UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	**ENFORCEMENT COUNSEL'S POST-HEARING BRIEF**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

ENFORCEMENT COUNSEL'S POST-HEARING BRIEF

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I. Introduction

From 2008 until 2013, Integrity Advance originated loans to consumers in an illegal and deceptive manner. The company provided disclosures to consumers that indicated that their loans were single payment loans, even though the default operation of the loans called for multiple loan rollovers that caused the costs of the loans to multiply. The Administrative Law Judge ruled, at summary disposition, that Integrity Advance violated the Truth in Lending Act and engaged in deceptive acts and practices. However, the Administrative Law Judge's ruling left three issues to be decided at trial: 1) whether Respondent James Carnes (Carnes), the chief executive of Integrity Advance, is responsible for the deceptive and unfair acts and practices of his company; 2) whether Respondents' use of remotely created checks was an unfair act or practice under the Consumer Financial Protection Act of 2010 (CFPA); and 3) the appropriate relief, including restitution to consumers, civil money penalties, and injunctive relief.

In order to establish personal liability against Carnes, Enforcement Counsel had to show that Carnes had authority to control the acts of Integrity Advance. The evidence presented at trial left no dispute on this point: Carnes exercised full control and authority over Integrity Advance and he was the CEO and majority owner of Hayfield Investment Partners (Hayfield), Integrity Advance's parent company. In order to meet its burden Enforcement Counsel also had to show that Carnes had knowledge of Integrity Advance's misrepresentations. There is no dispute on this fact as well—Carnes admitted that when he was running Integrity Advance he knew how the company's loans were disclosed, knew how the loans automatically renewed if a consumer did not call the company, and knew that most consumers would experience renewals which would raise their loan costs above what had been disclosed.

The testimony at trial also confirmed that Integrity Advance unfairly used remotely created checks to debit consumer accounts when those consumers had taken steps to block the company's electronic access to their bank accounts. Respondents used this procedure even though most consumers are not familiar with remotely created checks, and the contract language ostensibly justifying the practice was unclear and hidden in fine print. Further, the evidence is undisputed both that Carnes knew that Integrity Advance was using remotely created checks when consumers were trying to protect their bank accounts and that Carnes had the authority to stop the practice.

The CFPA (12 U.S.C. § 5565), empowers the Administrative Law Judge to give broad relief to Enforcement Counsel and consumers. Here, Enforcement Counsel properly seeks restitution, which is measured by the amount consumers paid to Integrity Advance above what the company disclosed in its loan agreements. Enforcement Counsel presented evidence at trial that reasonably approximates the amount of fees Integrity Advance charged beyond what was disclosed in consumers' TILA boxes.[1] Finally, Enforcement Counsel seeks Tier 1 penalties under the CFPA against both Integrity Advance and Carnes for each practice that violated Federal consumer financial law. Enforcement Counsel further seeks injunctive relief to aid former Integrity Advance consumers and ensure that Respondents do not violate the Federal consumer financial laws in the future.

II. Procedural Background

On November 18, 2015, the Consumer Financial Protection Bureau (Bureau) filed a Notice of Charges against Integrity Advance and its chief executive officer James R. Carnes. *See*

[1] Enforcement Counsel has also calculated revised figures to address questions posed by the Administrative Law Judge during trial.

Notice [Dkt. 001]. The Notice of Charges alleged violations of the Truth in Lending Act (TILA) and the Electronic Fund Transfer Act (EFTA), and alleged that Respondents had engaged in deceptive and unfair acts and practices. *Id.*

The parties filed cross motions seeking summary disposition on May 10, 2016. The Administrative Law Judge issued an order partially granting Enforcement Counsel's motion for summary disposition and denying Respondents' motion in its entirety. Order [Dkt. 111]. The Administrative Law Judge held that Integrity Advance violated the Truth in Lending Act (Counts I and II), the Electronic Fund Transfer Act (Counts V and VI), and engaged in deceptive conduct (Count III). *Id*. The parties subsequently stipulated to the withdrawal of Count IV. *See* Mot. to Withdraw Count IV [Dkt. 125]. The Administrative Law Judge then conducted a three-day hearing on Carnes's liability under Count III, the Count VII unfairness claim related to the use of remotely created checks, and the appropriate relief for Respondents' unlawful conduct.

III. Factual Background

1. Individual Liability

Integrity Advance is a Delaware limited liability company that originated and serviced small dollar consumer loans. *See* Order Partially Granting Summ. Disposition [Dkt. 111] (Order), Facts Deemed Established at ¶¶ 1, 3. Integrity Advance offered only a single product, a short term 'payday' loan. Enforcement Counsel Findings of Fact (FOF) ¶¶ 74-75. The Administrative Law Judge previously found that Integrity Advance's disclosure of the costs of that loan violated TILA and was deceptive. *See* Order [Dkt. 111] at 27, 31.

Integrity Advance was wholly-owned by an entity called Hayfield Investment Partners (Hayfield). EC-EX-067; Tr. I 94:5-12; Tr. I 100:14-17. Carnes was the founder, chief executive officer, and majority owner of Hayfield. EC-EX-067; Tr. I 94:5-12; Tr. I 100:14-19; Tr. I

102:23-103:3. As such, Carnes acted as the chief executive of all of the Hayfield subsidiaries, including Integrity Advance. Tr. I 94:5-12; Order [Dkt. 111], Facts Deemed Established at ¶ 6; Tr. I 104:23 – 105:12. Carnes agreed that as the chief executive, he had authority over and was the ultimate decision-maker at Integrity Advance. Tr. I 209:1-10; EC-EX-068 at 32:15-17; Tr. I 221:22 – 222:1; FOF ¶¶ 59-63.

Carnes was an active and involved manager of Integrity Advance. Carnes was in the office every day along with other employees who provided services to the company (Tr. I 209:22-210:2; Tr. I 74:13-17; Tr. I 30:16-25), and he conducted regular meetings about Integrity Advance business. FOF ¶¶ 38, 54-56, 58. Carnes also displayed a comprehensive knowledge of Integrity Advance's business during his testimony at trial. *See e.g.,* Tr. I 118:5-120:4 (explaining details about the pricing of payday loan leads); Tr. I 177:8-178:11 (describing in detail a fraud issue that occurred at one of Integrity Advance's call vendors over five years ago).

Integrity Advance developed its loan product in 2008 when Carnes formed the company and the company started making loans to consumers. EC-EX-068 at 7:18-25; Tr. I 230:25 – 231:5. Once Integrity Advance had developed its loan agreement and loan product, there were no meaningful changes made to the company's business model. Tr. II 38:20 – 39:1; Tr. I 38:18 – 39:10; EC-EX-068 at 22:6-14; Tr. II 15:10-25. Throughout its existence, Integrity Advance only offered one loan product and had no additional sources of revenue. Tr. I 94:19 – 95:8. The revenue and resulting operating profits generated by Integrity Advance's loans resulted in more than 75% of Hayfield's operating profits in most years. FOF ¶¶ 12-14.

At the time Integrity Advance created its loan product and loan agreement, Carnes was one of only four individuals who performed functions for Integrity Advance. FOF ¶¶ 20, 77. In addition to Carnes, there was Edward Foster (the company's general counsel), Hassan Shahin (an

information technology specialist), and a receptionist. FOF ¶ 20. At trial, Carnes and Foster would not clearly state who decided to implement Integrity Advance's deceptive loan agreement. However, Carnes was the chief executive and the loan agreement formed the basis for Integrity Advance's only product; a product that generated more than 75% of Hayfield's revenues. Tr. I 104:13 – 105:12; EC-EX-068 92:19-93:16; Tr. I 112:8 – 114:25. Foster, the company's general counsel, testified that his involvement in developing the loan agreement was purely legal in nature. Tr. II 28:4-23; Tr. II 43:8 – 44:17. Given this testimony, it can be inferred that he did not make the business decision to approve the loan product or the loan agreement. Shahin was the company's primary IT support and there is no evidence in the record that his duties extended into business decisions about the loan agreement or loan product. Tr. I 212:14 – 213:3. Similarly, there is no evidence to suggest that the receptionist had corporate decision-making authority. Based on all of the evidence and the credibility of the witnesses' testimony, the ALJ can find that Carnes approved the use of the deceptive loan agreement.

Carnes understood that the loan agreement disclosed Integrity Advance's loans in a manner which indicated only a single finance charge. Tr. II 51:16-25. He understood that Integrity Advance's loans would rollover by default if a consumer did not call the company in advance of their payday. Tr. I 219:11-17. Carnes also understood that consumers who did not contact the company would have their loans renewed repeatedly, which would result in much higher costs than what had been disclosed. Tr. I 219:18 – 220:3; EC-EX-068 245:10-25. And Carnes understood that most Integrity Advance consumers would experience at least one rollover. Tr. I 222:5 – 225:25; EC-EX-068 227:3-16.

2. Remotely Created Checks

Integrity Advance used the ACH network to conduct most if its business; it customarily sent loan proceeds and collected repayments using this system. *See* Order [Dkt. 111] at 32, Facts Deemed Established ¶ 37; Answer [Dkt. 021] at 12. However, some Integrity Advance consumers, when they realized that the company was continuing to withdraw payments after the disclosed "Total of Payments" had been satisfied, would request that their bank block Integrity Advance's ACH access to their account. But that did not stop Integrity Advance from accessing the consumer's bank account. In those situations, Integrity Advance would use remotely created checks to continue debiting consumer accounts. FOF ¶ 113.

Remotely created checks are checks (or images thereof) that draw on a consumer's account even though the consumer has neither seen nor signed the check. EC-EX-098 at 1; EC-EX-094 at 1-2. A company can generate a remotely created check if they have a consumer's bank routing and account number, and then deposit or cash that check as if it was a 'normal' check that a consumer had ripped out of their checkbook, completed, and signed. Tr. II 172:3-6; *see also* EC-EX-096 at 8, 53. Most consumers are unfamiliar with and do not understand this financial product. Tr. II 170:5-11.

The language in the Integrity Advance loan agreement that Respondents used to justify this practice did not explain remotely created checks or make clear that Integrity Advance could write a check against the consumer's account without the consumer's knowledge or signature. The operative language reads: "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." FOF ¶ 107.

IV. The Standard for Individual Liability Includes Covered Persons Such as Carnes

1. Carnes Is a Covered Person

Carnes is a covered person due to his role directing Integrity Advance's operations. The CFPA defines a "related person" to mean, *inter alia*, "any director, officer, or employee charged with managerial responsibility" for, or a "controlling shareholder" of, a covered person. 12 U.S.C. § 5481(25)(C)(i). There is no dispute that Carnes exercised "managerial responsibility" over and was the "controlling shareholder" of a covered person (Integrity Advance). Carnes admitted to having ultimate control over Integrity Advance's policies and procedures. FOF ¶ 59. Carnes was also Integrity Advance's "controlling shareholder" – he owned 100% of Willowbrook Marketing, which at all times owned a controlling interest in Hayfield, Integrity Advance's parent company. EC-EX-067; Tr. I 104:23 – 105:1. As a related person, Carnes is a "covered person for all purposes of any provision of Federal consumer financial law." 12 U.S.C. § 5481(25)(B). *See also* Order Den. Mot. to Dismiss [Dkt. 075] at 19.

2. A Covered Person Is Liable for a Deceptive or Unfair Practice When He Engages in that Practice

A covered person can be held liable for an unfair or deceptive act or practice when he "engages" in that practice. 12 U.S.C. § 5536(a)(1)(B) ("It shall be unlawful for—(1) any covered person or service provider- (B) to engage in any unfair, deceptive, or abusive act or practice.").

An individual covered person engages in a deceptive practice under the CFPA when: "(1) he participated directly in the deceptive acts *or* had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016) (emphasis in original) (quoting *F.T.C v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)). This standard

comports with prior FTC case law on individual liability in cases involving unfair or deceptive acts or practices in violation of the FTC Act. *See POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478, 498 (D.C. Cir. 2015) (agreeing with other circuits that determined that "[i]ndividuals may be liable for FTC Act violations committed by a corporate entity if the individual participated directly in the deceptive practices or acts or had authority to control them.") (internal quotations omitted); *F.T.C. v. Tax Club, Inc.*, 994 F. Supp. 2d 461, 471 (S.D.N.Y. 2014) (holding that an individual is liable for the unfair or deceptive acts of a corporation if that individual: (1) had authority to control the corporate defendants or participated directly in the wrongful acts or practices and (2) had some knowledge of the acts or practices); *Five-Star Auto Club*, 97 F. Supp. 2d 502, 538 (S.D.N.Y. 2000) ("An individual's assumption of the role of president and her authority to sign documents on behalf of the corporation demonstrate that she had the requisite control over the corporation to be held liable under the F.T.C. Act.").

V. Carnes Engaged in Deceptive Acts Along with Integrity Advance

The evidence plainly establishes both prongs of the *Gordon* individual liability test. The first prong can be satisfied by showing that the individual had authority to control the deceptive acts of the company *or* by showing that the individual directly participated in such acts. Here, the evidence shows that Carnes did both: he exercised control over Integrity Advance and directly participated in the company's use of a deceptive loan agreement. The second prong of the *Gordon* test can be met by showing that the individual had knowledge of the misrepresentations, was recklessly indifferent to the misrepresentations, or intentionally avoided the truth. The evidence at trial shows that Carnes either knew that the loan agreement misrepresented the cost of Integrity Advance's loans or he was recklessly indifferent to that fact.

1. Carnes Had Authority Over Integrity Advance

The evidence clearly demonstrates that Carnes had authority to control Integrity Advance during all relevant times. Carnes admitted that he "had ultimate authority over the company." FOF ¶ 60; *see also* Tr. I 228:6-11 ("as CEO you are ultimately approving everything."). It makes sense that Carnes had "ultimate authority" over Integrity Advance – he was the founder of the company and functioned as the chief executive throughout the time that it originated loans to consumers. FOF ¶¶ 4, 8-9. Carnes also was the majority owner and CEO of Integrity Advance's parent company. FOF ¶¶ 7-8.

Carnes exercised this "ultimately authority" over Integrity Advance on a daily basis and in a number of ways. In his role as chief executive, Carnes supervised all individuals who provided services to Integrity Advance (FOF ¶ 19), made the final decision to hire all of the individuals who provided services to the company (FOF ¶ 31), decided how much Integrity Advance would pay for payday loan leads (FOF ¶¶ 44, 45), set Integrity Advance's underwriting policies (FOF ¶ 48), approved the contents of the company's website (FOF ¶ 57), and directed changes to the website (FOF ¶¶ 51, 53). Carnes also admitted signing several agreements on behalf of Integrity Advance with vendors, service providers, and the company's bank. FOF ¶¶ 64-68. At bottom, there can be no dispute that facts here satisfy the authority prong of the *Gordon* individual liability test.

2. Carnes Participated Directly in Deceptive Acts

Given the evidence presented at trial, the Administrative Law Judge should also find that Carnes made the decision to use the deceptive loan agreement and thereby directly participated in Respondents' deceptive acts. While Carnes did not testify that he reviewed and approved the loan agreement, the undisputed evidence leaves no other logical conclusion.

During the first part of 2008, when Integrity Advance was developing its loan agreement and loan product, the company only had four employees – Carnes, Foster (the general counsel), an IT person, and a receptionist. FOF ¶ 77. Foster's testimony indicates that he was not responsible for the business decisions behind Integrity Advance's loan product and loan agreement. Tr. II 28:4-23; Tr. II 43:8 – 44:17. There is no evidence in the record to suggest that either the IT employee or the receptionist played any role in the approval of the loan agreement. This leaves Carnes as the only person who plausibly could have reviewed and approved the loan agreement before Integrity Advance started using it with consumers.

Moreover, a factual finding that Carnes reviewed and approved the loan agreement is consistent with Carnes's level of involvement with Integrity Advance. Carnes worked out of the company's Kansas City area office along with other Integrity Advance employees on a daily basis. FOF ¶¶ 18, 38. Due to his "open-door policy," Carnes had regular discussions and meetings with other Integrity Advance staffers. FOF ¶ 39; Tr. II 74:6-8. Indeed, Carnes had regular conversations about "lead performance" and "lead volume conversion rates" (FOF ¶¶ 40, 42), conducted regular information technology meetings, set employee salaries, and hired most of Integrity Advance's senior leadership. FOF ¶¶ 30-37, 54-55 .

An Administrative Law Judge finding that Carnes reviewed and approved the loan agreement also makes sense given the centrality of the loan agreement to Integrity Advance's business. Integrity Advance only had one product, a consumer payday loan formed through the loan agreement. FOF ¶ 75. That one product was the sole source of Integrity Advance's revenue and generated all of Integrity Advance's operating profits. FOF ¶ 74. Integrity Advance's loans also generated at least 75% of Hayfield's operating profits. FOF ¶¶ 12-14. Given these facts, it strains credulity to suggest that Carnes left the business decision to employ the loan agreement,

during the company's formative year, to an IT person or a receptionist. While Carnes tried to distance himself from this decision (testifiying that he "possibly" saw a loan agreement template at some point in 2008)[2] the Administrative Law Judge should find Carnes's testimony on this topic not credible and reject it.

Finally, Carnes's claim that "the state of Delaware" designed Integrity Advance's deceptive loan product is even less credible. Tr. I 220:14-15. E. Quinn Miller, a supervisor at the Delaware Office of the State Bank Commissioner, testified clearly and unequivocally that Delaware did not design Integrity Advance's deceptive loan product: the state licensing agency did not require a particular loan agreement, did not require a particular fee structure, did not require payday loans to rollover, did not require rollovers by default, and did not write loan agreements for payday lenders. FOF ¶¶ 94-99. The only logical conclusion is that Carnes reviewed and approved Integrity Advance's deceptive loan agreement, and that is what the Administrative Law Judge should find here.

3. Carnes Had Knowledge of Integrity Advance's Misrepresentations

As mentioned above, Integrity Advance misrepresented its loans through its loan agreement. It disclosed an expensive multi-payment installment loan as if it was a much cheaper single payment loan. Order [Dkt. 111] at 28, 31. The evidence at trial shows that Carnes was fully aware of this misrepresentation. As a result, Enforcement Counsel has satisfied the second prong of the *Gordon* test.

Carnes admitted that he understood how Integrity Advance disclosed their loans as single payment loans. When presented with a hypothetical first time customer who took a $100 loan, he testified that "their TILA disclosure would say $130." FOF ¶ 82. This would reflect the principal

[2] FOF ¶ 91.

and a single finance charge that a consumer would only pay if they affirmatively contacted Integrity Advance prior to their next paycheck. Carnes also understood that the default for Integrity Advance's loans was rollover. He explained that if a consumer "didn't call or email, and it was their first payment… they would be renewed." FOF ¶ 83. Indeed, he knew that the consumer would be renewed repeatedly and then placed into an auto-workout process. FOF ¶¶ 84, 85. Carnes was also clear that he understood the automatic renewal and auto-workout process while he was running Integrity Advance. Tr. I 220:6-12 ("Q. Mr. Carnes, this process of renewal and auto work-out you just described, is this something you understood when you were the CEO of Integrity Advance? A. I don't understand. JUDGE McKENNA: Were you familiar with this process? THE WITNESS: Sure, it was our product.").

While he was running Integrity Advance, Carnes understood that most of the company's consumers would experience rollovers. He admitted to understanding that the majority of Integrity Advance loans would experience at least one renewal or rollover. FOF ¶ 87. Indeed, Carnes admitted in his investigational hearing that ninety percent of Integrity Advance customers experienced rollovers. FOF ¶ 86. Finally, Carnes admitted that he knew that the consumers who rolled over would pay more than what Integrity Advance disclosed in the "Total of Payments" box. FOF ¶ 89. These facts clearly establish that Carnes "had knowledge of the misrepresentations" as required under the second and final prong of the *Gordon* standard. With both prongs plainly satisfied, the Administrative Law Judge should find that Carnes engaged in the deceptive acts or practices identified in the summary disposition order, and hold him responsible for that conduct.

4. Carnes Was Recklessly Indifferent

Despite all of the evidence to the contrary, if the Administrative Law Judge finds that Carnes did not have knowledge of Integrity Advance's misrepresentations, he should still find that Carnes was "recklessly indifferent" under the *Gordon* standard. As seen above, Carnes had "ultimate authority" over Integrity Advance during the company's entire existence. He was an active and engaged manager who exercised control over all business decisions. The loan agreement was the operative document for Integrity Advance's only product, a product that generated millions of dollars of income for the company (and for Carnes). And Carnes knew that the loan agreement disclosed the cost of the loan by assuming that it would be repaid in a single payment, even though Integrity Advance would automatically renew the loan multiple times by default, and most Integrity Advance loans were in fact automatically renewed. On these facts, Carnes was at least recklessly indifferent to whether the agreement misrepresented the cost of Integrity Advance's loans.

VI. Courts Routinely Find Individual Liability under the FTC Act in UDAP cases

Numerous courts have found chief executives and other high level employees liable for unfair and deceptive corporate acts on similar facts, under the similar standard contained in the FTC Act. For example, *F.T.C. v. World Media Brokers* involved a series of linked corporate entities that illegally sold foreign lottery tickets in the United States. 415 F.3d 758, 760 (7th Cir. 2005). In the process of selling the tickets through a telemarketing operation, representatives either failed to state that Canadian lottery tickets could not be purchased legally in the United States or affirmatively misrepresented that the practice was legal. *Id*. at 762. The individual who essentially ran the operation argued that he could not be held personally liable since he did not "directly or indirectly make false or misleading statements to U.S. consumers or participate in

practices designed to induce U.S. consumers to purchase shares or interests in foreign lottery tickets." *Id*. at 764. The Court ruled that this argument "misses the mark." *Id*. The Court found him individually liable for the deceptive acts or practices based on the fact that he was an officer of several of the linked entities, had control over the operation, and knew that selling Canadian lottery tickets in the U.S. was illegal. The Court also found individual liability against another corporate officer who had registered business names, handled corporate accounts, and was the "authorized signing officer" for at least one entity involved in the scheme. *Id*. at 764-766.

Similarly, in *F.T.C. v Stefanchik*, the Ninth Circuit held an executive individually liable for the deceptive acts or practices of his company in comparable circumstances. 559 F.3d 924 (9th Cir. 2009). That case involved a book that promoted a method of building wealth through the purchase of privately held mortgages. *Id*. at 926. The book's author started a company, of which he was the president, director, and sole shareholder, designed to telemarket his ideas as a way to build wealth easily in one's spare time. *Id*. The FTC brought suit alleging that the author's ideas were not an easy way to earn money (in fact it was time-consuming and very difficult to turn a profit using his scheme), and the representations to the contrary were misleading. *Id*. at 926-27. The Court found the author personally liable because he controlled the activity of his company and had "authority- both individually and through counsel- to control the marketing activity and representations about his product." *Id*. at 931. *See also, e.g., F.T.C. v Wellness Support Network, Inc.*, No. 10-CV-04879-JCS, 2014 WL 644749, at *19 (N.D. Cal. Feb. 19, 2014) (holding a husband and wife liable where their company had made deceptive claims about a diabetes remedy); *F.T.C. v. J.K. Publ'ns., Inc*., 99 F. Supp. 2d 1176, 1204-1207 (C.D. Cal. 2000) (finding individuals liable where they were key players in or recklessly indifferent to an improper credit card billing scheme); *F.T.C v. Lanier Law, LLC*, No. 3:14-CV-

786-J-34PDB, 2016 WL 3632371, at *30 (M.D. Fla. July 7, 2016) (finding individuals liable where they were actively involved in deceptive representations in the context of a foreclosure rescue scheme).

VII. Respondents Unfairly Used Remotely Created Checks

Section 1031(c) of the CFPA provides that an act or practice is "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers" and that "substantial injury is not outweighed by countervailing benefits to consumers or to competition." 12 U.S.C. § 5531(c). Enforcement Counsel established at trial that Respondents substantially injured consumers by using remotely created checks to continue withdrawing money from consumers' accounts after those consumers had satisfied the disclosed "Total of Payments" and after the consumers had subsequently attempted to block Integrity Advance's electronic debits. FOF ¶ 118; EC-EX-068 at 219:7-18; EC-EX-072; EC-EX-092; EC-EX-094; EC-EX-096; EC-EX-097; EC-EX-098; EC-EX-100; EC Mot. Summ. Disposition [Dkt. 086] at 16-21; EC Opp'n to Resp. Mot. Summ. Disposition [Dkt. 099] at 20-21; EC Reply in Supp. of Mot. Summ. Disposition [Dkt. 104] at 9-10. Consumers could not reasonably avoid these injuries given that the Integrity Advance loan agreement failed to adequately disclose that the company could use this poorly understood mechanism to debit their accounts. EC-EX-001-014; EC-EX-063.

Respondents have offered no facts to negate Enforcement Counsel's evidence and offered no evidence, through their damages witness or otherwise, in support of their claim that "the undisputed facts show that there was no consumer injury arising from the creation of remotely created checks." Resp. Mot. Summ. Disposition [Dkt. 089] at 19. The suggestion that the harm to consumers was 'speculative' is simply untrue. As Respondents' own data shows, Integrity Advance took money from consumer bank accounts through remotely created checks when

consumers were specifically trying to protect those accounts. EC-EX-095; EC-EX-097; EC-EX-100; EC-EX-101. Thus, the Administrative Law Judge should find that Respondents unfairly used remotely created checks against consumers.

1. An Overview of Remotely Created Checks

A remotely created check is an "oddball check that is drawn on an account but obviously wasn't torn from the account holder's checkbook and, on further inspection, doesn't even have the account holder's handwritten signature on it." EC-EX-098 at 1. Remotely created checks—also known as demand drafts, check drafts, telechecks, preauthorized drafts, or RCCs—allow a payee such as Integrity Advance to withdraw funds from a consumer's account by means of a check that the consumer never completed, signed, or even saw.[3] "[U]nlike traditional checks, the payee, and not the account holder, creates the instrument that instructs the drawee bank to make payment." EC-EX-094 at 1-2. Where a consumer's signature would appear on a regular check, a remotely created check usually includes a statement indicating that the consumer has authorized the check. EC-EX-096 at 7-8. And unlike electronic checks that consumers instruct their bank to create and mail to payees, remotely created checks are created by the payee, *i.e.* the same party receiving payment from the remotely created check. Tr. II 190:16 – 192:10, *see also* EC-EX-094 at 1-2.

[3] Regulation CC, 12 C.F.R. § 229.2(fff), which implements the Expedited Funds Availability Act, 12 U.S.C. §§ 4001-4010, defines a 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. For purposes of this definition, "account" means an account as defined in paragraph (a) of this section as well as a credit or other arrangement that allows a person to draw checks that are payable by, through, or at a bank.

Enforcement Counsel, contrary to Respondents' claims, has never argued that remotely created checks are *per se* illegal. Nonetheless, remotely created checks do have inherent operational weaknesses that have made it difficult to enforce consumer protections, and most consumers are unfamiliar with the product. Tr. II 170:5-11. As a result, the FTC has been critical of remotely created checks, even banning them in the telemarketing space.[4] Indeed, remotely created checks have been called a payment method "favored by con artists and scammers."[5]

The "ease with which a remote payee can create remotely created checks" is a "reason why these payment instruments have drawn scrutiny." EC-EX-094 at 2. A payee can create remotely created checks with just a consumer's routing number and account number and a one-time pre-authorization from the consumer. Tr. II 172:2-5. In fact, when consumers provide general authorizations for payees to debit their bank accounts electronically, they have sometimes unwittingly authorized remotely created checks on their accounts as well. Tr. II 175:19 – 176:2. Once a payee has obtained the consumer's routing and account number and authorization, the payee may write remotely created checks against the consumer's account without any further involvement from the consumer. Tr. II 173:4 – 175:7; EC-EX-094 at 3. Indeed, once the instrument is created, payees can deposit remotely created checks into the

[4] Final Telemarketing Sales Rule, 16 C.F.R. Part 310, 80 Fed. Reg. at 77,520-77,560 (Dec. 14, 2015); *id.* at 77525 (Commenters to the Telemarketing Sales Rule "agreed that perpetrators of fraud frequently use remotely created checks … to extract money from consumer victims and inflict significant harm.")

[5] Press Release, FTC, *F.T.C. Amends Telemarketing Rule to Ban Payment Methods Used by Scammers*, (Nov. 18, 2015), https://www.ftc.gov/news-events/press-releases/2015/11/ftc-amends-telemarketing-rule-ban-payment-methods-used-scammers; *see also* EC-EX-096 at 29-37 (discussing recent FTC fraud cases involving remotely created checks in the telemarketing space).

Federal Reserve Bank's check clearing system in the same way as they would traditional paper checks. EC-EX-096 at 8.

Consumers who provide their account information to a payee "have no effective control over how that payment is processed, little understanding of the different levels of protection afforded different types of payments, and no realization that the information they provide can be used to initiate unauthorized debits." EC-EX-096 at 20; *see also id.* at 13 (The FTC has concluded that, for telemarketing transactions, the requirement that consumers provide "express verifiable authorization [to payees to use remotely created checks] is manifestly ineffective at preventing massive consumer losses in fraudulent telemarketing transactions involving remotely created checks[.]"). Consumers also struggle to determine if they have had a payment debited by remotely created checks, because debits taken by remotely created check are not explicitly identified as such in a consumer's periodic statement. Tr. II 176:15 – 177:4.

2. Respondents Used Remotely Created Checks After Consumers Blocked ACH Withdrawals

As a part of the loan application and approval process, Integrity Advance required consumers to sign an ACH agreement. Order [Dkt. 111] at 34-39. The agreement contained the following opaque language: "[i]f you revoke your authorization you agree to provide us with another form of payment acceptable to us and you authorize us to prepare and submit one or more checks drawn on Your Bank Account so long as amounts are owed to us under the Loan Agreement." EC-EX-001-014; EC-EX-064. Respondents used this language to justify initiating remotely created checks from consumers' bank accounts. FOF ¶¶ 107, 113-114.

As the record reflects, some consumers discovered that Integrity Advance rolled over their loans repeatedly such that the total cost of the loan was greater than the amount disclosed in the "Total of Payments" section of the TILA box. EC-EX-075. Some of those consumers

attempted to stop Integrity Advance's ACH debits or revoke Integrity Advance's ACH authorization, *i.e.* the company's ability to electronically debit funds from the consumer's bank account. EC-EX-097. When consumers exercised this right, Respondents simply switched to creating remotely created checks in order to continue extracting funds from consumers' accounts. FOF ¶¶ 113-114.

Respondents' data captures all transactions associated with each of the 602 times that Respondents engaged in this practice on or after the transfer date. EC-EX-097; EC-EX-095; EC-EX-101. For example, consumer #21292653 took out a $500 loan (#54158546) with a "Total of Payments" disclosure of $650. Tr. II 145:10-21; EC-EX-100. From December 21, 2011 through February 29, 2012, Integrity Advance withdrew $950 from this consumer's account via ACH debits. Tr. II 143:9-145:5; EC-EX-100 at ll. 1-6. That is, the amount Integrity Advance collected had already exceeded the "Total of Payments" disclosure by $300. The consumer subsequently revoked Integrity Advance's ACH authorization. Tr. II 145:10-14; EC-EX-100 at l. 7.[6] As a result, Respondents' following ACH attempt, on March 14, 2012, failed. *Id*. But even though the consumer revoked the company's ACH authorization, Respondents succeeded in taking an additional $520 from the consumer's account via remotely created check on April 2, 2012. Tr. II

[6] The transaction data provided by Respondents included NACHA Return Reason Codes, which indicate why an ACH debit failed. In assessing harm to consumers through remotely created checks, witness for Enforcement Counsel data scientist Robert Hughes relied on three codes that indicated that a consumer had revoked the company's ACH authorization or stopped ACH debits—R07, R08, and R10. Tr. II 146:12-25. According to the NACHA Operating Rules & Guidelines, code R07 indicates that ACH authorization was revoked by the customer. EC-EX-092 at 3. Code R08 means that a stop payment order was placed on the payee. *Id.* Code R10 signifies that a customer has advised his or her bank that the ACH is unauthorized, improper, ineligible, or incomplete. *Id.* at 4. In an effort to be conservative, Hughes did not consider as part of his harm analysis remotely created checks connected to other NACHA Return Reason Codes. Tr. III 42:5-15.

145:17-21; EC-EX-100 at l. 8. In total, the consumer paid $1,470 on a $500 loan with a "Total of Payments" disclosure of $650. Tr. II 145:18-22; EC-EX-100 at l. 9.

3. Respondents' Use of Remotely Created Checks Caused Substantial Injury

The use of remotely created checks resulted in substantial financial harm to Integrity Advance consumers. It is well-settled that "billing customers without permission causes injury for the purposes of asserting" an unfairness claim. *F.T.C. v. Amazon.com, Inc.*, 71 F. Supp. 3d 1158, 1164 (W.D. Wash. 2014) (citing *see e.g., F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1153 (9th Cir. 2010)); *F.T.C. v. Ideal Fin. Sols., Inc.*, 2014 WL 2565688, at *5 (D. Nev. June 5, 2014); *F.T.C. v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1004 (N.D. Cal. 2010), *aff'd*, 475 F.App'x. 106 (9th Cir. 2012). Consumers who had blocked Integrity Advance's ACH access to stop the company from continuing to withdraw funds suffered financial harm when Integrity Advance used remotely created checks to take additional funds from their bank accounts. According to Respondents' own data, Integrity Advance used remotely created checks 602 times after consumers had revoked or otherwise blocked ACH debits from their accounts and already paid over the "Total of Payments" disclosure in their loan agreement. Through this practice, Respondents took $115,024.50 from consumers on or after July 21, 2011. Respondents offered no evidence at trial to refute any of these facts. Indeed, throughout this proceeding, Respondents have made only bare, conclusory allegations that the use of remotely created checks did not cause, and was not likely to cause substantial injury.

4. The Injury Caused by Respondents' Use of Remotely Created Checks Was Not Reasonably Avoidable

An injury is not reasonably avoidable "[i]f consumers do not have a 'free and informed choice that would have enabled them to avoid the unfair practice[.]'" *F.T.C. v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008) (quoting *F.T.C. v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d

1176, 1201 (C.D. Cal. 2000)). Here, the undisputed evidence demonstrates that consumers did not have a free and informed choice regarding the use of remotely created checks.

The remotely created check provision in the Integrity Advance loan agreement is, on its face, neither clear nor conspicuous. The provision is boilerplate language that appears only once in the contract.[7] The provision is located at the end of a paragraph in the middle of the ACH authorization section of the loan agreement, and is unlikely to be noticed or read by consumers who signed the loan agreement. *See, e.g.* EC-EX-005 at 10-11; *see also* EC-EX-092 at 21-24. Furthermore, the loan agreement, which states that consumers "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[]" is ambiguous. First, it is unclear that "so long as amounts are owed to us under the Loan Agreement" means that Integrity Advance has authority to debit a consumer's account even after he or she has paid the "Total of Payments" amount disclosed in the TILA box. *See* EC-EX-092 at 25. Second, the provision makes no explicit mention of remotely created checks and does not explain that it purports to give Integrity Advance the ability to write checks on the consumer's account even though the consumer has neither seen nor signed those checks. *Id.* This lack of clarity is particularly egregious here given that the product at issue is something that would be unfamiliar to most consumers.

5. The Substantial Injury to Consumers Was Not Outweighed by Any Benefits to Consumers or Competition

There is no plausible argument that Respondents' use of remotely created checks benefitted consumers or competition. Respondents used a little known—and not well

[7] *Am. Fin. Servs. Ass'n v. F.T.C.*, 767 F.2d 957, 976-78 (D.C. Cir. 1985) (holding that the presence of boilerplate language in standardized credit contracts prevented consumers from reasonably avoiding injury arising from the inclusion of security interests and wage assignments in those contracts).

understood—product that was disclosed in a confusing and vague way to debit consumer accounts. And they did this after consumers had paid the loan costs that Integrity Advance disclosed and subsequently tried to block the company's access to their bank accounts. There is no argument that consumers benefited from having money taken out of their bank accounts in this scenario. And even if there were a benefit to consumers or competition, it would not outweigh the loss of funds, any associated fees, and the loss of control over their bank account that the consumers experienced.

6. Carnes Engaged in the Unfair Practice

Under the *Gordon* standard cited above (and other analogous case law), Carnes engaged in Integrity Advance's unfair use of remotely created checks if he knew about the practice and had authority to control it. As seen above, Carnes exercised clear and total authority over Integrity Advance and its policies and procedures. There is no evidence in the record that Integrity Advance's use of remotely created checks was somehow outside of Carnes's purview as the chief executive of the company and its parent entity, Hayfield. There is also no dispute that Carnes knew that Integrity Advance was using remotely created checks when consumers had blocked electronic access to their accounts. FOF ¶ 119. Carnes testified that he saw a printer being used to create remotely created checks, and this likely happened on a weekly basis. FOF ¶¶ 120-121. Given these undisputed facts, there is no question that Carnes legally engaged the unfair use of remotely created checks and therefore can be held liable for this practice.[8]

[8] During the trial, at the conclusion of Enforcement Counsel's case, Respondents moved for a directed verdict. That motion argued that Enforcement Counsel had failed to meet its burden and the remaining claims should be dismissed. At that time, the Administrative Law Judge agreed that it would be more appropriate to address Respondents' motion through post-trial briefing. Tr. III 55:10-24. For all the reasons discussed herein, the evidence establishes both that Carnes engaged in the deceptive cost disclosures and that Integrity Advance and Carnes engaged in an

VIII. Relief

1. The Bureau Is Entitled to Broad Relief Available under the CFPA

The Administrative Law Judge has authority under 12 U.S.C. § 5565 to grant broad relief to Enforcement Counsel. Enforcement Counsel hereby requests the following monetary restitution:

Table 1[9]

Count	Violation	Liable Persons	Amount	How Calculated
I	TILA	Integrity Advance	$132,580,041.06	All sums paid over amounts disclosed for all loans
II	CFPA (TILA violation)	Integrity Advance	$38,453,341.62	All sums paid over amounts disclosed for all post transfer date loans
III	CFPA (Deception)	Integrity Advance and Carnes	$38,453,341.62	All sums paid over amounts disclosed for all post transfer date loans
V	EFTA	Integrity Advance	(same as Count I)	N/A
VI	CFPA (EFTA violation)	Integrity Advance	(same as Count II)	N/A
VII	CFPA (Unfairness)	Integrity Advance and Carnes	$115,024.50	All remotely created check payments post transfer date where the consumer had already satisfied the amount disclosed

unfair practice through the use of remotely created checks. Therefore, given this evidence and the conclusory nature of Respondents' motion, Enforcement Counsel respectfully suggests that Respondents' motion be denied.

[9] The harm for Counts II and III is identical and is a subset of the harm for Count I. As reflected above, however, Carnes and Integrity Advance are jointly and severally liable for Count III and Count VII. Similarly, if the Administrative Law Judge orders the full relief requested under Counts I-III, that will overlap with any relief under Count VII.

Since Enforcement Counsel has established a reasonable approximation of damages, Respondents bear the burden of showing why that approximation is not reasonable. *See S.E.C. v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989). Respondents have failed in their efforts to undermine these calculations. First, Respondents' data witness did not first remove loans where consumers had not paid over the "Total of Payments" from her calculations. As a result, Respondents' incorrectly calculated the amount that Integrity Advance consumers, in aggregate, paid over the "Total of Payments" disclosed in their loan agreements.

Second, any kind of offset due to the fact that some Integrity Advance consumers took out more than one loan would be inappropriate under the case law on restitution offsets. The Administrative Law Judge has already found the Integrity Advance loan agreement facially deceptive as to returning customers and Respondents failed to establish any evidence that returning customers did not rely on the deceptive loan agreements. Moreover, there are several potential reasons why a consumer might take a subsequent Integrity Advance loan aside from satisfaction with the initial loan. For instance, they might have been forced to take a subsequent loan due to Integrity Advance debiting more than anticipated on the initial loan. Finally, contrary to Respondents' repeated suggestions, restitution for TILA violations that occurred prior to the CFPA transfer date does not have an impermissibly retroactive effect. Integrity Advance was subject to TILA and the accompanying equitable remedies (including restitution) during its entire existence. The fact that a new agency is enforcing long standing law does not create a retroactivity problem.

2. The Administrative Law Judge Has Authority to Recommend All Appropriate Legal and Equitable Relief Pursuant to the CFPA

Pursuant to the CFPA, 12 U.S.C. § 5565(a)(1), the Administrative Law Judge has broad authority, in an "adjudication proceeding brought under Federal consumer financial law" such as

this one, to order "any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law." 12 U.S.C. § 5563(a) (providing, *inter alia*, that the Bureau is authorized to conduct an adjudication proceeding to enforce compliance with enumerated consumer laws and provisions of the CFPA). The CFPA, EFTA, and TILA are all Federal consumer financial laws. *See* 12 U.S.C. § 5481(14); 12 U.S.C. §§ 5481(12)(C), (12)(O).

Section 5565 became effective on the designated transfer date (July 21, 2011), but that section does not prevent the Administrative Law Judge from recommending relief for violations that happened prior to the transfer date. Instead, the relevant consideration is when the Administrative Law Judge recommends the relief. As long as the Administrative Law Judge is recommending the relief after the transfer date—as is the case here—the Administrative Law Judge may do so even if the violation occurred prior to the transfer date so long as doing so will not have an impermissible retroactive effect. As demonstrated below, recommending the relief requested by Enforcement Counsel will not have an impermissible retroactive effect.

3. Enforcement Counsel Has Established Appropriate Values for Restitution

Among the broad relief allowed under the CFPA is restitution to consumers. 12 U.S.C. § 5565(a)(2)(C). Restitution is an appropriate remedy here, because Respondents' violations have caused consumer injury. *See, e.g. F.T.C. v. RCA Credit Servs., LLC*, 727 F. Supp. 2d 1320, 1337 (M.D. FL 2010) (restitution appropriate for defendants' violations where consumer injury was caused by defendants' misrepresentations). Here, Enforcement Counsel properly seeks restitution in the amounts equivalent to the monetary harm suffered by consumers. As courts have recognized, the proper award is "the full amount lost by consumers," and is not limited to "a defendant's profits." *F.T.C. v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009); *accord F.T.C. v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (rejecting an argument that "the proper formula to calculate damages is defendants' profits and not consumers' losses" and affirming the conclusion

"that consumers' net payments to defendants provided the appropriate measure of restitution, without any consideration of defendants' profits."). This makes sense, because requiring Respondents "to return the profits that they received rather than the costs incurred by the injured consumer would be the equivalent of making the consumer bear the defendants' expenses." *F.T.C. v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga 2008); *see also F.T.C. v. Stefanchik*, 559 F.3d 924, 932 (9th Cir. 2009) ("[B]ecause the FTC Act is designed to protect consumers from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits.").

As found by the Administrative Law Judge, Respondents violated TILA and the CFPA's prohibition against deceptive acts or practices by giving consumers a TILA disclosure that assumed a single payment loan even though Integrity Advance's loans automatically rolled over, resulting in additional undisclosed charges to the consumer. Order [Dkt. 111] at 24-31. The harm suffered by consumers is the amount they paid over what had been disclosed in the loan agreements. That is, a consumer who received a loan agreement that disclosed a "Total of Payments" of $390 was damaged to the extent that she paid more than this amount. Return of these funds paid over the disclosed "Total of Payments" (subtracting out any amounts already refunded) will properly compensate consumers for their losses.

In order to properly establish consumer harm, Enforcement Counsel must "show that its calculations reasonably approximate[] the amount of consumers' net losses[.]" *F.T.C. v. Partners in Health Care Ass'n.*, 14-23109-CIV-SCOLA, 2016 WL 3093125, at *10 (S.D. Fla. May 31, 2016) (quoting *F.T.C. v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997). Here, Enforcement Counsel's restitution figures are based on calculations generated by CFPB data scientist Robert Hughes. EC-EX-097; EC-EX-102; Attch. A, Hughes Decl.; EC-EX-072; EC-EX-103. Hughes's

testimony and declarations rely on Integrity Advance datasets that capture all Integrity Advance consumer payments (EC-EX-095; EC-EX-101), data dictionaries (EC-EX-080; EC-EX-081), and the NACHA Table of ACH Return Reason Codes (EC-EX-082).[10] Taken together, Hughes's work sufficiently substantiates the specific monetary relief sought against Respondents.

a. Restitution for Violations Arising Out of Integrity Advance's TILA Violations (Count I)

To remedy Respondents' inaccurate TILA disclosures (Count I), the Administrative Law Judge should order Integrity Advance to refund the amounts consumers paid above that disclosed in the "Total of Payments" section of the Integrity Advance loan agreement TILA box. According to Respondents' payment data (EC-EX-101), for all loans originated by Integrity Advance where the consumer paid over the "Total of Payments," the aggregate amount of these overpayments totals $132,580,041.06.[11] Attch. A, Hughes Decl. ¶ 8.

b. Restitution for Violations Arising Out of Integrity Advance's Violation of the CFPA (Count II)

As held by the Administrative Law Judge in the July 1, 2016 Order, by virtue of violating TILA, Integrity Advance also violated the CFPA. Order [Dkt. 111] at 27. The Bureau is pursuing CFPA claims only for violations that occurred on or after July 21, 2011, so the consumer harm for Count II is the amount paid by consumers over the "Total of Payments" for loans originated

[10] The size of the datasets, which contained approximately 5.3 million lines of transaction data, required that the calculations be conducted using a computer programming language that could manage large datasets. Hughes, in his role as a data scientist, analyzed the large datasets using the programming language SQL. Tr. II 117:3-17.

[11] This figure is slightly lower than the one presented at trial because Enforcement Counsel has extracted potential rebates and refunds from the calculation of total overpayments. Since Respondents' payments data is unclear about which rebates and refunds were actually applied to consumer accounts, this is a conservative figure that likely understates the actual harm to consumers.

by Integrity Advance on or after that date.[12] Respondents' payments data shows that for all loans originated by Integrity Advance after the transfer date where the consumer paid over the "Total of Payments," the aggregate amount of these overpayments totals $38,453,341.62.[13] Attch. A, Hughes Decl. ¶ 8a. This is a subset of the harm identified above for Count I.

c. Restitution for Violations Arising Out of Respondents' Deception (Count III)

As held by the Administrative Law Judge in the July 1, 2016 Order, the loan agreement used by Integrity Advance was legally deceptive. As with Counts I and II, consumers suffered harm from the deceptive conduct to the extent that they paid sums above what was disclosed in the "Total of Payments" section of their loan agreement. Respondents' payments data shows that for all loans originated by Integrity Advance after the transfer date where the consumer paid over the "Total of Payments," the aggregate amount of these overpayments totals $38,453,341.62. Attch. A, Hughes Decl. ¶ 8a. This figure, which is identical to Count II, is also an overlap with the harm quantified for Count I. However, Integrity Advance and Carnes are jointly and severally liable for the Count III relief.

[12] Loan origination dates are not explicitly captured in the Integrity Advance datasets, which only include consumer transaction data, *i.e.*, payments made from or to Integrity Advance. To ensure that all loan transactions connected to loans that had originated before July 21, 2011 were removed from consideration, any loans with first transaction dates prior to August 13, 2011 were removed from the calculation. Tr. II 128:13-129:19; EC-EX-097. As set forth in the Integrity Advance loan agreement, the first transaction on a loan occurs between 8 and 23 days after origination. To ensure that the loans considered had originated on or after July 21, 2011, any loans with transaction dates that occurred fewer than 23 days after July 21, 2011 were not considered. Tr. III 37:1–38:6. The method is a conservative approach, as Hughes testified, because excluding transactions that occurred 8 to 22 days after July 21, 2011 removed additional loans from consideration that may have originated on or after July 21, 2011. Tr. II 128:23 -129:4; Tr. III 37:1 – 38:6. The effect was to reduce the restitution amount sought by Enforcement Counsel while ensuring that all the loans considered were connected to loans that originated on or after July 21, 2011. *Id*.

[13] This figure is also slightly lower than the one presented at trial (Tr. II 142:5-14; EC-EX-097) due to the removal of potential refunds and rebates.

At trial, the Administrative Law Judge expressed a concern that some fees paid by consumers should not be included in the amount that was paid over the "Total of Payments." However, any fees charged after consumers had satisfied the amount disclosed were improper and should be returned. That is, if a consumer received a disclosure saying her loan would cost $390, and after she paid that amount Integrity Advance assessed a late fee, that amount should be returned since Integrity Advance should not have been seeking additional funds from that consumer. Additionally, all of the fees represent a small portion of the harm (approximately $1.1 million out of over $132 million in harm) such that the figures contained in Table 1 still reasonably approximate harm, even if a small portion of the fees paid by consumers who ultimately paid over the "Total of Payments" were assessed prior to the consumer satisfying the "Total of Payments."

However, if the Administrative Law Judge rules that fees should be excluded from the relief calculations, the amounts would be as follows:

Table 2.[14]

Count	Amount without Fees[15]
I	$131,433,343.47
II	$38,164,153.31
III	$38,164,153.31
IV	$103,623.00

[14] Attch. A, Hughes Decl. ¶¶ 18, 18a, 19, 19a.

[15] As with Table 1, these figures do not include any potential rebates or refunds.

d. Monetary Relief for Violations of EFTA (Counts V and VI)[16]

For each one of Integrity Advance's loans, the company required electronic repayment via the ACH agreement in violation of EFTA. Order [Dkt. 111] at 39, 41. Based on the Integrity Advance data (EC-EX-101), 98.5% of initial loan repayments were ultimately made via ACH. EC-EX-072 ¶ 8.

Enforcement Counsel believes disgorgement would be the most appropriate remedy for the violations of EFTA (Counts V and VI) in this case. However, given the relief being provided to consumers pursuant to Counts I-III would largely encompass any disgorgement amounts, Enforcement Counsel is not seeking additional equitable monetary relief or damages.

e. Monetary Relief for Unfair Use of Remotely Created Checks (Count VII)

As addressed above, some Integrity Advance consumers sought to block Integrity Advance from electronically debiting their accounts once they had paid the amount disclosed in the "Total of Payments" in their loan agreement. In those situations, Respondents unfairly used remotely created checks to take additional funds from consumers' bank accounts. Integrity Advance's consumer payment data (EC-EX-095; EC-EX-101) shows that, using remotely created checks generated after July 21, 2011, Respondents collected $115,024.50 from consumers in excess of what Integrity Advance had disclosed. FOF ¶ 127. The Administrative Law Judge should hold Integrity Advance and Carnes jointly and severally liable for returning these funds to consumers to the extent that they have not been paid out as relief for violations of Counts I, II, or III.

[16] Count IV was voluntarily dismissed by agreement of the parties. *See* Order Granting EC's Stipulated Mot. to Withdraw Count IV with Prejudice [Dkt. 133].

4. Enforcement Counsel Properly Established Restitution Values Through a CFPB Data Scientist

Respondents have implied that, without the expert testimony of an economist, Enforcement Counsel cannot establish the appropriate values for restitution. However, where assessing appropriate values for restitution consists of simply analyzing and summarizing numbers from datasets Respondents provided, courts have long held that the practice of relying on non-economists to analyze that information is an acceptable way to establish a reasonable approximation of monetary harm. *See, e.g. F.T.C. v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997) (arriving at total consumer loss through computer specialist and public accountant's analysis of defendants' consumer database); *F.T.C. v. Wellness Support Network, Inc.*, 10-CV-04879-JCS, 2014 WL 644749, at *19 (N.D. Cal. Feb. 19, 2014), *judgment entered*, 3:10-CV-4879 JCS, 2014 WL 3805755 (N.D. Cal. Feb. 20, 2014) (supporting calculations of net sales attributable to defendants through declaration introduced by the FTC containing calculations done on defendants' Excel spreadsheets); *F.T.C. v. NHS Sys., Inc.*, 936 F. Supp. 2d 520, 537 (E.D. Pa. 2013) (based on an inquiry by an investigator, the FTC reviewed defendants' databases to determine the total amount of consumer injury); *F.T.C. v. Partners in Health Care Ass'n.*, 14-23109-CIV-SCOLA, 2016 WL 3093125, at *10 (S.D. Fla. May 31, 2016) (relying on a FTC investigator who was also a certified fraud examiner to generate reports using defendants' software to calculate appropriate restitution). Where consumer harm can be determined just by summarizing Respondents' own datasets, Enforcement Counsel does not need, and the law does not call for, an economist to serve as a damages expert. Relying on the data summaries and analysis of data scientist Hughes, Enforcement Counsel has met its burden to establish a reasonable approximation of the appropriate restitution values.

5. The Relief Sought for Pre-Transfer Date Violations of TILA (Count I) Is Available under the CFPA

As seen above, Enforcement Counsel requests equitable relief pursuant to 12 U.S.C. § 5565 for Integrity Advance's violations of TILA (Count I), including those violations that occurred prior to the designated transfer date, July 21, 2011. Notice [Dkt. 001] at ¶ 12; *id.*, Prayer for Relief, at 14-15. The Bureau has authority under § 5565 to order this relief. [17]

Recommending the relief for Count I does not have an impermissible retroactive effect, because the FTC was empowered to obtain equitable relief, and in particular restitution, for TILA violations that occurred in the period between 2008 (when Integrity Advance's conduct at issue in this proceeding began) and July 21, 2011. 15 U.S.C. §§ 53(b), 1607(c). Pursuant to the version of TILA in effect at the time of Integrity Advance's conduct, a violation of TILA constitutes a violation of the FTC Act. 15 U.S.C. § 1607(c). Section 13(b) of the FTC Act, which also was in effect at the time in question, authorizes the FTC to seek injunctive and other equitable relief, including disgorgement and restitution, for violations of "any provision of law enforced by the [FTC]," including TILA. 15 U.S.C. § 53(b); *see also, e.g.*, *F.T.C. v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016) (holding that 15 U.S.C. § 53(b) authorizes "any ancillary relief necessary to accomplish complete justice, including restitution" (quotations omitted)); *F.T.C. v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (holding that section

[17] Section 5565 took effect on the designated transfer date, July 21, 2011. CFPA § 1058, *codified at* 12 U.S.C. § 5561 note. Thus, as of that date, courts and the Bureau were empowered to grant the relief authorized by that section. The statute, however, does not also limit courts and the Bureau to granting that relief only for violations that occurred after the designated transfer date. Because the statute does not "expressly prescribe[]" whether the statutory remedies apply to pre-July 21, 2011 violations, under *Landgraf*, the question is "whether the new statute would have retroactive effect." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). As explained herein, subjecting Integrity Advance to equitable monetary remedies under § 5565(a) for its pre-transfer-date TILA violations does not have retroactive effect.

13(b) permits court "to order a defendant to disgorge illegally obtained funds"); *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir. 1989) (holding that "section 13(b) [15 U.S.C. § 53(b)] grants the authority to issue other necessary equitable relief," including "[r]escission and restitution"). Thus, the relief requested here does not "increase [defendant's] liability for past conduct," *Landgraf*, 511 U.S. at 280. Imposing that relief therefore does not have an impermissible retroactive effect, and that relief accordingly is available to the Bureau for pre-transfer-date violations of TILA.[18]

Respondents attempted to argue at trial that because the FTC, under Section 13(b) of the FTC Act, must seek equitable monetary relief in district court, the Bureau is barred from obtaining such relief in an administrative forum for unlawful conduct that predated the transfer date. This claim is incorrect. The CFPA expressly grants authority to obtain equitable monetary relief administratively. The fact that the relief may be obtained in a different forum does not create an impermissible retroactive effect. *See Landgraf*, 511 U.S. at 275. Whether relief may be sought in district court or an administrative forum is a purely procedural question, and as *Landgraf* has held, "[b]ecause rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." *Id.* "Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation …. Such statutes affect only *where* a suit may be brought…." *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997) (*citing*

[18] Were Enforcement Counsel seeking equitable relief pursuant to 12 U.S.C. § 5565 for Integrity Advance's EFTA violations (Count V), pre-transfer date relief would be available for the same reasons. At the time Integrity Advance's pre-transfer date conduct occurred, equitable relief was available to the FTC for violations of EFTA. 15 U.S.C. §§ 53(b), 1693*o*.

Landgraf, 511 U.S. at 275, 291). A statute that addresses a change from district court to an administrative forum "speak[s] to the power of the court rather than to the rights or obligations of the parties" (*Landgraf*, 511 U.S. at 274 (quoting *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100 (1992))) and thus "take[] away no substantive right but simply changes the tribunal that is to hear the case" *Id.* (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Such "[c]hanges in procedural rules" do not "rais[e] concerns about retroactivity." *Landgraf*, 511 U.S. at 275. Integrity Advance's conduct in 2008 (when it started making loans) violated TILA, and assessment of equitable monetary relief for TILA violations was permitted at that time, and it was still permitted as of July 21, 2011. *Supra* note 17. The CFPA, by permitting assessment of such relief against consumers in an administrative forum, has simply added another tribunal that may hear this case. Such a change does not take away a substantive right, increase Integrity Advance's liability, or change Integrity Advance's longstanding obligations under TILA.

6. Repeat Customers Are Entitled to Restitution

Respondents' claim that repeat customers should not receive restitution is not well-founded in law or fact. As an initial matter, given that Respondents' violations flow from the loan agreement, every consumer who took a loan from Integrity Advance was a victim of the company's practices. Every loan agreement Integrity Advance issued violated TILA, and whether an individual was a first-time or returning customer does not change this fact. Additionally, in the Administrative Law Judge's July 1, 2016 order, he considered the fact that some Integrity Advance consumers took more than one loan, but still held that "this does not change the fact that the loans were facially deceptive[.]" Order [Dkt. 111] at 31.

Once deception has been proven, as it has here, a "presumption of actual reliance arises[.]" *See F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). [19] Moreover, having shown that the loan agreement is deceptive, it is Respondents' burden to demonstrate that returning consumers were, in fact, not deceived. *See F.T.C. v. Wellness Support Network, Inc.*, 10-CV-04879-JCS, 2014 WL 644749, at *20 (N.D. Cal. Feb. 19, 2014), *judgment entered*, 3:10-CV-4879 JCS, 2014 WL 3805755 (N.D. Cal. Feb. 20, 2014) (holding "that in the absence of affirmative evidence that customers who reordered did not rely, at least in part on [the deceptive] advertising, the amount of restitution for consumer injury should include sales even if they were reorders."); *see also F.T.C. v. Nat'l. Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008), *aff'd*, 356 F. App'x. 358 (11th Cir. 2009) (unpublished) ("defendants have presented nothing more than mere speculation [that returning consumers did not rely on deceptive advertising] and, thus, have failed to meet their burden. Accordingly, the court will not reduce the defendants' monetary liability by the amount of the sales to consumers who reordered the products."); *F.T.C. v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 387 (D. Conn. 2009) ("The burden is on the defendants to introduce evidence that the repeat customers did not rely on the deceptive advertising in placing their orders but instead on their own satisfaction with the product."). Respondents have provided no evidence that returning consumers were satisfied with their payday loan and were not harmed by Respondents' TILA and CFPA violations.

Instead, Respondents have proffered only figures concerning the number of repeat customers and how many loans those customers took from Integrity Advance. *See* RX020,

[19] To obtain restitution Enforcement Counsel "is not required to show reliance by each individual consumer." *Id.* (quoting *RCA Credit Servs.*, 727 F. Supp. 2d at 1335-36); *accord Figgie*, 994 F.2d at 605-06 (explaining that, under FTC Act, "proof of individual reliance by each purchasing customer is not needed.").

RX021. But the fact that an Integrity Advance consumer returned and took out additional payday loans does not establish that the consumer was not deceived regarding the loan's cost. It also does not "mean or even imply that the customers did not also rely upon the representations in the [loan agreement] when making their subsequent purchases." *F.T.C. v. Nat'l. Urological Grp.*, 645 F. Supp. 2d at 1213. The returning customers might not have paid more than the "Total of Payments" on prior loans, they might have been forced into taking subsequent loans due to Integrity Advance deducting more than anticipated, or lead generators might have redirected unwitting consumers to the company. Respondents have failed to meet their burden in this case, and repeat customers should not be removed from the calculation of the appropriate restitution baseline.

For the reasons described above, repeat customers should receive restitution. However, if the Administrative Law Judge finds otherwise, Enforcement Counsel respectfully suggests that it would be more appropriate to limit restitution to first-time customers rather than one-time customers because all consumers were harmed by the facially deceptive loan agreement in their first loan even if repeat customers made a knowing decision in deciding to take out subsequent loans (a conclusion not supported by the evidence in the record). If the Administrative Law Judge determines that consumers were only injured on their initial loan ('first time loans'), or determines that consumers were only injured if they took only one loan from Integrity Advance ('one time loans'), the relief sums are as follows:

Table 3[20]

Count	First time loans (fees included)	One time loans (fees included)	First time loans (fees extracted)	One time loans (fees extracted)
I	$69,232,170.39	$39,734,832.39	$68,477,934.28	$39,105,182.12
II	$12,141,593.76	$8,934,859.59	$11,999,322.85	$8,807,265.56
III	$12,141,593.76	$8,934,859.59	$11,999,322.85	$8,807,265.56

7. Ang's Analysis Is Flawed and Should Be Disregarded

At trial, Respondents presented damages calculations done by Dr. Xiaoling Ang (Ang). Her calculations are fundamentally flawed and are not a valid basis for determining relief in this matter. Ang testified using exhibits designed to set forth Respondents' values connected to payments made by Integrity Advance consumers (RX019), payments made by Integrity Advance consumers through first-time loans (RX022), payments made by Integrity Advance consumers through one-time loans (RX023), and payments made by Integrity Advance consumers excluding all loans to repeat customers whose first loans were renewal loans (RX024).

Given that Enforcement Counsel has met its burden to reasonably approximate appropriate restitution values (*see* section VIII.1 supra), the burden shifts to Respondents to show that Enforcement Counsel's estimation is not a reasonable approximation. *F.T.C. v. Bronson Partners*, 674 F. Supp. 2d at 381. At this point, "[t]he risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty." *Febre*, 128 F.3d at 535 (quoting *S.E.C. v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C.Cir.1989)). Any doubts that may arise

[20] Attch. A, Hughes Decl. ¶¶ 11, 11a, 13, 13a, 21, 21a, 23, 23a, As with Tables I and II, these figures do not include any potential rebates or refunds.

from lack of information or ambiguity in the data should be resolved against Respondents. *Id.*[21] As discussed in greater detail below, Respondents' attempt, through Ang's testimony and calculations, to call into question the calculations put forth by Enforcement Counsel is deeply flawed, fails to meet Respondents' burden, and should be disregarded.

a. Hughes's Methodology

The starting point for understanding the flaws of Ang's analysis begins with understanding how Hughes calculated the figures presented above. In calculating the amount of harm, Hughes considered only consumers for whom Respondents withdrew more than the "Total of Payments" and rolled over the loan at least once. Thus, if the data showed that a given consumer had a loan where the disclosed "Total of Payments" was $390 but that consumer paid only $100 in total, Hughes excluded that consumer entirely from his analysis. Hughes eliminated these loans because the consumers who paid less than the disclosed "Total of Payments" arguably were not harmed and their payments should not offset harm to consumers who paid more than the disclosed "Total of Payments."

Hughes also did not consider loans that did not rollover at least once. Respondents disclosed their loans as if consumers would make a single repayment which would include only the loan principal plus a single finance charge. In actuality, consumers were obligated to allow a series of charges to repay their loans. Order [Dkt. 111] at 23. The mechanism through which the

[21] For example, Respondents have asserted, without support, that Hughes's analysis is premised on flawed datasets provided by Respondents containing some duplicate loans and instances of $0 finance charges rather than the correct finance charge. Respts Resp. to EC Submission [Dkt. 155] at 3. Respondents cannot now pick apart their own datasets as a means of attacking the values put forth by Enforcement Counsel. *See, e.g. Febre*, 128 F.3d at 534-355 (rejecting defendants' contention that their dataset was not complete and therefore not a reliable basis for the FTC to calculate appropriate equitable relief on grounds that the risk of uncertainly should fall on the wrongdoer who created the uncertainty).

series of payments happened, and through which the harm occurred, was rollovers. Thus, loans that did not rollover at least once were properly excluded from the calculation.

Once Hughes isolated the appropriate set of loans, he calculated the amount each Integrity Advance consumer overpaid by summing the total amount paid over the "Total of Payments" amount in his or her respective loan agreement. EC-EX-103 at ¶ 9. The total amount paid over "Total of Payments" for all consumers was then derived by summing the total overpayments for these individual consumers who overpaid.[22] Importantly, and as discussed further below, the Total Paid Above "Total of Payments" was *not* derived indirectly by subtracting the aggregate "Total of Payments" values for all loans from the aggregate Total Paid on all loans.

b. Ang Understated the Total Paid Above "Total of Payments"

Ang did not use the same method as Hughes to determine the aggregate Total Paid Above "Total of Payments." Instead, she attempted to determine the Total Paid Above "Total of Payments" (line 3 of RX019) indirectly by taking the aggregate Total Paid by all Integrity Advance consumers (line 1 of RX019) and subtracting the aggregate TILA "Total of Payments" (line 2 of RX019) for every Integrity Advance loan. Tr. III 70:8-11; Tr. III 73:15-20. This method overstates the aggregate "Total of Payments," which in turn results in an understatement of the total amount paid over "Total of Payments." As a result, if the Administrative Law Judge accepted Dr. Ang's analysis, harmed consumers would receive less than the full restitution that Respondents owe them.

[22] For Counts II, III and VII Hughes only included loans originated after the transfer date, July 21, 2011.

Ang began her analysis by summing the TILA box disclosed "Total of Payments" (*i.e.* the sum of the principal and first finance charge) for all Integrity Advance loans, whether or not a consumer had paid above or below the "Total of Payments" on that loan, to create an aggregate "Total of Payments." Ang did not exclude consumers who had paid less than the disclosed "Total of Payments." Tr. III 159:2-5.[23] As Ang testified, "the consumers who did make less [in payments] than what could be considered the TILA box amount were still included in the calculation [of "Total of Payments"]. Tr. III 158:17-19. Next, Ang took her calculation of the aggregate "Total of Payments" for all loans and subtracted it from the Total Paid on all loans to ostensibly determine the aggregate Total Paid Above "Total of Payments." This method errs in that it fails to exclude consumers who repaid less than the disclosed "Total of Payments." For example, if a consumer paid $60 towards a loan with a disclosed "Total of Payments" of $130, Ang subtracted a "Total of Payments" of $130 (line 2 of RX019) from $60 (line 1 of RX019) for a Total Paid Above "Total of Payments" of *negative* $70 (line 3 of RX019). Tr. III 163:14 – 164:2. This effectively allows underpayments by some consumers to offset harm to consumers who paid Integrity Advance more than the amount disclosed in the "Total of Payments" section of their loan agreement.[24] This would be an unjust result.

[23] As she testified, however, Ang did exclude consumers who paid $0 towards the "Total of Payments." Tr. III 160:11-15.

[24] In Response to Hughes's July 29, 2016 affidavit, which points out this error, Respondents now assert that Ang's methodology was not an error, because in some instances returning customers paid less than the "Total of Payments" on some of their loans and more than the "Total of Payments" on other loans. Respts Resp. to EC Submission [Dkt. 155] at 3. If it had been Ang's intent to offset the payments of returning customers who paid below the "Total of Payments" on some loans, she would have necessarily begun by grouping returning customer loans together and squaring those loans with one another. But Ang has included all payments in her analysis, including one-time customers who underpaid and overpaid. Thus, Ang's method is not an appropriate measure of harm, even if her intention was to offset the payments of underpaying

Hughes demonstrated the effect of Ang's error by applying Ang's methodology to a subset of two loans (EC-EX-103 at ¶ 23, Attch. B). The "Total of Payments" disclosed in the TILA box for both loans in Hughes's example was $650. But for the first loan, the Integrity Advance consumer paid $2,000 on the loan, thus paying $1,350 *above* the "Total of Payments." For the second loan, the Integrity Advance consumer paid only $300 on the loan, thus paying $350 *below* the "Total of Payments." As Hughes demonstrates, because Ang did not discard the second loan from her calculations, her aggregate Total Paid Above "Total of Payments" for both loans was $1,000. That is, she added the two disclosed "Total of Payments" figures ($650 for loan 1 + $650 for loan 2) to calculate an aggregate "Total of Payments" of $1,300, and then subtracted that from the Total Paid of $2,300 ($2,000 for loan 1 + $300 for loan 2) to arrive at $1,000 for Total Paid Above "Total of Payments." Obviously this is incorrect. The first consumer incurred $1,350 of overpayments, while the second consumer, who did not pay over the "Total of Payments," incurred no overpayments, so the total paid above "Total of Payments" across both loans was $1,350. Under Hughes's methodology, the first consumer would receive $1,350 in restitution while the second would receive nothing. Under Ang's methodology, either the first consumer would receive only $1,000 despite having been harmed by $1,350 or both consumers would receive $500, even though the second consumer was not harmed.

As a result of this fundamental error, Ang's calculations of Total Paid Above "Total of Payments" for first time loans (RX022), one-time loans (RX023), and loans excluding all loans to repeat customers whose first loans were renewal loans (RX024) are likewise flawed. They

returning customers who also overpaid on loans. Even if Respondents experienced losses as a result of some consumers who paid below the "Total of Payments," it is not the responsibility of other harmed consumers to cover Respondents' losses. In addition, Respondents' new claim that some returning customers paid less than the total disclosed in their initial loans undercuts their speculative claim that returning customers could not have been deceived by the loan agreement.

employ her incorrect "adjusted" Total Paid Above "Total of Payments" (line 1 of RX022, line 1 of RX023, line 1 of RX024) as a starting point.

IX. Civil Money Penalties and Injunctive Relief

1. Civil Money Penalties Apply to Respondents' Actions Occurring on or After July 21, 2011

Enforcement Counsel requests a civil money penalty (CMP) against Integrity Advance of $11,743,920,[25] and a CMP against Carnes of $7,829,280. Civil money penalties at these amounts are consistent with the CFPA, a central purpose of which is to strengthen the enforcement of Federal consumer financial law. Section 1055 of the CFPA provides that "[a]ny person that violates, through any act or omission, any provision of Federal consumer financial law *shall* forfeit and pay a civil penalty pursuant to this subsection." 12 U.S.C. § 5565(c)(1) (emphasis added). Penalties apply "for each day during which *such violation … continues*." *Id*. at (c)(2)(A-C) (emphasis added). CFPA remedies are available for all conduct occurring on or after July 21, 2011, the effective date of the statute. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 245 (1994) (as a general principle, "a court must apply the law in effect at the time it renders its decision") (citations omitted).[26]

The CFPA contains three penalty tiers keyed to the level of a respondent's scienter. Here, Enforcement Counsel seeks a first tier penalty, which should be assessed "[f]or any violation of a law, rule, or final order or condition imposed in writing by the Bureau[.]"12 U.S.C. §

[25] Enforcement Counsel is aware that the evidence presented at trial suggests that Integrity Advance currently may have little to no assets. *See* Tr. I 142:13-18.

[26] Civil money penalties should be calculated from the transfer date, July 21, 2011 until the date Respondents' unlawful practices ceased.

5565(c)(2)(A). The first tier penalty permissible under the statute is $5,000 per violation per day. *Id.*[27]

The requested penalties are appropriate in consideration of the mitigating factors. The CFPA directs that, within the appropriate tier, in determining the proper amount of any penalty to assess, the adjudicator "shall take into account the appropriateness of the penalty" with respect to certain factors, namely: "(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." 12 U.S.C. § 5565(c)(3). An examination of these factors does not support any mitigation of the penalties assessed against Respondents.

a. Financial Resources

Carnes testified that he received between twenty and twenty five million dollars from the sale of the Hayfield companies. Tr. I 246:2-5. Carnes, as the sole owner of Willowbrook Marketing (the company that owned a controlling interest in Hayfield), also received [redacted], and [redacted]. Tr. I 158:24 – 159:4, Tr. I 174:24 – 175:6. He testified that more than 75% of Hayfield's profits were attributable to Integrity Advance in 2010, 2011 and 2012. FOF ¶¶ 12-14. Carnes also received an annual salary of $250,000 when he was CEO of Integrity Advance. Tr. I 167:11-17. Some of Integrity Advance's assets were sold as part of the sale of EZ Corp. Tr. I 237:22-25. Carnes testified that the company has "something in the neighborhood of a hundred dollars" in

[27] Since the passage of the CFPA, the civil money penalty amounts have been revised. The maximum Tier 1 penalty is now $5,437 per day. 12 C.F.R. § 1083.1. The penalties sought here by Enforcement Counsel are based on the revised amount.

its bank account, Tr. I 142:13-18, while Hayfield has a balance of between [redacted], Tr. I 145:19 – 146:4. Given this information, mitigation is not warranted on this factor.

b. Gravity of the Violations

Respondents' violations are not minor or technical in nature. Respondents built Integrity Advance's business model entirely around a deceptive loan agreement that hid the true cost of the loan from consumers. Consumers entered into loan agreements with Integrity Advance expecting the cost of the loan to be the amount disclosed in the TILA box, only to discover that Integrity Advance would continue to withdraw money from their accounts every pay period, long after the consumer had understood the loan to be paid off in full, and sometimes after the consumer tried to cut off Integrity Advance's access to the account. As one consumer complained, Integrity Advance "keeps charging me fees that I now do not owe. My loan was paid in full. However, they keep billing me to an account that now has a negative balance." EC-EX-075D. Customers regularly paid fees well over the amounts disclosed in the TILA box in attempts to pay off their loans in full. "I have paid over $1,000 for a $500.00 loan," one consumer complained. "Please have my loan as paid. I have made every attempt to pay off this debt immediately, and I was met with resistance by [Integrity Advance's] representative." EX-075B at 1. This particular consumer put a block on her account and even considered closing her bank account entirely because, as she explained, Integrity Advance "continue[s] to take money out of my account, which is putting me in a financial situation." *Id.* At bottom, the considerable gravity of Respondents' violations does not support any mitigation of the penalties.

c. Severity of the Losses

Even using the most conservative calculations of consumer harm (one of which excludes all payments made by consumers for fees as well as refunds provided by Integrity Advance), Respondents' violations are serious, pervasive, and hurt tens of thousands of consumers. This makes sense given that Integrity Advance's business model was built solely on the deceptive loan agreement. During the time that Integrity Advance provided loans, consumers paid more than the "Total of Payments" disclosed in the TILA box more than 200,000 times. These consumers paid over $130 million over the disclosed amounts. For loans originated after July 21, 2011, over 55,000 resulted in payments above the "Total of Payments" disclosed in the TILA box. Those consumers paid a total of over $38 million above and beyond the disclosed amounts. Respondents could have put procedures in place to lessen these considerable risks to consumers, particularly given the profits that Integrity Advance generated, but chose not to do so.

Respondents also used unfair methods to take money from consumers ensnared in Integrity Advance's deceptive loan product. After July 21, 2011, Integrity Advance used remotely created checks over 600 times to obtain more than $115,000 after consumers had revoked or stopped the company's authorizations to withdraw funds from their bank accounts. In other words, Integrity Advance used an extreme measure, which they effectively hid in the middle of their loan agreements, to take funds from consumers who were contesting the company's right to those funds. Given the large losses suffered by consumers due to Respondents' conduct, no mitigation is warranted under this factor.

d. History of Previous Violations

While the record does not contain evidence of prior violations, given the scale and magnitude of the harm caused by Respondents, and the relatively short amount of time that Integrity Advance operated, no mitigation on this factor is warranted.

e. Penalty Requested

Between July 21, 2011 and July 9, 2013, Respondents engaged in three distinct practices that require the imposition of a penalty: 1) Respondents used a loan agreement that violated TILA (Counts I and II) and was deceptive (Count III) due to its misrepresentation of the cost of Integrity Advance's loan product; 2) Integrity Advance violated EFTA (Counts V and VI) by requiring consumers to satisfy their loans though electronic repayment; and 3) Respondents unfairly used remotely created checks (Count VII) to debit consumers' accounts. Each of these practices continued throughout the entire period from July 21, 2011 until July 9, 2013.

Here, Enforcement Counsel seeks full first tier penalties ($5,437 per violation per day) for each of these three practices pursuant to section 5565(c) of the CFPA. There were 720 days from July 21, 2011 through July 9, 2013. Thus, the maximum CMP for each practice is $3,914,640. In total, Enforcement Counsel seeks the maximum CMP for all three practices against Integrity Advance - which totals $11,743,920. Carnes should be penalized for the two deceptive and unfair practices (Counts III and VII): resulting in a total requested penalty of $7,829,280.00. If Carnes does not have the financial resources to pay both the recommended restitution and CMP, Enforcement Counsel respectfully requests that the Administrative Law Judge recommend Carnes pay the restitution first and then pay the CMP.

2. Injunctive Relief

The CFPA permits the Administrative Law Judge to order injunctive relief under section 5565(2)(G). During the course of Enforcement Counsel's investigation of this matter, Respondents represented that Integrity Advance still holds $18 million of Integrity Advance debt owed by payday loan consumers. Enforcement Counsel requests that the Administrative Law Judge recommend permanently enjoining Integrity Advance and Carnes, and any successors, from taking any action that would result in the collection, sale, assignment, or transfer of this debt. Enforcement Counsel also understands that Integrity Advance furnished information to consumer reporting agencies related to the company's loans. Enforcement Counsel requests that the Administrative Law Judge order Respondents to make all reasonable and appropriate efforts to cause any consumer reporting agency to permanently delete any trade lines or collection accounts or any other information maintained on consumer reports furnished by Integrity Advance. Enforcement Counsel requests that the Administrative Law Judge order Carnes to provide an accounting of all funds received from Integrity Advance, whether directly or indirectly through his ownership of Willowbrook Marketing and its ownership of Hayfield, and to order disgorgement of any funds in excess of the amounts Carnes is required to pay as relief or a penalty. Enforcement Counsel also seeks an injunction to prevent Respondents from committing any future violations of the Federal consumer financial laws, including but not limited to, the Truth in Lending Act, the CFPA, and the Electronic Fund Transfer Act. Finally, Enforcement Counsel requests that the ALJ require Respondents to cooperate fully to assist the Bureau in determining the identity, location, and amount due to each consumer entitled to relief under his Order.

X. Conclusion

For all the reasons cited above, Enforcement Counsel respectfully requests that the Administrative Law Judge make appropriate findings of fact and conclusions of law and order the following relief:

(1) Judgment against Integrity Advance for restitution in the amount of $132,580,041.06;

(2) Judgment against Carnes for restitution in the amount of $38,453,341.62;

(3) Civil Money Penalties against Integrity Advance for $11,743,920.00;

(4) Civil Money Penalties against Carnes for $7,829,280.00; and

(5) An injunction- a) preventing Respondents from collecting, selling, or transferring any debt held by Integrity Advance, b) requiring Respondents to make best efforts to cause consumer reporting agencies to delete Integrity Advance tradelines, c) preventing any future violations of the consumer financial laws by Respondents; d) requiring Respondents to cooperate fully to assist the Bureau in determining the identity, location, and amount due to each consumer entitled to relief; and

(6) Disgorgement by Carnes of funds received from Integrity Advance's operations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August 2016, I caused a copy of the foregoing Enforcement Counsel's Post-Hearing Brief, along with the accompanying Proposed Findings of Fact and Conclusions of Law and Proposed Order, to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather.L. MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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