UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING File No. 2015-CFPB-0029 In the matter of: INTEGRITY ADVANCE, LLC and JAMES R. CARNES	**RESPONDENTS' OPPOSITION TO ENFORCEMENT COUNSEL'S POST-HEARING BRIEF**

<u>RESPONDENTS' OPPOSITION TO ENFORCEMENT COUNSEL'S POST-HEARING BRIEF</u>

Integrity Advance, LLC and James R. Carnes (together, "Respondents"), pursuant to 12 C.F.R. § 1081.305, and the Court's Order Scheduling Post-Hearing Submissions, Dkt. 149, submit the following Opposition to Enforcement Counsel's Post-Hearing Brief.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Regulations

INTRODUCTION

Enforcement Counsel has failed to prove its case. The record contains no evidence that could even potentially support a finding that Mr. Carnes engaged in deceptive or unfair acts or practices. Indeed, the facts in this case show the opposite, that Mr. Carnes had every indication – through the use of consumer financial regulatory experts to draft Integrity Advance's loan agreement, to the Company's constant compliance with Delaware's licensing regime, to Integrity Advance's high returning customer rate – that consumers understood, appreciated, and benefited from Integrity Advance's loan product.

The record also contains no evidence that Integrity Advance's rare use of remotely-created checks ("RCCS") resulted in substantial, and unavoidable, consumer injury. Indeed, the record contains no evidence of any consumer injury. Enforcement Counsel makes no effort to describe the consumer harm it seeks to address with any specificity, and does not provide any causal link between the "injury" alleged and Respondents' alleged conduct.

Without evidence in support of its claims, Enforcement Counsel seeks $132,580,041.06 in restitution for the claimed TILA violation on the part of Integrity Advance, which includes conduct that occurred up to three years before the CFPB even existed. Enforcement Counsel then seeks seemingly duplicative monetary relief, again with no evidentiary support, as well as civil money penalties ("CMPs") from Integrity Advance and Mr. Carnes. Enforcement Counsel's request for monetary relief and CMPs is extraordinary, unsupportable, and should be rejected. Finally, Enforcement Counsel's eleventh-hour request for sweeping categories of injunctive relief – raised for the first time in post-trial briefing – is unwarranted and unsupported by the record. The process and manner in which Enforcement Counsel has sought such injunctive and monetary relief violates Respondents' due process rights. Judgment should be entered for Respondents.

ARGUMENT

I. THERE IS NO EVIDENCE TO SUPPORT A FINDING OF LIABILITY

A. The Uncontroverted Evidence Shows That Mr. Carnes Never Engaged In Deceptive Acts Or Practices

Enforcement Counsel has failed to present any evidence that could establish Mr. Carnes's individual liability for unfair or deceptive acts or practices. An individual is personally liable for allegedly deceptive acts or practices, if that individual has: (1) "participated directly in deceptive acts *or* had the authority to control them, and (2) . . . ***had knowledge of the misrepresentations***, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth. *See* Dkt. 162, EC Br. 7 (citing *CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016)) (bolded emphasis added). Enforcement Counsel relies on this same standard. The record in this proceeding contains no facts to support any element of this standard. *See id.*

1. Mr. Carnes Never Participated Directly In Any Allegedly Deceptive Acts Nor Did He Have The Authority To Control Any Allegedly Deceptive Acts

The case law is clear that an individual's participation must be much more direct than anything Enforcement Counsel has alleged or could allege on the facts in this record. For example, the individual must actually create, edit, or direct the use of the misrepresentations. *See FTC v. Tax Club, Inc.*, 994 F. Supp. 2d 461, 472 (S.D.N.Y. 2014) (individual created "sample sales scripts to guide sales representatives in making deceptive claims during telemarketing calls."). At no time during trial did Enforcement Counsel even claim that Mr. Carnes actually participated in the allegedly deceptive acts.

Now, in its post-trial brief, Enforcement Counsel alleges for the first time that Mr. Carnes participated directly in deceiving consumers. Dkt. 162, EC Br. 9–11. This argument necessarily fails. First, Enforcement Counsel cites no cases to support its contention that any "decision to employ the loan agreement," in Enforcement Counsel's words, by Mr. Carnes constitutes direct participation in deceptive acts. Even assuming there is evidence that shows that Mr. Carnes made such a decision, that would still not support a finding that he "directly participated" in the allegedly deceptive conduct absent a showing that Mr. Carnes knew the loan agreement contained deceptive disclosures.

Second, Enforcement Counsel asks the Court to find that Mr. Carnes is liable for allegedly deceptive acts or practices based on facts that are not actually in the record. Indeed, Enforcement Counsel's main argument is that there is no evidence showing that Mr. Carnes did not engage in certain activities or conduct. *Id.* at 10. But such an argument, of course, hardly comes close to making a prima facie case of individual liability, let alone proving by a preponderance of the evidence that Mr. Carnes engaged in deceptive acts or practices. For example, contrary to the facts in the record, Enforcement Counsel contends that Mr. Carnes was "[t]he only person who could have reviewed and approved the loan agreement . . . ." *Id.* But there is neither direct evidence that supports this supposition nor circumstantial evidence that enables the Court to make such a conclusion.

Moreover, Enforcement Counsel never explains how Mr. Carnes de fact "ultimate authority" over Integrity Advance's business translated to specific authority to control the alleged deceptive acts or practices at issue here. No facts established by Enforcement Counsel demonstrate that Mr. Carnes had effective authority to override consumer financial regulatory experts regarding the TILA disclosures used in Integrity Advance's loan agreements. *See infra*

Section I.A.2–3. Nevertheless, Enforcement Counsel would have the Court make this assumption because Mr. Carnes was the CEO of Integrity Advance. Enforcement Counsel points to the facts that show that Mr. Carnes was present in Hayfield Investment Partners' ("HIP") Kansas City area office when he was not out of the office pursuing other business opportunities; had "discussions and meetings" with HIP personnel working on Integrity Advance issues, such as lead generation; headed up weekly IT meetings that addressed all of the HIP business interests, including Integrity Advance, on which no more than five minutes of time was spent; and set some employee salaries. *Id.* at 10–11.

This attempt to cobble together evidence against Mr. Carnes ignores the salient facts: Mr. Carnes offered uncontroverted testimony that he never drafted, reviewed, or revised a loan agreement, including its disclosures. *See* Hr'g Tr. I-229:2-6. Mr. Carnes also offered repeated and uncontroverted testimony that he did not have the training or expertise necessary to draft, review or revise any aspect of the loan agreement, including its disclosures, and relied on others to do so. S*ee id.* at II-26:20-23. Moreover, the content of Integrity Advance's loan agreement was not explained to Mr. Carnes. *See id.* at I-213:11-12. These facts wholly distinguish this case from any of the other cases in which individual liability was found.

2. Mr. Carnes Did Not Have The Requisite Knowledge To Be Found Liable

i. The Case Law Is Clear That An Individual Must Have Actual Knowledge Of The Alleged Misrepresentation

Enforcement Counsel's attempt to show Mr. Carnes had the requisite knowledge to be found individually liable also fails. Despite acknowledging that the requisite knowledge is "knowledge of the misrepresentation," Enforcement Counsel erroneously tries to hold Mr. Carnes liable simply because he knew about the loan product. That is not the standard. Mere "familiarity" *with a product or process* is insufficient to prove requisite knowledge; an individual must know that a representation deceived consumers or was otherwise unfair in order to be held personally liable.[1] Enforcement Counsel bears the burden of proving this knowledge by a preponderance of the evidence, and it has failed to do so here. Where, as here, an agency "provide[s] no evidence regarding the knowledge element, and the facts in the record indicate that [an individual] did not possess the requisite level of knowledge," the individual should not be found to be personally liable for any violations. *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 974 (N.D. Ill. 2006), *amended on recon. in part*, 472 F. Supp. 2d 990 (N.D. Ill. 2007), *and aff'd*, 512 F.3d 858 (7th Cir. 2008).

Requisite knowledge is shown by clear evidence that the individual defendant was integral to the creation of materials causing the misrepresentation or was alerted to the falsity of a representation or the potential for fraud. For example, in *CFPB v. Gordon*, the Ninth Circuit upheld a finding of individual liability because the individual defendant reviewed, edited, and modified scripts and marketing materials, personally assured that "all advertising [was] legal," and demanded sole authority as to the marketing of "representations made to the public." 819

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[1] Indeed, Enforcement Counsel cites cases addressing the knowledge requirement for individual liability. But each of these cases shows that "knowledge of the misrepresentation" only exists when there is evidence that an individual had some indication that a representation was false or misunderstood – such as an influx of consumer complaints. This is necessary to form the basis of an individual's knowledge regarding the truth or falsity of a representation. *See FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1182–83, 1204–07 (C.D. Cal. 2000) (finding that the individual defendants knew disgruntled customers complained and sought chargebacks, indicating that consumers thought the corresponding credit card charges were fraudulent); *FTC v. Lanier Law, LLC*, No. 3:14-CV-786-J-34PDB, 2016 WL 3632371, at *30 (M.D. Fla. July 7, 2016) (finding that an individual defendant was aware "of consumer complaints and investigations of the Law Firm practices by state regulatory authorities"). Enforcement Counsel's assertion that "courts routinely find individual liability under the FTC Act in UDAP cases" is therefore incomplete, ignores that courts have done so on facts entirely distinct from those present here, Dkt. 162, EC Brief 13, and Enforcement Counsel should have clarified that such findings are made "when specific facts in the record directly support a finding of knowledge." No such facts exist in the record of this proceeding.

F.3d 1179, 1193 (9th Cir. 2016). Similarly, in *FTC v. Wellness Support Network, Inc.*, the court found an individual had the requisite knowledge when he personally created a product and all marketing materials, which made claims the defendant knew could not be true. No. 10-cv-04879-JCS, 2014 WL 644749 *18 (N.D. Cal. Feb. 19, 2014).[2] And, in *FTC v. Stefanchik*, the individual was "the driving force behind the marketing scheme," was advised by his counsel after reviewing the telemarketing scripts that he needed to substantiate the sales claims, and was told that "sales representatives were misleading consumers." 559 F.3d 924, 931-32 (9th Cir. 2009). No cases have found knowledge sufficient to hold an individual personally liable without such extensive and specific evidence. The Court should not be the first to do so here.

Indeed, taken to its logical conclusion, the generalized standard argued by Enforcement Counsel would hold all CEOs liable for any unlawful conduct where the CEO generally understands how the company's product works. The standard for individual liability is not an individual's general understanding, however, but evidence of specific and deliberate knowledge of a misrepresentation, or knowledge of unmistakable warning signs. The standard argued by Enforcement Counsel would, in effect, hold Mr. Carnes strictly liable for violations on the part of Integrity Advance and completely obviate the scienter requirement for individual liability.

ii. Mr. Carnes Did Not Know About Any Alleged Misrepresentations In The Loan Agreement

Enforcement Counsel has not shown that Mr. Carnes had any knowledge, let alone requisite knowledge, of the alleged misrepresentation in the loan agreement. Enforcement Counsel, instead, relies on the evidence that Mr. Carnes was generally familiar with Integrity

[2] The defendant, who was not a scientist or a doctor, created a product to aid diabetes sufferers based on "research he conducted on the Internet" and wrote marketing material that included statements that scientific studies supported the claims made about the product. *Wellness Support Network, Inc.*, No. 10-cv-04879-JCS, 2014 WL 644749 *18.

Advance's *loan process*, Dkt. 162, EC Br. 12 (citing Hr'g Tr. I-220:6-12), and asks the Court to infer Mr. Carnes's knowledge *of the misrepresentation* from his general understanding of that process. *Id.* As discussed above, this does not meet Enforcement Counsel's burden of proof.

Furthermore, Enforcement Counsel ignores that Mr. Carnes, like any competent CEO, hired experts to handle aspects of his business venture that required specific expertise, such as drafting the loan agreements. *See, e.g.*, Hr'g Tr. II-26:20-23. ("[n]o one at the Hayfield group of companies . . . were consumer lawyers or experts in consumer law."); *id.* at II-27:5-6 ("[a]ll agreements were written by outside counsel."). It is also incontrovertible (and Enforcement Counsel never disputes) that Integrity Advance's loan process complied with Delaware law. *Id.* at II-95:11-16 (Integrity Advance "hired outside counsel to create and give us loan documents that conformed with the Delaware and federal law."); *see id.* at II-19:22-24 (testimony of Mr. Foster) (the "vast majority" of the appearance and function of Integrity Advance's loan agreement was determined by Delaware law). This fact must be taken into consideration when evaluating Mr. Carnes's knowledge.

Indeed, Mr. Carnes knew that Integrity Advance was licensed by the state of Delaware, that such licensure was available only after Integrity Advance and its loan agreement were reviewed by investigators from the Delaware Office of the State Bank Commissioner, and that Integrity Advance maintained that license through annual renewals and periodic examinations for the entirety of the Company's existence. *See id.* at II-80:13-25, II-81:1-13. Mr. Carnes knew that Integrity Advance received approval to lend every year and "posted the license on [the company's] website." *Id.* at II-82:7-9. During trial, Elizabeth Quinn Miller, Senior Investigator for the Delaware Office of the State Bank Commissioner, explained the licensing and renewal process in detail, and confirmed that the process involved a review of the TILA Box and independent calculations of the disclosed APR. *See id.* at III-125:23 – 127:18. Ms. Miller's testimony also shows that an aspect of Integrity Advance's loan agreements that is central to Enforcement Counsel's argument – four loan renewals (or rollovers) – complied with Delaware law and is specifically contemplated by Delaware statute. *Id.* at III-135:1-11, III-138:3-11. Taken together, this evidence directly contradicts any contention that Mr. Carnes should have known of any misrepresentation in Integrity Advance's loan disclosures.

Moreover, nothing in Integrity Advance's day-to-day business operations would have alerted Mr. Carnes to any misrepresentations or consumer misunderstanding. Mr. Carnes received no feedback regarding Integrity Advance's loan agreement that would have put him on notice. *See* Dkt. 164, Resp'ts' Br. 8–9; Hr'g Tr. I-231:11-12 (noting that the content of Integrity Advance's loan agreement was not explained to Mr. Carnes). Nor could Mr. Carnes have been alerted by an influx of consumer complaints, as these did not rise to his attention. *See* Hr'g Tr. I-233:18-22; *see also id.* at II-29:18 – I-30:13 (explaining that the third party call center handled most complaints, and Integrity Advance's legal team, not Mr. Carnes, handled any escalated complaints). To the contrary, the evidence shows that Mr. Carnes was aware that, for the time period relevant here, Integrity Advance made a large majority of its loans – 66% – to returning customers. *See* RX-021; Hr'g Tr. I-46:6 – I-47:10. In the relevant time period, nearly half of Integrity Advance's borrowers were returning customers. RX-021. In fact, the rate of returning customers steadily increased each year that the Company operated.[3]

[3] For Integrity Advance's entire operational years, one out of three of its customers was a returning customer, and 60% of its loans were made to returning customers. *See* RX-020 – 021; Hr'g Tr. III-82:2-10.

Nothing in the record supports a finding of individual liability against Mr. Carnes. To follow Enforcement Counsel's logic, all CEOs, and other corporate officers, would be liable for any and all regulatory violations simply by coming into the office regularly, signing agreements with third-party vendors, or merely speaking with employees of the companies they manage, *see* Dkt. 164, Resp'ts' Br. at 9–10, while at the same time being "familiar" with the company's products or services, *see id.* at 12. This, of course, has never been the law.[4]

3. Mr. Carnes Was Not Recklessly Indifferent To Any Misrepresentation That May Be Found In Integrity Advance's Loan Agreement

Enforcement Counsel's attempt to show Mr. Carnes was "recklessly indifferent" to misrepresentations in Integrity Advance's loan agreement fails as well. Citing no basis in the law, Enforcement Counsel contends that Mr. Carnes was "recklessly indifferent" merely because he was an "active and engaged manager" with a basic – but unsophisticated – understanding of the operation of the Company's loan product. *See* Dkt. 162, EC Br. 13. "Reckless indifference to the truth or falsity of misrepresentations," however, requires that an individual ignore clear and unambiguous warning signs alerting him or her to a violation, such as reports from advisors

[4] A recent case underscores the reasons why Mr. Carnes is not personally liable. In *CFPB v. CashCall, Inc.*, the court found the CEO of a consumer lending company individually liable for violations stemming from usury law evasions when the "undisputed facts" demonstrated that the CEO "knew and approved of the tribal lending model to avoid state usury limits and licensing laws." No. 2:15-cv-07522-JFW-RAO, at 15 (C.D. Cal. Aug. 31, 2016). Indeed, the *CashCall* court found that the CEO expressly approved a legal arrangement that was designed so that the company could evade state and federal regulations and laws. The CEO in *CashCall* also "frequently discussed the status of ongoing lawsuits" regarding the loan products with counsel. *Id.* Mr. Carnes, by contrast, knew that Integrity Advance's loan agreement complied with Delaware law, was subject to licensing and annual renewals by the Delaware Office of the State Bank Commissioner, and maintained its license throughout the company's existence. As Mr. Carnes testified, Integrity Advance was specifically licensed in Delaware and availed itself of that state's statutory roll-over specifications. Unlike CashCall, Integrity Advance deliberately sought the oversight of a state regulator. The facts in *CashCall* and this proceeding could not be more different, especially as it concerns the question of individual liability. Indeed, *CashCall* further demonstrates why Mr. Carnes is not liable for allegedly deceptive or unfair conduct.

or employees, a direct awareness of a significant volume of complaints or other signs, such as credit card chargebacks, indicating the consumers are confused about an advertisement or representation, or notices from regulators or law enforcement agencies. *See, e.g.*, *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574–75 (7th Cir. 1989) (finding it "unlikely" that the individual defendants would have "missed the signals sent by the high volume of consumer complaints and the excessive credit card chargebacks").

Enforcement Counsel has provided no facts that show that Mr. Carnes ignored such warning signs. To the contrary, as Respondents have explained, the indications available to Mr. Carnes, including Integrity Advance's continued licensure by the state of Delaware and the Company's high rate of returning customers, overwhelmingly show that the Company was engaging in lawful practices and that customers were returning – more each year – because they were satisfied with the Company's loan product. Enforcement Counsel does not, indeed, cannot, contend otherwise, and its assertion of reckless indifference is unfounded. Enforcement Counsel has utterly failed to meet its burden of proving that Mr. Carnes engaged in deceptive acts or practices.

4. Mr. Carnes Is Not Personally Liable For Unfair Acts Or Practices As They Concern The Use Of RCCs

Enforcement Counsel has not met its burden of showing by a preponderance of the evidence that Mr. Carnes engaged in unfair acts or practices as to the use of RCCs. Instead, Enforcement Counsel makes up a new legal standard, by arguing that all it has to show is that Mr. Carnes "knew about the practice" at issue and had authority as to the Company. Dkt. 162, EC Br. 22. This, of course, is not the law, for numerous due process and policy reasons.

Further, Enforcement Counsel's claim that Mr. Carnes should be held individually liable for Integrity Advance's use of RCCs is not supported by the record. Enforcement Counsel asserts that because Mr. Carnes was the CEO, then every instance when the Company used RCCs must have been within his "purview." Dkt. 162, EC Br. 22. However, Mr. Carnes presented uncontroverted testimony that he was *not* personally involved in setting Integrity Advance policies regarding the use of RCCs or the decision to issue specific RCCs. Hr'g Tr. at II-98:3-14, II-98:23 – II-99:3. Rather, this on-the-ground determination was made by Integrity Advance's call center. *Id.* at II-32:17-22. Further, Mr. Carnes was not involved in drafting, reviewing, or revising the ACH authorization or other disclosures that were made to consumers. *See id.* at I-231:23-25, II-95:11-16. Nor is Mr. Carnes liable for allegedly unfair acts or practices, simply because he "saw a printer being used to create remotely created checks," Dkt. 162, EC Br. 22, because as discussed above, mere awareness of a process is insufficient to establish the requisite knowledge required for individual liability. Mr. Carnes should not held individually liable and the Court should find in his favor as to Count VII.

B. Integrity Advance Did Not Engage In Any Unfair Practices As To RCCs

1. Enforcement Counsel Has Failed To Prove Any Unfairness Claim

Enforcement Counsel has failed to put forward any evidence demonstrating that Integrity Advance's use of RCCs caused any injury to consumers. Enforcement Counsel's entire theory as to unfairness for RCCs rests on an unsupported *assumption* that *every* instance in which Integrity Advance used an RCC after a consumer had purportedly withdrawn authorization for ACH debits amounts to customer harm. Despite Enforcement Counsel's claims to the contrary, this theory seeks to impose a strict liability standard that does not exist under the law. Indeed, Enforcement Counsel does not dispute that Integrity Advance used a legal payment mechanism to collect outstanding amounts due on certain loans. However, the record is devoid of any evidence that use of an RCC after a consumer had withdrawn authorization for ACH debits caused substantial injury that was not reasonably avoidable.

2. There Is No Evidence That Integrity Advance's Use Of RCCs Caused Substantial Consumer Injury

Integrity Advanced used RCCs in a limited, legal manner. Dkt. 164, Resp'ts' Br. 16. Enforcement Counsel asserts that there was a small number of customers who purportedly withdrew their ACH authorization and then Integrity Advance subsequently withdrew funds using RCCs. Dkt. 162, EC Br. 18–19. Crucially, however, Enforcement Counsel has failed to present any evidence that the use of RCCs was unauthorized. Enforcement Counsel *assumes*, without any support, that Integrity Advance did nothing to contact customers who withdrew ACH authorization and then Integrity Advance "simply switched" to RCCs to collect amounts owed. *Id.* at 19. Tellingly, Enforcement Counsel offered no consumer complaints, no consumer testimony, no consumer survey, and no expert testimony to support its theory. Instead, Enforcement Counsel offered only the numerical analysis of Mr. Hughes to purportedly identify the number of instances in which RCCs were used after one of three NACHA codes was put in place, including a "stop payment" code. But the fact that an RCC was used does not establish that a customer was injured as a result of some unfair conduct. Indeed, Mr. Hughes did not know *why* a customer may have stopped payment, acknowledged that he did not conduct any additional investigation, and acknowledged that consumers could have been trying to renege on their obligation to pay. Dkt. 164, Resp'ts' Br. 15–16. Mr. Carnes, in turn, presented uncontroverted testimony Integrity Advance rarely used RCCs and did so only after "numerous calls and emails" to set up alternative payment arrangements. Hr'g Tr. II-84:6 – II-85:11.

Enforcement Counsel has failed to meet its burden to demonstrate substantial injury and the Court should find for Respondents as to Count VII.

3. To The Extent There Was Any Injury, (And There Was Not), Such Injury Would Have Been Reasonably Avoidable By Customers

Enforcement Counsel has also failed to demonstrate that any harm caused by Integrity Advance's use of RCCs was not reasonably avoidable. Instead, Enforcement Counsel offers only an unsupported contention that the ACH Authorization is unclear and ambiguous "on its face." Dkt. 162, EC Br. 21. Faced with a lack of evidence presented at the hearing to support this, Enforcement Counsel now seeks to rely on the expert report of Dr. Manoj Hastak that the ACH Authorization was "*unlikely* to be noticed or read by consumers." *Id.* at 21 (emphasis added). Notably, Dr. Hastak was never called as a witness during the hearing[5], thus depriving this Court of any opportunity to assess his credibility and similarly denying Respondents the opportunity to cross-examine him. As the Court stated in its July 5, 2016 Order denying Respondents' motion to exclude Dr. Hastak, such a credibility analysis was necessary to determine what weight, if any, should be afforded to Dr. Hastak's proposed testimony and report. *See* Dkt. 112 at 4 ("[I]f Dr. Hastak's methodology is flawed, it affects the credibility of both his testimony and report. Thus, such an outcome will affect the weight to be afforded to his testimony. However, at this juncture, I will wait until after the hearing to determine the weight Dr. Hastak's testimony should be accorded").

Regardless, Dr. Hastak's opinion cannot satisfy Enforcement Counsel's burden to prove that Integrity Advance's use of RCCs caused any unavoidable consumer injury. Dr. Hastak's opinion is nothing more than his own rank speculation. It does not conform to the generally accepted standards in the field of consumer understanding. Furthermore, Dr. Hastak provided no data about how many customers read the section of the Loan Agreement regarding authorization

[5] Indeed, Dr. Hastak was not even listed in Enforcement Counsel's Witness List as a witness for its case-in-chief, but as a "rebuttal witness." *See* Dkt. 115, EC Wit. List 3.

from consumers for Integrity Advance to use RCCs and conducted no empirical analysis to ascertain what consumers understood. *See* RX-003 at ¶¶ 49–51. Enforcement Counsel offered no customer survey, no consumer testimony, and no consumer complaints to support its theory. Dr. Hastak's opinion was fully rebutted by Dr. Nathan Novemsky's opinion, which explained why Dr. Hastak's *untested and unproven hypotheses* regarding what consumers *may* have understood from the ACH Authorization are unreliable and unacceptable as valid conclusions in the field of consumer behavior. *See id.* ¶¶ 15–16. In sum, there is simply no evidence in the record to support a finding that consumers did not understand the loan agreement and could not reasonably avoid the use of RCCs.

II. ENFORCEMENT COUNSEL FAILED TO PROVE THAT THE COURT SHOULD IMPOSE MONETARY OR INJUNCTIVE RELIEF

Enforcement Counsel's argument for relief – one of the three issues to be adjudicated at the hearing in this matter – is difficult to comprehend and thin on substance, both factually and legally. But it is even more troubling that Enforcement Counsel never presented a damages analysis during trial. Indeed, the first time that Respondents have learned about the full (or partial) and apparent scope of relief that Enforcement Counsel seeks is upon reading its post-hearing brief. For this reason alone, the Court should deny Enforcement Counsel any monetary or injunctive relief. Enforcement Counsel's impermissible eleventh-hour damages arguments have deprived Respondents of their due process rights by eliminating their ability to subject Enforcement Counsel's claims to cross-examination. S*ee United States v. Schiff*, 538 F. Supp. 2d 818, 841 (D.N.J. 2008) ("A post-hearing brief is not the place for new theories. This is not arbitrary, but rather essential for a fair hearing process."); *White v. Beard*, No. CV 13-7921 RGK (MRW), 2014 U.S. Dist. LEXIS 129716, at *7 (C.D. Cal. July 24, 2014) (quoting Sheppard v. Rees, 909 F.2d 1234, 1237 (9th Cir. 1989)) (holding that a defendant may not be convicted based on a charge or legal theory "that was neither subject to adversarial testing, nor defined in advance of the proceeding"). Enforcement Counsel has failed to make a prima facie case that it is entitled to any monetary or injunctive relief. Its arguments lack clarity, any modicum of precision, and its arguments' flaws underscore Enforcement Counsel's pattern of disregarding entirely its burden of proof in this matter. Indeed, as noted below, Respondents are still unclear as to which precise remedies Enforcement Counsel is seeking from the Court.

A. Enforcement Counsel Has Not Articulated What Relief It Seeks Or The Basis For Its Request

Following a three-day hearing and completion of opening post-hearing briefs, it remains difficult, if not impossible, to deduce the actual damage amounts that Enforcement Counsel is requesting that the Court award.

For example, it appears that Enforcement Counsel is seeking double-recover for the same alleged conduct. Enforcement Counsel's request for relief includes *two separate damage awards* of $132,580,041.06 against Integrity Advance and $38,453,341.62 against Mr. Carnes. *See* Dkt. 162, EC Br. 54; *see also* Dkt. 163, EC Pr. Concl. of Law & Findings of Fact 22–23.[6] As discussed in Respondents' post hearing brief, awarding both of these damage amounts would result in duplicative recovery for the same acts. *See* Dkt. 164 at 31–32.

Similarly, while Enforcement Counsel now argues (for the first time in this litigation) that both Respondents are jointly and severally liable for Counts III and VII, Enforcement Counsel

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[6] Enforcement Counsel acknowledges that "the harm for Counts II and III [$38,453,341.62 each] is identical and is a subset of the harm for Count I [$132,580,041.06]" (*see* Dkt. 162, EC Br. 29 n.9). Enforcement Counsel similarly acknowledges that if the relief requested under Counts I-III is awarded "that will overlap with any relief under Count VII [$115,024.50]." *Id.*; *see also id.* at 34 (noting that the $38,453,341.62 damage amount in Count II is "a subset of the harm identified above for Count I" and the "identical" figure for Count III "is also an overlap with the harm quantified for Count I.")

does not articulate the legal basis for holding Mr. Carnes jointly and severally liable. For that matter, Enforcement Counsel does not make clear whether it seeks to impose joint and several liability on Mr. Carnes for $38,453,341.62 or for the $132,580,041.06 it seeks from Integrity Advance.

Furthermore, the relief amount under Count VII of $115,024.50 that is referenced earlier in Enforcement Counsel's brief, *see* Dkt. 164, Resp'ts' Br. 29, is absent from the request for relief at the conclusion of the brief and from Enforcement Counsel's Conclusions of Law and Proposed Order. *See generally* Dkt. 163, Pr. Concl. of Law & Findings of Fact. Thus, it is entirely unclear what damages – if any – Enforcement Counsel is seeking as to Count VII. Respondents are, yet again, left to guess as to the scope and underlying basis for Enforcement Counsel's damages claims.

B. Enforcement Counsel Seeks Restitution Based On A Theory That Does Not Exist In The Law

Assuming that Enforcement Counsel seeks $132,580,041.06 in restitution from Integrity Advance, and seeks to hold both Integrity Advance and Mr. Carnes jointly and severally liable for a portion of this same restitution, $38,453,341.62, there is no basis for such relief on this record.[7]

1. Enforcement Counsel Has Not Met Its Burden To Reasonably Approximate Consumer Injury In The First Instance

Enforcement Counsel's argument for restitution reflects a fundamental misunderstanding of the burden-shifting framework required in assessing equitable damages. Under Enforcement Counsel's version of its obligation to reasonably approximate consumer harm, no evidence of

[7] Nor would there be any basis to hold Mr. Carnes jointly and severally liable for $132,580,041.06.

causation is required and the only burden Enforcement Counsel has is "simply analyzing and summarizing numbers from datasets Respondents provided . . . ." *See* Dkt. 162, EC Br. 37.[8]

However, the authorities that Enforcement Counsel cites acknowledge the government's burden to establish causation in reasonably approximating consumer injury. For example, Enforcement Counsel cites *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989) for the proposition that because Enforcement Counsel "has established a reasonable approximation of damages, Respondents bear the burden of showing why that approximation is not reasonable." *See* Dkt. 162, EC Br. 30. Enforcement Counsel ignores that the D.C. Circuit did so based upon a showing that the SEC's approximation of profits was "*causally connected to the violation*." 890 F.2d at 1231 (emphasis added). Noting that "the SEC bears the ultimate burden of persuasion that its disgorgement figure reasonably approximates *the amount of unjust enrichment*," the court found that the burden was satisfied based on "the government's showing of appellants' actual profits *on the tainted transactions* . . . ." *See id.* at 1232 (emphasis added). The court in *FTC v. Bronson Partners, LLC* – also cited by Respondents – similarly noted that "restitution is measured by the defendants' *unjust gain*, rather than the plaintiff's loss." 674 F. Supp. 2d 373, 379 (D. Conn. 2009) (emphasis added).

Enforcement Counsel has not carried its burden here. As discussed in Respondent's opening brief, the burden of proof does not shift to Respondents until Enforcement Counsel *first* reasonably approximates the amount of unjust gains. *See* Dkt. 164, Resp'ts' Br. 26 (citing

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[8] Enforcement Counsel's reliance on cases in which "non-economists" have analyzed data on behalf of the FTC is not relevant. *See* Dkt. 162, EC. Br. 37. Enforcement Counsel still must draw a causal link between consumer injury and the disclosure in Integrity Advance's loan agreement. At no point it is briefing or argument at the hearing does Enforcement Counsel draw such a link.

Verity, 443 F.3d at 69).[9] Because Enforcement Counsel has not done so, the burden cannot shift to Respondents. Enforcement Counsel's statement that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty," s*ee* Dkt. 162, EC Br. 43 (quoting *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997)), is simply another way of trying to avoid its burden, which is precisely what courts have rejected. *See Verity*, 443 F.3d at 69.

2. Even If Enforcement Counsel Could Prove Any Damages Case, Which It Cannot, Damages Would Only Be Appropriate For One-Time Customers

Returning Integrity Advance customers necessarily went through the entire loan process, and could not have been injured by any alleged deception in the loan agreement. Enforcement Counsel relies on inapposite case law to support an argument that loans taken out by repeat customers should be included in its request for monetary relief and not offset from any restitution awarded in this matter. These cases, however, actually underscore the reasons why the Court should not award any restitution, and should certainly not award restitution as to any customer who took out more than one loan from the Company.

Specifically, here, Enforcement Counsel relies entirely on cases that concern allegedly false advertisements for dietary products guaranteeing certain outcomes that could only be obtained after long-term use. Thus, in every instance when a customer did not see as-promised results, that customer would have been potentially induced to re-order the product at issue, because the

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[9] In another example of Enforcement Counsel's failure to reasonably approximate consumer injury, Enforcement Counsel included with its post-trial brief a fourth declaration from its data scientist, Mr. Hughes. Putting aside the obvious due process issues of including new evidence in a post-trial brief that is not subject to cross-examination, Enforcement Counsel acknowledges, but then ignores, the issue of NSF fees (insufficient fund fees) raised by the Court during trial and in post-trial communications with counsel. *See* Dkt. 162, EC Br. at 29. Specifically, Enforcement Counsel acknowledged that fees, including NSF fees, represent over $1 million of its purported relief calculation, and yet *include* those fees in its ultimate relief request because they claim that their initial figure nonetheless is still a reasonable approximation.

customer did not yet think the results had been achieved. For example, Enforcement Counsel cites *FTC v. National Urological Grp., Inc.*, in which the court specifically noted that the advertisements for weight loss supplements at issue "contain several express statements that indicate that consumers who reorder the products and use them long term will see favorable results." 645 F. Supp. 2d 1167, 1213, n.30 (N.D. Ga. 2008). Thus, defendants were not entitled to an offset for repeat customers because a re-order could reasonably be attributed to the deception itself. *Id*. Similarly, advertisements for supplements purporting to assist in the management of diabetes were at issue in *FTC v. Wellness Support Network, Inc.*, in which the court quoted *National Urological* in finding that re-orders did not necessarily mean consumers were not deceived, thus no offset was warranted. No. 10-cv-04879, 2014 WL 644749 at *2 (N.D. Ca. Feb. 19, 2014). The court in *Bronson*, which dealt with advertisements for weight loss products, similarly denied an offset for customers who re-ordered the products at issue because customers "may have done so because they had not yet achieved the results promised in the deceptive advertising." 674 F. Supp. 2d at 386.

The allegations, here, of course, do not concern a product with promised results that may only be ascertainable after long-term use. First, unlike the circumstances discussed above, a repeat Integrity Advance customer – particularly one whose first loan was renewed – would have been on notice after a single loan of how the loan operated. Indeed, this Court acknowledged this in its July 1, 2016 Order on Summary Disposition, stating that "certainly, a returning customer would be aware of the fact that they would pay more than the disclosed finance charge if they allowed the loans to renew and eventually enter auto-workout." *See* Dkt. 111 at 31. While Enforcement Counsel takes note of the fact that the Court stated that this "does not change the fact that the loans were facially deceptive," Enforcement Counsel fails to mention that the

Court was not making a restitution damages assessment. Indeed, whether the loan agreement was facially deceptive is not determinative of the reasonable approximation of damages causally connected to such deception. *See FTC v. Publishers Bus. Servs., Inc.*, 540 F. App'x 555, 558 (9th Cir. 2013) (holding that the district court erred by failing to consider customers who renewed subscriptions because "a customer who renewed subscriptions necessarily knew the actual terms of the transaction at the time of the renewal," and thus was not misled or injured by the defendant's conduct); *see also Bronson*, 674 F. Supp. 2d at 379 ("The Second Circuit clearly set forth that restitution is measured by the amount of the defendant's *unjust gain*") (emphasis added) (citing *Verity*, 443 F.3d at 67).

Furthermore, Enforcement Counsel's alternative explanations for customers repeatedly taking out loans from Integrity Advance are unreasonable, speculative, and unsupported by the facts. Enforcement Counsel first argues that customers came back to Integrity Advance because they "might not have paid more than the 'Total of Payments' on prior loans." Dkt. 162, EC Br. 42. This argument borders on the nonsensical given the fact that "in calculating the amount of harm, [Enforcement Counsel's witness, Mr. Robert Hughes] considered only consumers for whom Respondents withdrew more than the 'Total of Payments' and rolled over at least once." *Id.* at 44.[10] In other words, anyone who did not pay more than the Total of Payments is *already* excluded from Enforcement Counsel's own damages assessment.

Next, Enforcement Counsel argues that "returning customers might have been forced into taking subsequent loans due to Integrity Advance deducting more than anticipated." *Id.* at 42.

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[10] Adding to the unreasonable and *ad hoc* nature of Enforcement Counsel's claims for relief, none of Mr. Hughes' multiple declarations, two of which were offered after the hearing, accounted for nonsufficient funds fees (or "NSF fees") charged to borrowers. *See* Hr'g Tr. III-19:3-12. His calculations of consumer's payments thus include charges that have no bearing on the TILA disclosure at issue in this proceeding.

Enforcement Counsel points to no facts in the record to support this claim because there are no such facts. The notion of a customer taking out another loan from Integrity Advance in order to pay off a loan that the individual cannot afford to pay because Integrity Advance – *that same company* – "deduct[ed] more than anticipated," strains credulity.

Finally, notwithstanding the actual evidence in the record, Enforcement Counsel argues that customers repeatedly took out loans because "lead generators might have redirected unwitting customers to the company." *Id.* There is nothing in the record to support Enforcement Counsel's speculation, and in fact, the evidence is to the contrary. As Mr. Carnes testified, repeat customers "[a]lmost always came back through the website or called us." *See* Hr'g Tr. II-79:15-24. In other words, repeat customers generally did not return to the company via a lead generator. Enforcement Counsel has presented no evidence to conclude otherwise.

3. Enforcement Counsel's Attempt To Apply The CFPA To Conduct Pre-Dating The Enactment Of The Statute Violates Due Process

Enforcement Counsel claims that "Integrity Advance's conduct in 2008 . . . violated TILA." Dkt. 162, EC Br. 34. However, the CFPB's authority to enforce TILA did not begin until, at the earliest, July 21, 2011, and, at that, such authority concerns only banks. 15 U.S.C. § 1607; 12 U.S.C. § 5565, 5561 *note*. Enforcement Counsel, nevertheless, asks that the Court apply the CFPA, and specifically, to award restitution, as to conduct that predates the statute's existence. Such a result, of course, violates due process, and renders the CFPA impermissibly retroactive. The "presumption against retroactive legislation" is a well-established one. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (citation omitted). Indeed, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997) (internal quotation and citation omitted). Thus, courts "apply this time-honored presumption unless Congress has clearly manifested its intent to the contrary." *Id.* at 946.

Nevertheless, Enforcement Counsel asks the Court to award nearly $133 million in restitution for TILA violations, with approximately $95 million arising from conduct that predates July 21, 2011; specifically, Enforcement Counsel asserts that the CFPA contemplates such a remedy and that applying this statute to conduct that predates July 21, 2011 is not impermissibly retroactive, given that the FTC Act allows the FTC to obtain restitution for TILA violations. There are numerous legal and factual flaws in this argument.

First, the FTC Act only enables the FTC to obtain monetary relief in district court proceedings, even when there is a finding of liability in an administrative forum. Enforcement Counsel ignores the precedent of this Court, and argues its administrative forum is merely "another tribunal that may hear this case," along with federal district court. Such an argument, of course, contradicts *CFPB v. PHH*, which expressly holds that a UDAAP claim under the CFPA that is brought in the Bureau's administrative forum is not subject to any statute of limitations, even though the same claim brought in federal district court is subject to a three-year statute of limitations. File No. 2014-CFPB-0002, Decision of the Director (June 4, 2015). In other words, if the forum matters for a statute of limitations analysis, it also must matter when Enforcement Counsel is asking the Court to impose a nearly-$133 million restitution remedy.

Second, it is not the case that the CFPB's administrative forum is merely "another tribunal." Indeed, cases that proceed in federal district court, in contrast to the Bureau's administrative forum, require that litigants present evidence in accordance with the Federal Rules of Evidence, which, of course, track the Due Process Clause of the United States Constitution. Enforcement Counsel has come nowhere close to presenting evidence in this matter in accordance with any such standard – for any part of its case – let alone evidence that could justify imposition of such a staggering restitution number.

Finally, while the FTC Act may be similar to the CFPA in some respects, it is incontrovertible that the CFPA creates statutorily-enumerated remedies that apply to violations of TILA and other consumer financial protection laws. *See* 12 U.S.C. § 5565. The FTC Act has no analog; rather section 13(b) of the FTCA (cited by Enforcement Counsel) states "[t]hat in proper cases the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). This is a far different standard than the broad, and statutorily-based (rather than judicial) relief the CFPB may access under 12 U.S.C. § 5565. Like the statutory amendment in *Hughes Aircraft*, the CFPA "does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Hughes Aircraft*, 520 U.S. at 951 (emphasis in the original). Application of this new statutory relief provision to conduct that predates the CFPA's passage "would attach an important new legal burden to that conduct" and thus "does not apply to events antedating its enactment in the absence of clear congressional intent." *See Landgraf*, 511 U.S. at 283.

The creation of a brand new agency (the CFPB), under a brand new statute (the CFPA) with authority over Integrity Advance parallel and in addition to that authority still wielded by the FTC does more than "simply changes the tribunal that is to hear the case." *See Landgraf*, 511 U.S. at 275. This is especially true where, as here, the new agency seeks to apply authority *expressly denied* to the existing agency, the FTC. *See e.g., Landgraf*, 511 U.S. at 286. Thus, awarding the Bureau restitution under TILA (Count I)[11] for conduct that predates July 21, 2011 would violate due process by impermissibly applying the CFPA retroactively and the Court should decline to do so.

C. Enforcement Counsel's Request for Joint and Several Liability Is Prejudicial And Violates Respondents' Due Process Rights

As discussed in Respondents' Post-Hearing Brief, presenting a theory of relief at the post-hearing stage violates Respondents' due process rights. *See* Dkt. 164, Resp'ts' Br. 23-24. The first notice that Respondents received of Enforcement Counsel's intent to seek joint and several liability against both Integrity Advance and Mr. Carnes as to Counts III and VII appears in a footnote halfway through Enforcement Counsel's post-hearing brief. *See* Dkt. 162, EC Br. 29, n.9. No such notice was provided in Enforcement Counsel's pre-hearing brief. *See generally* Dkt. 134, EC Pre-Hearing Statement. During the hearing, the Court specifically asked Enforcement Counsel if it was seeking to hold Integrity Advance and Mr. Carnes joint and severally liable. *See* Hr'g Tr. III-182:12-19. Enforcement Counsel responded that Mr. Carnes "is not responsible for all of the damages on all of the counts. We are not saying that he is responsible under the Truth in Lending Act." *Id.* at III-182:20-23. When pressed to explain whether Enforcement Counsel was seeking joint and several liability, Enforcement Counsel responded that "we are happy to spell this out in more detail in our brief." *Id*. at III-183:5-14.

Putting aside the due process problems, Enforcement Counsel's attempt to hold Mr. Carnes jointly and severally liable fails for other legal reasons, too. Tellingly, Enforcement Counsel fails to cite a *single* legal authority to support its newly-announced theory of joint and several liability. Indeed, Enforcement Counsel states, without any justification (legal or

[11] Respondents' arguments here apply with equal force to Enforcement Counsel's claims under EFTA in Count V.

otherwise) that: "Carnes and Integrity Advance are jointly and severally liable for County III and Count VII", *id.*; "Integrity Advance and Carnes are jointly and severally liable for the Count III relief", *id*. at 34; and "[t]he Administrative Law Judge should hold Integrity Advance and Carnes jointly and severally liable for returning [Count VII damages] to consumers to the extent that they have not been paid out as relief for violations of Counts I, II, or III", *id*. at 36. As there are no facts or law to support Enforcement Counsel's argument, it should be rejected.

D. The Court Should Not Award Any Civil Money Penalties

Enforcement Counsel has presented no evidence that supports any CMP award, let alone the substantial amount that Enforcement Counsel now – for the first time – asks the Court to impose. The CFPA provides for three tiers of CMPs based on the scienter of a violation, and Enforcement Counsel seeks the maximum CMP amount allowed by statute under the lowest-scienter tier. 12 U.S.C. § 5565(c)(2)(A) (stating that, for the first tier, "[a] civil penalty *may not exceed* $5,000 for each day during which such violation or failure to pay continues") (emphasis added); Dkt. 162, EC Br. 46 (indicating that Enforcement Counsel seeks "full first tier penalties").[12]

When reviewing amounts imposed pursuant to CMP provisions analogous to that found in 12 U.S.C. § 5565(c), courts routinely focus on the nature of the amount requested relative to the maximum amount permissible – that is, in determining the appropriateness of a CMP, courts routinely focus on whether the government has sought the maximum. *Cf. Michael v. FDIC*, 687 F.3d 337, 355–56 (7th Cir. 2012) (examining 12 U.S.C. § 1818(i) and explaining that because

[12] At no point in the entirety of this proceeding has Enforcement Counsel alleged that Respondents recklessly or knowingly violated a Federal consumer financial law. Thus, $5,437 represents the *maximum* possible CMP under Enforcement Counsel's pleadings. *See* 12 C.F.R. § 1083.1

"[petitioners] were eligible for first tier penalties that far exceeded the amounts actually imposed[, there was] no abuse of discretion in the . . . imposition of the relatively modest CMPs").

Enforcement Counsel still has failed to articulate any basis for its pursuit of any CMPs, other than to "strengthen the enforcement of Federal consumer financial law." Dkt. 162, EC Br. 42. Enforcement Counsel cites only two consumer complaints to argue that the gravity of the violations it has charged Respondents with warrant the highest amount of CMPs. Such a *de minimis* number of complaints fails to support the "gravity" alleged by Enforcement Counsel. Nor does Enforcement Counsel point to any previous TILA or EFTA violations by Respondents, arguing instead that "the scale and magnitude of the harm" warrants imposition of the maximum CMP amount. Dkt. 162, EC Br. 46. However, the Court should consider the fact that – as Enforcement Counsel admits – there is no evidence of a previous "violation of a law, rule, *or final order or condition imposed in writing*," 12 U.S.C. § 5565(c)(2)(A) (emphasis added), which mitigates against imposition of the maximum CMP amount. Dkt. 162, EC Br. 42.

In asking the Court to impose CMPs, Enforcement Counsel implicitly argues that Respondents somehow acted in bad faith. Dkt. 162, EC Br. 44–45. However, Enforcement Counsel ignores the clear evidentiary record that Integrity Advance was properly licensed by the Delaware State Bank Commissioner and operating within the bounds of Delaware law, used outside compliance counsel to prepare its loan documents, and sought and received the appropriate licensure. Hr'g Tr. I-226:20 – 227:9; II-26:13 – 27:6; III-138:18 – 144:14. Indeed, the high number of returning Integrity Advance customers and low number of complaints should drastically mitigate, if not preclude, CMPs here.

Moreover, case law interpreting similar CMP provisions suggests that it is the government's burden to prove ability to pay, yet Enforcement Counsel has not introduced any evidence that Integrity Advance has the financial resources to pay *any* CMPs. *Cf. United States v. Cornerstone Wealth Corp.*, 549 F. Supp. 2d 811, 823 (N.D. Tex. 2008) ("So far as this court is aware, no court has as yet decided whether the government has the burden of proof on the 'ability to pay' factor under But the Fifth Circuit's analysis of similar statutory provisions persuades the court that the burden of proof is on the government."). Enforcement Counsel has done nothing to show that CMPs are warranted in this matter, let alone the highest CMP amount allowed for first tier penalties.

E. Enforcement Counsel Cannot Justify Its Request For Injunctive Relief

Only now, for the first time, and over a month after the end of the hearing, has Enforcement Counsel articulated the actual injunctive relief it seeks. Tellingly, Enforcement Counsel fails to cite a single case in support of its veritable laundry list of injunctive relief requests, nor does it articulate why such relief is appropriate here. Enforcement Counsel has even failed to lay out the legal standard it must satisfy to obtain injunctive relief.

"To obtain a permanent injunction, the Bureau must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *See CFPB v. Siringoringo*, No. SACV1401155JVSAJWX, 2016 WL 102435, at *5–7 (C.D. Cal. Jan. 7, 2016) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Enforcement Counsel has not established any aspect of this standard.

Even assuming there was proof of liability (which there is not), the scope and nature of the injunctive relief is not reasonably tailored "to prevent future violations." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (citation omitted). For the first time in its post-hearing brief, Enforcement Counsel seeks "fencing-in" relief – relief that is broader than the conduct that is allegedly unlawful – including an injunction prohibiting collection of outstanding debts on Integrity Advance loans and a vague obligation to modify Integrity Advance consumer credit reports. *See* Dkt. 162, EC Br. at 47. "Fencing-in provisions serve to 'close all roads to the prohibited goal, so that [an] order may not be by-passed with impunity.'" *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (citation omitted). However, "[f]encing-in provisions *must bear a "reasonable relation to the unlawful practices found to exist*." *Id.* (emphasis added). Here, there simply is no evidence to support a need to "'fence in' [Respondents] from engaging in behavior." *See Siringoringo*, 2016 WL 102435, at *5–7.

Integrity Advance ceased operations in 2013, and there is no evidence in the record of any possibility that Mr. Carnes will, or is likely to, engage in any conduct in the future that violates the CFPA, TILA, or EFTA. *See, e.g., SEC v. Tourre*, 4 F. Supp. 3d 579, 598 (S.D.N.Y. 2014) (denying the SEC's request for injunctive relief "because there is insufficient evidence in the record to demonstrate a reasonable likelihood of future violations by [the defendant.]") Moreover, as discussed in Section I, there is no evidence that Respondents acted with a blatant disregard for the law – quite the contrary, at every turn Respondents took steps to ensure compliance with applicable laws, *see supra* Section I.A.2 – or that Respondents had a history of engaging in the allegedly illegal conduct at issue. *See Litton Indus., Inc.*, 676 F.2d at 370–71 ("Because fencing-in provisions are prophylactic, the ultimate question is the likelihood of the petitioner committing the sort of unfair practices they prohibit. Accordingly, '(a)mong the circumstances which should be considered in evaluating the relation between the order and the unlawful practice are whether the respondents acted in blatant and utter disregard of the law, and whether they had a history of engaging in unfair trade practices.'" (quoting *Standard Oil Co. v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978)).

Further, Enforcement Counsel has offered no explanation as to why an injunction should issue in light of the restitution it seeks. Enforcement Counsel has wholly ignored its obligation to demonstrate why its proposed monetary relief is "inadequate to compensate for [any] injury" such that an injunction is necessary or justified.

As discussed in Respondents' post-hearing brief, Enforcement Counsel's decision to brief an argument for injunctive relief for the first time in its post-hearing brief has greatly prejudiced Respondents and deprived Mr. Carnes of his due process rights, leaving Respondents without the chance to examine any witnesses or evidence that might rebut Enforcement Counsel's request for injunctive relief. *See* Dkt. 164, Resp'ts. Br. 37. Moreover, Enforcement Counsel has not pointed to any evidence in the record to support the injunctive relief sought. Here, too, the Court must deny the request for injunctive relief.

F. Enforcement Counsel Cannot Justify Its Request For Disgorgement

As an afterthought appearing on the penultimate page of its brief, Enforcement Counsel seeks an order that Mr. Carnes "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 [Mr.] Carnes is required to pay as relief or a penalty." *See* Dkt. 162, EC Br. 53. This disgorgement is later described as "disgorgement by [Mr.] Carnes of funds received from Integrity Advance's operations." *Id.* at 54; *see also* Dkt. 163, EC Pr. Concl. of Law & Findings of Fact 25 (Mr.

Carnes "shall DISGORGE *all* funds received from Integrity Advance, LLC's operations.") (emphasis added). As with its other claims for relief, *see supra* Section II.A, it remains unclear what, precisely, Enforcement Counsel is seeking in the way of a disgorgement remedy.

To the extent that Enforcement Counsel seeks an order that Mr. Carnes disgorge "all funds received from Integrity Advance, LLC's operations," and thus seeks an "accounting of all funds received from Integrity Advance" this claim has no basis in law. Enforcement Counsel seems to acknowledge as much by failing to cite a single case – let alone a case in which both restitution and disgorgement were awarded for the same wrongdoing – nor advancing any argument in support this request for relief. Moreover, as the court held in *First City Fin. Corp*. – a case cited by *Enforcement Counsel itself* – "[s]ince disgorgement primarily serves to prevent unjust enrichment, the court may exercise its equitable power *only over property causally related to the wrongdoing*." 890 F.2d at 1231 (emphasis added); *see also id.* at 1232 ("[T]he SEC bears the ultimate burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment . . . ."). In its overbroad request for "all funds," Enforcement Counsel has not actually narrowed its claim to property causally connected to the purported wrongdoing, nor made *any* effort to reasonably approximate what amount of such funds is causally connected to Mr. Carnes' purported CFPA violations.

Furthermore, Enforcement Counsel itself has already acknowledged that seeking disgorgement on top of restitution would amount to duplicative recovery. Enforcement Counsel stated in its closing arguments that it was not seeking disgorgement for Count V of the Notice of Charges for purported violations of EFTA because "we think that the relief largely overlaps the relief that we are seeking under Counts One, Two and Three." *See* Hr'g Tr. III-180:17-25. To the extent that Enforcement Counsel is now seeking disgorgement *in addition to restitution* for

Counts I, II and III (which, again, is entirely unclear from its moving papers) this necessarily overlaps with the relief already being sought. As discussed in Respondents post-hearing brief, this would result in Enforcement Counsel recovering the same damages multiple times. *See* Dkt. 164, Resp'ts' Br. 31–32.

CONCLUSION

For all of the foregoing reasons, the Court should recommend that Respondents are entitled to judgment in their favor on the Bureau's Notice of Charges.

Respectfully submitted,

Dated: September 13, 2016

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CERTIFICATION OF SERVICE

I hereby certify that on the 13th day of September, 2016, I caused a copy of the foregoing Opposition to Enforcement Counsel's Post-Hearing Brief to be filed by electronic transmission (e-mail) with the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Heather L. MacClintock (Heather.L.MacClintock@uscg.mil), and Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), and served by electronic mail on the following parties who have consented to electronic service:

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