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,** **Respondents.**	**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY DISPOSITION**

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I. Introduction

Respondents have failed to demonstrate that they are entitled to summary disposition. Rather than pointing to actual evidence in the record, Respondents repeatedly rely on unsupported assertions, mischaracterizations of Enforcement Counsel's positions, or legal arguments that are irrelevant, erroneous, or previously rejected by the Administrative Law Judge (ALJ).

Respondents' motion essentially admits the facts regarding the operation of the loan agreements that underlie the Bureau's Truth in Lending Act (TILA) claim: if a consumer failed to contact Integrity Advance three business days before the payment due date, Integrity Advance automatically renewed the loan pursuant to the auto-renewal and auto-workout provisions in the loan agreement, but Respondents disclosed the finance charge, APR, and total of payments assuming that the loan would not renew automatically. Respondents did not tell consumers the costs of the loan under the default operation of the loan agreement. Respondents' motion presents no additional facts or legal arguments to rebut the Bureau's TILA claim. Summary disposition in Respondents' favor is therefore clearly unwarranted.

Although Respondents attempt to mischaracterize the Bureau's deception claim, the well-established law and the facts in this matter clearly preclude summary disposition for Respondents. Respondents' loan disclosures were material misrepresentations that were likely to mislead consumers acting reasonably. Similarly, the law and evidence demonstrate that Respondents' disclosure practices were legally unfair. Those practices caused substantial injury that consumers could not reasonably avoid because Respondents hid the true costs of their loans from consumers. Respondents do not even bother to cite to any facts—because there are none—

supporting their claim that there is a benefit to consumers or to competition that outweighs the substantial injury. Respondents' bare, conclusory, single paragraph seeking summary disposition as to the unfairness of the use of remotely created checks flies in the face of the evidence in the record that this practice was unfair. Nor do Respondents cite any compelling evidence, relying almost solely on the Notice instead, to support summary disposition on the Electronic Fund Transfer Act (EFTA) claim. The plain language of the agreement combined with the fact that 98.5% of initial payments were made via electronic fund transfers is sufficient evidence to preclude summary disposition in Respondents' favor.

Respondents also attempt to obfuscate the issue of damages by moving for summary disposition on "actual damages" that Enforcement Counsel is not seeking. Enforcement Counsel properly seeks relief for all of the violations—including those occurring both before and after the designated transfer date—pursuant to 12 U.S.C. § 5565. The provisions of TILA and EFTA cited by Respondents—the same provisions that the ALJ previously ruled applied to private litigants and not to government agencies —are not relevant here.

Finally, Respondents begin their motion by recycling their contention that the Bureau has no jurisdiction over Respondents. The ALJ already rejected this argument, and Respondents offer no new evidence or law. Therefore, the ALJ should deny this part of the motion under the law of the case doctrine.

II. Statement of Facts

As described more fully in Enforcement Counsel's Motion for Summary Disposition, filed on May 10, 2016 (EC MSD), under the default operation of Respondents' loan agreements, Respondents automatically rolled over consumers' loans multiple times (through both the auto-renewal and auto-workout provisions in the agreements) unless the consumers called to change the terms of the loan to pay it off in a single payment. EC MSD at 7; Enforcement Counsel Statement of Facts (EC SMF) ¶¶ 24, 31-33. Despite these automatic rollovers, Respondents only disclosed the finance charge, APR, and total cost that would apply if the loan was paid off in a single payment. EC MSD at 7; EC SMF ¶¶ 41-44. Based on Respondents' own payment data, only 1% of consumers who made payments paid their loans off in a single payment, and over 69% paid more than the total cost Respondents disclosed in the loan agreements. EC MSD at 3; EC MSD Exh. C ¶¶ 5, 7 (Hughes Decl.). Respondents also conditioned their loans on preauthorized electronic fund transfers, EC MSD at 23, 25; EC SMF ¶¶ 50-55, and used remotely created checks to extract funds from consumers' accounts after the consumers had withdrawn their consent for electronic debits. EC MSD at 17; EC SMF ¶¶ 61-62.

A. Summary Disposition Standard

Respondents attempt to conflate the burden at trial with the burden on its summary disposition motion. *See, e.g.*, Resp. MSD at 1, 13 (referring to Enforcement Counsel's ultimate burden). While it is certainly true that Enforcement Counsel bears the ultimate burden of proof as to the claims pled in the Notice of Chagres, Respondents, as the moving party, bear their own burden as to their affirmative motion.

In order to prevail at summary disposition, Respondents have two options. They can show that the Bureau has failed to produce evidence supporting its claims, or introduce evidence that negates or undermines the Bureau's claims. *Carmona v. Toledo*, 215 F.3d 124, 132 (1st Cir. 2000) ("Where the moving party lacks the ultimate burden of persuasion at trial, its initial burden of production is conventionally satisfied in one of two ways. The movant may affirmatively produce evidence that negates an essential element of the non-moving party's claim.... Alternatively, the moving party may point to evidentiary materials already on file—such as answers to interrogatories, affidavits, or portions of depositions—that demonstrate that the non-moving party will be unable to carry its burden of persuasion at trial.") *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099 (9th Cir. 2000). To defeat Respondents' motion, Enforcement Counsel does not have to meet its ultimate burden, it only has to demonstrate that Respondents have failed to meet their burden. *See, e.g., Robinson v. Pezzat*, No. 15-7040, 2016 WL 1274044, at *6 (D.C. Cir. Apr. 1, 2016). Additionally, since the Bureau is the non-movant, the Administrative Law Judge must view all evidence in the light most favorable to Enforcement Counsel. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir.1990); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Finally, Respondents bear the ultimate burden as to their affirmative defenses. *See, e.g., Bengston v. Gibbs*, 884 F.2d 1387 (4th Cir. 1989) ("[g]enerally, the defendant who pleads an affirmative defense has the burden of proof"). Respondents' blanket unsupported statement that they "renew their affirmative defenses" (Resp. MSD at 6) does not meet this burden.

III. Argument

A. The Administrative Law Judge Has Already Rejected Respondents' Arguments Regarding the Bureau's Authority Over Them

Respondents begin their motion by attempting to re-litigate the question of the Bureau's authority over Integrity Advance and James Carnes based on when the Senate confirmed Director Cordray and when Respondents allegedly ceased offering loans.

Resp. MSD at 6-7.[1] The Administrative Law Judge has already ruled on this issue and rejected Respondents' arguments. Ord. Deny Resp. Mot. Dismiss at 7 (stating that "the Bureau had jurisdiction over nonbank entities such as Respondents prior to the Director's Senate confirmation"). Respondents raise no new facts or law that was not addressed in their motion to dismiss. *See* Resp. Mot. Dismiss at 6-16. Under the law of the case doctrine, courts typically do not revisit prior legal decisions in a later stage of a case. *See FMC Corp. v. U.S. E.P.A.*, 557 F. Supp. 2d 105, 109 (D.D.C. 2008) ("The law-of-the-case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'") (*quoting Arizona v. California*, 460 U.S. 605, 618 (1983)); *see also New York City Dep't of Fin. v. Twin Rivers, Inc.*, No. 95 CIV. 1389 HB HBP, 1997 WL 299423, *1-2 (S.D.N.Y. June 5, 1997). Given that the Administrative Law Judge issued a legal ruling that Respondents were subject to the Bureau's jurisdiction, Respondents are essentially asking the Administrative Law Judge to violate this doctrine. Accordingly, Respondents' motion should be denied.[2]

[1] Respondents also mention their statute of limitations defenses, but they do so only in a footnote. Resp. MSD at 7 n.1. Simply stating that they "renew" their affirmative defense is not sufficient to raise the argument. If the ALJ considers Respondents' statute of limitations argument, he should deny the motion for the same reasons as the authority argument, namely the law of the case doctrine and for the reasons stated in Enforcement Counsel's Opposition to the Motion to Dismiss.

[2] If the ALJ elects to consider Respondents' argument on the merits despite their failure to raise any new facts or legal arguments, the motion should be denied for the same reasons put forth in Enforcement Counsel's Opposition to the Motion to Dismiss, at 4-9.

B. Integrity Advance Violated the Truth in Lending Act by Failing to Accurately Disclose the Costs of Its Loans (Counts I & II)

As stated above, in order to prevail on their motion, Respondents must show that the Bureau lacks sufficient evidence to support its claims or point to evidence in the record that negates the Bureau's claims. Here, Enforcement Counsel has clearly produced sufficient evidence to support its TILA claim and the related CFPA claim (Counts I & II). Enforcement Counsel's Motion for Summary Disposition includes ample evidence regarding the operation of Respondents' loans and how they were disclosed. EC MSD at 7.

Additionally, Respondents' motion fails to introduce any additional evidence from the record that would negate Enforcement Counsel's TILA claim. Indeed, Respondents' motion makes clear that the parties largely agree on the pertinent facts surrounding the operation and disclosure of Respondents' loans. Resp. MSD at 3, 9-10; EC MSD at 7; EC SMF ¶¶ 23-28. If a consumer failed to contact Integrity Advance three business days before the payment due date, Integrity Advance automatically renewed a consumer's loan pursuant to the auto-renewal and auto-workout provisions in the loan agreement. However, Respondents disclosed the finance charge, APR, and total of payments by assuming that the loan would not renew automatically. Resp. MSD at 9, 20; Ans. ¶ 26; EC MSD at 7; EC SMF ¶ 19. These are the same facts alleged in the Notice of Charges and assumed as true in the order denying the motion to dismiss. Notice ¶¶ 27, 49-57; EC Opp. Mot. Dismiss at 2; Ord. Deny Mot. Dismiss at 4.

The parties disagree only on the legal import of these facts. *Compare* Resp. MSD at 19-22 *with* EC MSD at 7-9. The ALJ already rejected Respondents' argument that Integrity Advance complied with TILA based on these facts. Ord. Deny Mot. Dismiss at

31 ("I find the Notice of Charges set forth sufficient facts that, if proven true, the Bureau would be entitled to relief under TILA."). Hence, there is no cause to grant summary disposition in Respondents' favor.

The only new factual argument presented by Respondents concerns language in the loan agreement. Respondents highlight language in the contract stating that a consumer "must" select a payment option. Resp. MSD at 21. This just further serves to illustrate how misleading Integrity Advance's loan agreement was. Consumers were not, in fact, required to make a payment election because the default payment option was for auto-renewal and auto-workout payments, and as Respondents admitted, the company automatically renewed the loan if the consumer did not change the default payment option. Answer ¶¶ 29-31. Indeed, Respondents' own data shows that only 1% of consumers who made at least one payment paid exactly the amount disclosed in the TILA box. EC MSD Exh. C ¶ 7 (Hughes Decl.).

Respondents' argument cannot change the facts: if the consumer did nothing else after signing, the consumer would be obligated to make all of the payments, and Integrity Advance would use the consumer's electronic fund transfer authorization to extract those payments from the consumer's account. For that reason, the disclosures in the loan agreement violated TILA.

Respondents' other arguments do not alter this result. Respondents recycle their arguments about 'post-consummation changes' and the format of their TILA disclosures, but these arguments have already been rejected. Enforcement Counsel's TILA claim goes to the inaccurate contents of Integrity Advance's disclosures, not the format. And the post consummation change regime is inapplicable to these facts. Integrity Advance designed its contracts at inception to automatically rollover and charge the consumer undisclosed sums. The fact that the customer does not contact Integrity Advance to "change the terms of the loan" simply is not a situation where the disclosure becomes inaccurate because of an event that *occurs after* the creditor delivers the required disclosures. Integrity Advance's disclosures were inaccurate when made.

Respondents also erroneously argue that the Bureau "conflate(s) 'default option' with legal obligation." Resp. MSD at 21. But that argument fails because the "default option" is in fact the legal obligation within the meaning of TILA. EC MSD at 7-9. The entire framework of Respondents' loan agreements is designed to allow Respondents to extract multiple payments from consumers: the agreement automatically allows rollovers unless the consumer takes additional action *after* signing the agreement and receiving the funds. Respondents—and not consumers—make the actual withdrawals from consumers' accounts; and Respondents require consumers to authorize electronic fund transfers for *all* of the auto-renewal and auto-workout payments when they sign the loan agreements. EC SMF ¶¶ 50, 51, 53, 54.

Respondents essentially attempt to have it both ways. They want Integrity Advance to have received full authorization for the entire series of automatic rollovers it deducted from consumer accounts—otherwise the company took these payments without proper authorization, which itself would be an illegal practice—but they want to claim that the consumer was not legally obligated to make those payments because otherwise Integrity Advance violated TILA. Under Respondents' reading of the law, virtually any multi-payment loan with a pre-payment option could be disclosed as a single payment obligation if the creditor simply framed the installment payments as default rollovers. But the fact that consumers could pre-pay their obligation to Integrity

Advance at a lower price makes the obligation no different than a mortgage that a consumer can prepay, resulting in less interest being paid.

C. Respondents' Loan Agreements Were Deceptive (Count III)

As with the TILA claim, Enforcement Counsel agrees that its deception claim can be resolved at the summary disposition stage—Respondents' loan agreements were deceptive. EC MSD at 10-13. Respondents provided an incorrect TILA disclosure and never disclosed the true loan costs of their loans to consumers. *Id.*

Respondents have no plausible argument that Enforcement Counsel has failed to produce sufficient evidence to support its deception claim. To prove deception, Enforcement Counsel must show (a) a material (b) representation, omission, or practice (c) that is likely to mislead consumers acting reasonably under the circumstances. *F.T.C. v. Cyberspace.Com, LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006). As shown in Enforcement Counsel's motion, the record is replete with evidence that Respondents' misrepresentations regarding the costs of their loans were likely to mislead consumers acting reasonably—including the loan agreement itself, Dr. Hastak's expert report, and consumer complaints. *See* EC MSD at 10-13; EC MSC Exh. A (Hastak Report).

None of the facts or arguments introduced by Respondents undermine or negate Enforcement Counsel's deception claim. Respondents highlight various parts of the loan agreement which they allege show that their loans were not meant for long-term use. These citations are puzzling given that they only serve to reinforce the deceptive nature of Respondents' loan agreement. For example, Respondents highlight the loan agreement language stating that "Your Payment Schedule will be: One (1) payment of [Total_of_Payments] due on [Loan_Due_Date]." Resp. MSD at 9. This statement is false. In order to make one payment totaling the disclosed total of payments, a consumer had to call and change the loan terms, and in fact, less than 1% of all consumers who made at least one payment paid exactly the amount disclosed in the TILA box. EC MSD at 7; EC MSD Exh. C ¶ 7 (Hughes Decl.). Also, the language in the agreement stressing that payday loans are short-term products is irrelevant because the language says nothing about the cost and has no context. Even a short-term loan can roll over, and all of Respondents' loans were short-term when compared to typical automobile loan or a 30-year mortgage.

Similarly, the steps that Respondents allegedly took to "ensure that consumers understood . . . the payday loan for which they applied" and the fact that Respondents allegedly required consumers to sign the agreements in eight separate places are equally irrelevant to the deception claim in this matter. Resp. MSD at 9. Respondents allege that company representatives "walked consumers through the loan and answered questions." *Id*. However, once again, Respondents do not allege or present any evidence that their representatives disclosed the actual costs of the loans when the default renewals are included, which is the heart of Respondents' deceptive practices. Similarly, more signatures cannot cure Respondents' failure to disclose accurate loan costs in the loan agreement. Indeed, Respondents have provided no evidence whatsoever that consumers understood their loan terms with Integrity Advance.

1. Respondents' Loan Agreements Were Likely to Mislead Consumers

Respondents create a strawman argument that misstates Enforcement Counsel's claims. Respondents erroneously frame the argument by stating that their "loan application process" was not deceptive. Resp. MSD at 8. Similarly, they contend that "the process through which consumers applied for and were extended credit" was not deceptive. *Id*. Respondents continue by incorrectly arguing that Enforcement Counsel, in order to prove deception, must show that consumers thought they were receiving an installment loan where the payments would add up to the sum in Respondents' 'total of payments' box. Resp. MSD at 9. This assertion is baseless, as indicated by the fact that it is unsupported by any citation.

While Enforcement Counsel does not endorse Respondents' loan application 'process,' the gravamen of the deception claim is that Respondents failed to disclose the loans' actual costs. In this case, therefore, Enforcement Counsel must show only that Respondents misrepresented the cost of the loans, because Respondents' representations and omissions regarding the costs were material and were likely to (and indeed actually did) mislead consumers. EC MSD at 11-13; EC SMF ¶¶ 45, 46. Respondents have offered no evidence—because none exists—that they provided consumers with the APR, finance charge, and total of payments for a loan that went through the default auto-renewal and auto-workout process. Respondents have therefore failed to meet their burden to negate the Bureau's evidence.

2. Respondents' Misrepresentations of the Cost of the Loans Were Material

Respondents argue that consumers did not find material the fact that their loan would rollover because "Integrity Advance's customers needed access to credit as quickly as possible[.]" Resp. MSD at 12. Respondents offer no citation or evidence to support this assertion.

More importantly, Respondents' arguments once again misstate the claims in this matter. The deception claim here does not center on the fact that Integrity Advance's loans rolled over; it centers on the fact that the *costs* of the rollovers were never disclosed even though the rollovers were automatically initiated by Integrity Advance. Respondents have not even tried to argue that that cost is not material as that assertion is belied by common sense and well-established case law. *See* EC MSD at 11.

3. Consumer Complaints Confirm Respondents' Deceptive Practices

Finally, in an effort to undermine the Bureau's evidence, Respondents selectively quote Enforcement Counsel's expert to support their erroneous argument that the existence of consumer complaints is not evidence of the unlawful conduct alleged in the Notice of Charges. Resp. MSD at 11. As an initial matter, even a non-representative sample of consumer complaints can create a genuine issue of material fact sufficient to justify denying a motion for summary disposition.[3] In any case, consumer complaints in this matter are a legitimate part of the wealth of evidence demonstrating that Respondents' practices regarding the disclosure of the costs of their loans were deceptive. EC MSD at 10-13.

During his deposition, Enforcement Counsel's expert made the entirely non-controversial statement that consumer complaints do not provide a random sampling. Exh. 13 (Hastak 139:16-18) ("the complaints are not representatives of the customers of Integrity Advance); *id*. (Hastak 182:19-21) ("Customer -- complainers are not a random sample, if you will, of all the customers of any company."). But Dr. Hastak also confirmed that complaints provide valuable information when considering Respondents' loan agreement. *Id*. (Hastak 182:17-18) ("complaints provide useful information…"); *id*. (Hastak 139:13-14) ("The complaints simply validated the possibility

[3] The question of whether a selection of consumer complaints, by themselves, could prove that a practice was deceptive need not be decided in this matter.

that people may have made [an] inference.”). Enforcement Counsel has used complaints in exactly the manner suggested by Dr. Hastak, as a way of confirming that consumers were likely to be misled and deceived by Respondents’ practices. There is no plausible argument that these complaints do not offer probative evidence of how consumers understood the loan agreement, even if they do not reflect a statistically representative sample.

D. Respondents’ Disclosure Practices Were Unfair (Count IV)

In order to prove legal unfairness, Enforcement Counsel must show that Respondents’ practices were likely to cause substantial injury to consumers, that injury was not reasonably avoidable, and the injury was not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c). In its motion for summary disposition, Enforcement Counsel presented evidence that Respondents provided incorrect TILA disclosures that did not state the actual costs that consumers would incur under the loan agreements. Indeed, there is no evidence in the record that Respondents ever told consumers the costs of the loans under the default operation of the agreements. Rather, there *is* evidence that Respondents actually instructed their vendors *not to tell* consumers the total cost of the loans and that consumers actually *were* confused about the cost of the loans. EC SMF ¶¶ 16, 45, 46. Respondents’ failure to disclose these costs was likely to cause, and indeed did cause, substantial injury—namely the amounts taken out of their accounts beyond the amounts Respondents disclosed—that was neither reasonably avoidable nor outweighed by any countervailing benefit to consumers or to competition. EC MSD at 13-17. Hence, Respondents cannot argue that Enforcement Counsel has not submitted evidence sufficient to establish its claims.

Respondents' effort to introduce facts to negate the Bureau's unfairness claim fails for several reasons. As in initial matter, Respondents' arguments are almost entirely unsupported. In an approximately six-page argument, there are at least nine instances where Respondents rely on allegedly 'undisputed facts' yet offer no citations and no subsequent discussion of *any* facts. *See* Resp. MSD at 13-18. Second, Respondents' claim that they were not the cause of consumer harm is without merit; the harm here is a direct result of Respondents' failure to disclose the costs of their loans. Further, Respondents contend that Enforcement Counsel has failed on the 'reasonably avoidable' prong of unfairness but consumers cannot be expected to avoid an unforeseeable and undisclosed harm. Finally, Respondents fail support their contention that their unfair practices benefitted consumers or competition.

1. Respondents' Practices Were the Cause of Harm to Consumers

Respondents argue that the Bureau failed to show that Respondents' acts were the proximate cause of any harm to consumers. Resp. MSD at 16. Enforcement Counsel alleges—and indeed has proven—that consumers were injured[4] when Respondents withdrew more money from their accounts than the amounts Respondents disclosed, and that injury was a direct and proximate result of Respondents' failure to disclose the costs of the loans under their default provisions. EC MSD at 14-16. Respondents merely assert that Enforcement Counsel has not demonstrated proximate cause, but they never explain why failing to disclose loan costs did *not* cause consumers to suffer the unexpected loss of funds. Resp. MSD at 16. Even assuming *arguendo* that proximate

[4] There is no doubt that this injury constitutes a substantial injury. Indeed, Respondents' data demonstrates that consumers paid $40,886,753 more than Respondents disclosed. EC MSD Exh. C ¶ 6b.

cause is required to prove an unfairness claim, Respondents have failed to meet their burden of demonstrating that there is no evidence of proximate cause in this matter.

Instead, Respondents rely on citations that do not prove their point. *United Food & Commercial Workers Unions, Employers Health & Welfare Fund v. Philip Morris, Inc.* merely stands for the proposition that Alabama tort law requires a showing of proximate cause. 223 F.3d 1271, 1273 (11th Cir. 2000). In *CFPB v. ITT Educ. Servs.*, 1:14-cv-00292, 2015 WL 1013508, n. 34 (S.C. Ind. Mar. 6, 2015), the court merely mentions in footnote dicta that a proximate cause showing is required for an abusiveness claim. No abusiveness violation has been alleged here.

Finally, Respondents argue that the 1st Circuit decision in *Frappier v. Countrywide Home Loans, Inc.*, 750 F.3d 91 (1st Cir. 2014), is somehow relevant here. Resp. MSD at 16, 17. *Frappier* involved a consumer who took a series of mortgage loans over the course of several years. 750 F.3d at 93-94. The consumer started experiencing financial difficulties, was foreclosed upon, and then tried to assert a variety claims based on the premise that Countrywide had lured him into loans that the company knew he could not afford. *Id*. The Court denied the plaintiff's claims, determining that his financial difficulties caused his default and not Countrywide's offering of loans that he allegedly could not afford. *Id*. at 98. That factual scenario and decision has no bearing on the instant proceeding. Enforcement Counsel is not arguing that Respondents intentionally lured consumers into loans they could not afford or that any default by consumers was caused by Respondents. Rather, Count IV alleges that Respondents' practice of failing to disclose the total cost of the loans under the default operation of the loan agreements—and its practice of instructing its vendors *not* to disclose this information—was unfair. Respondents' motion fails to demonstrate that there is no genuine issue of fact as to the cause of the harm such that summary disposition for Respondents is appropriate; indeed, the undisputed evidence actually demonstrates the opposite, that Respondents' disclosure practices caused substantial injury—over $40 million—to consumers. Monetary harm of this nature plainly constitutes substantial injury under an unfairness analysis. *See, e.g. Am. Fin. Servs. Ass'n v F.T.C.* , 767 F.2d 957, 972-73 (D.C. Cir. 1985)*; F.T.C. v. Loanpointe, LLC*, No. 2:10-CV-225DAK, 2011 WL 4348304, at *6 (D. Utah Sept. 16, 2011) aff'd, 525 F.App'x 696 (10th Cir. 2013).

2. Respondents' Practices Were Not Reasonably Avoidable

Respondents also argue that consumers' right to rescind the loan or prepay it means that consumers could have avoided any injury. However, Respondents essentially concede that making a single repayment would constitute paying "ahead of schedule." Resp. MSD at 17. Respondents fail to explain how the ability to prepay or rescind makes the harm from Respondents' failure to disclose the loan costs reasonably avoidable. Consumers cannot know that they should prepay a loan (assuming they have the means to do so) or rescind it when Respondents have not disclosed the true costs of that loan. It is well established that an injury is not reasonably avoidable if the consumer could not make a "free and informed" choice to avoid it. *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010). A consumer cannot possibly make a "free and informed" choice about Respondents' loans because Respondents' practices hid the costs of their default operation. The fact that consumers could take some action *after* a loan origination as a result of Respondents' unfair conduct does not alter that fact. *See, e.g., F.T.C. v. Direct Benefits Group, LLC*, 6:11-CV-1186-ORL-28, 2013 WL 3771322, at *14 (M.D. Fla. July 18, 2013) (stating that "the fact that many customers were able to—eventually—obtain refunds from Defendant[ ] does not render the injury avoidable").

Furthermore, given Respondents' practices, there simply is no argument that either the ability to rescind or the ability to prepay would realistically enable a consumer to avoid the injury. First, a consumer could only rescind the loan within three days of receiving the funds, which is before the first payment is due and before the consumer would have any indication that Respondents planned to take more than the amount they disclosed. Resp. MSD at 17. Second, the fact that a consumer could try to change the payment options and prepay does not allow the consumer to make a free and informed choice to avoid Respondents' disclosure practices. Consumers would not have paid more than the amount disclosed—under the default operation of the agreements—until approximately the sixth withdrawal. At that point, assuming that a consumer realizes instantaneously that Respondents had taken more than they had disclosed, the consumer was faced with the reality that, according to Respondents, they still owed virtually the entire loan principal. Even if the consumer tried to stop the payments by revoking the ACH authorization Respondents would continue to extract money from the consumer via remotely created checks. EC SMF ¶¶ 62-70; EC MSD at 16-19.

Respondents also suggest that emails sent to consumers after the loan transaction was consummated show that the unfair practice could have been avoided. Resp. MSD at 18. However, the email templates referenced by Respondents do not state the costs of the default auto-renewal and auto-workout process. Resp. Exh. 3; Resp. Exh. 4; Profita Decl. ¶¶ 4-5. Hence, even assuming consumers received such an email—and there is no evidence in the record aside from self-serving testimony that Respondents always sent such an email, and there is evidence in the record that consumers did not receive such emails (*see, e.g.* Exh. 7 (Consumer Complaint, CFPB036637); Exh. 9 (Consumer Complaint, CFPB036690))—it would not make the harm from the disclosures reasonably avoidable.

Respondents also allege that any harm was reasonably avoidable as to returning Integrity Advance customers "who had already seen the operation of the loan first hand." Resp. MSD at 18. But Respondents have put forth no evidence on the number of returning customers and have provided no evidence that any of the consumers actually did understand the costs of the loan renewal process and could have reasonably avoided the injury. The returning customers might not have seen the full operation of the auto-renewal and auto-workout process in their first loan or might have been forced to use a subsequent loan to pay off the original loan. And even assuming *arguendo* that the returning consumers reasonably could have avoided injury from their subsequent loans, those consumers could not reasonably avoid the injury from their first loans.

3. There Is No Evidence that Respondents' Unfair Practices Benefitted Consumers or Competition

Respondents' argument that they provided benefits to consumers is facially absurd and completely unsupported. Respondents, once again without any reference to the record, baldly assert that the 'undisputed facts' show that Integrity Advance provided credit to consumers who did not have access to credit otherwise. There is nothing in the record supporting that statement. But even if Respondents did help consumers find credit when other avenues were foreclosed to them, that does not justify failing to disclose the cost of the loans. There is no logical argument that the unfair disclosures somehow benefited consumers or completion, let alone outweighed the substantial injury identified above. Integrity Advance could have provided credit to consumers and properly disclosed the costs of that credit. Respondents' argument does nothing to negate Enforcement Counsel's unfairness showing.

4. Respondents' Disclosure Practices Are Both Deceptive and Unfair

Respondents begin their unfairness argument by taking issue with the fact that the facts underlying the Bureau's unfairness claim also underlie the deception claim. Resp. MSD at 14. This fact is irrelevant, and Respondents make no arguments as to why it should matter. While unfairness and deception have different elements, Respondents cite to no authority stating that the same facts cannot lead to both violations. Indeed, courts have found the same conduct to constitute both a deceptive and unfair practice under the FTC Act. *F.T.C. v. Crescent Pub. Grp., Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001); *Orkin Exterminating Co. v. F.T.C.*, 849 F.2d 1354, 1367 (11th Cir. 1988) (". . . while a practice may be both deceptive and unfair, it may be unfair without being deceptive.")

5. The Bureau's Unfairness Claim Is Not Based on Customer 'Dissatisfaction'

Respondents state, once again with no reference to the record, that the facts show that consumers "received the credit for which they applied." Resp. MSD at 15. They argue that "dissatisfaction" with the eventual price of the loan is not actionable. *Id*. at 16. This fundamentally misunderstands the nature of Enforcement Counsel's claim. The unfairness of Respondents' practices and its loan agreement flows from the fact that the loan costs that existed at origination were not disclosed; it does not come from consumers using a product that was honestly disclosed and deciding afterwards that they were dissatisfied.

Moreover, the caselaw cited by Respondents does not support their premise. *Dzielak v. Whirlpool Corp*. involves whether alleged misrepresentations about dishwashers were actionable under New Jersey law. 26 F.Supp.3d 304 (D.N.J. 2014). The passage quoted by Respondents about 'unmet expectations' is essentially dicta; the court held later in the same section of the opinion that misrepresentations about dishwasher energy efficiency *were* actionable under the New Jersey Consumer Fraud Act. *Id*. at 336. Similarly, Respondents cite *Mason v. Coca-Cola Co.*, 774 F.Supp.2d 699, 704 (D.N.J. 2011), for the proposition that "dissatisfaction with a product" is not actionable. Resp. MSD at 16. But the court in that case held that Coca-Cola had not violated New Jersey law because it had accurately represented the ingredients in its soft drink. *Id*. at 703. That has no bearing on this matter, where it is undisputed that Integrity Advance *did not* state the costs of rolled over loans. EC MSD at 3.

E. Respondents' Use of Remotely Created Checks Was Unfair (Count VII)

Enforcement Counsel has submitted evidence establishing that Respondents substantially injured consumers by using remotely created checks to continue withdrawing money from consumers' accounts after consumers had revoked ACH authorization or blocked ACH debits. EC SMF ¶¶ 61-70; EC MSD Exh. C ¶¶ 9-11 (Hughes Decl.). Respondents' own data has established that Integrity Advance used remotely created checks 3,545 times when consumers had revoked or blocked ACH debits from their accounts in order to take $839,879.50 from consumers. EC MSD Exh. C ¶¶ 10-11 (Hughes Decl.). Of that total, $265,452.50 was taken by Integrity Advance through remotely created checks on or after July 21, 2011. *Id.* at ¶ 11a. Respondents caused additional harm, as the record reflects, in the form of overdraft charges and insufficient funds fees assessed to consumers. EC SMF ¶ 69 at Exh. 24 (CFPB037146).

Respondents make only a bare, conclusory allegation in a single paragraph that the use of remotely created checks did not cause, and was not likely to cause, substantial injury. This clearly fails to negate Enforcement Counsel's evidence. Respondents offer no facts in support of their claim that "the undisputed facts show that there was no consumer injury arising from the creation of remotely created checks." Resp. MSD at 19. Indeed, Respondents fail even to develop an argument that would support awarding summary disposition in their favor. The suggestion that the harm to consumers was 'speculative' is simply untrue; the sums referenced above represent amounts taken from consumer bank accounts that consumers were specifically trying to protect.

F. Integrity Advance Violated EFTA (Counts V and VI)

As established in Enforcement Counsel's motion for summary disposition, the undisputed facts establish that Integrity Advance violated EFTA's proscription on compulsory repayments by electronic transfer. EC MSD at 23-27. Respondents admitted that consumers had to sign Integrity Advance's ACH authorization to receive a loan from the company, stating that "[c]onsumers could only receive loan proceeds by way of an electronic deposit which was authorized by the ACH authorization form." Ans. ¶ 40. The form authorized both the deposit and the **withdrawals** for payments via ACH. EC SMF ¶¶ 52-53. That is, by signing a form that Integrity Advance required in order to receive a loan, consumers authorized a series of regularly recurring electronic repayments. Predictably, Respondents' data shows 98.5% of initial loan repayments were made via electronic means. EC MSD Exh. C ¶ 8 (Hughes Decl.).

Respondents completely fail to negate Enforcement Counsel's claim. Respondents' reliance on an allegation from the Notice of Charges that 95% of Integrity Advance consumers signed the ACH authorization is unavailing. Resp. MSD at 23 (citing Notice ¶ 41). As an initial matter, during summary proceedings reliance on allegations is typically disfavored. *See* § 10A Fed. Prac. & Proc. Civ. § 2722 (3d ed.) ("Because the summary-judgment motion is designed to pierce the formal allegations of the pleadings it normally is not made or opposed on the basis of the pleadings alone"). Here, Respondents rely only on the Notice for their point because there is no evidence in the record that consumers could receive a loan without signing the ACH authorization. Instead, the evidence in the record indicates that virtually every Integrity Advance consumer was required to sign the ACH agreement authorizing electronic debits. EC SMF ¶¶ 51, 52. Further, the evidence demonstrates that Integrity Advance failed to offer consumers an alternative to granting electronic access as part of the origination, which is itself a violation of EFTA. *See F.T.C. v. Payday Fin. LLC*, 989 F Supp. 2d 799, 812 (D.S.D. 2013).

Respondents also focus on language in the ACH agreement stating that Integrity Advance accepted alternative forms of payment. Resp. MSD at 23-24. But that language does not cure the fact that Respondents required virtually every consumer to preauthorize electronic fund transfers, and the meaning of that language is certainly clouded by another clause stating that the ACH agreement "remains in full force and effect" for as long as the consumer owed money to Integrity Advance. EC SMF Exh. 1 at 11 (Template Loan Agreement, CFPB000797); EC SMF Exh. 2 at 10 (Template Loan Agreement, CFPB000691). Further, a right to later rescind ACH authorization does not cure a violation at the initial extension of credit. EC MSD at 26.

G. Integrity Advance's Delaware License Is Not Relevant

Respondents attempt to avoid liability for their unlawful acts by implying that Integrity Advance could not have had a Delaware lending license if Respondents were violating the law. Resp. MSD at 2. This suggestion is irrelevant. Even if Delaware knew of Respondents' conduct and took no action, that fact simply would not be probative of whether Respondents violated Federal law as alleged in the Notice of Charges. Furthermore, Respondents point to no actual evidence regarding Delaware's review of Integrity Advance's practices—they point only to the license and statutory language about what Delaware *could* do generally. *See* Resp. SOF ¶¶ 23-27. In fact, a representative of the Delaware State Bank Commissioner stated that for a non-bank lender like Integrity Advance, the office's practice was only to collect two or three samples of Truth in Lending disclosures and check that the APR calculations in the TILA box were mathematically accurate. Exh. 1 ¶¶ 6-8 (Albanese Decl.). In addition, even if the APR calculations were inaccurate, that fact would only be one factor in determining whether a license would be granted or renewed. *Id.* at ¶ 7. Further, the Delaware State Bank Commissioner did not examine non-bank lenders for their compliance with UDAAP or EFTA. *Id.* ¶¶ 10, 12.

In addition, any suggestion by Respondents that Integrity Advance was an entity that complied with all applicable laws is belied by the evidence in the record. In its interrogatory responses to the Bureau, Integrity Advance admitted that various state regulators had sent the company cease and desist letters asserting violations of state law. EC SMF Exh. 7 at 2 (November 25, 2013 Interrogatory Response, CFPB 042375-76). Many of these letters centered on the fact that Integrity Advance was loaning in states where it did not have a license or was otherwise violating state law. *See e.g.*, Exh.

3 at 1 (Letter from the KY Dept. of Financial Institutions, CFPB033843) ("[n]ot only is it unlawful to make payday loans without a license, because your activities are conducted online, there are no physical locations available for you to comply with many of the requirements under our applicable laws."); Exh. 4 at 1 (Letter from the SC Board of Financial Institutions, CFPB034323) ("[t]his company is not a licensed lender in South Carolina...[r]ebate to the South Carolina consumer all interest charged and/or collected."). Integrity Advance was also the subject of an enforcement action by the State of Minnesota Attorney General's office related to its failure to obtain a license in that state and its practice of automatically rolling over consumer loans. A court awarded, and an appellate court upheld, a judgement for over $700,000 in restitution and $7 million in statutory damages and penalties. *State ex rel. Swanson v. Integrity Advance*, LLC, 846 N.W.2d 435 (Minn Ct. App. 2014), *aff'd sub nom*, Swanson v. Integrity Advance, LLC . 870 N.W.2d 90 (Minn. 2015).

H. The Bureau Is Entitled to Relief Available Under the CFPA for Violations of TILA and EFTA

Respondents' arguments that they are entitled to summary disposition on the issue of actual damages for both the TILA and EFTA claims are nonsensical because Respondents have fundamentally mischaracterized Enforcement Counsel's request for relief in this matter. Resp. MSD at 22-24; Notice at 13-14 (Prayer for Relief).

Enforcement Counsel properly requested relief pursuant to 12 U.S.C. § 5565 for Integrity Advance's violations of TILA and EFTA, including its unlawful conduct both before and after the designated transfer date. Notice ¶12; *id.* at 14-15 (Prayer for Relief). Section 5565(a)(1) provides, "The court (or the Bureau, as the case may be) in an action *or adjudication proceeding* brought under Federal consumer financial law, shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law." 12 U.S.C. § 5565(a)(1) (emphasis added). This proceeding is brought under Federal consumer financial law. 12 U.S.C. § 5563(a) (providing, *inter alia*, that the Bureau is authorized to conduct an adjudication proceeding to enforce compliance with enumerated consumer laws). Both TILA and EFTA are enumerated consumers laws, 12 U.S.C. §§ 5481(12)(C), (12)(O), and therefore Federal consumer financial laws, 12 U.S.C. § 5481(14). Further, the plain language of Section 5565 does not create a distinction between the Bureau's ability to order relief for unlawful conduct that occurred prior to the designated transfer date and conduct that occurred after.[5] Thus, the ALJ in this matter has authority pursuant to § 5565 to order "any appropriate legal or equitable relief," including but not limited to all of the relief listed in § 5565(a)(2), for TILA and EFTA violations, regardless of when they occurred, as part of his recommended decision. 12 U.S.C. §§ 5481(12)(C), (12)(O), (14); 5565(a).

Therefore, for violations—including violations of EFTA and TILA—that occurred on or after July 21, 2011 (the designated transfer date), Enforcement Counsel seeks disgorgement, restitution, and any other legal or equitable relief deemed appropriate (as well as costs and civil money penalties pursuant to §§ 5565(b) and (c)). For TILA and EFTA violations that occurred prior to July 21, 2011, Enforcement Counsel seeks only restitution, disgorgement, and other equitable relief deemed appropriate. The Bureau has authority under § 5565 to order this relief, and ordering such relief will not have any

[5] The Bureau must, however, actually order the relief on or after the effective date of the CFPA, but that requirement is irrelevant here, as any relief will be ordered years after the effective date of the CFPA.

retroactive effect because the FTC could get these types of relief for TILA and EFTA violations that occurred in the period between 2008 and July 21, 2011. More specifically, at the time Integrity Advance's pre-transfer date conduct occurred, the FTC was empowered to seek equitable relief, including permanent injunctive relief, disgorgement, and restitution, for violations of TILA and EFTA. 15 U.S.C. §§ 53(b), 1607(c), 1693o.[6] Thus, when the Bureau obtains, for pre-transfer-date violations, such equitable relief that was available to the FTC prior to the designated transfer date that does not "increase [Integrity Advance's] liability for past conduct," *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)—the amount of liability is the same. Imposing that relief therefore is not retroactive, and that relief accordingly is available to the Bureau for pre-transfer-date violations of TILA and EFTA.

Respondents' arguments regarding "actual damages" are nothing more than a red herring. Respondents' request that the Administrative Law Judge deny the Bureau actual damages under 15 U.S.C. § 1640(a)(1) for TILA violations (Counts I and II) and under 15 U.S.C. § 1693m(a) for EFTA violations (Counts V and VI). Resp. MSD at 22-24.

[6] Pursuant to the version of TILA in effect at the time of Integrity Advance's conduct, a violation of TILA constitutes a violation of the FTC Act. 15 U.S.C. § 1607(c). Similarly, the version of EFTA in effect at the time provided that a violation of EFTA constitutes a violation of the FTC Act. 15 U.S.C. § 1693o. Finally, Section 13(b) of the FTC Act, which also was in effect at the time in question, authorizes the FTC to seek injunctive and other equitable relief, including disgorgement and restitution, for violations of "any provision of law enforced by the [FTC]," including TILA and EFTA. 15 U.S.C. § 53(b); *see also, e.g.*, *F.T.C. v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016) (holding that 15 U.S.C. § 53(b) authorizes "any ancillary relief necessary to accomplish complete justice, including restitution" (quotations omitted)); *F.T.C. v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (holding that section 13(b) permits court "to order a defendant to disgorge illegally obtained funds"); *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir. 1989) (holding that "section 13(b) [15 U.S.C. § 53(b)] grants the authority to issue other necessary equitable relief," including "[r]escission and restitution").

This argument is premised on two incorrect notions: that the Bureau's claims are governed by these provisions and that the Bureau has sought actual damages pursuant to these provisions.

As noted above, Enforcement Counsel has sought relief under 12 U.S.C. § 5565, not any provisions of TILA or EFTA. In any event, the particular TILA and EFTA provision that Respondent cite have no bearing on the Bureau's ability to seek relief at all. As the Administrative Law Judge has stated, 15 U.S.C. §§ 1640 and 1693m "govern civil actions brought in court by *private litigants ... not by an administrative agency* such as the Bureau." Ord. Deny Mot. Dismiss 27 (emphasis added). The framework for actual damages to private litigants of TILA and EFTA claims, as outlined in 15 U.S.C. §§ 1640 and 1693m, is simply not applicable here, and despite Respondents' arguments otherwise, the Bureau's Prayer for Relief simply does not request "actual damages" pursuant to either 15 U.S.C. § 1640(a)(1) or 15 U.S.C. § 1693m(a) for violations of TILA or EFTA respectively. Notice at 14-15 (Prayer for Relief).[7]

IV. Conclusion

Respondents have utterly failed to provide evidence that would justify summary disposition in their favor. Their motion repeatedly fails to provide evidence supporting their arguments and ignores the fact that the Administrative Law Judge denied their motion to dismiss. Respondents have provided no evidence to refute the most basic fact in this proceeding – they provided loans to consumers that automatically renewed and

[7] In any case, courts have held that—despite Respondents' insinuations otherwise—government agencies do not need to prove individual damages in order to establish liability. "Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of the section." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993).

never, through any means, disclosed the costs of those renewals to consumers. Respondents also fail to provide any evidence to counter the fact that they improperly required electronic access to consumer accounts and when consumers blocked that access they resorted to unfair and poorly disclosed remotely created checks. Respondents' motion should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May 2016, I caused a copy of the foregoing Enforcement Counsel's Opposition to Respondents' Motion for Summary Disposition, along with Enforcement Counsel's Response to Respondents' Statement of Undisputed Facts, supporting exhibits, and declarations, to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather.L. MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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