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.**	**ENFORCEMENT COUNSEL'S ANSWERING BRIEF**

ENFORCEMENT COUNSEL'S ANSWERING BRIEF

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I. **Introduction**

Over the course of this proceeding Enforcement Counsel proved that Respondents ran a payday loan operation that consistently violated federal law. Respondents failed to accurately disclose the cost of their loans, forced consumers into electronic repayments, and when consumers realized that they were being overcharged, Respondents used a little-known financial product to continue withdrawing consumer funds. After almost a year of litigation, which included dozens of briefs and a three-day hearing, the Administrative Law Judge (ALJ) issued a Recommended Decision (RD) that largely agreed with Enforcement Counsel and found both Respondents liable for millions of dollars in monetary relief.

Respondents now appeal virtually every part of the ALJ's ruling, suggesting that he was unqualified to hear the case and erred at "nearly every instance." Resp. Br. [dkt. 184] at 1. Respondents are mistaken. The findings reflected in the RD are well grounded in both case law and the facts established throughout this proceeding, including an assessment of the witnesses' testimony and the many exhibits introduced. Respondents' primary reaction is to repeatedly state that there is "no evidence" against them even when that is clearly untrue. Respondents also frequently inveigh that they were not given an opportunity to test Enforcement Counsel's theories and evidence, when the truth is that Respondents—for whatever reason—chose not to do so on many occasions. The fact that this strategy failed does not render the recommended decision infirm. The Director should affirm the ALJ's factual findings and liability determinations in his Final Decision.

II. **Integrity Advance Violated TILA**

Integrity Advance is a Delaware limited liability company that, from at least May 2008 through December 2012, originated and serviced short term 'payday' loans to consumers. *See* EC Stat. of Mat. Facts [dkt. 88] at ¶ 1. Each one of Integrity Advance's loan agreements

contained a Truth in Lending Act box that disclosed a loan that would be paid off in a single payment. Indeed, Respondents admitted that they disclosed the costs of their loans as if they were single payment loans. *See* Answer [dkt. 021] at ¶ 26 ("Respondents admit that [TILA] disclosures stated a calculation that reflected loan repayment in one payment . . . ."). But that was not how Integrity Advance's loans actually functioned. Integrity Advance automatically rolled over consumers' payday loans unless they called three business days before payment was due to "change the terms" of the loan. EC Stat. of Mat. Facts [dkt. 088] at ¶ 24. Integrity Advance would continually automatically renew a consumer's loan through an 'auto renewal' and 'auto workout' process such that a first-time Integrity Advance consumer who took a $300 loan would have $1065 withdrawn from his account. Answer [dkt. 021] at ¶ 31. Thus, Integrity Advance's loans effectively were multi-payment installment loans, with a prepayment option, not single-payment loans. *See* Summ. Disp. Order [dkt. 111] at 15-18.

Respondents' protests to the contrary are unavailing and unsupported. Respondents argue that at the time of loan consummation a consumer only owed the principal amount plus one finance charge. Resp. Br. [dkt. 184] at 8. That is simply untrue. At the time of loan consummation, consumers had agreed to allow Integrity Advance to withdraw a series of payments from their bank accounts. EC Stat. of Mat. Facts [dkt. 088] at ¶¶ 26, 50, 53. These payments were automatically deducted from consumers' bank accounts without any additional authorization or notice. The fact that consumers had a prepayment option does not lessen this obligation, just as the ability to prepay a 30-year mortgage does not lessen the initial obligation to make 360 monthly payments. Respondents also suggest that "there is no evidence" that a consumer's legal obligation included renewal payments (Resp. Br. [dkt. 184] at 8) but this is

nonsensical given that Respondents admitted that they automatically renewed consumer loans unless a consumer called to change the loan terms. EC Stat. of Mat. Facts [dkt. 88] at ¶ 23.

III. <u>Respondents' Loan Agreements Were Deceptive</u>

As seen above, Respondents disclosed their loans as if they were single payment loans when in fact consumers had obligated themselves to an expensive multi-payment loan. Indeed, Respondents never disclosed the full and accurate cost of the company's loans. EC Stat. of Mat. Facts [dkt. 088] at ¶¶ 42, 43. As a result, the ALJ properly found that Integrity Advance engaged in deceptive practices. Summ Disp. Order [dkt. 111] at 31. He found that "consumers would not be able to meaningfully understand the cost difference between paying in a single lump sum and paying over time according to the renewal and auto-workout schedule." *Id*. at 28.

Respondents first take issue with the ALJ's conclusion that a reasonable consumer would have been misled by Respondents' disclosures. But courts routinely make legal determinations about "reasonable consumers." *See e.g.*, *Floersheim v. FTC*, 411 F.2d 874, 876-78 (9th Cir. 1969) (finding that debt collection letters using the phrase "Washington D.C." misled consumers into thinking that the letters were from the government); *FTC v. Brown & Williamson Tobacco Corp*., 778 F.2d 35, 42–43 (D.C. Cir. 1985) (upholding a district court finding that a tobacco company's advertisements concerning tar were deceptive). Indeed, in the portion of his recommended decision denying Respondents' motion for reconsideration of the deception summary disposition ruling, the ALJ stated that the "reasonable person determination is properly within the fact-finder's discretion." RD [dkt. 176] at 26. Respondents suggest that the lack of evidence regarding Integrity Advance's customers' "intelligence, education level, or income bracket" somehow undermines the ALJ's reasonable person analysis, but fail to explain how or why. They also ignore the fact that they were free prior to and during summary disposition

briefing to develop and present relevant evidence on this issue. Their failure to do so is not cause to overturn the Recommended Decision.[1]

Finally, Respondents fail in their attempt to distinguish the decision in *FTC v. AMG Serv., Inc.*, 29 F.Supp.3d 1338 (D. Nev. 2014), *appeal docketed*, No. 16-17197 (9th Cir. Nov. 30, 2016). AMG Services, like Integrity Advance, provided TILA disclosures based on a single repayment schedule even though the contractual fine print required consumers to take affirmative steps to avoid numerous automatic renewals. *Id.* at 1345. The court in *AMG* found this practice facially deceptive. *Id*. at 1365-72. While there was a large volume of complaints in that matter, the court did not rely on the complaints or expert testimony to reach its legal conclusion finding facial deception. *Id.* at 1350-52. Indeed, the AMG loan agreement included more information about the cost of the loan than Integrity Advance's agreement. The AMG contract included, in bold, an example that demonstrated how much in total finance charges a consumer who renewed a $200 loan four times would have to pay. *See* EC Reply in Sup. of Mot. for Summ. Disp. [dkt. 104], Att. 2 to Exh. A at 3 (AMG Loan Agreement). By contrast, there is no evidence in the record that Respondents ever explained to consumers the total costs associated with automatic renewals, and Respondents do not meaningfully dispute that their loan agreements did not disclose the costs of automatic renewals. EC Stat. of Mat. Facts [dkt. 88] at ¶¶ 41-44; Resp. Stmt. Disp. Facts [dkt. 102] at ¶ 13.[2]

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[1] Respondents also take issue with the fact that Enforcement Counsel did not put a consumer survey into evidence. But courts have been clear that a deception claim does not require survey evidence. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 39-41 (D.C. Cir. 1985).

[2] Respondents' argument that Enforcement Counsel failed to provide live consumer testimony or sworn consumer statements during the hearing is completely disingenuous. Resp. Br. [dkt. 184] at 10. As Respondents know, the Administrative Law Judge granted summary disposition in favor of Enforcement Counsel on its deception claim against Integrity Advance and found that

1. **Respondents' Cost Disclosures Were Material**

Respondents contend that the Recommended Decision erred in finding that the cost of Integrity Advance's loans was material. They allege that there is no evidence that individual Integrity Advance consumers cared about the loans' costs. Resp. Br. [dkt. 184] at 11. But courts have been clear that the costs of a loan product are relevant and material to consumers. *See FTC v. Figgie Int'l, Inc*., 994 F.2d 595, 608 (9th Cir. 1993) (stating that terms relating to the price of products are material); *Steele v. Ford Motor Credit Co*., 783 F.2d 1016, 1019-20 (11th Cir. 1986) ("[A]ny understatement of the finance charge is material because any understatement would be of some significance to a reasonable consumer."). This makes perfect sense; cost is one of the only things that differentiate one loan product from another. Respondents' unsupported premise that a consumer would not find it material that a $390 repayment would balloon to $1065 strains credulity.

IV. <u>Respondents' Use of Remotely Created Checks was Unfair</u>

Section 1031(c) of the CFPA provides that an act or practice is "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers" and that "substantial injury is not outweighed by countervailing benefits to consumers or to competition." 12 U.S.C. § 5531(c). Enforcement Counsel established at the hearing that Respondents substantially injured consumers by using remotely created checks to continue withdrawing money from consumers' accounts after those consumers had satisfied the disclosed "Total of Payments" and had subsequently attempted to block Integrity Advance's electronic

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the loan agreement was legally deceptive. Summ. Disp. Order [dkt. 111] at 27-31. Given that, there was no reason for Enforcement Counsel to waste judicial resources eliciting consumer testimony to prove deception.

debits. EC Prop. Find. of Fact [dkt. 163] at ¶¶ 118, 119; EC-EX-068 at 219:7-18; EC-EX-072, -092, -094, -096, -097, -098, -100; EC Memo in Supp. of Summ. Disp. [Dkt. 087] at 16-21; EC Opp'n to Resp. Mot. Summ. Disp. [Dkt. 099] at 20-21; EC Reply in Supp. of Mot. Summ. Disp. [Dkt. 104] at 9-10. Consumers could not reasonably avoid these injuries given that the Integrity Advance loan agreement failed to adequately disclose that the company could use this poorly understood mechanism to debit their accounts. *See* EC-EX-001-014; EC-EX-063.

Respondents suggest that Enforcement Counsel imposed a "strict liability" standard on their use of remotely created checks, but that is simply untrue. Resp. Br. [dkt. 184] at 12. Enforcement Counsel never argued that RCCs are per se illegal and explicitly stated as much in its briefing. *See* EC Post Hearing Br.[dkt. 162] at 17. Enforcement Counsel argued (and the ALJ agreed) that Respondents were liable because they initiated remotely created checks after failing to adequately disclose them in the loan agreement, and because they used RCCs after consumers had paid the disclosed total of payments and tried to block Integrity Advance's access to their bank accounts.

Respondents argue that there is no proof that the amounts withdrawn via RCC by Integrity Advance were unauthorized and constituted harm. Once again, Respondents ignore the evidence in the record. As a part of the loan application and approval process, Integrity Advance required consumers to sign an ACH agreement. Summ. Disp. Order [Dkt. 111] at 34-39. The agreement contained the following language: "*[i]f you revoke your authorization* you agree to provide us with another form of payment acceptable to us and you authorize us to prepare and submit one or more checks drawn on Your Bank Account so long as amounts are owed to us under the Loan Agreement." EC-EX-001-014; EC-EX-064 (emphasis added). Additionally, Respondents' data captures 602 separate occasions when Respondents used a RCC to debit a

consumer's account after that consumer had withdrawn authorization. *See* EC-EX-097; EC-EX-095; EC-EX-100; EC-EX-101; Tr. II 142:15 - 148:4; Tr. II 152:15 - 153:11. Finally, in his hearing testimony Carnes admitted that Integrity Advance used RCCs once consumers had withdrawn ACH authorization. Tr. I 235:19 - 236:3; Tr. II 84:6-85:11.

Given this, the harm to consumers is clear. Integrity Advance withdrew money from consumers' bank accounts precisely when those consumers were trying to prevent the company from doing so. It is well-settled that "billing customers without permission causes injury for the purposes of asserting" an unfairness claim. *See e.g.*, *FTC v. Amazon.com, Inc.*, 71 F. Supp. 3d 1158, 1164 (W.D. Wash. 2014) (citing., *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1153 (9th Cir. 2010)); *FTC v. Ideal Fin. Solutions, Inc.*, 2014 WL 2565688, at *5 (D. Nev. June 5, 2014).

Finally, Respondents oddly take issue with the fact that Enforcement Counsel, during post trial briefing, decided to reduce its requested relief for the RCC unfairness claim to include only consumers who had fully satisfied the disclosed 'Total of Payments' amount. *See* Resp. Br. [dkt. 184] at 12. This change merely *reduced* Respondents' potential liability and did not reflect a fundamental change in Enforcement Counsel's theory. Given that Enforcement Counsel moved for summary disposition on this issue, Respondents knew the nature of the unfairness claim Enforcement Counsel was asserting (*see* EC Memo in Supp. of Summ. Disp. [dkt. 087] at 16-21) and had every opportunity at the hearing to present evidence defending their practices. The fact that Enforcement Counsel curtailed the requested relief in no way prejudiced Respondents.[3]

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[3] Respondents suggest that Enforcement Counsel did not establish the 'reasonably avoidable' prong of unfairness but fail to actually argue that Integrity Advance's use of RCCs was reasonably avoidable by consumers. Enforcement Counsel argued that Respondents' use of RCCs was not reasonably avoidable given that the loan agreement provision ostensibly authorizing their use was opaque, unclear, and hidden among pages of dense boilerplate fine

V. Integrity Advance Violated the Electronic Fund Transfer Act

Regulation E prohibits lenders from conditioning credit on consumers' agreement to repay that credit via preauthorized electronic fund transfers. 12 C.F.R. § 1005.10(e). The undisputed facts in this case make clear that consumers were required to sign Integrity Advance's ACH authorization in order to receive a loan from the company. Answer [dkt. 021] at ¶¶ 39-40. The ACH form authorized both the deposit of loan funds *and* the withdrawal of repayments via ACH. *See* EC Stat. of Mat. Facts [dkt. 088] at ¶ 53. Indeed, according to Respondents' own data, 98.5% of initial loan repayments were made via electronic means. *See* EC Memo in Supp. of Summ. Disp. [dkt. 087], Exhibit C (Hughes Decl.) at ¶ 8. Relying on these facts, the ALJ properly determined that Integrity Advance violated EFTA and Regulation E. Summ. Disp. Order [dkt. 111] at 33-41.

Respondents protest this finding, primarily focusing on language in their ACH agreement stating that Integrity Advance accepted alternative forms of payment. Resp. Br. [dkt. 184] at 14-15. But that language does not cure the fact that Respondents required virtually every consumer to initially consent to preauthorized electronic fund transfers. Even if a consumer could revoke an ACH authorization after signing the contract, it is still unlawful to require a consumer to agree to preauthorized electronic fund transfers to receive credit. *See FTC v. Payday Fin. LLC*, 2013 WL 5442387 at *8-9 (D.S.D. Sept. 30, 2013); *O'Donovan v. CashCall, Inc.,* No. C 08–03174 MEJ, 2009 WL 1833990 (N.D. Cal. June 24, 2009); Summ. Disp. Order [dkt. 111] at 34 ("To accept Respondents' argument that requiring electronic repayment is meaningfully different than

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print. *See* EC Memo in Supp. of Summ. Disp. [dkt. 087] at 19-20. Respondents have never disputed these facts about the RCC provision.

requiring an agreement to repay electronically with the option to later change one's mind would defy the spirit of EFTA.").

VI. Carnes is Individually Liable for Respondents' Deceptive and Unfair Acts

The evidence in the record clearly establishes that Carnes, Integrity Advance's chief executive, meets the standard for individual liability. Carnes had full authority over Integrity Advance and was directly involved with the daily operations of the company. Carnes also directly testified that he understood that Integrity Advance's loan agreements did not accurately convey the default operation of the company's loans. Given these facts, there is no plausible argument that Carnes is not individually liable, as the ALJ found.

A covered person can be held liable for an unfair or deceptive act or practice when he "engages" in that practice. *See* 12 U.S.C. § 5536(a)(1)(B). The ALJ applied the standard adopted by courts interpreting the FTC Act, holding that an individual is liable for corporate actions when: "(1) he participated directly in the deceptive acts *or* had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *C.F.P.B. v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016) (emphasis in original) (quoting *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)).

The evidence here plainly establishes both prongs of this individual liability test. First, Carnes acted as the chief executive of Integrity Advance and admitted that he "had ultimate authority over the company." EC Prop. Findings of Fact [dkt. 163] at ¶ 59; *see also* Tr. I 228:6-

11 ("[A]s CEO you are ultimately approving everything.").[4] The evidence also confirms that Carnes directly participated in the deceptive conduct by approving Integrity Advance's loan agreement. Integrity Advance only had one product, a consumer payday loan formed through the company's loan agreement. *Id.* at ¶ 80. That one product was the sole source of Integrity Advance's revenue, generated all of Integrity Advance's operating profits, and generated at least 75% of the operating profits of Integrity Advance's parent company. *Id.* at ¶¶ 13-15, 79. When the loan agreement was developed and approved, the company only had four employees, and the company's general counsel directly testified that he did not authorize the loan agreement.[5] So, either Carnes approved the deceptive loan agreement or he left that decision to an IT employee or the company receptionist. *Id.* at ¶ 82. Considering all of the evidence in the record, the ALJ correctly found that Carnes had the requisite authority, and the evidence clearly demonstrates that he directly participated in the deceptive conduct as well.

Second, the record establishes that Carnes had knowledge of Integrity Advance's misrepresentations. Carnes admitted that he understood how Integrity Advance disclosed its loans as single payment loans. When presented with a hypothetical first-time customer who took a $100 loan, he testified that "their TILA disclosure would say $130." *Id.* at ¶ 88. Carnes also understood that the default for Integrity Advance's loans was rollover. He explained that if a consumer "didn't call or email, and it was their first payment… they would be renewed." *Id.* at ¶ 83. Indeed, Carnes knew that the consumer would be renewed repeatedly and then placed into an

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[4] The record contains numerous additional facts establishing Carnes's authority over Integrity Advance. *See* EC Prop. Findings of Fact [dkt. 163] at ¶¶19, 31, 32, 43, 44, 46, 52, 56, and 64-71.
[5] Tr. II 28:4-23; Tr. II 43:8 – 44:17.

auto-workout process. *Id*. at ¶¶ 84-85. Carnes was also clear that he understood the automatic renewal and auto-workout process while he was running Integrity Advance. Tr. I 220:6-12.

Carnes also understood that most of the company's consumers would experience rollovers. He admitted to "understanding that the majority of Integrity Advance loans would experience at least one renewal or rollover." EC Prop. Findings of Fact [dkt. 163] at ¶ 87. Indeed, Carnes stated in his investigational hearing that ninety percent of Integrity Advance customers experienced rollovers. *Id*. at ¶ 86. Finally, Carnes admitted that he knew that the consumers who rolled over would pay more than what Integrity Advance disclosed in the "Total of Payments" box. *Id*. at ¶ 89. In sum, Carnes knew the loans were disclosed as single payment loans, knew that the loans would automatically rollover, knew that most consumers would experience rollovers, and knew that the rollovers would result in increased cost. This clearly establishes that Carnes "had knowledge of the misrepresentations" and engaged in deceptive conduct.

Despite failing to cite any authority, Respondents argue that Carnes should escape liability because he "had no reason to know that consumers may not have understood IA's loan agreements." Resp. Br. [dkt. 184] at 16. Even if Respondents' statement were true – which it is not – the key issue is knowledge of the *misrepresentations*, not whether Carnes knew that consumers were confused. Respondents' attempt a similar tactic in trying to avoid individual liability for the unfair use of RCCs – arguing that Carnes had no "reason to know about the allegedly unfair conduct." But the evidence summarized above (*see* section IV *supra*) shows that

Carnes knew that Integrity Advance was using RCCs when consumers withdrew ACH authorization and whether or not Carnes knew this was legally unfair is irrelevant.[6]

Respondents attempt to distinguish this matter from various prior cases where an individual defendant was aware of consumer complaints or authored deceptive communications. None of the cases cited by Respondents stand for the premise that a Respondent must personally author or edit deceptive materials or be knowledgeable about consumer complaints in order to be individually liable. To this point, Enforcement Counsel has previously cited several examples of executives who were found individually liable in circumstances analogous to those presented here. *See* EC Post Hearing Br. [dkt. 162] at 14.[7]

Finally, Respondents argue that Integrity Advance's lending license issued by the Delaware Banking Commission absolves them from liability for failure to comply with federal law or somehow relates to Carnes's individual liability. Respondents have cited to no authority or otherwise explained those arguments. Regardless, E. Quinn Miller, a supervisor at the Delaware Office of the State Bank Commissioner, testified clearly and unequivocally that her office did not design Integrity Advance's deceptive loan product, did not require a particular loan agreement, did not require a particular fee structure, did not require payday loans to rollover, did

[6] *See generally Jerman v. Carlisle*, 559 U.S. 573, 582-3 (2010) ("Our law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law.").

[7] Respondents' suggestion that Carnes did not know about consumer complaints is highly questionable. Carnes testified during an investigational hearing that he was aware of consumer complaints – even if he did not handle them or give them much credence. *See* EC-EX-068 at 242-43. His attempt to deny this during the hearing was not credible, and the ALJ expressly called Carnes's truthfulness into question in the Recommended Decision. RD [dkt. 176] at 54. Respondents' footnote attempting to explain Carnes's inconsistent statements does nothing to rehabilitate his testimony. *See* Resp. Br. [dkt. 184] at 19 n.4.

not require rollovers by default, and did not write loan agreements for payday lenders. EC Prop. Findings of Fact [dkt. 163] at ¶¶ 101-104.[8]

VII. Statutes of Limitation Do Not Bar the Bureau's Claims

In response to the Notice of Charges, Respondents filed a motion to dismiss which asserted, among other things, that various statutes of limitations barred Enforcement Counsel's CFPA, EFTA, and TILA claims. *See* Resp. MTD [dkt. 028] at 16-21. Enforcement Counsel opposed this motion, arguing that the Director's binding decision in *In the Matter of PHH Corp*., File No. 2014-CFPB-0002, clearly distinguished between administrative proceedings which are not subject to the limitations period in 12 U.S.C. § 5564 and actions in court which are. *See* EC Opp. to MTD [dkt. 033] at 10-14. The ALJ agreed with Enforcement Counsel and denied Respondents' motion in its entirety. *See* MTD Order [dkt. 075] at 20-29.

On appeal, Respondents contend that the recent decision of the D.C. Circuit in *C.F.P.B. v. PHH Corp*., 2016 WL 5898801 (D.C. Cir. Oct. 11, 2016), which ruled that a statute of limitations found in the Real Estate Settlement Procedures Act (RESPA) should have been applied in a Bureau administrative proceeding, means that Enforcement Counsel's TILA, EFTA, and CFPA claims are now time-barred. Respondents are incorrect, and appear to misapprehend the holding in that case. The *PHH* panel held that a statute of limitations in RESPA applied to Bureau administrative proceedings to enforce RESPA brought pursuant to 12 U.S.C. § 5563(a)(2). Contrary to Respondents' assertions, it did not apply the limitations period found in

[8] Respondents' statement that Ms. Miller "explained lenders' loan agreements were likely reviewed on a regular basis during the State's supervisory examination process" is a mischaracterization of the witness's testimony. Resp. Br.[dkt. 184] at 21. When asked about the supervisory process and changes in loan agreements, Ms. Miller testified that "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 131:16-21.

12 U.S.C. § 5564 to administrative proceedings. The ruling of the *PHH* panel is narrow and has no bearing on this case.

It is a well-established canon that statutes of limitations are construed in favor of the government, rooted in the traditional rule *quod nullum tempus occurrit regi*—time does not run against the King. *BP America v. Burton*, 549 U.S. 84, 95-96 (2006) (citing *E.I. DuPont De Nemours & Co. v. Davis*, 264 U.S. 456 (1924) and *Guaranty Trust Co. v. United States*, 304 US 126, 132 (1938)). If the scope of the statute is ambiguous, the sovereign is given the benefit of the doubt. *Id*. at 96.

1. **The Statute of Limitations in 12 U.S.C. § 5564(g) Does Not Apply to Administrative Proceedings**

Section 5564, including subsection (g), does not apply to administrative proceedings brought by the Bureau. The language of the statute is clear, and no court has held that its provisions apply to administrative proceedings. While the *PHH* panel interpreted the term "action", it interpreted "action" contained within Section 2614 of RESPA based on "the overall text, context, purpose, and history of" that particular statute, *PHH*, 839 F.3d at 53—and its holding in no way controls the meaning of "action" in Section 5564 of the CFPA.

The Supreme Court has been clear that the term 'action' typically refers to a case brought in court and not administrative proceedings like this one. *See BP Am.*, 549 U.S. at 91 ("[t]he key terms in this provision -- 'action' and 'complaint' – are ordinarily used in connection with judicial, not administrative, proceedings."). Reading subsection (g) in the context of § 5564 and Part E makes it clear that Congress distinguished between administrative proceedings and court actions. Section 5563 relates to "hearings and adjudication proceedings" and section 5564 relates to "litigation authority."

Section 5564 clearly applies to actions in court. Subsection (a) states that the Bureau may "commence a civil action" when a person violates Federal consumer financial law. Subsection (c) permits compromise of an action if the settlement is "approved by the court." Subsection (f) provides that "any civil action brought under this title may be brought in a United States district court or in any court of competent jurisdiction." Nothing in § 5564(g) or the related provisions overcomes the presumption, articulated by the Supreme Court in *BP America*, that the term "action" refers to court actions and not administrative proceedings. Because this administrative proceeding is not an action, § 5564 is inapplicable here.

2. There is No Statute of Limitations for UDAAP Claims Brought in Administrative Proceedings

As stated above, the D.C. Circuit's *PHH* decision applies a statute of limitations that governs certain RESPA claims to a Bureau administrative proceeding seeking to enforce that statute under 12 U.S.C. § 5563(a)(2). Section 5563(a)(2) states that the Bureau can enforce enumerated laws "unless such Federal law specifically limits the Bureau from conducting a hearing or adjudication proceeding," and the *PHH* decision relied upon that language in reaching its conclusion. However, when the Bureau brings a UDAAP claim in the administrative forum, it does so under § 5563(a)(1), not § 5563(a)(2). This provision allows the Bureau to bring administrative proceedings to enforce compliance with "the provisions of this title" (including the UDAAP prohibition in § 5536) but does not have any limitation language like that contained in §5563(a)(2). Hence, Congress did not impose any statute of limitations in administrative proceedings enforcing the CFPA's provision against unfair, deceptive, or abusive practices.

Respondents, citing to the *PHH* panel decision, argue there should not be a dichotomy between district court actions and administrative proceedings. But Respondents fail to acknowledge that the Supreme Court has, in fact, recognized this dichotomy. In *BP America*, the

Court acknowledged the petitioners' policy arguments regarding asymmetrical statues of limitations, but held that the relevant inquiry was not whether such approach was good policy, but rather determining how far Congress intended to go when enacting the statute of limitations at issue. 549 U.S. at 100. Here, Congress included no limitations period for claims brought under § 5563(a)(1) of the CFPA in administrative proceedings.[9]

3. Neither TILA nor EFTA Contain Any Statute of Limitations Applicable to Bureau Enforcement Actions or Proceedings

a. *The Text of TILA and EFTA Does Not Limit the Bureau*

The *PHH* panel ruled that if an enumerated law "specifically limits the Bureau from conducting a hearing or adjudication proceeding," including by imposing a statute of limitations, that statute of limitations applies in the administrative proceeding. *PHH*, 2016 WL 5898801 at *51. But even assuming that this is controlling law, it still would not bar Enforcement Counsel's TILA and EFTA claims here.

Federal government enforcement of TILA is governed by 15 U.S.C. § 1607(a). This provision is entitled "Administrative Enforcement" and explicitly provides that the Bureau is one of the "enforcing agencies." *Id*. This section does not contain a statute of limitations provision. By contrast, the provision that governs a private right of action contains the one-year statute that Respondents have repeatedly sought to apply to this matter. *See* 15 U.S.C. § 1640.[10] By its own

[9] This does not allow the Bureau to seek penalties for a limitless period of time in an administrative proceeding. Congress has required the government to commence proceedings for penalties or fines to five years after the accrual of the claim. *See* 28 U.S.C. § 2462.

[10] Enforcement Counsel is aware that there is a federal district court decision holding that a one-year statute of limitations provision found in TILA applies to the Bureau in federal district court actions. *C.F.P.B. v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015). That case was incorrectly decided, and in any event, is not controlling case law here. It is also worth noting that the *ITT* court agreed with Enforcement Counsel that statutes

terms, §1640 applies to any "action…brought in any United States district court, or in any other court of competent jurisdiction." It also applies only to "any action under *this section*" (emphasis added)—the section dealing with *private* lawsuits. Clearly this provision cannot apply to a Bureau administrative proceeding. Similarly, Federal government enforcement of EFTA is governed by 15 U.S.C. § 1693o, which empowers the Bureau to enforce that law, but does not contain a statute of limitations provision. The one-year time-bar that Respondents seek to apply here is found in the civil liability section governing private lawsuits and does not apply to this proceeding. *See* 15 U.S.C. § 1693m. As with TILA, the civil liability section of EFTA only applies to "any action under" the private liability section that is commenced in a United States District Court or other any other court of competent jurisdiction.

b. *TILA and EFTA Limitations Cannot Apply to CFPA Claims*

Section 5536(a)(1) of title 12 provides that it is unlawful for any covered person –

(A) to offer or provide a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law;…

Accordingly, violations of enumerated consumer laws are also violations of the CFPA. Enforcement Counsel included two separate counts in its Notice of Charges, Count II and Count VI, alleging violations of the CFPA by virtue of Integrity Advance's violations of TILA and EFTA, respectively. *See* Notice [dkt. 001] at 10 (*citing* 12 U.S.C. § 5536(a)(1)(A)) and 13. In his summary disposition order finding that Integrity Advance violated TILA and EFTA, the ALJ also found that Counts II and VI had been proven. Summ. Disp. Order [dkt. 111] at 27, 41. Hence, Integrity Advance is still liable for its post-transfer date conduct that violated TILA and

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of limitations that apply to court actions do not apply in Bureau administrative proceedings. *Id.* at *33.

EFTA because that same conduct violated the CFPA. These claims are not impacted by any TILA and EFTA statutes of limitation (if any applied) and would be barred only if the CFPA imposed a statute of limitations that foreclosed them. As argued herein, no part of the CFPA creates such a bar.

4. Even if the Statute of Limitations in 12 U.S.C. § 5564(g) Applied to Administrative Proceedings, this Proceeding is Not Time-Barred

Even if § 5564 did apply to this proceeding, it still would not bar any of Enforcement Counsel's CFPA claims. The statute requires that claims be filed within 3 years from the "date of discovery of the violation." 12 U.S.C. § 5564(g). Accordingly, the question is not whether three years had passed since the date the violations occurred, but whether three years have passed since the Bureau "discovered" the violations. *See generally Gabelli* 133 S.Ct. 1216, 1220-24 (2013) (discussing distinction between dates of accrual and dates of discovery). Respondents have put forth no evidence that Enforcement Counsel discovered Respondents' violations prior to November 18, 2012 (*i.e.*, three years prior to the filing of the Notice of Charges). *See Seed Co. Ltd v. Westerman*, 832 F.3d 325, 331 (D.C. Cir. 2016) ("The burden of proof rests with the defendants because the statute of limitations is an affirmative defense."); *Roane v. Holder*, 607 F.Supp.2d 216, 221 (D.D.C. 2009) ("A statute of limitations bar is an affirmative defense and the defendants bear the burden of proving it."). Here, Respondents make only a conclusory statement that Enforcement Counsel "knew or had reason to know about [Carnes's] purported conduct more than three years" before the Notice of Charges (Resp. Br. [dkt. 184] at 7).

No court has yet interpreted what constitutes "date of discovery" of a violation under § 5564(g). But regardless of when a violation is considered "discovered", in this case the three-year period clearly had not lapsed as of the filing of the Notice of Charges. The first Civil Investigative Demand to Integrity Advance was not sent until January 7, 2013. *See* Wheeler

Decl. at ¶ 3. Integrity Advance began its production in October of 2013 and largely completed it in early December of 2013. *Id*. at ¶¶ 5,6. Enforcement Counsel did not have possession of the loan agreements at issue in this matter until Respondents produced them in response to the CID. *Id*. at ¶ 7. Enforcement Counsel took an investigational hearing of Carnes in June of 2014. EC-EX-068, The NORA call between Enforcement Counsel and Respondents' counsel took place on October 23, 2014 (*Id.* at ¶ 8) and Respondents provided their written NORA response on November 13, 2014. *Id*. at ¶ 9. All of these events occurred well within three years of the filing the Notice of Charges on November 18, 2015.

VIII. Respondents Were On Notice About the Bureau's Claims for Monetary Relief

Throughout this proceeding Respondents have been on notice that Enforcement Counsel was seeking monetary relief. In the Notice of Charges, Enforcement Counsel requested "disgorgement," "restitution," "civil money penalties," and "any other legal or equitable relief deemed appropriate." Notice [dkt. 001] at 14-15. When Enforcement Counsel later moved for summary disposition, the theory and amount of restitution sought was stated explicitly. "The large majority of those 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 Mot. for Summ. Disp. [dkt. 87] at 9-10; *see also*, *id*. at 14 ("According to Respondents' own data, from May 2008 to May 2013 consumers paid a total of $133,422,838.83 more than the total amounts disclosed by Respondents"). Enforcement Counsel reiterated its request for "disgorgement, restitution, [and] damages" in its pre-hearing statement (EC Pre-Hearing Stmt. [Dkt. 134] at 8) and separately moved *in limine* to exclude from the hearing evidence not related to the "limited issues remaining for trial: Respondent 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. Finally, during opening statements Enforcement Counsel reiterated its request for relief and mentioned the thousands of Integrity Advance consumers who paid millions of dollars above what the company had disclosed. *See* Tr. 1 16:2; *see also*, Tr. III 109:19-22. ("[P]ayments made above the total of payments represents damages to the consumer.").

Despite these facts, Respondents contend that their due process rights were violated because, according to them, Enforcement Counsel delayed in articulating a relief theory. *See* Resp. Br. [dkt. 184] at 4. As seen above, this claim is without merit. Respondents clearly had ample notice of the monetary relief Enforcement Counsel was seeking. In addition to the facts outlined above, Respondents fail to mention that one of the exhibits to Enforcement Counsel's summary disposition brief was a declaration by the Bureau's data scientist summarizing Integrity Advance's payments data and concluding that consumers paid tens of millions of dollars above what had been disclosed. EC Memo in Supp. of Summ. Disp. [dkt. 087], Attch. D at 2. Similarly, Enforcement Counsel provided its hearing exhibits to Respondents almost two weeks prior to the commencement of the hearing and those exhibits included a summary of the data analysis that Enforcement Counsel used to prove monetary harm. *See* EC-EX-97.[11] Hence, there is no argument that Enforcement Counsel's request for damages constituted unfair surprise. *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*

[11] As a result, Respondents' citation to *Trident Seafoods, Inc. v N.L.R.B.*, 101 F.3d 111 (D.C. Cir. 1996), is inapposite. Resp. Br. [dkt. 184] at 4. The D.C. Circuit in that matter found that the Respondents could not raise an argument for the first time at the post-trial briefing stage. *Trident*, 101 F.3d at 115. As seen above, Enforcement Counsel did not wait until post-trial briefing to assert its claim for damages.

Holiday Magic, Inc., 84 F.T.C. 748 (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.").

Respondents' complaint that they were unable to test Enforcement Counsel's relief theories is similarly without merit. During the hearing Enforcement Counsel proffered exhibits and testimony on its proposed relief methodology and amounts; Respondents cross-examined Enforcement Counsel's witness (data scientist Robert Hughes) on both of these topics; and Respondents introduced evidence on monetary relief calculated by their own witness, Dr. Xiaoling Ang. *See* Tr. II:110-164 (direct examination of Hughes); Tr. III:4-46 (cross, redirect, and re-cross of Hughes); Tr. III:64-106 (direct of Ang); Tr. III 154-166 (cross and redirect of Ang). Moreover, all of Enforcement Counsel's relief calculations—submitted before, during, and after the hearing—were based on Respondents' own consumer transactional data (EC-EX-095; EC-EX-101).[12] Similarly, Respondents' suggestion that they were unaware that Enforcement Counsel was seeking joint and several liability against Integrity Advance and Carnes is disingenuous at best. The Notice of Charges clearly asserts claims against both Respondents (see Notice [dkt. 001] at 9-14) and this was confirmed in Enforcement Counsel's summary disposition and pretrial briefing.

Respondents further contend that the ALJ improperly allowed Enforcement Counsel to submit additional evidence after the close of the hearing. This is untrue. During the hearing, both

[12] Enforcement Counsel did not receive Respondents' data production until May 5, 2016, only five days before the deadline for filing motions for summary disposition, and more than six weeks after the deadline established by the ALJ in his February 19, 2016 Order Granting Bureau's Request for Issuance of a Subpoena. *See* EC-EX-099.

parties were given the opportunity to submit additional damages exhibits, which the ALJ admitted into evidence. To account for any potential prejudice from these new exhibits, both parties were given up to five business days to respond to those exhibits. *See* Tr. II 155:15-25. Respondents did not avail themselves of this opportunity and therefore cannot now claim due process violations. *See, e.g.*, *FTC 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.").[13]

Finally, Respondents criticize Enforcement Counsel's use of a data scientist to establish the amount of consumer harm (Resp. Br. [dkt. 184] at 5-6), but Courts have been clear that the practice of relying on non-economists to analyze that information is an acceptable way to establish a reasonable approximation of monetary harm. *See, e.g. FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997) (arriving at total consumer loss through computer specialist and public accountant's analysis of defendants' consumer database); *FTC v. Wellness Support Network, Inc.*, 10-CV-04879-JCS, 2014 WL 644749, at *19 (N.D. Cal. Feb. 19, 2014), *judgment entered*, 3:10-CV-4879 JCS, 2014 WL 3805755 (N.D. Cal. Feb. 20, 2014) (supporting calculations of net sales attributable to defendants through declaration introduced by the FTC containing calculations done on defendants' Excel spreadsheets).

[13] Respondents incorrectly suggest that the ALJ violated 12 C.F.R. § 1081.400(e)(1) by receiving new evidence without formally reopening the proceeding. Resp. Br. [dkt. 184] at 5. As an initial matter, that rule does not prohibit the ALJ from considering additional evidence prior to the issuance of the recommended decision; it merely states that the hearing officer may reopen the hearing. Additionally, Rule 400(e) applies after the hearing officer issues an order formally closing the hearing pursuant to 12 C.F.R. § 1081.304(c). Here the ALJ here issued no such closing order.

IX. Respondents' Objection to the Proposed Relief Are Unfounded

Respondents' primary complaint regarding the relief ordered by the Recommended Decision is that the ALJ included loans taken by repeat Integrity Advance consumers. But Respondents' brief suggests that they misunderstood the burden shifting analysis set out in the case law. By failing to meet their burden, Respondents relinquished any chance to reduce the relief ordered against them.

To establish consumer harm, Enforcement Counsel had to "show that its calculations reasonably approximate[] the amount of consumers' net losses[.]" *FTC v. Partners in Health Care Ass'n*, 14-23109-CIV-SCOLA, 2016 WL 3093125, at *10 (S.D. Fla. May 31, 2016) (quoting *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997)). Once the government makes this threshold showing, the burden shifts to the defendant to show that the government has overstated consumer harm. *See Gordon*, 819 F.3d at 1195. Here, Enforcement Counsel's restitution figures are based on calculations generated by CFPB data scientist Robert Hughes. EC-EX-097; EC-EX-102; EC-EX-072; EC-EX-103. Hughes's testimony and declarations rely on Integrity Advance datasets that capture all Integrity Advance consumer payments (EC-EX-095; EC-EX-101), data dictionaries (EC-EX-080; EC-EX-081), and the NACHA Table of ACH Return Reason Codes (EC-EX-082). In contrast, Respondents failed to meet their burden to show that Enforcement Counsel overstated consumer harm. They presented no evidence either during the hearing or during post-trial briefing to showing that returning customers actually were not harmed and therefore should be excluded from the restitution calculation. *See FTC v. Wellness Support Network, Inc.*, 10-CV-04879-JCS, 2014 WL 644749, at *20 (N.D. Cal. Feb. 19, 2014), *judgment entered,* 3:10-CV-4879 JCS, 2014 WL 3805755 (N.D. Cal. Feb. 20, 2014) (holding "that in the absence of affirmative evidence that customers who reordered did not rely, at least in part on [the

deceptive] advertising, the amount of restitution for consumer injury should include sales even if they were reorders."); *see also FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008), *aff'd,* 356 F. App'x 358 (11th Cir. 2009) (unpublished) ("[D]efendants have presented nothing more than mere speculation [that returning consumers did not rely on deceptive advertising] and, thus, have failed to meet their burden. Accordingly, the court will not reduce the defendants' monetary liability by the amount of the sales to consumers who reordered the products."); *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 387 (D. Conn. 2009) ("The burden is on the defendants to introduce evidence that the repeat customers did not rely on the deceptive advertising in placing their orders but instead on their own satisfaction with the product.").

Further, Respondents' suggestion that returning customers could not have been harmed is highly questionable. Once deception has been proven, as it has here, a "presumption of actual reliance arises[.]" *See Figgie Int'l*, 994 F.2d at 605 (9th Cir. 1993).[14] Indeed, the ALJ considered Respondents' concerns about returning customers in his summary disposition order but found that "this does not change the fact that the loans were facially deceptive[.]" Summ. Disp. Order [Dkt. 111] at 31.[15] Moreover, from a strictly factual perspective, the returning customers may have taken additional loans for any number of reasons, including being trapped in a cycle of debt that necessitated further loans.

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[14] To obtain restitution Enforcement Counsel "is not required to show reliance by each individual consumer." *FTC v. RCA Credit Servs., LLC*, 727 F. Supp. 2d 1320, 1335-36 (M.D. Fla. 2010); *accord FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993) (explaining that, under FTC Act, "proof of individual reliance by each purchasing customer is not needed").

[15] *See also FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008) (holding that the fact that consumers repurchasing a product does not "mean or even imply that the customers did not also rely upon the representations in the [loan agreement] when making their subsequent purchases").

X. The Recommended Decision's Penalty Award was Appropriate

The CFPA provides that "[a]ny person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty pursuant to this subsection." 12 U.S.C. § 5565(c)(1). The precise amount of any penalty is governed by the appropriate penalty tier, taking into account the enumerated mitigating factors. *See* 12 U.S.C. § 5565(c)(3). Here, Enforcement Counsel sought, and the ALJ largely granted, Tier 1 penalties against both Integrity Advance and Carnes. *See* RD [dkt. 176] at 70-74.

Respondents argue that the ALJ did not properly consider all of the mitigating factors (Resp. Br. [dkt. 184] at 24), but fail to argue how those factors should have been considered or how that might have altered the penalty. Moreover, to the extent the record lacked evidence on certain mitigation factors, Respondents were free to present such evidence during the course of the hearing. Respondents' decision not to present evidence that might have justified a lower civil money penalty does not invalidate that penalty.

XI. The Permanent Injunction Ordered by the RD Was Proper

The CFPA gives the Bureau broad discretion to order injunctive relief when a violation of consumer financial protection law is found. 12 U.S.C. § 5565(a)(2)(G) (including "limits on the activities or functions of the person"). This comports with federal district court practice where a judge's entry of a permanent injunction is subject only to abuse of discretion review. *See e.g., U.S. v. Phillip Morris USA, Inc*., 566 F.3d 1095, 1110 (D.C. Cir. 2009). Here, the ALJ recommended enjoining both Respondents from participating in payday lending operations for 15 years. *See* RD [dkt. 176] at 77. Respondents argue that the elements required for granting a permanent injunction were not met here, citing *C.F.P.B. v. Siringoringo*, No. 14-01155, 2016 WL 102435, at *5 (C.D. Cal. Jan. 7, 2016). But the Court in *Siringoringo* granted injunctive

relief despite the Bureau not showing each factor because the defendant's violations harmed thousands of consumers. *Id*. at *6. Moreover, injunctions against individuals limiting their ability to engage in future legal violations are commonly awarded in Federal Trade Commission cases. *See e.g*., *FTC v. Amy Travel*, 875 F.2d 564 (7th Cir. 1989); *FTC v. Magui Publishers, Inc*., 1991 WL 90895 (C.D. Cal. Mar. 28, 1991). Respondents also seem to take issue with the fact that this particular injunctive relief was *sua sponte*. However, Enforcement Counsel clearly sought injunctive relief governing Respondents' future conduct, and Respondents cite to no precedent that would prohibit the ALJ from revising the requested relief as he deemed proper.

XII. The Bureau has authority to pursue CFPA claims against Respondents

Respondents argue that "[t]he Bureau has no authority to pursue CFPA claims" against them because they were never "covered persons." Resp. Br. [dkt. 184] at 1. That is nonsensical. It is true that the Bureau may bring CFPA claims for unfair, deceptive, and abusive acts and practices only against "covered persons" (or "service providers"), 12 U.S.C. §§ 5531(a), 5536(a)—but Respondents are undeniably "covered persons." The term "covered person" includes "any person that engages in offering or providing a consumer financial product or service," such as "extending credit" that is "for use by consumers primarily for personal, family, or household purposes," 12 U.S.C. § 5481(5)(A), 15(A)(i). Respondents do not and cannot dispute that they extended such credit.[16]

Unable to deny that their lending activity placed them squarely within the definition of "covered person," Respondents instead argue about what authority the Secretary of the Treasury

[16] In addition, Carnes is a "covered person" because he is an "officer," "employee charged with managerial for," and "controlling shareholder" of Integrity Advance. *See* 12 U.S.C. § 5481(25)(C). He is therefore a "related person" who is deemed to be a "covered person." *Id.* § 5481(25)(B).

had before "the lawful appointment of a Director." Resp. Br. [dkt. 184] at 2. But whatever authority the Treasury Secretary had before the Director's confirmation is entirely irrelevant here—because the Treasury Secretary did not authorize this enforcement proceeding; the Bureau Director did, well *after* his "lawful appointment." *Compare* Notice [dkt. 001] filed November 18, 2015, *with* 159 Cong. Rec. S5704-05 (daily ed. July 16, 2013) (Senate confirmation of Bureau Director on July 16, 2013). Although they do not clearly articulate their argument, Respondents apparently mean to suggest that they were not "covered persons" subject to the CFPA at the time they were extending credit (and violating the CFPA) because, at that time, no Bureau official had authority to bring an enforcement proceeding against them. But being required to comply with a law and being potentially subject to an enforcement action by a government agency are two distinct issues. And even if it were true that the Bureau could not have enforced the law against Respondents at the time (which Enforcement Counsel does not concede), it would not follow that the laws did not apply or that Respondents get off scot-free forever. Their conduct was undeniably unlawful at the time, and the Bureau undeniably has authority to enforce the law against them now. Respondents can point to no authority that would allow them to escape liability for their unlawful actions.

Finally, Respondents incorporate by reference their briefs supporting their Motion to Dismiss. Resp. Br. [dkt. 184] at 2. Such incorporation by reference is improper. *See Decision and Order on Petition by Great Plains Lending, LLC; MobiLoans, LLC; and Plain Green, LLC to Set Aside Civil Investigative Demands* at 9 (Sept. 26, 2013), http://files.consumerfinance.gov/f/201309_cfpb_decision-on-petition_great-plains-lending-to-set-aside-civil-investigative-demands.pdf (explaining that "the Bureau will not consider incorporated-by-reference arguments" because they require the decision-maker to "play archeologist with the referenced

materials") (internal quotations omitted). But, to the extent that the Director does consider those incorporated-by-reference arguments, Enforcement Counsel respectfully request that he also consider Enforcement Counsel's responses to those arguments in the opposition to Respondents' Motion to Dismiss. *See* EC Opp. to MTD [dkt. 033] at 4-9.

XIII. The Administrative Law Judge was Appointed in Accordance with the Appointments Clause

Respondents fare no better in contending that the ALJ is an "inferior Officer" whose appointment violated the Appointments Clause. Resp. Br. [dkt. 184] at 2. D.C. Circuit precedent forecloses this contention. In *Landry v. F.D.I.C.* and *Raymond J. Lucia Companies, Inc. v. S.E.C.*, the D.C. Circuit made clear that ALJs like this one are not "inferior Officers" at all—and thus that the Appointments Clause does not limit the method of their appointment. *Landry v. F.D.I.C.*, 204 F.3d 1125, 1134 (D.C. Cir. 2000); *Raymond J. Lucia Companies, Inc. v. S.E.C.*, 832 F.3d 277, 284-89 (D.C. Cir. 2016). In particular, an ALJ is not an "inferior Officer" where he issues only a *recommended* decision, and where the agency "makes its own factual findings" rather than deferring to the ALJ's. *Landry*, 204 F.3d at 1133; *accord Raymond J. Lucia*, 832 F.3d at 285. The same is true of the ALJ here. *See* 12 C.F.R. § 1081.104(b)(11) (ALJ has power "[t]o issue and file recommended decisions"); 12 C.F.R. § 1081.405 (Director issues final decision). Thus, the appointment of this ALJ is not governed by the Appointments Clause.

XIV. The Administrative Proceeding Does Not Violate Respondents' Due Process Rights

Respondents next offer a laundry list of arguments that the Bureau's administrative adjudication process denied them due process.[17] Those arguments all lack merit. First, the proceeding's "accelerated litigation schedule" (Resp. Br. at 3) did not violate Respondents' due process rights. Although Respondents assert that this schedule "hampered [their] ability to adequately prepare a defense" (*id.*), they make no effort to explain this bare assertion. Indeed, they do not so much as mention what they were unable to do under the proceeding's timeframes. This conclusory assertion does not come close to establishing a due process violation.

Second, the fact that the Federal Rules of Civil Procedure and Federal Rules of Evidence do not apply in the administrative forum likewise does not amount to a due process violation. "[C]ourts have consistently held that agencies need not observe all the rules and formalities applicable to courtroom proceedings," including the rules Respondents invoke. *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979) (citing *Dixon v. Love*, 431 U.S. 105, 115 (1977)) (specifically mentioning Federal Rules of Civil Procedure); *see also Richardson v. Perales*, 402 U.S. 389, 400-02 (1971) (holding that administrative proceeding that did not follow "strict rules of evidence" did not offend procedural due process). Respondents do not identify any rule they wished to rely on, let alone offer any reason why the inapplicability of any such rule in this case violated their due process rights.

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[17] Respondents also assert, in passing, that the Bureau's administrative adjudication process violated their "equal protection rights."Resp. Br. [dkt. 184] at 2. Respondents, however, provide no argument or citation to authority to support their equal protection argument, and that argument is therefore waived. *Cf. Consolidated Edison Co. of N.Y., Inc. v. F.E.R.C.*, 347 F.3d 964, 970 (D.C. Cir. 2003) (finding argument waived where party only "hints at" it in opening brief).

Third, the different discovery rules in the administrative process also do not offend due process. It is well established that "[t]here is no basic constitutional right to pretrial discovery in administrative proceedings." *Silverman v. CFTC*, 549 F.2d 28, 33 (7th Cir. 1977); *Kropat v. FAA*, 162 F.3d 129, 132 (D.C. Cir. 1998) (holding that challenger was "simply wrong in suggesting that 'formal,' pre-hearing discovery, of the sort that might be available under the Federal Rules of Civil Procedure, must be provided to satisfy procedural due process" in connection with administrative proceeding). Although "discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process," *McClelland*, 606 F.2d at 1286, Respondents—unlike Enforcement Counsel—did not seek any discovery beyond deposing an expert, and Respondents have not shown—and could not show—that their inability to engage in district-court-type discovery caused them any prejudice at all, much less prejudice that resulted in a due process violation.

Finally, Respondents had no entitlement to a jury trial. Congress can create a "statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989); *accord, e.g.*, *Cavallari v. Office of the Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (rejecting Seventh Amendment jury-trial challenge to OCC administrative proceeding).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December 2016, I caused a copy of the foregoing Enforcement Counsel's Answering Brief to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather.L. MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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