workout schedule. Under TILA therefore, IA was required to provide consumers with disclosures that reflected consumers' ultimate legal obligation to complete repayment of the loan by the end of the renewal and auto-workout schedule. Contrary to Respondents' suggestion, Resp. Br. at 20, disclosures based on the full renewal and auto-workout term would not reflect consumers' "post-consummation choices," but rather consumers' legal obligation at the time loans were issued. *See also Moseley*, 980 F.3d at 27 (rejecting similar argument).

Allowing IA to make disclosures that reflected consumers' option to repay the loan immediately would neuter TILA's requirements that creditors prominently disclose a closed-end loan's finance charge and total payments. After all, closed-end loans commonly permit a consumer to repay the loan ahead of schedule, often without a penalty for prepayment. *See, e.g.*, 12 C.F.R. § 1026.18(k) (requiring disclosures about prepayment of closed-end loans). On Respondents' theory, lenders who offer consumers a 30-year home mortgage with a prepayment option would only need to disclose a tiny fraction of the finance charge and total payments that consumers are obligated to repay.

To the extent that there were any doubt about whether consumers had a legal obligation to immediately repay the loans based on the terms of the contracts alone, the undisputed evidence concerning the parties' course of conduct removes it. Most significantly, Respondents admitted in their answer "that unless a consumer contacted Integrity Advance *to change the terms of the loan* – through one of several available means – Integrity Advance renewed the consumer's loan." Doc. 21, at ¶ 29 (emphasis added); *accord id.* ¶ 30 (Respondents admit that "$50 would be automatically applied to a consumer's loan principal after four loan renewals, unless a consumer contacted Integrity Advance – through one of several available means – *to change the terms of payment*." (emphasis added)). *See, e.g.*, *AT&T Corp. v. Lillis*, 970 A.2d 166, 172 (Del. 2009) ("It is hornbook law that the contracting parties' course of conduct may be considered as evidence of their intended meaning of an ambiguous contractual term. In this case, that course of conduct included the undisputed fact that AT&T made certain admissions in its original answer, which it later withdrew."). Consistent with this admission, Respondents do not point to any evidence to suggest that IA could or did treat consumers as having an obligation to immediately repay the loans. Unless a consumer affirmatively chose to repay her loan right away, IA would not debit the consumer's account for the full amount of the loan. Nor would IA treat the consumer as if she had breached the agreement for failing to either repay the loan or affirmatively renew the loan. Indeed, the first repayment option that IA identified for consumers in their welcome was: "**YOU CAN LET THE LOAN AUTOMATICALLY RENEW**." Doc. 274A at 24. Instead, as Respondents concede in their brief on appeal, the contract "informed consumers that their loans would be automatically

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(and it is not, for the reasons discussed in the next section), the alleged clarity of the remainder of IA's contract is irrelevant to whether IA's mandatory TILA disclosures were accurate.

renewed if they failed to select a payment option, and … allowed consumers to decline renewals ….” Resp. Br. at 21.

Accordingly, I find that IA's disclosures violated TILA as implemented by Regulation Z. Because IA is a covered person,[8] I find that IA also violated 12 U.S.C. § 5536(a)(1)(A) by providing consumers disclosures that violated Federal consumer financial law.

C. Through IA's use of the loan agreement, IA and Mr. Carnes engaged in deceptive practices (Count III)

Under the CFPA, "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." *Gordon*, 819 F.3d at 1192 (quotation marks omitted); *see also id.* at 1192 n.7.

Here, the ALJ concluded that IA's loan agreement was deceptive as a matter of law because it was likely to mislead reasonable consumers about how much the loans cost. Doc. 293, at 40-41. The loan agreement's TILA disclosures identified the total of payments that applied only to those consumers who affirmatively chose, at least three days before the first payment due date, to pay the loan in full. *Id.* at 8 ¶¶ 37, 38, 46. But neither in the TILA disclosures nor elsewhere in the loan agreement did IA disclose to consumers how much they would have to pay under the loan's default payment schedule pursuant to which IA made ACH withdrawals according to the auto-renewal and auto-workout process. *Id.* at 8, ¶ 47. As the Ninth Circuit recently concluded in affirming summary judgment on the FTC's deception claim in a case involving a very similar loan agreement, a reasonable consumer who received the loan agreement "might expect to pay only" the amount listed in the "total of payments." *FTC v. AMG*, 910 F.3d at 423 (2018); *cf. also Moseley*, 2020 WL 6437737, at *12 ("[A] jury could rationally have found that Moseley's "total of payments" disclosure of just the loan principal plus one finance charge – despite the fact that no such payment was actually scheduled – was inaccurate and misleading.").

On appeal, Respondents challenge the ALJ's deception conclusion in three ways.

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[8] In a two-sentence paragraph, Respondents assert that they were not covered persons "during the period of the CFPB's authority," by which they mean the period after the CFPA took effect but before the Senate confirmed Richard Cordray as the Bureau's first director in July 2013. Resp. Br. at 14. This argument has been waived. To the extent that this drive-by assertion is not waived, I reject it. The definition of covered person became effective on July 21, 2010, and the prohibition on unfair, deceptive, and abusive acts or practices by covered persons took effect on July 21, 2011. *See* 12 U.S.C. § 5301 note (setting the general effective date of the Dodd-Frank Act that is applicable to 12 U.S.C. § 5481's definition of covered person); *id*. § 5531 note (providing that subtitle C of the CFPA, which includes 12 U.S.C. §§ 5531, 5536's prohibitions on unfair, deceptive, or abusive acts and practices would take effect on the designated transfer date); 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010) (establishing July 21, 2011 as designated transfer date). Accordingly, as of July 21, 2011, Respondents were covered persons subject to the CFPA's requirements and restrictions, including the prohibitions on unfair and deceptive acts or practices.

First, they say that Enforcement Counsel failed to establish as a matter of law that IA's misrepresentations about the full cost of the loans were material to consumers. In support of this argument, Respondents note that Enforcement Counsel did not present any extrinsic evidence of materiality. Resp. Br. at 21-22. But Respondents' argument misunderstands the law of materiality.[9] A misrepresentation is "material if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). Not surprisingly, the FTC and the courts have long treated misrepresentations about how much a product or service costs as presumptively material. *See, e.g.*, FTC Policy Statement on Deception, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 1984 WL 565319, at *49; *In re Sanctuary Belize Litig.*, Civ. No. 18-3309, 2020 WL 5095531, at *11 (D. Md. Aug. 28, 2020); *accord FTC v. Freecom*, 401 F.3d at 1203 (10th Cir. 2005) ("Misrepresentations concerning anticipated income from a business opportunity generally are material and likely to mislead consumers because such misrepresentations strike at the heart of a consumer's purchasing decision."). Where the presumption of materiality applies, additional evidence of materiality is unnecessary. *See* FTC Policy Statement on Deception, 1984 WL 565319, at *49-50; *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992). I find that the application of this presumption was particularly appropriate here because IA's misrepresentation concerned a nearly $700 discrepancy in the total cost of a $300 loan. Accordingly, Enforcement Counsel was not required to provide additional evidence to prove that IA's misrepresentation was material.

Respondents also attempt to rebut the presumption of materiality by noting that IA had repeat customers. Resp. Br. at 22-23. But as the court explained in *FTC v. AMG*, "[i]t is equally plausible that the repeat borrowers were just as confused as those taking out their first loans." 910 F.3d at 425; *see also* discussion below. Indeed, Respondents have no evidence that a cost difference of several hundred dollars would somehow be less important to the decision of a repeat borrower. After all, materiality does not require proof that, but for the misrepresentation, no consumer would ever purchase a product. Instead, the question is whether the misrepresentation was likely to affect consumer behavior. The existence of some consumers willing to repay more than $1000 in order to borrow $300 does not mean that price is irrelevant to IA's borrowers, even to repeat borrowers. All it shows is that *some* consumers were willing to pay that price.

Second, Respondents dispute, in passing, the ALJ's conclusion that the net impression of the loan agreement was deceptive as a matter of law. They claim that IA "took steps" to ensure consumers understood the loan, and that there was "ample other evidence" establishing a genuine issue of fact on this issue. Resp. Br. at 22. But Respondents' brief on appeal did not specify the "steps" or the "evidence" on which Respondents hoped to rely, citing instead pages of argument that it made to the ALJ. To the extent that Respondents have not waived this argument, I reject it. As the Ninth Circuit explained in *AMG*, "the TILA box suggested that the value reported as the 'total of payments' … would equal the full cost of the loan," but in fact, "under the default terms of the loan, a consumer would be required to pay much more." 910 F.3d at 423. None of the steps or evidence Respondents identified in the proceeding before the ALJ could have even arguably corrected that misimpression. *See* Doc. 272 at 9-11. Indeed, the closest IA came to disclosing to consumers that,

[9] Notably, Respondents failed in their opening brief to specifically identify *any* basis to rebut the presumption of materiality, instead citing to various pages of their briefs to the ALJ. Resp. Br. at 21-22.

as a result of the loan's default terms, consumers "would be required to pay much more" than the amount disclosed in the total of payments box was a generic statement in the loan agreement in all capital letters that "Additional fees may accrue if the loan is refinanced or 'rolled over.'" Doc. 293 at 9, ¶ 50. But as the ALJ pointed out (and Respondents have failed to meaningfully dispute, *see* Appeal Tr. at 46-47) this disclosure "did not clearly set forth what those additional fees would be for a loan that followed the default renewal procedure or explain how a reasonable consumer was to calculate these additional fees." Doc. 293 at 38. Even worse, this disclosure was itself "misleading" because it "present[ed] the accrual of additional fees upon renewal as a possibility rather than the certainty that it was, further contributing to the overall impression that consumers could expect to pay only the 'Total of Payments' disclosed." *Id.*

Finally, Respondents contend that because IA had repeat customers, this shows that the loan agreements would not have misled reasonable consumers. This misstates the standard for proving deception. To prove that an act or practice is deceptive, the Bureau did not need to prove that every consumer was, in fact, misled. *See, e.g.*, *FTC v. Johnson*, 96 F. Supp. 3d 1110, 1119 (D. Nev. 2015) ("The FTC is not required to show that all consumers were deceived, and the existence of satisfied consumers does not constitute a defense."). Rather, all Enforcement Counsel had to show was that the act or practice was *likely* to mislead reasonable consumers. Here, consistent with the Ninth Circuit's decision in *AMG*, I find that as a matter of law IA's loan agreement was likely to mislead reasonable consumers, and as explained above, Mr. Carnes is liable for that violation of the CFPA.

D. Through IA's use of the loan agreement, IA engaged in unfair practices (Count IV)

Under the CFPA, an act or practice is "unfair" if it is likely to cause substantial injury that is not reasonably avoidable by consumers and that is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1). The ALJ held, and I agree, that IA's use of loan agreements that misrepresented the total cost of credit was unfair, and as I explain above, Mr. Carnes was liable for that violation of the CFPA.

First, IA's practice was likely to cause (and did cause) substantial injury because many consumers paid significantly more than they would have anticipated based on the loan agreement. This harm easily clears the "substantial injury" bar, which can be satisfied by showing that an act or practice does "a 'small harm to a large number of people, or if it raises a significant risk of concrete harm.'" *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010) (quoting *Am. Fin. Servs. Ass'n v. FTC*, 767 U.S. 957, 972 (D.C. Cir. 1985)).

Second, the injury consumers suffered was not reasonably avoidable because it was not properly disclosed in the loan agreement. *See Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) ("Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it…."). And once consumers realized that IA had deducted more money from their bank accounts than the amount disclosed in the loan agreement's total of payments box, they still could not avoid injury because, as illustrated by the example set forth above in the Findings of Fact and Legal Background, at that point they still owed IA more than the principal amount of the loan. Respondents claim, Resp. Br. at 24, that the evidence would support the inference that reasonable consumers "*did* understand that they would incur additional costs if they did not pay off the loans in full on the Payment Due Date" because the loan agreement said

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that "additional fees may accrue if the loan is refinanced or 'rolled over.'" *Id.* But as explained above in connection with Respondents' liability pursuant to Count III, the mere fact that the loan agreement stated that there *may* be some unspecified additional fees does not permit the inference that consumers understood that they were actually authorizing IA to charge them more than twice as much as the loan agreement actually disclosed. Nor is it persuasive that IA had repeat customers. *See id.* Even if there were a subgroup of IA customers who understood IA's loan agreement well enough to avoid paying more than the total of payments (and IA has not demonstrated that there were such customers), that would not excuse IA's violations with respect to other customers.

Third, whatever benefits IA's loans might have provided to consumers, there is no evidence that the challenged practice of misrepresenting or otherwise obscuring the material terms of those loans provided a countervailing benefit to consumers or competition. As the ALJ observed (and Respondents do not challenge), "the benefit of the loans could have been provided to consumers while accurately disclosing the costs. There is no plausible argument that can be made that IA had to misrepresent the costs in order for consumers to receive the benefit of a payday loan." Doc. 293 at 49.

Respondents attempt to avoid liability for their unfair practice by asserting that the Bureau is estopped from pursuing its unfairness claim because when this matter was being considered by Judge McKenna, Enforcement Counsel agreed to dismiss this claim (*i.e.*, Count IV) with prejudice in light of Judge McKenna's summary disposition order. *See* Doc. 127. But dismissal of the unfairness claim came before I ordered that Respondents be given a new hearing in light of the Supreme Court's decision in *Lucia* and before I directed Judge Kirby to "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna." Doc. 216. Consistent with that order, the parties were permitted to proceed as if Judge McKenna had not issued any opinions, orders, or rulings.

In this context, I find that it was appropriate for Judge Kirby to allow Enforcement Counsel to pursue a claim that it had abandoned in reliance on a now-inoperative opinion by Judge McKenna. That decision makes particular sense because Respondents have not shown that the stipulated dismissal in the proceeding before Judge McKenna provided an unfair advantage to Enforcement Counsel in the proceeding before Judge Kirby or imposed an unfair detriment on Respondents. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (observing that one consideration in a claim of judicial estoppel is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped"). Nor can the stipulated dismissal be understood to have persuaded Judge McKenna to adopt the Bureau's position on a contested matter. *Cf. id.* at 750 (courts ask "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled" (quotation marks omitted)).

E. IA violated EFTA (Counts V and VI)

Count V of the Notice of Charges alleged that IA violated a provision of EFTA, 15 U.S.C. § 1693k, and its implementing Regulation E, 12 C.F.R. § 1005.10(e), when IA conditioned extensions of credit on repayment by preauthorized electronic fund transfers. Count V alleged that IA required consumers to complete IA's ACH Authorization as part of the loan application process. By doing this, consumers authorized repeated electronic fund transfers every payday until the principal reduced to zero. This ACH authorization constituted a "preauthorized electronic fund transfer" as that term is defined in Regulation E, and there was no indication in IA's documents that a consumer could obtain a loan without signing the ACH Agreement.

Count VI of the Notice of Charges alleged that by virtue of its violation of EFTA and Regulation E, IA also violated the CFPA. In particular, the CFPA provides that when a covered person violates an enumerated statute, that covered person also violates the CFPA. 12 U.S.C. § 5536(a)(1)(A). Respondents have not disputed that if they violated EFTA, they also violated the CFPA. *See* Resp. Br. at 25.

I conclude that IA violated EFTA and Regulation E, and as a result, also violated the CFPA.

EFTA provides that "No person may … condition the extension of credit to a consumer on such consumer's repayment by means of preauthorized electronic fund transfers." 15 U.S.C. § 1693k. Regulation E has a similar prohibition: "No financial institution or other person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers[.]" 12 C.F.R. § 1005.10(e). Regulation E defines an "electronic fund transfer" as "any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account." 12 C.F.R. § 1005.3(b)(1). A "preauthorized electronic fund transfer" is defined as "an electronic fund transfer authorized in advance to recur at substantially regular intervals." 12 C.F.R. § 1005.2(k). The parties do not dispute that the payments that IA extracted from consumers' bank accounts were "preauthorized electronic fund transfers."

As an initial matter, there is no dispute that IA is a "person" for purposes of EFTA and Regulation E. Regulation E defines a person to mean "a natural person or an organization, including a corporation, government agency, estate, trust partnership, proprietorship, cooperative, or association." 12 C.F.R. § 1005.2(j). The parties jointly stipulated that IA is a Delaware limited liability company. Doc. 56 at 1. Respondents have also not disputed that IA extended credit to consumers.[10] EFTA does not specifically define the term "credit," but that term is defined elsewhere in the Consumer Credit Protection Act (of which EFTA is Title IX) as the right to "incur debt and defer its payment." 15 U.S.C. § 1602(e). The parties jointly stipulated that IA made loans to consumers. Doc. 56 at 2.

[10] It has been argued that Regulation E limits the scope of EFTA's prohibition to extensions of credit granted by financial institutions. *See McCready v. eBay, Inc.*, No. 03-cv-2117, 2005 WL 6082528, at *5 (C.D. Ill. Feb. 4, 2005), *aff'd*, 453 F.3d 882 (7th Cir. 2006). Respondents have not made this argument, and it is accordingly waived. In any event, I would reject the argument because a regulation cannot limit the scope of a violation defined by a statute. *See Zuniga v. Barr*, 946 F.3d 464, 470 (9th Cir. 2019) (court must reject an interpretation of a regulation if it is inconsistent with the statute under which the regulation has been promulgated). *See also* 61 Fed. Reg. 19662, 19667 (May 2, 1996) (promulgating what is now codified as 12 C.F.R. § 1005.10(e) and noting that the provision applies not just to financial institutions).

The question that remains is whether IA conditioned its extensions of credit on the consumer's repayment by preauthorized electronic fund transfers. I conclude that it did.

The following provisions of the loan agreement (ECX 2) demonstrate that IA required consumers to agree to preauthorized electronic fund transfers to repay their loans as a condition of getting the loans:

- "In order to complete your transaction with us, you must electronically sign the Loan Agreement by clicking the 'I Agree' button at the end of the Loan Agreement, as well as all the other 'I Agree' buttons that appear within the Loan Agreement and related documents that appear below." ECX 2 at 4. (The ACH Authorization was one of these buttons.) *Id.* at 11.

- "By entering your name and clicking the 'I Agree' button below, you are electronically signing and agreeing to all the terms of the Loan Agreement, the Arbitration Provision, and the ACH Authorization ('the Loan Documents') as providing or confirming your electronic signature on all of the Loan Documents…." *Id.* at 15.

- "The ACH Authorizations set forth in the Loan Agreement are to remain in full force and effect for this transaction until your indebtedness to us for the Total of Payments, plus any other charges or fees incurred and described in the Loan Agreement, is fully satisfied." *Id.* at 10.

- "You grant us a security interest in your ECheck/ACH Authorization in the amount of the Total of Payments (the 'ECheck/ACH') which we may negotiate on the Payment Due Date or thereafter…. Pursuant to the ECheck/ACH Authorization, you have directed us to initiate one or more ECheck/ACH debit entries to Your Bank Account for the amounts owed to us under the Loan Agreement on the Payment Due Date or thereafter and for certain fees that may be assessed in the event of dishonor when presentment is made to your bank on your ECheck/ACH Authorization." *Id.* at 4-5.

There is no indication in the loan agreement that a borrower could obtain a loan from IA without agreeing to the ACH authorization. Accordingly, I conclude that the loan agreement violates EFTA.

Respondents argue that the loan agreement did not condition the extension credit on repayment by recurring electronic fund transfer because the ACH Authorization indicated that consumers could repay their loan through other means. Resp. Br. at 25; Resp. Reply at 13. Indeed, a provision of the ACH Authorization did say, "You understand and agree that this ACH authorization is provided for your convenience, and that you have authorized repayment of your loan by ACH debits voluntarily. You agree that you may repay your indebtedness through other means, including by providing timely payment via cashier's check or money order directed to: Integrity Advance, 300 Creek View Road, Suite 102, Newark, DE 19711." ECX 2.

While this provision allowed borrowers, at least in theory, to make payments by a means other than preauthorized electronic fund transfer, it did not allow the borrower to obtain credit from IA without agreeing to allow IA to make preauthorized electronic fund transfers from the borrower's account to repay the loan. Although IA made loans to a small number of borrowers who, despite the provisions of the loan agreement did not agree to the ACH Authorization, Doc. 272 at 34, there is no clear explanation in the record as to why. (I do not read the Notice of Charges to allege that IA violated either EFTA or Regulation E with respect to this small number of borrowers who were the exception to the rule.)

I disagree with Respondents' interpretation of the relevant provisions of EFTA and Regulation E. EFTA and Regulation E prohibit a lender from conditioning a loan on repayment by preauthorized electronic fund transfers. Respondents, however, would apparently permit a creditor to require that a consumer agree to repayment by preauthorized electronic fund transfer, but contend that the creditor would not violate EFTA so long as the creditor does not then require the consumer to actually make every single payment by preauthorized electronic fund transfer. There is no evidence that Congress intended such a result and IA has offered none. Indeed, the legislative history of EFTA is to the contrary. Two bills that were precursors to EFTA contained the same language that was ultimately enacted as section 1693k. *See* S. 3499, 95th Cong. § 913 (1978); S. 3156, 95th Cong., § 913 (1978). The Senate reports explained that these bills provided that "a creditor could not condition the extension of credit on a consumer's agreement to repay by automatic EFT payments." S. Rep. No. 95-915, at 7 (1978); S. Rep. No. 95-1273, at 14 (1978) (emphasis added). That, of course, is exactly what IA required.

The court in *De La Torre v. CashCall, Inc*., 56 F. Supp. 3d 1073 (N.D. Cal. 2014), considered, and rejected, the same argument made by Respondents here. The defendant in that case argued that what EFTA actually prohibited was "conditioning the extension of credit upon a requirement to make all loan payments by [electronic fund transfer] during the life of the loan." *Id*. at 1088. However, the court concluded that EFTA's language is "unambiguous" that a violation of EFTA's compulsory use provision "occurs at the moment of conditioning – that is, the moment the creditor requires a consumer to authorize EFT as a condition of extending credit to the consumer." *Id*. at 1089. The court also concluded that the legislative history of EFTA confirmed its unambiguous meaning. *Id*. It further held that the mere fact that a borrower may revoke an agreement to repay by preauthorized electronic fund transfer does not allow a creditor who conditions the extension of credit on entering into such an agreement to avoid liability under EFTA and Regulation E. *Id*. at 1089-91. Other court decisions have reached a similar conclusion. *See* Doc. 111 at 34-35 (citing *O'Donovan v. CashCall, Inc*., No. 08-cv-3174, 2009 WL 1833990, at *3 (N.D. Cal., June 24, 2009), and *FTC v. PayDay Financial LLC*, 989 F. Supp. 2d 799, 811-13 (D.S.D. 2013)).

I therefore conclude that EFTA's text is best read as prohibiting a person from conditioning a loan on a consumer's agreement to authorize repayment by preauthorized electronic fund transfers and reject Respondents' contrary argument.

As explained above, because IA violated EFTA and Regulation E, it also violated the CFPA, as alleged in Count VI.

F. As a result of IA's use of RCCs, both IA and Mr. Carnes engaged in unfair practices (Count VII)

Count VII of the Notice of Charges alleged that Respondents engaged in an unfair practice in violation of the CFPA when IA obtained authorization for RCCs in a confusing manner and then initiated the RCCs. IA's loan agreement included a provision allowing IA to create RCCs if consumers successfully canceled their authorization for ACH withdrawals. But IA buried this provision in the section of the loan agreement regarding ACH authorization, and, even if a consumer had focused on the provision, that consumer would not have reasonably known that the provision also authorized IA to use RCCs. IA then used this provision to withdraw funds from consumers' bank accounts in situations where consumers had cancelled the ACH authorization. I conclude that IA's use of RCC was unfair – it caused substantial injury to consumers that they could not reasonably avoid, and that injury was not offset by benefits to consumers or competition.

I conclude that IA's use of RCCs imposed two types of injury on consumers. As I explained above in connection with Count IV, IA caused substantial injury to consumers whenever IA debited consumers' accounts for amounts in excess of what was disclosed in the total of payments box in the loan agreement. IA used RCCs to make such withdrawals 602 times on or after July 21, 2011. These withdrawals totaled $115,024.50. ECX 97 at 4-5. I also conclude that consumers suffered substantial injury because IA withdrew funds from consumers' accounts when, as explained below, consumers reasonably believed that IA no longer had access to their accounts. *See FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157-58 (9th Cir. 2010) (facilitating unauthorized access to consumers' bank accounts constitutes substantial injury). This second type of injury would occur regardless of whether the consumers had already paid the amount disclosed in the total of payments box – consumers might have other reasons for withdrawing ACH authorization. Nonetheless, Enforcement Counsel have only alleged violations for those RCCs that IA used after consumers had paid the amount in the total of payments box. Accordingly, I will only consider the violations caused by those RCCs.

This injury is enhanced by the fact that consumers are not likely to be aware that, by entering into the loan agreement, they have authorized IA to create RCCs. The authorization for RCCs is buried in the loan agreement's ACH authorization. The ACH authorization is more than a page of dense text that begins in the middle of the lengthy loan agreement. The main purpose of the ACH authorization section is to permit IA to deposit borrowed funds into the consumer's bank account and then to withdraw funds in amounts and at times as agreed to in the loan agreement. ECX 92 at 22-23. However, approximately half-way through the ACH Authorization, there is a paragraph that grants IA powers that are distinct from the central purposes of the ACH authorization. One sentence in that paragraph authorizes RCCs: "If you revoke your authorization, you agree to provide us with another form of payment acceptable to us and you authorize us to prepare and submit one or more checks drawn on Your Bank Account so long as amounts are owed to us under the Loan Agreement." Nothing in this sentence, or anywhere else in the loan agreement, explains that by signing the ACH Authorization, consumers are also authorizing IA to write checks on consumers' accounts without notifying consumers about the checks, and without obtaining their signatures. And the only instruction in the ACH authorization regarding revocation reads as follows: "You may only revoke the above authorizations by contacting us directly." This does nothing to inform consumers that, if they contact their bank and revoke ACH authorization, this will have no impact on IA's authority to use RCCs. I conclude that as a matter of law the sentence authorizing RCCs is neither clear nor conspicuous, and not likely to be read or understood by borrowers. *See* ECX 92 at 26.

Although Respondents argue that "consumers did consent to the use of RCCs when they signed the Loan Agreement," Resp. Br. at 26, they did not do so knowingly. Respondents also argue that extrinsic evidence is necessary to show that consumers did not understand the authorization. *Id.* Given the placement of the RCC authorization, and given its wording, extrinsic evidence is unnecessary to support my conclusion that consumers were not likely to understand that they had authorized IA to use RCCs. *See Frendreis v. Blue Cross Blue Shield*, 873 F. Supp. 1153, 1157 (N.D. Ill. 1995) ("[j]udges need not check their common sense at the door when interpreting" contractual agreements).

Consumers could not reasonably avoid this injury because, as explained above, it was unlikely that consumers even knew that they had authorized IA to use RCCs. Even if consumers somehow did know that they had authorized IA to use RCCs, it would have been very difficult for them to revoke that authority. Consumers could have contacted their financial institutions to stop payment of RCCs, but this might not have been successful since it is doubtful they would have the basic information (such as the check number) necessary for the financial institution to stop payment. And of course, even if the financial institution did stop payment, the financial institution might impose stop-payment fees. Consumers could also have closed their accounts at the financial institutions, but that could have resulted in fees for overdrafts and nonsufficient funds on items outstanding at the time the account was closed, as well as the other potential costs and inconvenience of such a process. Further, even if consumers had contacted their financial institutions after discovering the unauthorized RCCs and sought reimbursement by asserting the RCCs were not properly payable, see Uniform Commercial Code § 4-401, obtaining reimbursement would likely have required a "substantial investment of time, trouble, aggravation, and money." *See F.T.C. v. Neovi, Inc.*, 604 F.3d at 1158. And consumers still would have incurred injury during the time they lost access to and use of the funds taken using RCCs. *Id*. So even if consumers' financial institutions eventually restored the consumers' money, consumers likely would have suffered unavoidable injuries that could not be fully mitigated. *Id*.

Respondents argue that consumers could have avoided the injury by contacting IA and offering another form of payment. Resp. Br. at 26. But consumers cancelled ACH authorization because, as I have determined, IA was attempting to collect amounts that exceeded what was disclosed in the total of payments box, amounts that consumers did not owe. Offering payment in some other form would not have diminished that injury.

I also conclude that the substantial injury was not outweighed by countervailing benefits to consumers or to competition. It is hard to imagine a situation in which policy considerations would justify withdrawing money from consumers' accounts without authorization. Here, the only benefit that has been suggested is that, because of RCCs, IA made loans to some consumers who would not otherwise have been eligible for credit. *See* Resp. Br. at 26. But this argument fails given the minuscule number of instances in which IA actually used RCCs. *See* Doc. 278 at 22. Nor does this justify IA's failure to provide adequate disclosure of the RCC authorization. Finally, if consumers were actually delinquent, IA had other means at its disposal, such as bringing a lawsuit to collect the debt. Accordingly, I conclude that, as a result of IA's use of RCCs, IA engaged in an unfair practice in violation of the CFPA, and as explained above, Mr. Carnes is liable for that violation.

REMEDIES

The ALJ recommended restitution, monetary civil penalties, and injunctive relief. I agree.

A. Restitution

The ALJ recommended that IA and Mr. Carnes be ordered to pay restitution. In particular, as a result of the TILA and CFPA violations stemming from the loan agreement, she ordered IA to pay $132,580,041.06. This amount included restitution for loans that IA originated both before and after July 21, 2011. Part of that total, $38,453,341.62, was for loans that IA originated after July 21, 2011, and she held that Mr. Carnes was jointly and severally liable with IA for that amount. I have decided not to impose restitution for loans that IA originated before July 21, 2011, but I do order that it pay restitution for loans it originated on or after that date. That amount – $38,453,341.62 – is the amount paid by consumers to IA that exceeded what was disclosed to them in IA's TILA disclosures. I also conclude that Mr. Carnes should be held jointly and severally liable for this amount because, as explained above, the loans agreements for loans originated on or after July 21, 2011, violated the CFPA's prohibition of unfair and deceptive practices, violations for which both IA and Mr. Carnes are liable.

The CFPA authorizes the Bureau in a proceeding such as this one "to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law." 12 U.S.C. § 5565(a)(1). Appropriate legal or equitable relief includes "restitution." 12 U.S.C. § 5565(a)(1). Here, Enforcement Counsel sought restitution as "measured by the amount consumers paid to Integrity Advance above what the company disclosed in its loan agreements." Doc. 276 at 2. As the ALJ found, because consumers made payments directly to IA, this amount captures both consumer losses and Respondents' unjust gains. Doc. 293 at 81; *see also Gordon*, 819 F.3d at 1195; *FTC v. Stefanchik*, 559 F.3d 924, 931-32 (9th Cir. 2009). As explained above, I have determined that IA's loan agreement violated TILA and was unfair and deceptive. As a result, consumers who did not take affirmative steps to pay their loans in full prior to the first payment-due date paid IA more than the amount disclosed in the loan agreement. Whether as a matter of equity or law, *see* Doc. 293 at 79, I find that an award of restitution is justified both to remedy the losses consumers suffered as a result of Respondents' unlawful practices and to deprive Respondents of the amounts that they gained as a result of their unlawful conduct.

The ALJ recommended that restitution be awarded for IA's TILA violations that occurred prior to the date that TILA enforcement authority was transferred to the Bureau. She based this on her belief that the FTC could have sought such relief pursuant to its authority under 15 U.S.C. § 53(b). Doc. 293 at 83-84. However, the Supreme Court has granted certiorari in *AMG v. FTC*, No. 19-508, and the only question presented by the petitioner in that case is whether § 53(b) authorizes the FTC to obtain monetary equitable relief. Rather than further delay this proceeding by waiting for a decision in *AMG*, I have decided to drop all charges against IA to the extent that they apply to acts that occurred prior to July 21, 2011, the date that enforcement authority was transferred to the Bureau. Similarly, Counts III, IV, and VII allege violations of the CFPA, and because the CFPA did not take effect until July 21, 2011, I will award restitution only for loans that IA originated, or for RCCs that IA issued, on or after that date. (Enforcement Counsel does not dispute that restitution for pre-transfer date CFPA violations would be inappropriate.) Thus, the same loans that give rise to restitution as a result of TILA violations – loans originated on or after July 21, 2011 – also give rise to restitution as a result of CFPA violations.

The record shows that IA originated 55,661 loans on or after July 21, 2011, on which the borrower paid more than the amount disclosed in the total of payments box. Doc. 163B at 2. In connection with those loans, I award restitution only for the amounts that consumers paid to IA over and above the amount disclosed in the total of payments box on IA's loan agreement – that is the amount IA gained as a result of its wrongful conduct. The record in this case shows that this amount totals $38,453,341.62. Doc. 163B at 2. With respect to Count VII, the record shows that, in connection with loans that IA originated on or after July 21, 2011, IA used 602 RCCs to withdraw money from the accounts of consumers who had already paid an amount that was at least equal to the amount disclosed in the total of payments box of their loan agreements. Doc. 163B at 3. Those RCCs totaled $115,024.50. *Id*. Because these RCCs collected amounts over and above the amounts disclosed in the total of payments box, any separate award of restitution would duplicate amounts encompassed by the award of $38,453,341.62. Because both IA and Mr. Carnes are liable for the violations alleged in Counts III, IV, and VII, the ALJ correctly held that they are jointly liable for the restitution.[11] Doc. 293 at 85. "If an individual may be held personally liable for corporate violations … nothing more need be shown to justify imposition of joint and several liability for the corporation's restitution obligations." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016). This is particularly appropriate because IA was merely a shell. *See* Doc. 173 at 6.

Respondents argue that restitution is not appropriate because there was no showing of fraudulent intent, and because Respondents used the loan agreement with advice of counsel. Resp. Br. at 27. These arguments are based on a misunderstanding of the purpose of restitution. The "primary purpose of restitution is to restore the victims to their position prior to the deceptive sale." *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 386 (D. Conn. 2009), *aff'd* 654 F.3d 359 (2d Cir. 2011). Restitution is not based on any particular degree of culpability of the wrongdoer, other than responsibility for the deceptive conduct. *See Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988) ("a practice may be deceptive without a showing of intent to deceive"). It is true that knowledge is relevant when assessing whether an individual may be held responsible for a corporation's violations, but that knowledge need not rise to the level of fraudulent intent. And, as explained above, "[o]btaining the advice of counsel did not change the fact that the business was engaged in deceptive practices." *FTC v. Amy Travel*, 875 F.2d at 575. That is because the degree of knowledge is irrelevant with respect to IA, and as to Mr. Carnes, "counsel could not sanction something that the [individual defendant] should have known was wrong." *Id*. To the extent that *CFPB v. CashCall, Inc*., No. 15-cv-07522, 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018), suggests that advice of counsel may be relevant to a determination of whether an award of restitution is appropriate, *see* Resp. Reply at 14, I conclude that case is inconsistent with the cases discussed above and will follow the weight of authority.

Respondents argue that restitution was inappropriate because there was no showing that consumers failed to receive the benefit of the bargain. Resp. Br. at 27. But as I have explained, consumers contracted to pay the amount in the loan agreement's total of payments box. Respondents were not entitled to whatever they collected in excess of that amount. Respondents argue that Enforcement

[11] Respondents have raised no argument regarding my authority to hold them jointly and severally liable, and have therefore waived any such challenge.

Counsel failed to present testimony from consumers who were deceived by IA. Resp. Br. at 27. No such testimony is necessary. *FTC v. Colgate-Palmolive* Co. 380 U.S. 374, 391-92 (1965) (holding that no consumer testimony is necessary to establish deception); *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 n.10 (3d Cir. 1982) (same); *FTC v. Medlab, Inc*., 615 F. Supp. 2d 1068, 1078 (N.D. Cal. 2009) (same).

Respondents cite *FTC v. Verity Int'l, Ltd*., 443 F.3d 48, 67 (2d Cir. 2006), and *CFPB v. CashCall*, 2018 WL 485963, at *13, and argue that any award of restitution must be limited to unjust gains. Resp. Br. at 28. Even assuming that the redress in this case must be limited to Respondents' unjust gains (as opposed to consumers' losses), Respondents' argument does not apply here. As the court explained in *CFPB v. Gordon*, 819 F.3d at 1195, the first step in calculating an award of restitution is calculating the defendant's unjust gains. The problem in *Verity* was that the district court based its calculation on consumer losses, not on the defendants' gains. As a result, the district court ordered the defendants to pay, as part of an award of restitution, money that they had never received. Nothing like that happened here. Respondents have never disputed that IA actually received the amounts that consumers paid in excess of what was disclosed in the total of payments box. That is, Respondents' unjust gains equaled consumers' losses. In *CashCall*, the court faulted the Bureau for failing to present any evidence that the award the Bureau sought approximated defendants' unjust gains. 2018 WL 485963, at *14. The court was concerned that the Bureau was seeking restitution for loans that were legal, and that the proposed restitution might thereby have created a windfall for certain consumers. Whatever the merits of the concerns raised in *CashCall*, they are not applicable here because the restitution I have awarded is based on amounts that consumers paid above and beyond the total of payments disclosed in IA's TILA disclosures. No consumer will get a windfall.

Respondents argue that IA's repeat customers are not entitled to restitution. Resp. Br. at 28. In particular, Respondents suggest that repeat customers understood, and were satisfied with, the loans they got from IA, and this explains why they were repeat customers. *See* Resp. Reply at 6. In *FTC v. AMG*, 910 F.3d at 428, the court rejected a very similar argument. That case involved a loan agreement and loan repayment arrangement that were nearly identical to what was involved in this case. *See id.* at 422. Defendants in *AMG* argued that repeat customers demonstrated that AMG's loan agreement was not deceptive. Unlike Respondents here, the defendants in *AMG* presented evidence regarding repeat customers – a study conducted by an economist, Dr. David Scheffman. *Id.* at 425. This study purported to show that repeat borrowers behaved the same as first-time borrowers when it came to paying off their loans. *Id.* at 425. Because Dr. Scheffman assumed that repeat borrowers could not be misled (based on experience gained from their first loan), he concluded that no borrowers had been misled. *Id.* But the court held otherwise: "Dr. Scheffman's reasoning begs the question. … While Dr. Scheffman concludes that first-time borrowers were just as well informed as the repeat ones, it is equally plausible that the repeat borrowers were just as confused as those taking out their first loans."[12] *Id.* Respondents here have provided no evidence that IA's repeat borrowers were any less confused than its first-time borrowers.

[12] Respondents note that AMG used a variety of different corporate names, and they contend that AMG's repeat borrowers did not know they were dealing with the same company. Appeal Tr. at 45. However, regardless of the corporate name, AMG used the same loan agreement, with the same repayment terms, for all its customers. 910 F.3d at 421.

Respondents also cite *FTC v. Publishers Business Services, Inc.*, 540 F. App'x 555 (9th Cir. 2013), and *FTC v. Kuykendall*, 371 F.3d 745 (10th Cir. 2004), Resp. Br. at 28, but those cases merely recognize that a defendant charged with engaging in deceptive practices should have the opportunity to show that certain customers suffered no injury. Here, there is no dispute that Respondents used the same loan agreement for all its borrowers, both first-time and repeat. That means that Respondents made the same misrepresentations with respect to all their borrowers, first-time as well as repeat. It is Respondents' burden to show that repeat borrowers were not deceived. *FTC v. Ewing*, No. 2:14-cv-0683, 2017 WL 4797516, at *11 (D. Nev. Oct. 24, 2017); *FTC v. Bronson Partners*, 674 F. Supp. 2d at 386; *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008). Respondents had ample opportunity to satisfy that burden but failed to do so. For instance, Respondents apparently assumed that all repeat borrowers necessarily understood how much they were agreeing to pay IA without providing evidence to support this assumption, particularly with respect to consumers who may have ended up paying more for their second or third loan than they did for their first. Accordingly, I reject their argument that repeat customers are not entitled to restitution.

B. Civil Money Penalty

The CFPA provides that "[a]ny 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 CFPA establishes three tiers of penalties with statutory maxima ranging from $5000 to $1 million (before adjustments for inflation) for each day during which a violation continues. I conclude that IA and Mr. Carnes are separately liable for civil penalties for violations that occurred on or after July 21, 2011.

Enforcement Counsel has sought only first tier penalties ($5000 per day), and the ALJ accepted that recommendation. She identified three distinct practices that merited civil penalties: 1) the use of the loan agreement that violated the CFPA (as well as TILA); 2) EFTA violations; and 3) the use of RCCs. She held that IA and Mr. Carnes were separately liable for civil penalties with respect to the first and third of those practices, and that only IA was liable for the second. She concluded that the relevant time period for each of these practices was from July 21, 2011, until December 1, 2012, inclusive, a total of 500 days. Accordingly, she recommended that IA pay a penalty of $7.5 million (500 (days) x $5000 (penalty amount) x 3 (practices)), and that Mr. Carnes pay a penalty of $5 million (500 x $5000 x 2). Enforcement Counsel have not challenged this amount. Respondents' only argument is that the amount recommended with respect to the RCCs was excessive because there was no showing that IA actually used RCCs on each of the 500 days. Resp. Br. at 30. They also argue that the award should be reduced based on their good faith and on their lack of history of violations of federal consumer laws. *Id.*

I agree with the ALJ that the relevant time period for violations relating to the use of the loan agreement (practices 1 and 2 above) is from July 21, 2011, until December 1, 2012, inclusive, a total of 500 days. During that period, IA originated 82,980 loans. ECX 97 at 1. I could impose a $5000 penalty for each of those loans, an amount that far exceeds the $2.5 million recommended by the ALJ. However, as an exercise of my discretion, I will limit the award to a single $5000 per each of the 500 days during which Respondents consummated loans using the loan agreement. Thus, I determine that the appropriate penalty is $5000 x 500 = $2,500,000 for each of the first two practices. Since both IA and Mr. Carnes are responsible for the CFPA violations in the loan agreement, I hold each of them separately liable for $2,500,000. (I do not impose any additional civil penalty on IA as a result of its TILA violations.) With respect to the second distinct practice, EFTA violations, I hold IA liable for a penalty of $2.5 million. As to the third practice, Respondents argue that the record does not show that they used RCCs on each of the days from July 21, 2011, until December 1, 2012. Resp. Br. at 30. But the record does show that, during that period, IA used RCCs on 602 occasions. I could impose a $5000 for each of those 602 RCCs. However, as an exercise of discretion, I will limit the award to a single $5000 for each of days during which Respondents consummated loans that authorized the use of those RCCs. This again totals $2,500,000, and again I hold IA and Mr. Carnes separately liable for this amount. Thus, the total award imposed on IA is $7,500,000, and the total award imposed on Mr. Carnes is $5,000,000.

There are five factors in the CFPA that I must consider in determining an appropriate civil penalty. 12 U.S.C. § 5565(c)(3). I conclude that the amount I award – substantially less than the statutory maximum – is appropriate in light of those factors. The first factor is the size of the financial resources and good faith of the person charged. With respect to the financial resources, although IA may no longer have financial resources, it is not apparent that the same is true with respect to Mr. Carnes. Indeed, information with respect to Mr. Carnes' resources is within his control and since he has not attempted to justify mitigation on this basis I will not do so. Respondents do argue, however, that they acted in good faith because they consulted with a lawyer, they provided the loan agreement to Delaware state regulators, and they "intended to act lawfully." Resp. Br. at 30. As explained above, consulting with counsel provides no excuse for conduct that Mr. Carnes should have known was wrong. (Otherwise, patently unreasonable, incompetent, or corrupt legal advice could shield a wrongdoer. But that is not the law.) Moreover, in April 2012, the FTC filed a complaint against AMG Services alleging that a loan agreement very similar to the one used by Respondents was deceptive and violated TILA and EFTA. *FTC v. AMG Servs., Inc.*, No. 2:12-c-v536 (D. Nev. Filed Apr. 2, 2012). And yet Respondents' practices continued unabated. There is also no reason to believe that Delaware state regulators evaluated compliance with all the statutes that are at issue in this case. Accordingly, I decline to conclude that Respondents acted in good faith or that their financial resources render any further reduction in the amount of the recommended penalty amount appropriate.

The next factor is the gravity of the violation. Respondents committed their violations over an extended period of time, and their violations affected thousands of consumers. This factor does not favor any further reduction in the penalty amount. The third factor looks to the severity of the violations and the number of "products or services sold." Again, Respondents' violations were extensive. Thus, this factor does not favor mitigation. The fourth factor considers the history of previous violations. Respondents conceded that, prior to the filing of the Bureau's Notice of Charges, IA was subject to an enforcement action brought by the State of Minnesota. Doc. 239 at 17; *see Minnesota v. Integrity Advance, LLC*, 846 N.W.2d 435, 438 (Minn. Ct. App. 2014), *aff'd* 870 N.W.2d 90 (Minn. 2015). It is irrelevant that, since the filing of the Notice of Charges, IA has not engaged in any additional violations because IA has not functioned since 2013. ECX 68 at 9-10. The final factor looks to such other matters as justice may require. I am not aware of any, and Respondents have not brought any to my attention. Accordingly, there is no reason to further reduce the award of civil monetary penalties.

C. Injunctive relief

The ALJ ordered Respondents to cooperate in assisting the Bureau in determining the identity, location, and amount of restitution due to each consumer who was entitled to redress. I agree that this is appropriate injunctive relief. The ALJ did not impose other conduct prohibitions, and I agree that this is appropriate because there is no evidence that Respondents are engaging in the conduct that led to this proceeding, or that they have done so for many years.

Respondents make one argument: They contend that because IA ceased operations seven years ago and sold its assets, they should not be ordered to assist the Bureau. However, one of the goals of injunctive relief is to promote compliance with other terms of the order. *FTC v. Direct Mktg. Concepts*, 648 F. Supp. 2d at 212. The Order that I am entering includes an award of restitution, and the injunctive provision will assist in effectuating that award. Even if IA's assets have been sold, there may be assistance that Respondents (including Mr. Carnes) can provide to the Bureau in locating consumers who are entitled to relief.

CONCLUSION

For these reasons, I AFFIRM the Recommended Decision in part, and REVERSE it in part.

Kathleen L. Kraninger

Kathleen L. Kraninger
Director
Consumer Financial Protection Bureau

January 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Decision of the Director* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
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Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 11th day of January 2021
at Washington, D.C.

Exhibit 2

Dkt. 309 – Order
(filed Jan. 11, 2021)

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of	)	
	)	
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	FINAL ORDER

IT IS ORDERED that, within 30 days after service of this Final Order, Respondents Integrity Advance LLC and James R. Carnes must pay restitution of $38,453,341.62. They shall make this payment by wire transfer to the Bureau, or to the Bureau's agent. The Bureau may use these funds to provide redress to consumers who borrowed money from Respondent Integrity Advance on or after July 21, 2011, in the amount that each consumer paid in excess of the amount disclosed in the Total of Payments box of Integrity Advance's loan agreement. If funds remain after this redress has been completed, the Bureau will deposit any remaining funds in the U.S. Treasury as disgorgement. Respondents will have no right to challenge any actions that the Bureau or its representatives may take under this portion of this Order. However, if either of the Respondents appeals this decision pursuant to 12 U.S.C. § 5563(b)(4), Respondents may, within 30 days after service of this Order, pay the award of restitution into an escrow account in lieu of making the payment to the Bureau. The escrow account shall be held by an entity that is chosen by Respondents and is acceptable to the Bureau. The escrow account shall be established so that if all or any portion of the restitution award is upheld on appeal, that amount shall be released to the Bureau within 30 days after the mandate issues on that appellate decision. Once the mandate has issued and the Bureau has received the portion of the restitution award to which it is entitled, any funds remaining in escrow shall be released to Respondents.

IT IS FURTHER ORDERED that, within 30 days after the service of this Final Order, Respondent Integrity Advance shall pay a civil penalty of $7,500,000 to the Bureau by sending those funds by wire transfer to the Bureau or to the Bureau's agent in compliance with the Bureau's wiring instructions. The civil money penalty paid under this Consent Order will be deposited in the Civil Penalty Fund of the Bureau as required by § 1017(d) of the CFPA, 12 U.S.C. § 5497(d). If Integrity Advance appeals this decision pursuant to 12 U.S.C. § 5563(b)(4), Integrity Advance may, within 30 days after service of this Order, pay the civil penalty into an escrow account in lieu of making the payment to the Bureau. The escrow account shall be held by an entity that is chosen by Integrity Advance and is acceptable to the Bureau. The escrow account shall be established so that if all or any portion of the civil penalty is upheld on appeal, that amount shall be released to the Bureau within 30 days after the mandate issues on that appellate decision. Once the mandate has issued and the Bureau has received the portion of the restitution award to which it is entitled, any funds remaining in escrow shall be released to Integrity Advance.

IT IS FURTHER ORDERED that, within 30 days after service of this Final Order, Respondent James R. Carnes shall pay a civil penalty of $5,000,000 to the Bureau by sending those funds by wire transfer to the Bureau or to the Bureau's agent in compliance with the Bureau's wiring instructions. The civil money penalty paid under this Consent Order will be deposited in the Civil Penalty Fund of the Bureau as required by § 1017(d) of the CFPA, 12 U.S.C. § 5497(d). If Mr. Carnes appeals this decision pursuant to 12 U.S.C. § 5563(b)(4), Mr. Carnes may, within 30 days after service of this Order, pay the civil penalty into an escrow account in lieu of making the payment to the Bureau. The escrow account shall be held by an entity that is chosen by Respondent and is acceptable to the Bureau. The escrow account shall be established so that if all or any portion of the civil penalty is upheld on appeal, that amount shall be released to the Bureau within 30 days after the mandate issues on that appellate decision. Once the mandate has issued and the Bureau has received the portion of the restitution award to which it is entitled, any funds remaining in escrow shall be released to Integrity Advance.

IT IS FURTHER ORDERED that Respondents Integrity Advance and James R. Carnes, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall cooperate in assisting the Bureau in determining the identity, location, and amount of restitution due to each consumer entitled to redress.

SO ORDERED.

Kathleen L. Kraninger
Director
Consumer Financial Protection Bureau

January 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Final Order* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
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Date: 2021.01.11 14:38:24 -05'00'

Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 11th day of January 2021
at Washington, D.C.

Exhibit 3

Dkt. 238 – Order Denying Further Discovery on
Statute of Limitations Issue
(filed Jan. 28, 2019)

UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:

INTEGRITY ADVANCE, LLC and
JAMES R. CARNES,

Respondents.

ORDER DENYING FURTHER DISCOVERY ON STATUTE OF LIMITATIONS ISSUE

BACKGROUND

Procedural History

On August 16, 2019, I conducted an initial scheduling conference in this matter. At the conference, I made the decision to reopen the record with regards to the statute of limitations issue based upon a decision by the D.C. Circuit Court of Appeals, issued after the previous Administrative Law Judge's (ALJ) recommended decision, that could potentially impact the current matter. *See PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (finding *inter alia* that statutes of limitations apply to claims brought in CFPB's administrative proceedings); and *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc court reversing some parts of the previous panel's decision, but reinstating portion relating to applicability of statutes of limitations). I directed the parties to meet and confer and provide me with a joint proposal for supplementing the record.[1]

The parties subsequently submitted a *Joint Statement on Fact Development Regarding Statute of Limitations Defense* on August 23, 2019 (*Joint Statement*; Doc. 231). Respondents'

[1] I note that contrary to Respondents' representation in *Respondents' Brief in Support of Further Discovery on the Statute of Limitations Issue* (Doc. 236), I did not recognize that "Respondents were denied the opportunity to develop the factual record on the statute of limitations issue." Respondents' Brief at p. 3. That characterization is either an overstatement or a misunderstanding of what I said. The point I was making was that there had been a change in the relevant case law and the parties had not had a chance to fully address its impact in the prior proceeding due to the timing of the decision. Therefore, the record is silent as to the applicability of *PHH Corp.* to this matter.

Counsel (RC) simultaneously submitted *Respondents' Request for Issuance of Subpoena to the Consumer Financial Protection Bureau for Production of Documents*, seeking additional factual discovery (Doc. 232). In the *Joint Statement*, Enforcement Counsel (EC) presented various arguments as to why the record should not be reopened and RC requested an opportunity to respond. In the *Joint Statement*, EC also represented that they had already produced all required factual information pursuant to the CFPB's *Rules of Practice for Adjudication Proceedings*, 12 C.F.R. § 1081.206 (Rule 206).

I therefore issued an order dated August 30, 2019, in which I directed counsel to confer again and clarify whether the required discovery documentation had, in fact, already been provided. In the event the parties could not agree that the required documentation had been provided, I set forth a schedule for the parties to submit briefs on the issue of whether additional discovery needs to be conducted on the statute of limitations issue.

On September 11, 2019, the parties submitted a *Joint Update on Fact Development Regarding Statute of Limitations Issue* (*Joint Update*; Doc. 234) in which they informed me that they were unable to reach agreement as to whether all required discovery had been provided and they would proceed to brief the issue. In the *Joint Update* at pages 3-4, the parties provided a list of undisputed facts relating to the statute of limitations issue to which they were willing to stipulate.

On September 18, 2019, EC submitted *Enforcement Counsel's Brief Addressing the Completeness of the Factual Record on Respondents' Statute-of-Limitations Defense* (*EC's Brief*; Doc. 235). On October 4, 2019, RC submitted *Respondents' Brief in Support of Further Discovery on the Statute of Limitations Issue* (*RC's Brief*; Doc. 236). On October 15, 2019, EC submitted *Enforcement Counsel's Reply Brief Addressing the Completeness of the Factual Record on Respondents' Statute-of-Limitations Defense* (*EC's Reply*; Doc. 237).

CFPB's Position

EC argue that no further discovery on Respondents' statute of limitations defense is warranted for four reasons: 1) EC have already produced or stipulated to all the documents and material facts Respondents need to advance their limitations defense; 2) Respondents have failed to show that reopening the record is necessary or that they were denied the ability to present their statute of limitations defense during the prior proceeding; 3) legal developments between the initial proceedings and this remand hearing do not address how to apply the Consumer Financial Protection Act's (CFPA) "date of discovery" statute of limitations and do not address the facts needed to adjudicate limitations questions under the CFPA; and 4) Respondents' request for additional discovery contravenes the discovery limits set forth in the CFPB's *Rules of Practice for Adjudication Proceedings*, 12 C.F.R. part 1081.

EC agree that further development of the record with regards to briefing on the merits of the statute of limitations defense is appropriate.

Respondents' Position

RC argue that additional discovery is needed on the statute of limitations issue for four reasons: 1) the discovery Respondents seek is highly relevant to determining a potentially dispositive threshold issue; 2) the CFPA's three-year statute of limitations begins running from the date that the CFPB knew or should have known of the alleged violations; 3) the discovery Respondents seek is narrowly tailored and appropriate under CFPB rules; and 4) supplementing the record is appropriate under *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd*., 296 F.3d 111 (D.C. Cir. 2015).

Rules of Practice for Adjudication Proceedings

The procedures for the conduct of administrative adjudication proceedings brought by the CFPB are governed by the *Rules of Practice for Adjudication Proceedings* (Rules) set forth at 12 C.F.R. part 1081. The final rules were issued after receiving and analyzing public comments. The comments and explanations for the rules are found in the Federal Register, Vol. 77, No. 126.

Rule 206, *Availability of documents for inspection and copying*, deals with the production of documents in an administrative adjudication. The commentary explains that the rule adopts an "affirmative disclosure" approach to fact discovery in order to promote fair and efficient resolution of adjudicatory proceedings. Rather than requiring respondents to submit discovery requests, the rule is written to provide them with an automatic right to inspect and copy documents they would likely seek and obtain in the course of a protracted discovery period. The purpose of the rule is to ensure that respondents have a complete understanding of the **factual basis** for the CFPB's action, thereby enabling them to determine the nature of their defenses or decide whether to seek settlement (emphasis added). 77 Fed. Reg. 39058, 39070 (June 29, 2012).

The rule provides that the Office of Enforcement (OE) shall make available for inspection and copying documents it has obtained prior to the institution of proceedings, from persons not employed by the CFPB, in connection with the investigation leading to the institution of proceedings. It sets forth three categories of documents that shall be provided: 1) documents turned over in response to civil investigative demands or other written requests to provide documents or be interviewed issued by the OE; 2) all transcripts and transcript exhibits; and 3) any other documents obtained from persons not employed by the Bureau. 12 C.F.R. § 1081.206(a)(1). Additionally, the OE must make available for inspection and copying: 1) each civil investigative demand (CID) or other written request to provide documents or be interviewed issued by the OE in connection with the investigation leading to the institution of proceedings; and 2) any final examination or inspection reports prepared by any other office of the Bureau if the OE intends to introduce them into evidence or use them to refresh the recollection of, or impeach, any witness.[2] 12 C.F.R. § 1081.206(a)(2).

[2] I am paraphrasing the rules, but recommend the parties review the source document.

The rule clarifies that the OE may provide additional documents if it so chooses and that respondents may seek access to or production of additional documents pursuant to subpoena. The hearing officer has the authority to order a subpoena issued unless he or she determines that it is unreasonable, oppressive, excessive in scope, or unduly burdensome. 12 C.F.R. §§ 1081.206(a)(3), 1081.208(d).

The rule also specifies that the OE may withhold a document if: 1) it is privileged; 2) it is an internal memorandum, note or writing prepared by a person employed by the Bureau or another government agency, other than an examination or supervision report as specified in paragraph 206(a)(2)(ii), or it would otherwise be subject to the work product doctrine and will not be offered in evidence; 3) the document was obtained from a domestic or foreign governmental entity and is either not relevant to the resolution of the proceeding or was provided on condition that the information not be disclosed; 4) the document would disclose the identity of a confidential source; 5) applicable law prohibits disclosure of the document; or 6) the hearing officer grants leave to withhold the document or category of documents as not relevant to the subject matter or otherwise, for good cause shown. The rule also prohibits the OE from withholding any material exculpatory evidence it would otherwise be required to produce. 12 C.F.R. § 1081.206(b).

<u>Respondents' Request for Issuance of Subpoena</u>

On August 23, 2019, Respondents filed a request for issuance of a subpoena (Doc. 232). Pursuant to the request, Respondents seek four categories of documents for the period July 21, 2011[3] to November 18, 2012:[4] 1) all consumer complaints regarding Respondents; 2) all external correspondence regarding Respondents; 3) all internal correspondence regarding Respondents; and 4) all internal reports, memoranda, notes, analysis, or other documents regarding Respondents.

In their request for subpoena, Respondents appear to acknowledge that some of the materials they are requesting could be subject to privilege and therefore properly withheld pursuant to Rule 206(b). To the extent that any of the requested documents are withheld or redacted, Respondents therefore request a withheld documents log. Respondents argue that the requested documents should be produced for the four reasons set forth above under Respondents' Position.

In their briefs (Docs. 235, 237), EC argue that the request for subpoena should be denied for the four reasons stated above under the CFPB's Position.[5]

<u>Parties' Stipulation of Fact and Declarations</u>

[3] The effective or transfer date of the CFPB.
[4] Three years prior to the date the Notice of Charges was filed in this matter.
[5] I am treating EC's brief and arguments as a motion to quash the subpoena. Both parties have set forth their arguments regarding whether the subpoena should be issued.

In the parties' *Joint Update* (Doc. 234) filed on September 11, 2019, they stipulated to several facts relevant to the production of documents issue. The parties stipulated that EC have produced, among other things, documents obtained by the OE prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of such proceedings and a PDF indicating that the OE searched the Federal Trade Commission's database of consumer complaints. They stipulated as to relevant dates concerning the CID, investigative hearing testimony of Carnes and Foster, and the Notice and Opportunity to Respond and Advise (NORA) letter. The parties further stipulated as to the dates that Respondents made an initial partial production in response to the CID and dates it completed production, as well as the date of Respondents' response to the NORA letter.

Within the stipulation of facts, the parties also referenced Doc. 187, a Declaration of EC, Alusheyi J. Wheeler, who stated, in addition to the dates relating to the CID and responses thereto, that the OE first obtained copies of Integrity Advance's loan agreement through the company's productions in response to the January 7, 2013, CID. The stipulation also references Doc. 189, a Declaration of Peter S. Frechette, former counsel for Respondents, who submitted a copy of the Memorandum of Understanding between the CFPB and the Federal Trade Commission (FTC) and a document reflecting that EC searched the FTC Consumer Sentinel database of consumer complaints for complaints about "Integrity Advance" on March 29, 2012.

In their brief, EC specify that they have produced each CID in this matter, responses to each CID, transcripts of testimony taken in June 2014 from Respondent James Carnes and Integrity Advance's Chief Operating Officer, Edward Foster, and consumer complaints obtained by the OE (Doc. 235, pp. 4-5). They represent that if they had other information they were required to disclose, they would have supplemented the disclosures.

ANALYSIS

1. **<u>Has EC already produced all required categories of documents set forth in Rule 206(a)?</u>**

In their brief, EC represent that they have already produced all of the documents obtained by the OE from external sources prior to filing the *Notice of Charges* and stipulated to material facts pertinent to Respondents' statute of limitations defense. EC specifically represent that they have produced each CID and responses thereto, transcripts of testimony taken in June 2014 from James Carnes and Edward Foster, and all consumer complaints and communications regarding Respondents that the OE received from outside sources before these proceedings were initiated. *EC's Brief* at 4-5, *EC's Reply* at 1-2. EC represent that they have no further information to disclose pursuant to Rule 206 and, if they did, they would have supplemented their production. *EC's Brief* at 5.

Pursuant to the stipulation of facts contained in the *Joint Update* (Doc. 234, pp. 3-4), as discussed above, Respondents have conceded that EC produced documents obtained by the OE prior to the institution of proceedings from persons not employed by the Bureau and a PDF indicating that a member of the OE searched the Federal Trade Commission's Consumer Sentinel database of consumer complaints on March 29, 2012. Respondents have also stipulated to other relevant facts and dates related to the investigation including the dates of the CID, responses to the CID, investigational hearing testimony, the NORA letter, responses to the NORA letter, and filing of the *Notice of Charges*.

Within the stipulation of facts, the parties also referenced Doc. 187, a Declaration of EC, Alusheyi J. Wheeler, who stated, in addition to the dates relating to the CID and responses to the CID, that EC first obtained copies of Integrity Advance's loan agreement through the company's productions in response to the January 7, 2013, CID. Attached to the Declaration was a copy of the January 7, 2013, CID which also sets forth, beginning at page 7, *Interrogatories* and *Requests for Documents* that EC were specifically seeking from the Respondents as part of the investigation.

In their brief (Doc. 235, p. 5), EC reiterate that the loan agreement, upon which EC's claims rest, was received by the OE when it was produced in response to the January 7, 2013, CID. EC also represent that they learned of Respondent Carnes' awareness of Integrity Advance's consumer lending activities and his involvement in and authority to control those activities when they conducted the investigational hearings of Carnes and Foster. The parties stipulated in their *Joint Update* (Doc. 234) that the interviews of those two individuals took place in June of 2014.

The stipulation of facts (Doc. 234) also references Doc. 189, a Declaration of Peter S. Frechette, former counsel for Respondents, who submitted a copy of the Memorandum of Understanding between the CFPB and the Federal Trade Commission (FTC) and a document reflecting that EC searched the FTC Consumer Sentinel database of consumer complaints for complaints about "Integrity Advance" on March 29, 2012.

Respondents thus do not appear to allege that EC has not produced the documents required under Rule 206, but rather they are requesting additional categories of documents that they perceive to be relevant, above and beyond those described in Rule 206(a), *Availability of documents for inspection and copying*.

After reviewing the parties' briefs, stipulation of facts, and documents they have submitted or referenced therein, I find that EC have already produced the documents required under Rule 206(a), which includes documents obtained by the OE prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of the proceedings. This encompasses categories one and two of Respondents' subpoena: consumer complaints and external correspondence (Doc. 232 at 1, and Att. A). I therefore **DENY** Respondents' request for issuance of a subpoena for these two categories of documents as unreasonable. I decline to issue a subpoena for documents that have already been provided in accordance with the Rules.

2. <u>Are Respondents entitled to additional documents that Rule 206(b) lists as *Documents that may be withheld*?</u>

In their brief, Respondents clarify that they are seeking documents to establish: 1) when someone at the CFPB first viewed a copy of the loan agreement; 2) when someone at the CFPB first viewed a consumer complaint; 3) when the CFPB opened a research matter; and 4) when the CFPB opened an investigative matter. *RC's Brief* at 1. They assert that the answers to these questions are relevant to when the CFPB "knew or should have known of the alleged violations"[6] and that the Rules allow for discovery of additional relevant documentation.

EC argue in reply that Respondents are seeking documents that are explicitly exempt from disclosure, including the Bureau's internal correspondence and internal reports, and that Respondents are thus seeking to employ discovery mechanisms that are not available under the Bureau's procedural rules (Doc. 237 at 6). They argue that Respondents should not be allowed to seek information beyond the required discovery documentation that EC have already provided that may specifically be withheld under Rule 206(b).

I find based on *RC's Brief* (Doc. 236), *Request for Subpoena* (Doc. 232), and the *Joint Statement* (Doc. 231) that Respondents are seeking to obtain documentation from the CFPB that goes beyond the required documentation listed under Rule 206(a), and that would reveal its attorneys' mental impressions of the factual information received, work product, and case strategy in deciding when to institute proceedings by filing the *Notice of Charges* in this matter.

In their *Request for Subpoena*, Respondents specifically state that that they are seeking "internal correspondence" and "internal reports" (Doc. 232 at 2 and Att. A). Thus, on its very face, the subpoena is seeking categories of documentation that may properly be withheld under the Rules. In both their brief and subpoena, Respondents acknowledge that the documentation they are seeking may properly be withheld under the categories set forth in Rule 206(b) which would include privilege, internal communications, and work product. (Doc. 232 at Att. A, Doc. 236 at 13).

Furthermore, Respondents have already acknowledged, via a document referenced in the stipulation of facts (Doc. 187), that the CFPB represents that it first received a copy of Integrity Advance's loan agreement through the company's production in response to the CID. So, presumably Respondents know when the CFPB asserts that someone at the Bureau first viewed a copy of the loan agreement. Respondents also stipulated that EC provided copies of documents

[6] Respondents are thus asserting that the term "date of discovery" within the Consumer Financial Protection Act statute of limitations means "constructive" discovery, i.e., the date when the CFPB "knew or should have known of the alleged violations." I note however, that Respondents state in their brief (*RC's Brief* p. 2) and EC agree (*EC's Brief* p. 6) that whether a constructive discovery standard applies in this matter need not be ruled upon for purposes of determining whether the Respondents are entitled to additional factual discovery on the statute of limitations issue. I agree that an analysis of this issue will be more appropriate when I am considering the merits of the parties' statute of limitations arguments, so I decline to discuss that issue now, although both parties devote a significant portion of their briefs to arguing their positions on this issue.

obtained by the OE prior to the institution of proceedings, from persons not employed by the Bureau. This would include copies of consumer complaints. Thus, presumably Respondents also already know when someone at the Bureau first viewed a copy of a consumer complaint. I therefore find the Respondents' argument that they are trying to ascertain missing information unconvincing.

I also am not convinced by the Respondents' argument concerning the relevance of whether members of the OE followed guidance set forth in an internal office manual. Such guidance, whether followed or not, would not reveal when the OE received the factual information which is the basis for the allegations contained in the *Notice of Charges*. As discussed in the Rules and commentary, Respondents are entitled to know the factual bases for the charges against them.

Respondents are correct that Rule 206(a)(3) provides for the possibility that additional documents other than those enumerated in Rule 206(a)(1)-(2) may be either provided by the OE of its own accord or sought by Respondents pursuant to subpoena under Rule 208, *Subpoenas*. However, the fact that Respondents may perceive information to be relevant does not mean that Rule 206(b) regarding withheld documents may be ignored.

Rule 208 governs the issuance of subpoenas in administrative adjudication proceedings. The rule grants the hearing officer the discretion to determine whether to issue or deny a subpoena. The standard for denying a subpoena is whether the hearing officer finds it to be unreasonable, oppressive, excessive in scope, or unduly burdensome.

The commentary to Rule 206 provides that Rule 208 permits a respondent to seek other relevant documents in the possession of the Bureau. However, it goes on to explain that Rule 206 is intended to give respondents access to the **material facts underlying enforcement counsel's decision to recommend the commencement of enforcement proceedings** (emphasis added). It states that it is not intended to create an obligation for enforcement counsel to search the files of other divisions or offices in the Bureau, but that the Bureau will include in its affirmative disclosure documents obtained by other elements of the Bureau from persons not employed by the Bureau and later provided to the OE for its use in connection with the investigation leading to the institution of proceedings. It further states that through the affirmative disclosure process, the OE will turn over the **documents that informed its decision to recommend the institution of proceedings** (emphasis added). 77 Fed. Reg. 39058, 39073 (June 29, 2012).

Respondents acknowledge in their brief that the purpose of the discovery process is to provide them with a complete understanding of the factual basis for the Bureau's action (Doc. 236 at 13). Respondents also cite to a case which *inter alia* actually appears to support EC's position that they should not be required to produce either documents or witnesses which reveal counsel's mental impressions, case strategies, or legal opinions, but only those materials which contain factual matters that support the allegations. *See CFPB v. Universal Debt Sols., LLC*, No. 1:15-CV-859, 2017 U.S. Dist. LEXIS 146222 (N.D. Ga. Aug. 25, 2017).

I find that EC have provided documentation showing the material facts underlying their decision to recommend the commencement of enforcement proceedings. I further find that Respondents are attempting to subpoena documents via their subpoena categories 3 and 4 (Doc. 232, Att. A) that clearly fall within the categories of documents that may properly be withheld under Rule 206(b). Respondents have not provided convincing authority entitling them to such categories of information. Accordingly, I **DENY** Respondents' request for issuance of a subpoena for these two categories, i.e., internal correspondence and internal reports, memoranda, notes, analysis and other documents. I find that the subpoena of these documents is both unreasonable and excessive in scope.

3. Are Respondents entitled to a withheld document list?

In their brief, Respondents acknowledge that some of the documents they are seeking "could be privileged" (Doc. 236 at 13). They therefore request that EC be ordered to provide a "privilege log."[7] In support of their request for a privilege log they cite to Rule 206(c) which provides that a hearing officer *may* require the OE to produce a list of documents or categories of documents withheld pursuant to paragraphs (b)(1)(i) through (v). Respondents again cite to the *Universal Debt Sols.* case, described above, in which the court did not even address the issue of a withheld document list, but emphasized that the defendants in that case were entitled only to the factual bases for the CFPB's allegations. I therefore do not find the case particularly helpful or supportive of Respondents' request for a withheld document list. Respondents did not cite to any other cases or authorities to support their position that they are entitled to a withheld document list. EC did not address the issue of a withheld document list in its reply brief.

Rule 206(c) provides for the possible production of a "withheld document list" and states that the hearing officer *may* require the OE to produce a list of documents or categories of documents withheld based upon the five withholding categories set forth above or to submit to the hearing officer any document withheld.

The commentary regarding Rule 206(c) states only that a hearing officer *may* require the OE to submit a withheld document list. It provides that the hearing officer *may* require the OE to submit a list of documents or categories of documents withheld "when appropriate" but does not elaborate further. 77 Fed. Reg. 39058, 39074 (June 29, 2012).

I do not find it appropriate in this case to compel EC to produce a detailed withheld document list. Although the rules provide that I may alternatively require EC to provide a list of "categories" of documents that it wishes to withhold, based on the briefs, it is clear that those categories would include categories three and four, set forth in Respondents' subpoena request: internal correspondence, reports, memoranda, notes, analysis, etc. I therefore find requiring a category list to be an unnecessary and dilatory exercise. Given that the documents in question involve EC's internal correspondence and internal reports, etc., reflecting counsels' analysis of the

[7] I believe what RC are referring to by "privilege log" is a "withheld document list" as discussed in Rule 206(c).

case and charging strategy, rather than documents containing factual information obtained from external sources that provided the bases for the allegations, I decline to require a withheld document list.

4. <u>Are Respondents entitled to supplement the record under the *Intercollegiate* case?</u>

In their brief, RC argue that they are entitled to the additional discovery they request in their subpoena pursuant to the case of *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015) (Doc. 236 at 14-15). They argue that because the law regarding applicability of statutes of limitations in administrative proceedings has changed due to the *PHH Corp*. case, they have therefore provided a "specific reason" why it is necessary to reopen the record. They also argue that, although they did not make a discovery request for the documents they are seeking now when the statute of limitations issue was adjudicated by the ALJ previously, and, although they presented their argument to Judge McKenna without claiming that they needed this additional information, they should be excused from not having requested these documents previously, because it would not have made a difference.

EC argue that Respondents have not provided a "specific reason" why it is necessary to reopen the record to take further evidence and that Respondents cannot explain how they were denied an opportunity to present their case or point to any decision of the prior ALJ that prevented them from obtaining information. They assert that Respondents are attempting to reason backward from the ALJ's decision on the motion to dismiss by arguing that any efforts to seek discovery would have been futile (Doc. 235 at 8-10). EC also argue that *PHH Corp*. did not change the law with regards to the "date of discovery" issue or what elements parties must assert in the statute of limitations.

In the *Intercollegiate* case, the D.C. Circuit addressed the cure for an appointments clause violation in a case involving the Copyright Royalty Board. The Court found *inter alia* that a *de novo* record review, rather than live trial-like adversarial hearing, was reasonable where each party had ample opportunity to present its case in the initial proceedings, and no party provided any specific reason why it was necessary to reopen the record to take further evidence.

In the current matter, as I discussed in my *Scheduling Order* (Doc. 233 at FN. 1), the Respondents' previous motion to dismiss based on the running of the statute of limitations was denied by the ALJ based on the CFPB Director's decision in *PHH Corp*. (finding statutes of limitations inapplicable in CFPB administrative proceedings). Ultimately, the Director's decision was overturned on this point by the D.C. Circuit Court. However, due to the timing of the D.C. Circuit's decision, the statute of limitations issue was never revisited in the previous proceeding, and the issue of what effect, if any, the D.C. Circuit's *PHH Corp*. decision has on this matter, was not resolved.

I therefore do agree that Respondents have presented a specific reason why I need to reopen the record on the statute of limitations issue. I find that the parties should be able to submit their respective arguments regarding what effect, if any, the *PHH Corp*. case has on this matter, in light of the fact that Respondents' previous motion on this issue was denied specifically due to the Director's *PHH Corp*. decision. I also find Respondents' argument that, even though they did not seek the additional evidence that they now seek when they made their previous statute of limitations argument before Judge McKenna, their failure to do so should be ignored because it "would not have made a difference" to be unconvincing. Regardless of whether or when Respondents did or did not seek the additional discovery, as discussed above, I have found that Respondents are not entitled to the additional discovery they are seeking because it may properly be withheld under Rule 206(b).

I find that the *PHH Corp*. decision is significant because it addressed the **applicability** of statutes of limitations to CFPB administrative proceedings. The case did not address the "discovery rule" or the specific statute of limitations in this matter. Nor did the case address whether Respondents should be entitled to the type of discovery they are now requesting. It did not make a finding that would entitle Respondents to discovery of documents that would properly be withheld under Rule 206(b). Accordingly, I find only that the record on the statute of limitations issue should be **reopened** to allow the parties to present their arguments regarding what effect, if any, the *PHH Corp*. case has in this matter and whether any of the charged Counts are time-barred. I **DENY** the Respondents' request to open the record for additional factual discovery on the statute of limitations.

Accordingly, I issue the following **ORDERS**:

1. *Respondents' Request for Issuance of Subpoena to the Consumer Financial Protection Bureau for Production of Documents* (Doc. 232) is **DENIED**.

2. The parties will submit briefs on the issue of whether any, or all, of the counts in this matter are barred by the relevant statute of limitations. In their briefs, the parties will specifically address the following issues:

    a. what statute of limitations applies to each count and their position as to whether the count is time-barred by the relevant statute;

    b. what effect, if any, the *PHH Corp*. case or other recent case law has on the current matter;

    c. what the parties' position is with regard to Count IV which was previously dismissed with prejudice by ALJ McKenna based upon the parties' *Stipulated Motion to Withdraw Count IV With Prejudice*. *See* Doc. 127, 133.

3. The briefing schedule is as follows:

    a. RC's Brief due **November 15, 2019**

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b. EC's Response Brief due **December 6, 2019**
c. RC's Reply Brief due **December 13, 2019**

SO ORDERED.

Christine L. Kirby
Digitally signed by Christine L. Kirby
Date: 2019.10.28 15:24:28 -04'00'

HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 28th day of October 2019 at Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Denying Further Discovery on Statute of Limitations Issue* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 28th day of October 2019
at Washington, D.C.

Exhibit 4

Dkt. 267 – Order Denying Respondents' Motion to Amend Answer
(filed April 24, 2020)

UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	ORDER DENYING RESPONDENTS' MOTION TO AMEND ANSWER
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

Procedural History

On December 11, 2015, Respondents filed an *Answer* (Doc. 21) to the *Notice of Charges* in this matter (Doc. 1). In the *Answer*, Respondents stated eight specific affirmative defenses. Doc. 21 at 14-15. On March 26, 2020, Respondents' Counsel ("RC") filed *Respondents' Motion to Amend Answer* (Doc. 259), seeking to add two additional affirmative defenses. Respondents requested oral argument. On April 9, 2020, Enforcement Counsel ("EC") for the Consumer Financial Protection Bureau ("CFPB") filed a consolidated response brief addressing the motion (Doc. 264). On April 15, 2020, RC filed a consolidated reply brief addressing the motion. (Doc. 265).

Respondents' Motion

Respondents' seek to amend their *Answer* to add: 1) an affirmative defense of good faith reliance on the advice of counsel; and 2) an affirmative defense of lack of fair notice as to the prohibited conduct underlying the Consumer Financial Protection Act (CFPA) claims for "unfairness" and "deception." RC assert that a recent District Court decision held that good faith reliance on advice of counsel can have a significant impact on the financial penalties and restitution that can be imposed in CFPB enforcement matters and that any potential prejudice to the CFPB can be mitigated by allowing additional discovery. Doc. 259 at 1. With regard to the fair notice defense, they assert that EC will not be prejudiced because the CFPB has responded to similar challenges in other cases. *Id*.

CFPB's Response

The CFPB asserts that Respondents should not be allowed to interject new legal issues into this matter that they could have asserted previously, and that Respondents waived or forfeited these defenses by electing not to raise them earlier. Doc. 264 at 2, 15-17. EC assert that there has been no intervening change in the law that would justify adding these defenses. *Id*. at 17. They assert that allowing the addition of these defenses now would provide Respondents with a procedural windfall that is not available to other litigants and cannot be justified. *Id*. at 2. EC also argue that asserting these two defenses would be futile as neither could save Respondents from liability. *Id*. at 18-20.

ANALYSIS

I. Legal Standard

The CFPB's *Rules of Practice for Adjudication Proceedings* ("*Rules*") state that "[a]n answer must specifically respond to each paragraph or allegation of fact contained in the notice of charges and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact." 12 C.F.R. § 1081.201(b). Rule 201(b) further states that "[a] respondent is not required to respond to the portion of a notice of charges that constitutes the prayer for relief or proposed order" and that "[t]he answer must set forth affirmative defenses, if any, asserted by the respondent." *Id*.

Pursuant to Rule 202(a), an answer may be amended before the hearing "only with the opposing party's written consent or leave of the hearing officer." 12 C.F.R. § 1081.202(a). The commentary to Rule 202 explains that the rule "encourages parties to plead their case fully" and "reflect[s] a liberal standard of permitting amendments of pleadings, but implements an appropriate limit for amendments that are unduly prejudicial." 77 Fed. Reg. 39058, 39069.

The Supreme Court has held that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Furthermore, "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the [Federal Rules of Civil Procedure] require, be 'freely given.'" *Id.*

The D.C. Circuit Court analyzed the timeliness of affirmative defenses in *Harris v. Sec'y, U.S. Dep't. of Veterans Affairs*, 126 F.3d 339 (D.C. Cir. 1997). The Court noted that although the Federal Rules of Civil Procedure "do not explicitly mention waiver or forfeiture as the consequence of failure to follow Rule 8(c), it is well-settled that a party's failure to plead an affirmative defense generally results in the waiver of that defense and its *exclusion from the case*."[1]

II. Good Faith Reliance on Advice of Counsel Defense

[1] *Harris*, 126 F.3d at 343 (quoting *Dole v. Williams Enters., Inc.*, 876 F.2d 186, 189 (D.C. Cir. 1989) (emphasis in original, internal quotation marks and alterations omitted)); *see also Wood v. Milyard*, 566 U.S. 463, 470 (2012) ("An affirmative defense, once forfeited, is excluded from the case.") (internal quotation marks and alterations omitted).

In their brief, RC cite to the case of *CFPB v. CashCall, Inc., et al.*[2] as support for their motion to amend their answer to include an affirmative defense of good faith reliance on advice of counsel. Doc. 259 at 3-4. RC argue that although Respondents did not raise the defense at the first hearing and even raised objections to questioning regarding what if any advice of counsel Respondents received, based on their desire to preserve attorney-client privilege, they now believe based on the recent decision in *CashCall* that this defense "could have a significant impact on any potential penalty and restitution award." *Id*. at 4. RC further argue that the CFPB will not be unduly prejudiced by allowing Respondents to raise an advice of counsel/good faith defense because we are not in the midst of or on the eve of a hearing and EC may seek reasonable discovery. *Id*. at 5.

EC assert that Respondents made the strategic decision not to raise an affirmative defense of good faith reliance on advice of counsel previously and thus waived or forfeited the defense. Doc. 264 at 15-16. In support of this position they rely on the D.C. Circuit Court decision in *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*[3] as holding that in a remand case to remedy an Appointments Clause problem, a party is limited to the evidence that it decided, on its own volition, to submit in the previous proceeding. *Id*. at 16-17. EC also assert that *CashCall* did not represent a change in the law as to whether good faith reliance on advice of counsel is an affirmative defense to liability. *Id*. at 17. Furthermore, EC assert that since good faith reliance on advice of counsel is not a cognizable affirmative defense to liability, as Respondents concede, it would therefore be futile to assert it. *Id*. at 18-20.

In *CashCall*, the court cited to its previous holding[4] that advice of counsel is **not** a defense to liability, but that it is relevant to the determination of whether restitution is an appropriate remedy. *CashCall*, 2018 WL 485963, at *12. In their brief, Respondents concede that assertion of good faith reliance on counsel is not, in fact, an affirmative defense, but contend that it would assist them in establishing that the CFPB has not met its burden to show that restitution is an appropriate remedy. Doc. 259 at 7. They also accurately state that under the CFPB's rules, they are "not even required to respond to the CFPB's sought-after remedies, much less assert affirmative defenses as to the remedies." *Id*. They vaguely state, however, that they are nevertheless seeking to amend their *Answer* to include good faith reliance on the advice of counsel as an affirmative defense "in an abundance of caution." *Id*. at 7, 8.

Accordingly, I find that good faith reliance on advice of counsel is not an affirmative defense to liability. I further find that Respondents are not required to respond to portions of the *Notice of Charges* that constitute the prayer for relief. As restitution is only mentioned in the prayer for relief portion of the *Notice of Charges*, I find no need to include information in the *Answer* responding to the CFPB's request for restitution. Respondents' motion to amend the *Answer* to add an affirmative defense of good faith reliance on the advice of counsel is **DENIED.**[5]

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[2] *CFPB v. CashCall, Inc., et al.*, No. CV 15-07522-JFW, 2018 WL 485963 (C.D. Cal. Jan. 19, 2018).
[3] *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015).
[4] *Chase v. Trs. of W. Conference of Teamsters Pension Trust Fund*, 753 F.2d 744, 753 (9th Cir. 1985).
[5] The question remains whether Respondents can introduce supplemental evidence on advice of counsel to assist me in adjudicating the merits of the action, i.e., the appropriateness of restitution. I will address this issue in the Order addressing *Respondents' Motion to Open Record for a New Hearing*.

III. <u>Lack of Fair Notice Defense</u>

In their brief, RC also seek to amend their *Answer* to assert a defense that the CFPB did not provide fair notice of the prohibited conduct underlying the CFPA claims for "unfairness" and "deception." RC do not explain why this defense was not raised previously and, unlike the good faith reliance on advice of counsel defense discussed *supra*, do not cite to any purported change in the law that would make this defense more relevant now than it would have been in the previous hearing. They simply assert that the CFPB will not be prejudiced because it has responded to this defense in other matters. Doc. 259 at 8.

EC make similar arguments as those made above. Specifically, EC assert that Respondents made the strategic decision not to raise the lack of fair notice defense previously and thus waived or forfeited it and there has been no change in the law. Doc. 264 at 15-17. They also argue that the defense would be futile and result in prejudice. *Id*. at 20.

Respondents seek to assert this defense more than four years after the *Notice of Charges* was filed and cite to absolutely no reason why they failed to assert it earlier. Nor do they cite to any change in the law that would make this defense more relevant now than it was previously. I also note that in the course of this remand proceeding, unlike with the advice of counsel defense which Respondents raised immediately at the start of the proceeding (*See* Doc. 228), Respondents did not raise the lack of notice defense until now, several months into this proceeding. Given their lack of any explanation whatsoever for the delay, and the requirement to conduct adjudication proceedings expeditiously and the duty of all parties, as well as the hearing officer, to make every effort at each stage of a proceeding to avoid delay,[6] I find that Respondents have waived this affirmative defense[7] and that to allow it to be raised now would result in prejudice to the CFPB and cause undue delay. Respondents' motion to amend the *Answer* to include an affirmative defense of lack of fair notice is **DENIED**.

<u>ORDERS</u>

1. Respondents' request for oral argument is **DENIED**.

2. Respondents' Motion to Amend Answer is **DENIED**.

SO ORDERED this 24th day of April 2020.

Christine L. Kirby
Digitally signed by Christine L. Kirby
Date: 2020.04.24 15:50:36 -04'00'

HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 24th day of April 2020 at Washington, D.C.

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6 *Rules of Practice for Adjudication Proceedings*, 12 C.F.R. § 1081.101.

7 *See* March 13, 2020, *Order Denying Motions to Stay and Dismiss* (Doc. 257, at 3-5) in which I discussed the D.C. Circuit Court's analysis of the timeliness of affirmative defenses.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Denying Respondents' Motion to Amend Answer* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
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Bureau of Consumer Financial Protection

Signed and dated on this 24th day of April 2020 at Washington, D.C.

Exhibit 5

Dkt. 269 – Order Denying in Part Respondents'
Motion to Open Record for New Hearing
(filed April 24, 2020)

UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of: INTEGRITY ADVANCE, LLC and JAMES R. CARNES, Respondents.	ORDER DENYING IN PART RESPONDENTS' MOTION TO OPEN RECORD FOR A NEW HEARING

Procedural History

On August 14, 2019, counsel for Respondents (RC) filed *Respondents' Motion to Open Record For A New Hearing* (*Motion*) (Doc. 229) and accompanying memorandum of law in support of the motion (Doc. 229A). In the memorandum, Respondents stated that they were merely identifying, but not asking for dispositive rulings on the issues therein, and that the memorandum did not contain their full arguments on the merits. Rather than addressing all the issues identified in the *Motion*, I chose to first address the issues related to the Statutes of Limitations,[1] followed by other issues which arose in the interim. On March 13, 2020, I issued a *Scheduling Order for Issues in Respondents' August 14, 2019, Motion*, in which I directed the parties to return to the issues raised in the *Motion* and set forth a briefing schedule. I ordered Respondents to file any supplemental brief in support of their motion no later than March 26, 2020.

On March 26, 2020, RC filed *Respondents' Supplemental Brief in Support of Their Motion to Open Record for a New Hearing* (Doc. 261). On April 9, 2020, Enforcement Counsel (EC) for the CFPB filed *Enforcement Counsel's Opposition to Respondents' Motion to Open Record for New Hearing* (Doc. 263). On April 15, 2020, RC filed a consolidated reply brief which addressed *inter alia Respondents' Motion to Open Record for a New Hearing* (Doc. 265).

Respondents' Motion

RC make four main arguments in the motion: 1) a new hearing is required by the Supreme Court's Ruling in *Lucia v. SEC*[2] and the CFPB Director's Order; 2) a new hearing is needed to assess witness credibility; 3) a new hearing is needed to supplement the record on issues where the

[1] The issues related to the Statute of Limitations have already been adjudicated and will not be addressed further in this Order.
[2] *Lucia v. SEC*, 128 S. Ct. 2044 (2018).

prior administrative law judge (ALJ) granted summary disposition; 4) a new hearing is needed to present testimony with regard to the issues of good faith reliance on advice of counsel and calculation of restitution that have become relevant due to changes in the law. Doc. 261 at 1.

CFPB's Position

EC assert that the record, created on the parties' own accord, contains an ample basis for the current administrative law judge to conduct a *de novo* review and issue a new recommended decision. They assert that Respondents have failed to show good cause to supplement the existing record with cumulative live testimony and that the ALJ can adjudicate liability without the need to make credibility determinations based on witness demeanor. They further assert that Respondents lack good cause to introduce new evidence of their reliance on advice of counsel and that there has been no change in the law necessitating supplemental evidence in this regard. Finally, they assert that Respondents lack good cause to introduce supplemental evidence of their expenses for purposes of determining restitution. Doc. 263 at 1.

ANALYSIS

1. Legal Standard

In *Lucia v. SEC*, the Supreme Court held that, where a case was heard and decided by an ALJ who was not constitutionally appointed and where the issue of improper appointment is timely raised, the appropriate remedy is a new "hearing before a properly appointed official."[3] The Court did not specify what form a "new hearing" was to take.[4]

On May 29, 2019, the CFPB Director, pursuant to the holding in *Lucia*, remanded this matter to me for a "new hearing and recommended decision in accordance with" the CFPB *Rules of Practice for Adjudication Proceedings* (Rules).[5] Doc. 216 at 9. The authority of the hearing officer is set forth in Rule 104. Pursuant to this Rule, the hearing officer has the authority *inter alia* to receive relevant evidence and to rule upon the admission of evidence and offers of proof; regulate the course of a proceeding and the conduct of the parties and their counsel; consider and rule upon, as justice may require, all procedural and other motions appropriate in adjudication proceedings; and to do all other things necessary and appropriate to discharge the duties of a presiding officer.[6]

In *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, the U.S. Court of Appeals for the D.C. Circuit held that a *de novo* record review by a properly appointed Board was sufficient to cure an Appointments Clause violation, but indicated that the adjudicator could decide to supplement the record if a party provides a specific reason why it is necessary to reopen the record and take further evidence.[7]

[3] *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (quoting *Ryder v. U.S.*, 515 U.S. 177, 183, 188, (1995)).
[4] *See id*.
[5] 12 C.F.R. Part 1081.
[6] *See* 12 C.F.R. § 1081.104(b)(4), (5), (10), (14).
[7] *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd*., 796 F.3d 111, 126 (D.C. Cir. 2015). *See also Stearns Zoological Rescue & Rehab Ctr., Inc.*, AWA Docket No. 15-0146, 2020 WL 836672, at *4-5 (U.S.D.A. Feb. 7,

2. Is a new hearing required by the Supreme Court's Ruling in *Lucia v. SEC* and the CFPB Director's Order?

The fact that a new hearing is required based on the Supreme Court's decision in *Lucia* and the CFPB Director's May 29, 2019, *Order Directing a Remand to the Bureau's Administrative Law Judge* is not in dispute. Respondents correctly state that in *Lucia*, the Supreme Court held that the appropriate remedy for an adjudication tainted by an Appointments Clause violation is a "new hearing before a properly appointed official." Doc. 261 at 3 (citing *Lucia*, 138 S. Ct. at 2055). In the CFPB Director's May 29, 2019, remand order, she remanded the case to me for a "new hearing and recommended decision in accordance with Part 1081 of the Bureau's Rules, 12 C.F.R. Part 1081." Doc. 216 at 9.

The more relevant question posed by Respondents' motion is what form the "new hearing" should take. To put it in plain language, the issue is whether I should discard the entire record from the previous hearing and truly start anew or whether I may retain and review all or parts of the previous record, supplementing it where necessary, in rendering my own independent decision.

The Court in *Lucia* noted that another ALJ or the Securities and Exchange Commission itself must hold the new hearing because the judge that already heard the case and issued an initial decision on the merits could not be expected to consider the matter as though he had not adjudicated it before. *Lucia*, 138 S. Ct. at 2055. In a footnote, the court explained that a new hearing officer is required because the previous judge would have no reason to think he did anything wrong on the merits and could be expected to reach all the same judgments. *Id.* n.5. In the present matter, a review of the record would not impair my ability as the new ALJ to make an untainted decision on the merits. Neither *Lucia* nor the *Ryder* case on which the Court relied in the *Lucia* decision further explains what is meant by a "new hearing" and therefore, are not helpful in answering the question of what form the "new hearing" should take.

Respondents seem to assert that a "new hearing" means that everything that was done in this case previously should be discarded and the case should truly start afresh. In *Respondents' Memorandum of Law in Support of Motion to Open Record for a New Hearing* (Doc. 229A), RC argued that the Chief ALJ for the SEC has ordered that post-*Lucia* matters before the SEC are entitled to new hearings and that it is only appropriate to conduct a "mere review of the existing record where both parties agree to that review." Doc. 229A at 3-4.

However, the SEC never defined what is meant by a "new hearing" and never indicated that a review of the record by a newly assigned ALJ would be inappropriate.[8] Furthermore, the language that RC relied on to argue that the Chief ALJ distinguished between a full new hearing and a review of the existing record does not support their argument. *See* Doc. 229A at 3-4. The SEC order states that ALJs were assigned "to preside over new hearings except 'where the parties

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2020) (finding *de novo* record review appropriate to remedy an Appointments Clause violation, absent specific reason to reopen record for further evidence).

[8] *See In Re: Pending Administrative Proceedings*, 2018 WL 4003609 (Aug. 22, 2018); *In re: Pending Administrative Proceeding*, File Nos. 3-140061, Chief Administrative Law Judge's Order assigning Proceedings Post *Lucia v. SEC* (Sept. 12, 2018), https://www.sec.gov/alj/aljorders/2018/ap-5955.pdf.

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waived their right to a new hearing and requested that the **Commission** decide their petitions for review on the present record.'"[9] This language merely distinguishes a new hearing in front of an ALJ from the Commission deciding petitions based on the record. It does not follow that a new hearing in front of an ALJ could not include a review of the record by the ALJ.

The CFPB's position, based on the D.C. Circuit Court's decision in *Intercollegiate* is that a mere *de novo* record review is a sufficient remedy for an Appointments Clause violation. Doc. 263 at 1-3.

In opposition, RC assert that, to the degree *Intercollegiate* stands for the proposition that a *de novo* record review is appropriate, it has been overturned by *Lucia*, or even if it is still good law, that the circumstances in the instant case are different and require a new hearing. Specifically, they argue that "a *de novo* record review may be appropriate where the parties have not identified 1) any determination that 'turned on witness' credibility nor 2) any relevant evidence that is not on the record." Doc. 261 at 3. RC claim that key issues turn on witness credibility and the written record does not contain all of the relevant evidence. *Id*. at 4. Finally, they argue that "the ALJ cannot make factual findings based on a paper review of the existing record as the prior ALJ explicitly relied upon credibility determinations to make his factual findings." *Id*.

Examining RC's arguments regarding *Intercollegiate*, it appears that RC misstate the Court's analysis and reasoning for finding a *de novo* record review appropriate. The language that RC rely on is not, in fact, the analysis of the court but rather the rationale for the Copyright Royalty Board's decision not to hold new evidentiary hearings. *See Intercollegiate*, 796 F.3d at 116. The court never opined on the Board's reasons for determining that a *de novo* review of the existing record was appropriate. Rather, the court analyzes "the validity of a subsequent determination when—as here—a properly appointed official has the power to conduct an independent evaluation of the merits and does so." *Id.* at 117.

The *Intercollegiate* court goes on to analyze two Supreme Court cases that dealt with new hearings as a result of Appointments Clause violations. First, the court concludes that the Supreme Court in *Ryder v. United States* stands for the proposition that review by a properly appointed body *can* be insufficient to cure an Appointments Clause violation, but that it does not stand for the proposition that *de novo* review is insufficient. *Id.* at 120. It also notes that the Supreme Court never stated that a new hearing would be required if the reviewing court possesses *de novo* authority nor that such a hearing would have to involve live witnesses or additional evidence. *Id.* The other case, *Wingo v. Wedding*, 418 U.S. 461 (1974), involved federal habeas corpus proceedings and stands for the proposition that a *de novo* review of an existing record "is inadequate when a statute expressly requires the reviewing judge to personally hold an evidentiary hearing." *Id.* at 120-121.

After reviewing the briefs and cited cases, I conclude that both parties have raised valid points. I find that it would be inefficient and imprudent to totally discard everything that has been done to create the extensive record in this matter. The cases cited by Respondent do not support

[9] *In re: Pending Administrative Proceeding*, File Nos. 3-140061, Chief Administrative Law Judge's Order assigning Proceedings Post *Lucia v. SEC* (Sept. 12, 2018), https://www.sec.gov/alj/aljorders/2018/ap-5955.pdf (emphasis added).

such an extreme measure. During the previous hearing, several relevant witnesses were called, who testified under oath and were subject to both direct and cross examination by the parties. It does not make sense to now state that these witnesses are no longer relevant, that their testimony has suddenly become unreliable, and/or that they need to re-testify. Similarly, both parties submitted several relevant documentary exhibits. Respondents have not stated anything that convinces me that such testimonial and documentary evidence should be discarded.

However, a mere *de novo* record review is also not practical, because the previous ALJ made decisions in the course of the proceedings that affected what charges went forward to full hearing and what evidence was admitted and/or excluded. So, to the extent that the previous judge made rulings on motions for summary disposition and admitted or excluded evidence over objection of the parties, I must decide whether the record needs to be supplemented or whether portions of it should be struck. I am not bound by the prior ALJ's evidentiary or other rulings. Also, if there have, indeed, been changes in the relevant law, I must consider whether the changes merit supplementation of the record.

With regard to judging the credibility of witnesses, I will address this issue in more detail below, but I am not bound by the previous ALJ's rulings on credibility and they are irrelevant to my independent adjudication of this matter.

In summary, as I have stated to the parties previously, it is my intent to conduct a *de novo* review of the record - to the extent possible. However, I will consider the parties' arguments as to whether the record needs to be supplemented or whether portions of the record that were previously admitted should be struck.

2. Is a new hearing needed so the hearing officer can assess witness credibility in person?

RC assert that because the prior ALJ relied upon credibility determinations, factual findings cannot be based on a paper review of the existing record. Doc. 261 at 4. They assert that because the previous ALJ made either explicit or implicit credibility determinations of every witness' testimony, that I must therefore hear live testimony from every witness so that I can assess their demeanor and thus determine whether they are credible. They specifically want me to hear live testimony from: Respondent James Carnes, Edward Foster, an unspecified representative of the Delaware Office of the State Bank Commissioner (to replace the testimony of previous witness Elizabeth Quinn Miller, who has died since the previous hearing), Robert Hughes, Dr. Xiaoloing Ang, Joseph Baressi,[10] Bruce Andonian, and Timothy Madsen. *Id.* at 4-10.

EC assert that the prior ALJ's credibility determinations are due no weight on this remand and that I can review the prior testimony to reach my own conclusions without resorting to past

[10] With regard to Joseph Baressi there is a separate issue as to whether his testimony should be struck from the record. In the previous hearing, Respondents made a motion to strike his testimony (Doc. 153). EC filed an opposition to the motion (Doc. 158). The motion was granted in part and denied in part by the previous ALJ (Doc. 161). In their Supplemental Brief (Doc. 261) Respondents state that "[f]or the reasons stated in the motion to strike [Doc. 153], Enforcement Counsel should not be permitted to present Mr. Baressi's testimony in this proceeding. I will therefore need to examine this issue and make an independent ruling on it. I will make a ruling on this when I review the testimony in detail and will examine Respondents' motion to strike and EC's opposition and make a ruling at that time.

credibility determinations. Doc. 263 at 4. They assert that Respondents have not demonstrated that it is necessary to evaluate a particular witness' demeanor. *Id.* They further assert that it is unnecessary to disbelieve the testimony in order to find Respondent Carnes personally liable. *Id.* at 5. Furthermore, they assert that the prior ALJ's credibility determinations were based on the weight of the evidence and not on witnesses' demeanor. *Id.* at 7. They assert that recalling the witnesses would be cumulative.

As the CFPB Director stated in her remand order, I am to give no weight to nor presume the correctness of any prior opinions, orders, or rulings issued by the previous ALJ in this matter. Doc. 216 at 9. Therefore, whether the previous judge found some or all of the witnesses' testimony to be credible or not, and what method he used to do so, is totally irrelevant to my adjudication of this matter.

The case that RC cites refers to witness demeanor in the context of appeals courts granting deference to trial courts' credibility determinations because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985).

There is much discussion and disagreement in the legal and psychiatric community as to whether it is possible to determine whether someone is lying by evaluating their demeanor.[11] While demeanor is one factor that a judge *may* use to evaluate a witness' credibility, a judge is not *required* to utilize this factor. I do not find this factor to be reliable and I do **not** plan to consider it to determine credibility in this matter. I do not believe that I have any special power to determine whether someone is lying based on observing their demeanor and I believe it is possible for a dishonest person to portray an air of utter confidence, sincerity and seeming honesty, while an honest person can seem to be lying based on nervousness, gestures, and mannerisms that make them appear to be uncertain or untruthful. An exception to this is where someone is obviously joking or being sarcastic and means the opposite of what he or she says.[12]

The Merit Systems Protection Board has established a number of factors that a fact-finder may consider in assessing witness credibility. Specifically:

> To resolve credibility issues, the trier of fact must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the

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[11] *E.g.*, Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 Am. U. L. Rev. 1331 (2015); Honorable James P. Timony, *Demeanor Credibility*, 49 Cath. U. L. Rev. 903 (2000).

[12] If the parties can identify any specific instance of this in the record and want to bring it to my attention, I will consider it.

inherent improbability of the witness's version of events; and (7) the witness's demeanor.[13]

In noting that deference must ordinarily be given to an administrative judge's credibility determinations "when they are based on the observation of the demeanor of witnesses testifying at a hearing," the Merit Systems Protection Board implied that demeanor is one possible factor that *can* be considered, but it is not required. While not binding precedent, I find the list of possible factors to be helpful.

The factors that I intend to utilize to determine credibility in this matter include a combination of the following: opportunity and capacity to observe the event or act about which witness is testifying; ability to recall; consistency or inconsistency of the witness' testimony with other testimony or evidence; relevant background, training, education or experience; bias; interest in outcome of case; inconsistent statements of the witness; corroboration; inherent probability of the witness' version of events/plausibility. These factors do not require me to observe a witness' live testimony and I do not find that Respondents have articulated sufficient grounds for me to recall any of the witnesses for this purpose. I therefore **deny** Respondents' request to reopen the record to have some or all of the witnesses re-testify (or, in the case of Mrs. Quinn Miller, have a new unnamed person testify in her place) so that I can observe their testimony in person and judge their credibility based on demeanor.

3. Is a new hearing needed to supplement the record on issues where the prior ALJ granted summary disposition?

RC accurately assert that in the first proceeding, the former ALJ granted summary disposition in favor of the CFPB as to Integrity Advance's liability for Counts I, II, III, V, and VI.[14] Doc. 261 at 10. Based on these rulings, the prior ALJ then granted the CFPB's *Motion in Limine to Preclude Evidence Disputing Issues Decided and Facts Established at Summary Disposition*.[15] *Id*. at 11. Respondents assert that they therefore never had the opportunity to present live testimony or cross-examine CFPB witnesses on these issues and that they should now have the opportunity to do so. *Id*.

EC do not specifically address this argument in their opposition brief, but indicate that they intend to make a motion for summary disposition in the current matter. Doc. 263 at 8 n.7. I note that RC have also indicated an intent to seek summary disposition. Doc. 261 at 3 n.1.

As stated above, I am not bound by the prior ALJ's rulings and am to give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by the previous ALJ. Accordingly, the previous ALJ's ruling with regard to summary disposition (Doc. 111) and subsequent evidentiary decision based on that ruling (Doc. 141) have no effect in this remand proceeding. Both parties have indicated their intent to again make motions for

[13] *Rapp v. Office of Pers. Mgmt.*, 108 M.S.P.R. 674, 681 (2008) (citing *Faucher v. Dep't of the Air Force*, 96 M.S.P.R. 203, ¶ 8 (2004); *Hillen v. Dep't of the Army*, 35 M.S.P.R. 453, 458 (1987)).
[14] *Order Granting in Part and Denying in Part Bureau's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition*, Doc. 111.
[15] Doc. 141.

summary disposition, but have not yet done so. That will be the next phase of this proceeding. However, since I have not yet adjudicated such motions, RC's assertion of a need to supplement the record on the relevant counts is premature.

4. Have there been changes in the law which require the testimony to be supplemented?

a. Good faith reliance on advice of counsel

Respondents assert that at the time the prior ALJ rendered a recommended decision in this matter, there was no case law recognizing the relevance of good faith reliance on the advice of counsel to the appropriateness of restitution in a CFPA matter, but that in the time since the recommended decision, there have been two additional cases[16] that reflect that restitution is not an appropriate remedy in a CFPA case where the CFPB does not establish fraudulent intent or that consumers did not receive the benefit of their bargain. Doc. 261 at 11-12. They assert that by introducing evidence that Respondent Carnes relied on the advice counsel to draft the loan agreement and ensure it complied with the law, he can establish that he acted in good faith such that the CFPB could not prove that he acted with fraudulent intent and thus could not establish the appropriateness of awarding restitution. In order to establish that Carnes relied on the advice of counsel and thus acted in good faith, they want to reopen the record to call the following witnesses: James Foster (in-house counsel) and Claudia Calloway (outside counsel). Doc. 261 at 13. Additionally, they want to call an unnamed representative of the Delaware Bank Commissioner, a state regulator, so I "can assess Respondents' good faith reliance on the repeated approvals by the Delaware Bank Commissioner." Doc. 261 at 9, 13.

EC assert, in opposition, that there has been no change in the law necessitating new evidence of good faith reliance on advice of counsel. They state that Respondents' reliance on counsel/good faith was not relevant in the prior hearing on the issue of restitution and continues to be irrelevant on this issue. Doc. 263 at 9. They state that the issue was relevant in the previous hearing, and continues to be a mitigating factor, only on the issue of the amount of a civil money penalty pursuant to 12 U.S.C. §5565(c)(3). *Id.* at 8. They assert that because the CFPB is seeking legal restitution, there is no discretion to deny restitution if the ALJ finds Respondents liable of a violation and resulting harm. *Id.* at 9-10. They assert that to deny restitution on the grounds that Respondents did not act in bad faith or reasonably relied on the advice of counsel would contradict the CFPA's purpose. *Id.* at 10. They assert that the *CashCall* case relied upon by Respondents, which is under appeal and not binding precedent, is inconsistent with these principles and was incorrectly decided. *Id.* at 11.

The first question to address is whether there has, in fact, been a change in the relevant law. Respondents cite to *CashCall*, a case from the Central District of California, that is currently pending appeal in the 9th Circuit. EC are correct that this district court case is not binding precedent in the current matter. Nevertheless, a non-binding case can sometimes provide persuasive authority. Respondents argue that *CashCall* represents a change in the law as to the appropriateness of restitution. Specifically, they state that in *CashCall*, the Court found that while advice of counsel is not a defense to liability, it is relevant to the determination of whether

[16] *CFPB v. CashCall, Inc., et al.*, No. CV 15-07522-JFW, 2018 WL 485963 (C.D. Cal. Jan. 19, 2018) and *CFPB v. Nationwide Biweekly Admin., Inc., et al.*, No. 15-cv-02106-RS, 2017 WL 3948396 (N.D. Cal. Sept. 8, 2017).

restitution is an appropriate remedy. Doc. 261 at 12. I note that in reaching its holding that advice of counsel is relevant to the determination of whether restitution is appropriate, the *CashCall* court cited to its previous holding in the 1985 *Chase*[17] case. RC cited to this section of the case in their brief. *Id*. The court was merely applying its previous holding rather than making a change to the law. I thus fail to see how this case represents new law. Granted, the CFPB was not a party to the 1985 case, so the application of the law to the CFPB is clearer now, but I find that the state of the law regarding restitution and the relevance of advice of counsel in the 9th Circuit has not changed. Similarly, it does not appear that the *Nationwide* case, cited by Respondents, represents a change in 9th Circuit law.

Nevertheless, as stated above, Respondents want to call three witnesses to address whether Respondents relied on the advice of counsel.[18] Aside from the issue of whether this truly represents a change in the law, it would also appear based on Respondents' brief, that there is already testimony in the record regarding whether Respondent Carnes received advice of counsel.

Respondents state in their brief that Respondent Carnes previously testified that he relied upon his outside counsel to draft the loan agreement and to ensure it complied with the law, but that he did not speak to outside counsel regarding the loan agreement template. Doc. 261 at 6, 13 (citing to the hearing transcript). They also state that Carnes testified that he did not recall Integrity Advance's in-house counsel, Mr. Foster, ever explaining Integrity Advance's loan agreement to him. *Id*. at 6. Nor did he recall specific conversations with Integrity Advance personnel about the loan agreement. *Id*. Additional testimony from Foster and Calloway thus appears unnecessary and, at best, would merely corroborate Carnes' sworn testimony. Similarly, with regard to additional testimony from a representative of the Delaware Bank Commissioner, Respondents concede that Elizabeth Quinn Miller already testified that she reviewed loan agreements for compliance with Delaware law and looked at agreements to make sure TILA disclosures were presented in the correct format, but that her team did not approve the contract and, other than the APR, did not conduct any mathematical calculations. Doc. 261 at 8, (citing to the hearing transcript). Additional testimony on this issue, thus would also be unnecessary.

I also note, as EC point out,[19] that good faith clearly was relevant in the previous hearing in this matter, albeit on the issue of the appropriateness of a civil money penalty, in accordance with 12 U.S.C. § 5565(c)(3). Thus, Respondents would have had no less motivation to develop the testimony in the prior proceeding than they do now.

Accordingly, I **deny** Respondents motion to reopen the record to call James Foster and Claudia Calloway to testify as to the legal advice they gave Respondents and similarly **deny** their motion to call an unidentified representative of the Delaware Bank Commissioner. I decline at this time to opine on the issue of "legal" versus "equitable" restitution raised by EC as it is not

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[17] *Chase v. Trs. of W. Conference of Teamsters Pension Trust Fund*, 753 F.2d 744, 753 (9th Cir. 1985).

[18] I note that in their briefs (Docs. 229A, 261, 265) Respondents do not indicate a desire to call additional witnesses to testify regarding whether consumers received the benefit of their bargain or present any arguments in this regard. Accordingly, I do not find the need to call additional witnesses for this purpose to be an issue in the case and alternatively find that Respondents have waived this issue.

[19] *See* Doc. 263, at 11 n.9.

required to decide this motion. In the event this case proceeds to a consideration of remedies, the parties will be allowed to brief their legal theories at that time.

b. Calculation of restitution

RC assert that in calculating restitution, there is a two-step process. First, the CFPB must prove that the amount it seeks reasonably approximates the Respondents' unjust gains and if does so, then the burden shifts to Respondents to show that this amount overstates any "unjust gains." Doc. 261 at 14, citing to the *Gordon*[20] and *CashCall* cases. Respondents assert that the law regarding the calculation of "unjust gains" has developed since the first proceeding in this matter and that according to the *CashCall* court, adjudicators must now consider whether the damages calculation has been "netted for expenses" in determining whether the CFPB's approximation is reasonable. *Id*. at14-15. They assert that the record in this case is silent on Respondents' expenses and, therefore, they must now have the opportunity to put on evidence regarding their expenses.

EC assert that Respondents had an opportunity to present evidence of expenses in the previous proceeding, but of their own volition, failed to do so. Doc. 263 at 12. They assert that the law has not changed since the original hearing and that expenses have no place in the proper calculation of restitution. *Id*.

At this stage, I need not rule on the appropriate measure for calculating restitution, but rather, whether the law has changed since the first proceeding such that Respondents should be allowed to present additional evidence regarding their expenses. RC assert that in *CashCall*, "[t]he court has now made clear that adjudicators should consider whether the damages calculation has been 'netted for expenses.'" Doc. 261 at 14-15.

I find this to be a mischaracterization of the court's position. Specifically, the opinion mentions expenses only once, in the last sentence of a paragraph concluding that the CFPB did not demonstrate that the amount it sought was appropriate for restitution. *See CashCall*, 2018 WL 485963 at *13. After noting that a court may use net revenues as a basis for measuring restitution, the court states, "[i]n fact, [the CFPB's witness] admitted on cross-examination that he did not believe that the CFPB's proposed restitution amount was netted to account for expenses." *Id*. Given the cursory manner in which the court mentions expenses, I find it a stretch to conclude that the court has "now made clear" that expenses may be pertinent to the calculation of net revenues, as RC contend. At most, the court implies that expenses may be pertinent to the calculation of net revenues, but the court never truly analyzes that calculation and makes no conclusion as to the relevant variables. Given the *CashCall* opinion's reliance on 9th Circuit precedent for the proper calculation of restitution, citing to cases including *Gordon* and *FTC v. Commerce Planet, Inc.*,[21] which exclude expenses from the calculation, combined with the lack of discussion concerning including expenses in the calculation, it does not appear that the court departed from established precedent and created a new standard. Thus, I find that there has not been a change in the law necessitating new evidence of Respondents' expenses.

[20] *CFPB v. Gordon*, 819 F.3d 1179, 1195 (9th Cir. 2016).
[21] *FTC v. Commerce Planet, Inc*., 815 F.3d 593 (9th Cir. 2016).

Furthermore, the two-step framework for calculating restitution that RC cite as applicable requires, and has always required, Respondents to show in the second step that an amount presented by EC overstates any unjust gains. Nothing in the prior proceeding prevented RC from presenting evidence regarding their expenses if they believed that including expenses in the calculation would otherwise overstate their unjust gains. Therefore, I find this evidence to be no more relevant to the calculation now than it was in the prior proceeding and **deny** Respondents' motion to reopen the record to put on additional evidence for this purpose.

ORDERS

1. Respondents' request for oral argument is **DENIED**.

2. Respondents' *Motion to Open Record for a New Hearing* is **DENIED, IN PART**.[22]

SO ORDERED this 24th day of April 2020.

Christine L. Kirby

Digitally signed by Christine L. Kirby
Date: 2020.04.24 15:02:16 -04'00'

HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 24th day of April 2020 at Washington, D.C.

[22] As stated *supra*, I am not yet adjudicating whether the testimony of Joseph Baressi should be struck from the record or whether the record needs to be supplemented based on future summary disposition rulings.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Denying in Part Respondents' Motion to Open Record for a New Hearing* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 24th day of April 2020 at Washington, D.C.

Exhibit 6

Dkt. 293 – Recommended Decision
(filed Aug. 4, 2020)

UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of: **INTEGRITY ADVANCE, LLC and** **JAMES R. CARNES,** **Respondents.**	**RECOMMENDED DECISION GRANTING ENFORCEMENT COUNSEL'S MOTION FOR SUMMARY DISPOSITION AND DENYING RESPONDENTS' MOTION FOR SUMMARY DISPOSITION** **Hon. Christine L. Kirby, Presiding**

APPEARANCES:

Stephen C. Jacques, Benjamin J. Clark, Thomas Ward, Deborah Morris, and Alusheyi J. Wheeler for the Consumer Financial Protection Bureau

Richard J. Zack, Michael A. Schwartz, Christen M. Tuttle, and Saverio S. Romeo for the Respondents

SUMMARY

This Recommended Decision finds Respondent Integrity Advance liable for: Count I (Truth in Lending Act "TILA"); Count II (Consumer Financial Protection Act "CFPA" due to violation of TILA); Count III (CFPA-Deception with regard to Loan Agreement TILA disclosures); Count IV (CFPA-Unfairness with regard to Loan Agreement TILA disclosures); Count V (Electronic Funds Transfer Act "EFTA"); Count VI (CFPA due to violation of EFTA); and Count VII (CFPA-Unfairness with regard to use of remotely created checks "RCCs"). It finds Respondent James R. Carnes individually liable for Counts III, IV, and VII.

The decision recommends that Respondent Integrity Advance be held liable for restitution in the total amount of $132,580,041.06 and as a subset of that amount, both Respondent Integrity Advance and Respondent James R. Carnes be held jointly and severally liable for restitution in the amount of $38,453,341.62. It recommends that Respondents be ordered to cooperate in assisting the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress. Finally, it orders the imposition of a civil money penalty in the amount of $7,500,000.00 against Respondent Integrity Advance and in the amount of $5,000,000.00 against Respondent James R. Carnes.

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TABLE OF AUTHORITIES

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Other Authorities

I. PROCEDURAL HISTORY

On November 18, 2015, Enforcement Counsel ("EC") for the Consumer Financial Protection Bureau ("CFPB" or "Bureau") filed a *Notice of Charges* (Dkt. 1) alleging that Respondent Integrity Advance, LLC ("IA") violated TILA (Count I), EFTA (Count V), and the CFPA (Counts II, III, IV, VI, and VII). They alleged that Respondent James R. Carnes ("Carnes"), IA's Chief Executive Officer, violated the CFPA (Counts III, IV, and VII). The CFPB alleged that Respondents misled consumers regarding the terms of small dollar loans, wrongfully required electronic access to consumer bank accounts, and unfairly undermined consumers' ability to contest withdrawals from their accounts. (Dkt. 1 at 1).

The matter proceeded to a formal administrative hearing before Administrative Law Judge ("ALJ"), Parlen L. McKenna, who issued a *Recommended Decision* on September 27, 2016. (Dkt. 176). Both parties appealed the *Recommended Decision* to the Director of the CFPB ("Director"). (Dkt. 177, 178). However, based on two cases[1] that were pending before the D.C. Circuit Court of Appeals and the United States Supreme Court that had the potential to impact this matter, the Director placed the appeal in abeyance. (Dkt. 208, 210). On May 28, 2019, the Director remanded this matter to me for a new hearing and recommended decision, directing that I was to give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna. (Dkt. 216).

After adjudicating several issues and motions relating to the new hearing, on April 29, 2020, I issued a scheduling order, setting forth dates for the parties to file motions for summary disposition and related documents. (Dkt. 271). On May 15, 2020, the parties filed cross-motions for summary disposition.[2] EC seek summary disposition as to liability for all claims asserted in

[1] *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) and *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

[2] Documents filed include: Dkt. 272, *Respondents' Motion for Summary Disposition*; Dkt. 273, *Respondents' Statement of Undisputed Facts in Support of Their Motion for Summary Disposition*; Dkt. 274, *Declaration of Richard J. Zack in Support of Respondents' Motion for Summary Disposition*; Doc. 274-A, *Exhibits to Zach Declaration*; Dkt. 275, *Enforcement Counsel's Motion for Summary Disposition*; Dkt. 276, *Enforcement Counsel's Memorandum of Points and Authorities in Support of Its Motion for Summary Disposition* (*PUBLIC*); Dkt. 276-A, *Enforcement Counsel's Memorandum of Points and Authorities in Support of Its Motion for Summary Disposition* (*UNDER SEAL*); Dkt. 277, *Enforcement Counsel's Statement of Material Facts in Support of Its Motion for Summary Disposition* (*PUBLIC*); Dkt. 277-A, *Enforcement Counsel's Statement of Material Facts in Support of Its Motion for Summary Disposition* (*UNDER SEAL*).

the *Notice of Charges* and for appropriate remedies relating thereto. (Dkt. 275). Respondents' Counsel ("RC") also seek summary disposition as to all counts in the *Notice of Charges* and thus deny that any remedies are appropriate. (Dkt. 272). On June 4, 2020, the parties filed opposition briefs. (Dkt. 278, 281). On June 10, 2020, the parties filed reply briefs. (Dkt. 283, 284). RC requested oral argument on its motion, which I hereby am denying because the parties have fully presented their positions in their multiple briefs.

On July 6, 2020, RC filed *Respondents' Notice of Supplemental Authority and Request for Reconsideration* (Dkt. 285), requesting that I reconsider my *Order Denying Motions to Stay and Dismiss* (Dkt. 257), which I issued on March 13, 2020, and dismiss the current matter. Due to the necessity of adjudicating this request and providing the parties the allotted time to file their briefs, it was necessary to delay issuance of the current order and exceed the 30-day issuance requirement set forth in the *Rules of Practice for Adjudication Proceedings*. *See* 12 C.F.R. § 1081.212(h). On August 3, 2020, I issued an *Order Granting Respondents' Request for Reconsideration In Part and Denying Respondents' Motion to Dismiss*. (Dkt. 288).

II. CFPB'S MOTION

In their *Memorandum of Points and Authorities in Support of Its Motion for Summary Disposition*, EC assert that the undisputed facts show that Respondents failed to disclose the true cost of loans to consumers by disclosing the loan costs as if they were single-payment loans when, in reality, the default operation of the loans called for automatic, multiple rollovers that caused the costs to be significantly higher than disclosed, in violation of TILA [and the related CFPA provision] and the CFPA's prohibition on unfair and deceptive acts or practices. (Dkt. 276 at 1). They assert that Respondent IA violated the EFTA [and the related CFPA provision] by requiring consumers to preauthorize electronic fund transfers as a condition of receiving a loan. (*Id.*). They also assert that both IA and Carnes engaged in unfair and deceptive practices in relation to the disclosure of the loan costs and repayment procedures. (*Id.* at 1-2). They assert that Carnes bears individual liability for the alleged unfair and deceptive practices. (*Id.* at 2). Finally, they assert that the remedies in this matter should include restitution, civil money penalties, and injunctive relief. (*Id.*).

III. <u>RESPONDENTS' MOTION</u>

RC assert that the undisputed facts show that the CFPB cannot support any of its allegations. (Dkt. 272 at 2-3). They assert that the terms of IA's Loan Agreement included all material terms and that a reasonable consumer would not have been misled or suffered substantial unavoidable harm. (*Id.* at 1). They also assert that the repayment procedures were not unfair but were legal and legitimate. (*Id.*). They assert that the undisputed facts do not establish that Carnes had the requisite level of knowledge or intent or that he engaged in "misrepresentations" or "fraud" as would be required to impose individual liability. (*Id.* at 2). They assert that since Respondents relied on the work of outside legal counsel and approval of Delaware state regulators to ensure that the Loan Agreement was legally compliant, that restitution should not be a remedy in this matter for any claims. (*See id.* at 1, 3). They further assert that "actual damages" cannot be recovered for Counts I, II, V, and VI. (*Id.* at 3).

IV. <u>LEGAL STANDARD FOR SUMMARY DISPOSITION</u>

Pursuant to the CFPB's *Rules of Practice for Adjudication Proceedings* ("Rules"), a motion for summary disposition may be granted if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted show that: (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to a decision in its favor as a matter of law. 12 C.F.R. § 1081.212(c). This standard is virtually identical to the standard for summary judgment set forth in Federal Rule of Civil Procedure ("FRCP") 56.

Neither Rule 212(c) nor FRCP 56 addresses the procedure for analyzing cross-motions for summary disposition. In this matter each party has filed its own motion for summary disposition, a response to the opposing party's motion, and a reply in support of its own motion. Although I have considered each party's motion and related documents in their entirety, I will address all the parties' arguments within the body of this one order rather than two separate orders, in the interest of efficiency.

In considering a motion for summary disposition, all evidence must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The party seeking summary disposition bears the initial burden of identifying the specific evidence that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party has met its initial burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the party opposing summary disposition must specifically show what facts create a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

A factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. *Anderson*, 477 U.S. at 247-48. A dispute is genuine if the evidence is such that a reasonable fact finder could return a decision for the nonmoving party. *See id.* at 251-52; *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 467 (3d Cir. 2005). "Material facts" are facts that may affect the outcome of the case. *See Anderson*, 477 U.S. at 248.

V. FINDINGS OF FACT

Both parties have presented their own statements of undisputed facts and responses to the opposing party's statement of undisputed facts. After reviewing all of the statements and responses, I find that the underlying material facts necessary to decide these motions are not in dispute, although the parties differ as to their interpretation of what particular facts indicate. In cases where the parties have attempted to insert their own characterization of what a particular fact means, I have adhered to the exact language of the exhibit or testimony in question, rather than the party's interpretation of that language. "Where the operative facts are substantially undisputed, and the heart of the controversy is the legal effect of such facts, such a dispute effectively becomes a question of law that can, quite properly, be decided on summary judgment." *FTC v. Gill*, 71 F. Supp. 2d 1030, 1035 (C.D. Cal. 1999), *aff'd* 265 F.3d 944 (9th Cir. 2001).

After reviewing all of the parties' statements and the cited evidentiary support therefor, I find the following facts are undisputed, supported by the documentary evidence cited,[3] and deemed established:

<u>Company Information</u>

1. Integrity Advance was a Delaware licensed limited liability company that offered short term loans. Parties' Joint Stipulations of Fact (Dkt. 56) ("JSF") ¶¶ 2, 8.

2. Integrity Advance was formed on July 2, 2007. RX-007.

3. Integrity Advance originated loans from May 15, 2008 though December 2012. Its final loan transaction occurred on July 9, 2013. JSF ¶ 8; Reporter's Official Transcript of Proceedings Hearing ("Tr.") II 132:23-133:18.

4. Integrity Advance offered loans to consumers in amounts ranging from $100 to $1000. JSF ¶ 11.

5. Integrity Advance did not offer any products other than consumer loans. Tr. I 94:19-22.

6. Consumer loans were the sole source of Integrity Advance's revenues and operating profits. Tr. I 94:14-95:8.

7. Integrity Advance was a wholly owned subsidiary company to Hayfield Investment Partners ("HIP"). JSF ¶ 4; Tr. I 100:14-17; EC-EX-067.

8. Respondent James Carnes ("Carnes") was the Chief Executive Officer of HIP. Tr. I 94:7-12.

9. At some points in time, Carnes owned 52% of Hayfield Investment Partners. JSF ¶ 5.

10. Willowbrook Marketing LLC, which was wholly owned by Carnes, owned a majority share of Hayfield Investment Partners. EC-EX-067; Tr. I 102:8-10.

11. EZ Corp., Inc. purchased a set of assets of Integrity Advance in December 2012. Tr. I 237:19-238:13; Tr. II 70:22-23.

[3] Citations to Volumes I-III of the previous hearing transcripts refer to the final, sealed versions of the official transcripts of the Adjudication Proceeding Hearing held on July 19, 20, and 21, 2016 (Dkt. 150, 151, 152). Citations to "EC-EX-" and "RX-" refer to exhibits offered by EC and RC at the previous hearing. Citations to "EC SMF Exh." refer to documents that EC previously submitted as evidence in support of *EC's Statement of Material Facts in Support of its Motion for Summary Disposition as to Liability* (May 10, 2016) (Dkt. 88). Citations to "RC SMF Exh." refer to documents that RC submitted as *Exhibits to the Declaration of Richard J. Zack in Support of Respondents' Motion for Summary Disposition* (May 15, 2020) (Dkt. 274).

12. In order to obtain and maintain its lending license, Integrity Advance had to renew it each year with the Delaware State Bank Commissioner. Del. Code Ann. tit. 5 § 2207; *see also* RC SMF Exh. 7.

13. Elizabeth Quinn Miller ("Miller"), Senior Investigator for the Delaware Office of the State Bank Commissioner testified that her office would try to get the loan contract to have on file and they did not approve the contract. Tr. III 126:16-24.

14. Miller testified that in her review she would look to make sure that certain things like the four fed[eral] boxes (i.e., the TILA disclosures) were in the loan contract. Tr. III 127:1-18.

15. Miller testified that for license renewals, there is an abbreviated application process that involves sending in the abbreviated application and fee and unless they see a "horrendous problem," the license is renewed. Tr. III 129:19-130:10.

16. Miller testified that in reviewing an application, she checked to see if there was a separate Truth in Lending box and checked the Annual Percentage Rate ("APR") calculation for mathematical correctness. Tr. III 150:24-151:5; 151:14-153:6.

Integrity Advance's Loan Application, Agreement, and Cost and Fee Disclosures

17. Integrity Advance generated all of its loan contracts with consumers using one of two application and Loan Agreement templates. *See* EC SMF Exh. 1 (first application and Loan Agreement template); EC-EX-063 (second application and Loan Agreement template).

18. Integrity Advance's Loan Agreement did not change significantly between 2008 and 2013. Tr. II 38:20-39:1; *see also* EC SMF Exh. 1 at 3-8; EC-EX-063 at 2-8.

19. Carnes testified that over the years in which Integrity Advance offered loans, "[t]he product never changed." EC-EX-068 at 22:13.

20. Most Loan Agreements contained up to eight lines for consumers to sign or initial. EC SMF Exh. 1 at 3-8; EC-EX-063 at 2-8.

21. Integrity Advance, either directly or through a third-party vendor, serviced the loans that it originated. EC-EX-068 at 15:1-8, 193:2-19, 197:2-198:21; EC-EX-069 at 151:17-22, 172:13-22, 175:5-13. *See also* EC-EX-057 (invoice from Clearvox to Integrity Advance).

22. Integrity Advance's call center manual instructed call center representatives to tell potential applicants who asked about the cost for a loan, "It is our policy not to disclose cost information until you apply for a loan. Should you decide you do not wish to take the loan, you are under no obligation to do so." EC-EX-078 at 13.

23. Carnes testified that call center representatives called prospective customers with pending applications to explain the components of the loan and the pay down and payoff procedure. EC-EX-068 at 188:1-189:13.

24. Carnes testified that Integrity Advance sent customers a "welcome email" explaining the terms of the loan with a copy of the executed Loan Agreement attached. EC-EX-068 at 224:3-10; *see also* RC SMF Exh. 3.

25. Carnes testified that Integrity Advance sent payment reminder emails to alert customers that a payment was coming and what to do to pay off or pay down their loans. EC-EX-068 at 243:14-21; *see also* RC SMF Exh. 4.

26. The Loan Agreement included two tables of fees based on the loan amount, set forth in the Schedule of Charges and Fees. EC SMF Exh. 1 at 6-8; EC-EX-063 at 6-7.

27. The fee schedules that Integrity Advance used for VIP customers and for new and non-VIP customers did not change over time. Tr. II 15:24-25; Tr. II 48:14-22.

28. The Loan Agreement included a Truth in Lending Act disclosure box ("TILA box"). EC SMF Exh. 1 at 3; EC-EX-063 at 2; Answer and Affirmative Defenses to Notice of Charges Seeking Restitution, Disgorgement, Other Equitable Relief, and Civil Money Penalties (Dkt. 21) ("Answer") ¶ 25.

29. The TILA box was modeled on the sample provided in Regulation Z. *See* 12 C.F.R. pt. 1026, app. H (H.2).

30. The TILA box contained four individual boxes stating the amount of the loan APR, finance charge, amount financed, and total of payments. EC SMF Exh. 1 at 3; EC-EX-063 at 2; Answer ¶ 25.

31. The disclosures in the TILA box reflected calculations as if the loan were a single-payment, "payment-in-full" loan. Answer ¶ 26.

32. Some Integrity Advance loan contracts included a statement immediately below the TILA box stating that the payment schedule was "[o]ne (1) payment of" an amount equal to the loan amount plus a single finance charge. EC SMF Exh. 1 at 3.

33. Some Integrity Advance loan contracts contained a statement below the TILA box that read "Itemization of Amount Financed." EC-EX-063 at 2.

34. For a $300 loan to a new consumer, the "Itemization of Amount Financed" statement would read: "Amount given to you directly: $300.00. Amount Paid on Loan#: [XX] with us: $390.00." *See, e.g.*, EC-EX-014 at 1-2.

35. The Loan Agreement described two loan "Payment Options": "Payment in full" and "Renewal." EC SMF Exh. 1 at 3; EC-EX-063 at 3.

36. The Loan Agreement required consumers to select a payment option by telephone. *Id.*

37. The Loan Agreement required consumers to select a payment option no later than three days prior to their payment due date. EC SMF Exh. 1 at 3; EC-EX-063 at 3.

38. If a consumer did not contact Integrity Advance and choose "Payment in Full," Integrity Advance auto-renewed the consumer's loan. Answer ¶ 29; EC SMF Exh. 1 at 4; EC-EX-063 at 3.

39. If a consumer did not contact Integrity Advance and choose to pay the loan in-full prior to a payment due date, Integrity Advance automatically renewed the loan up to four times. Answer ¶¶ 29, 30; EC SMF Exh. 1 at 4; EC-EX-063 at 3.

40. When Integrity Advance auto-renewed a loan, it would debit an amount equal to the first finance charge from the consumer's account, but this amount would not be applied to the principal of the loan. EC-EX-070 at 9; EC SMF Exh. 1 at 4; EC-EX-063 at 3.

41. If a consumer did not contact Integrity Advance and choose to pay the loan in-full after four auto-renewals, Integrity Advance automatically placed the loan into "auto-workout" status. EC SMF Exh. 1 at 4; EC-EX-063 at 3.

42. During the auto-workout process, Integrity Advance would debit the consumer an amount equal to a finance charge plus $50 which would be applied to the loan principal. EC-EX-070 at 9; EC SMF Exh. 1 at 4; EC-EX-063 at 3.

43. During the auto-workout process, unless a consumer contacted Integrity Advance and chose to pay the loan in-full, Integrity Advance would continue to debit $50 along with a new finance charge on each payment due date until the loan principal was zero. *Id.*

44. Integrity Advance consumers whose loans auto-renewed paid more in finance charges than the amount disclosed in the "Finance Charge" in the TILA box. Answer ¶¶ 26, 31.

45. Integrity Advance consumers whose loans auto-renewed paid more than the amount that was disclosed in the "Total of Payments" in the TILA box. *Id.*

46. In order to pay only the amount disclosed in the "Total of Payments" in the TILA box, consumers had to contact Integrity Advance and affirmatively choose to pay the loan in-full. EC SMF Exh. 1 at 3-4; EC-EX-063 at 2-3.

47. Neither in the TILA box nor elsewhere did Integrity Advance's Loan Agreements disclose to consumers the amounts they would pay under the auto-renewal and auto-workout process. *See* EC SMF Exh. 1; EC-EX-063.

48. For a $300 loan that went through the auto-renewal and auto-workout process, the consumer would be debited $1,065.00, although the "Total of Payments" in the TILA box would state the amount as $390. Answer ¶ 31.

49. The Loan Agreement contained a promise to pay which stated, "You promise to pay us the Total of Payments according to the terms of our disclosures set forth below on the Payment Due Date and all other amounts owed to us under the Loan Agreement." EC SMF Exh. 1 at 4; EC-EX-063 at 4.

50. The Loan Agreement contained a "special notice" displayed in all capital letters, stating that "(1) This loan is designed as a short-term cash flow solution and not designed as a solution for longer term financial problems. (2) Additional fees may accrue if the loan is refinanced or 'rolled over.'" EC SMF Exh. 1 at 5; EC-EX-063 at 6.

51. The Loan Agreement contained a notice that, "A payday loan is not intended to meet long-term financial needs." EC SMF Exh. 1 at 6; EC-EX-063 at 6.

52. Edward Foster ("Foster") testified that returning customers were classified as "VIP" because they had successfully paid back their loans. Tr. II 15:19-22.

53. Since July 21, 2011, a total of 26,129 customers (48% of Integrity Advance customers since July 21, 2011) took out two or more loans with Integrity Advance. RX-021.

54. Of the 82,980 loans originated on or after July 21, 2011, 66% were loans to repeat customers. *Id.*

55. From May 2007 through July 2013, on 207,426 loans, Integrity Advance obtained $132,580,041.06 more from its customers than the amount disclosed in the "Total of Payments" boxes in their TILA disclosures, excluding all payments denoted as refunds or rebates. Decl. of Robert J. Hughes in Supp. Of EC's Aug. 2016 Post-Hearing Br. (Dkt. 163B) ("Hughes PH Decl.") ¶ 8; see also EC-EX-101.

56. Loans where the first transaction occurred on or after August 13, 2011, originated on or after July 21, 2011. Tr. III 36:4-37:25; Tr. II 128:13-129:4.

57. On 55,661 loans originated on or after July 21, 2011, Integrity Advance obtained $38,453,341.62 more from its customers than the amount disclosed in the "Total of Payments box in their TILA disclosures, excluding all payments denoted as refunds or rebates. Hughes PH Decl. ¶ 8a.

Integrity Advance's ACH Agreement and use of Remotely Created Checks

58. As part of the online application and approval process, Integrity Advance consumers were presented with an automated clearing house ("ACH") agreement that authorized

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electronic debits from their bank accounts. EC SMF Exh. 1 at 9-11; EC-EX-063 at 8-10.

59. The same form was used to authorize both electronic credits to and debits from a consumer's bank account. *Id.*

60. The Loan Agreement and related documents stated that Integrity Advance used electronic means to disburse customers' loan proceeds but did not provide an alternate method of receiving loan proceeds. EC SMF Exh. 1 at 4, 9; EC-EX-063 at 3-4, 8.

61. Integrity Advance consumers could only receive loan proceeds by way of an electronic deposit which was authorized by the ACH authorization form. Answer ¶ 40.

62. The Loan Agreement stated, "In order to complete your transaction with us, you must electronically sign the Loan Agreement by clicking the 'I Agree' button at the end of the Loan Agreement, as well as all other 'I Agree' buttons that appear within the Loan Agreement and related documents that appear below." EC SMF Exh. 1 at 4; EC-EX-063 at 3-4.

63. Foster testified that "[t]here would be no provisional or initial approval of the application without additional contact with the customer" if all signatures, including those on the ACH authorization, were not completed. EC-EX-069 at 83:24-84:13.

64. Integrity Advance's loan documents did not contain any indication that consumers could obtain a loan from the company without completing and agreeing to the ACH authorization. *See* EC SMF Exh. 1; EC-EX-063.

65. Integrity Advance's loan documents did not explain what a consumer must do to complete the loan application without signing and agreeing to the ACH authorization. *See id.*

66. Approximately 95% of Integrity Advance's consumers signed the ACH authorization. Notice of Charges (Dkt. 1) ¶ 41.

67. The ACH authorization stated, "[y]ou agree that you may repay your indebtedness through other means, including by providing timely payment via cashier's check or money order directed to: Integrity Advance, 300 Creek View Road, Suite 102, Newark DE 19711." EC SMF Exh. 1 at 10; EC-EX-063 at 9.

68. Carnes testified that Integrity Advance "accepted all forms of payments besides cash that we could think of." Tr. II 97:12-24.

69. The ACH authorization form authorized Integrity Advance to withdraw auto-renewal and auto-workout payments. EC SMF Exh. 1 at 9-10; EC-EX-063 at 8-9.

70. The ACH authorization contained the language stating it "remain[s] in full force and effect" until a consumer's indebtedness to Integrity Advance is repaid. EC SMF Exh. 1 at 10; EC-EX-063 at 9; Answer ¶ 45.

71. The ACH authorization permitted consumers to revoke the authorization by contacting Integrity Advance directly. EC SMF Exh. 1 at 10; EC-EX-063 at 9.

72. The ACH authorization contained a provision that allowed Integrity Advance to execute remotely created checks ("RCCs"), also known as "demand drafts" or "check drafts," on consumers' bank accounts. *Id.*

73. The ACH authorization stated, "[i]f you revoke your authorization, you agree to provide us with another form of payment acceptable to us and you authorize us to prepare and submit one or more checks drawn on Your Bank Account so long as amounts are owed to us under the Loan Agreement." This was the provision that authorized Integrity Advance to execute RCCs on consumers' bank accounts. EC SMF Exh. 1 at 10; EC-EX-063 at 9.

74. The RCC provision appeared only once in the Loan Agreement, at the end of a paragraph, in the middle of the ACH authorization section. *Id.*

75. The RCC provision was not emphasized by any bolded, underlined, capitalized, or enlarged font. *See id.*

76. The ACH authorization form contained lines for consumers to sign or initial at various places throughout the document, including three paragraphs below the RCC provision. *See* EC SMF Exh. 1 at 9-11; EC-EX-063 at 8-10.

77. Integrity Advance did not require consumers to sign or initial the RCC provision separately. *See* EC SMF Exh. 1 at 10; EC-EX-063 at 9.

78. The RCC provision did not explicitly refer to "remotely created checks," "RCCs," "demand drafts," "check drafts," or any other specific term. *See id.*

79. The RCC provision did not inform consumers that the checks to be drawn on a consumer's bank account did not have to be signed by the consumer. *See id.*

80. The RCC provision did not inform consumers that the checks to be drawn on a consumer's bank account could be submitted without prior warning to the consumer. *See id.*

81. Carnes testified that Integrity Advance used RCCs only when the consumer revoked the ACH authorization and the company was unable to set up alternate payment arrangements. Tr. II 84:15-85:11.

82. Integrity Advance used RCCs to withdraw funds from consumers' bank accounts in instances where consumers had revoked the company's authorization to electronically debit their accounts using the ACH network or stopped ACH withdrawals made by the company, and after those consumers had already paid more than the "Total of Payments" disclosed in the TILA box. Tr. II 142:15-148:4; Tr. II 152:15-153:11; EC-EX-097 at 4-5.

83. Even if the consumer's bank account had insufficient funds, Integrity Advance continued to attempt to use RCCs on consumers who had revoked the company's ACH authorization or stopped ACH debits by Integrity Advance. Tr. II 142:15-148:4; EC-EX-097 at 4; EC-EX-100.

84. Integrity Advance used RCCs in less than one percent of all loans during the post-July 21, 2011 period. EC-EX-097 at 1, 4.

85. Integrity Advance used RCCs 602 times on or after July 21, 2011, on consumers who had revoked or stopped their authorization for Integrity Advance to withdraw funds from their accounts and who had already paid an amount equal to the "Total of Payments" in the TILA box in the consumers' Loan Agreements. Tr. II 151:6-11; EC-EX-097 at 4.

86. On or after July 21, 2011, Integrity Advance used RCCs to obtain $115,024.50, excluding all payments denoted as refunds or rebates, from consumers who had revoked or stopped their authorization for Integrity Advance to withdraw funds from their accounts after having paid an amount equal to the "Total of Payments" in the TILA box. Hughes PH Decl. ¶¶ 9, 9a; EC-EX-097 at 5; Tr. II 152:15-153:1.

James Carnes's Authority, Control, and Participation in Integrity Advance's Business

87. Carnes founded Integrity Advance. EC-EX-068 at 7:12-13; Tr. I 94:3-4.

88. Carnes was the President and CEO of Integrity Advance. JSF ¶ 7.

89. Carnes was the president and chief executive of Integrity Advance throughout the entire time that it offered short term or "payday" loans to consumers. EC-EX-065; EC-EX-068 at 31:1-3.

90. Carnes testified that his active involvement with HIP, as well as with Integrity Advance, changed over time: he spent 75% of his time on all HIP businesses in 2008, 70% in 2009, 60% in 2010, 50% in 2011, and 80-90% in 2012 (which involved HIP's asset sale to EZ Corp.). Tr. II 67:8-12; Tr. II 68:23-69:9.

91. Carnes testified that of his time spent on HIP businesses, he focused a percentage on Integrity Advance: 66% in 2008, 50% in 2009, 25% in 2010, 15% in 2011, and 15% in 2012. Tr. II 67:8-12; Tr. II 69:10-71:3.

92. Foster and Bruce Andonian ("Andonian") testified that Carnes was ultimately the decision maker for Integrity Advance's business decisions. Tr. I 51:4-7; Tr. I 82:2-4.

93. Everyone that was involved with Integrity Advance as an employee reported directly or indirectly to Carnes. EC-EX-065; EC-EX-068 at 32:4-9; EC-EX-069 at 21:23-22:5.

94. Carnes made the final decision to hire all employees who were involved with Integrity Advance. EC-EX-068 at 40:24-25.

95. Carnes worked in the Kansas City office, where the senior executives worked, on a daily basis. EC-EX-068 at 23:9-11; 32:4-9.

96. Carnes had an open-door policy and was accessible to any Integrity Advance employee who wanted to talk. EC-EX-068 at 37:11-13.

97. Foster worked for Integrity Advance as its executive vice president, general counsel, secretary, and assistant treasurer. Tr. II 8:10-12.

98. Carnes directly hired Foster. Tr. I 96:15-16.

99. Carnes set Foster's salary. Tr. II 9:17-18.

100. Foster reported to Carnes. Tr. II 9:19-24.

101. Carnes spoke daily with Foster. EC-EX-069 at 22:19-24; EC-EX-068 at 35:15-17.

102. Carnes met with Foster "a few times a week" about Integrity Advance business. EC-EX-068 at 35:18-21.

103. Foster spoke to Carnes about Integrity Advance business if there "was a significant problem." Tr. I 215:5-18.

104. Foster discussed all of the HIP subsidiaries with Carnes as part of his job duties. While Foster and Carnes discussed Integrity Advance more often towards the beginning of the business and almost daily during setup and formation, the time spent on Integrity Advance matters eventually "became a very small percentage of time spent on things." Tr. II 10:2-11:9.

105. Timothy Madsen ("Madsen") worked for HIP as Vice President of Marketing for approximately five years, from August 2008 until some of Integrity Advance's assets were purchased by EZ Corp. Tr. I 28:4-8; Tr. I 29:6-12.

106. Madsen's job was to purchase leads and manage relationships with lead providers for Integrity Advance, as well as manage leads internally and coordinate with Integrity Advance's call center regarding leads. Tr. I 28:9-13; Tr. I 28:24-29:5.

107. Carnes and Foster together hired Madsen. Tr. I 98:4-6.

108. After he was originally hired, Madsen reported directly to Carnes. Tr. I 39:3-7.

109. Carnes spoke with Madsen on a daily basis. Tr. I 35:8-10.

110. Carnes spoke to Madsen about "the behavior of the lead purchase systems that we had in place, how well they were performing, our different partners, and any adjustments that we need to make sure that it backed out for us what it needed to from a business perspective." Tr. I 31:11-16.

111. The adjustments that Carnes spoke to Madsen about included how much Integrity Advance would pay for a lead and whether the company needed to change its underwriting model in order to purchase more leads. Tr. I 31:19-23.

112. Madsen and Carnes discussed lead volume conversion rates, long-term performance of sources, and default rates. Tr. I 47:13-21.

113. Integrity Advance had a dashboard system that was used to monitor the performance of leads. Tr. I 45:13-19.

114. Both Carnes and Madsen monitored and reported results from the dashboard. Tr. I 48:16-49:1; Tr. I 68:20-22.

115. Madsen had to consult with Carnes about changes in the credit scores Integrity Advance would accept from its customers if they departed by more than a couple of points from set parameters. Tr. I 33:15-21.

116. Madsen did not discuss Integrity Advance's Loan Agreement with Carnes. Tr. I 67:21-24.

117. Andonian worked for HIP as Director of Software Development for approximately two years, from February 2011 until May 2013. Tr. I 70:12-13; Tr. I 71:5; Tr. I 71:11-12.

118. Andonian reported directly to Foster, and ultimately to Carnes. Tr. I 72:5-6.

119. Andonian's job for Integrity Advance was to address issues with Integrity Advance's website and database. Tr. I 89:10-16.

120. In conjunction with his duties, Andonian attended weekly IT meetings with Carnes, Foster, and the project manager for Willowbrook, to discuss the different products under the Willowbrook/HIP umbrella. Tr. I 75:16-76:24.

121. "Most of the time" Carnes set the priorities for the tasks that were addressed at the weekly IT meetings. Tr. I 75:16-76:13.

122. Carnes would bring Integrity Advance matters to Andonian's attention when there were issues such as "if the data base was running slow or if we weren't accepting leads or the conversion rate was low." Tr. I 75:7-15.

123. Carnes had final say over the contents of Integrity Advance's website and approved the contents of the website at a high level. EC-EX-068 at 41:1-6; Tr. I 217:1-15.

124. Carnes directed Andonian to make changes to Integrity Advance's website to reflect adjustments in the credit score that the company would accept from its potential customers. Tr. I 77:19-78:5.

125. Carnes directed Andonian to remove states from Integrity Advance's website. Tr. I 77:1-3.

126. Andonian did not discuss the Loan Agreement with Carnes. Tr. I 87:24-88:12.

127. Carnes and Foster together hired Stephanie Schaller, Integrity Advance's Vice President of Decision Science. Tr. I 98:17-20.

128. Carnes directly hired George Davis, the Delaware Office Manager. Tr. I 98:24-99:1.

129. Carnes directly hired Hassan Shahin, Integrity Advance's Vice President of Technology. Tr. I 99:6-7.

130. Carnes and Foster together hired Mark Rondeau, Integrity Advance's Director of IT Operations. Tr. I 99:15-18.

131. As chief executive, Carnes had the ultimate say over Integrity Advance's policies and procedures. EC-EX-068 at 32:15-17.

132. Carnes testified that he "had ultimate authority over the company and making sure that it complied with the Delaware law." Tr. I 221:24-222:1.

133. Carnes ultimately made the call on what Integrity Advance would pay for a lead. Tr. I 35:1-6; Tr. I 32:10-16.

134. Carnes was the main decision-maker regarding Integrity Advance's underwriting policies. EC-EX-069 at 22:17-18; Tr. I 59:18-25.

135. Carnes was the signatory on the contract with the vendor that provided debt collection services to Integrity Advance. EC-EX-085 at 5.

136. Carnes was the signatory on the lead purchase agreement between Integrity Advance and T3 Leads. EC-EX-053; Tr. I 122:22-123:14.

137. Carnes was the signatory on the lead purchase agreement between Integrity Advance and Partner Weekly. EC-EX-054; Tr. I 126:17-127:13.

138. Carnes was the signatory on the ACH origination agreement between MoneyGram and Integrity Advance. EC-EX-056.

139. Carnes was an authorized signatory for the bank account used by Integrity Advance. EC-EX-055; Tr. I 141:16-20.

140. Integrity Advance's Loan Agreement was implemented by a third-party call center. Tr. I 133:16-135:23.

141. Carnes testified that he did not review, edit, revise, discuss, or see call center scripts. Tr. II 74:13-75:10.

142. Carnes had communications with the call centers used by Integrity Advance. Tr. I 64:3-6.

143. Carnes was involved in the decision to move Integrity Advance's business from one call center to another. Tr. I 64:13-19.

144. Invoices from ClearVox, LLC, a call center used by Integrity Advance, were directed to Carnes's attention. EC-EX-057; EC-EX-058.

145. When a call center used by Integrity Advance had an employee who was allegedly committing fraud, Carnes directed the resolution of the problem. EC-EX-087; Tr. I 177:3-178:3.

146. Consumer complaints were handled primarily by customer service representatives at the third-party call center or escalated to a call center manager. Tr. II 30:2-7.

147. Consumer complaints that were escalated beyond the third-party call center were ultimately the responsibility of Integrity Advance's legal group and Foster. Tr. II 30:10-16.

148. Carnes testified that he did not draft, edit, or revise Integrity Advance's Loan Agreement template or any version of the agreement. Tr. II 75:11-76:13.

149. Integrity Advance hired outside counsel to create loan documents that conformed with Delaware and federal law. Tr. II 95:10-13.

150. Carnes testified that he may have flipped through the Loan Agreement at some point after it had been prepared and before putting it into action. Tr. I 228:19-229:6.

151. Carnes testified that he did not discuss the Loan Agreement with outside counsel, that he did not recall Foster ever explaining Integrity Advance's Loan Agreement to him,

and that he did not recall specific conversations with Integrity Advance personnel about the Loan Agreement. Tr. I 227:10-12; Tr. I 231:11-12; Tr. I 232:14-17.

152. Carnes testified that he did not discuss Integrity Advance's Loan Agreement with the Delaware regulator. Tr. II 96:21-23.

153. Carnes testified that his attorneys had his approval to use the Loan Agreement. Tr. I 232:7-12.

154. Carnes testified that as the CEO, even though he did not give express approval to use the loan documents created by outside counsel, he knew they would be used and gave tacit approval for their use. Tr. II 96:2-14.

155. Carnes testified that as chief executive he was "ultimately approving everything." Tr. I 228:8-11.

156. Carnes knew that for a "fictional consumer . . . who had $100 loan, . . . their TILA disclosure would say $130" for the sum of payments. Tr. II 50:18-51:3.

157. Carnes knew that if a consumer "didn't call or email, and it was their first payment . . . they would be renewed." Tr. I 219:13-20.

158. Carnes knew that if the consumer did nothing on the next payday, the loan would be renewed again. Tr. I 219:21-23.

159. Carnes knew that an Integrity Advance loan would automatically rollover four times before it went to auto-workout. Tr. I 219:24-220:3.

160. Carnes testified that about ninety percent of Integrity Advance's loans experienced at least one rollover. He later testified that he did not have a specific number in mind at the time he was running Integrity Advance. EC-EX-068 at 227:13-16, 244:12-15; Tr. I 222:17-20, 225:18-21.

161. Carnes understood at the time Integrity Advance was in business that the majority of Integrity Advance's loans would experience at least one rollover. Tr. I 225:6-10.

162. Carnes understood that consumers who had their loans rolled over would pay more than the amount that had been disclosed in their TILA disclosures. EC-EX-068 at 245:10-25.

163. Carnes testified that a common consumer complaint was that they did not understand that their renewal payments would not reduce loan principal. EC-EX-068 at 243:1-12.

164. Carnes later testified that he was unaware of any consumer complaints. Tr. I 233:16-22.

165. Carnes had the authority to change Integrity Advance's fee structure. Tr. II 49:15-18.

166. Carnes knew that Integrity Advance used RCCs to withdraw money from the accounts of consumers who had withdrawn ACH authorization. EC-EX-068 at 219:7-18; Tr. II 84:6-85:11.

167. Carnes saw RCCs being printed using a printer in Integrity Advance's Kansas City office. Tr. I 236:10-11; Tr. I 236:20-22.

168. Carnes testified that RCCs were "probably printed weekly" and used to collect consumer debt. Tr. I 23:24-236:15.

<u>Respondents' Financial Resources</u>

169. Carnes received an annual salary of $250,000 when he was the chief executive of Integrity Advance. Tr. I 167:11-17.

170. Carnes received approximately twenty-five million dollars from the sale of Integrity Advance and other Hayfield entities to EZ Corp. Tr. I 239:4-8.

171. Carnes testified that Integrity Advance was the most profitable of HIP's companies and it contributed most of the income to HIP. EC-EX-068 at 88:24-89:6.

172. Integrity Advance contributed more than 75% of Hayfield's profits in 2010. EC-EX-068 at 92:19-93:9; Tr. I 114:11-25.

173. Integrity Advance contributed more than 75% of Hayfield's profits in 2011. EC-EX-068 at 93:10-14; Tr. I 115:8-21.

174. Integrity Advance contributed more than 75% of Hayfield's profits in 2012. EC-EX-068 at 93:15-16; Tr. I 115:22-116:2.

VI. <u>DISCUSSION AND FINDINGS</u>

A. COUNT I (TILA) AND COUNT II (CFPA) AGAINST RESPONDENT INTEGRITY ADVANCE

1. Legal Standard

Count I alleges that IA inaccurately disclosed the terms of the legal obligation between the parties in violation of TILA. Count II alleges that by virtue of violating TILA, IA also violated the CFPA. TILA is set forth at 15 U.S.C. § 1601 *et seq.*, which states that its purpose is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing . . . ." 15 U.S.C. § 1601(a). The required creditor disclosures are set forth at 15 U.S.C. § 1638(a) and require, *inter alia*, disclosure of the amount financed; finance charge; finance charge expressed as an annual percentage rate; sum of the amount financed and the finance charge, which shall be termed the "total of payments;" number, amount, and due dates or period of payments scheduled to repay the total of payments; and descriptive explanations of the terms "amount financed," "finance charge," "annual percentage rate," and "total of payments."

TILA is implemented by Regulation Z, 12 C.F.R. pt. 1026. Regulation Z requires creditor disclosures be set forth "clearly and conspicuously in writing." 12 C.F.R. § 1026.17(a)(1). It requires that the disclosures "reflect the terms of the legal obligation between the parties." *Id.* § 1026.17(c)(1). It further states that "if any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided to the consumer, and shall state clearly that the disclosure is an estimate." *Id.* § 1026.17(c)(2)(i).

Under the CFPA, violations of an enumerated statute, such as TILA, by any "covered person"[4] are considered to be violations of the CFPA. 12 U.S.C. § 5536(a)(1)(A). Therefore, if Respondent IA is found to have violated TILA, then it will also have violated the CFPA.

2. CFPB's Position

EC assert in their *Memorandum of Points and Authorities in Support of Its Motion for Summary Disposition* that IA violated TILA because it failed to disclose consumers' legal

[4] In *EC's Memorandum of Points and Authorities in Support of Its Motion for Summary Disposition* (Dkt. 276), EC assert that IA and Carnes are "covered persons." I already resolved this issue, finding that Respondents are "covered persons" in my *Order Denying Respondents' Motion to Dismiss.* (Dkt. 268 at 4). I note that RC have not addressed this issue in *Respondents' Brief in Opposition to EC's Motion for Summary Disposition* (Dkt. 278), and I will not address it further.

obligation. (Dkt. 276 at 9). Specifically, EC assert that IA disclosed the cost of consumers' loans as if they were single-payment loans when, in fact, they were multi-payment, automatically renewing loans with much higher costs and payments that were authorized at the time the loan documents were signed. (*Id.* at 8-9). They assert that although consumers had a prepayment option, it did not lessen their legal obligation, just as the ability to prepay a 30-year mortgage does not lessen the initial obligation to make 360 monthly payments. (*Id.* at 9). They thus assert that IA's TILA disclosure failed to inform consumers of the correct APR, finance charge, and total of payments for the consumer's actual obligations under the Loan Agreement. (*Id.*). They assert that each of IA's Loan Agreements during its five years of operation included a false TILA disclosure. (*Id.* at 10). They assert that because IA violated TILA, it therefore also violated the CFPA. (*Id.*)

In *EC's Opposition to Respondents' Motion for Summary Disposition*, EC also assert that consumers were not *required* to make a payment election, as RC assert, because the default payment option was for auto-renewal and auto-workout payments, and the company automatically renewed the loan if the consumer did not change the default payment option. (Dkt. 281 at 6). They state that the Loan Agreement automatically included rollovers unless the consumer took additional action *after* signing the agreement and receiving the funds. (*Id.* at 7). Furthermore, they assert that IA required consumers to authorize electronic fund transfers for all the auto-renewal and auto-workout payments at the time they signed the Loan Agreements. (*Id.*). They state that the default option was the "legal obligation" within the meaning of TILA. (*Id.*). EC also state that the format of Respondents' TILA disclosures is irrelevant, because the claim goes to the inaccurate *content* of the disclosures, rather than to whether they were in the proper format. (*Id.* at 6).

In support of their position, EC rely on the case of *FTC v. AMG Servs., Inc.*, 29 F. Supp. 3d 1338 (D. Nev. 2014), *aff'd sub nom*. *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018). (*See* Dkt. 276 at 9-10; Dkt. 281 at 7-8; Dkt. 284 at 2-3).

3. Respondents' Position

RC assert in their *Motion for Summary Disposition* that IA clearly and conspicuously disclosed consumers' legal obligations at the time the loans were made. (Dkt 272 at 22). They assert that at the time the loans were made, a consumer owed only the amount reflected in the TILA "Total of Payments" box. (*Id.* at 22). They assert that the Loan Agreement also *obligated* the consumer to select a payment option and that under the Loan Agreement, when consumers did not select a payment option, the Loan Agreement *could* renew automatically (emphasis added). (*Id.* at 23). They assert that the "auto-renewal" and "auto-workout" provisions did not constitute the legal obligation between the parties at the time the loan was made and that the CFPB's allegations conflate "default option" with "legal obligation." (*Id.*). They explain that a "default option" is merely the consequence of a failure to meet an obligation, not the obligation itself. (*Id.*). They assert that the CFPB's allegations implicitly read into Regulation Z a requirement that a loan agreement include a disclosure that predicts post-consummation events and incorporates them into the TILA disclosure. (*Id.*).

RC further assert that the Loan Agreement disclosures used the appropriate format, labels, and terminology prescribed by Regulation Z, and therefore the company has a legal safe harbor and the Loan Agreement is presumptively compliant with the TILA "clear and conspicuous" requirement. (*Id.* at 22).

In *Respondents' Brief in Opposition to Enforcement Counsel's Motion for Summary Disposition*, RC further clarify that at the time the loans were made, the consumer had a legal obligation to pay the loan in full on the payment due date or set up an alternative payment option, including electing to renew the loan, by contacting IA. (Dkt. 278 at 4). Only when a consumer failed to take affirmative action by contacting IA and otherwise failing to pay the loan in full on the Payment Due Date would the loan be automatically renewed. (*Id.*). They state that at loan signing, customers were not obligated to renew their loans and thereby make a "series of payments." (*Id.* at 5).

In their O*pposition Brief*, RC also assert that the CFPB's reliance on the *AMG* case is misplaced because the loan agreement at issue in *AMG* differed in critical respects from IA's Loan Agreement. (*Id.* At 6-8). They also distinguish *AMG* in their *Reply Brief*. (Dkt. 283 at 2, 4-5).

In their *Reply Brief*, RC assert that if a consumer took no action and the loan therefore rolled over automatically, the consumer had breached their obligations under the terms of the loan which required them to select a payment option at least three business days prior to the Payment Due Date. (*Id.* at 5). They further assert that the Loan Agreement accurately disclosed that additional fees would be incurred if a loan were renewed. (*Id.* at 6).

4. Analysis

a. Was the consumer's legal obligation at the time of signing IA's Loan Agreement clearly and conspicuously disclosed?

In analyzing liability for Counts I and II, the relevant questions are: a) what was the consumer's legal obligation at the time of signing IA's Loan Agreement? and b) was the consumer's legal obligation "clearly and conspicuously" disclosed in the TILA disclosures section of the Loan Agreement?

In analyzing these questions, it is helpful to view exactly how IA's Loan Agreement form[5] set forth the "Federal Truth in Lending Disclosures":

[5] IA had two versions of the Loan Agreement Form, which I will refer to as Version 1 and Version 2. The two forms were very similar except the second version did not contain the line in the second box below the "Federal Truth In Lending Disclosures" Box which contains the language: "Your Payment Schedule will be: One (1) payment of [dollar amount] due on [date] ("Payment Due Date")." Both versions may be found in full at *Respondents' Exhibits to their Motion for Summary Disposition*, Dkt. 274-A, Exhibit 11, Appendices B and C. They are also contained in EC SMF Exh. 1 (Version 1) and EC-EX-063 (Version 2).

FEDERAL TRUTH IN LENDING DISCLOSURES

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate. CALCULATED_APR%	FINANCE CHARGE The dollar amount the credit will cost you. FINANCE_CHARGE	Amount Financed The amount of credit provided to you or on your behalf. LOAN_AMOUNT	Total of Payments The amount you will have paid after you have made all payments as scheduled. TOTAL_OF_PAYMENTS

Your Payment Schedule will be: One (1) payment of **TOTAL_OF_PAYMENTS** due on **LOAN_DUE_DATE** ("Payment Due Date").
Security: You are giving a security interest in the ECHECK/ACH Authorization.
Prepayment: If you pay off early, you will be entitled to a refund of the unearned portion of the finance charge.

See the terms of the Loan Agreement below for any additional information about nonpayment, default, and prepayment refunds.

Itemization of Amount Financed: Amount given to you directly: **LOAN_AMOUNT** . Amount paid on Loan#: **APPLICATION_NUMBER** with us: **TOTAL_OF_PAYMENTS**.

PAYMENT OPTIONS: You must select your payment option at least three (3) business days prior to your Payment Due Date by contacting us at (800) 505-6073. At that time, you may choose:

(a) Payment in full: You may pay the Total of Payments shown above, plus any accrued fees, to satisfy your loan in full. When you contact us and choose this option, we will debit Your Bank Account (defined below) for the Total of Payments plus any accrued fees, in accordance with the ACH Authorization below; OR

(b) Renewal: You may renew your loan (that is, extend the Payment Due Date of your loan until your next Pay Date[1]) by authorizing us to debit Your Bank Account for the amount of the Finance Charge, plus any accrued fees. If you choose this option, your new Payment Due Date will be your next Pay Date[1], and the rest of the terms of the Loan Agreement will continue to apply.

AUTO-RENEWAL: If you fail to contact us to confirm your Payment Option at least three (3) business days prior to any Payment Due Date, or otherwise fail to pay the loan in full on any Pay Date, Lender may automatically renew your loan as described under (b) above, and debit Your Bank Account on the Payment Due Date or thereafter for the Finance Charge and any accrued fees. Your new Payment Due Date will be your next Pay Date[1], and the rest of the terms of the Loan Agreement will continue to apply. You must contact us at least three (3) business days prior to your new Payment Due Date to confirm your payment option for the Renewal. If you fail to contact us, or otherwise fail to pay the loan in full on your new Payment Due Date, we may automatically renew the loan until your next Pay Date.[1] After your initial loan payment, you may obtain up to four (4) Renewals. All terms of the Loan Agreement continue to apply to Renewals. All Renewals are subject to Lender's approval. Under Delaware law, if you qualify, we may allow you to enter into up to four (4) Renewals, also known as a "refinancing" or a "rollover". The full outstanding balance shall be due upon completion of the term of all Renewals, unless you qualify for Auto-Workout, as described below.

AUTO-WORKOUT. Unless you contact us to confirm your option for Payment in Full prior to your Fourth Renewal Payment Due Date, your loan will automatically be placed into a Workout Payment Plan. Under the Workout Payment Plan, Your Bank Account will automatically be debited on your Pay Date[1] for accrued finance charges plus a principal payment of $50.00, until all amounts owed hereunder are paid in full. This does not limit any of Lender's other rights under the terms of the Loan Agreement. All Workout Payment Plans are subject to Lender's approval

(EC SMF Exh. 1 at 3-4)

The material facts as to how IA's loan process operated are undisputed. The majority of consumers filled out a loan application online. If the loan was approved, IA would electronically deposit the funds in a bank account specified by the consumer. As shown above, the Loan Agreement contained four boxes ("TILA boxes") under the heading "Federal Truth in Lending Disclosures" which included a box each for the Annual Percentage Rate, Finance Charge, Amount

Financed, and Total of Payments. The amounts in these boxes were disclosed as if the loan were a single-payment loan. For example, in *Respondents' Exhibits to their Motion for Summary Disposition* (Dkt. 274-A, Exhibit 1), for a $500.00 loan the boxes would have contained the following figures: APR = 684.38%; Finance Charge = $150.00; Amount Financed = $500.00; and Total of Payments = $650.00.

As shown above, Version 1 of the Loan Agreement contained a box directly under the TILA boxes which informed the consumer that their payment schedule would be one payment of the amount of "Total of Payments" due on a specific date called the "Payment Due Date." The other version of the Loan Agreement did not contain this line.

Both versions of the Loan Agreement contained a paragraph under the TILA boxes with the heading "Payment Options" in bold, all capital letters. According to this paragraph, a consumer "must select" a "payment option" by calling IA at least three days prior to his or her Payment Due Date. The consumer "may" then "choose" to pay the loan in-full as a single-payment loan, in which case IA would debit the consumer's bank account for the "Total of Payments" as set forth in the "Total of Payments" box in the TILA disclosure, plus any accrued fees. The consumer could alternatively affirmatively "choose" to renew their loan, in which case their bank account would be debited for the amount of the finance charge, plus any accrued fees. The new "Payment Due Date" would then be the consumer's next pay date and consumers were told, "**the rest of the terms of the Loan Agreement will continue to apply**." (emphasis added). This sentence is vague and given that it is below the TILA boxes, the phrase, "the rest of the terms" could reasonably indicate the terms in the TILA boxes, i.e., the APR, Finance Charge, Amount Financed, and Total of Payments.

However, if the consumer did not affirmatively choose to pay the loan in full on the payment due date and took no further action, then IA would *not*, in fact, debit the consumer's account for the full amount of the loan and accrued fees, i.e., the disclosed "Total of Payments," on the payment due date. Instead, the loan would *automatically* renew, and the consumer's bank account would be debited for a finance charge, plus accrued fees. These payments would not be applied to paying down the loan's principal. The automatic renewals would happen up to four times, unless the consumer telephoned IA and affirmatively chose to pay the loan off in-full on the next payment due date. After the fourth renewal, if the consumer took no other affirmative action, the loan would automatically be placed into an "auto-workout" payment plan. Under the auto-workout payment plan, the consumer's bank account would be debited on the payment due date for the accrued finance charges plus a principal payment of $50, until all amounts owed on the loan were paid in full. The Loan Agreement does not disclose the terms of the loan (the APR, Finance Charge, Amount Financed, and Total of Payments) under the auto-renewal and auto-workout schedule.

Under this scenario of "auto-renewal" and "auto-workout," the loan costs to the consumer would be substantially higher than those disclosed in the TILA boxes. For example, as set forth in the *Notice of Charges* (Dkt. 1 ¶ 31) and admitted by Respondents in their *Answer* (Dkt. 21 ¶ 31), a consumer who took out a $300.00 loan that was disclosed in the TILA box as having a "Total of Payments" of $390.00 and took no further affirmative action to choose "payment in full" would, in fact, have paid $1,065.00 after all of the "auto-renewal" and "auto-workout" payments had been made. The Loan Agreement, however, does not disclose the amounts consumers would pay under the auto-renewal and auto-workout schedule.

EC argue that the loans were, accordingly, multi-payment, automatically renewing loans, with a prepayment option. (Dkt. 276 at 8). They allege that by disclosing the loans as if they were single-payment loans, Respondent IA failed to disclose consumers' legal obligations and thus violated the TILA and CFPA. (*Id.* at 8-9).

RC argue in opposition that IA properly disclosed the loans as one-payment loans due on a particular date. (Dkt. 272 at 22). They assert that consumers were "obligated" to select a payment option at least three days prior to the payment due date and that if they did not do so, then the loan "could" renew automatically. (*Id.* at 23).

I find, however, contrary to RC's assertion, that consumers were not, in fact, "obligated" to select a payment option. As IA's procedures demonstrate, if a consumer did not select a payment option, then the loan would automatically renew. Also, it is inaccurate to state that the loan "could" renew as RC state in their brief (*id*.) and imply in the Loan Agreement in the section entitled "Auto Renewal" (*see supra*) (stating that IA "may" renew the loan and that "if you qualify, we may allow you to enter into up to four (4) Renewals"). Rather, if the consumer did not make a specific payment selection, then the loan *would* renew without any further procedure necessary. This was the default procedure. If, as RC assert, the loan was, in fact, a single-payment loan, then, absent an affirmative selection of payment renewal by the consumer, the logical default procedure should have been for IA to debit the consumer's account for the "Total of Payments" as disclosed in the TILA box on the Payment Due Date.

RC also argue that the CFPB is implicitly reading into Regulation Z a requirement that any loan agreement include a disclosure that predicts post-consummation events and incorporates that prediction into the TILA disclosure. (Dkt. 272 at 23). They argue that the "auto-renewal" and "auto-workout" provisions did not constitute the legal obligation between the parties at the time the loan was made and were instead the consequence of the consumer's failure to meet the obligation of affirmatively paying the loan in full. (*Id.*). Accordingly, they implicitly assert that IA could not have known at the time of loan consummation whether a consumer would choose to pay the loan as a single-payment loan or to renew the loan.

With this reasoning, it appears that Respondent is attempting to have it both ways. On one hand, RC is arguing that IA properly disclosed the loan costs in the TILA boxes as a single-payment loan because that was the legal obligation. However, with this argument comes the implication that the only way the TILA disclosures are inaccurate is if consumers choose to do anything other than pay the loan in-full on their pay date. On the other hand, RC imply that they cannot predict how a consumer will choose to repay because choosing to pay in-full or choosing to renew the loan are equally valid options. However, if a single full payment was the consumer's "legal obligation" as RC assert, then it does not make sense why IA clearly presented it as a "payment option."

Furthermore, if IA truly could not predict how a consumer would choose to repay the loan, RC (and EC) ignore that Regulation Z provides for the possibility that a creditor may be missing some necessary information at the time a loan is consummated and a TILA disclosure is made. As stated above in the section discussing the "legal standard," Regulation Z provides that "if any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided to the consumer, and **shall state clearly that the disclosure is an estimate**." 12 C.F.R. § 1026.17(c)(2) (emphasis added). IA did not adhere to this mandate, although it could have clarified that the figures in the TILA boxes were for a single-payment loan. Since automatic renewal was the default procedure when a consumer did not affirmatively choose "Payment in Full," IA could have also set forth the costs based on the default operation of the loan and provided cost estimates in accordance with the "Payment Options" specifically referred to in the Loan Agreement. The undisputed testimony of Respondent Carnes shows that about 90% of IA's loans experienced at least one renewal, which reinforces the conclusion that automatic renewal was IA's default procedure for its loan product. (Tr. I 222:17-20).

RC also argue that because the TILA boxes were in the proper format and used the proper labels and terminology, that IA cannot be found liable for a violation. (Dkt. 272 at 22). However, under such reasoning, putting form entirely over substance, a creditor could hypothetically write any false terms that it chose in the TILA boxes, as long as they were in the proper format, without fear of liability. Such an interpretation would ignore the purpose of TILA, as stated above, which is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing . . . ." 15 U.S.C. § 1601(a); *see also Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) (stating purpose of TILA).

EC cite to the *AMG*[6] case in support of its position. (Dkt. 276 at 9-10; Dkt. 281 at 7-8; Dkt 284 at 2-3). While *AMG* does not constitute binding precedent, I do find the facts to be sufficiently similar for it to serve an instructive role. In *AMG*, the Federal Trade Commission ("FTC") brought action against payday lenders, their owner, and others alleging, *inter alia*, that high-interest, short-term payday loans did not accurately disclose the loans' terms and thus were deceptive under the

[6] *FTC v. AMG Servs., Inc.,* 29 F. Supp. 3d 1338 (D. Nev. 2014), *aff'd sub nom. FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018).

FTC Act.[7] The defendants disclosed the loan terms in the TILA boxes as if the loans were single-payment loans. However, unless a consumer took affirmative action to decline the "option" of renewing the loan, the loan would automatically renew, resulting in significantly higher costs to the consumer than had been disclosed. The court found that renewing the loan was the default payment schedule and thus found that the defendants-appellants had violated the FTC Act by disclosing the terms as if the loan were a single payment loan. *AMG Capital*, 910 F.3d at 423-24.

Although RC highlight some factual differences between *AMG* and the current matter to argue that EC's reliance on *AMG* is misplaced (Dkt. 278 at 6-8), I do not find these differences to necessarily be significant. For example, RC argues that in *AMG* the "consumers could agree to the loan by clicking four boxes, without needing to read the terms and conditions," but in the current matter, IA "required that consumers read through the entire agreement and electronically sign . . . ." (*Id.* at 6-7). However, I fail to see how this is pertinent. A consumer in the current matter, just as in *AMG* potentially could have electronically signed or initialed the Loan Agreement without reading through the entire agreement. Similarly, RC argue that *AMG* consumers could only decline renewal of the loan through confusing email and hyperlink procedures, but in the current matter, consumers could simply call IA at a telephone number. (*Id.* at 7). However, RC did not cite to any evidence in the record demonstrating that this was, in fact, a simple procedure. RC also state that IA demarcated the auto-renewal and auto-workout provisions in bold, all caps font telling consumers that if they failed to contact IA then their loans may automatically renew. (*Id.*). However, without also clearly disclosing the cost implications of these provisions, this would merely seem to reinforce the impression to consumers that if they did nothing then the "Total of Payments" would eventually be deducted from their accounts, not that the costs would be significantly higher than the disclosed "Total of Payments."

In reply, EC argue that RC's analysis ignores the striking similarities between the loan agreement in *AMG* and IA's Loan Agreement. (Dkt. 284 at 2). They state that both companies calculated the amounts disclosed in the TILA boxes by assuming a single payment and, absent further action by consumers after signing, both companies automatically renewed the loans. (*Id.*). Also, both companies required consumers to select their payment option at least three business

[7] 15 U.S.C. § 45(a)(1).

days before the payment due date if they did not want the loan to auto-renew, and both had customers accept terms and conditions by electronically checking boxes, signing or initialing. (*Id.*). They state that both agreements contained renewal provisions directly below the TILA box. (*Id.*). They also assert that *AMG's* contract provided more information that IA's contract because it provided, in bold, an example showing how much in total finance charges a consumer who renewed a $200 loan four times would have to pay. (*Id.* at 2-3). I find these points to be accurate and relevant to the current matter.

Based on my review of the relevant portions of the Loan Agreement and consideration of the undisputed facts and parties' arguments, I find that Respondent IA disclosed multi-payment loans as if they were single payment loans. I thus find that Respondent IA failed to clearly and conspicuously disclose consumers' legal obligations, in violation of the TILA (Count I), and related CFPA provision (Count II).

B. COUNT III (CFPA - DECEPTION) AGAINST RESPONDENTS INTEGRITY ADVANCE AND JAMES R. CARNES[8]

1. Legal Standard

Count III alleges that Respondents engaged in deceptive practices by providing consumers with TILA disclosures that were false and misleading in violation of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a)(1)(B). (Dkt. 1 at 11). 12 U.S.C. § 5531(a) states, in relevant part, that the Bureau may take action to prevent a covered person from engaging in a deceptive practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. 12 U.S.C. § 5536(a)(1)(B) states, in relevant part, that it shall be unlawful for a covered person to engage in any deceptive practice.

The term "deceptive" is not statutorily defined in the CFPA. However, courts interpreting CFPA claims asserting unfair, deceptive, and abusive conduct recognize that the FTC Act applies

[8] I will discuss the issue of Carnes' individual liability for Counts III, IV, and VII in a separate section of this recommended decision.

a "similar, if not identical, standard" in analyzing unfair and deceptive conduct. *See CFPB v. IrvineWebWorks, Inc.*, SACV 14-1967 JVS, 2016 WL 1056662, at *12 (C.D. Cal. Feb. 5, 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1193 n.7 (9th Cir. 2016); *CFPB v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 WL 7188792, at *14 (S.D.N.Y. Dec. 2, 2016).

Under both the CFPA and analogous FTC law, the Bureau must prove the following elements to establish the existence of a deceptive act or practice: a) a material; b) representation, omission, or practice; c) that is likely to mislead consumers acting reasonably under the circumstances. *See Gordon*, 819 F.3d at 1192-1193; *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006); *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012).

2. CFPB's Position

EC assert that Respondents' Loan Agreements were facially deceptive because they disclosed a multi-payment loan as if it were a single-payment loan. (Dkt. 276 at 11). They assert that the TILA disclosure of the APR, amount of the finance charge, number of finance charges, total amount owed, and total number of payments are "material" representations. (*Id.*). They assert that Respondents' disclosures were "likely to mislead consumers acting reasonably under the circumstances" and that proof of "actual deception" is not required. (*Id.*) They assert that a court can grant summary judgment based on a facial analysis of a document. (*Id.* at 12). They further assert that although proof of actual deception is not required to establish a deception claim, the consumer complaints contained in the record demonstrate that many consumers were, in fact, misled. (*Id.*).

In their *Opposition Brief*, EC clarify that, although the record contains evidence such as Dr. Hastak's expert report and consumer complaints that reinforce the deceptive nature of Respondents' Loan Agreement, it is the language of the Loan Agreement *alone* that justifies a finding that Respondents' practices were likely to mislead reasonable consumers. (Dkt. 281 at 8-9). They assert that any alleged steps that Respondents took to ensure customers understood the loans are irrelevant and that there is no evidence in the record that representatives informed consumers of the cost of the loans when the default renewals were included, which is the heart of

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the deceptive practices claim. (*Id.* at 10). Similarly, they assert that additional signatures cannot cure Respondents' failure to accurately disclose the costs of the loans. (*Id.*)

In their *Reply Brief* in support of their motion, EC again emphasize that the cost of the loans was material, reasonable consumers would have been misled, and the language of the Loan Agreement alone justifies a finding that Respondents' practices were likely to mislead, regardless of other evidence. (Dkt. 284 at 3-4).

3. Respondents' Position

In their *Motion* and *Opposition Brief*, RC assert that the CFPB must establish that a "reasonable" consumer would be misled, not merely that the "least sophisticated consumer" would be misled. (Dkt. 272 at 9; Dkt. 278 at 9). They assert that Respondents took steps to ensure that consumers understood and appreciated the terms of the loan for which they applied, such as requiring signatures in multiple locations; having a customer representative walk customers through the loan; informing consumers that the payment schedule was one payment due on a specific date; providing a "special notice," in all capital letters, that the loan was a short-term cash solution and additional fees could accrue if the loan were refinanced or rolled over; and providing another notice that the loan was not intended to meet long-term financial needs. (Dkt. 272 at 9-10). They emphasized that the payment options and instructions were located directly below the TILA boxes. (*Id.* at 11).

RC also assert that Respondents' intent for the loan documents to comply with the law can reasonably be inferred from the fact that they hired outside counsel to draft the loan documents and were licensed by Delaware banking regulators, with annual renewals of their license. (*Id.*). They assert that consumer complaints are insufficient to prove violations of the law and the CFPB did not put on testimony from any consumers at the hearing. (Dkt. 278 at 10). Furthermore, they state that the CFPB's expert witness, Dr. Hastak, did not talk to any consumers or rely on complaints, and explained that complaints are not representative of IA's customers. (Dkt. 272 at 12; Dkt. 278 at 10). RC also argue that IA's high rate of repeat customers establishes that a reasonable consumer understood the Loan Agreement. (Dkt. 272 at 12-13; Dkt. 278 at 11-12; Dkt. 283 at 2).

4. Analysis

Although I have found above that IA violated TILA and the related provision of the CFPA, the portion of the CFPA addressing deceptive practices requires that different elements be proved to establish liability. Specifically, the CFPB must establish that the representations in question were "material." If the CFPB can establish that the representations were "material," it must then also establish that the material representations were likely to mislead consumers "acting reasonably under the circumstances."

a. Were the TILA disclosures "material representations?"

Several courts have discussed the definition of what makes a representation "material." A representation is "material" if it is "likely to affect the consumer's decision to buy the product or service." *FTC v. Int'l Computer Concepts, Inc.*, No. 5:94cv1678, 1995 WL 767810, at *3 (N.D. Ohio Oct. 24, 1995). Stated differently, "[a] misleading impression created by a solicitation is material if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Cyberspace.com*, 453 F.3d at 1201 (internal quotation marks and citation omitted).

In the context of TILA, the Fifth Circuit has held that because TILA's purpose is "to promote the informed use of credit by assuring a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him . . . [a] material disclosure, then, relates to information that would affect the credit shopper's decision to utilize the credit." *Bustamante v. First Fed. Sav. & Loan Ass'n of San Antonio*, 619 F.2d 360, 364 (5th Cir. 1980) (internal quotation marks, alterations, and citations omitted). The Eleventh Circuit has stated that in the context of TILA, "any understatement of the finance charge is a material non-disclosure, although the possibility of a *de minimis* exception has not been ruled out." *Steele v. Ford Motor Credit Co.*, 783 F.2d 1016, 1018 (11th Cir. 1986). The court analyzed Fifth Circuit precedent and concluded that those cases support "the proposition that any understatement of the finance charge is material *because* any understatement would be of some significance to a reasonable consumer." *Id.* at 1019. They held that "cost would likely be of prime importance to most reasonable consumers shopping for loans." *Id.* at 1020.

RC argue that the evidence does not establish that the possibility of loan renewals was material to a consumer's decision-making at the time they entered into a loan agreement with IA. (Dkt. 272 at 14). They further argue that IA's high rate of repeat customers shows that the automatic renewal provision was not material to a consumer's decision to obtain a loan. (*Id.*).

EC respond to this argument by stating that the deception claim does not center on the *fact* that IA's loans renewed, but rather on the fact that the *costs* of the renewals were never disclosed, even though the renewals were automatically initiated by IA. (Dkt. 281 at 11). They note that Respondents have not even tried to argue that cost is not material, as that assertion would be belied by common sense and well-established case law. (*Id.* at 12).

I find that RC is missing the crux of the materiality issue. It is, indeed, the *cost* of a loan renewal that is the issue here and not the *possibility* of a loan renewal. Certainly, if the loans in this case had renewed with no additional cost or *de minimis* cost to the consumer and simply extended the payment due date, there would be no issue of whether the renewals were material. However, that is not the case here, where customers incurred substantial additional costs due to loan renewals.

Also, RC have not explained how the high rate of repeat customers shows that the automatic renewal provision was not material to the customer's decision to obtain a loan, as they assert. (Dkt. 272 at 14). They cite no authority for this position. A similar argument regarding the motivation of repeat customers was made in the *AMG* case. There the defendants-appellants introduced an expert witness to attempt to explain what motivated repeat borrowers to take out multiple loans. The court found that there were other plausible explanations for a repeat customer's behavior besides that put forth by the expert witness and that a speculative analysis of repeat customers' motivation did not, in fact, establish what influenced their behavior. *AMG*

Capital, 910 F.3d at 425-26. The court highlighted a lack of "evidence that indicates one way or another whether repeat customers were actually deceived." *Id.* at 428. I find that to also be true in the current matter.

Similarly, the Northern District of Georgia, in response to the defendants' argument that damages should be reduced by the amount of sales to repeat customers, noted that "the fact that the customers' experiences played a role in their purchasing decisions does not mean or even imply that the customers did not also rely upon the representations in the advertisements when making their subsequent purchases." *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008). Like the Ninth Circuit in the *AMG* case, the court also highlighted a lack of evidence supporting the defendants' position, noting that "defendants do not introduce any evidence of what actually influenced the customers' decisions to reorder the products; instead, they merely speculate that it was the customers' experiences rather than the advertisements." *Id.* The court ultimately concluded that since the FTC met its burden in proving the misrepresentations, it could presume that consumers actually relied upon the advertisements even for subsequent purchases and that defendants would therefore have to introduce evidence demonstrating the absence of reliance. *Id.* (citing *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993)).

I find that while both sides speculate as to what motivated a repeat customer's behavior, neither party has established what actually motivated a repeat customer to take out a subsequent loan. Therefore, if I conclude that EC have met their burden in proving the deceptive nature of the loans, I will presume that consumers actually relied upon the deceptive disclosures even for subsequent purchases. *See id.*

Based on the case law discussed above, particularly those cases involving TILA, I find that the credit terms including the APR, finance charge, and total of payments disclosed in the TILA boxes were "material" representations to consumers taking out loans. RC do not provide a plausible explanation as to why the cost of credit would not be material to consumers who were already in the financial position of seeking out a payday loan, and they have introduced no convincing authority in support of such a position.

b. Were the representations likely to mislead consumers acting reasonably under the circumstances?

The next issue in determining liability is whether the material representations were "likely to mislead" consumers "acting reasonably under the circumstances." Under FTC case law, "[a representation] may be likely to mislead by virtue of the net impression it creates even though the [representation] also contains truthful disclosures." *Cyberspace.com*, 453 F.3d at 1200; *see also FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) ("Deception may be found based on the net impression created by a representation."); *Int'l Computer Concepts*, 1995 WL 767810, at *3 ("In determining the message conveyed by a representation, it is the overall net impression that counts. Fine print or ineffective disclaimers do not change the message conveyed if the overall net impression is different."). Furthermore, "[t]he deception need not be made with intent to deceive; it is enough that the representations or practices were likely to mislead consumers acting reasonably." *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006).

The Ninth Circuit summarized a series of cases in which they and other courts analyzed various advertisements to determine whether they were deceptive based on the net impressions they created. *Cyberspace.com*, 453 F.3d at 1200-01. Factors that were noted include the appearance and repetition of certain words, inclusion of fine print that conveys a different message than the overall advertisement, placement of fine print, and the predominant visual message of an advertisement compared to the accompanying verbal message. *See id.*

Additionally, "while consumer surveys conducted by independent experts may arguably constitute the best way to establish consumer understanding . . . , such surveys are not the exclusive form of probative evidence of public perception." *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 (D.C. Cir. 1985). And "[p]roof of actual deception is unnecessary to establish a violation of [the FTC Act's prohibition on deceptive acts or practices]." *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979); *see also FTC v. Commerce Planet, Inc.*, 642 F. App'x 680, 682 (9th Cir. 2016) ("The FTC Act does not require a showing of actual deception; a showing that a practice is *likely* to deceive will suffice.").

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As RC highlight (Dkt. 272 at 9), the "CFPA's prohibition against using deceptive acts or practices uses a 'reasonable person' standard rather than a 'least sophisticated consumer' standard" like the Fair Debt Collection Practices Act. *CFPB v. Weltman, Weinberg & Reis Co.*, No. 1:17 CV 817, 2018 WL 3575882, at *3 n.1 (N.D. Ohio July 25, 2018). The reasonable person standard is higher than the least sophisticated consumer standard. The latter "is to be considered uninformed, naïve, and trusting, but also possessing reasonable intelligence, and capable of making basic logical deductions and inferences." *Id.* at *3. An FTC case analyzing the deceptiveness of an advertisement noted that "[a]n interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers." *ECM BioFilms, Inc. v. FTC*, 851 F.3d 599, 610 (6th Cir. 2017) (quoting FTC Policy Statement on Deception, 103 F.T.C. 174, 177 n.20 (1984)).

RC argue that the "process" through which consumers applied for and were extended credit was not deceptive under the CFPA because Respondents took steps to ensure consumers understood and appreciated the terms of the loans for which they applied. (Dkt. 272 at 9). Specifically, they assert that applicants were required to sign the Loan Agreement in multiple locations and that a customer representative walked customers through the loan and answered questions. (*Id.* at 9-10). They assert that the Loan Agreement clearly indicated to consumers that the loans were required to be repaid in a single payment. (*Id.* at 10). They further state the Loan Agreement provided a "special notice" in all capital letters which informed consumers that the loan was designed as a short-term cash flow solution and not as a solution for longer term financial problems, and that additional fees may accrue if the loan is refinanced or rolled over. (*Id.*). There was also another notice that stated, again in all capital letters, that a payday loan is not intended to meet long-term financial needs. (*Id.*). Moreover, they state that the requirement that consumers were to select a payment option and instructions were included directly below the TILA box. (*Id.* at 11).

EC respond that Respondent's assertion that the loan application "process" was not deceptive is a strawman argument and that while EC do not endorse Respondents' loan application "process," the gravamen of the deception claim is that Respondents failed to disclose the loans' actual costs. (Dkt. 281 at 10). They assert that they must show only that Respondents misrepresented the loans' costs. (*Id.*). They state that Respondents have offered no evidence that they provided consumers with the APR, finance charge, and total of payments for a loan that went through the default process. (*Id.*).

As discussed above in the section on TILA, I find that Respondents' Loan Agreement failed to clearly and conspicuously disclose consumers' legal obligations. Specifically, I find that the Loan Agreements disclosed the terms of consumer loans as if they were for single-payment loans, when the loans were, in fact, multi-payment loans with substantially higher costs. I therefore agree with EC that the loan document was facially deceptive. Furthermore, I find that the representations of the loans' terms were "material." I therefore disagree with RC's assertion that the Loan Agreement *clearly* indicated to consumers that the loans were required to be repaid in a single payment. I will not repeat my analysis of this point as it is fully set forth above. *See supra* Section VI.A.4.

Considering the factors the Ninth Circuit highlighted in *Cyberspace.com*, I find the visual message created by the placement, language, and prominence of the TILA boxes, the summary of the payment schedule, and the itemization of the amount financed, as compared to the fine print, contributed to the net impression that the Loan Agreement was for a single-payment loan that would cost only the "Total of Payments." Indeed, RC do not dispute that the Loan Agreement's disclosures were based on a single-payment loan, as RC contend that the disclosures properly reflected the single payment that was the consumers' legal obligation at the time the loans were made. (Dkt. 272 at 21-24). Relevant to the current matter, the Ninth Circuit concluded in *AMG* that "a reasonable consumer might expect to pay only" the amount displayed in the TILA box, where "the TILA box suggested that the value reported as the 'total of payments'—described further as the 'amount you will have paid after you have made the scheduled payment'—would equal the full cost of the loan." *AMG Capital*, 910 F.3d at 423. Because the default terms of the loan would require a consumer to pay much more than the amount disclosed and the loan note's fine print did not reasonably clarify the terms, the *AMG* court ultimately found the loan note to be deceptive. *See id.* at 423-24. The Loan Agreement in the current matter contains almost identical language, with the "Total of Payments" described as "[t]he amount you will have paid after you have made all payments as scheduled." I have also similarly found that the default terms of the loan would require a consumer to pay much more than the amount disclosed and the Loan Agreement's fine print did not reasonably clarify the terms, so I find a reasonable consumer could similarly expect to pay only the amount disclosed by Respondents.

I am not convinced by RC's argument that a "special notice," stating that the loan is designed as a short-term cash flow solution and not for longer term financial problems or to meet long-term needs, clarified the true costs of the loans for consumers. Without defining "short-term" and "long-term," the notices gave no information about the intended length of the loan term. Also, although RC are correct that the Loan Agreement did include language to the effect that additional fees may accrue if the loan is refinanced or rolled over, the Loan Agreements did not clearly set forth what those additional fees would be for a loan that followed the default renewal procedure or explain how a reasonable consumer was to calculate these additional fees. It was also misleading to present the accrual of additional fees upon renewal as a possibility rather than the certainty that it was, further contributing to the overall impression that consumers could expect to pay only the "Total of Payments" disclosed.

Respondents also argue that a customer had to sign the loan in multiple places. However, since the Loan Agreement did not clearly and conspicuously disclose the terms of the loan, it is unclear how additional signatures would cure this defect. I also find that later "welcome" and "follow-up" emails, even if they clarified the loan terms, which I do not find they do, would not be sufficient to eliminate Respondents' liability for making deceptive claims in the first instance. *See Gordon*, 819 F.3d at 1194 (later corrective written agreement does not eliminate liability for deceptive claim); *Resort Car Rental Sys., Inc. v. FTC*, 5118 F.2d 962, 964 (9th Cir. 1975) (an advertisement is deceptive if it induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract); *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-02106-RS, 2017 WL 3948396, at *6 (N.D. Cal. Sep. 8, 2017) (quoting and agreeing with *Gordon* that later corrective written agreement does not eliminate defendant's liability for deceptive claims in the first instance); *AMG Capital*, 910 F.3d at 424 (nondeceptive business practices do not cure the deceptive nature of the loan note); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496-97 (1st Cir. 1989) (each advertisement must stand on its own merits).

Respondents also state that Carnes testified that a "customer representative walked customers through the loan and answered questions." (Dkt. 272 at 9-10). In support of this assertion, they cite to Carnes' deposition testimony. (EC-EX-068 at 188:18-189:13). In examining the exact testimony cited, I see that Carnes did testify that everyone who applied for a loan was called and talked to. (*Id.* at 189:13). However, other than this testimony, the record does not contain evidence of the content of such calls or support the characterization that a "customer representative **walked customers through the loan and answered questions**." (emphasis added). The record also does not indicate, and RC do not assert, that customer representatives informed consumers of the cost of loans under the auto-renewal and auto-workout process. Additionally, even if customer representatives fully explained the details of the loans, for the same reasons as above, I do not find these calls to be sufficient to eliminate Respondents' liability for making deceptive claims in the first instance.

RC also argue that Respondents' intent to comply with the law can be inferred because they hired outside counsel to draft the loan documents and later provided the Loan Agreement to Delaware banking regulators for review. (Dkt. 272 at 11). In opposition, EC respond that the fact that Respondents hired outside counsel to draft the Loan Agreement and shared it with Delaware banking regulators, even if true, has no bearing on whether the Loan Agreement disclosed the actual cost of the loans or were likely to mislead consumers. (Dkt. 281 at 10-11). I find that the law is clear that the Respondents' intent is irrelevant and good faith is not a defense to liability for a deceptive practice under the CFPA. *FTC v. LoanPointe, LLC*, No. 2:10–CV–225DAK, 2011 WL 4348304, at *9 (D. Utah Sept. 16, 2011) (good faith is not a defense to liability for deceptive act under the FTC Act) (citing *Cyberspace.com*, 453 F.3d at 1202).

RC also assert that the CFPB cannot establish deception because it did not introduce testimony of any consumers and its expert witness, Dr. Hastak, did not talk to customers or rely on complaints, which were just a small sampling of consumers and not representative of a typical IA consumer. (Dkt. 272 at 12). Regardless of their number, RC assert that complaints are insufficient to prove violations of the law. (*Id.*).

In response, EC assert that summary disposition is appropriate where the loan agreement, like the one in this case, is facially deceptive. (Dkt. 276 at 12). They assert that additional evidence such as Dr. Hastak's report and consumer complaints, while demonstrating that many consumers were, in fact, misled about their loans, is not required to prove the charge. (*Id.*). They further state that "actual deception" is not required to prove a deception claim, citing to *AMG* which, on similar facts, found deception based on the face of the loan agreement alone. (*Id.*) (citing *AMG Capital*, 910 F.3d at 423).

In reaching my decision on Count III, as with Counts I and II, I clarify that I am relying on the undisputed facts, the specific language of the loan documents in question, the statutes, and relevant case law. I am not relying on any expert reports or consumer complaints. Contrary to RC's assertions, the case law is clear that a representation may be likely to mislead by virtue of the "net impression" it creates. *See Cyberspace.com*, 453 F.3d at 1200; *Stefanchik*, 559 F. 3d at 928; *Int'l Computer Concepts*, 1995 WL 767810 at *3; *Verity Int'l*, 443 F.3d at 63; *AMG Capital*, 910 F.3d at 422; *Nationwide Biweekly Admin.*, 2017 WL 3948396, at *2; *Gordon*, 819 F.3d at 1193.

The CFPA also is clear by the language "likely to mislead" that proof of "actual deception" is unnecessary. This point is reinforced by the decisions of various courts. *See AMG Capital*, 910 F.3d at 422, 425 (proof of actual deception is unnecessary to establish violation); *LoanPointe*, 2011 WL 4348304, at *4 (FTC not required to prove each consumer relied on deceptive claims; presumption of actual reliance arises once FTC has proven that there were material misrepresentations widely disseminated and that consumers purchased the product); *Cyberspace.com*, 453 F.3d at 1201 (proof of actual deception not required, but may bolster deception).

After reviewing all of the parties' arguments and the relevant law, I find that the net impression of IA's Loan Agreement was deceptive because it was likely to misrepresent to reasonable consumers that the loans were single-payment loans with set "Total of Payments" costs when they were, in fact, multi-payment loans with significantly higher costs, and those costs are material. I find that the record contains sufficient undisputed material facts to establish that Respondent Integrity Advance engaged in deceptive practices in violation of Count III.

C. COUNT IV (CFPA - UNFAIRNESS) AGAINST RESPONDENTS INTEGRITY ADVANCE AND JAMES R. CARNES

1. Legal Standard

Count IV alleges that Respondents engaged in unfair practices by supplying consumers with deceptive loan cost disclosures that misled them about their repayment obligations and prevented them from properly assessing the actual loan costs. (Dkt. 1 at 12). Under the CFPA, an act or practice is "unfair" if: 1) it is likely to cause substantial injury to consumers; 2) the substantial injury is not reasonably avoidable by consumers; and 3) the substantial injury is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1). The standard for the meaning of "unfair" acts or practices mirrors the FTC Act. *See NDG Fin. Corp.*, 2016 WL 7188792, at *13; CFPB v. *ITT Educ. Servs.*, 219 F. Supp. 3d 878, 903 (S.D. Ind., Mar. 6, 2015); *LoanPointe*, 2011 WL 4348304, at *4.

2. CFPB's Position

EC assert that Respondents' failure to accurately disclose the costs of their loans, with regard to all loans issued on or after July 21, 2011, was legally unfair. (Dkt. 276 at 13, 15; Dkt. 281 at 12-13). They assert that customers suffered "substantial injuries" when the company electronically debited more money from their accounts than had been disclosed and cite to case law supporting their position that monetary harm is considered a "substantial injury." (Dkt. 276 at 13; Dkt. 281 at 13-14). They assert that according to Respondents' own data, consumers who took out loans after July 21, 2011, paid $38,453,341.62 more than the total amounts disclosed. (Dkt. 276 at 13-14; Dkt. 281 at 13).

EC also assert that customers could not have "reasonably avoided" substantial injury. (Dkt. 276 at 14-15; Dkt. 281 at 14-17). They state that Respondents did not tell customers the total loan costs and took affirmative steps to prevent customers from learning such information by instructing their call representatives not to tell consumers the total costs of loans during the application process and failing to provide a unified version of the contract until consumers had agreed to the loan. (Dkt. 276 at 14). They further assert that Respondents structured the repayment method in a way that gave them control over the amounts collected by pulling the loan repayments directly from consumers' accounts. (*Id.*). They state that even if consumers revoked their ACH authorizations or otherwise tried to block ACH withdrawals, Respondents nevertheless withdrew funds through the use of RCCs. (*Id.* at 15).

Finally, EC assert that there is no possible argument that hiding the total cost of loans provided any legitimate benefit to consumers or competition. (*Id.).* In their *Opposition Brief*, EC assert that Respondents' argument that they provided benefits to consumers in the form of increased consumer options is both unsupported by the record and irrelevant. (Dkt. 281 at 17). They argue that even if a Bureau White Paper supported the general point that payday loans can provide a benefit to a consumer in the abstract, it has no bearing on whether IA's deceptive cost disclosures provided a benefit to consumers in the current matter that outweighed the substantial harm caused. (*Id.*). They assert that even if Respondents helped consumers find credit when other avenues were foreclosed, it does not justify failing to disclose the true loan costs and there is no argument that inaccurate disclosures benefited consumers or competition, let alone outweighed substantial injury. (*Id.*; Dkt. 284 at 5). Furthermore, they state that Respondents never explain why they could not offer credit while also truthfully disclosing loan costs. (Dkt. 284 at 5).

In their *Reply Brief*, EC assert that even if some consumers were not injured or could have reasonably avoided the harm, that would not make the *practice* fair or necessarily create a genuine issue of fact. (*Id.* at 4-5). They assert that Respondents offer no evidence that any returning consumers understood loan costs given that Respondents' own expert testified that it was possible consumers who experienced renewals never calculated the total costs. (*Id.* at 5; Dkt. 281 at 17). They further assert that the harm was not reasonably avoidable and that actions such as requiring multiple signatures, bolding certain language in the Loan Agreement, and sending follow-up emails after loan consummation did nothing to cure the fact that the cost of the loans was not accurately disclosed, because consumers could not avoid costs that they did not know about. (Dkt. 284 at 5; Dkt. 281 at 16-17).

3. Respondents' Position

RC argue that the CFPB cannot prove that Respondents caused substantial injury to consumers by supplying deceptive disclosures and withholding information about the costs of its loans, because the CFPB cannot support its claim [in Count III] that the Loan Agreement was "deceptive." (Dkt. 272 at 16; Dkt. 278 at 15). Therefore, RC assert that the claim of "unfairness" must fail. (Dkt. 272 at 16; Dkt. 278 at 15). They assert that "speculative harms" do not meet the requirement for "substantial injury." (Dkt. 272 at 16; Dkt. 278 at 15). They state that consumers received the credit for which they applied and dissatisfaction with the eventual total price of the loan is not a cognizable injury under the injury prong of the unfairness analysis. (Dkt. 272 at 17).

With regard to the second and third unfairness elements, RC argue that any injury to consumers was "reasonably avoidable" and the fact of any injury was "outweighed by countervailing product benefits." (*Id.*). RC assert that consumers were allowed to repay their loans ahead of schedule, penalty-free, which would have reduced the amount of interest owed. (*Id.*). Also, they state the Loan Agreement contained a notice of rescission rights, which enabled consumers to decline a loan before expiration of a three-day rescission period. (*Id.*). They state that the Loan Agreement contained multiple places for consumers to assent to the loan terms, coupled with bold fonts and other elements that made any injury avoidable. (*Id.* at 18). Furthermore, they state that after the expiration of the right to cancel, consumers received alerts regarding their repayment obligations and could have taken reasonable steps to avoid any injury. (*Id.* at 18-19). They argue that any injury arising from the terms of the Loan Agreement would have been entirely avoidable by returning customers, who had already seen and experienced the loan operations. (Dkt. 272 at 19; Dkt. 278 at 16).

With regard to whether the alleged injury was outweighed by countervailing consumer benefit, RC assert that the loans increased consumer options. (Dkt. 272 at 19). They state that the CFPB has publicly acknowledged in a White Paper that some consumers have provided favorable responses about the speed at which payday loans are given and their availability for consumers who may not qualify for other credit products. (*Id.*; Dkt. 278 at 17). Therefore, they assert that it is undisputed that such loans provided a consumer benefit. (Dkt. 272 at 19-20; Dkt. 278 at 16-17; Dkt. 283 at 7).

4. Analysis

a. What is "substantial injury?"

In analyzing this count, it is first necessary to define the term "substantial injury." In a 1980 policy statement provided to Congress defining its unfairness authority, the FTC clarified that "in most cases substantial injury would involve monetary harm" and that it "is not concerned with trivial or merely speculative harms." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (citing Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), available at https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness) (internal quotation marks omitted); *see also LoanPointe*, 2011 WL 4348304, at *6 (quoting *Am. Fin. Servs. Ass'n*, 767 F.2d at 975) ("risk of substantial economic and monetary harm to the consumer is significant"). "An injury may be sufficiently substantial, however, if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm." *Am. Fin. Servs. Ass'n,* 767 F.2d at 972 (quotation marks omitted); *see also Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) ("[A]lthough the actual injury to individual customers may be small on an annual basis, this does not mean that such injury is not 'substantial.'"). In the context of a CFPB case, a district court also stated that a substantial injury in the context of consumer protection is most often a financial one, citing to the same sources. *ITT Educ. Servs.*, 219 F. Supp. 3d at 913 (citing *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 299 (D. Mass. 2008); *Am. Fin. Servs. Ass'n*, 767 F.2d at 972).

RC assert that "a 'substantial injury' exists only if the CFPB can show '[t]hat consumers were injured by a practice for which they did not bargain." (Dkt. 272 at 15) (quoting *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008)). However, I note that the *Neovi* case cites to *FTC v. J.K. Publications, Inc.*, for this proposition, which merely states that "[t]he substantial injury prong *can be satisfied* if the FTC establishes that consumers were injured by a practice for which they did not bargain." *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000) (emphasis added). There are no other cases RC cite that hold this as a requirement to prove "substantial injury." Thus, while a showing that consumers did not receive the benefit of their bargain can prove that consumers suffered substantial injury, it is not true that this necessarily must be a factor to find substantial injury.

RC also assert that because Respondents did *not* provide "deceptive" disclosures (Count III), consumers could not have been deceived or misled, and consequently could not have suffered substantial injury. (Dkt. 272 at 16). They therefore argue that the CFPB cannot prove "substantial injury" and the claim of "unfairness" must fail. (*Id.*).

I do not find this argument convincing because, as discussed above (see analysis of Counts I, II, and III), I have, in fact, found that IA provided consumers with inaccurate, deceptive TILA disclosures which did not clearly and conspicuously disclose the true costs of the loans.[9] Contrary to RC's argument, I find that consumers could not have bargained for loan terms that were not disclosed and thus by their very nature were deceptive. I also find that monetary harm does constitute substantial injury.

b. Were Respondents' acts or practices "likely to cause" substantial injury that was "not reasonably avoidable?"

RC assert, as stated in *Am. Fin. Servs. Ass'n*, that "merely speculative harms" do not typically qualify as "substantial injury." (Dkt. 272 at 16-17) (quoting *Am. Fin. Servs. Ass'n,* 767 F.2d at 972). However, I note that the statutory language is that the act or practice is "likely to cause" the injury, not that it "actually" causes the injury. The Eleventh Circuit has determined that "likely" means "probable" or "reasonably expected," which requires a higher threshold than "significant risk" but lower than "high probability of occurring." *LabMD, Inc. v. FTC*, 678 F.

[9] I note that an "unfairness" claim requires different elements of proof than a "deception" claim, so a finding of "deception" does not necessarily equate to a finding of "unfairness," even if the same underlying facts relate to both claims.

App'x 816, 821 (11th Cir. 2016). The Third Circuit has also noted that "[a]lthough unfairness claims usually involve actual and completed harms, they may also be brought on the basis of likely rather than actual injury." *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3rd Cir. 2015) (quoting *In the Matter of Int'l Harvester Co.*, 104 F.T.C. 949, 1061, 1061 n.45 (1984)) (internal citation and quotation marks omitted). The court stated that "the FTC Act expressly contemplates the possibility that conduct can be unfair *before* actual injury occurs." *Id.* (emphasis added). Since this conclusion is based on the "likely to cause substantial injury" language of the FTC Act, and identical language is contained in the CFPA, I conclude that the CFPA also expressly contemplates this possibility.

RC assert that since Integrity Advance ceased all consumer facing operations in June 2013, the CFPB must prove that the unfair act or practice "actually" caused substantial injury to consumers because there is no potential for any future injury. (Dkt. 272 at 15 n.3). They cite no authority, nor have I found any, for this proposition. Regardless of this deficiency, given the deceptive disclosures of loan costs in the Loan Agreement, which stated the terms as if the loans were single-payment loans when, in fact, they were multi-payment loans with higher costs, I find that many consumers paid significantly more than they anticipated and thus, Respondents' deceptive disclosures were "likely to cause" and did cause substantial injury to consumers.

RC also argue that any injury to consumers was "reasonably avoidable." (Dkt. 272 at 17). "An injury is reasonably avoidable if consumers have reason to anticipate the impending harm and the means to avoid it, or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact." *ITT Educ. Servs.*, 219 F. Supp. 3d at 916 (quoting *Davis*, 691 F.3d at 1168) (internal quotation marks omitted); *see also Orkin Exterminating Co.*, 849 F.2d at 1365; *CFPB v. Navient Corp.*, No. 3:17-CV-101, 2017 WL 3380530, at *21 (M.D. Pa. Aug. 4, 2017). "In determining whether consumers' injuries were 'reasonably avoidable,' courts look to whether the consumers had a free and informed choice." *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010) (citing *Am. Fin. Servs. Ass'n*, 767 F.2d at 976).

RC specifically assert that a consumer could have avoided injury by repaying the loan ahead of schedule or by declining the loan before the expiration of the three-day rescission period and thus aborting their applications. (Dkt. 272 at 17). They assert that consumers were told about the loan terms and prepayment options and received alerts regarding repayment obligations, and thus could have avoided any injury. (*Id.* at 18-19). They also repeat their argument, which they set forth with regard to Count III, that returning customers knew what to expect and therefore would have anticipated and had the means to avoid any impending harm. (*Id.* at 19).

EC argue that consumers could not have avoided injury because they could not make a free and informed choice about the true costs of the loans which were not disclosed to them. (Dkt. 281 at 14). They assert that even though consumers could have rescinded the loans, the true loan costs would not have been apparent to them during the rescission period. (*Id.* at 14-15). They state that the fact that a consumer could try to change the payment options and prepay did not allow the consumer to make a free and informed choice to avoid injury. (*Id.* at 15). In order to avoid injury, they argue consumers would have needed to prepay their loan in full before the first auto-renewal but at that time, there would have been no indication that the loan costs were more than the disclosed amounts. (*Id.*). They also assert that the fact that consumers had to sign the loan in several places was not a cure for the defect of failing to disclose the actual costs of the loans and thus would not have allowed consumers to avoid injury. (*Id.* at 15-16). They argue that there is no evidence that returning customers actually understood the costs of the loan renewal process and could have reasonably avoided injury. (*Id.* at 17).

I find that because the actual loan costs were not clearly and conspicuously disclosed, injury to consumers was not "reasonably avoidable." Consumers would not have been aware of the additional costs of their loans until they had already made several payments and thus were being debited an amount in excess of the "Total of Payments," as disclosed in the TILA box. At that point, they would have already suffered monetary harm. Even though consumers may have signed the loan documents in several places and received follow-up emails with prepayment options, such steps would not have served to cure the problem, because IA still did not disclose the actual costs of the multi-payment loans. Consumers thus could not avoid what was not revealed to them. As for returning customers, as I discussed above, the record does not establish the reason for returning consumers' behavior and whether they understood the costs of the loan renewal process. *See supra* Section VI.B.4.a. After reviewing the parties' arguments, statutory language, undisputed facts, and case law, I find that consumers could not have reasonably avoided substantial monetary injury from IA's loans.

c. Was the injury "outweighed by countervailing benefit to consumers or competition?"

RC assert that any injury to consumers was outweighed by countervailing product benefits. (Dkt. 272 at 19-20; Dkt. 278 at 16-17; Dkt. 283 at 7). Specifically, they assert that the availability of the loans and possibility of renewing those loans provided substantial consumer benefits because it increased consumer options. (*Id.*). They cite to case law stating that, "an increase in services or benefits to consumers or by benefits to competition" can outweigh adverse consequences to consumers. (Dkt. 272 at 19) (quoting *J.K. Publ'ns,* 99 F. Supp. 2d at 1201). They also cite to a CFPB White Paper which stated that, "some consumers provided favorable responses about the speed at which these [payday] loans are given, the availability of these loans for some consumers who may not qualify for other credit products, and consumers' ability to use these loans as a way to avoid overdrawing a deposit account or paying a bill late." (*Id.* at 19-20) (quoting CFPB White Paper, "Payday Loans and Deposit Advance Products," available at https://files.consumerfinance.gov/f/ 201304_cfpb_payday-dap-whitepaper.pdf).

EC counter that Respondents' claim of increased consumer options is unsupported by the record in this matter and it is irrelevant that, in a White Paper discussing the general benefits of payday loans, some consumers identified certain general benefits. (Dkt. 281 at 17). They assert that whether a consumer, in the abstract, can benefit from a payday loan has no bearing on whether IA's deceptive cost disclosures provided benefits to consumers in this matter that outweighed the substantial harm. (*Id.*). Furthermore, they argue that even if Respondents helped consumers find credit when other avenues were foreclosed, that did not justify failing to disclose the actual costs of the loans and there is no logical argument that inaccurate disclosures benefited consumers or competition, let alone outweighed the substantial injury. (*Id.*; Dkt. 284 at 5).

The record appears to support the proposition that consumers received the "amount financed" as stated in the TILA box.[10] So, in that sense consumers did, in fact, receive a benefit. However, the issue for this analysis is whether that benefit was enough to *outweigh* the substantial injury to consumers who were led to believe that the benefit, i.e., the amount financed, would cost them substantially less than they ultimately were debited. Furthermore, it raises the question of whether consumers would have taken loans from Respondents if the "actual" loan costs had been disclosed, without misrepresentations or deception, i.e., whether they had a "free and informed choice" that would have enabled them to avoid the unfair practice. *See Neovi*, 604 F.3d at 1158 (citing *Am. Fin. Servs. Ass'n*, 767 F.2d at 976).

I have not found a case directly on point and the parties do not cite to one, but in a CFPB case claiming abusive and deceptive conduct, the court discussed consumer benefit in the context of a discussion about remedies. The court stated, "[t]he law is . . . 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." *Nationwide Biweekly Admin.*, 2017 WL 3948396, at *12. The court cited to another case which found that a seller's misrepresentations tainted the customers' purchasing decisions and commented that the fraud was in the selling, not in the value of the things sold, and that is what entitled consumers to refunds. *Figgie Int'l*, 994 F.2d at 604.

I find that the harm to consumers in the current matter was not outweighed by a countervailing benefit to consumers or competition. I find that consumers' decisions regarding Respondents' loan product was tainted by IA's failure to reveal the actual costs of the loans. Furthermore, the benefit of the loans could have been provided to consumers while accurately disclosing the costs. There is no plausible argument that can be made that Respondents had to misrepresent the costs in order for consumers to receive the benefit of a payday loan.

For the reasons discussed above, I conclude that IA's acts or practices caused or were likely to cause substantial injury to consumers which was not reasonably avoidable and was not

[10] EC have not claimed that the consumers did not receive the amount financed and it has not come up as an issue for discussion in any of the briefs. I am assuming that consumers did, in fact, receive the amount financed, as disclosed in the TILA box.

outweighed by countervailing benefit to consumers or competition. I therefore find that the record contains sufficient undisputed material facts to establish that Respondent Integrity Advance engaged in unfair acts or practices in violation of Count IV.

D. COUNT V (EFTA) AND COUNT VI (CFPA) AGAINST RESPONDENT INTEGRITY ADVANCE

1. Legal Standard

Count V alleges that IA conditioned extensions of credit on repayment by preauthorized electronic fund transfers in violation of EFTA. (Dkt. 1 at 13). Count VI alleges that IA violated the CFPA by virtue of having violated EFTA. (*Id.*). EFTA is set forth at 15 U.S.C. § 1693 *et seq.* and aims primarily to protect consumers engaging in electronic fund transfers. EFTA is implemented by Regulation E, 12 C.F.R. pt. 1005. EFTA and Regulation E prohibit extensions of credit to a consumer conditioned on the consumer's repayment by preauthorized electronic fund transfers. 15 U.S.C. § 1693k; 12 C.F.R. § 1005.10(e). A "preauthorized electronic fund transfer" is "an electronic fund transfer authorized in advance to recur at substantially regular intervals." 15 U.S.C. § 1693a(10); 12 C.F.R. § 1005.2(k).

Under the CFPA, it is unlawful for any "covered person or service provider" to "commit any act or omission in violation of a Federal consumer financial law," such as EFTA. 12 U.S.C. § 5536(a)(1)(A). Therefore, if Respondent IA is found to have violated EFTA, then it will also have violated the CFPA.

2. CFPB's Position

EC assert in their *Memorandum of Points and Authorities in Support of its Motion for Summary Disposition* that IA violated EFTA by conditioning its offers of credit on preauthorized electronic repayments. (Dkt. 276 at 22). Specifically, EC assert that the payments authorized by IA's Loan Agreement were preauthorized electronic fund transfers under the definitions in EFTA and Regulation E because once consumers signed the loan documents and accepted their loans, IA had the authority to debit the entire series of default auto-renewal and auto-workout payments, which were deducted approximately every two weeks, from their accounts without any further action or authorization from consumers. (*Id.* at 23). EC also assert that IA conditioned its loans on consumers agreeing to repay the loans via ACH because consumers could not obtain a loan without signing the ACH authorization and the form authorized both the deposit of the loan proceeds and the withdrawals for payments via ACH. (*Id.* at 24-25). EC cite to *FTC v. PayDay Fin. LLC*, 989 F. Supp. 2d 799, 811-13 (D.S.D. 2013) for the proposition that failing to tell consumers that ACH authorization is not required and failing to provide an alternative to such authorization qualifies as conditioning an offer of credit on authorization for electronic fund transfers. (*Id.* at 24).

In *EC's Opposition to Respondents' Motion for Summary Disposition*, EC also assert that despite the fact that 95% of consumers signed the ACH authorization, and therefore 5% did not sign it, limited exceptions do not change the fact that IA's Loan Agreements required consumers to complete the ACH authorization in order to receive the loans. (Dkt. 281 at 20-21). They state that the evidence demonstrates that IA failed to offer consumers an alternative to granting electronic access as part of the origination, which is itself a violation of EFTA. (*Id.* at 21). They also assert that additional language in the ACH agreement stating that IA accepted alternative forms of payment does not cure the fact that Respondents required virtually every consumer to preauthorize electronic fund transfers. (*Id.*). Furthermore, the meaning of that language is clouded by another clause stating that the ACH agreement "remains in full force and effect" for as long as the consumer owed money to IA. (*Id.*).

3. Respondents' Position

Respondents assert in their *Motion for Summary Disposition* that IA's Loan Agreement did not condition extension of credit on the consumer's agreement to repay the loan through a preauthorized EFT. (Dkt. 272 at 24). Specifically, the express terms of the Loan Agreement provided that consumers could repay their loans through other means. (*Id.*). Furthermore, 95% of consumers that obtained loans with IA signed the ACH authorization, meaning 5% of consumers received loans without signing the ACH authorization, and 98.5% of initial loan repayments were made by electronic means. (*Id.* at 24-25). RC assert that these facts mean, by definition, that providing electronic access to consumers' bank accounts or repaying the loan via electronic means was not a condition for a loan. (*Id.* at 25).

In *Respondents' Brief in Opposition to Enforcement Counsel's Motion for Summary Disposition*, they distinguish the *PayDay Financial* case cited by EC by noting that IA's Loan Agreement gave consumers the ability to choose their payment method whereas in *PayDay Financial*, the loan agreement provided that repayment "shall" be made by ACH debit and was therefore required. (Dkt. 278 at 20). RC conclude that because IA did not require consumers to pay back their loans via electronic transfers as a precondition to getting a loan, they did not violate EFTA. (*Id.* at 20-21).

RC do not assert that the payments authorized by IA's Loan Agreement were not preauthorized electronic fund transfers under the definitions in EFTA and Regulation E.

4. Analysis

In analyzing liability for Counts V and VI, the relevant questions are: a) were consumers' repayments "preauthorized electronic fund transfers?" and b) did IA condition its loans on the authorization of such electronic fund transfers?

a. Were consumers' repayments "preauthorized electronic fund transfers?"

As noted above, a "preauthorized electronic fund transfer" is defined by EFTA and Regulation E as "an electronic fund transfer authorized in advance to recur at substantially regular intervals." 15 U.S.C. § 1693a(10); 12 C.F.R. § 1005.2(k). The "Official Interpretations" to Regulation E clarify that preauthorized electronic fund transfers are ones "authorized by the consumer in advance of a transfer that will take place on a recurring basis, at substantially regular intervals, and will require no further action by the consumer to initiate the transfer." 12 C.F.R. pt. 1005, Supp. I, 1005.2(k).

The ACH authorization in IA's Loan Agreement authorized IA to initiate credit and debit entries to consumers' bank accounts. Specifically, by signing the ACH authorization, consumers authorized debit entries as follows:

> (a) for the Total of Payments plus any accrued fees on the Payment Due Date, or on any subsequent Renewal Payment Due Date, if you contact us at least three (3) business days prior to such date and select Payment Option (a) in the Loan Agreement (Pay in full);
>
> (b) for the Finance Charge plus any accrued fees on the Payment Due Date, or on any subsequent Renewal Payment Due Date, if you contact us at least three (3) business days prior to such date and select Payment Option (b) in the Loan Agreement (RENEWAL), or if you fail to contact us to confirm your payment option;
>
> (c) for the accrued finance charges and fees, plus $50.00 on each Pay Date[1] after the fourth (4th) Renewal Payment Due Date, until all amounts owed under the Loan Agreement are paid in full; and
>
> (d) for any accrued Returned Payment charges, subject to the Loan Agreement.

(EC SMF Exh. 1 at 9-10; EC-EX-063 at 8-9).

The provisions above authorized the withdrawal of all payments, including those under the auto-renewal (paragraph (b)) and auto-workout (paragraph (c)) provisions. By signing the ACH authorization, a consumer gave IA the authority to debit all of the payments under the auto-renewal and auto-workout process without requiring any further action by the consumer. Despite the possibility that a consumer could pay off the loan in one payment (paragraph (a)), EFTA "applies where electronic fund transfers are preauthorized by the consumer, whether or not the preauthorized transfers actually do (or must) occur." *Baldukas v. B & R Check Holders, Inc.*, No. 12-CV-01330-CMA-BNB, 2012 WL 7681733, at *3 (D. Colo. Oct. 1, 2012).

The section above also makes it clear that the debits would recur at substantially regular intervals. According to the Loan Agreement, "Pay Date" "refers to the next time following the Payment Due Date, that you receive regular wages or salary from your employer. Because Renewals are for at least fourteen (14) days, if you are paid weekly, your loan will not be Renewed until the next Pay Date that is at least fourteen days after the prior Payment Due Date." (EC-EX-063 at 3; *see also* EC SMF Exh. 1 at 8). Thus, the Renewal Payment Due Date and the Pay Date referred to in the paragraphs above are dates occurring at substantially regular intervals because they coincide with the date on which a consumer receives regular wages or salary. Under the renewal, auto-renewal, and auto-workout provisions, a consumer would be debited every Pay Date.

There can be no question, therefore, that by signing the ACH authorization form, a consumer authorized payment in advance of a transfer, that would take place on a recurring basis, at substantially regular intervals, and that required no further action by the consumer to initiate the transfer. RC do not dispute this in their briefs. Thus, I find that the repayments authorized by IA's ACH form are "preauthorized electronic fund transfers" as defined by EFTA and Regulation E.

b. Did IA condition its loans on consumers executing an ACH authorization?

Because the repayments authorized by IA's ACH form were "preauthorized electronic fund transfers" under EFTA, IA's loans were conditioned on repayment by preauthorized electronic fund transfers if the loans were conditioned on consumers executing the ACH authorization. RC assert that because the Loan Agreement provided that consumers could repay their loans through other means, the extension of credit was not conditioned on the consumer's agreement to repay the loan through a preauthorized EFT. (Dkt. 272 at 24; Dkt. 278 at 19-20). RC further assert that because 98.5% of initial loan repayments were made by electronic means, and therefore 1.5% were made by other means, consumers could not have been required to repay their loans by electronic means. (Dkt. 272 at 25; Dkt. 278 at 20). "However, the right to later cancel EFT payments does not allow a lender who conditions the initial extension of credit on such payments to avoid liability." *O'Donovan v. CashCall, Inc.*, No. C 08-03174 MEJ, 2009 WL 1833990, at *3 (N.D. Cal. June 24, 2009); *see also PayDay Fin.*, 989 F. Supp. 2d at 812-13 (quoting and applying *O'Donovan*).

The undisputed facts establish that the ACH form authorized both electronic credits to and debits from a consumer's bank account. Therefore, if the ACH authorization was a condition for the loan, it inherently required consumers to agree to repay by ACH, even if they could later choose to "repay [their] indebtedness through other means." (EC SMF Exh. 1 at 10; EC-EX-063 at 9). This would mean that if the ACH authorization was a condition for the loan, IA violated EFTA.

The undisputed facts establish that IA's loan documents did not contain an indication that consumers could obtain a loan from the company without completing and agreeing to the ACH authorization. Respondents admitted that consumers could only receive loan proceeds by way of an electronic deposit which was authorized by the ACH form. Furthermore, the Loan Agreement provided:

> **DISBURSEMENT**: In order to complete your transaction with us, you must electronically sign the Loan Agreement by clicking the "I Agree" button at the end of the Loan Agreement, as well as all other "I Agree" buttons that appear within the Loan Agreement and related documents that appear below. We will then approve or deny your application and the Loan Agreement.

(EC SMF Exh. 1 at 4; EC-EX-063 at 3-4). The ACH authorization stated, "[t]his ACH Authorization is a part of and relates to the Loan Agreement . . . ." (EC SMF Exh. 1 at 10; EC-EX-063 at 9). Together, these two provisions indicated to a reasonable consumer that agreeing to the ACH authorization was a requirement to obtain a loan from IA.

RC assert that since 5% of consumers obtained loans with Integrity Advance without signing the ACH authorization, it could not have been a condition for a loan. (Dkt. 272 at 24; Dkt. 278 at 20). However, those consumers were the exception to the rule. Foster testified that without a completed ACH authorization, "[t]here would be no provisional or initial approval of the application without additional contact with the customer." (EC-EX-069 at 83:24-84:13). The Loan Agreement itself contained no provision indicating that consumers could obtain a loan without signing the ACH authorization, nor did it provide alternate means of receiving loan proceeds. There was no straightforward path, therefore, to obtaining a loan from IA without signing the ACH authorization. Foster's testimony indicates that it would require an incomplete application and a follow-up call from IA for that option to be presented to a consumer. That process simply cannot be considered evidence that consumers were not required to sign the ACH authorization in the normal course of business.

In *PayDay Financial*, the court noted in a similar situation that "that there is no language expressly stating that the extension of credit is not conditioned on agreement initially to EFT or explaining how a consumer might obtain a consumer loan from Defendants otherwise." *PayDay Fin.*, 989 F. Supp. 2d. at 812. Despite the fact that the defendant lenders in that case did not condition the extension of credit on consent to EFTs in practice, the court held that "in reality their loan agreements did just that." *Id.* Similarly, although IA accepted repayment of loans by other means and there may have been a way for consumers to obtain a loan without consenting to EFTs, the Loan Agreements made the loans conditioned on the ACH authorization.

RC try to distinguish their Loan Agreements from those in *PayDay Financial* by asserting that unlike those loan agreements, which provided that payment "shall" be made by ACH debit, IA's Loan Agreements gave consumers the ability to choose their payment methods. (Dkt. 278 at 20). This argument fails for two reasons. First, as EC correctly note in their *Reply Brief* (Dkt. 284), only a portion of the loan agreements in *PayDay Financial* that the court found to violate EFTA included the "shall" language. In fact, two of the three examples that the court cited in its opinion provided that the consumer was "authorizing [the lender] to effect both debit and credit entries into your Bank Account to fulfill your obligations under this Loan Agreement." *PayDay Fin.*, 989 F. Supp. 2d at 810. IA's ACH authorization similarly authorized IA "to initiate automatic credit and debit entries to Your Bank Account in accordance with the Loan Agreement." (EC SMF Exh. 1 at 9; EC-EX-063 at 8).

The second reason RC's attempt to distinguish IA from *PayDay Financial* fails is because the court's conclusion ultimately rested on the fact that the language of the loan agreements conditioned the loans on authorizing EFTs, even if consumers could later revoke that authorization and/or repay the loans through other means. Here, RC argue that since consumers could and did repay by other means, the loans could not have been conditioned on requiring repayment by EFT. But the facts here show that in order to obtain a loan from IA, consumers had to first agree to authorize ACH debits even if they later chose to repay by other means.

Thus, I find that Respondent IA conditioned its loans on consumers' repayment by preauthorized electronic fund transfers, in violation of the EFTA (Count V) and related CFPA provision (Count VI).

E. COUNT VII (CFPA - UNFAIRNESS) AGAINST RESPONDENTS INTEGRITY ADVANCE AND JAMES R. CARNES

1. Legal Standard

Count VII alleges that Respondents' practice of obtaining authorization for demand drafts (also referred to as "remotely created checks" or "RCCs") in a confusing manner, and then initiating such demand drafts, constituted an unfair practice under the CFPA. (Dkt. 1 at 13-14). Under the CFPA, an act or practice is "unfair" if: 1) it is likely to cause substantial injury to consumers; 2) the substantial injury is not reasonably avoidable by consumers; and 3) the substantial injury is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1). The standard for the meaning of "unfair" acts or practices mirrors the FTC Act. *See NDG Fin. Corp.*, 2016 WL 7188792, at *13; *ITT Educ. Servs.*, 219 F. Supp. 3d at 903; *LoanPointe*, 2011 WL 4348304, at *4.

2. CFPB's Position

EC assert that Respondents' use of RCCs unfairly interfered with consumers' ability to contest the company's debits on their accounts. (Dkt. 276 at 15). They assert that by using RCCs, Respondents could withdraw funds from a consumer's account by means of a check that the consumer never completed, signed, or saw, subjecting them to substantial financial harm. (*Id.* at 15-17). They assert that consumers are unfamiliar with RCCs and the FTC has banned them in the telemarketing space. (*Id.* at 16). Furthermore, EC assert that IA's customers were required to sign an ACH agreement which contained the following opaque language in one sentence to justify initiating RCCs: "[i]f you revoke your authorization, you agree to provide us with another form of payment acceptable to us and you authorize us to prepare and submit one or more checks drawn on Your Bank Account so long as amounts are owed to us under the Loan Agreement." (*Id.*).

EC assert that some consumers discovered that IA had rolled over their loans repeatedly such that the total costs of the loans were greater than the amount that had been disclosed in the TILA "Total of Payments" box, and in response, they attempted to stop IA's ACH debits or revoke IA's ACH authorization to debit their bank accounts. (*Id.* at 16-17). However, Respondents then created RCCs and continued to extract funds from the consumers' accounts. (*Id.* at 17).

EC assert that this practice resulted in substantial financial harm to IA's consumers, because they suffered financial harm when IA used RCCs to take additional funds from their bank accounts. (*Id.*). They state that according to IA's own data, the company used RCCs 602 times after July 21, 2011, for a total amount of $115,024.50, on consumers who had revoked or stopped their authorization for IA to withdraw funds and had already paid an amount equal to the "Total of Payments." (Dkt. 276 at 17; Dkt. 281 at 18).

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EC assert that the injury was not reasonably avoidable because consumers did not have a free and informed choice regarding the use of RCCs since the RCC provision, on its face, was neither clear nor conspicuous. (Dkt. 276 at 18). In support of this argument they state that the RCC language appeared only once in the contract and was not emphasized in any way. (*Id.*). They cite to their expert witness, Dr. Hastak, who concluded, without rebuttal, that the provision, even if read, was unlikely to be correctly understood and had the potential to confuse and misdirect borrowers rather than illuminate them. (*Id.*).

EC also assert that there is no possible argument of any benefit to consumers or competition from using a little-known, and not well understood, product that was disclosed in a confusing and vague way and prevented consumers from stopping unauthorized charges after they had paid the disclosed loan costs. (*Id.*).

3. Respondents' Position

RC assert that the CFPB failed to present any evidence of consumer injury, much less injury that is not outweighed by the benefits of the availability of RCCs. (Dkt. 272 at 20). They state that CFPB employee, Joseph Baressi, testified that RCCs are and have been lawful.[11] (*Id.*; Dkt. 278 at 17). They assert that RCCs were used in less than 1% of all loans during the post-July 21, 2011 period. (Dkt. 272 at 20). They further assert that the decision to use RCCs was made by a third-party call center on a case-by-case basis and they were used sparingly, only as a last resort. (*Id.* at 21). They state that Carnes testified that consumers could stop the RCC process by contacting IA and informing it of an alternative payment method. (*Id.*). They further assert that speculative harm is not the type of injury that can be addressed through the unfairness provision of the CFPA. (*Id.*).

[11] I note that although Respondents are relying here on the testimony of Mr. Baressi, they also moved previously to exclude the testimony of this witness. EC has not relied on the testimony of Baressi in any of the briefing in this matter. However, since the testimony RC are relying on has to do with applicable law and is not a question of fact, I do not see a need to rule on the admissibility of this testimony. The issue is whether the use of RCCs was unfair, not whether it was legal.

RC assert that any alleged injury was reasonably avoidable because the Loan Agreement expressly provided an alternative to RCCs since consumers could and did provide IA with other forms of payment such as cashier's checks or money orders. (Dkt. 278 at 18). They also assert that consumers could have stopped the RCC process by informing the company of an alternative payment method. (*Id.*). They emphasize that IA's customers explicitly agreed to the provision authorizing the use of RCCs. (*Id.*). RC also assert that Dr. Hastak's conclusion that the RCC provision was unlikely to be correctly understood and had the potential to confuse and misdirect borrowers rather than illuminate them was rebutted by Respondents' expert, Dr. Novemsky, who stated that there was no data provided about how many consumers read the RCC authorization provision and no empirical analysis as to what consumers understood from that authorization.[12] (*Id.* at 18-19). They state that the CFPB identified only one potentially relevant consumer complaint that post-dates July 21, 2011, but even the CFPB's expert [Dr. Hastak] acknowledged that consumer complaints do not equate to violations of the law. (*Id.* at 19).

RC also assert that the CFPB did not meet its burden of proving that consumers did not benefit from the use of RCCs. (Dkt. 283 at 7). They state that the benefit to consumers who seek payday loans is readily apparent because RCCs can provide a payment alternative if a consumer attempts to renege on his or her payment obligations. (*Id.*). The use of RCCs protects lenders, which in turn allows lenders to extend credit to consumers who might not otherwise be eligible. (*Id.*). They assert that such a benefit is not outweighed by any purported injury and the CFPB has not established the reason why consumers withdrew their ACH authorizations. (*Id.*).

4. Analysis

a. Did Respondents' use of RCCs cause Substantial Injury?

As I discussed in my analysis of Count IV, above, the term "substantial injury" does include monetary harm. *See supra* Section VI.C.4.a.

[12] I note that in my analysis I am relying on the language of the Loan Agreement rather than on the expert witnesses' interpretation of that language.

With regard to Count VII, EC assert that using RCCs to withdraw funds from consumers' bank accounts caused them to suffer substantial financial harm. (Dkt. 276 at 17). They cite to undisputed data that shows IA used RCCs 602 times to collect a total amount of $115,024.50 from consumers who had attempted to block IA's ability to withdraw money from their accounts by revoking ACH authorization or blocking ACH debits, after they had paid an amount equal to the disclosed "Total of Payments." (*Id.*; Dkt. 281 at 18). They further assert that such harm is not merely speculative, but is direct, substantial injury, because it was taken from consumers' bank accounts that they were specifically trying to protect. (Dkt. 281 at 18). They state that it is well settled that "billing customers without permission causes injury for the purposes of asserting" an unfairness claim and cite to several cases in support of this position. (*Id.*; Dkt. 276 at 17).

RC argue in opposition that the CFPB has not presented any evidence of consumer injury. (Dkt. 272 at 20). They assert that the CFPB identified only one potentially relevant consumer complaint that postdates July 21, 2011, and that consumer complaints do not equate to violations of the law. (Dkt. 278 at 19). They also assert that RCCs were used in less than one percent of all loans, as a last resort. (Dkt. 272 at 20-21).

I find that the undisputed facts do show that IA used RCCs 602 times after July 21, 2011, to collect a total amount of $115,024.50 from consumers who had attempted to block IA's ability to withdraw money from their accounts by revoking ACH authorization or blocking ACH debits after they had already paid an amount equal to the disclosed "Total of Payments." It is reasonable to conclude that consumers who attempted to block IA's access to their bank accounts did not consent to IA's use of RCCs to withdraw the money and suffered financial harm when IA continued to do so. Although RC argue that consumers consented to having money withdrawn from their accounts, it is clear in the cases where consumers took affirmative action to stop the automatic withdrawal of money, that they were not consenting to the continued use of RCCs to withdraw funds. Although the numbers of cases in which RCCs were used may have represented a small percentage of the total of loans, they were still used 602 times to collect money from consumers who were trying to protect their accounts. Furthermore, because I found the Loan Agreement to be deceptive and violative of TILA, the amounts obtained effectively were not owed to Respondents. Thus, taking the money from consumers' accounts, regardless of amount, is inherently substantial injury. I therefore do not find RC's argument that there is no evidence of consumer injury in the record to be convincing. I find that IA's use of RCCs to withdraw funds from the accounts of consumers who had attempted to stop ACH withdrawals from their bank accounts caused substantial injury.

b. Was the injury caused by RCCs Reasonably Avoidable?

EC argue that the substantial injury was not avoidable because the sentence which authorized IA to use RCCs in the Loan Agreement, on its face, was neither clear nor conspicuous. (Dkt. 276 at 16, 18). They state that it is boilerplate language that appeared only once in the contract, in a single, opaque sentence that was not emphasized or explained in any way. (Dkt. 276 at 2, 18).

RC argue in opposition that the use of RCCs was reasonably avoidable because consumers authorized their use and they could have provided IA with another form of payment. (Dkt. 278 at 18). They also state that consumers could have stopped the RCC process once it was initiated by informing IA of an alternative payment method. (*Id.*).

In analyzing this issue, it is helpful to look at the exact language of the Loan Agreement that authorized the use of RCCs.

> This ACH Authorization is a part of and relates to the Loan Agreement dated 3/24/2009 (the "Loan Agreement"). The words " you", "your" and "I" mean the borrower who has electronically signed it. The words "we", "us" and "our" mean Integrity Advance, LLC ("Lender"), a licensed lender of payday loans regulated by the Delaware State Bank Commissioner. You hereby voluntarily authorize us, and our successors and assigns, to initiate automatic credit and debit entries to Your Bank Account in accordance with the Loan Agreement. You agree that we will initiate a credit entry to Your Bank Account for the Amount Financed on or about the Disbursement Date.
> You also authorize us to initiate an ACH debit entry to Your Bank Account:
>
> (a) for the Total of Payments plus any accrued fees on the Payment Due Date, or on any subsequent Renewal Payment Due Date, if you contact us at least three (3) business days prior to such date and select Payment Option (a) in the Loan Agreement (Pay in full);
>
> (b) for the Finance Charge plus any accrued fees on the Payment Due Date, or on any subsequent Renewal Payment Due Date, if you contact us at least three (3) business days prior to such date and select Payment Option (b) in the Loan Agreement (RENEWAL), or if you fail to contact us to confirm your payment option;
>
> (c) for the accrued finance charges and fees, plus $50.00 on each Pay Date[1] after the fourth (4th) Renewal Payment Due Date, until all amounts owed under the Loan Agreement are paid in full; and
>
> (d) for any accrued Returned Payment charges, subject to the Loan Agreement.
>
> You agree that we may re-initiate a debit entry for the same amount if the ACH debit entry is dishonored or payment is returned for any reason. The ACH Authorizations set forth in the Loan Agreement are to remain in full force and effect for this transaction until your indebtedness to us for the Total of Payments, plus any other charges or fees incurred and described in the Loan Agreement, is fully satisfied. You may only revoke the above authorizations by contacting us directly. If you revoke your authorization, you agree to provide us with another form of payment acceptable to us and you authorize us to prepare and submit one or more checks drawn on Your Bank Account so long as amounts are owed to us under the Loan Agreement.

The relevant sentence appears in the document which is the "ACH Authorization" Form. At the top of the form above this section are several spaces for the consumer to fill in personal information. The paragraph with the relevant language, the last paragraph above, consists of six lines of text all in the same font with no bolding or capital letters. In the last sentence of this paragraph is the language that grants IA the power to use RCCs: "[i]f you revoke your authorization, you agree to provide us with another form of payment acceptable to us and you authorize us to prepare and submit one or more checks drawn on Your Bank Account so long as amounts are owed to us under the Loan Agreement." There is nothing to highlight this sentence in any way. The sentence is then followed by three more paragraphs of text, which further hinders it from standing out.

I find it significant that this sentence does not use the term "remotely created check," "RCC," "demand draft," or any other special term that would alert the consumer to gravity of what this sentence permits. It is not apparent from this sentence that IA could prepare a check without the consumer's knowledge or signature. Furthermore, it is significant that the sentence states in relevant part, "[i]f you revoke your authorization, you agree to provide us with another form of payment acceptable to us **and** you authorize us to prepare and submit one or more checks drawn on Your Bank Account . . . ." (emphasis added). By using the word "and" IA is still permitted to withdraw funds using RCCs even if a consumer provides another form of payment. This language prevents the consumer from avoiding the substantial harm caused by the use of RCCs, because IA can continue to use RCCs, regardless of whether the consumer offers another form of payment. If, as RC assert, the sentence provides consumers with an alternative to the use of RCCs, then instead of the word "and" the sentence should have included the word "or."

Additionally, consumers did not know when RCCs were initiated, so they would not have known to provide an alternate payment method at that point. RCCs were used specifically after consumers took action to try to protect their bank accounts. They were thus trying to avoid harm, but since there was no way to prevent RCC use, other than paying money which they were actively trying not to pay, almost by definition, the harm was not reasonably avoidable. Accordingly, I find that substantial injury to consumers was not reasonably avoidable.

c. Was the substantial injury outweighed by countervailing benefit to consumers or competition?

RC assert that any alleged harm to consumers was outweighed by a countervailing benefit to consumers or competition. Specifically, they state it is readily apparent that consumers benefited from the use of RCCs because by allowing their use, lenders were protected, which enabled them to extend credit to consumers who might not otherwise be eligible. (Dkt. 283 at 7). Since they raised this argument for the first time in *Respondents' Reply Brief in Support of Their Motion for Summary Disposition* (Dkt. 283), it was not addressed by EC. They also argue that the CFPB did not prove that consumers did *not* benefit from the use of RCCs. (*Id.*).

In examining RC's argument, they appear to argue that the general population of consumers who need payday loans benefit when lenders, in general, are able to recoup payments from consumers and thus continue in the loan business. This is a rather broad argument. They do not explain why the particular consumers in the current case who had their accounts debited by the use of RCCs, after they had specifically tried to prevent continued withdrawals from their accounts, reaped a benefit, especially not one that outweighed the substantial harm suffered when their accounts were debited using RCCs. Furthermore, while RC's argument may explain why RCCs are a valuable payment mechanism in the payday loan space, it does not justify their authorization and use in situations where consumers are not fully informed about the payment mechanism. I am not convinced by this argument and I find that the harm to consumers in the current matter was not outweighed by a countervailing benefit to consumers or competition.

For all of the reasons discussed above, I conclude that IA's acts or practices regarding RCCs caused or were likely to cause substantial injury to consumers which was not reasonably avoidable and was not outweighed by countervailing benefit to consumers or competition. I therefore find that the record contains sufficient undisputed material facts to establish that Respondent Integrity Advance engaged in unfair acts or practices in violation of Count VII.

F. COUNTS III, IV, AND VII, INDIVIDUAL LIABILITY OF RESPONDENT JAMES R. CARNES

1. Legal Standard

The CFPB alleges that Respondent James R. Carnes bears individual liability for Counts III (deception relating to TILA disclosures), IV (unfairness relating to TILA disclosures), and VII (unfairness relating to use of RCCs). (Dkt. 1 at 2-3, 11-14). In order to hold an individual liable for deceptive or unfair corporate acts under the CFPA, the CFPB must prove: 1) he participated directly in, or had the authority to control, the deceptive/unfair acts or practices at issue; and 2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud along with an intentional avoidance of the truth. *See Gordon*, 819 F.3d at 1193 (quoting *Stefanchik*, 559 F.3d at 931); *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016).

2. CFPB's Position

EC assert that Carnes had authority to control IA and either knew or was recklessly indifferent to the facts that the Loan Agreement deceptively and unfairly misrepresented the cost of IA's loans and that IA was unfairly using RCCs when consumers had blocked electronic access to their bank accounts.

EC assert that the undisputed evidence demonstrates that Carnes had authority to control IA during all relevant times and, in his testimony, he admitted that he "had ultimate authority over the company." (Dkt. 276 at 20). Specifically, they assert that Carnes was the founder of IA and functioned as its chief executive the entire time it originated loans. (*Id.*). He was the majority owner and CEO of IA's parent company. (*Id.*). They also assert that authority to control a company directly can be inferred from active involvement in business affairs and making of corporate policy, including assuming duties of a corporate officer. (*Id.*). They assert that Carnes assumed the duties of a corporate officer and was actively involved. (*Id.*). In his role as chief executive, he supervised all individuals who provided services to IA, participated in day-to-day business, made final hiring decisions, decided how much IA would pay for leads, set underwriting policies, approved website content, directed website changes, and signed several agreements on behalf of IA with vendors, service providers, and the company's bank. (*Id.*).

In their *Reply Brief*, EC assert, in opposition to RC's implication that Carnes needed to directly participate in practices in order to control them, that they need not prove that Carnes directly participated in practices, that he was aware of their illegality, or that they went beyond ordinary deception. (Dkt. 284 at 7).

EC also assert that Carnes had knowledge of IA's misrepresentations as to the loan costs. (Dkt. 276 at 21). Specifically, they state Carnes was fully aware that IA disclosed expensive multi-payment loans as if they were much cheaper single-payment loans. (*Id.*). They assert that Carnes admitted he understood that IA disclosed its loans as single-payment loans and that all loans rolled over by default and would be renewed repeatedly and automatically placed into the auto-workout process. (*Id.*). They state that Carnes admitted in testimony that 90% of IA's customers experienced loan rollovers and he knew that consumers who experienced loan rollovers would pay more than had been disclosed in the "Total of Payments" TILA box. (*Id.*).

Alternatively, EC argue that, at the very least, Carnes was recklessly indifferent to the truth or falsity of the misrepresentations and should have known about the unfair or deceptive practices given that he had "ultimate authority" over IA and was an active and engaged manager who exercised control over all business decisions. (*Id.* at 21-22). They also assert reckless indifference because the Loan Agreement was the operative document for IA's only product which generated millions of dollars of income for the company and for Carnes. (*Id.* at 22). Carnes knew that the Loan Agreement disclosed the cost of loans by assuming it would be repaid in a single payment, even though IA automatically renewed loans by default, and he admitted most of IA's loans were, in fact, automatically renewed. (*Id.*).

With regard to the unfairness of using RCCs, EC assert that Carnes knew that IA was using RCCs when consumers had blocked electronic access to their bank accounts. (*Id.*). They assert that Carnes testified that he saw a printer being used to create RCCs, likely on a weekly basis. (*Id.*).

In their *Opposition Brief*, EC assert that establishing knowledge of the misrepresentation only requires establishing "the requisite factual knowledge" of acts or practices that are deceptive and does not require evidence that the individual knew the acts or practices were illegal or that the individual "intended to defraud" consumers. (Dkt. 281 at 23-24).

With regard to Carnes's reliance on outside counsel to draft the Loan Agreement and on the Delaware regulator to review IA's documents and grant and renew a lending license, EC argue that such reliance, even if true, would merely go to Carnes's intent, which is neither relevant nor a defense to his liability. (*Id.* at 27-28). They also emphasize that Carnes did not need to draft, edit, revise, or substantively review the Loan Agreement templates in order to know of the misrepresentations it contained, and courts routinely hold individuals liable for deceptive materials even when they did not personally author them. (*Id.* at 25).

3. Respondents' Position

RC assert that the courts have set a high bar before an individual can be held responsible for corporate acts and that an individual cannot be held liable simply because he or she had authority over the corporate entity. (Dkt. 272 at 25). They assert that courts have found individuals liable where the individual drafted or provided input into the creation of the deceptive, fraudulent, or violative material, or the individual substantively reviewed, edited, or revised the materials. (*Id.*

at 26). They assert that summary disposition is inappropriate where, as here, the individual lacked knowledge of the allegedly deceptive material, even where the individual exercised control over the company. (*Id.* at 26-27).

In support of their argument, RC assert that the undisputed facts establish that Carnes was the *de facto* CEO of IA, who did not draft, edit, revise, substantively review, or approve the Loan Agreement template other than possibly flipping through it, and that he relied on outside counsel to draft an agreement that conformed with Delaware and federal law. (*Id.* at 27). They further assert that because the Loan Agreement was provided to Delaware banking regulators, it is reasonable to infer that Carnes believed it was legally compliant. (*Id.* at 28).

With regard to the use of RCCs, RC assert that they were a legitimate payment mechanism and the decision to use them was made by a third-party call center on a case-by-case basis, sparingly, and only as a last resort. (*Id.*). RC argue that the CFPB cannot show that Carnes knew, had reason to know, or recklessly avoided knowledge of the specific contents of the Loan Agreement templates or the use of RCCs. (*Id.*). Additionally, they assert that Carnes cannot be held liable because he had no reason to know either could be considered "deceptive" or "unfair" under the CFPA. (*Id.*).

RC also assert that the CFPB must show that Carnes had actual knowledge of "misrepresentations," was recklessly indifferent to their "truth or falsity," or was otherwise aware of a high probability of "fraud" with intentional avoidance of the truth. (*Id.* at 29). They assert that the repayments and cost information, as well as information regarding RCCs were, at worst (if Dr. Hastak's testimony that the information was not clear or conspicuous is correct), merely hidden in the fine print, but that the information was nevertheless contained in the Loan Agreement. (*Id.*). Therefore, they assert that the CFPB cannot establish the level of "misrepresentation," "falsity," or "fraud" that would be necessary to find Carnes liable. (*Id.* at 29-30).

In their *Opposition Brief*, RC again emphasize that a heightened standard of awareness beyond the authority to control is necessary in order to find individual liability. (Dkt. 278 at 21).

They dispute EC's version of the facts. Specifically, they dispute whether Carnes supervised all individuals who provided services to IA, whether they reported to him, and whether he consulted with them. (*Id.* at 22). They again emphasize that Carnes did not draft, edit, or substantively review the Loan Agreement and that the decision to use RCCs, which were rarely used, was made by a third-party call center. (*Id.* at 23).

In their *Reply Brief*, RC again emphasize that there is a heightened standard of awareness, that the Loan Agreement was created by outside counsel, and Carnes was unaware of any purported deception or unfairness, because any complaints would have been handled by a third-party call center. (Dkt. 283 at 8-9). RC also clarify that they are not arguing that Carnes is not liable due to his good faith reliance on counsel, but rather that he is not liable because he did not know about the *specific disclosures* in the Loan Agreement or that they were deceptive or unfair. (*Id.* at 9) (emphasis added).

4. Analysis

In analyzing Carnes's individual liability for Counts III, IV, and VII, the relevant questions are: a) whether Carnes participated directly in,[13] or had the authority to control, the deceptive and unfair acts or practices at issue; and 2) whether Carnes had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of the high probability of fraud along with an intentional avoidance of the truth.

a. Did Carnes have the authority to control the deceptive and unfair acts or practices?

EC assert in their motion for summary disposition that Carnes had the authority to control IA during all relevant times. (Dkt. 276 at 20). They assert that he had ultimate authority over the company, was the founder of IA and functioned as its chief executive the entire time it originated loans and was the majority owner and CEO of IA's parent company. (*Id.*). They also assert that his authority to control IA can be inferred from his active involvement in the company because

[13] EC do not argue that Carnes "directly participated" in the alleged unlawful acts or practices, but rather that he had the "authority to control" them.

Carnes supervised all individuals who provided services to IA, participated in day-to-day business, made final hiring decisions as to all individuals who provided services to the company, decided how much IA would pay for payday loan leads, set IA's underwriting policies, approved the contents of the company's website, directed changes to the website, and signed several agreements on behalf of IA with vendors, service providers, and the company's bank. (*Id.*).

In their *Motion for Summary Disposition*, RC did not initially argue that Carnes did not have the authority to control IA, but instead focused their argument on disputing whether the CFPB had established the second knowledge element for liability, discussed in the legal standard above. (Dkt. 272 at 25-30). In their *Opposition Brief*, RC stated that while Carnes was the *de facto* CEO of IA and did have ultimate authority over IA, this was not enough to hold him individually liable because the CFPB must show a heightened standard of awareness beyond the authority to control. (Dkt. 278 at 21-22). They assert that the facts relied upon by the CFPB to establish day-to-day management are disputed because there were multiple layers in the chain of command and Carnes did not supervise all of the individuals claimed by EC. (*Id.* at 22). Additionally, they assert that IA outsourced key functions to third parties; specifically, a third-party call center was hired to administer the loans and outside counsel was hired to create the Loan Agreement. (*Id.*). However, I find that these facts go to the question of "direct participation" rather than authority to control, and thus are not pertinent to my finding on this prong of the legal standard. The CFPB is only required to establish "direct participation" *or* "authority to control."

I note that RC cite to *FTC v. Freecom Communications, Inc.*, for the proposition that the CFPB must show a "heightened standard of awareness *beyond the authority to control*" in order to hold Carnes individually liable. *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1207 (10th Cir. 2005) (emphasis added). However, RC fail to include that court's explanation of the heightened standard of awareness: the FTC (or CFPB) "may fulfill its burden by showing the individual had 'actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *Id.* (quoting *FTC v. Amy Travel Serv.*, 875 F.2d 564, 574 (7th Cir. 1989)). This heightened standard is merely the second prong of the analysis established by

Gordon, which is already necessary to establish individual liability.[14] *See supra* Section VI.F.1. for the legal standard. Thus, I conclude that establishing authority to control is sufficient to establish the first prong of the analysis.

I have examined the evidence regarding Carnes' role in the company in detail and have set forth the undisputed facts regarding his authority to control the company. (*See* Section V, Facts Deemed Established, for full discussion of facts with citations to evidentiary support). In determining the undisputed facts, I examined the exact language of the testimony cited by each party as well as any referenced exhibits and disregarded either party's attempt to characterize the evidence. I will not repeat every such fact here, but will highlight some of the more significant ones that establish Carnes' authority to control IA:

> Carnes founded Integrity Advance and was its President and CEO during the entire period it offered loans to consumers. His active involvement with IA business decreased from 2008 to 2012. However, Carnes was the ultimate decision maker for IA's business decisions. Everyone who was involved with IA reported either directly or indirectly to Carnes and he made the final decision to hire all HIP employees who were involved with IA.
>
> Carnes worked in the Kansas City office, where the senior executives worked, on a daily basis, had an open-door policy, and was accessible to any IA employee who wanted to talk. Carnes met with Foster, who served at various times as IA's Executive Vice President, General Counsel, Secretary, and Assistant Treasurer, a few times a week about IA business and spoke to him if there was a significant problem with IA. Carnes, together with Foster, hired Madsen whose job was to purchase leads and manage relationships with lead

[14] I also note that the court distinguished between the FTC's burden of proof for obtaining injunctive relief against an individual for a business entity's acts or practices, for which the FTC need only prove that the individual participated directly in the business entity's deceptive acts or practices or had the authority to control them (*Freecom Commc'ns*, 401 F.3d at 1202-1203), and for holding an individual personally liable for consumer redress, for which the "heightened standard" is applicable (*Id.* at 1207). However, I find this distinction is inapplicable here, where *Gordon* establishes the test for individual liability in CFPA cases and requires both prongs to be proven, and where EC seek both injunctive relief and consumer redress, so both prongs would need to be proven regardless.

> providers. Madsen reported directly to Carnes and spoke to him on a daily basis about the behavior of the lead purchase system, conversion rates, long-term performance of sources, and default rates. Both Carnes and Madsen monitored and reported results from the dashboard system that was used to monitor lead performance. Madsen had to consult with Carnes about changes in the credit scores IA would accept from customers. Andonian's job for IA was to address issues with its website and database. He attended weekly IT meetings with Carnes, Foster, and the Willowbrook project manager where Carnes usually set the meeting priorities. Carnes would bring IA matters to Andonian's attention when there were issues with the database and Carnes had final say over the contents of IA's website and approved its contents at a high level. Carnes directed Andonian to make changes to the website and remove states from it.
>
> As chief executive, Carnes had the ultimate say over IA's policies and procedures and testified that he had ultimate authority over the company and making sure it complied with Delaware law. Carnes ultimately made the call on what IA would pay for a lead and was the main decision-maker regarding IA's underwriting policies. He was a signatory on the contract with the vendor that provided debt collection services to IA, on various lead purchase agreements, on the ACH origination agreement, and for IA's bank account. Carnes had communications with the call centers used by IA and was involved in the decision to move IA's business from one call center to another. When a call center used by IA had an employee who allegedly committed fraud, Carnes directed resolution of the problem. Carnes testified that his attorneys had his approval to use the Loan Agreement and that as chief executive he was ultimately approving everything. Carnes had the authority to change IA's fee structure.

Having examined the undisputed facts, law, and arguments of the parties, I find that the evidence is overwhelming that Carnes, in fact, had the "authority to control" IA and the deceptive and unfair practices at issue.

b. Did Carnes have knowledge of the misrepresentations or was he "recklessly indifferent" to the truth or falsity of the misrepresentations?[15]

The relevant facts regarding this issue are not in dispute and are set forth in Section V, above. With regard to the TILA loan disclosures, Carnes testified that IA hired outside counsel to draft a Loan Agreement that conformed with the law and that he did not draft, edit, revise, or substantively review it, although he may have looked through a template and could have "flipped through" it at some point before it was put into action and he gave his attorneys approval to use it. He also testified that he did not discuss the Loan Agreement with outside counsel or the Delaware regulator and could not recall whether he discussed it with in-house counsel or any IA personnel. He testified that IA had a lending license from the state of Delaware and that it was renewed. He testified that he knew the loan documents would be put into the loan management system and while he did not expressly approve it, he knew it was happening and did not prevent it, and thus gave tacit approval.

With regard to the loan process set forth in the Loan Agreement, Carnes' testimony makes clear that he understood the loan disclosures, auto-renewal, and auto-workout process. For example, he testified that he knew that for a fictional consumer with a $100 loan, their TILA disclosure would say they owed $130 for the "Total of Payments." He knew that if a consumer did not call or email IA, and it was their first payment, the loan would be automatically renewed, and if the consumer continued to do nothing, the loan would continue to renew or rollover four times before it went into the auto-workout process. He knew that about 90%[16] of IA's loans would experience at least one rollover and that consumers whose loans rolled over would pay more than had been disclosed in their TILA disclosures. He testified that IA did not have any products or sources of revenue besides the loans. He also testified that IA was the most profitable of HIP's subsidiary companies and it contributed most of the income to HIP.

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[15] The CFPB alleges that Carnes had knowledge of the misrepresentation or alternatively that he was recklessly indifferent to the truth or falsity of the misrepresentations. It does not argue that he was aware of a high probability of fraud.

[16] He later testified that the 90% number was not in his head at the time he was the CEO, but he understood at the time that the majority of loans would have at least one rollover.

With regard to knowledge of consumer complaints, Carnes' testimony during the formal hearing was inconsistent with his testimony at the investigational interview. At the formal hearing he testified that he did not know there were consumer complaints about the loan product. (Tr. I 233:16-22). However, during his earlier investigational interview, he testified that he was, in fact, aware of consumer complaints and a common complaint consumers made was that they did not understand that their payments were not going toward the principal. (EC-EX-068 at 243:6-244:5).

With regard to RCC usage, Carnes' testimony establishes that he knew that IA used RCCs to withdraw money from the accounts of consumers who had withdrawn ACH authorization. He had first-hand knowledge of RCC usage because he saw RCCs being printed "probably weekly" using a printer in the Kansas City office.

While the underlying facts are thus clear, the parties disagree as to the appropriate standard for determining Carnes' level of knowledge of the misrepresentations.

EC assert that establishing knowledge of a misrepresentation merely requires establishing "'the requisite factual knowledge' of acts or practices that are deceptive." (Dkt. 281 at 23) (quoting *CFPB v. CashCall, Inc.*, No. CV 15-07522-JFW, 2016 WL 4820635, at *11 (C.D. Cal. Aug. 31, 2016)). They assert that it does not require evidence that the individual knew the acts or practices were illegal, (citing *CashCall*, 2016 WL 4820635, at *11-12), or evidence that the individual "intended to defraud" consumers (citing *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1102 (9th Cir. 2014); *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 320 (S.D.N.Y. 2008)). (Dkt. 281 at 24). They assert that individuals can be held liable for any acts or practices that meet the elements of deception. (*Id.*) (citing *Nationwide Biweekly Admin.*, 2017 WL 3948396, at *6-9, 12 (holding individual liable for deceptive statements that were "literal[ly] true" and had "an articulable basis in fact.").

RC argue for a higher standard, specifically that Carnes must have known, had reason to know, or recklessly avoided knowledge of the specific contents of the Loan Agreement template and the use of RCCs, as well as that he must have known that either could be considered

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"deceptive" or "unfair" under the CFPA. (Dkt. 272 at 28-29). In their *Reply Brief*, RC clarify that their argument is *not* that Carnes had to know the actions were illegal but rather that he had to know they were deceptive and/or unfair.

In the *CashCall* case cited by EC, the district court noted that "a mistake of law is not typically a defense to liability, no matter how reasonable that mistake." *CashCall*, 2016 WL 4820635, at *11 (citing *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010) ("We have long recognized the common maxim, familiar to all minds that ignorance of the law will not excuse any person, either civilly or criminally.")). Specifically on the question of individual liability, the court addressed the individual's claim "that he believed that the loans were payable and fully collectible based on the advice of his counsel" by noting that "[r]eliance on advice of counsel is not a valid defense on the question of knowledge required for individual liability" and again cited the *Jerman* case regarding ignorance of the law. *Id.* at *12 (quoting *Grant Connect*, 763 F.3d at 1102). Similarly, RC assert that due to reliance on counsel and on the Delaware regulator's review of their annual license renewal, Carnes believed the Loan Agreements were lawful.

To the extent *CashCall* is persuasive, it holds that as long as Carnes knew of the misrepresentations in the Loan Agreements and that RCCs were used in circumstances that were unfair to consumers, he can be held individually liable despite believing the activities were nonetheless lawful. I have not found, and RC do not cite to, any case law supporting RC's assertion that Carnes had to know specifically that IA's actions were "deceptive" or "unfair." But taking this argument one step further, unless RC are asserting that Carnes had to have personal knowledge of each of the elements of a deception and unfairness claim to know that the company's actions were deceptive or unfair, which would make the bar for individual liability excessively high and has no support in the analyses of any of the cases cited by either party, the knowledge element must be satisfied if Carnes knew that the Loan Agreements were misleading and that RCCs were used in circumstances that were unfair to consumers. RC seem to support this as the standard, arguing that Carnes must have had knowledge of "misrepresentations," been recklessly indifferent to their "truth or falsity," or been otherwise aware of a high probability of "fraud." (Dkt. 272 at 29).

RC contend that the CFPB cannot show that Carnes knew, had reason to know, or recklessly avoided knowledge of the specific contents of the Loan Agreement Template or the use of RCCs. (Dkt 272 at 28). They also make this argument in their *Opposition Brief*, citing to *CFPB v. Mortgage Law Group, LLP*, which granted summary judgment in favor of an individual defendant where "there is no evidence that [Defendant] knew or should have known about the content of the [allegedly violative materials]." (Dkt. 278 at 23-24) (quoting *CFPB v. Mortgage Law Group, LLP*, 196 F. Supp. 3d 920, 946-47 (W.D. Wis. 2016)). RC try to equate Carnes' level of knowledge to that case's defendant's knowledge with regard to the content of loan disclosures they assert Carnes never reviewed. They compare *Mortgage Law Group* to *Gordon*, in which the individual defendant reviewed, edited, and modified the deceptive materials and was responsible for "assur[ing] that all advertising is legal," and thus was held individually liable. *Gordon*, 819 F.3d at 1193.

However, RC's argument fails as I find that Carnes did know and understand the contents of the Loan Agreement, as demonstrated by his testimony, even if he did not play a role in drafting, editing, revising, or substantively reviewing it. The relevant facts recited above support that he knew the information in the TILA boxes would be disclosed as if the loan were a single-payment "payment-in-full" loan and he knew and understood the default auto-renewal and auto-workout processes which the vast majority of the loans experienced.

RC also argue that the CFPB cannot possibly prove that Carnes had knowledge of misrepresentations in the Loan Agreement because the Loan Agreement did not contain misrepresentations or fraudulent statements, and the CFPB instead alleged that the repayment and cost information, as well as the information regarding RCCs were "hidden in fine print." (Dkt. 272 at 29). However, a "misrepresentation" does not require a "falsity" or "fraud." A misrepresentation is defined as "[t]he act or instance of making a false or misleading assertion about something, usually with the intent to deceive." Black's Law Dictionary (11th ed. 2019). I found that the Loan Agreement was deceptive which, by definition, means that I found it was likely to mislead consumers about a material representation—i.e., a misrepresentation. Thus, this argument fails.

Similarly, I also find that Carnes did know and understand that RCCs were being used in circumstances when consumers had revoked their ACH authorization and tried to prevent IA from debiting their bank accounts. Even if he believed that IA was utilizing a lawful payment mechanism that was properly disclosed to collect money that IA was legally owed, Carnes knew the circumstances under which they were used. As I have found these circumstances to be unfair, I find that Carnes had the requisite knowledge to hold him individually liable for this practice.

Alternatively, considering that consumer loans were IA's only product and that IA was the most profitable of all of HIP's subsidiaries and contributed most of the income to HIP, if Carnes did not know the contents of the Loan Agreement as RC assert, then I find he was recklessly indifferent to the misrepresentations contained therein.

Accordingly, I conclude that Carnes had the "authority to control" IA and the deceptive and unfair practices at issue, and that he had knowledge of the deceptive and unfair misrepresentations in the Loan Agreement and of the unfair circumstances under which RCCs were used. Therefore, I find that the record contains sufficient undisputed material facts to establish that Respondent Carnes may be held individually liable for the deceptive practices in Count III, the unfair practices in Count IV, and the unfair practices in Count VII.

G. REMEDIES

EC seek the imposition of restitution, injunctive relief, and civil money penalties as remedies for Respondents' violations of law. As I have found the violations alleged in all counts proven, I must decide what relief is appropriate for each count. The CFPA provides me "jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law . . . ." 12 U.S.C. § 5565(a)(1). This relief may include, *inter alia*, restitution, "limits on the activities of functions of the person" (i.e., injunctive relief), and civil money penalties. 12 U.S.C. § 5565(a)(2)(C), (G), (H).

1. Restitution

a. CFPB's Position

EC assert that because they have established Respondents' legal violations and the resulting harm to consumers, they are entitled to judgment for that amount, as they seek legal restitution. (Dkt. 276 at 25-26). EC further assert that restitution under the CFPA is determined using a two-step burden-shifting framework under which EC bear the initial burden of proving that the amount they seek approximates consumer loss or unjust gain and then the burden shifts to Respondents to demonstrate that the approximation overstates consumer loss or unjust gains. (*Id.* at 26-27).

EC calculate consumer losses as the amount paid by consumers in excess of the "Total of Payments" disclosed by Respondents in the TILA box. (*Id.* at 27). EC considered only consumers for whom Respondents withdrew more than the "Total of Payments" and rolled over the loan at least once. (*Id.*). They excluded loans where consumers paid less than the disclosed "Total of Payments" and those loans that did not roll over at least once. (*Id.* at 27-28).

For Count I, EC calculate the aggregate amount of all consumer overpayments as $132,580,041.06.[17] (*Id.* at 28). As the CFPB is pursuing CFPA claims only for violations that occurred on or after July 21, 2011, EC calculate the harm for Count II as a subset of that for Count I, totaling $38,453,341.62.[18] (*Id.* at 28-29). For Counts III and IV, EC calculate the harm at an amount identical to Count II, note that it also overlaps with the harm quantified for Count I, and note that both Respondents are jointly and severally liable for Count III and IV relief. (*Id.* at 29). For Count VII, EC calculate that Respondents used RCCs generated after July 21, 2011, to collect $115,024.50 from consumers in excess of what IA had disclosed after consumers had revoked or stopped the company's authorization to withdraw funds from their bank accounts. (*Id.*). EC also assert that IA and Carnes are jointly and severally liable for Count VII relief.

[17] EC clarify that this figure excludes any potential refunds and rebates. (Dkt. 276 at 28 n.15.)
[18] Again, EC clarify that this figure excludes potential refunds and rebates. (Dkt. 276 at 29 n.17.)

For Count I, EC calculate the restitution amount based on conduct dating back to 2008. In their *Reply Brief*, EC assert that 12 U.S.C. § 5565, which authorizes legal or equitable relief with respect to a violation of Federal consumer financial law, took effect on July 21, 2011, but does not limit relief to violations that occurred after that date. (Dkt. 284 at 9-10). EC assert that since the statute does not expressly prescribe whether the statutory remedies apply to earlier violations, the question is whether applying the statute to earlier conduct would have a retroactive effect. (*Id.* at 10) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). EC conclude that there would not be an impermissible retroactive effect because the FTC could have obtained relief for the same violations and it does not matter whether EC seeks restitution in an administrative forum. (*Id.* at 10).

b. Respondents' Position

RC assert that restitution in CFPA matters is an equitable remedy subject to the discretion of the ALJ. (Dkt. 278 at 26). They assert that the CFPB should be precluded from seeking legal restitution because this is a new position directly contrary to that taken by EC in the earlier proceeding and there is no authority for the proposition that restitution is mandatory. (Dkt. 272 at 32-33). They further assert that equitable restitution is not appropriate unless the CFPB establishes that Respondents intended to defraud consumers or that consumers did not receive the benefit of their bargain, which they assert the CFPB has not done. (Dkt. 272 at 31-32; Dkt. 278 at 27-28).

Additionally, RC claim that the CFPB has not matched their calculations to actual harm to consumers and has not established that their figures approximate "unjust gains." (Dkt. 278 at 29-30; Dkt. 272 at 34-35). They also contend that even if Respondents were found liable and restitution were to be granted, repeat customers should be excluded from the restitution calculation, as they could not have been harmed by the disclosures in the Loan Agreement. (Dkt. 278 at 30).

RC further assert that the CFPB cannot recover for conduct prior to July 21, 2011, since the CFPB's enforcement authority is expressly limited to conduct occurring on or after July 21, 2011. (*Id.* at 31). They argue that the CFPB's attempt to impose retroactive liability violates due process provisions within the Constitution. (*Id.*). Furthermore, RC assert that the FTC never had authority to obtain equitable monetary relief in administrative hearings so the CFPB cannot rely on the FTC's authority to regulate TILA established under the FTC Act for conduct pre-dating the CFPA. (*Id.* at 31-32).

In their *Reply Brief*, RC assert that the CFPB cannot seek legal restitution as a form of money damages in an administrative setting where Respondents did not have the ability to exercise their right to a jury trial. (Dkt. 283 at 10) (citing *Curtis v. Loether*, 415 U.S. 189, 197 (1974); *Verity Int'l*, 443 F.3d at 67). Additionally, RC assert that because Respondents transparently provided the Loan Agreement and other documents to the Delaware regulators for their review and were accordingly licensed, it demonstrates that Respondents were acting in good faith and reasonably believed they were legally compliant. (*Id.*).

c. Analysis

EC assert that the restitution they are seeking is "legal" restitution, "which is a judgment imposing 'a merely personal liability upon [Respondents] to pay a sum of money.'" (Dkt. 276 at 25-26) (quoting *Commerce Planet*, 815 F.3d at 601). According to EC, legal remedies are awarded "as a matter of course when the right [is] established." (*Id.* at 26) (quoting Dan B. Dobbs, *Law of Remedies* at 12, § 1.2 (2d ed. 1993)). They thus assert that if I find Respondents liable for the violations, I must award restitution. I note, however, that EC do not cite to any authority or cases applying this theory in the context of a CFPB case and RC argue that no such authority exists. I have not found any such applicable case law. I therefore am not convinced that EC's theory of "legal" restitution is applicable to the present matter. However, I need not decide this issue because I find that an award of "equitable" restitution is nevertheless appropriate.

RC assert, in opposition to EC's argument, that restitution is an "equitable" remedy subject to my discretion and that I cannot award restitution unless I find that Respondents either intended to defraud consumers or that consumers did not receive the benefit of their bargain.[19] (Dkt. 272 at

[19] I note RC's statement that the reason they did not previously request to reopen the record on the issue of whether consumers received the benefit of their bargain was because the evidence was already in the record. (Dkt. 272 at 32 n.8). I clarify that I am, in fact, considering their arguments that consumers received the benefit of the bargain and I am not treating that as a waived issue.

31). They assert that Respondents' lack of intent to deceive or mislead consumers is evident from the fact that they hired outside counsel to create a Loan Agreement that complied with the law and Delaware regulators granted the company approval to make loans to consumers, which further reinforced Respondents' belief that they were in legal compliance. (*Id.* at 31-32; Dkt. 283 at 10). They also argue that the CFPB did not prove that consumers did not receive the benefit of their bargain or that no fully-informed consumer would ever elect to take out a loan with IA because the existence of repeat customers establishes that fully informed consumers did elect to take out loans from IA. (Dkt. 278 at 28).

EC assert that if I find that the award of restitution is subject to my discretion, then Respondents' purported good faith or lack of intention to defraud are not appropriate bases to deny restitution and would undermine restitution's compensatory purpose. (Dkt. 276 at 26 n.11). They also assert that consumers did not get the benefit of their bargain because the bargain was that consumers would get a loan for the amount disclosed in the "Total of Payments" section of the TILA box, but instead they got a loan for a far higher price when the loan went into the auto-renew and auto-workout processes by default. (Dkt. 281 at 30-31).

As discussed above, I do find that consumers did *not* get the benefit of their bargain. *See supra* Section VI.C.4.c. Although consumers did receive loans, those loans, in the vast majority of cases, came at a substantially higher cost than was disclosed by Respondents. Also, I find that there is insufficient evidence to support RC's assertion that repeat customers were fully informed when taking out subsequent loans. *See supra* Section VI.B.4.a. However, I do find that all of the loans were deceptive on their face. Therefore, I find that I can award restitution, including for returning customers, and that it is appropriate in this case. Since I have found that consumers did not receive the benefit of their bargain, I need not address the issue of whether Respondents intended to defraud consumers for purposes of determining the appropriateness of restitution.

This brings us to the questions of the appropriate method for calculating restitution and the appropriate amount of restitution. The parties seem to be in agreement that the calculation method consists of a two-step burden shifting framework: 1) the CFPB bears the initial burden of proving that the amount it seeks approximates consumer loss or unjust gains; and 2) if the threshold showing has been made, the burden shifts to Respondents to demonstrate that the approximation overstates consumer loss or unjust gains. *See Gordon*, 819 F.3d at 1195. Although in *Gordon* the first step in this framework is quoted as identifying a defendant's unjust gains, the court also cited to *Stefanchik*, stating that, "[r]estitution may be measured by the 'full amount lost by consumers rather than limiting damages to a defendant's profits.'" *Id.* (quoting *Stefanchik*, 559 F.3d at 931). I agree with EC that the distinction is irrelevant since consumers made payments directly to IA, so unjust gains are equal to consumers' loss. (*See* Dkt. 276 at 26 n.12).

The disagreement comes in terms of deciding the amount of restitution. EC assert that the proper amount of restitution is the full amount lost by consumers and is not limited to a defendant's profits. (Dkt. 276 at 26). They assert that the CFPB is entitled to a presumption of actual reliance and does not have to prove actual reliance by consumers. (Dkt. 284 at 9). EC assert that it is reasonable to calculate consumer loss as the amount paid by consumers in excess of the "Total of Payments" disclosed by Respondents and they are only considering consumers for whom Respondents withdrew more that the "Total of Payments" and rolled over the loan at least once. (Dkt. 276 at 27). EC assert that the following amounts are appropriate:

Count I: $132,580,041.06 (aggregate amount of all consumer overpayments dating back to 2008; IA only) (*Id*. at 28).

Count II: $38,453,341.62 (a subset of Count I, for violations on or after July 21, 2011;[20] IA only) (*Id*. at 28-29).

Counts III & IV: $38,453,341.62 (same figure as Count II; also a subset of Count I, for violations on or after July 21, 2011; IA and Carnes jointly and severally liable) (*Id*. at 29).

Count VII: $115,024.50 (for violations on or after July 21, 2011; IA and Carnes jointly and severally liable) (*Id*.).

[20] The Bureau is not seeking damages under the CFPA for any conduct prior to July 21, 2011.

RC assert that restitution is not appropriate because the CFPB has not shown "actual harm" to consumers and has not established that their figures approximate "unjust gains." (Dkt. 278 at 29-30). They assert that repeat consumers should be excluded from the restitution calculation. (*Id.* at 30). They also assert that the CFPB cannot recover for conduct prior to July 21, 2011, the transfer date to the CFPB. (*Id.* at 31).

Having examined the cases cited by the parties, I do not find support for RC's assertion that the CFPB must prove damages for each consumer and its allegedly required four-factor analysis and agree that the CFPB is entitled to a presumption of actual reliance. *See Figgie Int'l*, 994 F.2d at 605 (proof of reliance by each purchasing customer not needed); *Gordon*, 819 F.3d at 1196 (government entitled to presumption that individuals who used services relied on misrepresentations); *AMG Capital*, 910 F. 3d at 428 (appellants failed to offer reliable method of quantifying whether customers purchased product free from deception). With regard to excluding repeat customers from the calculation, I have discussed returning customers at length above and do not find that there is a sound basis to exclude them from the calculation. Indeed, I concluded that if I found that EC met their burden in proving the deceptive nature of the loans, I would presume that consumers actually relied upon the deceptive disclosures even for subsequent loans. *See supra* Section VI.B.4.a. Since I have found that EC proved the deceptive nature of the loans, I therefore presume that returning customers relied upon the deceptive disclosures and, consequently, suffered harm.

The next question is whether the CFPB can recover for pre-transfer date violations of TILA. EC assert that pursuant to Section 1055 of the CFPA, the CFPB has authority to seek "any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law," including TILA. (Dkt. 284 at 9) (quoting 12 U.S.C. § 5565(a)(1)). They assert that this authority took effect on July 21, 2011, and does not limit the CFPB to only seeking relief for violations that occurred after that date. (*Id.*). They further state that because the statute does not "'expressly prescribe[] whether the statutory remedies apply to earlier violations, the question is whether applying the statute to earlier conduct 'would have retroactive effect.'" (*Id.* at 10) (quoting *Landgraf*, 511 U.S. at 280). EC assert that there would be no impermissible retroactive effect in seeking such a remedy since IA was subject to TILA and the accompanying equitable remedies, including restitution, during its entire existence. (Dkt. 284 at 9-10).

RC assert in opposition that there would be an impermissible retroactive effect since the FTC could not have recovered for TILA in administrative proceedings and the CFPB did not have authority to enforce the FTC Act until the transfer date. (Dkt. 278 at 31-32).

The Court in *Landgraf* set forth a two-part test for determining whether to apply a statute to conduct that pre-dates it. *See Landgraf*, 511 U.S. at 280. First, a court must determine whether Congress expressly prescribed the statute's proper reach. If Congress indicated a clear position, then the court is to apply that preference and no further inquiry is required. Where, as here, the statute is silent or unclear as to its reach, however, then the court must determine whether the new statute would have a retroactive effect, i.e., whether it would: a) impair the rights a party possessed when it acted; b) increase a party's liability for past conduct; or c) impose new duties with respect to transactions already completed. *Id.*

I do not find that the CFPA would impair any rights that Respondents possessed when they acted. Clearly there was no right pre-July 21, 2011, to fail to fairly and conspicuously disclose the terms of the Loan Agreement. The statute similarly does not impose any new duties. The relevant issue is whether it increases Respondents' liability for past conduct. Prior to July 21, 2011, Respondents were subject to TILA and its enforcement, including the possibility of being ordered to pay restitution. However, RC argue that they would not have been subject to this potential remedy in an administrative adjudication because the FTC never had authority to obtain equitable monetary relief in administrative hearings. (Dkt. 278 at 31-32) (citing *Heater v. FTC*, 503 F.2d 321, 326-27 (9th Cir. 1974)).

While that is true, it is clear that the FTC had authority to obtain restitution in a judicial forum. *See* 15 U.S.C. § 53(b) (authorizing the FTC to seek injunctive relief in district court for violations of "any provision of law enforced by the [FTC]," including TILA); *Commerce Planet*, 815 F.3d at 598 (reiterating previous holdings that 15 U.S.C. § 53(b) "empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution").

Therefore, Respondents would have been subject to this liability prior to July 21, 2011, if the FTC had brought an action in district court. As EC correctly note, the choice of forum is a procedural question that does not raise concerns about retroactivity. *See Landgraf*, 511 U.S. at 217; *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997).

Although I agree with RC's assertion that the CFPB may not rely upon the FTC's authority to regulate TILA prior to July 21, 2011, as the FTC Act was expressly excluded from the definition of "federal consumer financial law" which the CFPB has authority to enforce (12 U.S.C. § 5481(14)), EC assert, and I agree, that they do not seek to rely on the FTC's authority to enforce the FTC Act. Rather, whether the FTC had the authority to obtain restitution is relevant to the question of whether the CFPA increases Respondents' liability for past conduct under the *Landgraf* test. Since the FTC had this authority, I thus find that the CFPA does not increase Respondents' liability for past conduct, and the statute does not have a retroactive effect. Therefore, the CFPB may recover for violations of TILA prior to July 21, 2011.

The final question is whether EC's calculations appropriately capture the amount of consumer loss or Respondents' unjust gains.[21] I find that they do. Since I found liability for Counts I, II, III, and IV based on Respondents' incorrect disclosure of the "Total of Payments" as the amount of principal and one finance charge, consumers lost, and Respondents unjustly gained any amounts consumers paid in excess of the "Total of Payments" disclosed. I find that the methodology implemented by the CFPB's data scientist, Robert Hughes, was appropriate: to obtain the appropriate set of loans, he only considered consumers for whom Respondents withdrew more than the "Total of Payments" and rolled over the loan at least once, and excluded loans where consumers paid less than the disclosed "Total of Payments" and loans that did not roll over at least once. (Dkt. 276 at 27-28). From that population of loans, Hughes then took the sum of the total amount paid in excess of the "Total of Payments" for each Loan Agreement and aggregated those

[21] I note that in the prior proceeding, EC provided restitution calculations that excluded fees charged to consumers after the ALJ expressed a concern that some fees may have been charged prior to consumers repaying the amounts disclosed in the "Total of Payments" box. *See* Dkt. 162 at 29. In the current proceeding, neither party addressed the issue of fees. I consider any potential argument from RC that fees should be excluded to be waived since RC did not raise the inclusion of fees as an issue when the burden was theirs to demonstrate that EC's proposed figures overstated consumer harm or unjust gains. Furthermore, in proposing an alternative restitution figure that excluded repeat customers (*see* Dkt. 278 at 30-31), RC failed to exclude fees and thereby indicated that they chose to waive that theory of calculation.

amounts, subtracting rebates and refunds, to reach a total of all overpayments on IA loans of $132,580,041.06. (*Id.* at 28). I find this amount reasonably approximates consumer loss and Respondents' unjust gains under Count I.

For Counts II, III, and IV, the CFPB employed the same methodology for loans originated on or after July 21, 2011, arriving at a total of $38,453,341.62 for each Count. (*Id.* at 28-29). Since loan origination dates are not explicitly captured in the IA data on which CFPB relied, they approximated the population of loans by excluding loans with transaction dates that occurred fewer than 23 days after July 21, 2011, since the IA Loan Agreement provides that the first transaction on a loan occurs between 8 and 23 days after origination. (*Id.* at 29 n.16). I find that this methodology conservatively approximates the population of applicable loans, and therefore reasonably approximates consumer loss and Respondents' unjust gains under Counts II, III, and IV. Respondents IA and Carnes are jointly and severally liable for this amount for Counts III and IV.

For Count VII, where I found liability based on Respondents' use of RCCs in situations where consumers attempted to revoke their ACH authorization or block ACH debits after they had already paid an amount equal to the "Total of Payments" in the TILA box, the CFPB calculated consumer loss based on RCC usage in those exact situations. Specifically, the CFPB calculated that Respondents used RCCs generated after July 21, 2011, to collect $115,024.50 from consumers in excess of what IA had disclosed after consumers had revoked or stopped the company's authorization to withdraw funds from their bank accounts. (*Id.* at 29). This figure is a subset of the harm calculated under Count I, as it is comprised of amounts paid in excess of the disclosed "Total of Payments." Respondents IA and Carnes are jointly and severally liable for this amount.

I therefore find that EC has demonstrated that it is entitled to restitution in the amounts set forth below:

Count I:	$132,580,041.06 (aggregate amount of all consumer overpayments dating back to 2008; IA only)

Count II: $38,453,341.62 (a subset of Count I, for violations on or after July 21, 2011; IA only)

Counts III & IV: $38,453,341.62 (same figure as Count II; also, a subset of Count I, for violations on or after July 21, 2011; IA and Carnes jointly and severally liable)

Count VII: $115,024.50 (also a subset of Count I; for violations on or after July 21, 2011; IA and Carnes jointly and severally liable)

I clarify here that I am not allowing recovery for the same damages multiple times for violations that encompass the same injury under different legal theories. Rather, I am stating the appropriate restitution figure for each of the counts, which will result in a single recovery and are not meant to be cumulative, which would result in impermissible double recovery. *See Medina v. D.C.*, 643 F.3d 323, 326-27 (D.C. Cir. 2006) (noting that "a jury is not prohibited from allocating a single damages award between two distinct theories of liability" and contrasting that with impermissible double recovery); *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 497 (2d Cir. 1995) (holding that while "[a] plaintiff seeking compensation for the same injury under different legal theories is of course only entitled to one recovery[,] . . . [a] jury's award is not duplicative simply because it allocates damages under two distinct causes of action."). Thus, restitution is awarded in the amount of $132,580,041.06 as to Respondent IA, of which IA and Carnes are jointly and severally liable for $38,453,341.62.

2. Injunctive Relief

a. CFPB's Position

EC assert that injunctive relief is appropriate to remedy potential ongoing non-monetary consumer harm caused by Respondents' conduct, including harm caused by efforts to collect outstanding consumer debt and by IA's furnishing of derogatory information to consumer reporting agencies. (Dkt. 276 at 30). EC seek four types of injunctive relief: 1) that I permanently enjoin Respondents and any successors from taking any action that would result in the collection, sale, assignment, or transfer of IA debt owed by payday loan customers; 2) that I order Respondents to make all reasonable and appropriate efforts to cause any consumer reporting agency to permanently delete any trade lines or collection accounts or any other information maintained on consumer reports furnished by IA; 3) that I require Respondents to cooperate fully to assist the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress; and 4) that I enjoin Respondents from committing any future violations of Federal consumer financial laws, including but not limited to, TILA, the CFPA, and EFTA. (*Id.*).

b. Respondents' Position

RC assert that the CFPB has not met its burden to demonstrate that it is entitled to injunctive relief. (Dkt. 278 at 32). They assert that the CFPB merely speculates about "potential" harm, which is not sufficient to meet the CFPB's burden to demonstrate irreparable harm or to justify injunctive relief. (*Id.* at 33). Additionally, they assert that since IA stopped offering loans nearly eight years ago, its assets were sold to another company, and there have been no loan payment transactions since July 2013, the CFPB has no basis to conclude that Respondents will commit any future violations and they are legally prohibited from violating consumer financial laws without the need for a permanent injunction. (*Id.*).

c. Analysis

The CFPB seeks injunctive relief pursuant to 12 U.S.C. § 5565(a)(2)(G) which provides that relief may include limits on activities or functions [of the Respondents]. EC assert that there is potential ongoing non-monetary harm to consumers, including harms caused by any efforts to collect outstanding consumer debt and by IA's furnishing derogatory information to consumer reporting agencies. (Dkt. 276 at 30). They therefore request the four types of injunctive relief enumerated above. (*Id.*).

RC assert that injunctive relief is not merited because EC has not cited to any facts to support its claim there is "potential" harm based on any effort to collect outstanding consumer debt or the furnishing of derogatory information to consumer reporting agencies. (Dkt. 278 at 32-33). They assert that injunctive relief is inappropriate because Respondents ceased lending operations in December of 2012. (*Id.* at 33). They also assert that under well-established principles of equity the CFPB must demonstrate four factors before injunctive relief may be granted: 1) that it has suffered an irreparable injury; 2) that remedies at law, such as monetary damages, are inadequate; 3) that, considering the balance of hardships between the CFPB and Respondents, a remedy in equity is warranted; and 4) that a permanent injunction is in the public's interest. (*Id.* at 32) (citing *CFPB v. Siringoringo*, No. SACV 14-01155 JVS, 2016 WL 102435, at *5 (C.D. Cal. Jan. 7, 2016). EC do not respond to this argument or dispute the four-factor framework, but merely state, without citing to any facts or authority, that injunctive relief is appropriate to prevent Respondents from continuing to harm past customers and harming future consumers. (Dkt. 284 at 10).

In general, injunctive relief should be narrowly tailored to remedy specific harms. *See, e.g.*, *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004). The undisputed facts establish that IA ceased offering loans and sold its assets in December 2012. The CFPB did not cite to any evidence to establish that IA or Carnes have continued in the payday loan business during the approximately seven-and-a-half years since that time.

Looking at the four-factor framework above, I find that the CFPB and consumers have not suffered irreparable injury and I find that monetary damages do provide adequate relief. I will now examine each of EC's specific requests and address the remaining two factors where applicable.

First, EC request that I enjoin Respondents and any successors from taking any action that would result in the collection, sale, assignment, or transfer of IA debt owed by payday loan customers. They have not cited to any evidence in support of this request and I agree with RC that this request merely speculates about the potential harm to consumers. I therefore find inadequate support to grant such an injunction. A consideration of the balance of hardships between the CFPB and Respondents and of the public's interest further supports denying EC's request. I also note that, as RC concede, Respondents are prohibited from future violations of consumer financial protection laws and thus may not collect on debt that is not legally owed. (*See* Dkt. 278 at 33).

Second, EC request that I order Respondents to make all reasonable and appropriate efforts to cause any consumer reporting agency to permanently delete any trade lines or collection accounts or any other information maintained on consumer reports furnished by IA. However, again, EC have not cited to any evidence in support of such a request and the potential harm to consumers is speculative. There is no evidence in the record that even indicates that IA ever furnished information to any consumer reporting agency. The four-factor framework weighs in favor of RC and I therefore also decline to grant this request.

Third, EC request that I require Respondents to cooperate fully to assist the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress. Considering the balance of hardships to the CFPB and Respondents, and the public's interest, this is a reasonable request and I do order Respondents to fully cooperate in assisting the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress.

Finally, EC request that I enjoin Respondents from committing any future violations of Federal consumer financial laws including, but not limited to, TILA, the CFPA, and EFTA. I find that this request is overly broad and not narrowly tailored to remedy specific harms. EC have not set forth a factual basis for granting this request. I therefore decline EC's request. As noted above, Respondents are prohibited from future violations of consumer financial protection laws, regardless of the existence of a permanent injunction.

3. Civil Money Penalty

a. CFPB's Position

EC assert that Respondents engaged in three distinct practices that require the imposition of a civil money penalty ("CMP"): 1) Respondents used a loan agreement that violated TILA (Count I) and the CFPA (Count II), and that was deceptive (Count III) and unfair (Count IV) due to its misrepresentation of the cost of IA's loan product; 2) IA violated EFTA (Count V) and the

CFPA (Count VI) by requiring consumers to satisfy their loans through electronic repayment; and 3) Respondents unfairly used RCCs (Count VII) to debit consumers' accounts. (Dkt. 276 at 31). They assert that each of these practices continued throughout the period from July 21, 2011, until July 9, 2013. (*Id.*).

For each of these practices, EC seek a full first-tier, i.e., lowest tier, penalty, which is assessed "[f]or any violation of a law, rule, or final order or condition imposed in writing by the Bureau." (*Id.* at 31) (quoting 12 U.S.C. § 5565(c)(2)(A)). The maximum permissible first-tier penalty is $5,000 per violation per day, so EC calculate the maximum CMP for each practice as $3,600,000 for the 720 days from July 21, 2011 through July 9, 2013. (*Id.*). EC thus seek a CMP of $10,800,000[22] against IA for all three practices and of $7,200,000[23] against Carnes for the two practices encompassing Counts III, IV, and VII. (*Id.* at 31-32). EC assert that none of the mitigating factors in 12 U.S.C. § 5565(c)(3) support mitigation of the penalties. (*Id.* at 32-34).

b. Respondents' Position

RC assert that the CFPB cannot establish that the maximum penalty is appropriate because many of the mitigating factors are present, including the lack of financial resources and good faith. (Dkt. 278 at 34). RC also contend that since the alleged violations occurred within the disclosures in the Loan Agreement itself, Respondents could not have committed any violations after they ceased offering loans, i.e., December 2012. (*Id.* at 35). Accordingly, they assert that December 2012 is the outer limit of the relevant time period. (*Id.*). They also assert that the CFPB has not identified the days or number of days on which RCCs were used and thus EC's request for CMPs for Count VII should be denied. (*Id.* at 35 n.16).

c. Analysis

As stated above, EC assert that there are three distinct practices which require imposition of a CMP. (Dkt. 276 at 31). The first practice involves both IA and Carnes, the second involves

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[22] $5,000 x 720 x 3= $10,800,000
[23] $5,000 x 720 x 2= $7,200,000

only IA, and the third involves both IA and Carnes. They thus state that there are three practices involving IA and two practices involving Carnes requiring the imposition of CMPs. In their *Opposition Brief* and *Reply Brief*, although they dispute the appropriateness and amount of CMPs, RC do not dispute that there are three distinct practices or even address this as an issue. (*See* Dkt. 278; Dkt. 283). I find that there are, in fact three, distinct practices warranting imposition of CMPs, three of which involved Respondent IA and two of which involved Respondent Carnes. *See CFPB v. Mortgage Law Group*, 420 F. Supp. 3d 848, 858 (W.D. Wis. 2019) (number of violations calculated based on general category of misconduct).

The next issue is the duration of each of the three violations, as the maximum first-tier penalty is $5,000 per violation per day. 12 U.S.C. § 5565(c)(2)(A). EC assert that each of the three violations occurred from July 21, 2011 through July 9, 2013, for a total of 720 days. (Dkt. 276 at 31). RC assert, on the other hand, that the outer limit of the possible timeframe is December 2012 (and for RCCs, CMPs should be denied altogether as the CFPB did not identify the days or number of days on which RCCs were used). (Dkt. 278 at 35). I have found that for the first and second practices, which encompass Counts I-VI, the violations were based on the language of the Loan Agreement. Therefore, the violations occurred at the time of loan origination, which both parties agree ceased in December 2012, and did not continue through the date of the last transaction on an IA loan on July 9, 2013, as EC implicitly assert. The record does not establish the last date in December 2012 on which a consumer obtained a loan, so I will use December 1, 2012 as a conservative end date. Therefore, I find that the relevant time period for the first two violations is July 21, 2011 through December 1, 2012, inclusive, for a total of 500 days. At $5,000 per day for 500 days, the maximum CMP for each of the first two practices is $2,500,000.

For the third practice of unfair use of RCCs, RC are correct that EC did not identify the days or number of days on which RCCs were used. However, I disagree that this practice does not warrant the imposition of a CMP. On the other hand, assuming that RCCs were used until the date of the last transaction on an IA loan on July 9, 2013, as EC implicitly assert, is likely an overestimation. The undisputed facts establish that RCCs were used in less than one percent of all loans after July 21, 2011. Therefore, I will assume they were used throughout the same time period as has been established for the first two practices, with an end date of December 1, 2012. This date is likely conservative, but EC have not established that the practice of using RCCs continued after December 1, 2012, and a more conservative end date reflects the relative infrequency with which they were used compared to all loan transactions. Thus, I find that the relevant time period for the third violation is July 21, 2011 through December 1, 2012, inclusive, for a total of 500 days. At $5,000 per day for 500 days, the maximum CMP for the third practice is $2,500,000.

Having calculated the maximum first-tier penalty for each violation, the final question is whether there are any mitigating factors that warrant reduction of the penalty amount. *See* 12 U.S.C. § 5565(c)(3). The first factor to examine includes the size of financial resources and good faith of the person charged. The record is silent as to the current status of Respondents' financial resources. It is undisputed, however, that Carnes received an annual salary of $250,000 when he was the CEO of IA and received approximately $25,000,000 from the sale of IA and other Hayfield entities to EZ Corp. Carnes was the sole owner of Willowbrook Marketing which owned a controlling interest in Hayfield. EC set forth additional figures reflecting payments made by Hayfield.[24] The evidence in the record reflects that at the time of the previous hearing, IA had few or no assets. (Dkt. 276 at 32). EC explain this lack of assets as reflecting IA's choice to make distributions and liquidate assets and assert that since IA has ceased operations, a large penalty will not put it out of business. (*Id.* at 33). RC assert that IA does not have financial resources and EC's information regarding Carnes is nearly a decade old. I agree that the information in the record is dated, but also find that it was within the control of Respondents to make distributions and/or sell their assets, so the fact that assets have been liquidated or distributed is not necessarily a mitigating factor.

With regard to "good faith," RC assert that Respondents attempted to comply with the law and thought they were in legal compliance because they hired outside counsel to draft the loan documents and they were licensed by Delaware state regulators to whom they submitted copies of the Loan Agreement. The record does establish that Respondents hired outside counsel to draft the loan documents. They did, therefore, make some effort to comply with the law. However, even though Respondents may have thought these documents were technically in compliance with the law, it is apparent from Carnes' testimony (and as I found above) that he and IA understood

[24] These figures are in Dkt. 276A at 32-33 and Dkt. 277A at ¶¶ 145-146, which are under seal.

that the Loan Agreement disclosed the loans as single-payment "payment in full" loans when, in fact, in 90% of cases they were by default multi-payment loans that automatically renewed and automatically went into a workout process. So even though Respondents may have thought the documents were legally compliant, they nevertheless knew that they disclosed the loan costs deceptively, as well as that they were conditioned on electronic fund transfers and that RCCs were used in cases where consumers had attempted to stop access to their bank accounts.

With regard to the state regulator, it was apparent from the testimony of Miller that the regulator merely took a cursory look at the Loan Agreement to ensure that it contained a TILA box but did not conduct an in-depth review of the documentation. I thus find that RC overstate the role of the state regulator. Even if I assume that, based on their state licensing, they thought they were in legal compliance, the same problems exist as just discussed with regard to outside counsel. I therefore do not find "good faith" to be a mitigating factor.

The second mitigating factor is the gravity of the violation or failure to pay. EC assert that the violations are not minor or technical in nature and that IA's business model was built around a deceptive loan agreement that hid the true cost of loans, required consumers to provide electronic access to their bank accounts, and continued to withdraw money long after consumers thought the loans had been paid in-full and sometimes after the consumer tried to stop access to their accounts. (Dkt. 276 at 33). RC do not address this mitigating factor in their briefs. I find that the violations were, in fact, serious and do not find any mitigation on this factor.

The third mitigating factor is the severity of the risks or losses of the consumer, which may take into account the number of products or services sold or provided. EC assert that the violations were serious, pervasive, and hurt tens of thousands of consumers. (*Id.*). They cite to the number of consumers affected and the amounts paid over the total of payments disclosed, as well as the number of times RCCs were used to obtain money from consumers who had revoked or stopped IA's authorization to withdraw funds from their accounts. (*Id.* at 33-34). RC do not address this mitigating factor in their briefs. I thus find that the severity of losses is not a mitigating factor for Respondents.

The fourth mitigating factor is the history of previous violations. EC assert that because IA faced a public enforcement action in the state of Minnesota in 2012, in which the court awarded $7 million in damages and penalties for violations of payday-lending statutes that this factor does not support mitigation. (*Id.* at 34). RC assert in response that Respondents have no history of any violations or any new violations in the years since RC ceased operating. (Dkt. 278 at 34). While I do not have sufficient information about the previous case to determine its factual similarity to the current matter, I do not find RC's statement of no violations since IA ceased operating to warrant mitigation. It is just common sense that they would not have had any additional violations if they were not operating. Neither party cites to any other potentially mitigating factors and I do not find that any apply.

Because none of the mitigating factors warrant a reduction of the CMPs calculated above, the maximum first-tier penalties are appropriate. Therefore, for all three violations of law, the total civil penalty assessed against IA is $7,500,000 ($2,500,000 x 3). For the two violations of law applicable to Carnes, the total civil penalty assessed against Carnes is $5,000,000 ($2,500,000 x 2).

VII. CONCLUSIONS OF LAW

1. Integrity Advance violated the TILA by failing to clearly and conspicuously disclose consumers' legal obligations (Count I).

2. Integrity Advance violated the CFPA by virtue of its TILA violation (Count II).

3. Integrity Advance and James R. Carnes violated the CFPA's prohibition on deceptive conduct by creating a net impression in IA's loan disclosures that misled reasonable consumers into believing that their APR, Finance Charges, and Total of Payments were much lower than they actually were (Count III).

4. Integrity Advance and James R. Carnes violated the CFPA's prohibition on unfair conduct by misleading consumers about their repayment obligations and failing to clearly disclose the costs of loans that rolled over automatically (Count IV).

5. Integrity Advance violated the EFTA by conditioning extensions of credit on repayment by preauthorized electronic fund transfers (Count V).

6. Integrity Advance violated the CFPA by virtue of its EFTA violation (Count VI).

7. Integrity Advance and James R. Carnes violated the CFPA's prohibition on unfair conduct by obtaining authorization for Remotely Created Checks in a confusing manner and then using such a method to withdraw money from consumers' bank accounts after consumers attempted to block electronic access to their bank accounts (Count VII).

8. James R. Carnes may be held individually liable for the violations of Counts III, IV, and VII.

9. The CFPB may recover for violations of TILA prior to July 21, 2011 because the CFPA does not increase Respondents' liability for past conduct or have a retroactive effect.

10. A reasonable approximation of the restitution due to consumers for the practices described in Count I is $132,580,041.06.

11. A reasonable approximation of the restitution due to consumers for the practices described in Counts II, III, and IV is $38,453,341.62.

12. A reasonable approximation of the restitution due to consumers for the practices described in Count VII is $115,024.50.

13. Injunctive relief is appropriate to ensure Respondents fully cooperate in assisting the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress.

14. The most reasonable calculation of the civil money penalty is $7,500,000.00 as to Respondent Integrity Advance and $5,000,000.00 as to Respondent James R. Carnes.

VIII. PROPOSED ORDERS

1. *Enforcement Counsel's Motion for Summary Disposition* for Counts I, II, III, IV, V, VI, and VII against Respondent Integrity Advance is **GRANTED**.

2. *Enforcement Counsel's Motion for Summary Disposition* for Counts III, IV, and VII against Respondent James R. Carnes is **GRANTED**.

3. *Enforcement Counsel's Motion for Summary Disposition* seeking **restitution** is **GRANTED** in the amount of **$132,580,041.06** as to Respondent Integrity Advance, of which Respondents Integrity Advance and James R. Carnes are jointly and severally liable for **$38,453,341.62**.

4. *Enforcement Counsel's Motion for Summary Disposition* seeking **injunctive relief** is **GRANTED IN PART** and Respondents are ordered to cooperate in assisting the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress.

5. *Enforcement Counsel's Motion for Summary Disposition* seeking **civil money penalties** is **GRANTED** in the amount of **$7,500,000.00** as to Respondent Integrity Advance and in the amount of **$5,000,000.00** as to Respondent James R. Carnes.

6. *Respondents' Motion for Summary Disposition* is **DENIED**.

IX. NOTICE OF APPELLATE RIGHTS

The parties are hereby notified that a notice of appeal may be filed within ten days after service of this recommended decision. Unless a party timely files and perfects a notice of appeal of the recommended decision, the Director of the CFPB may adopt the recommended decision as the final decision and order of the CFPB without further opportunity for briefing or argument. *See* 12 C.F.R. § 1081.400(c)(1).

Christine L. Kirby
Digitally signed by Christine L. Kirby
Date: 2020.08.04 14:54:28 -04'00'

HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 4th day of August 2020 at Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Recommended Decision Granting Enforcement Counsel's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 4th day of August 2020
at Washington, D.C.