UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	**RESPONDENTS' MOTION FOR SUMMARY DISPOSITION**
INTEGRITY ADVANCE, INC. and JAMES R. CARNES,	
Respondents.	ORAL ARGUMENT REQUESTED

RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

Pursuant to Rule 211 of the Bureau's Rules of Practice and Administrative Law Judge Christine L. Kirby's April 29, 2020 Order, Respondents move for summary disposition in this matter. Based on the pleadings and evidence in the case, as described in Respondents' Statement of Material Facts as to Which There Is No Genuine Issue ("Statement"), summary disposition is appropriate as to all of the Counts in the Notice of Charges. The arguments supporting Respondents' motion are set forth in the accompanying Brief in Support of Respondents' Motion for Summary Disposition.

Dated: May 15, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May 2020, I caused a copy of the foregoing Respondents' Motion for Summary Disposition to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on opposing counsel at the following addresses:

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RESPONDENTS' BRIEF IN SUPPORT OF THEIR
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I. INTRODUCTION AND SUMMARY

Before deciding whether a trial is necessary in this case, the ALJ must evaluate all of the evidence gathered and presented in this matter to determine whether the Consumer Financial Protection Bureau ("CFPB") can identify sufficient evidence to meet its burden of proof for the claims alleged in the Notice of Charges. As explained below, the record is devoid of evidence to support the claims of deception, unfairness, and statutory claims advanced by the CFPB against Respondents Integrity Advance, LLC and James R. Carnes ("Respondents").

First, based on the undisputed facts, the CFPB cannot show that Respondents engaged in "unfairness" or "deception" through the terms of Integrity Advance's loan agreement ("the Loan Agreement"). The Loan Agreement included all material terms of the loan, required multiple consumer signatures, and was drafted by reputable, experienced outside counsel. Further, Respondents freely and openly provided copies of the Loan Agreement to Delaware regulators, reflecting their belief that the Loan Agreement was legally compliant and not intended to deceive consumers, and Delaware regulators annually licensed Integrity Advance to extend credit. The CFPB also cannot show that a reasonable consumer would have been misled by the Loan Agreement, nor that the Loan Agreement caused substantial unavoidable harm to consumers, given that it is undisputed that approximately *two-thirds* of Integrity Advance's loans went to repeat customers who received and repaid loans from Integrity Advance and then took out new loans from the same company under the same terms.

Second, the CFPB cannot show that Respondents' use of remotely-created checks ("RCCs") was unfair. It is undisputed that RCCs are a legal and legitimate method of payment, that RCCs were used sparingly in less than 1% of Integrity Advance loans, and that the decision to use RCCs was made on a case-by-case basis by a third-party call center. Third, the CFPB cannot show that Integrity Advance violated the Truth in Lending Act ("TILA"), as the Loan

Agreement accurately disclosed consumers' legal obligations at the time of the agreement in the format prescribed by TILA. Fourth, the CFPB cannot establish that Respondents violated the Electronic Funds Transfer Act ("EFTA") because it is undisputed that some consumers received loans from Integrity Advance *without* authorizing EFTs, and the Loan Agreement expressly provided that repayment could occur through a variety of means such as check or money order.

Fifth, the CFPB cannot show that Mr. Carnes can be held individually liable as the facts do not establish that he had the requisite level of knowledge or intent, nor that he engaged in "misrepresentations" or "fraud" as would be required to impose individual liability. Finally, given that Respondents relied on the work of legal counsel and the approvals of Delaware state regulators to ensure that the Loan Agreement was legally compliant, which they were entitled to do, restitution should not be a remedy in this matter.

Therefore, the ALJ should grant summary disposition in favor of Respondents because:

- The undisputed facts show that the CFPB cannot support its allegation that a reasonable consumer would have been "deceived" by the Loan Agreement; thus the CFPB's claim under Count III must fail;

- The undisputed facts show that the CFPB cannot supports its allegations of "unfair" acts or practices in Counts IV and VII;

- The undisputed facts show that the CFPB cannot support Count I and II of its Notice, which alleges that Integrity Advance purportedly violated the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1631, 1638 (2012);

- The undisputed facts show that the CFPB cannot prove the elements required for its claims in Count V and VI, under the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693k (2012), and its implementing regulation, Regulation E, 12 C.F.R. § 1005.10(e) (2015);

- The undisputed facts show that that the CFPB cannot prove that Respondent James Carnes is individually liable for Count III, IV, or VII; and

- The undisputed facts show that the CFPB cannot prove that restitution is an appropriate remedy for any claims, nor that "actual damages" can be recovered for Counts I, II, V, and VI.

II. UNDISPUTED FACTUAL BACKGROUND

Integrity Advance was a nonbank short-term, small-dollar lender. Respondents' Statement of Undisputed Facts ("Facts") ¶ 1. Between May 2008 and December 2012, Integrity Advance offered short-term, small-dollar loans to consumers, which ranged in value from $100-$1000. *Id.* ¶¶ 1-3. Integrity Advance stopped offering loans to consumers almost eight years ago, in December 2012. *Id.* ¶ 4.

Throughout its active operations, Integrity Advance was licensed by the Delaware State Bank Commissioner. *Id.* ¶ 1. Under Delaware law, Integrity Advance could only obtain a Delaware lending license once the State Bank Commissioner determined "that the financial responsibility, experience, character and general fitness of the applicant. . . and of the officers and directors thereof are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently." *Id.* ¶ 28. As Mr. Carnes testified, and which was not disputed by the CFPB, Mr. Carnes was aware that Integrity Advance submitted its Loan Agreement, as well as other financial documents, to the Delaware State Bank Commissioner for the regulator's review. *Id.* ¶ 38.

Consistent with the requirements of Delaware law, Integrity Advance had to renew its license regularly and furnish the State Bank Commissioner with any materials or information that had changed since the initial filing or any renewal application, including any changes to loan agreements and promissory notes. *Id.* ¶ 29. Under Delaware law, the State Bank Commissioner is required to conduct "a thorough examination into the affairs" of any nonbank lender, including its "resources and liabilities, the investment of the funds, the mode of conducting the business and the compliance or noncompliance with this Code or any regulations promulgated thereunder, and any under statutes or regulations of [Delaware] or the United States." *Id.* ¶ 30. If at any time there is a finding or determination that the licensee has violated any federal or state law, the State Bank Commissioner may revoke or suspend any lending license. *See id.* ¶ 31. This includes any findings that "[t]he licensee has engaged in business activities or practices in connection with extensions of credit to consumers, which could be deemed unfair or deceptive by nature of intent. *Id.* Such activities and practices include, but are not limited to, the use of tactics which mislead the consumer, misrepresent the consumer transaction or any part thereof or otherwise create false expectations on the part of the consumer." *Id.*

At the prior hearing, Elizabeth Quinn Miller, Senior Investigator for the Delaware Office of the State Bank Commissioner, testified that she reviewed loan contracts and paid particular attention to the "fed boxes," (i.e. the TILA box) stating "[t]here are a couple of things in our statute that I know need to be in there, and they are usually right there in the fed boxes right on front. I can look for those and make sure that, that part of our statute is being adhered to." *Id.* ¶ 34. She further testified that this has been the regulator's practice going back ten years to 2006. *Id.* Ms. Miller also explained that lenders' loan agreements were reviewed during the annual renewal process. *Id.* ¶ 36. Ms. Miller's testimony as to these issues was not challenged by the CFPB.

In offering short-term, small-dollar loans to consumers, Integrity Advance primarily used a web-based Application and Loan Agreement. *Id.* ¶ 5. The short-term, small-dollar loans offered by Integrity Advance included a set finance charge, with repayment due on the consumers next pay date. *Id.* ¶ 10. Under the terms of the Loan Agreement, consumers were required to choose a payment option: selecting to either pay the loan in full on the "Payment Due

Date," or renew the loan, thus incurring a new finance charge. *Id.* ¶ 12. For consumers who did not select a payment option -- in contravention of the requirement under the Loan Agreement -- the loan was automatically renewed. *Id.*

Integrity Advance Loan Agreements contained a TILA Box as required by TILA and Regulation Z. *Id.* ¶ 15. The TILA Box was structured based on the example provided by the CFPB at 12 C.F.R. 1026 App. H.2. *Id.* Immediately below the TILA Box, the Loan Agreements provided a Payment Schedule, set out in a text box, with bolded headings, which indicated that the loan would be repaid in one payment of the amount listed in the "Total of Payments" section of the TILA Box. *Id.* ¶ 16.

Below the TILA Box and Payment Schedule, the Loan Agreements stated the consumers' payment options in bold and all capitals. *Id.* ¶ 13. Under the Loan Agreement, the consumer agreed to select a payment method at least three days before their "Payment Due Date"— choosing either (1) to pay the loan in full or (2) renew the loan, which allowed consumers to pay a renewal fee and wait until the next pay date to repay the loan. *Id.* ¶ 12. Under the Loan Agreement, if consumers did not select their payment option, Integrity Advance renewed the loan, rather than attempting to collect the full cost of the loan or put consumers into default. *Id.*

A consumer who paid the loan off in full on the Payment Due Date repaid the loan principal, plus the finance charge (typically $30 for every $100 in credit taken out by the consumer). *Id.* ¶ 21. When a customer renewed his loan, he was charged a renewal fee. *Id.* Customers who exceeded the four allowed renewals under the Loan Agreement were placed into an "auto-workout" repayment plan, pending contact with the consumer. *Id.*

As described in the terms of the Loan Agreement, Integrity Advance accepted a variety of payment methods on its loans; while the most common payment method was ACH withdrawal, Integrity Advance also accepted cashiers' checks and money orders. *Id.* ¶ 14. As conceded by the CFPB in its Notice of Charges, consumers were not required to agree to ACH withdrawals as a precondition to receiving a loan, as some consumers received loans without this agreement. *Id.* ¶¶ 65-66, 69-71.

Integrity Advance had a high rate of repeat customers and many of those customers took out five or more loans. *Id.* ¶¶ 48-52. Since July 21, 2011,[1] a total of 26,129 customers (48% of Integrity Advance customers since July 21, 2011) chose to take out two or more loans. *Id.* ¶ 50. Since July 21, 2011, more than 6,527 customers chose to take out ***five or more*** loans, and 926 customers chose to take out ***ten or more loans***. *Id.* ¶ 51. Of the 82,980 loans originated on or after July 21, 2011, 66% of those loans were loans to repeat customers. *Id.* ¶ 52. Integrity Advance required customers to fully repay their first loan before taking out a second loan. *Id.* ¶ 48.

Integrity Advance's Loan Agreement was drafted by reputable outside counsel who was retained to create the loan document and ensure it was legally compliant. *Id.* ¶¶ 40-41. As Mr. Carnes testified, he did not draft, revise, or substantively review the Loan Agreement. *Id.* ¶¶ 98-101.

III. <u>LEGAL STANDARD</u>

The ALJ has the authority to grant summary disposition in this matter. Rule 212 states that summary disposition is proper when there is no genuine issue of fact for trial. *See* 12 C.F.R. § 1081.212(c). The Rule 212 standard "is virtually identical to the standard for summary

[1] As Enforcement Counsel has conceded, the CFPB is not seeking to recover under the CFPA claims for conduct predating July 21, 2011. *See* Dkt. 260 at 3 n.1.

judgment in civil actions." *In the Matter of PHH*, Order (Mar. 13, 2014); *see* Fed. R. Civ. P. 56(a). A party moving for summary disposition must show that "there is no genuine dispute as to any material fact," and that it is "entitled to judgment as a matter of law." *Id.*

"Case law pertinent to summary judgment is pertinent to summary disposition in this proceeding." *PHH*, Order at 10. The "party seeking summary judgment always bears the initial responsibility of. . . identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

Summary judgment must be granted if the non-moving party fails to produce significantly probative evidence on every essential element of his or her claim. *See Jakimas v. Hoffmann-LaRoche, Inc.,* 485 F.3d 770, 777 (3d Cir. 2007) ("[T]he non-moving party must present more than a mere scintilla of evidence; 'there must be evidence on which the jury could reasonably find for the [non-movant].'") (second alteration in original) (quoting *Anderson,* 477 U.S. at 252).

The absence of a fact does not create a material dispute of fact. *See Celotex Corp.,* 477 U.S. at 325 (stating that "the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel,* 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted). Thus, a moving party discharges its "burden" under Fed. R. Civ. P. 56 by demonstrating to the court that there is an absence of facts in the record to support a claim on which the non-moving party bears the ultimate burden of proof. *See Boudreaux v. Swift Transp. Co.,* 402 F.3d 536, 544-45 (5th Cir. 2005).

The CFPB bears the burden of proof for all claims set forth in its Notice. As explained in detail below, the undisputed material facts in the record show that the CFPB cannot prevail on any of its claims. Accordingly, the ALJ should grant summary disposition in favor of Respondents.

IV. RESPONDENTS' LOAN APPLICATION PROCESS WAS NOT "DECEPTIVE"

A. Legal Standard

The term "deceptive" is not statutorily defined in the Consumer Financial Protection Act ("CFPA"). However, courts interpreting CFPA claims asserting unfair, deceptive, and abusive conduct recognize that the Federal Trade Commission Act ("FTC Act") applies a "similar, if not identical standard" in analyzing unfair and deceptive conduct. *See CFPB v. IrvineWebWorks, Inc.*, 2016 WL 1056662, at *12 (C.D. Cal. Feb. 5, 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1193 n.7 (9th Cir. 2016); *CFPB v. NDG Fin. Corp.*, 2016 U.S. Dist. LEXIS 177756, at *45-46 (S.D.N.Y Dec. 2, 2016).

A practice is deceptive under the FTC Act "(1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012); *Gordon*, 819 F.3d at 1192. Similarly, the CFPB's examination manual defines "deception" as a "material representation, omission, act or practice that misleads or is likely to mislead a consumer, provided the consumer's interpretation is reasonable under the circumstances." CFPB Examination Manual V.2, UDAAP 5 (October 2012). Thus, an act or practice is only "deceptive" if (1) "there is a representation, omission, or practice that," (2) "is likely to mislead consumers acting reasonably under the circumstances," and (3) "the representation, omission, or practice is material." *See CFPB v. Frederick J. Hanna & Assocs., P.C.,* 114 F. Supp. 3d 1342, 1370 (N.D. Ga. 2015), *mot. to cert. appeal denied sub nom. CFPB v. Frederick J. Hanna & Assocs., P.C.,* No. 1:14-CV-2211-AT, 2015 WL 10551424 (N.D. Ga. Nov. 16, 2015) (citing *FTC v. Tashman,* 318 F.3d 1273, 1277 (11th Cir. 2003)).

B. <u>Reasonable consumers were not likely to be misled by the Loan Agreement</u>

The undisputed facts show that the process through which consumers applied for and were extended credit, specifically the Loan Agreements, was not "deceptive" under the CFPA. To show that the Loan Agreement was deceptive, the CFPB must provide evidence that reasonable consumers were likely to misunderstand the nature, operation, and/or terms of the loan for which they applied and to which they agreed. Under the CFPA, the CFPB must show that a "*reasonable*" consumer would be misled, not merely that the "least sophisticated consumer" would be misled. *See CFPB v. Weltman, Weinberg & Reis Co.,* 2018 U.S. Dist. LEXIS 124630, at *6 n.1 (N.D. Ohio July 25, 2018) (noting that the "reasonable person" standard of the CFPA is more stringent than the "least sophisticated consumer" standard used for violations of the Fair Debt Collection Practices Act). Based upon the undisputed facts, the CFPB cannot meet this standard.

Indeed, the undisputed material facts show that Respondents took steps to ensure that consumers understood and appreciated the terms of the loan for which they applied. For example, as shown in the Loan Agreement itself and as Mr. Carnes testified at his deposition, most applicants for Integrity Advance loans were required to sign the Loan Agreement in multiple locations throughout the document (varying by the version of the Loan Agreement). *See* Facts ¶ 6. Mr. Carnes also testified that an Integrity Advance customer representative walked customers through the loan and answered questions. *Id.* ¶ 7. The CFPB has not contested these facts.

The disclosures contained within the Loan Agreement informed consumers of the terms of the loan, including that the payment schedule was one payment due on a specific date. *Id.* ¶ 16. On the loan application, a text box immediately beneath the TILA disclosures states, with a header set out in bold:

> **Your Payment Schedule will be: One (1) payment of [TOTAL_OF_PAYMENTS] due on [LOAN_DUE_DATE] ("Payment Due Date").**

Id.

Thus, the Loan Agreement clearly indicated to consumers that loans were required to be repaid in a single payment, notwithstanding the later possibility that the loan could be renewed by the consumer under the terms of the Loan Agreement. *See id.* ¶ 13.

Further, the Loan Agreement then provided, a "special notice" (displayed in all capital letters), which stated:

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

Id. ¶ 17.

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

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

Id. ¶ 18.

Moreover, the requirement that the customer select a payment option and instructions for doing so were included directly below the TILA Box disclosure. *Id.* ¶ 13. "Payment in Full" was the first option presented to consumers, consistent with the later "special notice" reminding consumers of the nature of the loan. *Id.* ¶¶ 13, 17. Consumers also were presented with the option to renew the loan, for a fee, to extend the Payment Due Date. *Id.* ¶ 13.

Based upon these disclosures within the Loan Agreement, it is clear that consumers were fully informed of the terms of the loan. Additionally, it is undisputed that the Loan Agreement was drafted by outside counsel. *Id.* ¶ 41. As explained by former Integrity Advance general counsel Edward Foster, neither he nor Mr. Carnes were "experts in consumer law. So the strategy of the company was to always have highly compensated, highly acknowledged and reputable consumer law counsel, outside counsel, to provide the counsel and guidance on those matters." *Id.* ¶ 40. Mr. Carnes explained that the purpose of hiring legal counsel was to ensure the loan documents conformed with the law. *Id.* The ALJ can reasonably infer from the undisputed act of hiring outside counsel to draft the loan documents that Respondents intended the loan documents to comply with the law.

Additionally, Respondents provided the Loan Agreement to Delaware banking regulators to review during the licensing and renewal process, with the expectation that it would be reviewed. *Id.* ¶¶ 27, 29, 38. After the Loan Agreement was submitted, the Delaware regulator approved Integrity Advance to extend credit and then annually renewed that approval. *Id.* ¶ 38. This logically indicated to Respondents that the Loan Agreement was legally compliant; it also shows that Respondents freely provided the Loan Agreement to regulatory authorities and thus did not intend the Loan Agreement to deceive or mislead consumers.

In its Notice of Charges, the CFPB alleges that consumer complaints "indicate that the consumers thought the company would debit only the total amount disclosed in the TILA disclosure and did not understand that their loans would rollover four times before the company credited any of their payments to principal." Dkt. 1 ¶ 32. However, the CFPB did not put on testimony from a single consumer at the hearing. Facts ¶ 73. Further, the CFPB's *own expert witness*, Dr. Manoj Hastak, testified at a deposition that he "didn't talk to any customers, and [he] didn't rely on complaints either." *Id.* ¶ 24. Dr. Hastak explained that "the complaints are not representatives of the customers of Integrity Advance, and so they're just a small sampling of individuals who had a problem with Integrity Advance . . ." and were, thus, not "representative in any way" of a "typical consumer." *Id.*

Courts, noting the same logic employed by the CFPB's expert, have found that consumer complaints are insufficient to prove violations of the law. "Simply, 'complaints' do not equate to 'noncompliance . . . .'" *Bennett v. Nationstar Mortg,* LLC, No. CV 15-00165-KD-C, 2015 WL 5294321, at *12 (S.D. Ala. Sept. 8, 2015) (analyzing RESPA's statutory damages requirements). While an exceedingly high volume, thousands of consumer complaints, specific to the representation at issue would likely be probative, *see FTC v. Direct Benefits Group, LLC,* 2013 WL 3771322 (M.D. Fla. July 18, 2013), in this case, the CFPB cannot meet its burden and instead improperly relies on discreet consumer statements that are not indicative of Integrity Advance's average customer.

In deciding whether the CFPB can meet its burden to show that a reasonable consumer was deceived, the most probative evidence is the undisputed fact that Integrity Advance had a high rate of repeat customers. Since July 21, 2011, a total of ***26,129*** customers (***48%*** of Integrity Advance customers since July 21, 2011) chose to take out two or more loans.

Facts ¶ 50. And, of the 82,980 loans originated on or after July 21, 2011, ***66%*** of those loans were loans to repeat customers, with more than 6,527 of those customers choosing to take out ***five or more*** loans, and 926 of those customers choosing to take out ***ten or more loans***. *Id.* ¶¶ 51-52.[2] Importantly, in order to take out a second loan, a customer was required to fully repay his or her first loan. *Id.* ¶ 48. These numbers show that half of Integrity Advance's customers (representing two-thirds of Integrity Advance's loans) were repeat customers who took out loans from Integrity Advance, fully repaid the loans under the Loan Agreement terms, and chose to take out additional loans from the same company under the same terms – showing that they were not misled. Especially in light of the small number of customer complaints, *see id.* ¶ 47, the high rate of repeat customers shows that a ***reasonable*** consumer understood the Loan Agreement. Importantly, for CFPA "deception" claims, courts evaluate what a "reasonable person" would understand – not what the "least sophisticated consumer" would understand. *See Weltman, Weinberg & Reis Co.*, 2018 U.S. Dist. LEXIS 124630, at *6 n.1 (describing the "reasonable person" standard under the CFPA as "less stringent" than a "least sophisticated consumer" standard). Therefore, given the undisputed fact of the high rate of repeat customers, the CFPB cannot carry its burden of showing that a reasonable consumer would have been misled by the Loan Agreement.

C. <u>Any confusion or deception would not relate to a material fact</u>

To meet its burden on its "deceptive" claim under the CFPA, the CFPB also must establish that the alleged deception relates to a "material fact." A fact is material if a consumer would have acted differently knowing the information. Materiality is contextual—it is defined

[2] These figures are based on analyses of Integrity Advance's consumer loan data conducted by Respondents' expert witness Dr. Xiaoling Ang and memorialized in Respondents' exhibits RX-020 and RX-021, which were admitted into evidence at the hearing without objection by the CFPB. Hr'g Tr. III-79:22 – 80:2; III-83:19 – 84:5.

by the specific facts and circumstances surrounding the transaction between the parties. *See Matter of Cliffdale Associates, Inc.,* 103 F.T.C. 110 (1984) ("[A] material representation, omission, act or practice involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.").

The CFPB has not established (and cannot establish) that consumers considered the possibility of loan renewals to be "material" to their decision making at the time they entered into the Loan Agreement. For example, the CFPB conducted no consumer survey of what customers might have considered material to their decision making. Facts ¶ 24. There is no consumer testimony in the record about what even one consumer might have considered to be important at the time he or she took out a loan from Integrity Advance. *Id.* ¶ 73. And, as discussed above, Integrity Advance had a high rate of repeat customers, which shows not only that a reasonable consumer would not have been misled but also that the rollover provision was not material to a consumer's decision to obtain a loan. *See Id.* ¶¶ 48-52. The materiality element needed to prove a claim of deception cannot be met here.

Accordingly, the CFPB cannot meet its burden of showing that the terms of the Loan Agreement were deceptive, and the ALJ should therefore grant summary disposition in favor of Respondents on Count III of the Notice.

V. RESPONDENTS' LOAN APPLICATION PROCESS WAS NOT "UNFAIR"

A. Legal Standard

Undisputed material facts also show that no aspect of Respondents' loan application process was unfair. Specifically, the CFPA provides that "[t]he Bureau may take any action authorized under part E to prevent a covered person or service provider from committing or engaging in an *unfair*, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." 12 U.S.C. § 5331. But in order to prove "unfair" conduct under the CFPA, the CFPB must prove that the unfair act or practice: (1) caused substantial injury to consumers;[3] which is not reasonably avoidable by consumers; and (2) substantial injury is not outweighed by countervailing benefits to consumers or competition. *See* 12 U.S.C. § 5531(c). These elements are statutorily required, and the failure of the CFPB's proof on any one of the elements is grounds for summary disposition in favor of Respondents. *Id.* (stating the *"[t]he Bureau shall have no authority under this section" unless* the limiting elements above are met) (emphasis added).

Thus, the CFPB has the burden to show that the "unfairness" prong of the CFPA can be met because "(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition." *See id.*

Furthermore, a "substantial injury" exists only if the CFPB can show "[t]hat consumers were injured by a practice for which they did not bargain." *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008), *aff'd*, 604 F.3d 1150 (9th Cir. 2010) (quotation omitted). The CFPB also must show that the act or practice *causes* substantial injury to consumers.

An injury is reasonably avoidable if consumers "have reason to anticipate the impending harm and the means to avoid it," or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact. *See Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1365-66 (11th Cir. 1988) (cited approvingly in *Neovi*, 604 F.3d at 1158). Moreover, benefits to consumers or competition include "an increase

[3] The prospective aspect of the injury requirement -- that is whether an act or practice is likely to cause substantial harm in the future is not applicable here; there is no potential for any future injury. Integrity Advance ceased making loans in December 2012, and ceased all consumer facing operations (including collecting on outstanding loans) in June 2013.

in services or benefits to consumers or by benefits to competition." *Neovi*, 598 F. Supp. 2d at 1115.

B. The Undisputed Material Facts Show That Integrity Advance's Loan Agreements And Loan Application Processes Were Not "Unfair"

1. The CFPB Cannot Prove An Essential Element of "Unfairness," That Respondents Caused Substantial Injury To Consumers

a. The CFPB Fails to Show a "Substantial Injury"

The undisputed facts show that the CFPB cannot establish that the Loan Agreement disclosures caused, or were likely to cause, consumer injury, let alone the type of "substantial injury" required to prove an unfairness claim under the CFPA. The CFPB's theory, as articulated in the Notice of Charges, is that the "unfair" practices are predicated on the "deceptive" practices. Dkt. 1 ¶¶ 72-73. The CFPB has alleged that "Respondents caused substantial injury to consumers by supplying *deceptive* disclosures and withholding [of] information about the costs of its loans during the application process." *Id.* ¶ 72 (emphasis added). Therefore, a consumer could only be "substantially injured" if he or she was deceived or misled by the Loan Agreement. However, for all of the reasons discussed in Section IV above, the CFPB cannot support its claim that the Loan Agreement was "deceptive." Therefore, the CFPB cannot maintain that Respondents caused any "substantial injury" to consumers, and the claim of "unfairness" must fail.

Further, "[m]erely speculative harms" do not meet the requirement of the first part of the unfairness prong. *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (noting the FTC, in the exercise of its unfairness authority, "is not concerned with trivial or merely speculative harms"); *see also Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 160 (1st Cir. 2011) (using FTC Act principles to conclude that "[t]he substantial injury requirement is designed to weed out 'trivial or merely speculative harms" (internal quotation and citation omitted)).

There is no debate that consumers received the credit for which they applied. And, it is axiomatic that dissatisfaction with the eventual total price of the loan -- or any product or service -- is not a cognizable injury sufficient to meet the injury prong of the unfairness analysis. *See, e.g.*, *Dzielak v. Whirlpool Corp.,* 26 F. Supp. 3d 304, 335 (D.N.J. 2014) ("A cognizable injury . . . must consist of more than just unmet expectation"); *Mason v. CocaCola*, 774 F. Supp. 2d 699, 704 (D.N.J. 2011) ("[D]issatisfaction with a product . . . is not a quantifiable loss than can be remedied[.]"). Indeed, the high rate of repeat customers shows that customers got what they bargained for; they certainly did not suffer "substantial injury." Facts ¶¶ 48-52.

2. Undisputed Facts Show That Any Injury To Consumers Was Reasonably Avoidable And The Fact Of Any Injury Was Outweighed By Countervailing Product Benefits

The undisputed facts show that even if there was consumer injury - which there was not - such injury would have been reasonably avoidable. Among other things, the facts show that Integrity Advance loans allowed a consumer to repay the loan, ahead of schedule and penalty-free; this would reduce the amount of interest owed. *Id.* ¶ 13. The Loan Agreement also contained a notice of the consumers' recession rights, which enabled consumers to decline a loan before expiration of the three-day recession period runs in the event the customer changed his or her mind. Specifically, the Loan Agreement stated, set out in a text box:

RIGHT TO CANCEL: YOU MAY CANCEL THIS LOAN WITHOUT COST OR FURTHER OBLIGATION TO US, IF YOU DO SO BY THE END OF BUSINESS ON THE BUSINESS DAY AFTER 3/24/2009. To cancel, you may call us at **(800) 505–6073** to alert us of your intention to cancel. Alternatively, you may a print this page, complete the information in this box, sign and fax it to us at **(800)–581–8148.** If you follow these procedures but there are insufficient funds available in Your Bank Account to enable us to reverse the transfer of loan proceeds at the time we effect an ACH debit entry of Your Bank Account, your cancellation will not be effective and you will be required to pay the loan and our charges on the scheduled maturity date.

Signature: (X)________________________ **Date:** ________________________

Id. ¶ 19.

Further, consumers had to separately sign and date the "Right to Cancel" and other areas of the Loan Agreement. *Id.* ¶¶ 6, 19. The requirements for affirmative consumer assent to the terms of the Loan Agreement, coupled with the bolded fonts and other elements that alerted consumers to the loan's terms and conditions, make any injury "certainly avoidable." *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012). As in *Davis*, consumers applying for loans from Integrity Advance were instructed to read the terms and conditions of the loans and were required to consent to those terms "before completing the application, [which] meant that [they] could have aborted [their] application[s] upon reading the terms and conditions," and therefore were "provided 'the means to avoid' the alleged harm." *Id.*; *see also In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 965-66 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014) (dismissing unfairness claims under California law because "the defendant banks could not properly be deemed to have engaged in unfair or deceptive practices under the statute by acting consistently with all existing legal interpretations of the [National Bank Act] and with the express disclosures of their contracts concerning late and over-limit fees"); *Vu Nguyen v. Aurora Loan Servs., LLC*, 614 F. App'x 881, 884 (9th Cir. 2015) (defendant did not "unfairly or deceptively" place payments in suspense account where plaintiff "specifically and expressly authorized" that action pursuant to agreement); *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 973-74 (N.D. Cal. 2010) (rejecting allegations that loan terms were misrepresented and concealed where rider "clearly explains the terms of the loan and repayment").

Moreover, even after the expiration of the "Right to Cancel," consumers received alerts regarding their repayment obligations. Facts ¶ 9. Thus, consumers so alerted to their obligations and options for fulfilling those loan obligations could take reasonable steps to avoid any injury. Certainly, any injury arising from the terms of the Loan Agreement, as alleged by the CFPB, would be entirely avoidable by the large percentage of *returning* customers, who already had seen and experienced the operation of the loan first hand. "An injury is reasonably avoidable if consumers 'have reason to anticipate the impending harm and the means to avoid it,' or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact." *Davis*, 691 F.3d 1152, 1168 (9th Cir. 2012) (quoting *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1365-66 (11th Cir. 1988). Logic and the undisputed facts show that returning customers could have avoided any injury simply by not taking out a second loan with Integrity Advance, or by choosing to pay the loan in full (or prepay the loan) as contemplated in the Loan Agreement. Returning customers that chose to renew their loan, for whatever reason, also could have limited the overall cost of the loan by limiting the number of times they renewed the loan. And, rather than being injured by renewal fees, many returning customers knowingly chose to renew their loans (after repaying their first loan in full) under the same terms and conditions. *See* Facts ¶¶ 48-52.

The availability of the loans (and the possibility of renewing those loans) also provided substantial consumer benefits, as it increased consumer options. "[A]n increase in services or benefits to consumers or by benefits to competition" can outweigh adverse consequences to consumers. *See J.K. Publ'ns*, 99 F. Supp. 2d at 1201 (citing *Windward*, 1997 WL 33642380, at *11). As the CFPB has publicly acknowledged regarding the short-term loan industry, "some consumers provided favorable responses about the speed at which these loans are given, the availability of these loans for some consumers who may not qualify for other credit products, and consumers' ability to use these loans as a way to avoid overdrawing a deposit account or paying a bill late." Facts ¶ 23. Therefore, it is undisputed that such loans provide a consumer benefit.

Undisputed facts show that the CFPB cannot satisfy the required elements of an "unfairness" claim under §§ 5531, 5536, and thus the ALJ should grant summary disposition in favor of Respondents on Count IV.

VI. CONSUMERS' AUTHORIZATION OF REMOTELY CREATED CHECKS WAS NOT "UNFAIR"

In order to prevail on its unfairness claim related to remotely created checks ("RCCs"), the CFPB must show that there was "substantial injury" that resulted from the authorization for and creation of RCCs, and that the injury is not outweighed by countervailing benefits to consumers or competition. *See* 12 U.S.C. § 5531(c). The undisputed facts cannot establish these elements.

Indeed, at the previous hearing, Enforcement Counsel failed to present any evidence of any such consumer injury, much less one that is not outweighed by the benefits of the availability of RCCs. Nor is there any such evidence elsewhere in the record. Instead, the CFPB's own employee Joseph Baressi testified that RCCs are, and have been throughout the relevant time period, a lawful payment mechanism. Facts ¶ 56. Mr. Baressi also testified that RCCs are lawful for use related to short-term loans. *Id.* ¶ 57. The use of RCCs is governed by the Uniform Commercial Code ("UCC") (*id.* ¶ 55), but the CFPB has not alleged or presented evidence that Integrity Advance used RCCs in a manner that was inconsistent with the UCC. Instead, the CFPB has argued that Integrity Advance's legal use of this legitimate payment mechanism was somehow "unfair." This contention is contradicted by the facts.

Integrity Advance used RCCs in less than one percent of all loans during the post-July 21, 2011 period. *Id.* ¶ 58 (based on analysis conducted by the CFPB and documented at

EC-EX-097). As explained by both Mr. Foster and Mr. Carnes, the decision to use RCCs was made by the third-party call center on a case-by-case basis and were used sparingly only as a last resort. *Id.* ¶¶ 60-61. Mr. Carnes also testified that consumers could stop the RCC process after it had been initiated by contacting Integrity Advance and informing the Company of an alternative payment method. *Id.* ¶ 67. The CFPB has not disputed this testimony.

Having no evidence to support its claims, Enforcement Counsel seeks to rely on "merely speculative harms."[4] Such speculative harm, however, is not the type of injury that can be addressed through the "unfairness" provision of the CFPA. *See, e.g., Am. Fin. Servs. Ass'n v. F.T.C.*, 767 F.2d 957, 972 (D.C. Cir. 1985). The ALJ should grant summary disposition for Respondents as to Count VII of the Notice.

VII. RESPONDENTS DID NOT VIOLATE TILA, AS THE UNDISPUTED FACTS ESTABLISH

A. Legal Standard

TILA requires creditors to disclose specific information, as prescribed by Regulation Z, including a loan's annual percentage rate ("APR"), the finance charge, the amount financed, and a payment schedule. *See* 15 U.S.C.§§ 1631 and 1638. Regulation Z requires these disclosures to be "clear and conspicuous," that is, that they be legible and in a reasonably understandable form, 12 C.F.R. § 1026.17(a)(1); Comment 17(a)(1)-1), and that they *reflect the terms of the legal obligation between the parties." Id.* § 1026.17(c)(1) (emphasis added). Read together, these provisions mandate that a required disclosure like a payment schedule reflect the

[4] Enforcement Counsel should not be permitted to rely on the testimony about such speculative harms from CFPB employee Joseph Baressi, who provided improper and prejudicial testimony at the previous hearing. *See* Dkt. 261 at 9-10. The ALJ should strike Mr. Baressi's testimony for the reasons stated in Respondents' previously-filed Motion to Strike (Dkt. 153).

terms of the underlying credit contract and be communicated in a manner that the consumer may read and understand.

B. The Undisputed Facts Show That The Loan Agreement Clearly and Conspicuously Disclosed Consumers' Legal Obligations At The Time Loans Were Made

Undisputed material facts show that the Loan Agreements met the standards set out by TILA and Regulation Z. Indeed, the disclosures at issue in the Notice track the very model form that Regulation Z sets forth. The Loan Agreement plainly displayed TILA disclosures that track the model form and disclosed a payment schedule reflecting the agreement of the parties. Facts ¶¶ 15-16. Specifically, as the Loan Agreement shows, the disclosure uses the appropriate format, labels, and terminology as the regulation prescribes. As a matter of law, this Regulation Z model form provides a legal safe harbor, meaning that when a company presents a TILA disclosure that tracks this model form, the Loan Agreement is presumptively compliant with the TILA "clear and conspicuous" requirement. *See* 12 C.F.R. Part 1026, app. H.2.

Under Regulation Z, disclosures must "reflect the terms of the legal obligation between the parties." 12 C.F.R. § 1026(5)(c). The Official Commentary to Regulation Z states that "[t]he disclosures should reflect the credit terms to which the parties are legally bound at the time of giving the disclosures." Comment 1026(5)(c)-1. Further, "[t]he legal obligation is determined by applicable state or other law." Comment 1026(5)(c)-1-i.

Under the express terms of the Loan Agreement, at the time the loans were made, consumers only owed the "Total of Payments." Facts ¶¶ 15-16. This was the entirety of any consumer's legal obligation at the time the loan was made. Contrary to the CFPB's allegations, the consumer had no legal obligation -- at the moment the loan was consummated -- to repay the loan in accordance with the maximum number of renewals allowed or to repay the loan in accordance with the full length of the contracted repayment plan. Thus, as noted above, TILA and Regulation Z preclude a disclosure that would misstate the nature of a consumer's actual legal obligation at the time the loan was consummated.

Under the plain language of the Loan Agreement, consumers "[p]romise[d] to pay [Integrity Advance] the Total of Payments ... on the Payment Due Date . . . ." and, contingent on the consumers' choices, "[a]ll other amounts owed to us under the Loan Agreement." *Id.* ¶ 22. The Loan Agreement also obligated the consumer to select a payment option. *Id.* ¶ 13 ("You <u>must</u> select your payment option . . . ."). Under the Loan Agreement, when consumers did not select a payment method as required, the Loan Agreement could renew automatically. *Id.*

Contrary to the CFPB's allegations, the "Auto-Renewal" and "Auto-Workout" provisions did not constitute the legal obligation between the parties at the time the loan was made. *Id.* ¶ 21. The CFPB's allegations conflate "default option" with legal obligation. But a "default option" in contracts and other settings is merely the consequence of a failure to meet an obligation, not the obligation itself. The CFPB's allegations also implicitly read into Regulation Z a requirement that any loan agreement include a disclosure that predicts post-consummation events and incorporates that prediction into any TILA disclosure. But such a reading of Regulation Z is actually contradicted by the regulation's plain language. Section 1026.17(e) of Regulation Z makes clear that post-disclosure events (such as the election to renew a loan contract after consummation) do not render the initial disclosure inaccurate. *See* 12 C.F.R. § 1026.17(e); *see also Stein v. Titlemax of Ga.*, 2019 U.S. Dist. LEXIS 189993, at *17 (N.D. Ga. July 25, 2019) (noting that "[a]ccurate disclosures do not become TILA violations because they were rendered inaccurate by subsequent events"). Moreover, TILA and Regulation Z do not require new after-the-fact disclosures to be made. *See, e.g.*, *Jasper Cnty. Sav. Bank v. Gilbert*, 328 N.W.2d 287, 290 (Iowa 1982) (concluding that TILA "does not require the lender to disclose that the dollar amount of the costs of credit will increase if the consumer makes late payments").

The undisputed facts show that the Loan Agreement's disclosure clearly displays the total legal obligation that consumers had at the time the loan was consummated in conformity with TILA and Regulation Z's requirements. Accordingly, the ALJ should grant summary disposition in favor of Respondents on Counts I and II.

VIII. RESPONDENTS DID NOT VIOLATE EFTA

A. Legal Standard

Under EFTA and Regulation E, a creditor may not condition extensions of credit on repayment by "preauthorized" electronic fund transfers (EFTs). *See* 12 U.S.C. § 1693k; 12 C.F.R. § 1005.10(e). "Preauthorized electronic fund transfer" means an electronic fund transfer authorized in advance to recur at substantially regular intervals. *See* 12 U.S.C. § 1693a(9); 12 C.F.R. § 1005.2(k).

B. The Loan Agreements Did Not Condition Credit On Repayment By Preauthorized EFT

The undisputed facts show that the Loan Agreement did not condition the extension of credit on the consumer's agreement to repay the loan through a preauthorized EFT. Rather, under the express terms of the Loan Agreement, Integrity Advance offered many ways to repay loans. Facts ¶¶ 65-66. The Loan Agreement's ACH authorization expressly states that "[y]ou may repay your indebtedness through other means, including by providing timely payment via cashiers check or money order directed to: Integrity Advance, 300 Creek View Road, Suite 102, Newark DE 19711." *Id.* ¶ 63. Indeed, the CFPB itself alleges that 95% of consumers that obtained loans with Integrity Advance signed the ACH authorization, meaning that 5% of consumers received loans without signing the authorization. Dkt. 1 ¶ 41.

Additionally, the CFPB introduced evidence from its own employee, Robert Hughes, that 98.5% of initial loan repayments were made by electronic means. Dkt. 87D at 3, ¶ 8. If some percentage of loan recipients *did not* provide Integrity Advance with electronic access to their bank accounts or repay the loan via electronic means, then - by definition – it was not a condition for a loan. Thus, the CFPB's own pleading and evidence invalidates its EFTA and Regulation E claims.

Accordingly, the ALJ should grant summary disposition in favor of Integrity Advance on Count V.

IX. RESPONDENT JAMES CARNES IS NOT INDIVIDUALLY LIABLE

Mr. Carnes has been individually charged with alleged CFPA violations at Claims III, IV, and VII. However, the undisputed facts fail to establish that Mr. Carnes is individually liable and, in fact, show the opposite.

Courts have set a high bar before an individual can be held responsible for corporate acts that may violate the CFPA. An individual cannot be held liable simply because he or she had authority over the corporate entity. *See FTC v. Freecom Commc'ns*, *Inc.*, 401 F.3d 1192, 1207 (10th Cir. 2005) (analyzing individual liability under the FTC Act and finding "the FTC must show a heightened standard of awareness beyond the authority to control").[5] Instead, an individual may be held liable under the CFPA for corporate acts only if "(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 misrepresentation,

[5] Courts frequently look to the FTC Act in interpreting the CFPA. *See CFPB v. Universal Debt & Payment Sols.*, 2019 U.S. LEXIS 46492, at *40 (N.D. Ga. Mar. 21, 2019) ("[T]ime and again, courts have embraced the meaning of words in the FTC Act when interpreting the CFPA.")

or was aware of a high probability of fraud along with an intentional avoidance of the truth." *CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016).

Courts have found individuals to be liable where the individual drafted or otherwise provided input in the creation of the deceptive, fraudulent, or violative materials. *See FTC v. Amy Travel*, 875 F.2d 564, 574 (7th Cir. 1989) (finding that "as authors of the sales scripts," the liable individuals "were certain of the misrepresentations contained in them"); *see also FTC v. Ross*, 897 F. Supp. 2d 369, 385–86 (D. Md. 2012) (finding the defendant individually liable because she "wrote, edited, reviewed, and participated in the development" of the misleading advertisements at issue). Courts also have found individuals liable where they substantively reviewed, edited, or revised the deceptive, fraudulent, or otherwise violative materials. *See Gordon*, 819 F.3d at 1193 (citing evidence that the individual defendant reviewed, edited, and modified the deceptive materials and was responsible for "assur[ing] that all advertising is legal"); *see also FTC v. World Media Brokers*, 415 F.3d 758, 764–65 (7th Cir. 2005) (finding individual defendant liable where there was evidence he knew a scheme was illegal and approved scripts "directing telemarketers to assure consumers" that it was legal); *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006) (finding that the liable individual was "directly involved in the development of the deceptive marketing scheme," reviewed solicitation forms and "was aware" of resulting consumer injuries); *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1082 (C.D. Cal. 2012) (finding that the former president of the company had knowledge of the company's practices because he had "seen, reviewed, commented on, and approved various versions" of the misrepresenting documents).

Summary disposition in favor of an individual defendant is appropriate where the individual lacked knowledge of the allegedly deceptive material, even where the individual exercised control over the company. *See CFPB v. Mortgage Law Group, LLP*, 196 F. Supp. 3d 920, 946-947 (W.D. Wis. July 20, 2016), modified by 2016 U.S. Dist. LEXIS 192781 (W.D. Wis. Nov. 23, 2016) (granting summary judgment in favor of individual defendant as to allegedly deceptive marketing communications where the individual lacked knowledge about the contents of the communications, despite the fact that he was the majority partner with final decision-making authority over the company and actively participated in the company's operations).

Here, the undisputed facts establish that Mr. Carnes was the *de facto* CEO of Integrity Advance. Facts ¶ 91. However, as Mr. Carnes testified, which testimony has not been contradicted by the CFPB, Mr. Carnes did not draft, edit or revise Integrity Advance's Loan Agreement. *Id.* ¶ 98. Mr. Carnes did not substantively review or approve the Loan Agreement template other than possibly "flipping through it." *Id.* ¶ 97. Further, Mr. Foster testified that "[n]o one at the Hayfield group of companies, including myself or Mr. Carnes, were consumer lawyers or experts in consumer law. So the strategy of the company was to always have highly compensated, highly acknowledged and reputable consumer law counsel, outside counsel, to provide the counsel and guidance on those matters." *Id.* ¶ 40. Similarly, Mr. Carnes testified that "we hired an outside counsel to come up with the loan agreement. We trusted that that was the best thing to do and we used it." *Id.* ¶ 41. The purpose was to ensure that counsel drafted "loan documents that conformed with the Delaware and federal law." *Id.*[6]

[6] The ALJ denied Respondents' motion to open the record to present additional testimony from the general counsel (Mr. Foster) and outside counsel Claudia Callaway regarding these facts. In her ruling, the ALJ noted that the "[a]dditional testimony from Foster and Call[a]way thus appears unnecessary and, at best, would merely corroborate Carnes' sworn testimony." Dkt. 269 at 9. Therefore, Respondents request the ALJ to accept as true Mr. Carnes' testimony regarding his personal participation and counsel's role regarding the contents of the Loan

Further, Mr. Carnes understood that the Loan Agreement was provided to the Delaware banking regulators for their review and comment. *Id.* ¶ 38. Based on this fact, it is reasonable to infer that Mr. Carnes believed the Loan Agreement to be legally compliant. Indeed, after the Loan Agreement was provided to the state regulators, Integrity Advance was approved by the State of Delaware to extend credit using the Loan Agreement in question. *Id.* ¶¶ 27-29, 38. That approval was renewed annually, throughout the time period in question, and included the Delaware regulator's review of the Loan Agreement. *Id.* ¶¶ 34-38. Mr. Carnes was entitled to rely on the work of his attorneys, as well as the approvals by the State of Delaware, to ensure that the Loan Agreement template was legally compliant. And, the CFPB cannot introduce any evidence to the contrary.

Additionally, as both Mr. Carnes and Mr. Foster testified, an experienced third-party call center handled the day-to-day administration of the loans, a fact which has not been disputed by the CFPB. *Id.* ¶¶ 43-44. The decision to use RCCs, which are a legitimate payment mechanism governed by the Uniform Commercial Code, was made by the third-party call center on a case-by-case basis and were used sparingly only as a last resort. *Id.* ¶¶ 55, 60. In fact, under the CFPB's own analysis, RCCs were used in less than one percent of all loans during the post-July 21, 2011 period. *Id.* ¶ 58.

Given these undisputed facts, the CFPB cannot show, as it must, that Mr. Carnes knew, had reason to know, or recklessly avoided knowledge of the specific contents of the Loan Agreement template or the use of RCCs. It also is clear that Mr. Carnes had no reason to know that either could be considered "deceptive" or "unfair" under the CFPA. Without this

Agreement. If the ALJ does not accept this testimony as true, Respondents renew their request to present at trial on this issue the corroborative testimony of Mr. Foster and Ms. Callaway.

knowledge, Mr. Carnes cannot be held liable. *See Gordon*, 819 F.3d at 1193; *see also Mortgage Law Group, LLP*, 196 F. Supp. 3d at 946-947.

In addition to establishing the requisite level of knowledge as described above, the CFPB must show that Mr. Carnes had actual knowledge of "***misrepresentations***," was recklessly indifferent to their "***truth or falsity***," or was otherwise aware of a high probability of "***fraud***" with intentional avoidance of the truth. *See Gordon*, 819 F.3d at 1193 (emphasis added). This reflects a heightened standard for individual liability for corporate acts under the CFPA -- requiring misrepresentations or fraud -- that goes beyond the elements required to find the corporate entity liable.

Without question, the Loan Agreement does not contain these kinds of misrepresentations or fraudulent statements. The CFPB cannot prove otherwise. Instead, the CFPB merely alleged that the repayment and cost information, as well as the information regarding RCCs, were "hidden in fine print" within the Loan Agreement. Dkt. 1 at 5, ¶ 27; *id.* at 9, ¶ 47. In support of these allegations, the CFPB introduced evidence from its expert Dr. Manoj Hastak. Facts ¶ 24. However, Dr. Hastak made no findings that the information contained in the Loan Agreement was false. *Id.* Instead, Dr. Hastak opined that the fee disclosures in the Loan Agreement were not "clear and conspicuous." *Id*. Similarly, Dr. Hastak found that the disclosure related to the use of RCCs was "neither clear nor conspicuous." *Id*. Even assuming Dr. Hastak's opinion is correct,[7] such an opinion does not establish the level of "misrepresentation," "falsity," or "fraud" that would be necessary to find an individual liable for

[7] Respondents previously introduced, and plan to introduce at trial, rebuttal expert testimony from Dr. Nathan Novemsky, whose testimony undermined Dr. Hastak's conclusions. Facts ¶ 26. But, for purposes of this motion, Respondents assume that Dr. Hastak's opinions are true and contends that such opinions are insufficient as a matter of law to meet CFPB's burden.

corporate acts under the CFPA. Summary disposition should be granted as to Mr. Carnes' liability for Claims III, IV, and VII.

X. SUMMARY DISPOSITION SHOULD BE GRANTED AS TO RELIEF

The CFPB's Rules allow a party to move for, and the ALJ to grant, partial summary disposition. *See* 12 CFR §1081.212(d) ("[A]ny party may move for summary disposition in its favor of all or any part of the proceeding.") Similarly, under the Federal Rules of Civil Procedure, a motion for summary judgment may be granted as to all or part of a claim. Fed. R. Civ. P. 56(a). The remedy is part of the claim. *See Hamblin v. British Airways PLC*, 717 F. Supp. 2d 303, 307 (E.D.N.Y. June 17, 2010) ("A theory of liability is useless to a plaintiff without remedies flowing from that claim, and so I see the 'claim' as being composed of both the theory of liability and the remedies that that theory supports."). Therefore, courts may consider and grant motions for partial summary disposition as to a particular remedy where the there is no genuine issue of material fact that the plaintiff can recover that remedy. *See Hamblin*, 717 F. Supp. 2d at 309; *see also SEC v. Fisher*, 2012 U.S. Dist. LEXIS 122144, at *40 (N.D. Ill. Aug. 28, 2012) (granting defendant's motion for summary judgment as to the equitable remedies of injunction and director/officer bar); *Loft v. Stationary Eng'rs Local 39, PTF LLC*, 87 F. Supp. 3d 1138, 1147 (N.D. Cal. Mar. 31, 2015) (finding that the court can consider defendant's motion for summary judgment as to punitive and emotional distress damages). In this case, even if the ALJ denies Respondents' motion for summary disposition as to liability, summary disposition should be granted in favor of Respondents denying the award of restitution as to any claim. Additionally, summary disposition should be granted as to any claim for "actual damages" under TILA (Claims I and II) or EFTA (Claims V and VI).

A. <u>Restitution Should Be Denied for All Claims</u>

The CFPB bears the burden of showing that restitution is appropriate in an enforcement action. *See CFPB v. CashCall, Inc.*, 2018 U.S. Dist. LEXIS 9057, at *35 (C.D. Cal. Jan. 19, 2018) ("[T]he CFPB bears the burden of proving that restitution is an appropriate remedy and that the amount of restitution it seeks represent a defendant's unjust gains."); *see also CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-02106-RS, 2017 U.S. Dist. LEXIS 145923, at *31 (N.D. Cal. Sep. 8, 2017) (denying restitution where the CFPB failed to show that the restitution it sought was appropriate). In order to show that restitution is an appropriate remedy, the CFPB must establish "that Defendants intended to defraud consumers or that consumers did not receive the benefit of their bargain." *CashCall*, 2018 U.S. Dist. LEXIS 9057, at *36-37. Based on the undisputed facts in this case, the CFPB has not and cannot establish either condition.

First, similar to the facts in *CashCall*, Respondents retained highly-regarded outside counsel to create the Loan Agreement and ensure it was legally compliant (in fact, Respondents retained the same counsel that advised the defendants in *CashCall*). Facts ¶¶ 40-41. As explained by Respondents' former general counsel Mr. Foster "[n]o one at the Hayfield group of companies, including myself or Mr. Carnes, were consumer lawyers or experts in consumer law. So the strategy of the company was to always have highly compensated, highly acknowledged and reputable consumer law counsel, outside counsel, to provide the counsel and guidance on those matters." *Id.* ¶ 40. Additionally, as to Mr. Carnes individually, the undisputed facts establish that he did not draft, revise, or substantively review the Loan Agreement. *Id.* ¶ 98. Respondents relied on their outside counsel to create the Loan Agreement and ensure it complied with the law. *Id.* ¶¶ 40-41. Further, the repeated approvals by Delaware regulators reassured Integrity Advance and Mr. Carnes that the company's loan process was in compliance with the law. *Id.* ¶¶ 1, 27-38. Indeed, Mr. Carnes testified that he knew that the Loan Agreement had been supplied to the Delaware regulators. *Id.* at ¶ 38. This fact is not consistent with any contention that Mr. Carnes intended for the Loan Agreement to deceive or mislead consumers. Enforcement Counsel has not presented any facts to establish that Integrity Advance or Mr. Carnes concealed any facts from, or misrepresented any facts to, the attorneys or the Delaware regulators.

Additionally, there is no evidence that consumers did not receive the benefit of their bargain. Instead, the undisputed facts show that Integrity Advance had a high rate of repeat customers. *Id.* 48-52. Of the 82,980 loans originated on or after July 21, 2011, 66% of those loans were loans to repeat customers. *Id.* ¶ 52. Based on this repeat customer business, it is clear that consumers were satisfied that they received the benefit of their bargain.[8]

While contending that *CashCall* and *Nationwide Biweekly Admin., Inc.* were wrongly decided, on April 9, 2020 (approximately four and a half years after filing the Notice of Charges), the CFPB asserted for the first time that they are seeking restitution as "legal" rather than "equitable" relief and, therefore, the CFPB contends that the ALJ does not have any discretion to deny this relief. *See* Dkt. 263 at 9-10. This new position is directly contrary to that taken by Enforcement Counsel in the earlier proceeding, in which they argued that the ALJ has "broad authority" to determine the appropriate remedy and award tens of millions of dollars in restitution. *See* Dkt. 162 at 30-31. Enforcement Counsel now seeks to gain an unfair advantage by taking a position that is directly contradictory – arguing that the ALJ has <u>no</u> discretion in her

[8] In the Order Denying In Part Respondents' Motion to Open Record for a New Hearing, the ALJ indicated that Respondents had not requested to reopen the record on the issue of whether consumers received the benefit of their bargain and had therefore waived the issue. Dkt. 269 at 9, note 18. However, Respondents did not seek to introduce new evidence on this issue because the evidence already was in the record.

decision and must order restitution. However, judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (*quoting Pegram* v. *Herdrich*, 530 U.S. 211, 227, n. 8 (2000)). The doctrine precludes "a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co*., 270 F.3d 778, 782 (9th Cir. 2001); *see also Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 792 (D.C. Cir. 2010) (holding that the District Court properly invoked judicial estoppel to prevent a plaintiff from taking a position that was "clearly inconsistent" with his prior position). Based on judicial estoppel, Enforcement Counsel should be precluded from this attempt to gain an unfair advantage by suddenly changing course to avoid the impact of two federal district court decisions relating to the appropriate circumstances for awarding restitution. *See United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1148 (9th Cir. 2011) (finding that "judicial estoppel bars the government from effecting its sleight of hand" by taking "directly contradictory positions").

And, even if judicial estoppel does not apply, Enforcement Counsel does not cite to any authority for its new proposition that restitution in CFPA enforcement matters is mandatory, and Respondents are not aware that any such authority exists. Instead, courts have consistently held that the award of restitution in CFPA matters is discretionary. *See Nationwide Biweekly Admin., Inc.*, 2017 U.S. Dist. LEXIS 145923, at *10 (courts have "broad authority to impose appropriate remedies."). This is consistent with the language of the CFPA itself, which provides that "[t]he court (or the Bureau, as the case may be) in an action or adjudication proceeding brought under Federal consumer financial law, shall have jurisdiction to grant *any appropriate* legal or equitable relief" which "*may include* . . . restitution." 12 U.S.C. §5565(a) (emphasis added). These provisions make clear that relief under this section of the CFPA is discretionary.

Restitution is not automatic and, in this matter, cannot be awarded because the CFPB cannot establish either fraudulent intent or that consumers did not receive the benefit of their bargain.

B. The ALJ Should Deny The CFPB's Request For Actual Damages Arising From Alleged TILA Violations

The ALJ also should grant summary disposition in Respondents' favor as to the CFPB's Prayer for Relief as it pertains to Claim I and II. Actual damages under TILA require proof that the damages were incurred "as a result" of a party's violation of the statute. *See* 12 U.S.C. § 1640(a)(1). Plaintiffs must show detrimental reliance. *See Rucker v. Sheehy Alexandria, Inc.,* 228 F. Supp. 2d 711, 719-20 (E.D.Va.2002).

To prove actual damages, the CFPB must show—for each consumer—that 1) the consumer read the TILA disclosure statement; 2) the consumer understood the charges being disclosed; 3) had the disclosure statement been accurate, the consumer would have sought a lower price; and 4) the consumer would have obtained a lower price. *See Peters v. Lupient Oldsmobile Co.,* 220 F.3d 915, 917 (8th Cir. 2000); *see also Turner v. Beneficial Corp.,* 242 F.3d 1023, 1026 (11th Cir. 2001) (en banc); *Perrone v. General Motors Acceptance Corp.,* 232 F.3d 433, 436-40 (5th Cir. 2000); *Stout v. J.D. Byrider,* 228 F.3d 709, 718 (6th Cir. 2000); *In re Smith,* 289 F.3d 1155, 1156-57 (9th Cir. 2002). Even in cases, unlike here, where a loan's actual APR *did* differ from the disclosed APR, courts have denied claims for actual damages because "there is no evidence [that the borrower] would have rejected that loan had he been advised of the actual APR." *See In re Boganski,* 322 B.R. 422, 428 (B.A.P. 9th Cir. 2005). Since the undisputed material facts show that there are no actual consumer damages, the ALJ should therefore grant summary disposition on this issue.

C. <u>The ALJ Also Should Deny The CFPB's Request For Actual Damages Arising From An Alleged EFTA Violation</u>

The ALJ should grant summary disposition in favor of Respondents as to the CFPB's Prayer for Relief as it pertains to Claim V and VI. Actual damages under the EFTA require proof that the damages were incurred "as a result" of a party's violation of the statute. *See* 15 U.S.C. § 1693m(a).

Thus, "to recover actual damages [for violation of the EFTA], a plaintiff must establish causation of harm . . . ." *See Martz v. PNC Bank, N.A.*, 2006 WL 3840354, at *5 (W.D. Pa. Nov. 30, 2006); *Brown v. Bank of Ant*, 457 F. Supp. 2d 82, 90 (D. Mass. 2006) (finding that plaintiffs must "establish causation of harm in the form of detrimental reliance" to recover actual damages under the EFTA, relying on case law interpreting the identical actual damages provision in the Truth in Lending Act); *Voeks v. Pilot Travel Ctrs.*, 560 F. Supp. 2d 718, 723 (E.D. Wis. 2008) ("[Plaintiff's] actual damages have to be proximately caused by the Defendant's failure as recognized under the [EFTA]."). The undisputed material facts show that there were no actual damages suffered by any consumer because of an EFTA violation. Indeed, as noted above, in such instances, there must be a showing of actual injury, not merely speculative injury. And, it is axiomatic that an EFT withdrawal of an amount owed by a consumer does not harm the consumer. *See Brown*, 457 F. Supp. 2d at 90. The ALJ should grant summary disposition that denies the CFPB's request for actual damages.

XI. <u>CONCLUSION</u>

For the foregoing reasons, the ALJ should grant summary disposition and enter judgment in favor of Respondents on all Counts of the Notice of Charges.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May 2020, I caused a copy of the foregoing Respondents' Brief in Support of their Motion for Summary Disposition to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on opposing counsel at the following addresses:

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