UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

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| ADMINISTRATIVE PROCEEDING<br>File No. 2015-CFPB-0029<br><br>In the matter of:<br><br>INTEGRITY ADVANCE, LLC and<br>JAMES R. CARNES | **RESPONDENTS' OPPOSITION TO ENFORCEMENT COUNSEL'S MOTION FOR SUMMARY DISPOSITION** |

**RESPONDENTS' OPPOSITION TO**
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## INTRODUCTION

The Bureau fails to satisfy its burden and the Court should deny the Bureau's motion for summary disposition. Indeed, far from showing a lack of genuine issues of material fact, the Bureau cites facts that undermine its claims. The Bureau also fails to fully and adequately address the individual elements of its claim—and even invents new legal requirements from whole cloth.

The Bureau's claim that Respondent Integrity Advance violated the Truth in Lending Act ("TILA") is based on an invented disclosure – the "total cost" of a loan – which is not required under TILA and Regulation Z, and, in fact, runs counter to the purposes of the statute.

Nearly all of the Bureau's argument is tied to the legal theory of a single case, *FTC v. AMG Services, Inc.*, 29 F. Supp. 3d 1338 (D. Nev. 2014). However, the Bureau does not, and cannot, show that the facts here are in any way similar to the facts in *AMG*. The Bureau focuses almost solely on the language of the Loan Agreement, but cannot show where, in the Loan Agreement, consumers would have developed the misunderstanding that Integrity Advance was offering a multi-payment loan, instead of the single-payment loan as clearly disclosed in the TILA Box.

Again, the Bureau points to few facts, and no undisputed facts, in support of its claims. In the three-and-a-half years that the Bureau had to exercise its broad-reaching investigatory powers against Respondents, the Bureau conducted no consumer survey, nor attempted to determine whether reasonable consumers were likely to be misled by Integrity Advance loans. The Bureau's own expert conceded that a consumer survey is the best way to measure consumer takeaway, and, indeed, it is the primary way – if not the only way – to even begin to allege a deception claim. The Bureau, instead, relies on a superficial expert report and a handful of consumer complaints – which even the Bureau's own expert admits are an unreliable means of measuring what a reasonable consumer would have understood about the Loan Agreement.

The Bureau's unfairness claims suffer equally from a lack of support. The Bureau's arguments regarding unfairness rely entirely on the assumption that the agency can prove its deception claim; in other words, the Bureau offers no independent analysis to support its unfairness claims. And it points to no facts, let alone undisputed facts that do so.

Further to this point, the Bureau makes the startling logical leap that *any* consumer who renewed a loan as allowed under the Integrity Advance Loan Agreement (whether through the consumer's own initiative or by allowing the automatic renewal provision to take effect) was "substantially injured." Here, again, the Bureau points to no factual support, and instead supplies its own suppositions. The Bureau fails to prove the elements of an unfairness claim.

The Bureau's claim as to the "unfairness" of the use of remotely created checks suffers similarly. Here, the Bureau attempts to argue that a wholly-inapplicable law that did not even exist at the time that Integrity Advance made loans to argue that the mere fact of a remotely created check is *per se* unlawful. This, of course, is not the law and has never been the law. The Bureau's unfairness argument here is also not supported by the actual facts in this record.

Finally, the Bureau fails to provide sufficient factual support for its claims of violations of the Electronic Fund Transfer Act ("EFTA"). The Bureau fails to show that Integrity Advance *required repayment* of its loans through an electronic fund transfer – the very core of the EFTA violation the CFPB seeks to prove. Rather, as disclosed in the Loan Agreement, consumers had several options by which to repay their loans. That the bulk of consumers did, in fact, repay through EFTs is indicative only of the level of convenience offered by this method of repayment.

Respondents respectfully submit that the Bureau's Motion should be denied in its entirety.

## ARGUMENT

### I. INTEGRITY ADVANCE DID NOT VIOLATE TILA

Consumers owed Integrity Advance only the amount disclosed in the "Total of Payments" section of the TILA Box, unless and until the consumers renewed their loan, allowed their loan to renew, or took some other action that altered their obligation. The Bureau has not and cannot show that any Loan Agreement disclosure mandated under TILA and Regulation Z violated the "clear and conspicuous" requirement. Accordingly, the Court should deny the CFPB's motion for summary disposition and grant Respondents' motion.

#### A. The CFPB Creates A "Total Cost" Disclosure That Is Not Found In TILA Or Regulation Z

The CFPB's claims extend TILA and Regulation Z far beyond what the statute and its implementing rule cover. Indeed, the Bureau creates a term, "the total cost of the loan," that it argues the Loan Agreement should have disclosed. Dkt. 87, CFPB Mot. Summ. Disp. at 12, 23. A disclosure of the type that the Bureau demands would not be accurate, would be impossible under the disclosure rules, and actually could increase the likelihood of consumer confusion.

The general requirements of TILA are implemented through Regulation Z, which mandates specific disclosures of "certain information." *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 198 (2011). The specific disclosures at issue here are the "Finance Charge" and "Total of Payments" disclosures, required by 12 C.F.R. § 1026.18(d) and (h). The "total cost of the loan" is not defined or required as a disclosure under Regulation Z, and for good reason.

A disclosure showing the "total cost," of the loan, however, has never been a TILA or Regulation Z requirement. Indeed, such a cost number could only be rendered in retrospect; it is determined by the borrower's decisions and actions after the loan is made. For this reason and in conformity with TILA, Integrity Advance's TILA box only disclosed the specific legal obligation present at the outset of the loan – that is, the single payment due on the designated Payment Due Date. *See* Dkt. 90, Resp'ts' Statement Undisputed Facts ("Facts") ¶ 14.

While the terms of the Loan Agreement could and did result in consumers repaying differing amounts, any changes to the repayment amount would necessarily have occurred *after* the loan was made, pursuant to the consumer's rights under the Loan Agreement and applicable law. A borrower that repaid the loan in full on the stated payment due date paid exactly the amount disclosed in the TILA Box; other options, however, resulted in a "total cost" that was higher or lower than the TILA Box disclosure. For example, a borrower who prepaid the loan would pay less than the "Total of Payments." *See* Dkt. 91, Profita Decl. ¶ 2; Dkt. 91A, Ex. 1 at 3 (stating, in the TILA Box: "**Prepayment:** If you pay off early, you will be entitled to a refund of the unearned portion of the finance charge.") A borrower who experienced financial distress and invoked his rights under bankruptcy law would, as a result, not repay anything on the loan.

Thus, the potential "total costs" of any loan were myriad. By contrast, the disclosures required by TILA and Regulation Z are necessarily discreet, and are tied to the legal obligation "at the time of giving the disclosures" (*i.e.*, the "outset of the transaction"). Official Staff Comments, 12 C.F.R. § 226, Supp. I, 226.9(b); Official Interpretation, 12 C.F.R. § 1026, Supp. I, 1026.17(c)(1)-1. The Supreme Court has explained that "[m]eaningful disclosure [under TILA] does not mean more disclosure. Rather, it describes a balance between competing considerations of complete disclosure and the need to avoid information overload." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (internal quotation marks and alterations omitted).[1] Nevertheless, the Bureau proposes more disclosure, which would have likely resulted in consumer confusion. The Bureau's proposed reading of TILA over-extends the law and would actually cause consumer confusion. This, in turn, would contravene TILA – its letter and purpose. *See* 12 C.F.R. § 1026, Supp. I, 1026.17(c)(1)-1 ("The disclosures shall reflect the credit terms to which the parties are legally bound as of the outset of the transaction.").

The CFPB's other argument that TILA disclosures should be based on "default terms" is also incorrect. The initial legal obligations of a loan, at the time it is made, form the basis for the TILA disclosures. 12 C.F.R. § 1026.17(c). Consumers' initial legal obligation under the Loan Agreement was to pay the loan in full on the Payment Due Date or to contact Integrity Advance to set up a payment option—including electing to renew the loan. Only when consumers failed to contact Integrity Advance and otherwise failed to pay their loan in full would the loan be automatically renewed. Dkt. 90, Facts ¶ 19 (stating that if consumers "fail[ed] to contact" Integrity Advance "or otherwise fail[ed] to pay the loan in full on any Pay Date," the loan could

[1] Combating "information overload" was a key concern of the Federal Reserve Board when comprehensively reviewing Regulation Z's implementation of TILA in 2005. *See* Testimony of Governor Edward M. Gramlich, Regulation Z (Truth in Lending Act), Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, May 17, 2005, *available at* http://www.federalreserve.gov/BoardDocs/Testimony/2005/20050517/default.htm.

be automatically renewed). The Loan Agreement clearly and conspicuously disclosed this initial legal obligation in the TILA Box and various places throughout the Loan Agreement. *Id.* ¶¶ 11–14, 19–20. For example, under the Loan Agreement, consumers "[p]romise[d] to pay [Integrity Advance] the Total of Payments . . . on the Payment Due Date . . . ." and, contingent on the consumers' choices, "[a]ll other amounts owed to us under the Loan Agreement." *Id.* ¶ 20.

The Bureau incorrectly contends that "default provisions" of the Loan Agreement created "consumers' legal obligation." Dkt. 87, CFPB Mot. Summ. Disp. at 6. However, neither consumers' exercise of their rights under the Loan Agreement, nor the operation of the Agreement, could change the consumers' legal obligation *at the time the loan was made*. When the loans were made, consumers owed the amount disclosed in the TILA Box. The fact of this *initial* legal obligation did not change, even if consumers' obligations subsequently changed because (a) the consumer cancelled the loan, (b) the consumer chose to prepay the loan before the Payment Due Date, (c) the consumer paid the loan in full on their Payment Due Date, (d) the consumer chose to renew the loan, (e) the consumer did not choose a payment option or repay the loan in full as required by the agreement, allowing the loan to renew automatically, (f) the consumer's debt was deemed paid in full through a separate agreement with Integrity Advance,[2]

[2] For example, Integrity Advance would seek to remediate consumer issues, disputes, and complaints through debt cancellation and/or refunds, as appropriate. *See, e.g.*, Dkt. 87C, Marlow Decl., Ex. Marlow-4 (addressing a complaint to the consumer's satisfaction by deeming final balance paid in full).

(g) the consumer's obligation was negated through bankruptcy proceedings, or (i) any other subsequent occurrence or operation.[3]

The CFPB draws a comparison between the Loan Agreement and a 30-year mortgage, wherein borrowers have an "initial obligation to make 360 monthly payments." *Id.* at 14. The Bureau stops short, however, of extending this comparison to its actual theory of this case. The Bureau contends that Integrity Advance failed to disclose the "default terms of the contract" arguing that the "default terms" consist of those events that would occur pursuant to the Loan Agreement without any action taken by the borrower. *See id.*

But if the Bureau was analytically consistent and did extend the analogy of a 30-year mortgage to this case, then the Bureau would be forced to argue that the acceleration and foreclosure terms of a loan – the "default terms" of many mortgage loan agreements—constitute a consumer's legal obligation at the time the mortgage loan is made. This, of course, is not true. Indeed, the Bureau's mortgage analogy actually illustrates how the *initial legal obligation* of a borrower is distinct from any subsequent obligation that might arise through "default" operation of a loan agreement. Regulation Z expressly contemplates this distinction, as the Rule provides

[3] Although a non-exhaustive list, these various potential outcomes are instructive. Potential outcomes (a), (b), (g), and (h) result in a loan with less "total cost" than that shown in the TILA Box; (c) results in a "total cost" that matches that in the TILA Box.

that after-the-fact changes to the terms or other aspects of the loan do not render the initial disclosure inaccurate. *See* 12 C.F.R. § 1026.17(e).

**B. The CFPB's Reliance On *FTC v. AMG* Is Misplaced**

The Bureau misstates the facts and legal analysis in *FTC v. AMG Services, Inc.*, 29 F. Supp. 3d 1338 (D. Nev. 2014) in order to find support for its misreading of TILA and Regulation Z's requirements. The Bureau also uses the *AMG* case to conflate the legal requirements of a TILA claim and a deception claim. Mainly, the Bureau contends that there is "no meaningful distinction between the facts of the *AMG* case and the facts of the instant matter." Dkt. 87, CFPB Mot. Summ. Disp. at 14. But the facts here and in *AMG* are actually very different.

For example, in *AMG*, the court found that the format of the loan note "create[d] uncertainty" and "visually prioritize[ed] one half" of the note, while "hiding important information—including the provision that makes 'renewal' automatic . . . ." ***In contrast,*** here, the Loan Agreement placed the Payment Options, Auto-Renewal, and Auto-Workout sections directly below the TILA Box, demarcated by bold, all-caps headers, and formatted for ease of comprehension by separating these sections into individual paragraphs. *See* Dkt. 90, Facts ¶ 14; Dkt. 91, Profita Decl. ¶ 2; Dkt. 91A, Ex. 1 at 3.

In *AMG*, the court found that the loan note allowed consumers to agree to the loan by clicking four boxes, *without* needing to read the terms and conditions. Such terms and conditions were provided through hyperlinks that could easily be overlooked by consumers.

*AMG*, 29 F. Supp. 3d at 1358 ("[D]efendant's webpage facilitates borrowers not reading Defendants' terms and conditions."). ***In contrast,*** the Integrity Advance Loan Agreement required that consumers read through the entire agreement and electronically sign (rather than simply click) in six to eight places. *See* Dkt. 90, Facts ¶ 4.

In *AMG*, consumers were *required to decline* the renewal of the loan, if they wanted to pay it off in full. *AMG*, 29 F. Supp. 3d at 1359; *id.* at 1368 ("Neither the TILA box nor the fine print state that borrowers are automatically enrolled in a costly 'renewal' plan."). ***In contrast,*** Integrity Advance customers were clearly and expressly required to choose their payment option—placing the customer in charge, in the first instance, in deciding whether to pay the loan in full or renew the loan. Dkt. 90, Facts ¶ 10.

In *AMG*, the court found that the loan note never informed consumers that they would be automatically enrolled in the "renewal" plan. *AMG*, 29 F. Supp. 3d at 1377 ("Neither the TILA box nor the fine print state that borrowers are automatically enrolled in the 'renewal' plan. In fact, the word 'automatic' never appears in the loan note."). ***In contrast,*** the Loan Agreement demarcated the "Auto-Renewal" and Auto-Workout" provisions of the agreement in bold, all caps font. *See* Dkt. 90, Facts ¶ 19.

In *AMG*, consumers could only decline the renewal of the loan "through [a] confusing email-and-hyperlink procedure." *AMG*, 29 F. Supp. 3d at 1361. Further, the *AMG* court found that the lender controlled the consumer's ability to decline the renewal, since it controlled when the email containing the needed hyperlink was sent. *Id*. ***In contrast,*** Integrity Advance's Loan Agreement made clear how customers were to select their payment option, which customers could do simply by calling Integrity Advance. Dkt. 90, Facts ¶¶ 10–11.

In *AMG*, the court highlighted the thousands of consumer complaints – *8,500 complaints* – as well as testimony from the lender's former employees that consumers were confused by the loan notes. *AMG*, 29 F. Supp. 3d at 1362. ***In contrast,*** the CFPB specifically discusses only five complaints, Dkt. 87, CFPB Mot. Summ. Disp. at 13, and generally refers to only 127 total relevant complaints (most of which have no specific factual support). *See* Dkt. 87, CFPB Mot. Summ. Disp.; Dkt. 87C, Marlow Decl. at 2–3.[4]

In *AMG*, the court received testimony from *AMG's* employees which indicated "that the loan terms are confusing and should be changed"; employees knew – and accepted – that customers were confused. *AMG*, 29 F. Supp. 3d at 1362. ***In contrast,*** Integrity Advance had policies that actively sought to ensure that customers understood their loan terms; employees certainly did not accept the inevitability of consumer confusion. *See* Dkt. 90, Facts ¶¶ 6–7.

[4] The Bureau seeks to characterize the unsupported 127 complaints figure as "many consumers." *See* Dkt. 87, CFPB Mot. Summ. Disp. at 17 ("[T]he record in this matter contains numerous consumer complaints demonstrating that many consumers were in fact misled about their Integrity Advance loans."). This characterization is, charitably, misleading. This unsupported figure would mean than an Integrity Advance loan resulted in a BBB complaint 0.04% of the time. *See* discussion *infra* pp. 16–17.

Finally, in *AMG*, the court found that the lender trained its employees to mislead consumers regarding the terms and operation of its loans. *AMG*, 29 F. Supp. 3d at 1362. ***In contrast,*** Integrity Advance's employees, and its process generally, sought to ensure that its customers were fully informed, as evidenced by the phone calls that customers received to help answer questions about the loan, its terms, conditions and operation. *See, e.g.*, Dkt. 90, Facts ¶¶ 4–7.

The factors that led the *AMG* court to hold that the loan note at issue was "ambiguous," and thus in violation of TILA and Regulation Z are not found in Integrity Advance's Loan Agreement. Indeed, for almost every factor reviewed by the *AMG* court, the Integrity Advance Loan Agreement did the opposite. The CFPB cannot and does not show that Integrity Advance violated TILA or Regulation Z.

## II. THE LOAN AGREEMENTS WERE NOT DECEPTIVE

The CFPB has not shown that it is entitled to summary disposition of its deception claim. Enforcement Counsel relies almost exclusively on a highly distinguishable case and vague assertions that do not concern the actual Loan Agreement.

### A. Reasonable Consumers Were Not Likely To Be Misled By The Loan Agreement

#### 1. The Loan Agreement Was Not Facially Deceptive

The Bureau contends that a reasonable consumer reading the Loan Agreement would assume that they were being offered a "multi-payment loan" with some amount of bi-weekly or monthly payments resulting in the "Total of Payments" disclosed in the TILA Box. This is simply not the case – the Loan Agreement provided for a single payment and a single due date, stated clearly and conspicuously in the TILA Box:

> **Your Payment Schedule will be:** One (1) Payment of [the "**Total of Payments**" amount] due on [the "**Payment Due Date**"] ("Payment Due Date").

Dkt. 90, Facts ¶ 14. The Bureau does not show that a contrary reading is possible, let alone probable. *See Hotwire, Inc.*, No. 07-CV-1312HNLS, 2008 WL 5874305, at *3.

The Loan Agreement was not "facially" deceptive. The Loan Agreement TILA Box disclosures contained a stated "Total of Payments" that represented the amount that an applicant would owe at the time the loan was made. The Payment Schedule unambiguously stated that "One (1) payment" would be due on the "Payment Due Date." Dkt. 90, Facts ¶ 14. This was the borrower's legal obligation unless the borrower renewed the loan by selecting the renewal option or through operation of the Loan Agreement.

As discussed above, the TILA Box itself could not contain further information. *See* 12 C.F.R. § 1026, App. H-2. The law is clear that any additional information about the loan must have been contained in the body of the Loan Agreement, and not within the TILA box, notwithstanding the Bureau's misapprehension of TILA and Regulation Z. Dkt. 87, CFPB Mot. Summ. Disp. at 14. The Bureau, however, describes the other information contained in the Loan Agreement but not in the TILA box as "fine print." Far from "fine print," the Loan Agreement included important information directly below the TILA Box and in the body of the Loan Agreement, which was called out in bolded, underlined, and/or all-caps fonts and headers. *See, e.g.*, Dkt. 90, Facts ¶¶ 11, 19. These sections explained the necessity of choosing a payment option, as well as the operation of the payment options and the operation of the Loan Agreement in instances where customers did not choose a payment option. *See id.*

The Bureau relies almost exclusively on *FTC v. AMG* to support its contention that the Loan Agreement was "deceptive." As discussed above, there are extensive and fundamental differences between the facts of *AMG* and the facts present here. *Supra* Section I.B. The Bureau's nearly exclusive reliance on *AMG* is misplaced. Whereas the *AMG* court found that the loan note at issue was written, designed, and formatted to be misleading to consumers, the Loan Agreement here utilized short paragraphs, bolded important terms, bolded and all-caps headers, and up to eight signature points to ensure that consumers reviewing the Loan Agreement could do so efficiently and effectively. *See* Dkt. 90, Facts ¶¶ 4, 11–16. Where the loan note at issue in *AMG* was complicated (*e.g.*, requiring a "convoluted email-and-hyperlink procedure" to "decline" the renewal of the note[5]), the Loan Agreement here simply provided a telephone number for customers to select their payment option. *See id.* ¶ 11.

[5] *AMG*, 29 F. Supp. 3d at 1377–78.

Further, "[a] reasonable consumer is responsible for reading and familiarizing herself with the terms of an agreement she freely enters into." *Karakus v. Wells Fargo Bank, N.A.*, 941 F. Supp. 2d 318, 342 (E.D.N.Y. 2013), *adhered to on denial of recon.*, No. 09-CV-4739 ENV SMG, 2013 WL 3187055 (E.D.N.Y. June 20, 2013)). Indeed, the very mechanics of the Loan Agreement ensured that consumers were required to visually scan through the Loan Agreement before agreeing to its terms. *See* Dkt. 90, Facts ¶ 4. A reasonable consumer would have necessarily seen the bolded and/or all-caps "Special Notice" that further highlighted the nature of a payday loan; this, too, reduced the possibility that any reasonable consumer would be misled into thinking they had received a "multi-payment" installment loan.

**2. There Are No Facts, Let Alone Undisputed Facts, That Show That A "Reasonable Consumer" Would Have Been Misled About The Nature Of The Loan**

The Bureau fails to show that "reasonable consumers" were likely to have been misled. It is well accepted that "a representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." FTC, Policy Statement on Deception Statement (1983) (citing *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963)). A material misunderstanding must be probable, not merely possible, to qualify as deception. *See Ford v. Hotwire, Inc.*, No. 07-CV-1312HNLS, 2008 WL 5874305, at *3 (S.D. Cal. Feb. 25, 2008) (stating the "'[l]ikely' to deceive requires that deception is 'probable,' not merely 'possible'");

*Williams v. Gerber Products Co.*, 439 F. Supp. 2d 1112, 1115 (S.D. Cal. 2006) (same), *rev'd*, 523 F.3d 934 (9th Cir. 2008), *opinion amended and superseded on denial of reh'g*, 552 F.3d 934 (9th Cir. 2008), and *rev'd*, 552 F.3d 934 (9th Cir. 2008).

The Bureau provides no facts that support its assertion that a reasonable consumer would likely be deceived about the "total costs" of the loan. But, as a threshold matter, the Bureau offers no facts that even show that a "reasonable consumer" would ever expect that a loan that was not repaid on its due date would cost the same as a loan that was repaid on its due date. In fact, it seems likely that a reasonable consumer would expect to pay more for a loan that was repaid at a later date, as opposed to an earlier date. Dkt. 63, CFPB Mot. to Strike; Dkt. 63B, Novemsky Report ¶ 29 (noting that "research show[s] that consumers often understand when they purchase a product or service that they are in an exchange relationship with the firm supplying the product or service.").

The Bureau offers no support for its assertion as to what it contends "reasonable consumers" understood. First, the Bureau conducted no consumer survey to support its bald assertion that reasonable consumers were misled about the terms of the Loan Agreement. While the Bureau cites its expert, Dr. Manoj Hastak, for the proposition that the Loan Agreements failed to "clearly and conspicuously disclose the costs of Respondents' loans," Dr. Hastak's conclusions, and noted lack of methodology, have been squarely rebutted by Respondents' expert, Dr. Nathan Novemsky. Dr. Hastak did not conduct any empirical analysis of Integrity

Advance consumers, a fact that he does not dispute, *see* Frechette Decl. ¶ 4, Ex. 3, Hastak Test. at 59:12-14, which was the crux of Dr. Novemsky's rebuttal. *See* Dkt. 63, CFPB Mot. Strike; Dkt. 63B, Novemsky Report ¶¶ 12-14, 45, 49. Indeed, Dr. Hastak acknowledges that "consumer data provides the best way to assess consumer, you know, take-away from materials." *See* Frechette Decl. ¶ 4, Ex. 3, Hastak Test. at 90:14-16. In other words, Dr. Hastak admits that a consumer survey is the best indicator of what consumers understand, even though he failed to conduct such a survey. In fact, the only basis for Dr. Hastak's conclusions is his comparison of "the disclosures presented in the Loan Agreement" and "the Federal Trade Commission (FTC) guidelines on making disclosures and disclaimers clear and conspicuous in an online environment." *See* Dkt. 87, CFPB Mot. Summ. Disp.; Dkt. 87A, Hastak Report at 11. Dr. Hastak's "analysis" consists of merely reading the contents of the Loan Agreement and making his own "common sense" deductions. *See* Frechette Decl. ¶ 4, Ex. 3, Hastak Test. at 130:15-19; 138:14-19; 260:16-18.

As a last resort, the Bureau contends that consumer complaints are a proxy for the reasonable consumer's understanding. Specifically, the CFPB states that "the record in this matter contains numerous consumer complaints demonstrating that many consumers were in fact misled . . . ." Dkt. 87, CFPB Mot. Summ. Disp. at 12. But the Bureau's own expert expressly rejects the importance of complaints in determining how a "reasonable consumer" might have understood the Loan Agreement. *See* Frechette Decl. ¶ 4, Ex. 3, Hastak Test. at 138:14-16;

139:7-14. He explained that complaints "are not representatives [*sic*] of the customers of Integrity Advance . . . they're just a small sampling of individuals who had a problem with Integrity Advance, so I don't' take that as . . . representative in any way of . . . what a typical consumer . . . might take." *Id*. 139:16-22.[6]

The Bureau's assertion is further belied by its own factual statement, which references only "some" consumers had filed complaints. Dkt. 88, CFPB Statement Undisputed Facts ("CFPB Facts") ¶¶ 45–46. Indeed, less than one-half of 1% of Integrity Advance loans resulted in Better Business Bureau ("BBB") complaints about the repayment amount. Moreover, the Bureau cites only five such BBB complaints, and references (without providing the complaints or further support) a total of 127 complaints. Dkt. 87, CFPB Mot. Summ. Disp.; Dkt. 87C, Marlow Decl. at 2 ("In 127 complaints, consumers stated that Integrity Advance charged them more than they believed the loan would cost.").[7] The low number of BBB complaints that the CFPB asserts means that an Integrity Advance loan resulted in a complaint about the repayment

[6] In addition, the complaints, most of which are roughly four years old, constitute inadmissible hearsay.

[7] Further, the Marlow Declaration states without support that "[c]onsumers generally complained that they had relied on the Truth in Lending disclosures in the contract and/or representations or omissions regarding the loan terms made by Integrity Advance employees." Dkt. 87, CFPB Mot. Summ. Disp.; Dkt. 87C, Marlow Decl. at 2. The Marlow Declaration provides only five examples and does not cite or otherwise note the remaining 122 complaints that the Bureau references.

amount only **0.04%** of the time, and that assumes that these complaints reflect concerns about the Loan Agreement, as the Bureau states but fails to actually show.

Indeed, the Bureau's disconnected reference to a total number of 127 purportedly relevant consumer complaints lacks any foundation or support. Other than the handful of complaints attached as exhibits to the Marlow Declaration, the Bureau provides no indication as to which additional complaints the 127-complaint figure refers. The CFPB's briefing specifically cites only five complaints (representing 0.002% of the total number of loans made). Dkt. 87, CFPB Mot. Summ. Disp. at 13. The Marlow Declaration, which references a 127 number, only provides two additional examples of consumer complaints. *See* Dkt. 87, CFPB Mot. Summ. Disp.; Dkt. 87C, Marlow Decl. at 2–3. Here, too, the Bureau fails to support its deception claim.

#### 3. There Are No Facts, Let Alone Undisputed Material Facts, That Show That The Representations At Issue Were Material

The Loan Agreement disclosed all material representations to customers. Nevertheless, in contravention of well-established law, the Bureau posits that the future "total cost" of a loan, albeit unknown at the time the loan was made, was a material fact that Integrity Advance should have disclosed in its Loan Agreement. Putting aside the impossibility of disclosing unknown "total costs," the Bureau's arguments are also baseless.

A material representation is one that would change consumer behavior. *See Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984) (noting that a material representation is one that "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product"); *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 855 (D. Mass. 1992) (same). The Bureau, however, provides no facts that show that certain information, such as the cost and process of renewing the loan, was, in fact, material to Integrity Advance's consumers when they took out the loan. And "a material representation, omission, act or practice involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)). Material misrepresentations "strike at the heart of a consumer's purchasing decision." *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005).

The Bureau points to no facts here. Its expert also fails to establish that this information was material to consumers. In fact, Dr. Hastak assumed, based on his own "experience and understanding of the kinds of things that consumers typically focus on" that the cost of renewing the loan would be "an important factor" to Integrity Advance consumers, *see* Frechette Decl. ¶ 4, Ex. 3, Hastak Test. at 97:10-17; 99:7-17, without conducting any empirical evaluation to test this assumption. *Id.* 99:22-100:8; 209:8-16; 208:11-13. Indeed, Dr. Novemsky's report rebutted Dr. Hastak's conclusion on this issue because Dr. Hastak's report "provides no empirical support for the idea that consumers find [renewal cost disclosures] relevant in the first instance when taking out a loan." Dkt. 63, CFPB Mot. to Strike; Dkt. 63B, Novemsky Report ¶ 13. Further, Dr. Novemsky points out that "renewal costs are neither immediate nor certain" meaning that consumers might have been disinclined to view the renewal costs as material. *See id.* ¶ 24. As Dr. Novemsky explains, consumer decision making is just as easily driven by immediate costs and benefits, rather than later-in-time issues. *Id.* ¶¶ 22–24.[8]

In addition to pointing to no facts, the Bureau cites inapposite case law that cite legal standards that have no relationship to the materiality inquiry under deception doctrine. For example, in *FTC v. Figgie Int'l, Inc.*, the court analyzed Federal Rule of Evidence 803(24) [9], which addresses materiality as a question of admissibility and, as part of that analysis, found that the price of the heat detector products at issue was a "material fact." 994 F.2d 595, 608 (9th Cir. 1993). Second, in *Steele v. Ford Motor Credit Co.*, the court held that the understatement of a loan's finance charge, based on the lender miscalculating the amount of interest owed by the borrower, was a material non-disclosure *under TILA.* 783 F.2d 1016, 1017, 1019–20 (11th Cir. 1986). "Material disclosure" is a defined term under TILA and its implementing rule, Regulation Z. 12

[8] Indeed, Dr. Novemsky rebuts the Bureau's presumption of materiality. He has noted a study finding that fast and simple access to credit was more important to consumers than the cost of the credit. Dkt. 63, CFPB Mot. Strike; Dkt. 63B, Novemsky Report ¶ 15 (citing E.C. Lawrence & G. Elliehausen, *A comparative analysis of payday loan customers*, Contemporary Econ. Pol'y, 26(2), 299–316) (2008)).

[9] A 1997 amendment to the Federal Rules of Evidence transferred the contents of Rule 803(24) and combined them with the contents of Rule 804(b)(5) to form Rule 807 without any change in meaning. *See United States v. Cooper*, 91 F. Supp. 2d 79, 81 (D.D.C. 2000).

C.F.R. § 1026.23(a)(3)(ii). Neither "material facts" under the evidentiary rules, nor "material disclosures" under TILA are relevant here, as the only salient question is what would be material to a reasonable consumer at the time he or she took out a loan from Integrity Advance.

Materiality is an element of any claim of "deception." Dkt. 87, CFPB Mot. Summ. Disp. at 15 (citing *FTC v. Cyberpace.Com, LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006)). The Bureau's failure to show materiality precludes summary disposition in the CFPB's favor and warrants summary disposition in favor of Respondents. The Bureau has provided no facts or law to support its contention that the future costs of renewing a loan were material to consumers seeking a payday loan, at the time the consumers reviewed the disclosures. The CFPB has, thus, failed "to come forward with sufficient evidence to generate a trial-worthy issue," warranting the denial of the Bureau's motion and granting of the Respondents' motion. *See In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001).

## III. THE LOAN AGREEMENTS WERE NOT UNFAIR

The Bureau's claim that the disclosures in Integrity Advance's loan agreements amounted to an unfair practice lacks any support in fact or law. First, the Bureau's conclusory assertion that Integrity Advance's practice caused substantial injury to consumers is nothing more than conjecture and is based on unsupportable assumptions. Further, the Bureau has failed to show the requisite causal nexus between the alleged conduct and the purported injury. Second, the Bureau's contention that any injury was not reasonably avoidable ignores common-sense ways in which reasonable consumers could avoid injury either before or after accepting the loan terms, and also misrepresents the record as to what information Integrity Advance provided to consumers. Finally, the Bureau's argument that any injury was not outweighed by benefits to consumers or competition is tautological and ignores the inherent value of the short-term loans provided by Integrity Advance. Thus, the Bureau has failed to demonstrate that it is entitled to judgment as a matter of law on its unfairness claim.

**A. The Bureau Has Failed To Show Substantial Injury**

The Bureau's theory of injury is irreparably flawed and based on unsupportable assumptions. Here, despite the Bureau's assertion that its motion seeks summary disposition only as to liability and not summary adjudication of damages, the Bureau nonetheless contends that there was substantial injury of over $130 million based on its theory that Integrity Advance debited "more money from [consumers'] accounts than had been disclosed or authorized." Dkt. 87, CFPB Mot. Summ. Disp. at 11, 19. The Bureau offers no further explanation of this theory, which essentially states that *every single customer* who paid more than the "total of payments" presented in the TILA box was deceived and that these customers did not authorize those payments.[10]

Crucially, the Bureau's theory does not even attempt to account for the fact that consumers could *choose* to renew their loans, thereby incurring an additional finance charge, or could *choose* to pay off the loan in full on the payment due date. *See* Dkt. 90, Facts ¶ 11.

[10] The two cases the Bureau cites for its general proposition that "[c]ourts have been clear that monetary harm is considered a substantial injury" are inapposite. *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972-73 (D.C. Cir. 1985) (explaining that "ordinarily emotional impact and other more subjective types of harm would not make a practice unfair," but that "in most cases substantial injury would involve monetary harm."); *FTC v. Loanpointe, LLC*, No. 1:10-cv-225DAK, 2011 Wl 4348304, at *5–6 (D. Utah Sept. 16, 2011) (explaining that wage garnishment and assignment provisions in loan contracts cause substantial injury to consumers "because they can be invoked without the due process safeguards of a hearing and opportunity to present defenses" (citation omitted)), *aff'd* 525 F. Apex 696 (10th Cir. 2013).

Instead, the Bureau takes the incredible position that every single instance in which a consumer renewed a loan – regardless of the reason why – amounts to an unauthorized (and therefore unfair) charge. The Bureau ignores its burden of proof here, and it cannot show that there is a substantial likelihood that consumers were misled. Instead, the Bureau hopes that the Court will extrapolate from a handful of consumer complaints – complaints that its *own expert* expressly rejected as being representative – and find that *all* customers who renewed their loans were deceived or were likely to be deceived. This, of course, was not the case.

Further, the Bureau's injury theory ignores several key facts. First, by improperly assuming that *every* customer who renewed a loan incurred an unauthorized charge, the Bureau's injury calculations do not differentiate between, on the one hand, loans that were purposefully renewed by customers facing difficult financial situations who were unable to pay off their loan in full on their next pay day and, on the other hand, the small percentage of customers who may have misunderstood the loan renewal options. The Bureau does not apply any kind of reasonable proxy or rate at which customers were allegedly deceived, and instead assumes without justification that *all* renewal customers were deceived. *See FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997) (calculations must "reasonably approximate[] the amount of consumers' net losses"). By failing to account for this crucial distinction, the Bureau has failed to satisfy its obligation to reasonably approximate consumer injury, and instead tries to rely on the shock value of its unsupportable multi-million dollar allegation.

Second, the Bureau's injury theory does not account for returning customers. In his calculations, the Bureau's "numerical analysis" witness Robert Hughes did not account for customers who had taken out more than one loan with Integrity Advance. *See* Dkt. 87, CFPB Mot. Summ. Disp.; Dkt. 87D, Hughes Decl. ¶¶ 13–21. This omission is material for two reasons. First, returning customers indisputably understood how their loans worked; the CFPB cannot credibly argue that a customer that paid off her loan in full and then subsequently took out a second loan was deceived, misled, or could not reasonably avoid injury. Second, returning customers paid *less* in finance charges than first-time borrowers. *See* Frechette Decl. ¶ 2, Ex. 1, Carnes Test. at 162:9-24 (explaining that returning customers pay 20% less in finance charges than first-time borrowers). The Bureau's failure to account for this obvious fact further highlights the Bureau's failure to demonstrate that there has been substantial consumer injury.

Third, the Bureau misleadingly asserts that "the likelihood of substantial injury is clear" when analyzing data "from May 2008 to May 2013." Dkt. 87, CFPB Mot. Summ. Disp. at 19. However, as this Court has already held, "[t]he Bureau stipulated it is not seeking to enforce consumer financial protection laws to any of Respondent's conduct that occurred prior to the designated transfer date of July 21, 2011," Dkt. 75, Order Denying Mot. to Dismiss at 32, and, thus, facts and arguments regarding loans made prior to that date are irrelevant.[11]

The Bureau here glosses over the analysis required to show that consumers suffered substantial injury as a natural and proximate cause of Integrity Advance's practice. *See* Dkt. 89, Resp'ts' Mot. Summ. Disp. at 16-17 (unfairness requires a showing that there was a "causal relationship" between the alleged unfair acts or practices and the injury). Instead, the Bureau states in a wholly conclusory manner that "monetary harm is considered a substantial injury" and simply rests on its unsupported contention that Integrity Advance made unauthorized or undisclosed debits from consumer accounts. The Bureau has failed to put forth any facts, let

[11] While the Bureau's witness also performed calculations using July 21, 2011 as the starting date, the Bureau nevertheless points – in a misleading manner -- to the largest (and grossly overstated) theoretical injury figure it could never actually prove as matter of law.

alone undisputed facts, to support its argument that consumers suffered substantial injury as a matter of law.

**B. To The Extent There Was Any Consumer Injury, It Was Reasonably Avoidable**

The undisputed facts show that there were numerous ways, both before and after the consumer signed the loan documents, for a consumer to reasonably avoid any potential injury. *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012) ("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." (quoting *Orkin Exterminating Co.*, *v. FTC*, 849 F.2d 1354, 1365-66 (11th Cir. 1988))). The Bureau's "reasonably unavoidable" argument fails, too.

First, the Bureau ignores the obvious and common-sense way in which consumers could, and did, avoid any potential injury; consumers avoided any additional finance charges by paying back their loan, in full, on the payment due date. *See* Dkt. 90, Facts ¶¶ 4, 20. Second, the Loan Agreement contained a clear notice of the consumer's right of rescission. Specifically, if a consumer changed her mind she could return the principal and decline the loan before expiration of the three-day rescission period. Unlike the facts in *AMG*, here, consumers had to separately sign and date a specific "Right to Cancel" portion of the Loan Agreement. *See AMG*, 29 F. Supp. 3d at 1343, 1358.

Further, the Bureau erroneously and misleadingly contends that Integrity Advance trained its call representatives to not disclose the total cost of a loan during the loan application process, and thus consumers were misled and could not avoid injury. Dkt. 87, CFPB Mot. Summ. Disp. at 19. This assertion misstates the record and ignores important aspects of the loan application process. When consumers submitted a loan application, the costs of that loan were not determined until eligibility was verified and the loan was underwritten. For example, if a customer has an outstanding loan with Integrity Advance, the pending loan application would not be approved (and thus cost is irrelevant). If the customer is a returning customer, the cost of the loan will be less than for a new applicant. *See* Frechette Decl. ¶ 2, Ex. 1, Carnes Test. at 162:9-24. As the Bureau is well aware, the finance charge of a loan is determined by the amount of the loan for which the borrower is eligible.[12] Thus, total cost of the loan is *not known* until the customer has submitted a loan application and has gone through the loan verification process.[13] Then, as soon as the loan application is verified, call representatives were instructed to confer with consumers after they received the loan. Even after the customer consummates the loan, the "total cost" was determined by post-closing consumer choices (*e.g.*, a borrower that prepaid the loan would pay less than the "Total of Payments," while a borrower that experienced financial distress and exercised his renewal option to extend the repayment period would pay more).

In addition, after consummating the loan – which included hearing an explanation of the repayment option from the call representatives and also reviewing and individually signing

[12] Indeed, in the context of mortgage loans, the Bureau's website lists six different factors that go into determining the finance charge, including the loan amount and loan term – neither of which could have been known by Integrity Advance until after a loan application was submitted and reviews. *See* CFPB, *7 Factors That Determine Your Mortgage Interest Rate*, ConsumerFinance.gov (Jan. 20, 2015), http://www.consumerfinance.gov/about-us/blog/7-factors-that-determine-your-mortgage-interest-rate/.

[13] See discussion, *supra* Section I.A, explaining that TILA does not require disclosure of "total cost" of the loan for these very reasons – the legal disclosure obligations are discrete and do not include the Bureau's nebulous and necessarily volatile concept of "total cost."

numerous points in the loan documents, *see id.*; Dkt. 90, Facts ¶ 4 – consumers received (1) a welcome email reiterating the repayment options, and (2) alerts regarding their payment obligations. Dkt. 90, Facts ¶ 7; Dkt. 63, CFPB Mot. Strike; Dkt. 63A, Apex B & C; Dkt. 63B, Novemsky Report ¶ 25. The welcome email prominently explains the borrower's repayment options. Dkt. 63, CFPB Mot. Strike; Dkt. 63A, Apex B; Dkt. 63B, Novemsky Report ¶ 26. This alert clearly states that consumers have "3 convenient options for paying your loan back," including "PAY THE LOAN IN FULL." Dkt. 63, CFPB Mot. Strike; Dkt. 63A, Apex C; Dkt. 63B, Novemsky Report ¶ 26.

Lastly, as discussed above, the Bureau cannot credibly argue that *returning* customers did not understand their repayment options. It is undisputed that a consumer who paid off her loan in full and then decided to apply for, and accept, a subsequent loan could not have been misled or deceived about the cost of the loan or its operation. Indeed, the undisputed facts demonstrate that *nearly one-third* of customers in 2011 and 2012 were returning customers. Dkt. 63, CFPB Mot. Strike; Dkt. 63B, Novemsky Report ¶ 31. The Bureau points to no contrary facts, and offers no explanation as to how *returning* customers were purportedly misled or could not otherwise reasonably avoid potential injury. Here, too, the Bureau has plainly failed to meet its burden.

### C. To The Extent There Was Any Injury, It Was Outweighed By Countervailing Benefits to Consumers

Lastly, the Bureau argues that "hiding the total cost of loans from consumers" produces adverse consequences to consumers. The Bureau's argument, however, presupposes that all consumers were deceived and is, in effect, nothing more than a tautological argument that deception adversely affects consumers and there are no countervailing benefits to deceiving consumers. There is no dispute that deception harms consumers. But, here, the Bureau has failed to point to any facts, let alone undisputed facts, to satisfy its burden of showing that Integrity Advance's Loan Agreement produced no countervailing benefits to consumers. Putting aside the Bureau's circular reasoning, the Bureau ignores the fact that Integrity Advance provided consumers with credit when few, if any, other creditors might have done so. *See FTC v. J.K Publ., Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000) ("[A]n increase in services or benefits to consumers" can outweigh adverse consequences to consumers." (citing *FTC v. Windward Mktg., Inc.*, No. CIV. A. 1:96-cv-615F, 1997 WL 33642380, at *11 (N.D. Ga. Sept. 30, 1997))). Further, the renewal option presented in the Loan Agreements gave consumers an opportunity to extend their repayment period in the event of financial distress or in the event that a consumer was otherwise unable (or unwilling) to repay the loan on the repayment date. The Bureau's motion includes no facts showing why the opportunity to renew a loan and extend the repayment period – instead of being immediately placed in default, with the attendant harm to consumers' credit scores being presumptively obvious – did not benefit consumers. The Court should also deny the Bureau's motion as to this unfairness claim.

## IV. THE USE OF REMOTELY CREATED CHECKS WAS NOT UNFAIR

The use of remotely created checks did not constitute an unfair practice, and there are no facts or law that support the Bureau's unfairness claim here. To compensate for lack of factual support, the Bureau attempts to cast demand drafts as *per se* unlawful. This is not the case now – and certainly was not the case between 2008 and 2012. The Bureau cites an FTC Rule promulgated in December 14, 2015, Dkt. 87, CFPB Mot. Summ. Disp. at 22–23 & nn.5–6, but the rule would not apply to Integrity Advance if it was still operational, and the rule certainly does not apply retroactively.

The preamble to the FTC's Rule notes that demand drafts (or "remotely created checks") are governed principally by Articles 3 and 4 of the Uniform Commercial Code ("UCC"). *Telemarketing Sales Rule*, 80 Fed. Reg. 77520, 77523 (Dec. 14, 2015). The FTC chose to promulgate its rule as to a legal method of payment to combat fraud in the telemarketing industry, *see id.* But Integrity Advance never engaged in telemarketing sales, as that term is defined by the Telemarketing Sales Rule, nor has the Bureau made such an allegation. As noted in the preamble, until the 2015 rule change, use of remotely created checks by companies within the scope of the Telemarketing Sales Rule (unlike Integrity Advance), was not considered to be a *per se* unfair practice. *See id.* at 77537. The Bureau's reference to this Rule is a red herring, as the Rule neither relates in fact nor time to the alleged conduct at issue here.

Further, the cases upon which the Bureau relies involve circumstances in which consumers *did not authorize* the use of demand drafts. Indeed, those cases involve instances when customers had no apparent relationship – contractual or otherwise – with the parties making the alleged demand draft debits. *See, e.g., FTC v. Ideal Fin. Sols., Inc.*, No. 2:13-CV-00143-JAD, 2014 WL 2565688, at *1 (D. Nev. June 5, 2014) ("The FTC claims that Defendants *set up shell companies, established merchant accounts with third-party payment processors, and billed consumers using these merchant accounts, with charges upwards of $30*. For example, during a 2010 "Debt2Wealth Campaign," deductions between $30 and $40 were charged to consumers' credit cards; when those consumers called the phone number listed on the debit transaction, they were falsely told they had purchased financial counseling services." (internal citations omitted)) (emphasis added); *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 982 (N.D. Cal. 2010), *aff'd*, 475 F. Apex 106 (9th Cir. 2012) ("The record also demonstrates that individual defendants Roy and John Lin knew that most of *their 'customers' were unaware that they were* *customers*. Specifically, the Lin brothers received an avalanche of warnings from telephone companies, business partners, and even their own employees that most (if not all) of their customers had been fraudulently acquired and were being billed without authorization.") (emphasis added). Here, by contrast, for example, all of Integrity Advance's customers were aware that they were customers.

Customers, in fact, signed an ACH authorization that expressly acknowledged the possibility that Integrity Advance could use demand drafts to satisfy unpaid loan balances. Dkt. 91, Profita Decl. ¶ 2, Ex. 1 ([y]ou authorize us to prepare and submit one or more checks drawn on Your Bank Account . . . ."). Indeed, the only evidence that the Bureau presents to support its contention that Respondents' use of remotely created checks constituted an unfair practice is the unsubstantiated opinion of Dr. Hastak and a consumer complaint from April 7, 2010. *See* Dkt. 88, CFPB Facts; Dkt. 88E, Ex. 24 at 48; Dkt. 87, CFPB Mot. Summ. Disp. at 25. To begin, the Bureau's statement that Dr. Hastak's conclusion – that the Authorization for Remotely Created Checks (the "Authorization") "is neither clear nor conspicuous" – was "unrebutted" by Respondents' expert is inaccurate. Dkt, 87, CFPB Mot. Summ. Disp. at 25. In squarely rebutting Dr. Hastak's report, Dr. Novemsky's report expressly states that "there is no data provided about how many consumers read [the Authorization] and there is no empirical analysis provided about what consumers understand" from the Authorization. *See* Dkt. 63, CFPB Mot. Strike; Dkt. 63B, Novemsky Report ¶ 49. In fact, Dr. Novemsky repeatedly testified that in order to opine on how consumers would interpret the Authorization, he would need to see empirical data, such as a consumer survey, which the Bureau expressly chose not to undertake. *See* Dkt. 87, CFPB Mot. Summ. Disp.; Dkt. 87E, Novemsky Test. at 174:5-175:11.

Additionally, Dr. Hastak's declaration that the Authorization is not clear and conspicuous mischaracterizes and overlooks key portions of the ACH authorization form. Dkt. 87, CFPB Mot. Summ. Disp. at 25. For instance, the demand draft paragraph was located at the bottom of the first page of the ACH authorization, which was a completely different section of the Loan Agreement, *see* Dkt. 91, Profita Decl. ¶ 2; Dkt. 91A, Ex. 1 at 8. The ACH authorization was not positioned as Dr. Hastak described it. *See* Dkt. 87, CFPB Mot. Summ. Disp.; Dkt. 87A, Hastak Report at 27. Finally, the demand draft language clearly stated that "If you revoke your authorization . . . 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." *See* Dkt. 91, Profita Decl. ¶ 2; Dkt. 91A, Ex. 1 at 8.

Moreover, the *sole* consumer complaint that the Bureau cites in support of its substantial injury argument is dated April 7, 2010. *See* Dkt. 88, CFPB Facts; Dkt. 88E, Ex. 24 at 48. However, the Bureau has acknowledged that "[t]he UDAAP claims in this proceeding are limited to conduct that occurred *on or after July 21, 2011*." Dkt. 94, CFPB Opp. to Mot. to Stay at 7 (emphasis added). The Court should not permit the Bureau to support its motion for summary disposition with a consumer complaint that predates July 21, 2011.

Finally, the demand draft paragraph expressly provides a "reasonably avoidable" way that consumers could avoid any potential injury caused or likely to be caused by use of remotely created checks. Indeed, a customers could and did, in fact, "provide [Integrity Advance] with another form of payment," including, but not limited to, a cashier's check or money order. *See* Dkt. 91, Profita Decl. ¶ 2; Dkt. 91A, Ex. 1.

The Bureau is not entitled to summary disposition on the claims presented in Count VII of the Notice of Charges.

## V. INTEGRITY ADVANCE DID NOT VIOLATE EFTA

EFTA provides that "[n]o 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(a)(1) (emphasis added). The Official Interpretation to Regulation E states that "[c]reditors may not *require repayment of loans* by electronic means on a preauthorized, recurring basis." 12 C.F.R. § 1005, Supp. I, 1005.10(e)(1) (emphasis added).

The undisputed facts show that the Loan Agreement did not require *repayment* by EFT. In fact, the Loan Agreement's ACH authorization expressly states that "[y]ou 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." Dkt. 90, Facts ¶ 21. While ACH withdrawals may have been the predominate means by which consumers paid their loans or paid the finance charge accrued when renewing their loans, the Loan Agreement was not conditioned on such repayment.

Neither the CFPB, nor the cases cited in its brief, address the effect of the Loan Agreement's alternative payment options. In direct contrast, the court in *FTC v. PayDay Financial LLC* stated that the "loan agreements at issue provided that any loan payment by a consumer '*shall* be made by us [meaning the defendant lender] effecting one or more ACH debit entries to your Account at the Bank.'" 989 F. Supp. 2d 799, 812 (D.S.D. 2013) (alteration in original) (emphasis added). This distinction is important. EFTA "protect[s] consumers' ability to choose their payment method," *see Kemply v. Cashcall, Inc.*, No. 08-CV-03174-MEJ, 2016 WL 1055251, at *7 (N.D. Cal. Mar. 16, 2016), rather than forcing consumers to repay loans through EFTs. The Loan Agreement provided this choice.

Since the Loan Agreement did not condition the repayment of the loan on using EFTs, the CFPB cannot support is claim under EFTA and Regulation E. Accordingly, the Court should deny the Bureau's motion for summary disposition and grand the Respondents' motion.

## CONCLUSION

For the foregoing reasons, the Bureau's motion for summary disposition should be denied.

Respectfully submitted,

Dated: May 27, 2016

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**CERTIFICATION OF SERVICE**

I hereby certify that on the 27th day of May, 2016, I caused a copy of the foregoing Proposed Order to be filed by electronic transmission (e-mail) with the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Curtis E. Renoe (Curtis.e.renoe@uscg.mil) and Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), and served by electronic mail on the following parties who have consented to electronic service:

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