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' PRE-HEARING STATEMENT**

RESPONDENTS' PREHEARING STATEMENT

Integrity Advance, LLC and James R. Carnes (together, "Respondents"), pursuant to 12 C.F.R. § 1081.215, and the Court's Scheduling Order, as amended (*see* Dkts. 27, 48, 80, and 107) submit the following prehearing statement.

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I. INTRODUCTION

Integrity Advance strove to offer a fair and helpful product to consumers, and the Company took steps to help ensure that consumers understood the terms and conditions of the loan for which its customers had applied. These steps went far beyond industry standard, and included clear disclosures and descriptions of consumers' rights under the loan agreement; eight separate areas for consumers to sign or initial the loan agreement; and call representatives who explained the loan's terms, answered questions, and confirmed customer information.

II. STATEMENT OF FACTS

Integrity Advance was a nonbank short-term, small-dollar lender. Between May 2008 and December 2012, Integrity Advance offered short-term, small-dollar loans to consumers, which ranged in value from $100–$1000. James R. Carnes was the CEO and president of Integrity Advance. Integrity Advance ceased offering loans to consumers three years ago in December 2012, ceased operations altogether on June 30, 2013, and returned its Delaware lending license on July 10, 2013.

A. Delaware Licensing And Examination

Before Integrity Advance could begin lending, the Company had to submit its proposed lending documents and a license application to the Delaware State Bank Commissioner. Under Delaware law, Integrity Advance could only obtain a Delaware lending license once the State Bank Commissioner determined "that the financial responsibility, experience, character and general fitness of the applicant . . . and of the officers and directors thereof are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently." Del. Code Ann. tit. 5 § 2204 (2015). Delaware law required Integrity Advance to renew its license regularly and furnish the State Bank

Commissioner with any materials or information that had changed since the initial filing or any renewal application, including any changes to loan agreements and promissory notes. *See, e.g.*, Del. Code Ann. tit. 5 § 2207. The Company was examined as part of the Delaware regulator's supervisory process, and maintained its license and good standing until it returned its lending license on July 10, 2013 as part of Integrity Advance's structured wind-down.

B. Loan Application Process

In offering short-term, small-dollar loans to consumers, Integrity Advance primarily used a web-based Application and Loan Agreement. Consumers primarily accessed the Application through lead generation websites, which would forward eligible consumers to Integrity Advance's website to confirm their application information and walk through the Loan Agreement. For most first-time borrowers, a customer representative would call the applicant to facilitate this process and answer any questions. Integrity Advance had a high rate of returning borrowers.

C. Loan Agreement

The short-term, small-dollar loans offered by Integrity Advance included a set finance charge, with repayment due on the consumer's next pay date. Under the terms of the Loan Agreement, consumers were required to choose a payment option – either pay the loan in full on the Payment Due Date, or renew the loan, and incur a new finance charge. For consumers who did not select a payment option, the loan was automatically renewed. Integrity Advance Loan Agreements contained a TILA Box as required by TILA and Regulation Z. The TILA Box was structured based on the example provided by the regulation itself, at 12 C.F.R. § 1026 App. H.2. Immediately below the TILA Box, the Loan Agreements provided a Payment Schedule, set out in a text box, with bolded headings, which indicated that the loan would be repaid in one payment of the amount listed in the Total of Payments section of the TILA Box.

Below the TILA Box and Payment Schedule, the Loan Agreements stated the consumers' payment options in bold and all capitals. Under the Loan Agreement, the consumer agreed to select a payment method at least three days before their "Payment Due Date"—choosing either (1) to pay the loan in full or (2) renew the loan, which allowed consumers to pay a renewal fee and wait until the next pay date to repay the loan. Under the Loan Agreement, if consumers did not select their payment option, Integrity Advance renewed the loan, rather than attempting to collect the full cost of the loan or put consumers into default. A consumer who paid the loan off in full on the Payment Due Date repaid the loan principle and the finance charge (typically $30 for every $100 in credit taken out by the consumer). When a customer renewed his loan, he was charged a renewal fee. Customers who exceeded the four allowed renewals under the Loan Agreement were placed into an "auto-workout" repayment plan, pending contact with the consumer.

The Integrity Advance loan agreement required that a customer sign or initial each loan application up to eight separate times before receiving a loan. Customer representatives spoke with first-time loan applicants to ensure that they understood the details of the loan. Integrity Advance then sent the customer a welcome email that provided details about how the loan worked and reiterated what was described during the initial phone call. In addition, Integrity Advance sent customers routine emails that apprised customers of payment due dates, payment amounts and on what date the customer's account was going to be debited.

D. Loan Repayment

The Loan Agreement provided consumers with various options for repaying their loan. By the terms of the agreement, consumers were required to contact Integrity Advance three days[1] before their payment due date to schedule the loan payoff or otherwise repay the loan in full on the Payment Due Date. The Loan Agreement also permitted consumers to renew their loan by paying an additional finance fee and extending the Payment Due Date on the balance of the loan to the consumer's next pay date. Consumers were allowed to renew their loans up to four times. By the terms of the Loan Agreement, a consumer's loan automatically renewed if the consumer did not schedule a payment or otherwise repay their loan in full on the Payment Due Date.

Prior to the Payment Due Date (and before subsequent Payment Due Dates – if a loan was renewed one or more times), consumers received a payment reminder email, detailing their options for repayment under the Loan Agreement. Consumers whose loans were renewed the full four times, and who had not contacted Integrity Advance were placed in the "auto-workout" cycle. Consumers could also contact Integrity Advance and set up an individualized workout plan. Integrity Advance accepted a variety of payment methods on its loans, including cashier's checks and money orders, in addition to ACH debits (also known as "electronic funds transfers" or "EFTs").

III. ARGUMENT

A. The Bureau Does Not Have Jurisdiction Under The CFPA As To Respondents

1. Constitutional Defects in Bureau's Authority

Respondents incorporate all of the arguments that they have made in connection with their motion to dismiss. To summarize, the newly-created consumer financial protection

[1] While the terms of the Loan Agreement specified a call three days before the Payment Due Date, due to account for bank restrictions, as a matter of practice Integrity Advance generally allowed consumers to schedule payments up until the day before the Payment Due Date.

powers of the CFPA – which include taking enforcement actions against nonbanks for violations of the CFPA – had not vested in the agency prior to confirmation of its first Director in July 2013. Respondents were no longer engaged in the offering or provision of any consumer financial service or product by that time. Accordingly, Respondents never offered or provided a consumer financial product or service at a time when the Bureau had CFPA jurisdiction as to nonbanks. The Bureau seeks to retroactively apply its CFPA authority to Respondents, who never offered consumer financial products or services at a time when the CFPA reached that conduct.

In addition, the Bureau's administrative forum and its rules of procedure violate the due process and equal protection clauses of the Constitution. The CFPA specifically provides that the Bureau may achieve *identical remedies* in either administrative adjudications or civil actions brought in federal court, 12 U.S.C. § 5565(a)(1), but respondents in an administrative adjudication are hurried through an expedited process, 12 C.F.R. § 1081.400(a), are denied the ability to seek a trial by jury, *see id.* § 1081.400(c)(1), as well as the protective procedures inherent in the Federal Rules of Civil Procedure and Federal Rules of Evidence, *see id.* § 1081.303(b)(4).

2. Statute of Limitations and Scope of the Bureau's Claims and Relief

The CFPA's three-year statute of limitations, 12 U.S.C. § 5564(g)(1), governs this administrative enforcement action and functions to preclude all claims as to Mr. Carnes. Moreover, the one-year statutes of limitations for TILA and EFTA claims apply and preclude the remainder of the Bureau's claims against Integrity Advance.[2] The limitation period as to

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[2] In *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB, 2015 WL 1013508, *33 (S.D. Ind. Mar. 6, 2015), the district court held that the one-years statute of limitations under TILA applied to the Bureau's claims. This principle, and a similar limiting provision under EFTA, apply to the Bureau's claims here. Since the Bureau can achieve identical remedies

CFPB's claims has run and the Bureau may not pursue these claims, as Respondents have previously noted their motions filed with the Court.

In addition, Enforcement Counsel has stated that it is only seeking monetary relief under the provisions of the CFPA. Thus, fundamental principles of retroactivity, which the Bureau has already acknowledged apply in this matter, preclude the application of any monetary relief – civil money penalties or equitable relief – for conduct that predates July 21, 2011, including conduct that allegedly violated TILA and EFTA.[3]

B. The Record Contains No Evidence Of Deception

1. Legal standard[4]

An act or practice is only "deceptive" if (1) "there is a representation, omission, or practice that," (2) "is likely to mislead consumers acting reasonably under the circumstances," and (3) "the representation, omission, or practice is material." *See CFPB v. Frederick J. Hanna*

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in federal court or its own administrative forum, the same protections and limitations should also apply.

[3] Moreover, even if this Court deems claims prior to July 21, 2011 valid, under 28 U.S.C. § 2462, the CFPB may not seek "any civil fine, penalty, or forfeiture" against Respondents related to conduct prior to November 18, 2010. Any monetary requested by the Bureau would fall within the limitations period of § 2462. *See SEC v. Graham*, No. 4:13-cv-10011-JLK (11th Cir. May 26, 2016. The Bureau's claims "accrued" as to the conduct that the Bureau alleges against Respondents when the conduct occurred (*i.e.*, when the loans were made). *See 3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1460–63 (D.C. Cir. 1994); *see also United States v. Lindsay*, 346 U.S. 568, 568 (1954) (stating that general rule that a cause of action "accrues when it comes into existence"). Thus, under any theory, the Bureau cannot obtain monetary damages or penalties related to conduct prior to November 18, 2010.

[4] The Court has held on summary disposition that, as to Integrity Advance, the Loan Agreements were "facially deceptive." *See* Dkt. 111, July 1, 2016 Order at 15-18. However, the Court did not rule as to Mr. Carnes. *Id*. at 12; *see also* Dkt. 112, July 5, 2016 Order at n.1 ("[T]he question of whether Respondent Carnes engaged in deceptive acts or practices remains open for resolution.") As discussed above, the CFPB has alleged that it has authority over Mr. Carnes as a "related person" with respect to Integrity Advance (and therefore, as a "covered person" to the extent Integrity Advance is a "covered person"). Thus, the CFPB alleges that Mr. Carnes is *individually and independently liable* for the deceptive conduct alleged by the Bureau. It is necessary, therefore, to address the CFPA's deception standard.

& Assocs., P.C., 114 F. Supp. 3d 1342, 1370 (N.D. Ga. 2015), *mot. to cert. appeal denied sub nom. CFPB v. Frederick J. Hanna & Assocs., P.C.*, No. 1:14-CV-2211-AT, 2015 WL 10551424 (N.D. Ga. Nov. 16, 2015) (citing *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003).

2. The Bureau lacks evidence to prove that a reasonable consumer was deceived

Here, Enforcement Counsel's deception case fails because it cannot prove that reasonable consumers were likely to misunderstand the nature, operation, and/or terms of the loan for which they applied, and to which they agreed. Enforcement Counsel's primary argument is that the Loan Agreement was "facially" deceptive. To prove this point, Enforcement Counsel attempts to substitute its own reading of the Loan Agreement, or the reading of its expert – a professor of marketing – for that of reasonable consumers. But the law is clear that there needs to be evidence in the record as to what a reasonable consumer would likely conclude, and here, there is no such evidence. *Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984) ("[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.").

In addition to the TILA Box, the Loan Agreement contained disclosures that provided reasonable consumers with important information about how the loan operated and that helped consumers understand the terms of the loan. For example, the Loan Agreement provided a "special notice" (displayed in all capital letters), which stated:

> SPECIAL NOTICE:
>
> (1) THIS LOAN IS DESIGNED AS A SHORT-TERM CASH FLOW SOLUTION AND NOT DESIGNED AS A SOLUTION FOR LONGER TERM FINANCIAL PROBLEMS.
>
> (2) ADDITIONAL FEES MAY ACCRUE IF THE LOAN IS REFINANCED OR "ROLLED OVER."

Another notice immediately above the "Schedule of Charges and Fees" told consumers that:

> "A PAYDAY LOAN IS NOT INTENDED TO MEET LONG-TERM FINANCIAL NEEDS."

The Loan Agreement, thus, included important information in addition to the TILA Box in the body of the agreement, which was called out in bolded, underlined, and/or all-caps fonts and headers.[5] The record contains no evidence as to a reasonable consumer's interpretation of the Loan Agreement. 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). Indeed, Respondents took steps to ensure that consumers understood and appreciated the nuances of the loan for which they applied.

3. The Bureau presents no evidence that any deception related to material representations

Materiality is an element of any claim of "deception." *FTC v. Cyberpace.Com, LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006). 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). 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

[5] The TILA Box itself is limited to the exact wording described by Regulation Z and the Model Forms. *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.

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 record contains no evidence of what aspects of a loan agreement would be material to a consumer. Putting aside the impossibility of disclosing unknown "total costs," Enforcement Counsel cannot demonstrate any 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.

C. Respondent Carnes Has Not Engaged In Deceptive Conduct

Enforcement Counsel has failed to prove its deception case as a matter of law as to Integrity Advance or Mr. Carnes, notwithstanding Enforcement Counsel's implicit arguments. Naming Mr. Carnes as a related person merely confers subject matter jurisdiction under the CFPA.[6] The Bureau must still establish that any "related person" is liable for the alleged conduct at issue. Accordingly, here, the Bureau must prove that Mr. Carnes, as a "related person" specifically engaged in the alleged unfair or deceptive acts or practices. Merely showing the fact of deceptive or unfair conduct as to Integrity Advance does not establish liability as to Mr. Carnes.

Here, it is helpful to consider two separate sources of legal authority for determining the Bureau's standard of proof. First, the CFPA's definition of "related person" is nearly identical to the definition of "institution-affiliated person" ("IAP") under the Federal Deposit Insurance Act ("FDIA"). *Compare* 12 U.S.C. § 5481(25)(C)(i), *with* 12 U.S.C. § 1813(u)(1). The FDIA enables the banking agencies to bring claims against IAPs for allegedly unfair or deceptive conduct arising under section 5 of the FTCA.

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[6] The CFPA provides that a related person "shall be deemed to mean a covered person for all purposes of any provision of Federal consumer financial law." 12 U.S.C. § 5481(25)(B).

Courts in the D.C. Circuit, in turn, have considered the standards that an IAP has specifically engaged in unlawful conduct. For example, in *Grant Thornton, LLP v. Office of Comptroller*, the D.C. Circuit held that under the banking regulators' IAP jurisdiction, "imposition of a penalty requires that the accused be shown both to fit the statutory definition and *to have committed the acts actually triggering the punishment*." 514 F.3d 1328, 1331 (D.C. Cir. 2008) (emphasis added). As the D.C. Circuit in *Grant Thornton* makes clear, the CFPB's burden to show individual liability of Mr. Carnes is twofold: He must be shown to: (1) "fit within the statutory definition" of "related person" and (2) to have "commi[ted] the acts actually triggering the punishment." *Id.* at 1331. Indeed, in *Grant Thorton*, the D.C. Circuit found that "[w]hile the definitional section doesn't specify that the accused must have engaged in [the prohibited conduct] . . . the OCC doesn't dispute that, to prevail under the substantive provisions, it must show that Grant Thornton's audit activity amounted to such 'conduct.'" *See id.* at 1332. Here, too, Enforcement Counsel must show that Mr. Carnes was both a related person within the meaning of the CFPA and that he specifically engaged in conduct giving rise to allegations of deception or unfairness.

Moreover, the Court should consider the manner in which courts have applied the FTC's deception doctrine to alleged conduct by individuals. The FTC must establish three elements in order to prove individual liability. First, the FTC first must prove the corporate practices at issue were misrepresentations or omissions generally relied upon by reasonably prudent persons and that consumer injury resulted. *See FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989 (citing *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1291–92 (D. Minn. 1985)) (listing three requirements to find an individual liable under the FTCA for corporate practices).

Second, the FTC must demonstrate that the individual either directly participated in the action or had authority to control those who did so in order to demonstrate liability. *FTC v. Freecom Commc'n., Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005). Merely demonstrating that an individual was a CEO will not suffice in the absence of other facts demonstrating control. *FTC v. Swish Mktg.*, 2010 U.S. Dist. LEXIS 15016 at *14–15 (N.D. Cal. Feb. 22, 2010) (rejecting the FTC's argument that an individual's "status as CEO, standing alone, plausibly demonstrates his control over the company (and warrants the inference of involvement in the deception)"). *But see Amy Travel*, 875 F.2d at 573 (stating that "active involvement in business affairs and the making of corporate policy" can demonstrate control).

Finally, the FTCA also requires "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Amy Travel*, 875 F.2d at 574.

In many cases arising under the FTCA in which a court has found an individual liable for unfair or deceptive conduct, the individual defendant actively designed the deceptive or fraudulent materials. *See Amy Travel*, 875 F.2d at 574 (finding that "as authors of the sales scripts," the liable individuals "were certain of the misrepresentations contained in them"); *FTC v. Ross*, 897 F. Supp. 2d 369, 385–86 (D. Md. 2012) (finding the defendant individually liable because she "wrote, edited, reviewed, and participated in the development" of the misleading advertisements at issue); *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1103 (9th Cir. 2014) (finding that an individual defendant's "level of participation in the scheme and knowledge of the deceptive web pages shows that he know or was recklessly indifferent to [the company's] deceptive practices."). There is, of course, no evidence of that in this case.

In other cases under the FTCA, courts found that individuals engaged in unfair practices when, for example, the individuals substantively reviewed the deceptive materials before their dissemination. *See, e.g. FTC v. World Media Brokers*, 415 F.3d 758, 764–65 (7th Cir. 2005) (finding individual defendant liable where there was evidence he knew a scheme was illegal and approved scripts "directing telemarketers to assure consumers" that it was legal); *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006) (finding that the liable individual was "directly involved in the development of the deceptive marketing scheme," reviewed solicitation forms and "was aware" of resulting consumer injuries); *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1082 (C.D. Cal. 2012) (finding that the former president of the company had knowledge of the company's practices because he had "seen, reviewed, commented on, and approved various versions" of the misrepresenting documents).

Finally, in some instances, an individual's receipt and understanding of specific information, such as complaints about a misrepresentation, may put the individual on notice as to the violations. *See, e.g.*, *Cyberspace*, 453 F.3d 1196, 1202 (finding as an element of knowledge that he had numerous conversations about consumer complaints in which he was informed customers did not understand the checks he was authorizing the company to send). But the mere existence of consumer complaints is insufficient, by itself, to create individual liability without a demonstration that an individual defendant had direct and extensive knowledge of the complaints. *See Swish Mktg.*, 2010 U.S. Dist. LEXIS at *14–16 (N.D. Cal. Feb. 22, 2010).

The Bureau has alleged that Mr. Carnes is a "related person" because of his position at Integrity Advance. The Bureau, however, has never shown – indeed, cannot show – that Mr. Carnes was anything more than the CEO of the company and that he handled its business relationships, including contracts, with lead generators and other vendors. Indeed, the Bureau has not even alleged that Mr. Carnes played any role in drafting or approving the Loan Agreement. Accordingly, there is no basis for a finding that Mr. Carnes was individually liable for any allegedly deceptive or unfair conduct (relating to remotely created checks).

D. The Use of Remotely Created Checks Was Not Unfair

The use of remotely created checks ("RCCs" or "demand drafts") was not an unfair practice in violation of the CFPA. In order to prove conduct is unfair under the CFPA, Enforcement Counsel must establish that the act or practice: (1) caused substantial injury to consumers, which is not reasonably avoidable by consumers; and (2) substantial injury is not outweighed by countervailing benefits to consumers or competition. *See* 12 U.S.C. § 5531(c). There is no evidence of such unfairness here.

A demand draft is a legitimate payment mechanism governed by the Uniform Commercial Code ("UCC"), U.C.C. § 3-104(f), and Regulation CC.[7] Indeed, Enforcement Counsel has only cited cases inapposite from the facts here. In those cases, companies fraudulently used demand drafts that consumers *never authorized*. The Bureau's reliance on inapplicable case law is an attempt to mask a lack of evidence sufficient to prove that the use of demand drafts constituted an unfair practice that caused substantial injury to consumers that was not reasonably avoidable. The evidence will show only that demand drafts were used, *with prior consumer authorization*, and that a certain amount of money was withdrawn from some consumer accounts. There is no evidence to support an argument that the use of RCCs caused substantial injury to consumers, a necessary element of any unfairness claim.

[7] Regulation CC defined "remotely created check" as "[a] check that is not created by the paying bank and that does not bear a signature applied, or purported to be applied, by the person on whose account the check is drawn." 12 C.F.R. § 229.2(fff).

Moreover, Integrity Advance customers signed an ACH authorization that expressly acknowledged the possibility that Integrity Advance could use demand drafts to satisfy unpaid balances. The ACH authorization was a completely different section of the Loan Agreement, and the demand draft paragraph was located at the bottom of the first page of that authorization. Finally, the demand draft paragraph clearly stated that customers could "provide [Integrity Advance] with another form of payment," including, but not limited to, a cashier's check or money order. Use of RCCs was hardly unavoidable; indeed, RCCs were almost never used. Thus, the Bureau cannot prevail on its unfairness claim as to the use of demand drafts.

IV. RELIEF MUST BE RELATED TO ANY CONSUMER INJURY

Any monetary relief stemming from a violation of a consumer financial law must be causally linked to *consumer injury*. *See, e.g.*, *FTC v. Publishers Bus. Servs., Inc.*, 540 F. App'x 555, 558 (9th Cir. 2013). The consumer injury analysis is required because equitable relief must be tied to *unjust* gains. *See FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 69 (2d Cir. 2006) (noting that "[r]estitution is based on *unjust* payments, not just *overall* payments . . . .") (emphasis added). And this is a fact-specific analysis. For example, in *Publishers Bus. Servs.*, the Ninth Circuit found that the district court erred in not considering actual consumer injury, which was necessarily informed by such factors as whether a customer had renewed his or her subscription for the product at issue, because "a customer who renewed subscriptions necessarily knew the actual terms of the transaction at the time of the renewal." *Id.* at 558

While reasonable estimates may be used in UDAAP cases, the Bureau must support its request for relief with an approximation of the facts. *See FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006) ("The FTC bears the initial burden of showing that the amount sought is a reasonable approximation."). Enforcement Counsel has not shown, and will not be able to show at the Hearing, that an ascertainable subset of consumers was actually injured – that is, that a cognizable group of consumers relied on allegedly deceptive or otherwise unlawful representations in the Loan Agreement to their detriment. *Cf. McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000) ("Liability under the FTC Act is predicated upon certain misrepresentations or misleading statements, coupled with action taken in reliance upon those statements.").

Here, the number of returning customers is critical. Like the situation in *Publishers Business Services*, a customer who completed one loan before taking out another loan was undoubtedly informed of and understood how the loan worked. Indeed, such customers chose to take out second, third, or even fourth loans. And the fact of returning customers, for example, must be considered in any injury calculation that the Court considers.

Moreover, Enforcement Counsel also will need to provide a reasonable estimate that distinguishes between customers who voluntarily made use of either the affirmative or automatic renewal provisions in the Loan Agreement and customers who inadvertently allowed their loans to renew. Indeed, the Court has already noted this factor in addressing consumer injury, explaining that "[s]ome consumers affirmatively chose the option to extend their loan due date in return for an additional finance charge. *In such cases, the consumers got the benefit of their bargain* . . . ." (emphasis added). *See* Dkt. 111, July 1, 2016 Order at 23.

The Bureau has yet to describe the relief it seeks through the present action (notwithstanding the Bureau's prayer for any and all relief available under the CFPA). *See* Notice at pp. 14–15. Respondents request that the Court describe bounds for any monetary relief that are consistent with the number of consumers, if any, it finds to have been injured and apply a reasonable remedy based on substantial evidence in the record.[8]

V. CONCLUSION

After the presentation of evidence, Respondents will request that the Court issue a Recommended Decision that Integrity Advance provide no equitable relief or civil money penalties. Respondents will also request a Recommended Decision that Mr. Carnes did not engage in deceptive acts or practices, and that Respondents did not engage in unfair acts or practices as to the use of RCCs.

Respectfully submitted,

Dated: July 12, 2016

By: /s/ Allyson B. Baker

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[8] To the extent Enforcement Counsel seeks civil money penalties, the Court must take the statutory mitigating factors of 12 U.S.C. § 5565(c)(3) into account. These include:

(A) the size of financial resources and good faith of the person charged;
(B) the gravity of the violation or failure to pay;
(C) the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided;
(D) the history of previous violations; and
(E) such other matters as justice may require.

Application of these mitigating factors shows that a civil money penalty imposed, if any, against either Respondent be of minimal amount.

CERTIFICATION OF SERVICE

I hereby certify that on the 12th day of July, 2016, I caused a copy of the foregoing Prehearing Statement to be filed by electronic transmission (e-mail) with the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Heather L. MacClintock (Heather.L.MacClintock@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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