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 RESPONSIVE BRIEF**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	
Respondents.	

ENFORCEMENT COUNSEL'S POST-HEARING RESPONSIVE BRIEF

Table of Contents

Table of Authorities ii

I. Introduction 1

II. Carnes Engaged in Deceptive Acts 2

1. The Evidence Established at Trial Shows That Carnes Is Liable Under the *Gordon* Standard 2

2. Carnes Cannot Escape Liability by Claiming That He Did Not Know the Loan Agreements Were Unlawful 5

III. Respondents' Use of Remotely Created Checks Was Unfair 7

IV. Respondents' Due Process Claims Pertaining to Monetary Relief Are Meritless 10

V. Enforcement Counsel Has Reasonably Approximated Restitution Amounts Equivalent to Consumer Loss 14

1. Respondents Misstate the Standard for Restitution 14

2. Respondents Erroneously Claim That a Damages Expert Is Required in This Case 16

3. Respondents Failed to Present Any Evidence That Consumers Were Not Harmed 17

VI. Respondents' Due Process Claims Pertaining to Injunctive Relief Are Without Merit 21

VII. Imposing the Relief Sought for Pre-Transfer Date Violations of TILA (Count I) Pursuant to the CFPA Does Not Have an Impermissible Retroactive Effect 22

VIII. Civil Money Penalties Are Required Given the Findings of Violations of Law 24

IX. 28 U.S.C. § 2462 Does Not Bar the Monetary Relief That Enforcement Counsel Seeks 27

X. There Is No Basis for the Court to Reconsider Its Grant of Summary Disposition That Integrity Advance's Loan Agreement Was Facially Deceptive and Violated TILA. 28

XI. Conclusion 31

Table of Authorities

Cases

Barden Detroit Casino, L.L.C. v. City of Detroit, 59 F. Supp. 2d 641 (E.D. Mich. 1999) 22

Burton v. Zwicker & Assoc., PSC, 577 Fed. Appx. 555 (6th Cir. 2014) 16

CFPB v. CashCall, Inc., No. 07522-JFW, slip op. (C.D. Cal. Aug. 31, 2016) 4, 6

CFPB v. Corinthian Colleges, Inc., No. 1:14-cv-07194, 2015 WL 10854380 (N.D. Ill. Oct. 27, 2015) 22

CFPB v. Gordon, 819 F.3d 1179 (9th Cir. 2016) 2

CFPB v. Morgan Drexen, Inc., No. SACV13-01267, slip op. (C.D. Ca. Mar. 16, 2016) 26

Exposition Press, Inc. v. F.T.C., 295 F.2d 869 (2nd Cir. 1961) 17

F.T.C. v. Affiliate Strategies, Inc., 849 F. Supp. 2d 1085 (D. Kan. 2011) 15, 17, 18

F.T.C. v. Amazon.com, Inc., 71 F. Supp. 3d 1158 (W.D. Wash. 2014) 8

F.T.C. v. Amy Travel, 875 F.2d 564 (7th Cir. 1989) 6, 14

F.T.C. v. Bronson Partners, LLC, 674 F. Supp. 2d 373 (D. Conn. 2009) 18, 19, 20, 23

F.T.C. v. Direct Marketing Concepts, Inc., 624 F.3d 1 (1st Cir. 2010) 15

F.T.C. v. Febre, 128 F.3d 530 (7th Cir. 1997) 14, 15

F.T.C. v. Figgie Int'l, Inc., 994 F.2d 595 (9th Cir. 1993) 14, 15, 17, 18

F.T.C. v. Five-Star Auto Club, 97 F. Supp. 2d 502 (S.D.N.Y. 2000) 4

F.T.C. v. Freecom Communications, Inc., 401 F.3d 1192 (10th Cir. 2005) 4

F.T.C. v. Grant Connect LLC, 763 F.3d 1094 (9th Cir. 2014) 6

F.T.C. v. Ideal Fin. Solutions, Inc., No. 2:13-CV-00143-JAD, 2014 WL 2565688 (D. Nev. June 5, 2014) 8

F.T.C. v. Inc21.com Corp., 745 F.Supp.2d 975 (N.D. Cal. 2010) 8

F.T.C. v. Kuykendall, 371 F.3d 745 (10th Cir. 2004) 15

F.T.C. v. Nat'l Urological Grp., Inc., 645 F. Supp. 2d 1167 (N.D. Ga. 2008) 17, 18, 19, 20

F.T.C. v. Neiswonger, 580 F.3d 769 (8th Cir. 2009) 13

F.T.C. v. Neovi, Inc., 604 F.3d 1150 (9th Cir. 2010) 8

F.T.C. v. Publishers Bus. Servs., Inc., 540 App'x 555, 558 (9th Cir. 2013) 20

F.T.C. v. QT, Inc., 448 F. Supp. 2d 908 (N.D. Ill. 2006) 15

F.T.C. v. RCA Credit Servs., 727 F. Supp. 2d 1320 (M.D. Fla. 2010) 17

F.T.C. v. Renaissance Fine Arts, Ltd., 1995–2 Trade Cas. (CCH) ¶ 71,086 (N.D.Ohio Aug. 10, 1995) 14

F.T.C. v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991) 23

F.T.C. v. Silueta Distribs., Inc., 1995–1 Trade Cas. (CCH) ¶ 70,918 (N.D.Cal. Feb.24, 1995) 14

F.T.C. v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir.1982) 23

F.T.C. v. Stefanchik, 559 F.3d 924 (9th Cir. 2009) 14

F.T.C. v. Think Achievement Corp., 144 F. Supp. 2d 1013 (N.D. Ind. 2000) 14

F.T.C. v. Trudeau, 579 F.3d 754 (7th Cir. 2009) 14

F.T.C. v. Verity Int'l, Ltd., 443 F.3d 48 (2d Cir. 2006) 15

F.T.C. v. Wellness Support Network, Inc., No. 10-CV-04879-JCS, 2014 WL 664749 (N.D. Cal. Feb. 19, 2014) 18

Feil v. F.T.C., 285 F.2d 879 (9th Cir. 1960) 6

Finkel v. Universal Elec. Corp., 970 F. Supp. 2d 108 (E.D.N.Y. 2013) 11, 21

Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939 (1997) 23

In re Bankatlantic Bancorp, Inc. Secs. Litig., 07-61542-CIV, 2010 WL 6352662 (S.D. Fla. Aug. 30, 2010) 16

In re Broadcom Corp Secs. Litig., Nos. SA VC 01275GLTMLGZ, 2005 WL 1403516 (C.D. Cal. 2005) 25

In re Holiday Magic, Inc., et al., 84 F.T.C. 748 (F.T.C. 1974) 11

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573 (2010) 5

Johnson v. S.E.C., 87 F.3d 484 (D.C. Cir. 1996) 27, 28

Johnson v. United States, 394 F. Supp. 2d 854, 858 (S.D. W.Va. 2005) 16

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 22, 23

Meeker v. Lehigh Valley R.R. Co., 236 U.S. 412 (1915) 27

Montano v. Bonnie Brae Convalescent Hospital, Inc., 79 F. Supp. 3d 1120 (C.D. Cal. 2015) 21

Patsy's Italian Rest., Inc. v. Banas, 575 F. Supp. 2d 427 (E.D.N.Y. 2008) 21

Porter v. Warner Holding Co., 328 U.S. 395 (1946)... 23

Riordan v. S.E.C., 627 F.3d 1230 (D.C. Cir. 2010)... 28

S.E.C. v. Graham, 823 F.3d 1357 (11th Cir. 2016)... 27

S.E.C. v. Kokesh, No. 15-2087, 2016 WL 4437585 (10th Cir. Aug. 23, 2016)........................... 28

S.E.C. v. Quinlan, 373 Fed. Appx. 581 (6th Cir. 2010)... 22

S.E.C. v. Rind, 991 F.2d 1486 (9th Cir. 1993)... 28

S.E.C. v. Tambone, 550 F.3d 106 (1st Cir. 2008)... 28

Sivori v. Epps, No. 2:07CV79-MTP, 2009 WL 1421067 (S.D. Miss. May 19, 2009)................. 22

Stark v. Armstrong World Industries, Inc., 21 Fed. Appx. 371 (6th Cir. 2001) 16

United States v. Doman, 255 F.2d 865 (3d Cir. 1958)... 27

*United States v. Johnso*n, 541 F.2d 710 (8th Cir. 1976)... 5

United States v. Schiek, 806 F.2d 943 (9th Cir. 1986)... 14

United States v. Telluride Co., 146 F.3d 1241 (10th Cir. 1998)... 27, 28

Zacharias v. S.E.C., 569 F.3d 458 (D.C. Cir. 2009)... 28

Statutes & Regulations

12 C.F.R. § 1083.1.. 24

12 U.S.C. § 5536.. 6

12 U.S.C. § 5565.. 22

12 U.S.C. § 5565(c)(1).. 24

12 U.S.C. § 5565(c)(3).. 24

12 U.S.C. § 5565(c)(2)(A) 24, 25

12 U.S.C. § 5565(c)(2)(B) 25

12 U.S.C. § 5565(c)(2)(C) 25

28 U.S.C. § 2462.. 27, 28

I. Introduction

The evidence clearly shows that Respondent James Carnes (Carnes) engaged in deceptive conduct by virtue of his role at Integrity Advance and the company's use of a loan agreement that did not comport with the actual loan terms. The evidence further establishes that both Respondents engaged in unfair conduct through the use of remotely created checks. In the face of this undisputed evidence, Respondents resort to flawed arguments and ignore key facts.

With regard to Carnes's personal liability, Respondents' primary contention is that Carnes cannot be held liable for Respondents' deceptive loan agreement because he did not write or edit the agreement. But, even if it is true that Carnes did not author Integrity Advance's loan agreement template, the undisputed evidence establishes that Carnes legally engaged in deception. He had authority over the company, made the business decision to implement the loan agreement template, and knew that the loan agreement did not accurately reflect Integrity Advance's loan product. Respondents also contend that Carnes should escape liability since he did not know that the loan agreement was deceptive. However, there is no scienter requirement for UDAAP liability—a Respondent does not have to intentionally mislead consumers in order to be found liable for unfair or deceptive acts. For this reason, Respondents' references to Carnes's reliance on outside counsel, the company's Delaware lending license, and the volume of repeat customers are all irrelevant.

With regard to remotely created checks, Respondents make no effort to refute the key fact that Respondents failed to adequately disclose the product and then debited consumers' bank accounts after they had paid their total of payments and taken steps to block their accounts. Indeed, Respondents don't even argue that the remotely created check language in their ACH agreement was clear and conspicuous. Respondents' data clearly established consumer injury

from loss of funds and there is no evidence in the record that consumers had a reasonable mechanism to avoid being victimized by Respondents' remotely created checks.

Respondents' contention that any relief would violate their due process rights lacks merit. Respondents were well informed, through several Enforcement Counsel filings, about Enforcement Counsel's damages theory. Respondents had every opportunity to cross-examine Enforcement Counsel's data scientist, elicited testimony from their own data scientist, and were free to present evidence or argument as to why a different theory of damages was appropriate. Finally, as seen in our post-hearing brief, Enforcement Counsel reasonably approximated the consumer harm caused by Respondents' illegal acts. The burden is now on Respondents to show that certain consumers wanted to rollover their loans and pay higher fees, or that certain repeat consumers took subsequent loans fully understanding the loan product. Respondents have failed to meet this burden.

II. Carnes Engaged in Deceptive Acts

1. The Evidence Established at Trial Shows That Carnes Is Liable Under the *Gordon* Standard

As seen in Enforcement Counsel's Post-Hearing Brief [Dkt. 162] at 8-13 (EC Br.), Carnes clearly engaged in deceptive conduct under the standard articulated in *CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016). Carnes had authority over all Integrity Advance operations, policies, and procedures as chief executive (and majority owner) of Integrity Advance and its parent company. Carnes also conceded at trial that he had knowledge of Integrity Advance's misrepresentations. He understood how Integrity Advance's loans were disclosed and how those disclosures did not comport with the operation of the loan agreement. Finally, Carnes participated directly in Respondents' deceptive acts by making the business decision to implement Integrity Advance's deceptive loan agreement. Integrity Advance had only four

employees when it developed and started using its loan agreement, an agreement that did not materially change during the duration of the company's operations. Given that the other three employees either did not have corporate authority or specifically disclaimed a role in implementing the loan agreement, Carnes must have reviewed and made the business decision to use the loan agreement, thereby participating directly in the deception. *See* EC Br. at 9-11.

The crux of Respondents' counter-argument is that Carnes did not write or revise the Integrity Advance loan agreement template, and as such he cannot be held personally liable for Respondents' deception. This is simply incorrect. Carnes did not have to author the loan agreement in order to be responsible for the deception contained therein. He meets the *Gordon* individual liability standard (and the similar standard under the FTC Act) given the undisputed facts in evidence about his knowledge and authority. Even if the Administrative Law Judge accepts Respondents' factual premise (despite the fact that it is only supported by Carnes's self-serving testimony), there is no support in the case law (and Respondents have cited none) for the premise that a Respondent must personally author or edit deceptive materials in order to be held individually liable. Indeed, as seen *infra* and in Enforcement Counsel's post hearing brief, courts routinely hold chief executives liable for deceptive materials even when they did not personally author the materials. EC Br. at 13-15. Respondents' argument that Enforcement Counsel must prove facts identical to those in *Gordon* is unavailing. Respondents' Post-Hearing Brief [Dkt. 164] at 3-4 (Resp. Br.). Enforcement Counsel does not have to show that the instant matter mirrors the facts of *Gordon*, it must merely show—as it has—that the articulated standard has been met. Finally, holding that Carnes had to compose the loan agreement would have the practical effect of virtually eliminating the possibility of individual liability outside of one person companies. A chief executive with employees is necessarily going to delegate certain tasks; but

both logic and the case law do not support the assertion that this fact alone forecloses individual liability.

The other cases cited by Respondents not only fail to support their position, but in fact support the conclusion that Carnes is individually liable for the use of the deceptive loan agreement. *F.T.C. v. Five-Star Auto Club, Inc.* involved a pyramid scheme run by a husband and wife. 97 F. Supp. 2d 502 (S.D.N.Y. 2000). As Respondents concede in their brief, even though the wife was not "personally involved in creating and disseminating the deceptive materials" the court found her liable due to her role responding to government inquiries on behalf of the company. *Id*. at 539. Similarly, *F.T.C. v. Freecom Communications, Inc.* involved deceptive and misleading income projections used to encourage consumers to start home-based business ventures. 401 F.3d 1192, 1197 (10th Cir. 2005). The court found that the individual defendant, who owned the various entities involved in the scheme, could be held liable for deceptive income projections because he was fully aware of them. *Id*. at 1206. The record included testimony that he was involved in meetings where the deceptive representations were discussed. *Id*. Notably, however, the court did not consider whether the individual defendant authored or revised the misleading scripts—his knowledge of them was found sufficient.

In addition, a federal district court recently used the *Gordon* standard to hold an individual defendant liable for deceptive conduct under the CFPA, based on the CEO's authority over the company's operations and approval of the company's business model. *CFPB v. CashCall, Inc.*, No. 15-7522-JFW, slip op. at 14 (C.D. Cal. Aug. 31, 2016). In that case, the court found that the defendants had engaged in deceptive conduct by collecting on payday loans that were void or voidable under state law. *Id.* at 5. The defendants set up an arrangement where Western Sky (a tribal lending entity) would technically originate all loans and then quickly sell

the loans to CashCall on the theory that the sovereignty of the tribe would allow CashCall to service and collect on loans that otherwise would be void or voidable under state law. *Id.* at 2-4. The court found that CashCall's collection on these loans was deceptive and found CashCall's CEO personally liable, citing the *Gordon* standard. *Id.* at 14. The court found that the CEO had authority over the operation and approved the company's business model. *Id*. In its opinion, the court did not rely on any arguments that the CEO wrote loan agreements or personally called to collect on void or voidable payday loans. As Enforcement Counsel has shown, Carnes is similarly situated—even if he did not author Integrity Advance's loan agreement, he had authority over the company and knew exactly what it was doing.[1]

2. Carnes Cannot Escape Liability by Claiming That He Did Not Know the Loan Agreements Were Unlawful

Respondents appear to argue that Carnes is not liable because he did not know that the loan agreements were unlawful. This argument fails because knowledge of the unlawfulness is not required to prove deception.

As a general matter, courts "have long recognized the common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010) (citations omitted). Courts also have been clear that there is no intent requirement with respect to either unfair or deceptive conduct under the FTC Act. *United States v. Johnson*, 541 F.2d 710, 712 (8th Cir.

[1] Respondents' contention that Carnes spent a small percentage of his professional time on Integrity Advance after July 21, 2011 (the designated transfer date) is irrelevant. Respondents point to no authority holding that an individual must dedicate a majority of his time to deceptive or unfair practices in order to be found liable for those practices. Moreover, the record makes clear that the Carnes spent less time on Integrity Advance since, by 2011, the company was fully formed, running smoothly, and did not require significant attention from senior executives. Tr. II 70:5-10.

1976), *cert. denied*, 429 U.S. 1093 (1977) ("The Federal Trade Commission Act was designed to protect the public from unfair trade practices. Where such practices have occurred, liability for civil penalties arises without a need for any showing that the practices were intentional or malicious."); *F.T.C. v. Grant Connect, LLC*, 763 F.3d 1094, 1102 (9th Cir. 2014) ("The FTC need not show that a defendant intended to defraud consumers in order for that individual to be personally liable."). Nor does a person's good faith affect liability under the FTC Act. *Feil v. F.T.C.*, 285 F.2d 879, 896 (9th Cir. 1960) (holding that whether an individual acts in good or bad faith is immaterial to liability under Section 5 of the FTC Act).

Similarly, the CFPA does not require that a person know that deceptive or unfair conduct was unlawful for the person to be liable for that conduct. *See* 12 U.S.C. § 5536 ("it shall be unlawful for – … (1) any covered person or service provider - (B) to engage in any unfair, deceptive, or abusive act or practice"). Hence, because the evidence demonstrates that Carnes knew of the misrepresentations and had authority to control them, he is liable, and his intent or knowledge that the conduct was unlawful is legally irrelevant.

Nor can Carnes hide behind the advice of others. Although Respondents do not state explicitly that Carnes is relying on advice of counsel, Respondents make much of the fact that Integrity Advance hired outside lawyers to create the loan agreement template. Resp. Br. at 7-8. However, advice of counsel is not a defense against individual liability for unfair or deceptive conduct under the CFPA. *CFPB v. CashCall*, No. 15-7522-JFW, slip op. at 15 (holding that "reliance on advice of counsel is not a valid defense on the question of knowledge required for individual liability") (quoting *Grant Connect*, 763 F.3d 1102); *see also F.T.C. v. Amy Travel*, 875 F.2d 564, 575 (7th Cir. 1989) (approving of a lower court's decision that defendants could not rely on advice of counsel where they aware of material misrepresentations). Hence, the fact

that outside lawyers drafted Integrity Advance's loan agreement does not affect whether Carnes meets the standard outlined in *Gordon*.[2]

Finally, Respondents' suggestion that Carnes is not liable due to an alleged reliance on Integrity Advance's Delaware lending license is misplaced. As an initial matter, as seen above, any such reliance would go to Carnes's intent, which is not relevant to his liability. In addition, Delaware's licensing and renewal process was not a comprehensive review for adherence to federal law, and Respondents have provided no evidence that they reasonably could have believed otherwise. The Delaware Office of the State Bank Commissioner did not conduct any review whatsoever for compliance with the Electronic Fund Transfer Act and its review for TILA compliance was limited to a simple math calculation regarding the APR. Enforcement Counsel's Proposed Findings of Fact ¶¶ 101, 102 (EC FOF). Indeed, Delaware has never denied a license or refused to renew a license for a non-depository lender. *Id*. at ¶¶ 103-104.

III. <u>Respondents' Use of Remotely Created Checks Was Unfair</u>

The evidence presented at trial clearly established that Respondents unfairly used remotely created checks to debit consumer accounts. As addressed in Enforcement Counsel's post-hearing brief, Respondents used this poorly understood mechanism to debit consumer accounts when those consumers had already paid at least the disclosed "Total of Payments" and were trying to block Integrity Advance from taking additional funds. Respondents used remotely created checks in this scenario despite a hidden and opaque disclosure that did little to alert

[2] Similarly, Respondents' suggestion that the number of returning customers is germane to Carnes's knowledge is specious. Even if intent were relevant, Respondents cite to no evidence that Carnes actually observed and considered the number of returning Integrity Advance customers. And as Enforcement Counsel has previously argued, there are several reasons why consumers might become repeat borrowers aside from satisfaction with the product. EC Br. at 36.

consumers to the possibility that Integrity Advance could use this payment mechanism. *See* EC Br. at 15-22.

In their post-hearing brief, Respondents again repeat their straw man argument—that Enforcement Counsel seeks to make the use of remotely created checks per se improper. Resp. Br. at 12-13. As we have previously stated, Enforcement Counsel has never argued that the use of remotely created checks is inherently unfair; it is the manner in which Respondents' disclosed and used this payment mechanism that was unfair to consumers.

Any suggestion that Enforcement Counsel failed to establish consumer injury related to Respondents' use of remotely created checks (Resp. Br. at 14-16) is simply baseless. It is undisputed that Respondents used remotely created checks to debit consumers' bank accounts when those consumers had attempted to otherwise block access to their accounts. Respondents' own data showed how much Integrity Advance withdrew from consumers using remotely created checks. The case law is clear that loss of funds satisfies the substantial injury prong of an unfairness analysis. *See F.T.C. v. Amazon.com, Inc.*, 71 F. Supp. 3d 1158, 1164 (W.D. Wash. 2014) (holding that "billing customers without permission causes injury for the purposes of asserting" an unfairness claim) (*citing F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1153 (9th Cir. 2010); *F.T.C. v. Ideal Fin. Solutions, Inc.*, No. 2:13-CV-00143-JAD, 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)). Given this, there was no need for Enforcement Counsel to use a survey or an expert witness to establish consumer injury – the consumer injury is readily apparent from the undisputed facts.[3]

[3] Respondents suggest that the lack of consumer complaints in the record is somehow meaningful (Resp. Br. at 14), but provide no support for the position that consumer complaints

Respondents further contend that consumers could reasonably avoid their use of remotely created checks but do not even try to defend the loan agreement language ostensibly authorizing the payment mechanism. As shown in Enforcement Counsel's post-hearing brief, the remotely created check language failed to use the term remotely created check, and failed to communicate the fact that it allowed Integrity Advance to write a check against the consumer's account without their knowledge, signature, or approval. EC Br. at 20-21. Even if Respondents are correct in their assertion that the ACH authorization was presented separately to consumers (Resp. Br. at 17),[4] that fact does not demonstrate that Respondents explained to consumers that they would use remotely created checks or what it would mean if they did. Respondents point to testimony from Carnes that Integrity Advance's vendor would place calls and send emails before a remotely created check was used. However, Carnes provided few details about the prevalence of this practice (such as how many times the vendor would call the consumer or how many emails the vendor would send) or what the communications said, if anything, about remotely created checks. Tr. II 97:25 – 99:3. Put simply, there is no evidence in the record that Integrity Advance or its vendors explicitly warned consumers that, if they withdrew ACH authorization, Integrity Advance was going to forcibly debit their account using a check that they had never seen or signed. Moreover, it appears that if Integrity Advance or its vendor did successfully contact a consumer, her only option to avoid this practice was to pay Integrity Advance

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are required to establish unfairness. Given that many consumers are not familiar with remotely created checks (Tr. II 170:5-11) they likely would not know to complain about them.

[4] Respondents produced dozens of completed loan agreements during the course of the Bureau's investigation and they all contained every portion of the loan agreement in a single combined PDF document. In that format, the language ostensibly authorizing remotely created checks appears several pages into the document. *See e.g.*, EC-EX-001 – 006.

additional fees which she did not believe she owed or attempt to close her bank account before a remotely created check was processed.

Finally, Respondents argue that Carnes did not legally engage in unfair acts related to remotely created checks, but the evidence belies that argument. As shown in Enforcement Counsel's post-hearing brief and *supra*, Carnes meets the *Gordon* standard. EC Br. at 22. He plainly had authority over Integrity Advance and its policies and procedures. Even if Respondents are correct that Carnes was not personally involved in setting Integrity Advance's remotely created check policy (a statement which is unsupported by the record) there is no question that Carnes had authority over the policy. Additionally, Carnes testified that he knew the company was using remotely created checks, knew that they were used when consumers had withdrawn authorization, and saw remotely created checks being printed in the office. *See* EC FOF ¶¶ 119-121.

IV. <u>Respondents' Due Process Claims Pertaining to Monetary Relief Are Meritless</u>

Respondents' assertion that they have been "effectively left to guess" about Enforcement Counsel's monetary damages claims and that Enforcement Counsel "fail[ed] to present any damages case during trial," and consequently deprived Respondents of their due process rights, is disingenuous and utterly without merit. Resp. Br. at 19-20. As noted herein and in the post-hearing brief, Enforcement Counsel presented detailed testimony on the methodology for calculating the damages for each count and the amount of those damages. EC Br. at 23-37. Instead of debating this methodology on its merits, Respondents make the completely erroneous argument that expert testimony is required to prove damages. But expert testimony on damages simply is not necessary in a case like this where the finder of fact can determine the damages from the evidence in the record. Respondents disclosed one amount and charged more. The

difference is the basis for the damages for Counts I, II, and III. Respondents withdrew funds from consumers who had already overpaid and blocked ACH by using remotely created checks. The amount of those checks is the damages for Count VII.

Respondents have had ample notice and opportunity to be heard on Enforcement Counsel's damages claims. As an initial matter, any suggestion that Respondents did not know that damages were at issue in the hearing or that they did not have the opportunity—and obligation—to introduce evidence on damages and penalties during the hearing is utterly without merit. Enforcement Counsel sought damages and penalties in the Notice of Charges; Enforcement Counsel laid out its damages claims in connection with its motion for summary disposition; Enforcement Counsel's pre-hearing and opening statements reiterated the requested relief (EC Pre-Hearing Stmt. [Dkt. 134] at 8; Tr. I 16:2); and Enforcement Counsel moved *in limine* to exclude from the proceeding evidence not related to the "limited issues remaining for trial: Respondents Carnes's personal liability under Count III, Count VII, and the appropriate relief (including, *inter alia*, appropriate damages and civil money penalties) for all counts." EC Br. to Preclude Evid. [Dkt. 126] at 3. Indeed, in their opening statement, Respondents even argued against a damages claim of restitution. Tr. I 23:22 – 24:7. As such, there is no argument that Respondents were not on notice of their obligation to present evidence on the appropriate measure of damages or penalties. *See, e.g.*, *Finkel v. Universal Elec. Corp.*, 970 F. Supp. 2d 108, 121–22 (E.D.N.Y. 2013) ("[W]hen plaintiff clearly seeks such damages in its complaint, sufficient notice has been provided."); *In re Holiday Magic, Inc.*, 84 F.T.C. 748 (F.T.C. 1974) ("Respondents were formally put on notice of complaint counsel's intentions to seek restitutive relief the first day of trial …. Adequate and timely notice by complaint counsel on the record

with regard to seeking restitutive relief clearly meets all requirements of due process necessitating the elimination of surprise.").

Nor can Respondents plausibly claim that they did not have an adequate opportunity to test Enforcement Counsel's evidence of the appropriate amount of damages. All of Enforcement Counsel's damages calculations—submitted before, during, and after the hearing—were based on Respondents' consumer transactional data (EC-EX-095; EC-EX-101). Respondents completed production of this data on May 5, 2016, only five days before the deadline for filing motions for summary disposition. EC-EX-099. Nonetheless, Enforcement Counsel's briefing on summary disposition laid out its damages claims amounts based on calculations using that data. EC Br. in Support of Mot. Sum. Disp. [Dkt. 87] at 15 (arguing that the majority of Integrity Advance's consumers "paid more than the amount listed on the TILA disclosure, and Integrity Advance should be ordered to reimburse those consumers for the amounts paid in excess of the disclosed cost"); EC-EX-072 ¶¶ 6a, 6b, 11a (Hughes Decl. attached to the motion detailing specific amounts of damages from Respondents' unlawful conduct). The Hughes declaration attached to Enforcement Counsel's motion for summary disposition also set forth the methodology used in calculating the damages amounts. *Id.* ¶¶ 12-21. And Enforcement Counsel clearly stated that it estimated the amount consumers paid in excess of the disclosed cost to be approximately $133 million. EC Br. in Support of Mot. Sum. Disp. [Dkt. 87] at 14, 27.

Additionally, prior to the hearing, Enforcement Counsel provided Respondents with exhibits containing the damages calculations and explaining the methods for calculating those amounts from Respondents' own data. *See, e.g.*, EC-EX-097 (exhibit exchanged prior to the hearing that described the amounts of damages). Finally, during the hearing Enforcement Counsel proffered exhibits and testimony on the proposed methodology and amounts,

Respondents cross-examined Enforcement Counsel's witness on both the methodology and the amounts, and Respondents introduced evidence on damages calculated by their own witness. Put simply, Respondents' statement that "Enforcement Counsel's fail[ed] to even put forward a damages number (or numbers) until its closing argument," (Resp. Br. at 19), is simply false.

During the hearing both parties were given the opportunity to submit additional damages exhibits,[5] which the ALJ admitted into evidence, and both parties were given up to five business days to respond to those exhibits.[6] Hence, Respondents cannot now claim due process violations. *See, e.g.*, *F.T.C. v. Neiswonger*, 580 F.3d 769, 775 (8th Cir. 2009) (denying due process claims where defendant "was given notice and ample opportunity to be heard on the issues of damages and disgorgement. [Defendant] chose not to take full advantage of the opportunities.").

Enforcement Counsel's damages arguments have not changed in the post-trial briefing. Enforcement Counsel seeks damages equal to the amounts consumers paid over the "Total of Payments" as disclosed in the Integrity Advance loan agreement TILA box, including such amounts obtained by remotely created check. EC Br. at 25-30. The fact that the specific amounts were adjusted slightly *downward*—to account for potential refunds and to remove, per the

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[5] Enforcement Counsel's additional exhibit submitted at trial (EC-EX-102) addresses the ALJ's request, during trial, for information pertaining to first-time and one-time loans. Respondents likewise submitted six additional exhibits (RX019-RX024).

[6] Respondents asked for, and received, an adjournment to the following morning to continue their cross-examination of Mr. Hughes in light of the new exhibits. Enforcement Counsel submitted EC-EX-103 after the hearing, rebutting Respondents' new exhibits admitted during the proceeding. EC-EX-103 also relied on Respondents' datasets and applied the same methodology previously used by Mr. Hughes and previously contested by Respondents through cross-examination, exhibits, and their rebuttal witness.

Administrative Law Judge's request during the hearing,[7] all assessment of fees against consumers—does not violate Respondents' due process rights. *See, e.g.*, *United States v. Schiek*, 806 F.2d 943, 945 (9th Cir. 1986) (fair notice of damages amount received where restitution amount sought was less than the amount proved at trial).

V. Enforcement Counsel Has Reasonably Approximated Restitution Amounts Equivalent to Consumer Loss[8]

1. Respondents Misstate the Standard for Restitution

The proper restitution amount 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); *see also, e.g.*, *F.T.C. v. Trudeau*, 579 F.3d 754, 771 ("Consumer loss is a common measure for civil sanctions in … direct FTC actions.").

Enforcement Counsel has established reasonable approximations for restitution in the amount of consumers' net losses,[9] consisting of the amounts paid above the "Total of Payments," including those amounts paid by remotely created check after the consumer had blocked ACH, minus

[7] While the Administrative Law Judge made the request off-the-record in a side-bar with Enforcement Counsel and Respondents, a follow-up discussion pertaining to the request occurred on the record. Tr. III 111:18 – 113:12.

[8] As set forth in Enforcement Counsel's Post-Hearing Brief, where restitution amounts overlap, Enforcement Counsel is not seeking recovery for the same damages. EC Br. at 27-30.

[9] Consumers' net losses for purposes of calculating restitution equals the total monetary harm to consumer victims minus any refunds previously returned to victims. *See, e.g. F.T.C. v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1019 (N.D. Ind. 2000) ("[T]he amount of restitution equals the amount paid by the consumer victims of an illegal scheme, less any amounts previously returned to the victims.") (citing *F.T.C. v. Figgie Int'l, Inc.,* 994 F.2d 595, 606–07 (9th Cir. 1993) (stating that restitution is amount of enrichment received); *Amy Travel*, 875 F.2d at 570 (affirming restitution award equal to the amount consumers paid for travel certificates); *F.T.C. v. Renaissance Fine Arts, Ltd.,* 1995–2 Trade Cas. (CCH) ¶ 71,086 at 75,194 (N.D. Ohio Aug. 10, 1995) (stating that generally the appropriate amount of restitution in consumer redress cases is the full purchase price of the product, less refunds paid); *F.T.C. v. Silueta Distribs., Inc.,* 1995–1 Trade Cas. (CCH) ¶ 70,918 at 74,099 (N.D. Cal. Feb.24, 1995) (awarding restitution in full amount consumers paid)).

potential refunds.[10] *See Febre*, 128 F.3d at 536; *F.T.C. v. Affiliate Strategies, Inc.*, 849 F. Supp. 2d 1085, 1121 (D. Kan. 2011) (holding that consumers' net losses have been deemed "an appropriate baseline measure of actual loss [under the FTC Act] given the FTC's showing of reliance"); *see F.T.C. v. Kuykendall*, 371 F.3d 745, 765-66 (10th Cir. 2004); *F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06. (9th Cir. 1993).

Respondents' reliance on *F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006), for the proposition that the appropriate damages award is Respondents' unjust gains is misplaced. Resp. Br. at 21-22. In *Verity*, the court did not levy consumers' losses against defendants because non-party middlemen had taken some of the consumers' money before it reached the defendants. *Id.* at 68. Courts have rejected attempts to "inflate *Verity's* exception so that it overshadows the rule." *F.T.C. v. Direct Marketing Concepts, Inc.*, 624 F.3d 1, 14 (1st Cir. 2010) (holding that limiting the FTC's remedy to defendants' profits was improper where *Verity* was inapplicable, because the set of facts lacked the non-party middlemen that partook in proceeds from defendants' scheme before defendants, which gave rise to the exception in *Verity*); *F.T.C. v. QT, Inc.*, 448 F. Supp. 2d 908, 975 (N.D. Ill. 2006) (distinguishing appropriate disgorgement calculations in direct seller cases such as *Febre* as opposed to cases where some consumer losses are diverted to third parties, such as *Verity*). There is no evidence here that a portion of consumers' funds were diverted to third parties. Hence, Respondent's argument for damages

[10] Respondents suggest that Enforcement Counsel overstated consumer harm by failing to offset the loans of repeat customers where they paid less than the disclosed "Total of Payments." Resp. Br. at 25 n.20. As noted in Enforcement Counsel's post-hearing brief, Respondents did not engage in a good faith effort to estimate how many consumers to whom this applied. EC Br. at 40 n.24. Moreover, the fact that Respondents propose a factual finding that consumers were required to fully pay off a loan before Integrity Advance would originate a second loan suggests that this issue applies to very few Integrity Advance consumers. *See* Respondents' Proposed Findings of Fact [Dkt. 165] ¶ 94 (Resp. FOF). Finally, Respondents offer no case law support for their suggestion that an offset would be appropriate.

based on unjust gains is an improper attempt to inflate the *Verity* exception to a factually inapposite case.

2. Respondents Erroneously Claim That a Damages Expert Is Required in This Case

Respondents make the bare assertion that the restitution values established through Robert Hughes, a data scientist, and based on Respondents own datasets (EC-EX-095; EC-EX-101) are inadequate, simply because Mr. Hughes is not an economist. Resp. Br. at 18. As discussed in detail in the post-hearing brief, courts have long held that the practice of relying on non-economists to summarize a Respondent's data is an acceptable way to establish a reasonable approximation of monetary harm. *See* EC Br. at 31. Here, where the damages sought are based on a straightforward theory of injury—*i.e.*, consumers were injured when Respondents withdrew more than the amounts disclosed in the TILA box—Enforcement Counsel did not need to present evidence from an economist to connect the amounts of consumer injury to a theory of injury. Where the relevant "figures speak for themselves … an economist is not required … to interpret such evidence." *In re Bankatlantic Bancorp, Inc. Securities Litig*., 07-61542-CIV, 2010 WL 6352662, at *3 (S.D. Fla. Aug. 30, 2010); *see also Burton v. Zwicker & Assoc., PSC*, 577 Fed. Appx. 555, 567 (6th Cir. 2014) (holding that plaintiff "need not have paraded a team of economists in front of the judge to meet his burden of proof" but only provide some evidence that would serve as a basis for the district court to impose a limit on the duration of the award of front pay); *Stark v. Armstrong World Industries, Inc*., 21 Fed. Appx. 371, 376 (6th Cir. 2001) (unpublished) (holding that, where plaintiff suffered from cancer after four-and-a-half decades working with asbestos, plaintiff needed to bring forth evidence of the cause of the cancer but the court would "not require that cause necessarily be established by expert testimony"); *cf. Johnson v. United States*, 394 F. Supp. 2d 854, 858 (S.D. W.Va. 2005) (holding that where plaintiff's

claim was based on well-established legal theory of liability and straightforward injury—plaintiff asserts he suffered damages because a too-large prosthesis was inserted backwards—plaintiff did not have to present expert testimony to show a breach of standard of care).

3. Respondents Failed to Present Any Evidence That Consumers Were Not Harmed

Respondents' assertion that Enforcement Counsel's requested equitable monetary relief does not reflect "*actual* loss" is not supported by any evidence. Resp. Br. at 23.[11] As discussed in detail in the opening brief (EC Br. at 34-35), once deception has been proven, as it has here, a "presumption of actual reliance arises." *See Figgie*, 994 F.2d at 605; *see also Affiliate Strategies*, 849 F. Supp. 2d at 1120–21 (presumption of reliance where FTC has shown that the business entity made material misrepresentations likely to deceive consumers, the misrepresentations were widely disseminated, and consumers purchased the entity's products). Enforcement Counsel "is not required to show reliance by each individual consumer." *Id.* (quoting *F.T.C. v. RCA Credit Servs.*, 727 F. Supp. 2d 1320, 1335-36 (M.D. Fla. 2010); *accord Figgie*, 994 F.2d at 605-06 (explaining that, under the FTC Act, "proof of individual reliance by each purchasing customer is not needed"). Rather, once deception has been proven, the burden shifts to

[11] Respondents also make the odd assertion that Enforcement Counsel has failed to prove that Integrity Advance caused consumer harm. Resp. Br. at 20-21. This is not a case that warrants a complex causation analysis. Respondents took funds from consumers, either by ACH or remotely created check, that were not legally owed by those consumers. The loss of those funds represents harm, and there is no possible cause of that harm other than Respondents' actions. Furthermore, contrary to Respondents' assertion, consumer testimony and consumer surveys are not required to support a finding of consumer injury arising out of violations of Federal consumer financial law. *See, e.g. F.T.C. v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008) (In finding companies liable for monetary relief to consumers arising out of advertisements that were misleading on their face, court concluded that requiring "the FTC to survey the exact consumer group that defendants solicited is both unduly burdensome and unnecessary, particularly when the claims are apparent from the face of the advertisement."); *Exposition Press, Inc. v. F.T.C.*, 295 F.2d 869, 872 (2nd Cir. 1961) ("Actual consumer testimony is in fact not needed to support an inference of deceptiveness by the Commission.").

Respondents to demonstrate that specific consumers (*e.g.*, consumers with more than one loan) should not receive restitution. *See, e.g. Affiliate Strategies*, 849 F. Supp. 2d at 1121; EC Br. at 34-36.

It is well-settled that, as a baseline, the ALJ may presume that repeat customers were harmed. *F.T.C. v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1213 (2008) (The FTC has met its burden, and "thus, the court may presume that the consumers actually [were harmed], even when making subsequent purchases."); *F.T.C. v. Wellness Support Network, Inc.*, No. 10-CV-04879-JCS, 2014 WL 664749, at *20 (N.D. Cal. Feb. 19, 2014) (The presumption of harm "is not rebutted merely because a customer reorders a product."); *F.T.C. v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 398 (D. Conn. 2009) (" [the judge] may presume, absent evidence to the contrary, that [defendants'] customers relied upon the deceptive advertisements …. 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."); *see also Figgie*, 994 F.2d at 605-06. It is up to Respondents to rebut the presumption of harm to repeat customers by submitting evidence demonstrating that the repeat customers were "wholly satisfied with their purchases and thus suffered no damages." *Bronson*, 674 F. Supp. 2d at 386; *Wellness Support Network*, 2014 WL 644749 at *20 ("[I]n the absence of affirmative evidence that customers who reordered did not rely, at least in part, [on the deceptive loan agreements], the amount of restitution for consumer injury should include sales even if they were reorders.").[12]

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[12] Respondents suggest that Enforcement Counsel overstated consumer harm by failing to offset the loans of repeat customers where they paid less than the disclosed total of payments. Resp. Br. at 25 n.20. However, the Administrative Law Judge has already held that each loan agreement was facially deceptive, even as to returning customers. Order [Dkt. 111] at 31. Therefore,

There is no question that Respondents' evidence about the existence of repeat customers is insufficient to overcome the presumption of harm. "While it may be logical to infer that the customers who reordered [Respondents'] product[] relied to some degree upon their experience with the products, the fact that the customers' experience played a role in their purchasing decisions does not mean or even imply that the customers did not also rely upon the representations" in Integrity Advance's loan agreement. *Nat'l Urological Grp.*, 645 F. Supp. 2d at 1213. Respondents' calculations of the percentage of customers who took out more than one loan and how many loans such customers took out is irrelevant to the question of whether repeat customers suffered harm. *See, e.g. Bronson*, 674 F. Supp. 2d at 386 (That 8% of defendants' revenue was attributable to reorders by consumers was not sufficient to meet defendants' burden of proof). Repeat customers may have repurchased products for numerous reasons, including being forced into taking subsequent loans due to Integrity Advance deducting more than anticipated or being trapped in a cycle of debt, or lead generators might have redirected unwitting consumers to the company. Where "[n]othing in the record supports [the] proposition [that returning customers were wholly satisfied with the product] and [Respondents] failed to provide the [ALJ] with anything more than speculation that reorders are evidence of consumer satisfaction" Respondents are not entitled to any offset for repeat customers. *Bronson*, 674 F. Supp. 2d at 386. Relatedly, Respondents' speculation that repeat customers were "undoubtedly informed of and understood how the loan operated" (Resp. Br. at 24) is insufficient to overcome the presumption of harm to repeat customers. Respondents who present "nothing more than mere

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Enforcement Counsel calculated harm on a per loan basis. Moreover, as noted in Enforcement Counsel's post-hearing brief, Respondents did not engage in a good faith effort to estimate how many consumers underpaid on a subsequent loan, and offer no legal support for their suggestion that an offset would be appropriate. EC Br. at 40 n.24.

speculation in this regard … fail[] to meet their burden." *Nat'l Urological Grp.*, 645 F. Supp. 2d at 1213 ("The defendants do not introduce any evidence of what actually influenced the customers' decisions to reorder the products; instead, they merely speculate that it was the customers' experiences rather than the advertisements."); *Bronson*, 674 F. Supp. 2d at 386 ("[D]efendants failed to provide the court with anything more than speculation that reorders are evidence of consumer satisfaction.").

Respondents' cases do not provide otherwise. For example, Respondents cite to *Publishers Bus. Servs., Inc.*, 540 App'x 555, 558 (9th Cir. 2013), for the proposition that payments made towards subsequent loans should not be considered in the ALJ's calculation of consumer injury. Resp. Br. at 24. But in fact, that case stands for nothing more than the unremarkable proposition that courts may consider evidence that consumers were not harmed in ordering relief. *Publishers Bus. Servs.*, 540 App'x at 558. That case does not alter the burden-shifting framework described above. In *Publishers Bus. Servs.,* the court stated that the FTC must establish the calculation of injury to consumers, but that the court need not simply "accept the calculation proposed by the FTC" at face value. *Id.* Rather, in keeping with the burden-shifting framework for damages, the court noted that it may consider whether returning customers "necessarily knew the actual terms of the transaction at the time of the renewal." *Id.* However, nothing in the ruling changed whose burden it is to present that evidence for the court's consideration. In this matter, Respondents have the burden,[13] and they utterly failed to meet it. Respondents have failed to show that any repeat consumers knew the actual terms of the

[13] Respondents attempt to turn the burden-shifting framework on its head, asserting that the onus is on Enforcement Counsel to show "how or why a repeat customer … was harmed when that customer then returned to Integrity Advance[.]" Resp. Br. at 24. Respondents do not cite a single case for this proposition, and they cannot replace the burden-shifting regime with their own test for damages.

transaction and have not, for that matter, offered any evidence that sheds light on repeat customers.

VI. Respondents' Due Process Claims Pertaining to Injunctive Relief Are Without Merit

Throughout the proceeding, Respondents have been on notice of Enforcement Counsel's intention to seek injunctive relief. Enforcement Counsel's Notice of Charges explicitly requested, in the Prayer for Relief, a permanent injunction preventing future violations of Federal consumer financial law, including TILA and EFTA, and "[o]ther injunctive relief as the Court may deem just and proper[.]" Notice of Charges [Dkt. 1] at 14-15; *see also Finkel*, 970 F. Supp. 2d at 121–22. Enforcement Counsel has more than satisfied Respondents' procedural due process rights. *See, e.g.*, *Patsy's Italian Rest., Inc. v. Banas*, 575 F. Supp. 2d 427, 465-66 (E.D.N.Y. 2008), *aff'd*, 658 F.3d 254 (2d Cir. 2011) (holding that plaintiffs' argument that defendants were not entitled to injunctive relief because defendants' counterclaims prayer for relief only sought declaratory judgment to be "legally unsound," where "[t]hroughout this process, [p]laintiffs were on notice that [d]efendants would be seeking injunctive relief against [p]laintiffs, even though their prayer for relief did not explicitly state as much.")

Respondents have not explained how, having been put on notice of Enforcement Counsel's intention to seek injunctive relief eight months before trial, they could possibly be prejudiced by Enforcement Counsel's request for such relief. Furthermore, Respondents have not explained why Enforcement Counsel should not be permitted to state with greater specificity in its post-hearing brief the scope of injunctive relief it seeks. Respondents, in their own post-trial submission, have the opportunity to challenge the proper scope of any injunctive relief to be awarded. Indeed, the scope of injunctive relief is a matter often left to the post-hearing stage of a proceeding. *See, e.g.*, *Montano v. Bonnie Brae Convalescent Hosp., Inc.*, 79 F. Supp. 3d 1120,

n.1, (C.D. Cal. 2015) (following bench trial, court requested parties address type of injunctive relief court should grant in event court found in favor of plaintiff in their post-trial briefs); *Sivori v. Epps*, No. CIV.A. 2:07 CV79-MTP, 2009 WL 1421067, at *1 (S.D. Miss. May 19, 2009) (following bench trial finding that plaintiff entitled to injunctive relief for exposure to unreasonable levels of secondhand smoke, magistrate judge requested that parties file post-trial submissions setting forth the appropriate, narrowly-tailored scope of any injunctive relief to be awarded); *Barden Detroit Casino, L.L.C. v. City of Detroit*, 59 F. Supp. 2d 641, 656 n.26 (E.D. Mich. 1999), *aff'd*, 230 F.3d 848 (6th Cir. 2000) (requesting that parties submit post-hearing briefs addressing the scope of potential injunctive relief in casino licensing matter).[14]

VII. Imposing the Relief Sought for Pre-Transfer Date Violations of TILA (Count I) Pursuant to the CFPA Does Not Have an Impermissible Retroactive Effect

The arguments set forth in Enforcement Counsel's Post-Hearing Brief explain why, as a matter of law, the Bureau has authority to obtain 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. EC Br. at 32-34. Equitable relief for pre-transfer date violations of TILA also does not have an impermissible retroactive effect. *Id.* (*citing Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994)).

[14] Respondents also argue that injunctive relief should not be available, because Integrity Advance ceased operations in 2013 and, according to Respondents, Carnes is not likely to engage in future violations of Federal consumer financial law. Resp. Br. at 32. However, courts have held otherwise. *See, e.g.*, *CFPB v. Corinthian Colleges, Inc.*, No. 1:14-cv-07194, 2015 WL 10854380, at *8 (N.D. Ill. Oct. 27, 2015) (permanently enjoining college that had filed petition for chapter 11 bankruptcy from committing future violations of the CFPA's prohibition on unfair, deceptive, and abusive acts and practices); *S.E.C. v. Quinlan*, 373 Fed. Appx. 581, 586 (6th Cir. 2010) (permanently enjoining former CEO from future violations of securities law due to former CEO's wrongful conduct, lack of recognition of wrongful nature of conduct, and financial benefit from unlawful activity); *Think Achievement*, 144 F. Supp. 2d at 1018 (finding permanent injunction against corporate defendants necessary to protect the public from future violations of the FTC Act even though the corporate defendants were defunct).

Respondents' argument that the FTC is limited to obtaining cease and desist orders for violations of Section 13(b) of the FTC Act is misleading. Long before Respondents even began originating payday loans, it was well-settled that Section 13(b) allows the FTC to obtain equitable relief, including restitution. *See, e.g.*, *F.T.C. v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718-19 (5th Cir. 1982) (concluding that "a grant of jurisdiction such as that contained in Section 13(b) carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it" and holding that "Section 13(b) contains no express limitations on the otherwise full powers of the district court to mold appropriate decrees under its traditional equitable jurisdiction"); *See, e.g.*, *Bronson*, 674 F. Supp. 2d at 379 ("[E]quitable restitution is an available remedy under Section 13(b) of the FTC Act."); *see also F.T.C. v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991) (upholding the district court's rescission remedy despite § 13(b)'s failure to expressly allow that remedy because "[w]here Congress allows resort to equity for the enforcement of a statute, all the inherent equitable powers of the district court are available for the proper and complete exercise of the court's equitable jurisdiction, unless the statute explicitly, or by a necessary and inescapable inference, limits the scope of that jurisdiction") (citing *Porter v. Warner Holding Co.,* 328 U.S. 395, 397-98 (1946)).

Respondents can point to no new obligation, duty, or disability that would attach retroactively to Integrity Advance's violations of TILA before July 21, 2011. As discussed in Enforcement Counsel's opening brief, statutes affecting *where* a suit may be brought or *which* forum may have jurisdiction to entertain a cause of action are rules of procedure that regulate secondary rather than primary conduct and do not make application of the statute retroactive. *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997) (*citing Landgraf*, 511

U.S. at 275). EC Br. at 32-34. Integrity Advance's unlawful violations of TILA exposed the company to equitable relief before July 21, 2011, and Integrity Advance's unlawful violations of TILA continued to expose the company to equitable relief after July 21, 2011. As such, Respondents' claim that relief is not available for pre-transfer date violations of TILA must fail.

VIII. Civil Money Penalties Are Required Given the Findings of Violations of Law

Respondents claim that "there is no basis for imposing any CMPs here, let alone the maximum amount Enforcement Counsel seeks here." Resp. Br. at 30. But Respondents appear to misunderstand the statutory framework for assessing penalties under Section 5565 of the CFPA. "Any 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). Under the first tier of penalties, which requires no proof of recklessness or knowledge as to the unlawfulness of the conduct in question, Enforcement Counsel may seek up to $5,000 per violation per day. 12 U.S.C. § 5565(c)(2)(A). Pursuant to 12 C.F.R. § 1083.1, the maximum first tier penalty has been adjusted for inflation to $5,437 per violation per day. The penalties sought by Enforcement Counsel (EC Br. at 42-47) do not exceed the maximum permitted under the first tier, and Respondents offer no support for their claims otherwise.

In determining the amount of penalties to recommend, the Administrative Law Judge "shall take into account the appropriateness of the penalty" based on the evidence in the record with respect to the mitigating factors described in 12 U.S.C. § 5565(c)(3)(A)-(E). Despite having repeated notice that the appropriate amount of penalties was at issue in the hearing, Respondents proffered virtually no evidence supporting mitigation, and when all of the evidence in the record related to the mitigating factors is considered, there is no justification for recommending less than the amount sought by Enforcement Counsel. As is discussed above, there is no argument

that Respondents did not have notice and an opportunity to present mitigating evidence with respect to the imposition of civil money penalties.[15]

Respondents make the bare assertion that there is "no evidence to suggest that Respondents knew or should have known that the loan product might not comply with the law."[16] Resp. Br. at 31. To the extent Respondents are attempting to import a scienter requirement into first tier penalties, that effort must fail, as the plain language of the CFPA contains no such requirement. *Compare* 12 U.S.C. §§ 5565(c)(2)(A), *with* (c)(2)(B), (C). To the extent that Respondents are trying to argue that they acted in good faith, that effort also fails under the weight of the evidence in the record. Carnes admitted that when he was the chief executive of Integrity Advance he knew that the loans automatically rolled over and that the loan agreement disclosed the cost of the loan assuming that the loan would not rollover. Tr. I 219:13 – 220:3; Tr. II 50:21 – 51:3. He may (or may not) have thought the loans were lawful, but he knew that the disclosures were misleading. Furthermore, as noted above, Respondents had no rational basis for believing that Delaware had blessed their loan agreement. Those facts alone defeat Respondents' suggestion that the penalties should be mitigated based on alleged good faith.

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[15] Any argument by Respondents that Enforcement Counsel has the burden to introduce mitigating evidence is nonsensical, as most, if not all, of the relevant evidence is under Respondents' sole control.

[16] Although they do not expressly claim reliance on counsel, Respondents note that they used outside counsel to draft the loan agreement, but they do not offer evidence regarding any opinions they received from counsel regarding the lawfulness of the agreement. Resp. Br. at 30-31. Indeed, in response to Respondents' objections, Mr. Foster refused to testify about the drafting and approval of the loan agreement on grounds of privilege. Tr. II 21:21-25; Tr. II 29:9-11. Respondents cannot assert privilege on the one hand and claim reliance on the advice of counsel on the other. *See In re Broadcom Corp. Secs. Litigation*, Nos. SA CV 01275GLTMLGX, 2005 WL 1403516 (C.D. Cal. Feb. 10, 2005).

Respondents also argue, without support, that "[t]he Company and Mr. Carnes lack the financial resources to pay the CMPs sought by Enforcement Counsel." Resp. Br. at 31. Respondents appear to be attempting to interject a "present ability to pay" limitation on CMPs, but the statute includes no such limitation. Rather, one of the mitigating factors to consider is "size of financial resources and good faith of the person charged." 12 U.S.C. § 5565(c)(3). Respondents presented absolutely no evidence as to the size of Carnes's financial resources – either at trial or even in post-trial briefing. Instead, the only evidence in the record about Carnes's resources came from testimony elicited by Enforcement Counsel demonstrating that he received millions of dollars from the deceptive and unfair practices. Carnes received an annual salary of $250,000 when he was the chief executive of Integrity Advance. Tr. I 167:11-17. Carnes received $4.2 million in distributions from Hayfield in 2011, and $2.2 million in distributions from Hayfield in 2012. Tr. I 158:24 – 159:4; Tr. I 174:24 – 175:6. Carnes also received approximately $25 million from the sale of Hayfield to EZ Corp at the end of 2012. Tr. I 239:4-8. Thus, the evidence in the record does not justify mitigating any penalty recommended for Carnes based on his financial resources.[17]

[17] Enforcement Counsel recognizes, and cited in its post-hearing brief, that Carnes testified that Integrity Advance had relatively little money in its bank accounts. EC Br. at 43-44. However, Respondents did not introduce documentary evidence of Integrity Advance's finances, and when the entire record is considered, Enforcement Counsel respectfully suggests that the evidence does not justify mitigating the penalty for Integrity Advance based on the size of its resources. *See generally CFPB v. Morgan Drexen, Inc.*, No. SACV13-01267, slip op at 1 (C.D. Ca. Mar. 16, 2016) (ordering $40 million in civil money penalties against a company in bankruptcy).

As Respondents have not addressed any other potential mitigating factors relevant to first tier penalties,[18] the Administrative Law Judge should recommend imposing the penalties requested by Enforcement Counsel. *See* EC Br. at 46.

IX. 28 U.S.C. § 2462 Does Not Bar the Monetary Relief That Enforcement Counsel Seeks

Respondents assert that 28 U.S.C. § 2462 bars "any monetary [sic] requested by Enforcement Counsel." Resp. Br. at 33. This argument is specious because Respondents have failed to distinguish the types of monetary relief that come within the reach of this section. Section 2462 does not apply to claims for restitution-type relief and instead only applies to penalties. *Johnson v. S.E.C.*, 87 F.3d 484, 488 (D.C. Cir. 1996) ("[W]e conclude that a 'penalty,' as the term is used in § 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action."); *see also id.* at 491 ("[W]here the effect of the SEC's action is to restore the *status quo ante*, such as through a proceeding for restitution or disgorgement of ill-gotten profits, § 2462 will not apply."); *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915) ("The words 'penalty or forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such."); *United States v. Telluride Co.*, 146 F.3d 1241, 1246 (10th Cir. 1998) ("Our focus in defining a penalty for § 2462 is whether the sanction seeks compensation unrelated to, or in excess, of the damages caused by the defendant."); *United States v. Doman*, 255 F.2d 865,

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[18] Although Enforcement Counsel does not carry the burden to demonstrate the existence or non-existence of mitigating factors, it has addressed other mitigating factors in its Post-Hearing Brief. EC Br. at 43-46.

868 (3d Cir. 1958) (concluding that § 2462 did not apply because provision at issue "does not provide for a penalty but is remedial in nature"). Enforcement Counsel is only seeking penalties for conduct that occurred after July 21, 2011, so the five-year limitations period contained in §2462 (which for this matter could only apply to conduct prior to November 2010) does not limit the penalties that can be recommended by the Administrative Law Judge in this proceeding.

Respondents cite only one case for their sweeping proposition that § 2462 bars Enforcement Counsel from obtaining any monetary relief, *S.E.C. v. Graham,* 823 F.3d 1357 (11th Cir. 2016).[19] Resp. Br. at 33. However, the monetary relief addressed in that case was limited to disgorgement, where the primary monetary relief Enforcement Counsel seeks here is restitution. Further, *Graham* appears to represent a minority view. Most circuits that have addressed the issue have held that 28 U.S.C. § 2462 does not apply to disgorgement. *See Riordan v. S.E.C.*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010); *Johnson*, 87 F.3d at 491; *Zacharias v. S.E.C.*, 569 F.3d 458, 473 (D.C. Cir. 2009) (disgorgement orders are not penalties "so long as the disgorged amount is causally related to the wrongdoing."); *United States v. Telluride Co.*, 146 F.3d 1241, 1247 (10th Cir. 1998); *S.E.C. v. Kokesh*, No. 15-2087, 2016 WL 4437585, at *6 (10th Cir. Aug. 23, 2016); *S.E.C. v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008), *reh'g en banc granted, op. withdrawn*, 573 F.3d 54 (1st Cir. 2009), *op. reinstated in part on reh'g*, 597 F.3d 436 (1st Cir. 2010); *see also S.E.C. v. Rind*, 991 F.2d 1486 (9th Cir. 1993).

X. There Is No Basis for the Court to Reconsider Its Grant of Summary Disposition That Integrity Advance's Loan Agreement Was Facially Deceptive and Violated TILA

Respondents concede that the Bureau's Rules provide no basis for seeking reconsideration of the Administrative Law Judge's decision on summary disposition, and then

[19] Respondents have provided an incorrect citation to this case: 823 F.3d 1375.

proceed to seek it anyway. Resp. Br. at 34. As there is no procedural basis for this request, the Administrative Law Judge should not consider it.

Furthermore, Respondents' request is disingenuous at best, and granting it would be both unfair and unduly prejudicial to Enforcement Counsel. Respondents complain that the Administrative Law Judge should reverse his ruling on summary disposition as to the deceptiveness of the loan agreement (as well as the concomitant findings of fact) in part because Enforcement Counsel did not present evidence during the hearing to show that a specific, individual "reasonable consumer" was deceived by that agreement. Resp. Br. at 36. Respondents make this argument despite the fact that when the hearing began, the Administrative Law Judge had already ruled that there was no genuine issue of material fact as to whether the loan agreement was deceptive and Enforcement Counsel had moved to exclude this very type of evidence on the grounds that it would be unduly repetitive and irrelevant. Mot. to Preclude Evidence [Dkt. 126]. Recognizing that Respondents might try to relitigate these issues—exactly as they are trying to do now—the Administrative Law Judge granted the motion and excluded all such evidence. Ord. Precluding Evid. [Dkt. 141] at 2-3.

In any case, Respondents' arguments for reconsideration lack any substantive basis. First, Respondents' argument that Delaware law allowed multi-payment loans is irrelevant. Resp. Br. at 35. The summary disposition decision on these issues rested on the fact that Respondents disclosed a multi-payment loan as if it was a single payment loan (*see* Order Partially Granting Summ. Disposition [Dkt. 111] at 26), not whether they were permitted to roll over the loans under Delaware law.

Second, Respondents' argument is also based on their misrepresentations of the testimony of Quinn Miller. Respondents state that Ms. Miller "personally reviewed each loan

agreement to ensure that the TILA box was accurate and correctly placed." Resp. Br. at 35. In fact, Ms. Miller testified that her review of the Truth in Lending box consisted of determining whether there was a separate box in the loan agreement, Tr. III 150:24 – 151:2, and checking the lenders' calculations of the APR in the Truth in Lending box to determine if it was mathematically correct, *id.* 153:5-6. As she clarified in her testimony: "The only math we did on that [the TILA box] was for the APR, we didn't try to figure anything else." *Id.* 153: 5-6. In other words, she did not look to see if a lenders' disclosures comported with the terms of its agreement, but simply ran a mathematical calculation on the APR, one of four boxes in the TILA disclosure.[20]

Respondents also assert that Ms. Miller testified that as part of the supervisory examinations, "entities with lending licenses in the State of Delaware . . . are examined for compliance with the consumer finance laws." Resp. Br. at 35. In fact, Ms. Miller was very careful not to testify about the nature of the supervisory examinations. When asked whether her office engaged in supervisory examinations, she testified: "That is not for me to comment on. . . . [W]e have an examination section in the office. . . . That is all I can say." Tr. III 128:20, 128:23 – 129:1. And when asked about the potential supervisory examination review of loan agreements, she testified: "I would assume, not being the expert in this area, that it would come up at examination, but I'm not the one to ask about that." Tr. III 131:19-21.

As Respondents have provided no procedural or substantive basis for the Administrative Law Judge to reconsider his Order Granting the Bureau's Motion for Summary Disposition on

[20] Miller also specifically testified that her office did not look for compliance with the Electronic Funds Transfer Act. Tr. III 149:1-3.

the TILA and deception claims, Enforcement Counsel respectfully requests that the Administrative Law Judge deny this request.

XI. Conclusion

For years, Integrity Advance deceived its customers by providing loan agreements that purported to reflect the cost of the short-term loan being offered, when in fact, the true cost was not disclosed. That deception was made possible by the actions of Carnes, the CEO who was actively involved in the company's operations and ultimately responsible for the deceptive loan agreement. Consumers who discovered they were paying more than anticipated had few options—even if those consumers stopped the ACH authorization they had been required to provide under the loan agreement, they faced having their accounts debited by virtue of a remotely created check. The potential use of remotely created checks, even if consumers had understood that mechanism, was not clearly disclosed in the loan agreement. In situations where consumers had already paid more than the amount disclosed in the TILA box of their loan agreements and those consumers attempted to block access to their bank accounts, the use of remotely created checks was an unfair practice. As with the deceptive loan agreement, Carnes was fully aware of the operation and use of remotely created checks.

Tens of thousands of consumers were harmed by Respondents' practices. Those consumers' loan agreements indicated they owed a certain amount, when in reality they were obligated to repay much more. The operation of the loan agreement, automatically renewing and using required ACH authorizations and remotely created checks to take money from consumers' bank accounts, made it extremely difficult for consumers to stop the harm. Now is the time for that harm to be compensated. Those consumers should be given back the amounts collected in violation of the law, and Respondents must be penalized for those violations.

Enforcement Counsel respectfully requests that the Administrative Law Judge grant all of the relief requested in its post-hearing brief.

Respectfully submitted,

Attorneys for Plaintiff
Consumer Financial Protection Bureau

ANTHONY ALEXIS
Enforcement Director

DEBORAH MORRIS
Deputy Enforcement Director

CRAIG COWIE
Assistant Litigation Deputy

s/Alusheyi J. Wheeler

Alusheyi J. Wheeler
Wendy J. Weinberg
Vivian W. Chum
1700 G Street NW
Washington, DC 20552
Phone: (202) 435-7786
Facsimile: (202) 435-7722
Email: alusheyi.wheeler@cfpb.gov

Enforcement Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September 2016, I caused a copy of the foregoing Enforcement Counsel's Post-Hearing Responsive Brief, along with the accompanying Response to Respondents' Proposed Findings of Fact, 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:

Allyson B. Baker, Esq.
ABBaker@venable.com

Danielle R. Foley, Esq.
DRFoley@venable.com

Peter S. Frechette, Esq.
PSFrechette@venable.com

Hillary S. Profita, Esq.
HSProfita@venable.com

Joanna P. Boyd, Esq.
JPBoyd@venable.com

Christine E. White, Esq.
CEWhite@venable.com

Andrew T. Hernacki, Esq.
ATHernacki@venable.com

/s/ Alusheyi J. Wheeler
Alusheyi J. Wheeler