UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of: **INTEGRITY ADVANCE, LLC, and JAMES R. CARNES,** **Respondents.**	**ENFORCEMENT COUNSEL'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION**

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I. Introduction

For five years Integrity Advance originated and serviced consumer loans in an illegal, deceptive, and unfair manner. Consumers taking out a loan were not told the true cost of the loan, denying those consumers the ability to understand the obligations they were undertaking and denying them the ability to effectively comparison shop with other small dollar lenders. The company provided disclosures to consumers that would have been accurate only if the loan was paid off in a single payment, even though the default operation of the loans called for automatic, multiple rollovers that caused the costs of the loans to multiply. In practice, only 1% of Integrity Advance's loans were paid off in full in a single payment; the other 99% of loans cost consumers more than the amount disclosed by Integrity Advance. There is no genuine issue of material fact that the costs of consumers' legal obligations created by the default provisions of the loan agreements are not reflected in the loan agreements. As such, Integrity Advance violated the Truth in Lending Act and the Consumer Financial Protection Act's prohibition on unfair and deceptive acts or practices.

In addition, Integrity Advance violated the Electronic Fund Transfer Act by requiring that consumers authorize electronic repayments of their loans during the application process. The undisputed facts show that as a condition of receiving a loan, Integrity Advance's customers were required to sign a document authorizing the company to deduct payments from their bank accounts. Consumers were not able to procure a loan from Integrity Advance without granting this authorization, and that requirement is a violation of EFTA.

Respondents also engaged in an unfair practice by using remotely created checks to debit consumer accounts when those consumers had taken steps to block the company's electronic access to their bank accounts. Respondents used this procedure even though most consumers are not familiar with remotely created checks, and the contract language ostensibly authorizing the practice was unclear and hidden in fine print. The loan agreement did not clearly explain that a single, opaque sentence allowed Respondents to draw a check against consumers' accounts without their signature, knowledge, or approval. Nor did it explain that the provision would, in effect, prevent consumers from stopping Respondents' access to their accounts.

Respondent James Carnes, the chief executive of Integrity Advance, is responsible for the deceptive and unfair acts and practices of his company. The record in this case leaves no dispute that Carnes had authority to control the acts of Integrity Advance: he was the CEO and majority owner of Hayfield Investment Partners, Integrity Advance's parent company, and exercised full managerial control and authority over Integrity Advance. Carnes admitted under oath that he knew how the company's loans were disclosed, knew how the loans automatically renewed if a consumer did not call the company, and knew that most consumers would experience renewals that lead to loan costs above what had been disclosed. Further, it is undisputed that Carnes knew that Integrity Advance was using remotely created checks when consumers were trying to protect their bank accounts and that Carnes had the authority to stop the practice.

Finally, the record is clear regarding the appropriate remedies in this case. The Consumer Financial Protection Act empowers the Administrative Law Judge to award broad relief. Here, Respondents are liable for restitution, which is measured by the amount consumers paid to Integrity Advance above what the company disclosed in its loan agreements. Unchallenged evidence in the record establishes that that amount is $132,580,041.06. Penalties should also be imposed under the CFPA against both Integrity Advance and Carnes for each practice that violated Federal consumer financial law. Finally, injunctive relief is appropriate to aid former Integrity Advance consumers and ensure that Respondents do not violate Federal consumer financial laws in the future.

II. Factual Background

Integrity Advance is a Delaware limited liability company that originated and serviced short term loans to consumers. Enforcement Counsel's Statement of Material Facts in Supp. of Its Mot. for Summ. Dispos. ("SMF") ¶ 1. Integrity Advance started originating loans to consumers in May 2008 and processed its final loan payment transaction on July 9, 2013. SMF ¶ 2. The company offered loans ranging in value from $100 to $1000. SMF ¶ 3. Over the course of its operations, Integrity Advance originated over 300,000 loans. Decl. of Robert J. Hughes in Supp. of EC's May 2016 Mot. for Summ. Dispos. [Dkt. 87D] ("Hughes MSD Decl.") ¶ 3. Respondent James Carnes was the President and Chief Executive Officer of Integrity Advance throughout the entire time that it offered short term, or "payday," loans. SMF ¶ 12. He had "ultimate authority" over the company, SMF ¶¶ 40, 57, was extensively involved in the company's day-to-day operations, *see e.g.*, SMF ¶¶ 15-16, 42-52, and had knowledge of Integrity Advance's business practices at issue here. SMF ¶¶ 95-107, 135-137.

The Truth in Lending Act ("TILA") disclosures provided to Integrity Advance applicants only disclosed the amounts that would be paid if the loan was repaid in a single payment. SMF ¶ 66. That is, the total of payments, the finance charge, and the APR reflected calculations based on the assumption that the consumer would completely repay the loan on her next payday. SMF ¶¶ 65, 66. However, unless a consumer affirmatively contacted Integrity Advance to change the terms of their loan, Integrity Advance would automatically roll over the consumer's loan by debiting a sum equal only to the finance charge. SMF ¶¶ 70-73, 77. This "auto-renewal" payment, which was the default payment arrangement under the contract, did not reduce the principal owed by the consumer. SMF ¶¶ 73, 78. Unless contacted by the consumer, Integrity Advance would roll over a loan four times. SMF ¶¶ 70, 72. After these auto-renewal payments, Integrity Advance would put a consumer into "auto-workout" status, during which the company would debit a finance charge plus $50 towards loan principal each payday. SMF ¶¶ 74, 79-82. This auto-renewal and auto-workout process reflected the default operation of Integrity Advance's contract; it did not require an active decision, election, or further authorization by the consumer. SMF ¶¶ 73, 74, 76.

As a result, Respondents' data shows that only approximately 1% of their consumers who made any payments paid exactly the amount disclosed in their loan agreement. Hughes MSD Decl. ¶ 7. A new Integrity Advance customer taking a $300 loan would have received a disclosure reflecting a single repayment of $390. SMF ¶ 83. Indeed, some consumers' contracts included a separate statement, just below the TILA disclosure box ("TILA box"), explicitly stating that their payment schedule would be "one (1) payment" of $390. SMF ¶ 67. However, unless that consumer called Integrity Advance three business days before a payment due date to change the terms of her loan, she would pay much more than the amount disclosed. By the end of the default auto-renewal and auto-workout process, the consumer would have paid $1,065 instead of the $390. SMF ¶ 86.

Integrity Advance's loan agreement did not disclose to consumers the payment amounts that the company would be debiting from their accounts under the auto-renewal and auto-workout process. SMF ¶ 89. Integrity Advance's loan agreement never disclosed the APR, total finance charges, or total of payments that applied to consumers' loans given the default auto-renewal and auto-workout payments. SMF ¶¶ 89-92. Predictably, many Integrity Advance consumers were confused about the costs of their loans. SMF ¶¶ 93, 94, 105. Many did not understand that the auto-renewal payments did not reduce loan principal and were shocked to learn that even though they had made several payments (which in some cases equaled or exceeded the disclosed total of payments) they still owed the entire original loan balance. SMF ¶¶ 93, 94, 105.

As part of the loan application process, Integrity Advance required consumers to sign a form authorizing electronic access to their bank accounts. SMF ¶¶ 112-115. Consumers could only receive loan proceeds by way of an electronic deposit that was authorized by this ACH authorization form. SMF ¶ 114. The ACH form also authorized Integrity Advance to pull from consumers' accounts the auto-renewal and auto-workout payments discussed above. SMF ¶¶ 115, 121, 122. Those payments occurred at regular intervals tied to the consumer's paydays. SMF ¶ 117. There was no indication in the ACH authorization form that a consumer could obtain an Integrity Advance loan without signing the ACH authorization and thereby allowing recurring electronic repayments from their bank account. SMF ¶ 119. Indeed, data provided by Integrity Advance shows that over 98.5% of initial loan repayments were made via pre-authorized ACH. Hughes MSD Decl. ¶ 8.

The ACH authorization form also contained language that ostensibly authorized Integrity Advance to create checks drawn on a consumer's account. SMF ¶ 123. These checks, which are known as remotely created checks, check drafts, or demand drafts, can be used to debit a consumer's account even after a consumer has withdrawn or otherwise blocked an ACH authorization. SMF ¶¶ 123, 132. Integrity Advance's demand draft authorization consisted of a portion of a single, opaque sentence in the loan agreement. SMF ¶ 124. This part of the authorization was not highlighted for consumers in any way and did not explain that it allowed Integrity Advance to draw checks on a consumer's account without the consumer's signature, knowledge, or further authorization. SMF ¶¶ 128-130. Integrity Advance used this provision to withdraw money from consumers' accounts after those consumers had already paid the total of payments disclosed in the TILA box and had tried to block the company's electronic account access. SMF ¶ 132.

Consumers were harmed by Respondents' behavior when they paid more than the amount disclosed in the "Total of Payments" section of the TILA box. From May 2008 through July 2013, Integrity Advance obtained over $132.5 million more from its consumers than it disclosed. SMF ¶ 108. That includes over $38 million more than it disclosed on loans originated on or after July 21, 2011. SMF ¶ 110. Integrity Advance also used remotely created checks on or after July 21, 2011, to obtain more than $115,000 from consumers who had paid an amount equal to the Total of Payments in the TILA box before revoking or stopping their authorization for Integrity Advance to withdraw funds from their accounts. SMF ¶ 138.

III. Summary Disposition Standard

A motion for summary disposition may be granted if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and other evidentiary materials properly submitted show that: (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to a decision in its favor as a matter of law. 12 C.F.R. § 1081.212(c). Once the moving party has carried its initial burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). That is, a party opposing summary disposition must present facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A factual dispute between the parties will not defeat summary disposition unless it is both genuine and material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A dispute is genuine if the evidence presents a sufficient disagreement to submit the matter to a reasonable factfinder. *See id.* at 251-52; *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 467 (3d Cir. 2005).

IV. Argument on Liability

A. Integrity Advance and Carnes are Covered Persons

Under the terms of the Consumer Financial Protection Act ("CFPA"), the Consumer Financial Protection Bureau ("Bureau") may take action against covered persons, which are defined to include "any person that engages in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6). Consumer financial products and services include, *inter alia*, "extending credit and servicing loans." 12 U.S.C. § 5481(15)(a)(i). As seen above, Integrity Advance originated credit in the form of small dollar loans, making the company a covered person. SMF ¶¶ 1-3.[1]

Carnes is a covered person due to his role directing Integrity Advance's operations. The CFPA defines a "related person" to mean, *inter alia*, "any director, officer, or employee charged with managerial responsibility" for, or a "controlling shareholder" of, a covered person. 12 U.S.C. § 5481(25)(C)(i). There is no dispute that Carnes exercised "managerial responsibility" over and was the "controlling shareholder" of a covered person (Integrity Advance). Carnes was a director and officer of Integrity Advance charged with managerial responsibility for the company, and admitted to having ultimate control over Integrity Advance's policies and procedures. SMF ¶¶ 13, 39. Carnes was also Integrity Advance's controlling shareholder—he owned 100% of Willowbrook Marketing, which at all times owned a controlling interest in Hayfield Investment Partners ("Hayfield"), Integrity Advance's parent company. SMF ¶¶ 6, 7, 10, 11. As a related person, Carnes is a "covered person for all purposes of any provision of Federal consumer financial law." 12 U.S.C. § 5481(25)(B).

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[1] Integrity Advance is also a covered person by virtue of servicing its loans. SMF ¶ 1.

B. Integrity Advance Violated the Truth in Lending Act by Failing to Accurately Disclose the Costs of Its Loans

There is no genuine dispute regarding how Integrity Advance's loans worked. As Respondents have acknowledged, they automatically rolled over their payday loans unless the consumer called three business days before payment was due to change the terms of the loan. Respondents' Answer and Affirmative Defenses (Dec. 14, 2015) [Dkt. 21] ("Ans.") ¶ 29; SMF ¶ 71. Integrity Advance admitted, "if a customer took no action, a customer was auto-renewed and the payment amount was debited . . . in the amount of the finance fee plus any accrued fees." SMF ¶ 71 (interrogatory responses). Respondents admitted "that unless a consumer contacted Integrity Advance to change the terms of the loan . . . Integrity Advance renewed the consumer's loan." Ans. ¶ 29. Respondents further admitted that the renewal payments applied only to the finance charges, and after four renewal payments Respondents would apply only $50 to principal and the rest to finance charges. Ans. ¶ 30; SMF ¶¶ 78, 79, 80. Respondents admitted that a $300 loan to a new consumer would result in eleven payments totaling $1,065 unless a consumer called to change the terms of the loan to repay in a single payment. Ans. ¶¶ 29, 31. And through the ACH authorization, Integrity Advance could take these payments from consumers' bank accounts without further action from the consumer. SMF ¶¶ 112, 115, 116. Thus, Integrity Advance's loans were, in fact, multi-payment installment loans, with a prepayment option, not single-payment loans.

Despite this automatically renewing loan structure, Respondents admitted that they disclosed the costs of their loans as if they were single-payment loans. Ans. ¶ 26 ("Respondents admit that [the TILA] disclosures stated a calculation that reflected loan repayment in one payment."). The contract does not state the total cost of the loan, or the total amount of finance charges that a consumer must pay pursuant to the default terms. SMF ¶¶ 89-92. The contract also does not state the finance charge for any aspect of the default terms, including the auto-renewal or auto-workout payments. SMF ¶ 91.

Given that there is no dispute about these facts, Integrity Advance violated TILA as a matter of law. TILA is implemented by Regulation Z, which mandates that creditors disclose "the terms of the legal obligation between the parties." 12 C.F.R. § 1026.17(c); *id.* § 1026.17(a); *see* 15 U.S.C. § 1601(a). This includes, among other things, the loan's finance charge, annual percentage rate, due date, and series of payments scheduled to repay the total of payments. *Id.* §§ 1026.17(a), 1026.18; *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) (noting that TILA "requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges [and] annual percentage rates of interest"); Official Staff Comments, 12 C.F.R. pt. 1026, Supp. I, 1026.17(c)(1) cmt. 1 (loan disclosures must "reflect the terms to which the consumer and creditor are legally bound as of the outset of the transaction").

Integrity Advance failed to disclose consumers' legal obligation. As explained above, Integrity Advance's customers were obligated to make a series of payments that were authorized at loan signing. SMF ¶¶ 73, 112, 115. 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. Integrity Advance's TILA disclosures—which only included information assuming a one-time repayment—failed to inform consumers about the APR, finance charge, and total of payments of the consumers' actual obligations under the loan agreement.

On very similar facts, the only court to address this issue held that—as a matter of law—disclosing the APR, finance charge, and total of payments based on a single payment when the contract automatically rolled over both violated TILA and was deceptive under the Federal Trade

Commission Act. *FTC v. AMG Servs., Inc.,* 29 F. Supp. 3d 1338 (D. Nev. 2014), *aff'd sub nom. FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018). In *AMG Services*, as in this case, the payday lender made its TILA disclosures by assuming a single repayment, but automatically rolled over consumer loans unless the consumer contacted it. *Id.* at 1343, 1345-46. Based on its review of the contract language, the court in *AMG Services* awarded summary judgment to the Federal Trade Commission. *Id.* at 1354-55, 1368-72. On appeal, the Ninth Circuit noted that under AMG's loan contract, "borrowers had to perform a series of affirmative actions in order to decline to renew the loan and thus pay only the amount reported in the TILA box." *AMG Capital,* 910 F.3d at 423.

Each of Integrity Advance's 304,227 loan agreements during its five years of operation included a false TILA disclosure. SMF ¶¶ 88, 89, Hughes MSD Decl. ¶ 3. Because Integrity Advance is a "covered person," by violating TILA (Count I), Integrity Advance also violated section 1036(a)(1)(A) of the CFPA (Count II). 12 U.S.C. § 5536(a)(1)(A) (providing that it is unlawful for any "covered person or service provider" to "commit any act or omission in violation of a Federal consumer financial law").

C. Respondents' Loan Agreements Are Deceptive

Given the undisputed facts regarding the operation of the loan agreements and Respondents' disclosures about loan costs, it is clear that Respondents' loan agreements are deceptive on their face. In fact, Enforcement Counsel's expert, Dr. Manoj Hastak, in analyzing the loan documents, found that they failed to clearly and conspicuously disclose the costs of

Respondents' loans. Hastak Expert Report [Dkt. 87A] ("Hastak Rpt.") at 19-20.[2] It is undisputed that Respondents disclosed a multi-payment loan as if it was a single-payment loan. As such, the loan agreements were facially deceptive.

Under both the CFPA and analogous FTC law, the Bureau must show the following elements to establish the existence of a deceptive act or practice: (a) a material (b) representation, omission, or practice (c) that is likely to mislead consumers acting reasonably under the circumstances. *See CFPB v. Gordon*, 819 F.3d 1179, 1192-93 (9th Cir. 2016); *FTC v. Cyberspace.com*, *LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006). "Deception may be found based on the 'net impression' created by a representation." *Gordon*, 819 F.3d at 1193 (quoting *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009)).

The statements in the TILA disclosures—the APR, amount of the finance charge, number of finance charges, total amount owed, and total number of payments—are material representations. These terms go directly to the cost of the loans, and courts have been clear that the costs of a loan product are relevant and material to consumers. *See Steele v. Ford Motor Credit Co*., 783 F.2d 1016, 1019-20 (11th Cir. 1986); *see also FTC v. Figgie Int'l, Inc*., 994 F.2d 595, 608 (9th Cir. 1993).

Respondents' disclosures were also likely to mislead consumers acting reasonably under the circumstances. It is well settled that proof of actual deception is not required to prove a deception claim. *See, e.g., Libbey-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 417 (6th Cir.

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[2] Dr. Hastak's findings with respect to Respondents' loan agreements, while instructive on the question of whether the disclosures were deceptive (and consistent with other relevant evidence in the record), are not critical to a determination that Integrity Advance's loan agreements were deceptive. As explained below, the language of Respondents' loan agreement alone justifies a finding that Respondents' practices were likely to mislead, regardless of other evidence. *See AMG Servs.*, 29 F. Supp. 3d at 1350 (holding that contract was deceptive even in face of conflicting expert testimony).

1965); *Stauffer Labs., Inc. v. FTC*, 343 F.2d 75, 78 (9th Cir. 1965). Indeed, a practice is deceptive when it is "likely" to deceive consumers. *See Cyberspace.com,* 453 F.3d at 1199.

Here, the loan agreements were deceptive on their face. The case law clearly establishes that a court can grant summary judgment based on a facial analysis of a document. *See, e.g., id.* at 1200-01 (affirming finding of deception on summary judgment based on facially deceptive mailing, and finding conclusion bolstered by evidence of actual deception). "Cases involving plainly deceptive communications . . . [are] one[s] where we will grant summary judgment for the plaintiffs without requiring them to prove what is already clear." *Ruth v. Triumph P'ships*, 577 F.3d 790, 801 (7th Cir. 2009) (holding plaintiff was not required to produce extrinsic evidence to meet burden where communications were plainly deceptive).

In the *AMG Capital* case, the Ninth Circuit held that a very similar loan agreement was deceptive. 910 F.3d 417, 423 (9th Cir. 2018). Based on the face of the loan agreement alone, the court held that it was deceptive because "it did not accurately disclose the loan's terms," and "a reasonable consumer might expect to pay only" the amount disclosed in the TILA box's disclosed total of payments. *Id.* at 423. As with the loan agreement in *AMG Capital*, the fine print following the deceptive TILA box in Respondents' loan agreement does not reasonably clarify the deceptive statements in the TILA box. Indeed, the loan agreement never states the full and accurate cost of the company's loans. SMF ¶¶ 90, 91.

Notwithstanding that proof of actual deception is not required to establish a deception claim, the record in this matter contains numerous consumer complaints demonstrating that many consumers were in fact misled about their Integrity Advance loans. *See* Decl. of John Marlow [Dkt. 87B, 87C] ¶¶ 6, 7. Indeed, the largest category of consumer complaints submitted by Integrity Advance customers to the Better Business Bureau indicate that many consumers did not understand the costs of their loan. *Id.* Many consumers complained specifically that they thought the amount Respondents disclosed in the TILA box was the only amount they would have to pay. *See, e.g.*, SMF ¶ 94 at Exhs. 16, 17, 18, 20 (consumer complaints); SMF ¶ 131 at Exh. 27 (consumer complaint). These complaints show that consumers were deceived by Respondents' disclosures.

Respondents violated the CFPA's prohibition on deception as to all loans issued on or after July 21, 2011. SMF ¶ 89 at Exh. 1 (first loan agreement template); EC-EX-063 (second loan agreement template).

D. Respondents Engaged in an Unfair Act or Practice by Failing to Disclose the Costs of Their Loans

Respondents' failure to accurately disclose the costs of their loans also was legally unfair. An act or practice is unfair if (1) it is likely to cause substantial injury to consumers; (2) that injury is not reasonably avoidable by consumers; and (3) that injury is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c).

Integrity Advance customers suffered a substantial injury when the company electronically debited more money from their accounts than had been disclosed or authorized. Courts have been clear that monetary harm is considered a substantial injury. *See, e.g. Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985); *FTC v. Loanpointe, LLC*, No. 2:10-CV-225DAK, 2011 WL 4348304, at *6 (D. Utah Sept. 16, 2011), *aff'd*, 525 F. App'x 696 (10th Cir. 2013). According to Respondents' own data, consumers who took out a loan on or after July 21, 2011, paid a total of $38,453,341.62 more than the total amounts disclosed by Respondents.

Decl. of Robert J. Hughes in Supp. of EC's Aug. 2016 Post-Hearing Br. ("Hughes PH Decl.") [Dkt. 163B] ¶ 8(a); *see* Section V.A., *infra*.[3]

In determining what constitutes a "reasonably avoidable" injury, courts interpreting the FTC Act have looked to whether consumers had a "free and informed . . . choice" that would have enabled them to avoid the unfair practice. *Am. Fin. Servs. Ass'n*, 767 F.2d at 976. "Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues toward that end." *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988). Here, Respondents' customers could not reasonably avoid the injuries they suffered because Respondents did not tell them the total loan costs and in fact took affirmative steps to prevent them from learning such information. Respondents chose not to disclose total loan costs in the loan agreement. Respondents actually instructed their call representatives explicitly *not* to tell consumers the total costs of the loans during the application process. SMF ¶ 63. Furthermore, Respondents did not provide a unified version of its contract and related documents to consumers until after they had agreed to the loan. SMF ¶ 111.

Further, Respondents structured the repayment methods in the contract in a way that gave them—rather than consumers—control over the amounts collected. Respondents pulled the loan repayments directly from the consumers' accounts; consumers did not affirmatively make payments. SMF ¶ 76. This was an automatic process that did not require further action or

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[3] Because Enforcement Counsel is not seeking remedies for Respondents' unfair or deceptive acts or practices occurring before July 21, 2011, it has assessed the consumer harm from Counts IV and VII from July 21, 2011, through the practices' cessation. *See* Section V.A., *infra*.

authorization from the consumer.[4] *Id.* In addition, even if consumers revoked their ACH authorizations or otherwise blocked ACH withdrawals, Integrity Advance could withdraw funds from the consumers' accounts through remotely created checks, without obtaining their approval or signature at the time of the withdrawal. These provisions made it very difficult for consumers to protect their funds after they discovered that they owed much more under the agreement than they had been led to believe by Respondents' representations. *See* Sections IV.E., G., *infra.*

Finally, there is no plausible argument that hiding the total cost of loans from consumers—and violating TILA in the process—provides any legitimate benefit to either consumers or competition. "[W]hen a practice produces clear adverse consequences for consumers that are not accompanied by an increase in services or benefits to consumers or by benefits to competition, the unfairness of the practice is not outweighed." *FTC v. Windward Mktg., Inc.,* No. CIV. A. 1:96-CV-615F, 1997 WL 33642380, at *11 (N.D. Ga. Sept. 30, 1997); *Cf. Orkin Exterminating Co.,* 849 F.2d at 1365); *see also FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000).

Respondents violated the CFPA's prohibition on unfair practices as to all loans issued on or after July 21, 2011. SMF ¶ 89 at Exh. 1 (first loan agreement template); EC-EX-063 (second loan agreement template).

E. Respondents Unfairly Used Remotely Created Checks

Respondents' use of remotely created checks unfairly interfered with consumers' ability to contest the company's debits on their accounts. Remotely created checks allow an entity to

[4] The ACH authorization in Integrity Advance's loan agreements provided that, "You further authorize us to initiate debit entries as necessary to recoup the outstanding loan balance whenever an ACH transaction is returned to us for any reason." SMF ¶ 116 at Exh. 1 (first loan agreement template); EC-EX-063 (second loan agreement template).

withdraw funds from a consumer's account by means of a check that the consumer never completed, signed, or even saw. A remotely created check "is an oddball check that is drawn on an account but obviously wasn't torn from the account holder's checkbook and, on further inspection, doesn't even have the account holder's handwritten signature on it."[5] "[U]nlike traditional checks, the payee, and not the account holder, creates the instrument that instructs the drawee bank to make payment."[6] Due in large part to operational weaknesses that make it hard to enforce consumer protections, and the fact that consumers are unfamiliar with the product, the FTC has been critical of remotely created checks, even banning them in the telemarketing space.[7]

As a part of the loan application and approval process, Integrity Advance customers were required to sign an ACH agreement. SMF ¶¶ 112-113. The agreement contained the following opaque language: "[i]f you revoke your authorization, you agree to provide us with another form of payment acceptable to us and you authorize us to prepare and submit one or more checks drawn on Your Bank Account so long as amounts are owed to us under the Loan Agreement." SMF ¶ 124. Respondents used this language to justify initiating remotely created checks from consumers' bank accounts. SMF ¶¶ 124, 132, 133.

As the record reflects, some consumers discovered that Integrity Advance rolled over their loans repeatedly such that the total cost of the loan was greater than the amount disclosed in the Total of Payments section of the TILA box. In response, some consumers attempted to stop

[5] Mercurio, Dave and Angie Spitzley, *A Guide to Remotely Created Checks*, 11 No. 8 Elec. Banking L. & Com. Rep. 1 (Oct. 2006).

[6] Cavazos-Wright, Ana R., *An Examination of Remotely Created Checks*, Federal Reserve Bank of Atlanta (2007), https://www.frbatlanta.org/-/media/documents/rprf/rprf_resources/rprfwp0510.pdf.

[7] Final Telemarketing Sales Rule, 16 C.F.R. Part 310, 80 Fed. Reg. 77,520, 77,532-77,535 (Dec. 14, 2015).

Integrity Advance's ACH debits or revoke Integrity Advance's ACH authorization, *i.e.* the company's ability to electronically debit funds from the consumer's bank account. SMF ¶ 131. When consumers exercised this right, Respondents simply started creating remotely created checks and thereby continued to extract funds from consumers' accounts. SMF ¶¶ 125, 132.

The use of remotely created checks also resulted in substantial financial harm to Integrity Advance consumers. It is well-settled that "billing customers without permission causes injury for the purposes of asserting" an unfairness claim. *FTC v. Amazon.com, Inc.*, 71 F. Supp. 3d 1158, 1164 (W.D. Wash. 2014) (citing, *e.g., FTC v. Neovi, Inc.*, 604 F.3d 1150, 1153 (9th Cir. 2010)); *see also FTC v. Ideal Fin. Solutions, Inc.,* No. 2:13-cv-00143-JAD-GWF, 2014 WL 2565688, at *5 (D. Nev. June 5, 2014); *FTC v. Inc21.com Corp.,* 745 F. Supp. 2d 975, 1004 (N.D. Cal. 2010), *aff'd,* 475 F. App'x. 106 (9th Cir. 2012). Consumers who had blocked Integrity Advance's ACH access to stop the company from continuing to withdraw funds suffered financial harm when Integrity Advance used remotely created checks to take additional funds from their bank accounts. According to Respondents' own data, Integrity Advance used remotely created checks 602 times after July 21, 2011, when the consumer had revoked or otherwise blocked ACH debits from their accounts and had already paid an amount equal to the disclosed Total of Payments. SMF ¶ 134.[8]

[8] The transaction data provided by Respondents included NACHA Return Reason Codes, which indicate why an ACH debit failed. In assessing harm to consumers through remotely created checks, Enforcement Counsel data scientist Robert Hughes relied on three codes that indicated that a consumer had revoked the company's ACH authorization or stopped ACH debits: RO7, R08, and R10. Tr. II 146:11-24. These codes, respectively, indicate that ACH authorization was revoked by the customer, a stop payment order was placed by the payee, or that a customer has advised his or her bank that the ACH is unauthorized, ineligible, or incomplete. EC-EX-092 at 3-4. In order to be conservative, Hughes did not consider as part of his harm analysis remotely created checks connected to other NACHA Return Reason Codes. Tr. III 42:5-15. All citations to the transcript in this Memorandum (i.e., "Tr.") are to the final, sealed versions of the official transcripts of the Adjudication Proceeding Hearing held on July 19, 20, and 21, 2016.

An injury is not reasonably avoidable "[i]f consumers do not have a 'free and informed choice that would have enabled them to avoid the unfair practice.'" *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008) (*quoting J.K. Publ'ns*, 99 F. Supp. 2d at 1201). Here, the undisputed evidence demonstrates that consumers did not have a free and informed choice regarding the use of remotely created checks. The remotely created check provision in the loan agreement is, on its face, neither clear nor conspicuous. *See* SMF ¶¶ 126-128. Indeed, it is boilerplate language that appears only once in the contract and is not emphasized in any way. SMF ¶¶ 126, 127.[9] Dr. Hastak concluded without rebuttal that the provision, even if read, is unlikely to be "correctly understood" and "has the potential to confuse and misdirect borrowers rather than illuminate them." Hastak Rpt. at 26.[10] For instance, it is unclear that the provision means Integrity Advance can debit a consumer's account even after he or she has paid the Total of Payments, *see* Hastak Rpt. at 25, and the provision does not explicitly mention remotely created checks or otherwise explain that it purports to give Integrity Advance the ability to write checks on the consumer's account. *Id.*; SMF ¶ 129.

Finally, there is no plausible argument of any benefit to consumers or competition from using a little known—and not well understood—product that was disclosed in a confusing and vague way and that prevented consumers from stopping unauthorized charges after they had paid the disclosed loan costs. *Cf.* Final Telemarketing Sales Rule, 16 C.F.R. Part 310, 80 Fed. Reg. at 77,541 (Dec. 14, 2015) (finding, in the context of telemarketing transactions, that harm to

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[9] *Am. Fin. Servs. Ass'n*, 767 F.2d at 976-78 (consumers were not reasonably able to avoid injuries stemming from boilerplate provisions in standardized consumer credit contracts that authorized creditors to take security interests and wage assignments).

[10] Respondents' rebuttal expert stated that he had no opinion on whether the remotely created check disclosures were either conspicuous or clear. Exh. D to EC's Mem. of P. & A. in Supp. of its Mot. for Summ. Dispos. as to Liability (May 10, 2016) [Dkt. 87] (Novemsky 175:2-11).

consumers in the form of unauthorized and fraudulent charges from remotely created checks "vastly outweighs" the benefits remotely created checks provide to consumers or competition).

Data provided by Respondents indicates that they unfairly initiated 602 remotely created checks after consumers who had already paid an amount equal to the disclosed Total of Payments and revoked or blocked ACH access. SMF ¶ 134. This resulted in $115,024.50 being debited from consumers' accounts. SMF ¶ 138.

F. Carnes Is Liable for Integrity Advance's Deceptive and Unfair Practices

An individual can be held liable for deceptive acts or practices 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." *Gordon*, 819 F.3d at 1193 (emphasis in original) (quoting *Stefanchik*, 559 F.3d at 931). This two-pronged "*Gordon* test" comports with prior FTC case law on individual liability in cases involving unfair or deceptive acts or practices in violation of the FTC Act. *See, e.g., POM Wonderful, LLC v. FTC,* 777 F.3d 478, 498 (D.C. Cir. 2015) (agreeing with other circuits that determined that "[i]ndividuals may be liable for FTC Act violations committed by a corporate entity if the individual participated directly in the deceptive practices or acts or had authority to control them") (internal quotations omitted). This same standard applies to individual liability for unfair acts or practices. *Cf. Neovi*, 598 F. Supp. 2d at 1117.

The undisputed evidence establishes both prongs of the *Gordon* individual liability test: (1) Carnes exercised control over Integrity Advance, and (2) Carnes either knew that the loan agreement misrepresented the cost of Integrity Advance's loans or was recklessly indifferent to that fact, and knew that Integrity Advance was using remotely created checks when consumers had blocked electronic access to their accounts. Therefore, Carnes is liable for Counts III (deception relating to disclosures), IV (unfairness relating to disclosures), and VII (unfairness relating to remotely created checks).

1. Carnes Had Authority Over Integrity Advance

The undisputed evidence demonstrates that Carnes had authority to control Integrity Advance during all relevant times. Carnes admitted that he "had ultimate authority over the company." SMF ¶ 40; *see also* SMF ¶ 57. That admission comports with the fact that Carnes was the founder of Integrity Advance and functioned as its chief executive the entire time it originated loans to consumers. SMF ¶¶ 9, 11-12. Carnes also was the majority owner and CEO of Integrity Advance's parent company, Hayfield Investment Partners. SMF ¶¶ 6, 7, 10.

Authority to control a company can also be inferred from active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer. *See FTC v. Tax Club, Inc.*, 994 F. Supp. 2d 461, 471 (S.D.N.Y. 2014) (*quoting FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 320 (S.D.N.Y. 2008)); *see also id.* (*quoting FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 538 (S.D.N.Y. 2000)). The record demonstrates that Carnes unquestionably assumed the duties of a corporate officer and was actively involved in precisely these ways. In his role as chief executive, Carnes supervised all individuals who provided services to Integrity Advance, SMF ¶¶ 15, 22, 28, participated in Integrity Advance's day-to-day business, SMF ¶¶ 17, 18, 23, 24, 29-34, made the final decision to hire all of the individuals who provided services to the company, SMF ¶¶ 16, 20, 27, 35-38, decided how much Integrity Advance would pay for payday loan leads, SMF ¶ 45, set Integrity Advance's underwriting policies, SMF ¶ 46, approved the contents of the company's website, SMF ¶ 42, directed changes to the website, SMF ¶¶ 43, 44, and signed several agreements on behalf of Integrity Advance with vendors, service providers, and the company's bank. SMF ¶¶ 47-51.

2. Carnes Had Knowledge of Integrity Advance's Misrepresentations and Unfair Use of Remotely Created Checks

The undisputed evidence also shows that Carnes was fully aware that Integrity Advance disclosed an expensive multi-payment installment loan as if it were a much cheaper single-payment loan. 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." SMF ¶ 96. Carnes also understood that all of Integrity Advance's loans rolled over by default. He explained that if a consumer "didn't call or email, and it was their first payment . . . they would be renewed." SMF ¶ 97. Indeed, he knew that by default the consumer would be renewed repeatedly and then automatically placed into an auto-workout process. SMF ¶¶ 98, 99. Carnes was clear that he understood the automatic renewal and auto-workout process while he was running Integrity Advance. SMF ¶ 95.

Carnes also understood that because his company's loans operated this way by default, most of the company's consumers would experience rollovers. SMF ¶ 101. Indeed, Carnes admitted that ninety percent of Integrity Advance's customers experienced rollovers. SMF ¶ 100. 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. SMF ¶ 102. These facts clearly establish that Carnes had actual knowledge of Integrity Advance's unfair and deceptive practices, as required under the second and final prong of the *Gordon* test.

Even if the record were not clear on Carnes's actual knowledge, the undisputed evidence establishes that Carnes was at the very least "recklessly indifferent" under the *Gordon* test, and should have known about the unfair or deceptive practices. As established above, Carnes had "ultimate authority" over Integrity Advance during the company's entire existence. SMF ¶¶ 12,

40. He was an active and engaged manager who exercised control over all business decisions. The loan agreement was the operative document for Integrity Advance's only product, SMF ¶¶ 4-5, a product that generated millions of dollars of income for the company and for Carnes. *See* SMF ¶¶ 5, 140-143, 145-146. And Carnes knew that the loan agreement disclosed the cost of the loan by assuming that it would be repaid in a single payment, even though Integrity Advance would automatically renew the loan multiple times by default, and most Integrity Advance loans were in fact automatically renewed. SMF ¶¶ 95-105.

Carnes also knew that Integrity Advance was using remotely created checks when consumers had blocked electronic access to their accounts. SMF ¶ 135. Carnes testified that he saw a printer being used to create remotely created checks, and this likely happened on a weekly basis. SMF ¶¶ 136-137. Thus, he also had knowledge of Integrity Advance's unfair practices in connection with remotely recreated checks (Count VII). Given these undisputed facts, there can be little doubt that Carnes had knowledge of Integrity Advance's deceptive and unfair practices and had the authority to stop or change them. Since he did not, under the CFPA his liability is equal to that of his company.

G. Integrity Advance Violated the Electronic Fund Transfer Act by Requiring Repayment by Preauthorized Electronic Fund Transfers

Because the undisputed facts demonstrate that, as part of its loan application process, Integrity Advance required consumers to sign an agreement authorizing electronic fund transfers to repay their loans, Integrity Advance unlawfully conditioned offers of credit on preauthorized electronic repayments in violation of the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 *et seq*. ("EFTA"), and Regulation E, 12 C.F.R. pt. 1005. EFTA and Regulation E prohibit requiring consumers to agree to repay a loan via preauthorized electronic fund transfers in order to receive credit. 15 U.S.C. § 1693k; 12 C.F.R. § 1005.10(e). To establish a violation, Enforcement

Counsel must show that (1) consumers' repayments on their loans were preauthorized electronic fund transfers; and (2) Integrity Advance conditioned its loans on the authorization of such electronic fund transfers.

The payments authorized by Integrity Advance's loan agreement were preauthorized electronic fund transfers. EFTA and Regulation E define preauthorized electronic fund transfers as transfers "authorized in advance to recur at substantially regular intervals." 15 U.S.C. § 1693a(10); 12 C.F.R. § 1005.2(k). The official commentary to Regulation E further explains that transfers are preauthorized where a series of payments takes place at regular intervals "without further action by the consumer." 12 C.F.R. pt. 1005, Supp. I, 1005.2(k) cmt. 1. "The statute applies where electronic fund transfers are preauthorized by the consumer, whether or not the preauthorized transfers actually do (or must) occur." *Baldukas v. B & R Check Holders, Inc.*, No. 12-CV-01330-CMA-BNB, 2012 WL 7681733, at *3 (D. Colo. Oct. 1, 2012), report and recommendation adopted *sub nom*. *Baldukas v. B & R Check Holders*, No. 12-CV-01330-CMA-BNB, 2013 WL 950847 (D. Colo. Mar. 8, 2013).

Integrity Advance's ACH form authorized the withdrawal of all payments by electronic fund transfer, including the payments required by the default auto-renewal and auto-workout provisions. SMF ¶ 115. Once the consumer signed the loan documents and accepted the loan, Integrity Advance had the authority to debit the entire series of default auto-renewal and auto-workout payments from their accounts, and Integrity Advance deducted these payments from the consumers' accounts every consumer payday (typically every two weeks) without any further action or authorization from the consumer. SMF ¶¶ 115-117.

Courts have held that payday loan rollovers are considered preauthorized for purposes of Regulation E. For example, in *Johnson v. Tele-Cash, Inc.*, the court rejected the argument that a "single payment" payday loan transaction did not fall within the scope of EFTA. 82 F. Supp. 2d 264, 277-78 (D. Del. 1999), *rev'd in part on other grounds*, 225 F.3d 366 (3d Cir. 2000) (compelling arbitration of EFTA claims). Tele-Cash denied that their loans involved preauthorized electronic fund transfers because they were not authorized to make transfers that would "recur at substantially regular intervals," but rather were only authorized to "effect a debit entry [of] one payment." *Id.* Tele-Cash argued that, to renew a payday loan, a consumer had to enter into a new loan agreement (with a new one-time debit authorization). The court rejected these arguments and agreed with the plaintiff that, because his loan was very likely to roll over, it was "possible, and even likely" to result in recurring debits. *Id.* The fact that Integrity Advance consumers preauthorized "recurring" electronic fund payments is even clearer here, given that the regularly recurring payments were authorized at the outset and happened by default.

Finally, there can be no dispute that Integrity Advance conditioned its loans on consumers agreeing to repay the loans via ACH. The undisputed facts in this case make clear that consumers had to sign the ACH authorization in order to get a loan. SMF ¶¶ 112-114. Indeed, failing to tell consumers that ACH authorization is not required and failing to provide an alternative to such authorization qualifies as conditioning an offer of credit on authorization for electronic fund transfers. *See FTC v. Payday Fin. LLC*, 989 F. Supp. 2d 799, 811-13 (D.S.D. 2013). In *Payday Financial*, the company did not disclose in the contract that consumers were not required to agree to electronic repayments, and the company failed to provide a means for consumers to obtain a loan without initially agreeing to electronic fund transfers. *Id.* The court held that conditioning credit on an electronic repayment clause in this way was a violation of EFTA and Regulation E. *Id.* at 813.

Similarly, in this matter, the contracts offered by Integrity Advance contained no provision stating that consumers could obtain a loan without signing the ACH authorization, nor did the contract provide alternatives to electronic payments. There was no way for an Integrity Advance consumer to complete the online application process without signing the ACH authorization. SMF ¶ 113. Respondents admitted that consumers had to sign the ACH authorization form to get the loans, stating that "[c]onsumers could only receive loan proceeds by way of an electronic deposit which was authorized by the ACH authorization form." Ans. ¶ 40. Importantly, that form authorized *both* the deposit *and* the withdrawals for payments via ACH. SMF ¶¶ 114, 115. According to Respondents' own data, 98.5% of initial loan repayments were made via electronic means. Hughes MSD Decl. ¶ 8.

Integrity Advance required electronic access, and thereby violated EFTA, for each of its 304,227 loans originated during the company's lending operations. *See* SMF ¶ 112 at Exh. 1 (first loan agreement template); EC-EX-063 (second loan agreement template); *see also* Hughes MSD Decl. ¶ 3. Because Integrity Advance is a "covered person," by violating EFTA (Count V), Integrity Advance also violated section 1036(a)(1)(A) the CFPA (Count VI). 12 U.S.C. § 5536(a)(1)(A) (providing that it is unlawful for any "covered person or service provider" to "commit any act or omission in violation of a Federal consumer financial law").

V. Argument on Remedies

The undisputed facts demonstrate that Enforcement Counsel is entitled to restitution, injunctive relief, and civil money penalties as remedies for Respondents' violations of law.

A. The ALJ Should Order Restitution

The ALJ can grant broad relief in this matter, including restitution. 12 U.S.C. § 5565(a)(2)(C). Here, Enforcement Counsel seeks legal restitution, which is a judgment imposing "a merely personal liability upon [Respondents] to pay a sum of money." *See FTC v.*

Commerce Planet, Inc., 815 F.3d 593, 601 (9th Cir. 2016) (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002)). Because Enforcement Counsel has established Respondents' legal violations, as discussed above, and the resulting harm to consumers, as discussed below, it "is entitled to judgment for that amount." *See Curtis v. Loether*, 415 U.S. 189, 197 (1974); *see also* Dan B. Dobbs, *Law of Remedies* at 12, § 1.2 (2d ed. 1993) (a "legal remedy" is awarded "as a matter of course when the right [is] established.").[11] The undisputed facts support a total award of restitution as to Integrity Advance of $132,580,041.06, of which Integrity Advance and Carnes are jointly and severally liable for $38,453,341.62.

The proper amount of restitution is "the full amount lost by consumers," and is not limited to "a defendant's profits." *Stefanchik*, 559 F.3d at 931; *accord FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997).[12] Restitution under the CFPA is determined using a two-step burden-shifting framework. *Gordon*, 819 F.3d at 1195. Enforcement Counsel bears the initial burden of proving that the amount it seeks approximates consumer loss or unjust gains. Once this threshold

[11] To the extent that the ALJ concludes that whether to award restitution is subject to her discretion, Enforcement Counsel has established that it is entitled to restitution because Respondents took money from consumers without telling them they would have to pay those amounts. Those violations caused consumer injury in that amount. *See, e.g. FTC v. RCA Credit Servs., LLC*, 727 F. Supp. 2d 1320, 1337 (M.D. Fla. 2010). Respondents' purported good faith or lack of intention to defraud are not appropriate bases to deny restitution and would undermine restitution's compensatory purpose. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975) (explaining that consideration of good faith in the context of Title VII's compensatory remedies would "read the 'make whole' purpose right out of [the statute]."); *Wirtz v. Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968) (denying restitution because of supposed lack of bad faith would undermine effective enforcement of the law); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994) (holding that it is legal error to deny restitution under FTC Act for reasons that are "contrary to the purposes of the Act").

[12] Although some courts have measured restitution by a defendant's unjust gains rather than consumers' losses, *see e.g., FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006), such a distinction is irrelevant here, where consumers made payments directly to Integrity Advance. *See id.* at 68 (explaining that unjust gains "will be equal to the consumer's loss" in cases where "the consumer buys goods or services directly from the defendant" but may differ in cases in which a consumer paid fees to a middleman).

showing has been made, the burden shifts to Respondents to demonstrate that the approximation overstates consumer loss or unjust gains. *Id.*; *see also, e.g., Febre*, 128 F.3d at 535. Summary evidence calculated by a non-expert can satisfy Enforcement Counsel's burden at summary disposition. *See, e.g., Febre*, 128 F.3d at 535; *FTC v. AMG Servs., Inc.*, No. 2:12-cv-00536-GMN-VCF, 2017 WL 1704411, at *12 (D. Nev. May 1, 2017), *aff'd sub nom. FTC v. AMG Capital Mgmt., LLC,* 910 F.3d 417 (9th Cir. 2018); *FTC v. NHS Sys., Inc.*, 936 F. Supp. 2d 520, 537 (E.D. Pa. 2013).

Here, where Respondents charged consumers more than was disclosed on Integrity Advance's loan agreements, it is reasonable to calculate consumer loss as the amount paid by consumers in excess of the total payments disclosed by Respondents. *See AMG Capital*, 910 F.3d at 427-28. Enforcement counsel has done that, arriving at its restitution figures based on calculations generated by Bureau data scientist Robert Hughes. EC-EX-097; EC-EX-102; Hughes MSD Decl.; Hughes PH Decl.; EC-EX-072; EC-EX-103. Hughes's testimony and declarations rely on Integrity Advance datasets that capture all Integrity Advance consumer payments (EC-EX-095; EC-EX-101), data dictionaries (EC-EX-080; EC-EX-081), and the NACHA Table of ACH Return Reason Codes (EC-EX-082). Taken together, Hughes's work sufficiently substantiates the specific monetary relief sought against Respondents.

In calculating the amount of harm, Hughes considered only consumers for whom Respondents withdrew more than the Total of Payments and rolled over the loan at least once. Hughes eliminated from his analysis loans where consumers paid less than the disclosed Total of Payments because those consumers arguably were not harmed by Respondents' conduct and their payments should not offset harm to consumers who paid more than what was disclosed.

Hughes also did not consider loans that did not roll over at least once because those consumers presumably repaid the amount actually disclosed.

Once Hughes isolated the appropriate set of loans, he calculated the amount each Integrity Advance consumer overpaid by taking the sum of the total amount paid over the Total of Payments amount in his or her respective loan agreement. EC-EX-103 at ¶ 9.[13] The total amount paid over the disclosed Total of Payments for all consumers was then derived by taking the sum of the total overpayments for these individual consumers who overpaid.[14]

Hughes's calculations reasonably approximate consumer losses in connection with Integrity Advance's TILA violations, where consumers were harmed in the amount they paid over the amount disclosed in the loan agreement. According to Respondents' payment data (EC-EX-101), the aggregate amount of these overpayments totals $132,580,041.06.[15] SMF ¶ 108. With respect to the related CFPA claim (Count II), the Bureau is pursuing CFPA claims only for violations that occurred on or after July 21, 2011, so the harm for that count is a subset of the harm identified for Count I. The amount paid by consumers over the disclosed Total of Payments

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

[14] Hughes's methodology resembles the methodology used by the FTC to measure restitution in the *AMG Services* case, where a payday lender's loan agreement violated TILA and was deceptive. *See AMG Servs.*, 2017 WL 1704411, at *12. There, an FTC data analyst determined AMG's unjust gains by isolating loans in which a consumer paid more than the disclosed total of payments (the principal and one finance charge), and for those loans subtracting the disclosed cost of the loan from the total amount paid by the relevant consumers. *Id.*

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

for loans originated by Integrity Advance on or after that date[16] totals $38,453,341.62.[17] SMF ¶ 110.

Consumers also suffered harm from Respondents' deceptive and unfair conduct relating to its disclosures of loan costs (Counts III and IV) to the extent they paid sums above what was disclosed in the Total of Payments section of their loan agreement. That amount is identical to Count II, and likewise overlaps with the harm quantified for Count I. Unlike Counts I and II, for which only Integrity Advance is liable, both Respondents are jointly and severally liable for the Count III and IV relief.

Finally, consumers who paid more than the full amount disclosed in the Total of Payments in their loan agreement also suffered harm when Respondents unfairly used remotely created checks to take additional funds from their bank accounts. Integrity Advance's consumer payment data (EC-EX-095; EC-EX-101) shows that Respondents used remotely created checks generated after July 21, 2011, to collect $115,024.50 from consumers in excess of what Integrity Advance had disclosed after consumers had revoked or stopped the company's authorization to withdraw funds from their bank accounts. SMF ¶ 138. To the extent these funds are not paid out

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[16] Loan origination dates are not explicitly captured in the Integrity Advance datasets, which only include consumer transaction data, *i.e.,* payments made from or to Integrity Advance. To ensure that all loan transactions connected to loans that had originated before July 21, 2011, were removed from consideration, any loans with first transaction dates prior to August 13, 2011, were removed from the calculation. Tr. II 128:13-129:19; EC-EX-097; SMF ¶ 109. As set forth in the Integrity Advance loan agreement, the first transaction on a loan occurs between 8 and 23 days after origination, so any loans with transaction dates that occurred fewer than 23 days after July 21, 2011, were not considered. Tr. III 36:4-25. This conservative approach reduces the restitution amount sought by Enforcement Counsel for the CFPA violations while ensuring that all the loans considered were connected to loans that originated on or after July 21, 2011. Tr. II 128:23-129:4; Tr. III 37:1-38:6.

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

as relief for violations of Counts I, II, III, or IV, Integrity Advance and Carnes are jointly and severally liable for returning them to consumers to remedy the violation alleged in Count VII.

Since there is no evidence in the record suggesting that these calculations overstate consumer harm, Enforcement Counsel has demonstrated that it is entitled to restitution in the amounts discussed above.

B. The ALJ Should Order Injunctive Relief

The CFPA permits the ALJ to order injunctive relief under 12 U.S.C. § 5565(a)(2)(G). Injunctive relief is proper here to remedy potential ongoing non-monetary consumer harm caused by Respondents' illegal conduct, including harms caused by any efforts to collect outstanding consumer debt and by Integrity Advance's furnishing of derogatory information to consumer reporting agencies. The ALJ should permanently enjoin Respondents, and any successors, from taking any action that would result in the collection, sale, assignment, or transfer of Integrity Advance debt owed by payday loan customers. The ALJ should order Respondents to make all reasonable and appropriate efforts to cause any consumer reporting agency to permanently delete any trade lines or collection accounts or any other information maintained on consumer reports furnished by Integrity Advance. Finally, Enforcement Counsel requests that the ALJ require Respondents to cooperate fully to assist the Bureau in determining the identity, location, and amount of restitution due to each consumer entitled to redress. Enforcement Counsel also seeks an injunction to prevent Respondents from committing any future violations of Federal consumer financial laws, including but not limited to, TILA, the CFPA, and EFTA.

C. The ALJ Should Order Civil Money Penalties

Enforcement Counsel requests civil money penalties ("CMPs") of $10,800,000 against Integrity Advance and of $7,200,000 against Carnes. Section 1055 of the CFPA provides that "[a]ny person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty pursuant to this subsection." 12 U.S.C. § 5565(c)(1). Penalties apply "for each day during which such violation . . . continues." *Id.* at (c)(2)(A-C). Civil penalties are available for all conduct occurring on or after July 21, 2011, the effective date of the statute. *See CFPB v. Mortg. Law Grp., LLP*, 420 F. Supp. 3d 848, 858-860 (W.D. Wis. 2019) (assessing civil penalties from effective date until the date defendants' unlawful practices ceased).

Between July 21, 2011, and July 9, 2013, Respondents engaged in three distinct practices that require the imposition of a penalty: (1) Respondents used a loan agreement that violated TILA (Count I) and section 1036(a)(1)(A) of the CFPA (Count II), and that was deceptive (Count III) and unfair (Count IV) due to its misrepresentation of the cost of Integrity Advance's loan product; (2) Integrity Advance violated EFTA (Count V) and section 1036(a)(1)(A) of the CFPA (Count VI) by requiring consumers to satisfy their loans though electronic repayment; and (3) Respondents unfairly used remotely created checks (Count VII) to debit consumers' accounts. Each of these practices continued throughout the entire period from July 21, 2011, until July 9, 2013.

The CFPA contains three penalty tiers keyed to the level of a respondent's scienter. Here, Enforcement Counsel seeks a first-tier penalty (the lowest tier), which is assessed "[f]or any violation of a law, rule, or final order or condition imposed in writing by the Bureau." 12 U.S.C. § 5565(c)(2)(A). The first-tier penalty permissible under the statute is $5,000 per violation per day. *Id.* Enforcement Counsel seeks full first tier penalties ($5,000 per violation per day) for each of these three practices pursuant to section 1055(c) of the CFPA. There were 720 days from July 21, 2011 through July 9, 2013, so the maximum CMP for each practice is $3,600,000 for each practice. Enforcement Counsel seeks $10,800,000 (the maximum CMP) for all three practices against Integrity Advance. Carnes should be penalized $7,200,000 (the maximum CMP) for the two deceptive and unfair practices (Counts III, IV, and VII).

The maximum penalties are appropriate in consideration of the mitigating factors. The CFPA directs that, within the appropriate tier, in determining the proper amount of any penalty to assess, the adjudicator "shall take into account the appropriateness of the penalty" with respect to certain factors, namely: "(A) the size of financial resources and good faith of the person charged; (B) the gravity of the violation or failure to pay; (C) the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided; (D) the history of previous violations; and (E) such other matters as justice may require." 12 U.S.C. § 5565(c)(3). An examination of these factors, as established by the undisputed material facts, does not support any mitigation of the penalties to be assessed against Respondents.

1. Financial Resources

Carnes testified that he received between twenty and twenty-five million dollars from the sale of the Hayfield companies. SMF ¶ 144. Carnes, as the sole owner of Willowbrook Marketing (the company that owned a controlling interest in Hayfield), also received [redacted]. SMF ¶¶ 10, 145, 146. He testified that more than 75% of Hayfield's profits were attributable to Integrity Advance in 2010, 2011, and 2012. SMF ¶¶ 141-143. Carnes also received an annual salary of $250,000 when he was CEO of Integrity Advance. SMF ¶ 139. The evidence presented at trial suggests that Integrity Advance currently may have little to no assets. Carnes testified that the company has "something in the neighborhood of a hundred dollars" in its bank account, Tr. I 142:13-18, while Hayfield has a balance of [redacted], Tr. I 145:19-146:4. This does not provide a reason to mitigate a penalty with respect to

Integrity Advance. The company's lack of assets can be explained by the fact that, (1) while it was operating, its parent company [redacted], SMF ¶¶ 145-146, and (2) it chose to liquidate assets by selling them to EZ Corp. SMF ¶ 8. Moreover, since Integrity Advance has ceased operations, there is no risk that a large penalty will put it out of business. Given this information, mitigation is not warranted on this factor.

2. Gravity of Violations

Respondents' violations are not minor or technical in nature. Respondents built Integrity Advance's business model entirely around a deceptive loan agreement that hid the true cost of the loan from consumers. Consumers entered into loan agreements with Integrity Advance expecting the cost of the loan to be the amount disclosed in the TILA box, only to discover that Integrity Advance would continue to withdraw money from their accounts every pay period, long after the consumer had understood the loan to be paid off in full, and sometimes after the consumer tried to cut off Integrity Advance's access to the account. Integrity Advance was able to continue to withdraw money from these accounts above the disclosed Total of Payments by both requiring consumers to satisfy their loans though electronic repayment and unfairly using RCCs when consumers withdrew their authorization for electronic repayment.

3. Severity of Losses

Respondents' violations are serious, pervasive, and hurt tens of thousands of consumers. During the time that Integrity Advance provided loans, consumers paid more than the Total of Payments disclosed in the TILA box more than 200,000 times. These consumers paid over $130 million over the disclosed amounts. For loans originated after July 21, 2011, over 55,000 resulted in payments above the Total of Payments disclosed in the TILA box. Those consumers paid a total of over $38 million above and beyond the disclosed amounts. After July 21, 2011, Integrity Advance used remotely created checks more than 600 times to obtain over $115,000 after consumers had revoked or stopped the company's authorizations to withdraw funds from their bank accounts. Given the large losses suffered by consumers due to Respondents' conduct, no mitigation is warranted under this factor.

4. History of Previous Violations

Since Integrity Advance has faced another public enforcement action, this factor does not support mitigation. As Respondents acknowledge, they were subject to a public enforcement action brought by the Attorney General for the State of Minnesota in 2012. *See* Respondents' Motion to Dismiss and/or for Summary Disposition on Grounds Limited to October 28, 2019 Order, at 17 (Nov. 15, 2019) [Dkt. 239]. The Minnesota Supreme Court affirmed an award of $7 million in damages and statutory penalties for Integrity Advance's "many thousands" of violations of Minnesota's payday-lending statutes. *State ex rel. Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 93, 96-97 (Minn. 2015). Even if the ALJ does not consider Minnesota's enforcement action, this factor would not support further mitigation, because it does not appear Integrity Advance ever operated in a lawful manner.

5. Penalty Requested

In consideration of all mitigating factors, the ALJ should order Integrity Advance to pay a $10,600,000 CMP and Carnes to pay a $7,200,000 CMP.

VI. Conclusion

Enforcement Counsel respectfully requests that the Administrative Law Judge grant its Motion for Summary Disposition in its entirety.

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Respectfully submitted,

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