UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY DISPOSITION**
INTEGRITY ADVANCE, LLC, and JAMES R. CARNES,	
Respondents.	

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I. Introduction

Respondents have failed to demonstrate that they are entitled to summary disposition. Lacking actual evidence in the record to support their positions, Respondents repeatedly rely on unsupported assertions, mischaracterizations of Enforcement Counsel's positions, or legal arguments that are irrelevant or erroneous. At bottom, Respondents cannot refute the gravamen of the Notice of Charges: that Integrity Advance did not disclose the actual costs of its loans, consumers were harmed as a result, and Respondent James Carnes knew this was happening and could have stopped it.

Respondents' motion, rather than negating Enforcement Counsel's claims, actually confirms the key facts supporting the Truth in Lending Act ("TILA") and Consumer Financial Protection Act ("CFPA") claims relating to the disclosures in Integrity Advance's payday loan agreements: Respondents disclosed the loan's finance charge, APR, and total of payments based on a single repayment, even though Integrity Advance automatically renewed the loan pursuant to default "auto-renewal" and "auto-workout" provisions in the loan agreement. The loan agreement did not inform consumers about the costs of the loan under the default operation of the loan agreement. These disclosures were material misrepresentations that were likely to mislead consumers acting reasonably. And Respondents' disclosure practices caused substantial injury that consumers could not reasonably avoid because Respondents hid the true costs of their loans from consumers. Respondents' motion presents no additional facts or legal arguments to rebut Enforcement Counsel's TILA or CFPA claims relating to their loan agreement disclosure. Indeed, Respondents spend a significant portion of their motion advancing irrelevant arguments—about the formatting of their disclosures, the number of signatures in the loan agreement, and the Delaware State Banking Commissioner—that the Administrative Law Judge

("ALJ") should summarily disregard. Summary disposition in Respondents' favor on these claims is unwarranted.

Similarly, Respondents' bare, conclusory arguments seeking summary disposition as to the unfairness of the use of remotely created checks flies in the face of the evidentiary record establishing that this practice was unfair. Enforcement Counsel's claim has never hinged on the legality of remotely created checks or the percentage of Integrity Advance consumers victimized by this practice. And, with respect to the Electronic Fund Transfer Act ("EFTA") claim, Respondents cite no compelling evidence to support summary disposition in their favor. The plain language of the agreement combined with the fact that 98.5% of initial payments were made via electronic fund transfers is sufficient evidence to preclude summary disposition in Respondents' favor.

Nothing Respondents assert entitles them to summary disposition on individual liability or even establishes a factual dispute that the ALJ must resolve before finding for Enforcement Counsel. Carnes is liable for Integrity Advance's deceptive and unfair practices because the unrefuted evidence establishes that he had the authority to control them and knew about them. Even if Carnes did not personally participate in or affirmatively approve Integrity Advance's practices (which Enforcement Counsel does not concede), that would not allow him to escape liability. Respondents' suggestion that Carnes cannot be held personally liable because he did not know that the practices were illegal is contrary to law.

And even though Integrity Advance's practices caused consumers to pay over $130 million more than it disclosed, Respondents argue that redress is not appropriate. But the facts compel restitution for consumers: Enforcement Counsel has demonstrated violations of law and established consumer injury that Respondents cannot rebut. No argument that consumers received the credit for which they applied or that Respondents did not knowingly violate the law or intend to deceive consumers provides a basis to withhold redress from them. Respondents also attempt to obfuscate the issue of remedies by moving for summary disposition on "actual damages" that Enforcement Counsel is not seeking. Enforcement Counsel properly seeks relief for all of the violations pursuant to 12 U.S.C. § 5565, not provisions of TILA and EFTA that apply to private litigants instead of federal agencies.

II. Factual Background

As described in Enforcement Counsel's Memorandum of Points and Authorities in Support of Its Motion for Summary Disposition filed on May 15, 2020, [Dkt. 276] ("EC MSD"), under the default operation of Respondents' loan agreements, Integrity Advance automatically rolled over a consumer's payday loan multiple times unless the consumer called to change the terms of the loan to pay it off in a single payment. EC MSD at 8; Enforcement Counsel's Statement of Material Facts in Supp. of Its Mot. for Summ. Dispos. (May 15, 2020) [Dkt. 277] ("EC SMF") ¶¶ 70-72, 78-79. Despite this, Respondents only disclosed the finance charge, APR, and total cost that would apply if the loan were paid off in a single payment. EC MSD at 8; EC SMF ¶¶ 89-92. But, as Respondents have acknowledged, only a small minority of Integrity Advance customers paid off their loans before they were automatically rolled over. *See* EC SMF ¶ 100.

Respondents conditioned their loans on preauthorized electronic fund transfers; consumers could not complete the online application or receive loan funds without agreeing to electronic repayments. EC MSD at 22-23, 24-25; EC SMF ¶¶ 112-114. Respondents also used remotely created checks to extract funds from consumers' accounts after the consumers had withdrawn their consent for electronic debits, despite the loan agreement containing only opaque, fine-print language mentioning the possibility of "checks drawn" on the consumer's account. EC MSD at 16; EC SMF ¶¶ 124, 132, 133.

Carnes was the President and Chief Executive Officer of Integrity Advance throughout the entire time it offered payday loans. EC MSD at 20; EC SMF ¶ 12. He had "ultimate authority" over the company, EC MSD at 20; EC SMF ¶¶ 40, 57, was extensively involved in the company's day-to-day operations, *see e.g.*, EC MSD at 20; EC SMF ¶¶ 15-16, 42-52, and had knowledge of the business practices at issue here, including that Integrity Advance's loans automatically rolled over resulting in additional costs that went beyond what was disclosed in the loan agreement. EC MSD at 21-22; EC SMF ¶¶ 95-107, 135-137.

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, which includes over $38 million for loans originated on or after July 21, 2011. EC MSD at 28-29; EC SMF ¶¶ 108, 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. EC MSD at 29; EC SMF ¶ 138.[1]

[1] Enforcement Counsel mistakenly stated in the Introduction and Factual Background sections of its brief in support of its motion for summary disposition that 1% of all Integrity Advance loans were paid off in full in a single payment, *see* EC MSD at 1, 4, and mistakenly stated in the Introduction that 99% of all Integrity Advance loans resulted in customers paying more than Integrity Advance disclosed. *See id.* at 1. In fact, 1% of all Integrity Advance loans consist of *renewed* loans where customers paid the *exact* amount disclosed in the TILA box, *See* Decl. of Robert J. Hughes in Supp. of EC May 2016 Mot. for Summ. Dispos. [Dkt. 87D] ("Hughes MSD Decl.") ¶¶ 7, 17, and 69% of all Integrity Advance loans resulted in customers paying more than Integrity Advance disclosed. *See id.* ¶ 5.

III. Summary Disposition Standard

In order to prevail at summary disposition, Respondents either must show that Enforcement Counsel has failed to produce evidence supporting its claims or must introduce evidence that negates Enforcement Counsel's claims. *See Carmona v. Toledo*, 215 F.3d 124, 132 (1st Cir. 2000), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To defeat Respondents' motion, Enforcement Counsel need not meet its ultimate burden, but only demonstrate that Respondents have failed to meet their burden. *See, e.g., Robinson v. Pezzat*, No. 15-7040, 2016 WL 1274044, at *6 (D.C. Cir. Apr. 1, 2016). Additionally, since Enforcement Counsel is the non-movant, the ALJ must view all evidence in the light most favorable to Enforcement Counsel. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

IV. Argument

A. Integrity Advance Violated TILA by Failing to Accurately Disclose the Costs of Its Loans (Counts I and II)

Enforcement Counsel has produced sufficient evidence to support its TILA claim and the related CFPA claim (Counts I & II), and Respondents' motion fails to introduce any additional evidence from the record that would negate Enforcement Counsel's claims. EC MSD at 8-10. Indeed, Respondents' motion makes clear that the parties largely agree on the pertinent facts surrounding the operation and disclosure of Respondents' loans. Respondents' Mot. for Summ. Disp. (May 15, 2020) [Dkt. 272] ("Resps. MSD") at 4-5, 9-11; EC MSD at 8; EC SMF ¶¶ 70-75. If a consumer failed to contact Integrity Advance three business days before the payment due date, Integrity Advance automatically renewed a consumer's loan pursuant to the auto-renewal and auto-workout provisions in the loan agreement. EC MSD at 8; EC SMF ¶¶ 70-75. But Respondents disclosed the finance charge, APR, and total of payments by assuming that the loan would not renew automatically. Resps. MSD at 10, 22-23; Respondents' Answer and Affirmative Defenses (Dec. 14, 2015) [Dkt. 21] ("Ans.") ¶ 26; EC MSD at 8; EC SMF ¶ 66. These are the same facts alleged in the Notice of Charges and assumed as true in the ALJ's order denying Respondents' motion to dismiss. Notice of Charges (Nov. 18, 2015) [Dkt. 1] ("Notice") ¶¶ 26, 27, 49-57; EC Opp. to Resps. Mot. Dismiss (Apr. 9, 2020) [Dkt. 264] at 2, 10; Ord. Denying Resps. Mot. to Dismiss (Apr. 24, 2020) [Dkt. 268] at 5.

The only new factual argument presented by Respondents concerns language in the loan agreement stating that a consumer must select a payment option. Resps. MSD at 23. But this just further serves to illustrate how misleading Integrity Advance's loan agreement was. Consumers were not, in fact, required to make a payment election because the default payment option was for auto-renewal and auto-workout payments, and as Respondents admitted, the company automatically renewed the loan if the consumer did not change the default payment option. Ans. ¶¶ 29-31. Indeed, Respondents' own data shows that consumers routinely rolled over their loans and paid more than Integrity Advance disclosed in the loan agreements' TILA boxes. *See* Decl. of Robert J. Hughes in Supp. of EC Aug. 2016 Post-Hearing Br. ("Hughes PH Decl.") [Dkt. 163B] ¶¶ 7, 8.

Respondents' motion also recycles their arguments about the format of their TILA disclosures and "post-consummation changes." Both of these arguments are irrelevant. Enforcement Counsel's TILA claim goes to the inaccurate contents of Integrity Advance's disclosures, not the format. And the post-consummation change regime is inapplicable to these facts. Integrity Advance designed its contracts at inception to automatically rollover and charge the consumer undisclosed sums. The fact that the customer does not contact Integrity Advance to "change the terms of the loan" simply is not a situation where the disclosure becomes inaccurate because of an event that *occurs after* the creditor delivers the required disclosures. *See* 12 C.F.R. § 1026.17(e); 12 C.F.R. pt. 1026, Supp. I, 1026.17(e) cmt. 1. If an Integrity Advance customer takes no action, and the loan therefore rolls over automatically, the customer has not breached any of his or her obligations under the terms of the loan. The loan is just operating according to and consistently with its default terms.[2] The disclosures were inaccurate when made.

Respondents also erroneously argue that Enforcement Counsel "conflate(s) 'default option' with legal obligation." Resps. MSD at 23. But that argument, for which Respondents provide no case law support, fails because the "default option" is in fact the legal obligation within the meaning of TILA. EC MSD at 8-10. The entire framework of Respondents' loan agreements is designed to allow Respondents to extract multiple payments from consumers: the agreement automatically includes rollovers unless the consumer takes additional action *after* signing the agreement and receiving the funds; and Respondents require consumers to authorize electronic fund transfers for *all* of the auto-renewal and auto-workout payments when they sign the loan agreements. EC SMF ¶¶ 70-72, 78-79, 112, 113, 115, 116. A court considering another loan agreement that automatically rolled over held that the disclosure of the APR, finance charge, and total payments based on a single payment violated TILA. *See FTC v. AMG Servs.,*

[2] Each case cited by Respondents on this issue is inapposite because it involves a party explicitly breaching an obligation after consummation of a loan. *Jasper Cty. Sav. Bank v. Gilbert* involves a consumer who, after becoming delinquent on a promissory note, protested the failure to include delinquency charges in the TILA disclosures. 328 N.W.2d 287, 291 (Iowa 1982). And in *Stein v. TitleMax of Georgia*, a magistrate judge recommended dismissal of a TILA claim where the lender permissibly charged a lien recording fee but then failed to actually record the lien and pay the fee to the state of Georgia. Case No. 19-cv-00669-WMR-WEJ, 2019 WL 5549265, at *9 (N.D. Ga. July 25, 2019). These cases are plainly factually distinct from the instant matter and provide no support for Respondents' argument.

Inc., 29 F. Supp. 3d 1338, 1343, 1345-46, 1354-55 (D. Nev. 2014), *aff'd sub nom. FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018).

Respondents essentially attempt to have it both ways. They want Integrity Advance to have received full authorization for the entire series of automatic rollovers it deducted from consumer accounts—otherwise, the company illegally took these payments without proper authorization—but they want to claim that the consumer was not legally obligated to make those payments because otherwise Integrity Advance violated TILA. Under Respondents' reading of the law, virtually any multi-payment loan with a pre-payment option could be disclosed as a single payment obligation if the creditor simply framed the installment payments as default rollovers. But the fact that consumers could pre-pay their obligation to Integrity Advance at a lower price makes the obligation no different than a mortgage that a consumer can prepay to minimize the amount of interest paid.

B. Respondents' Loan Agreements Were Deceptive (Count III)

As with the TILA claim, Enforcement Counsel agrees that its deception claim can be resolved at the summary disposition stage—Respondents' loan agreements were deceptive. EC MSD at 10-13. Respondents provided an incorrect TILA disclosure and never disclosed the true costs of their loans to consumers. *Id.*

Respondents have no plausible argument that Enforcement Counsel has failed to produce sufficient evidence to support its deception claim. Under both the CFPA and analogous FTC law, Enforcement Counsel 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 (9th Cir. 2016); *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006). As shown in Enforcement Counsel's motion, the record is replete with evidence that Respondents' misrepresentations regarding the costs of their loans were likely to mislead reasonable consumers—including most importantly the loan agreement itself, but also Dr. Hastak's expert report, and consumer complaints. *See* EC MSD at 10-13; Hastak Expert Report [Dkt. 87A] ("Hastak Rpt.") at 19-21; Decl. of John Marlow [Dkt. 87B, 87C] ¶¶ 6, 7.[3]

None of the facts or arguments introduced by Respondents negate Enforcement Counsel's deception claim. Respondents highlight various parts of the loan agreement that they allege explained how the loan worked and informed consumers that their loans were not meant for long-term use. Resps. MSD at 10-11. But these citations only serve to reinforce the deceptive nature of Respondents' loan agreement. For example, Respondents highlight the loan agreement language stating that "Your Payment Schedule will be: One (1) payment of [TOTAL_OF_PAYMENTS] due on [LOAN_DUE_DATE] ("Payment Due Date")." Resps. MSD at 10. This statement is false. In order to make one payment totaling the disclosed total of payments, a consumer had to call and change the loan terms, and in fact consumers making multiple payments collectively paid over $132 million more than Integrity Advanced disclosed in the TILA box on over 200,000 loans. Hughes PH Decl. ¶¶ 7, 8. Also, the language in the agreement stressing that payday loans are short-term products (without even explaining what short-term means) is irrelevant because that language says nothing about the cost of the loan and is misleading given that the product is designed to have a longer duration than what was disclosed and what consumers anticipated.

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[3] As explained in Enforcement Counsel's motion, 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. Dr. Hastak's findings and consumer complaints, while instructive on the question of whether disclosures were deceptive, are not critical. EC MSD at 10-13 & n.2.

Also irrelevant are the steps that Respondents allegedly took to "ensure that consumers understood . . . the loan for which they applied" and the fact that Respondents allegedly required consumers to sign the agreements in multiple places. Resps. MSD at 9. Respondents allege that company representatives "walked customers through the loan and answered questions." *Id.* at 9-10. But once again, Respondents do not allege or present any evidence that their representatives disclosed the actual costs of the loans when the default renewals are included, which is the heart of Respondents' deceptive practices. Similarly, more signatures cannot cure Respondents' failure to disclose accurate loan costs in the loan agreement. Indeed, Respondents have provided no evidence that consumers understood their loan terms with Integrity Advance.

1. Respondents' Loan Agreements Were Likely to Mislead Consumers

Respondents' motion asserts that Integrity Advance's "loan application process" and the "process through which consumers applied for and were extended credit" were not deceptive. Resps. MSD at 8, 9, 10. This is a strawman argument. While Enforcement Counsel does not endorse Respondents' loan application "process," the gravamen of its deception claim is that Respondents failed to disclose the loans' actual *costs*. Hence, Enforcement Counsel must show only that Respondents misrepresented the cost of the loans, which it has done by demonstrating that Respondents' representations and omissions regarding the costs were material and were likely to (and indeed actually did) mislead consumers. EC MSD at 11-13; EC SMF ¶¶ 93, 94. Respondents have offered no evidence—because none exists—that they provided consumers with the APR, finance charge, and total of payments for a loan that went through the default process. Respondents therefore cannot negate Enforcement Counsel's evidence.

As part of their argument that reasonable consumers were not likely to be misled by Integrity Advance's loan agreement, Respondents explain at length that the loan agreement was drafted by outside counsel and shared with Delaware banking regulators. Resps. MSD at 11. But neither of these facts, even if true, have any bearing on whether Integrity Advance's loan agreement disclosed the actual cost of its payday loans or whether the disclosures were likely to mislead consumers. And Respondents similarly miss the mark when contending that the existence of repeat Integrity Advance customers somehow proves that a reasonable consumer understood the loan agreement. Resps. MSD at 12-13. Whether a portion of Integrity Advance's consumers chose to take out a subsequent loan is irrelevant to whether Enforcement Counsel can show that the loan agreements were likely to deceive consumers, and Respondents have not introduced any evidence showing that repeat consumers themselves were not misled by the loan agreement. A loan agreement is likely to mislead consumers, and thus summary disposition is appropriate, where that loan agreement—like this one—is facially deceptive, *FTC v. AMG Capital Mgmt.*, 910 F.3d at 423-424; *see Cyberspace.com*, 453 F.3d at 1201, regardless of whether that agreement was drafted by attorneys, shown to a state regulator, or seen more than once by a consumer.

2. Respondents' Misrepresentations of the Cost of the Loans Were Material

Respondents argue that Enforcement Counsel has failed to 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 because Enforcement Counsel conducted no consumer survey and obtained no consumer testimony through depositions or at the hearing. Resps. MSD at 14. Respondents also suggest that the rollover provision was not material to a consumer's decision to obtain a loan because a certain percentage of Integrity Advance's customers had previously obtained a loan from Integrity Advance. *Id.* These arguments, however, once again misstate Enforcement Counsel's claims in this matter. The deception claim here does not center on the fact that Integrity Advance's loans rolled over; it centers on the fact that the *costs* of the rollovers were never disclosed even though the rollovers were automatically initiated by Integrity

Advance. Respondents have not even tried to argue that that cost is not material, as that assertion is belied by common sense and well-established case law. *See* EC MSD at 12.

3. Consumers' Complaints Confirm Respondents' Deceptive Practices

Finally, in an effort to undermine Enforcement Counsel's evidence, Respondents selectively quote Enforcement Counsel's expert to argue that the existence of consumer complaints is not evidence of the alleged unlawful conduct. Resps. MSD at 12. During his deposition, Enforcement Counsel's expert made the entirely non-controversial statement that consumer complaints do not provide a random sampling. *See* Hastak Dep. (Mar. 11, 2016) [Dkt. 100B at Exh. 13] at 139:16-18, 182:19-21. But Dr. Hastak also confirmed that complaints provide valuable information when considering Respondents' loan agreement. *Id.* at 182:17-18, 139:13-14. Enforcement Counsel has used complaints in exactly the manner suggested by Dr. Hastak, as a way of confirming that consumers were likely to be misled and deceived by Respondents' practices. There is no plausible argument that these complaints do not offer probative evidence of how consumers understood the loan agreement, even if they do not reflect a statistically representative sample. EC MSD at 10-13.

C. Respondents' Disclosure Practices Were Unfair (Count IV)

In order to prove unfairness under the CFPA, Enforcement Counsel must show (1) that Respondents' practices were likely to cause substantial injury to consumers, (2) that injury was not reasonably avoidable by consumers, and (3) that injury was not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c). In its motion for summary disposition, Enforcement Counsel presented evidence that Respondents provided incorrect TILA disclosures that did not state the actual costs that consumers would incur under the loan agreements. EC MSD at 3-4, 8-9. Indeed, there is no evidence in the record that Respondents ever told consumers the costs of the loans under the default operation of the agreements. Rather, there *is* evidence that Respondents instructed their vendors *not to tell* consumers the total cost of the loans and that consumers actually *were* confused about the cost of the loans. EC SMF ¶¶ 63, 93, 94. Respondents' failure to disclose these costs was likely to cause, and indeed did cause, substantial injury—namely the amounts taken out of their accounts beyond the amounts Respondents disclosed—that was neither reasonably avoidable nor outweighed by any countervailing benefit to consumers or to competition. EC MSD at 13-15. Hence, Respondents cannot argue that Enforcement Counsel has not submitted evidence sufficient to establish its claims, and their efforts to introduce facts to negate Enforcement Counsel's unfairness claim fail.[4]

1. Respondents' Practices Caused Substantial Injury to Consumers

Enforcement Counsel has proven that consumers were injured when Respondents withdrew more money from their accounts than the amounts Respondents disclosed, and that injury was a direct result of Respondents' failure to disclose the costs of the loans under their default provisions. EC MSD at 13-15. There is no doubt that this injury constitutes a substantial injury. Indeed, Respondents' data demonstrates that consumers paid $38,453,341.62 more than Respondents disclosed on loans originated on or after July 21, 2011, alone. EC SMF ¶ 110; Hughes PH Decl. ¶ 8(a). Monetary harm of this nature plainly constitutes substantial injury

[4] Respondents assertion that the facts underlying Enforcement Counsel's unfairness claim also underlie the deception claim is irrelevant. *See* Resps. MSD at 16. Respondents cite to no authority stating that the same facts cannot lead to both violations. Indeed, courts have found the same conduct to constitute both a deceptive and unfair practice under the FTC Act. *FTC v. Crescent Publ'g Grp., Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1367 (11th Cir. 1988) ("[W]hile a practice may be both deceptive and unfair, it may be unfair without being deceptive."). *Cf. CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530, at *19-21 (M.D. Pa. Aug. 4, 2017) (permitting both an unfairness and abusiveness claim premised on same underlying conduct).

under an unfairness analysis. *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).[5]

2. Respondents' Practices Were Not Reasonably Avoidable

Respondents argue that consumers' right to rescind the loan or prepay it means that consumers could have avoided any injury. Respondents fail to explain how the ability to prepay or rescind makes the harm from Respondents' failure to disclose the loan costs reasonably avoidable. Consumers cannot know that they should prepay a loan (assuming they have the means to do so) or rescind it when Respondents have not disclosed the true costs of that loan. It is well established that an injury is not reasonably avoidable if the consumer could not make a "free and informed" choice to avoid it. *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010). A consumer could not possibly make a "free and informed" choice about Integrity Advance's loans because Respondents' practices hid the costs of their default operation. The fact that consumers could take some action *after* a loan origination as a result of Respondents' unfair conduct does not alter that fact. *See*, *e.g.*, *FTC v. Direct Benefits Grp., LLC*, No. 6:11-CV-1186-

[5] Respondents state, with no reference to the record, that "consumers received the credit for which they applied," Resps. MSD at 17, and argue that "dissatisfaction" with the eventual price of the loan is not an actionable injury. *Id.* This fundamentally misunderstands the nature of Enforcement Counsel's claim. The unfairness of Respondents' practices and its loan agreement flows from the fact that the loan costs that existed at origination were not disclosed; it does not come from consumers using a product that was honestly disclosed and deciding afterwards that they were dissatisfied. Moreover, the caselaw cited by Respondents does not support their premise. In *Dzielak v. Whirlpool Corp.*, the court held that misrepresentations about dishwasher energy efficiency were actionable under New Jersey law. 26 F. Supp. 3d 304, 336 (D.N.J. 2014). The passage quoted by Respondents about "unmet expectations" is dicta. *See id.* at 355. Meanwhile, in *Mason v. Coca-Cola Co.*, 774 F. Supp. 2d 699 (D.N.J. 2011), the court held that Coca-Cola had not violated New Jersey law because it had accurately represented the ingredients in its soft drink. *Id.* at 703. Whether consumers were dissatisfied with a product that was accurately represented has no bearing on this matter, where it is undisputed that Integrity Advance *did not* state the actual default costs of its loans. EC MSD at 4-5.

ORL-28, 2013 WL 3771322, at *14 (M.D. Fla. July 18, 2013) (stating that "the fact that many customers were able to—eventually—obtain refunds from Defendant[ ] does not render the injury avoidable").

Furthermore, given Respondents' practices, there simply is no argument that either the ability to rescind or the ability to prepay would realistically enable a consumer to avoid the injury. First, a consumer could only rescind the loan within three days of receiving the funds, which is before the first payment is due and before the consumer would have any indication that Respondents planned to take more than the amount they disclosed. Resps. MSD at 17. Second, the fact that a consumer could try to change the payment options and prepay does not allow the consumer to make a free and informed choice to avoid injury. In order to avoid injury, consumers would have needed to pre-pay their loan in full before the first auto-renewal. At that time, though, there was no indication that Respondents' loans cost more than the disclosed amount. Indeed, consumers paying off their loan under the default operation of the agreements would not have paid more than the amount disclosed until approximately the sixth withdrawal. By then, even if a consumer realized Respondents had taken more than the disclosed amount and wished to fully pay off their loan, the consumer still would have owed virtually the entire loan principal. And if the consumer tried to stop the payments by revoking the ACH authorization, Respondents would have continued to extract money from the consumer via remotely created checks. EC SMF ¶¶ 123-133; EC MSD at 15-19.

Respondents further suggest that any injury to Integrity Advance's customers was avoidable because they had to sign the loan agreement in several places and because they were alerted to the loans' terms and conditions with "bold fonts and other elements." Resps. MSD at 18. But Respondents argument again sidesteps the core fact being asserted in support of

Enforcement Counsel's claims: that disclosure regarding the cost of the loan as stated in the loan agreement was false and deceptive. Requiring multiple signatures and bolding certain language does nothing to cure that defect. Respondents cite to nothing in the loan agreements, bolded or otherwise, that disclosed the actual costs of the loans or which otherwise would have allowed consumers to avoid the injury caused by Respondents' unfair practices.

Respondents cite several cases in support of their contention that affirmative consumer assent to the terms of a loan agreement makes injury avoidable, but only one of those cases involved an unfairness claim analyzing reasonable avoidability, *see Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012), and none of them involved a loan agreement with facially inaccurate or deceptive terms. *See id.*; *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 965-66 (N.D. Cal. 2007); *Nguyen v. Aurora Loan Servs., LLC*, 614 F. App'x 881, 884 (9th Cir. 2015); *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 973-74 (N.D. Cal. 2010). The four cases all involved situations where the court determined that the contracts did not include deceptive or inaccurate disclosures and where the consumers could have avoided injury by reading the terms of the contract. The situation presented here is much different, where the material terms of the loan agreement are facially inaccurate and the costs of the loan do not appear in the agreement.

Respondents also suggest that emails sent to consumers after consummation show that the unfair practice could have been avoided. Resps. MSD at 18-19. However, the email templates referenced by Respondents do not state the costs of the default auto-renewal and auto-workout process. Decl. of Richard J. Zack In Supp. of Respondents' Mot. for Summ. Disp. (May 15, 2020) [Dkt. 274, 274A] ("Zack Decl.") ¶¶ 4-5; Zack Decl. Exh. 3 (welcome mail template); Zack Decl. Exh. 4 (reminder email template). Hence, even assuming consumers received such emails—and there is no evidence in the record aside from self-serving testimony that Respondents always sent such emails, *see* Enforcement Counsel's Resp. to Respondents' Statement of Undisputed Facts in Supp. of Their Mot. for Summ. Disp. (June 4, 2020) ¶¶ 8, 9—it would not make the harm from the disclosures reasonably avoidable.

Respondents further allege that any harm was reasonably avoidable as to returning Integrity Advance customers "who already had seen and experienced the operation of the loan first hand." Resps. MSD at 19. But Respondents have put forth no evidence that any of those consumers actually did understand the costs of the loan renewal process and could have reasonably avoided the injury. And even assuming arguendo that the returning consumers reasonably could have avoided injury from their subsequent loans, those consumers could not reasonably avoid the injury from their first loans.

3. There Is No Evidence That Respondents' Unfair Practices Benefitted Consumers or Competition

Respondents' argument that they provided benefits to consumers in the form of "increased consumer options" is unsupported by the record and entirely irrelevant. *See* Resps. MSD at 19-20. Respondents' sole support for this assertion is an observation in a Bureau white paper that some consumers identified certain general benefits of payday loans. *See id.* Even if Respondents' citation to the Bureau's white paper supported the general point that payday loans can provide a benefit to consumers, whether a consumer in the abstract can benefit from a payday loan has no bearing on whether Integrity Advance's deceptive cost disclosures provided benefits to consumers that outweighed the harm they caused. And even if Respondents helped consumers find credit when other avenues were foreclosed to them, that does not justify failing to disclose the cost of the loans. There is no logical argument that the inaccurate disclosures somehow benefited consumers or competition, let alone outweighed the substantial injury identified above. Integrity Advance could have provided credit to consumers and properly disclosed the costs of that credit.

D. Respondents' Use of Remotely Created Checks Was Unfair (Count VII)

Enforcement Counsel has submitted evidence establishing that Respondents substantially injured consumers by using remotely created checks to continue withdrawing money from consumers' accounts after consumers had revoked ACH authorization or blocked ACH debits. EC MSD at 15-19; EC SMF ¶¶ 123-134, 138; Hughes PH Decl. ¶¶ 9-9a. Respondents' own data has established that Integrity Advance used remotely created checks 602 times on or after July 21, 2011, on consumers who had revoked or stopped their authorization for Integrity Advance to withdraw funds from their accounts and who had already paid an amount equal to the "Total of Payments" in the TILA box in the consumers' loan agreements. EC SMF ¶ 134 Tr. II 151:6-11; EC-EX-097. This action resulted in Integrity Advance obtaining $115,024.50 from these consumers, excluding all payments denoted as refunds or rebates. EC SMF ¶ 138; Hughes PH Decl. ¶¶ 9, 9a; EC-EX-097; Tr. II 152:15-153:1.

Such harm is not merely speculative, as Respondents contend. Resps. MSD at 21. It is direct, substantial injury suffered by consumers who were subject to Respondents' unfair practices relating to remotely created checks. It is money taken from consumer bank accounts that consumers were specifically trying to protect. 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., Neovi*, 604 F.3d at 1153); *see also FTC v. Ideal Fin. Sols., 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 clear, concrete financial harm when Integrity Advance used remotely created checks to take additional funds from their bank accounts.[6]

Respondents also contend that any injury suffered by its customers was outweighed by countervailing benefits to consumers or competition. Respondents suggest that because remotely created checks are a "lawful payment mechanism," and because Enforcement Counsel hasn't alleged that their use of such checks violates the Uniform Commercial Code, Integrity Advance's practices somehow benefit consumers and thus cannot violate the CFPA. Resps. MSD at 20. This is nonsense. Respondents cite to no actual benefit to consumers or competition, and the facts upon which they rely support Enforcement Counsel's claim that Integrity Advance used remotely created checks in an unfair manner. The fact that Respondents harmed its customers by using remotely created checks "sparingly," or that it shunted responsibility for actually imposing these debt collection practices onto a third party (over which Carnes exercised control), does not make the injury any less substantial or the practice beneficial to consumers or competition. *See* Resps. MSD at 20-21. Indeed, Respondents admit that remotely created checks were used precisely in the unfair circumstances that Enforcement Counsel challenges: to obtain payment from consumers who had withdrawn authorization and "refused to . . . set up alternate payment arrangements." Resps. Statement of Undisputed Facts in Supp. of Their Mot. for Summ. Disp. (May 15, 2020) [Dkt. 273] ("Resps. SUF") ¶ 62; *see also id.* ¶ 61.

Tellingly, Respondents do not contend that their use of remotely created checks was reasonably avoidable by its customers, or that its disclosures related thereto were clear or

[6] Although Enforcement Counsel maintains that Joseph Baressi's testimony (which the prior ALJ specifically requested) was neither improper nor prejudicial, the ALJ need not revive or consider Respondents' previously-filed motion to strike. Enforcement Counsel does not rely on Baressi's testimony in this opposition and has not and will not rely on it in support of its motion for summary disposition.

conspicuous. Instead, they rely on bare, unsupported assertions that their use of remotely created checks benefited and did not injure their customers. Respondents' hollow contention that the record does not support Count VII does nothing to negate the undisputed facts in the record to the contrary.

E. Integrity Advance Violated EFTA (Counts V and VI)

As established in Enforcement Counsel's motion for summary disposition, the undisputed facts show that Integrity Advance violated EFTA's proscription on compulsory repayments by electronic transfer. EC MSD at 22-25. There was no way for an Integrity Advance consumer to complete the online application process without signing the ACH authorization. EC SMF ¶ 113. Respondents admitted that consumers had to sign Integrity Advance's ACH authorization to receive a loan from the company, 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. The form authorized both the deposit and the withdrawals for payments via ACH. EC SMF ¶¶ 114-115. 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. EC SMF ¶¶ 115-117.

Respondents completely fail to negate Enforcement Counsel's claim. Although the actual evidence shows that 98.5% of initial repayments were made electronically, Hughes MSD Decl. ¶ 8, Respondents attempt to rely on an allegation from the Notice of Charges that *only* 95% of Integrity Advance consumers signed the ACH authorization, and point to no evidence in the record that consumers could receive a loan without signing the ACH authorization. Respondents contend that because these figures are not 100% it must mean that the electronic payments were not required. Resps. MSD at 24-25. To the contrary, any limited exceptions do not change the fact that Respondents' loan agreements required that consumers complete an ACH authorization in order to receive the loan. EC SMF ¶¶ 112-114. Each time that Respondents required a consumer to authorize electronic repayment as a condition of receiving credit, they violated EFTA. Indeed, the evidence demonstrates that Integrity Advance failed to offer consumers an alternative to granting electronic access as part of the origination, which is itself a violation of EFTA. *See FTC v. Payday Fin. LLC*, 989 F. Supp. 2d 799, 812 (D.S.D. 2013).

Respondents also focus on language in the ACH agreement stating that Integrity Advance accepted alternative forms of payment. Resps. MSD at 24. But that language does not cure the fact that Respondents required virtually every consumer to preauthorize electronic fund transfers, and the meaning of that language is certainly clouded by another clause stating that the ACH agreement "remains in full force and effect" for as long as the consumer owed money to Integrity Advance. EC SMF ¶ 112 at Exh. 1 (first loan agreement template); EC-EX-063 (second loan agreement template).

F. Integrity Advance's Delaware License Is Not Relevant

Respondents attempt to avoid liability for their unlawful acts by implying that Integrity Advance could not have had a Delaware lending license if Respondents were violating the law. Resps. MSD at 1, 3-4, 11, 28. This suggestion is irrelevant and untrue. Even if Delaware knew of Respondents' conduct and took no action, those facts simply would not be probative of whether Respondents violated Federal law as alleged in the Notice of Charges. The fact "that a defendant operated under a state issued license has no bearing on whether the defendant engaged in 'deceptive acts.'" *FTC v. USA Fin., LLC*, 415 F. App'x 970, 974 n.2 (11th Cir. 2011). And even approval of a defendant's conduct by a state regulatory agency is irrelevant in determining whether that defendant has violated federal law. *See Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1144 (9th Cir. 1978); *see also Spicer Accounting, Inc. v. United States*, 918 F.2d 90, 94 (9th Cir. 1990) (state administrative agency's determination regarding entity's tax status does not prevent federal government from reaching contrary conclusion for federal tax purposes).

Furthermore, Respondents point to no actual evidence regarding Delaware's review of Integrity Advance's practices at issue here—they point only to the existence of the license, statutory language about what Delaware *could* do generally, and Integrity Advance's submission of the loan agreement to the state regulators. *See* Resps. SUF ¶¶ 27-31, 34-38. But the Delaware Commissioner does "not approve the loan contract" as part of the licensing process. Tr. III 126:16-24. In fact, a representative of the Delaware State Bank Commissioner stated that for a non-bank lender like Integrity Advance, the office's practice was not to review their loan agreements for compliance with EFTA or the CFPA, Tr. III 149:1-3; Decl. of Christopher Albanese (May 25, 2016) [Dkt. 100B at Exh. 1] ¶¶ 10, 12 ("Albanese Decl."), and to review for TILA compliance only by determining whether there was a separate TILA box in the loan agreement, Tr. III 150:24-151:2, and by checking the lenders' APR calculation for mathematical correctness; *Id.* 153:5-6; Albanese Decl. ¶¶ 6-8. In addition, even if the APR calculations were inaccurate, that fact would only be one factor in determining whether a license would be granted or renewed. Albanese Decl. at ¶ 7. As of the hearing, the Delaware Commissioner had *never* denied a non-depository lender's application for a license, Tr. III 144:23-145:1, nor had it ever denied the renewal of a non-depository lender's license. *Id.* 129:25-130:16.

In addition, any suggestion by Respondents that Integrity Advance was an entity that complied with all applicable laws is belied by the evidence in the record. As Integrity Advance has admitted, various state regulators sent the company cease and desist letters asserting violations of state law. EC-EX-070 at 2-3 (Nov. 25, 2013 Integrity Advance Interrogatory

Response). Many of these letters centered on the fact that Integrity Advance was loaning in states where it did not have a license or was otherwise violating state law. *See e.g.*, Letter from the Kentucky Dept. of Financial Institutions (Dec. 8, 2011) [Dkt. 100B at Exh. 3] at 1; Letter from South Carolina Board of Financial Institutions (May 30, 2012) [Dkt. 100B at Exh. 4] at 1. Integrity Advance was also the subject of an enforcement action by the State of Minnesota Attorney General's office related to its failure to obtain a license in that state and its practice of automatically rolling over consumer loans. The Minnesota Supreme Court upheld a judgment for $7 million in statutory damages and penalties for Integrity Advance's violations of Minnesota's payday-lending statutes. *State ex rel. Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 96-97 (Minn. 2015).

G. Carnes is Individually Liable for Integrity Advance's Unfair and Deceptive Acts and Practices

An individual can be held liable for unfair or 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 misrepresentation, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016) (quoting *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). Respondents do not dispute that Carnes controlled Integrity Advance, *see* Resps. MSD at 27, and only challenge whether he possessed the requisite knowledge or reckless indifference. But none of Respondents assertions undercuts Carnes's clear admissions that he knew about Integrity Advance's illegal practices.

Establishing knowledge of a misrepresentation requires establishing "the requisite factual knowledge" of acts or practices that are deceptive. *See CFPB v. CashCall, Inc.*, No. CV 15-07522-JFW (RAOx), 2016 WL 4820635, at *11 (C.D. Cal. Aug. 31, 2016). It *does not* require evidence that the individual knew the acts or practices were illegal, *see id.* at *11-12, or evidence that the individual "intended to defraud" consumers. *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1102 (9th Cir. 2014); *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 320 (S.D.N.Y. 2008). Individuals can be held liable for any acts or practices that meet the elements of deception. *See CFPB v. Nationwide Biweekly Admin., Inc.*, Case No. 15-cv-02106-RS, 2017 WL 3948396, at *6-9, 12 (N.D. Cal. Sept. 8, 2017) (holding individual liable for deceptive statements that were "literal[ly] true" and had "an articulable basis in fact.").[7]

With respect to the loan agreement, Carnes admitted that he understood how Integrity Advance disclosed its loans as single-payment loans. *See* EC MSD at 21; EC SMF ¶ 96. He admitted that he understood that, by default, Integrity Advance rolled over loans repeatedly before putting them into an auto-workout. EC MSD at 21; EC SMF ¶¶ 97, 98, 99. And he admitted that he knew most Integrity Advance customers experienced rollovers, and that those consumers who rolled over would pay more than the amount disclosed in the loan agreement. EC MSD at 21; EC SMF ¶¶ 100, 101, 102. Carnes also admitted that he was aware of Integrity Advance's unfair practices in connection with remotely-created checks: he knew Integrity Advanced used remotely created checks when consumers had blocked access to their accounts, saw remotely creating checks being created, and stated they were likely printed on a weekly

[7] There is simply no support in the caselaw for Respondents' argument that individuals can only be held liable for misrepresentations or fraud that go beyond the elements of ordinary deception. Resps. MSD at 29. In any event, Enforcement Counsel has shown that Respondents' loan agreement included facially deceptive and false statements. *See* Sections IV.B, IV.C.2, *supra*; EC MSD at 10, 12. Thus, even under Respondents' invented standard for individual liability, Carnes is liable because of falsities in Integrity Advance's loan agreement.

basis. EC MSD at 22; EC SMF ¶¶ 135, 136, 137.[8] Thus, there can be no dispute that Carnes had "the requisite factual knowledge" of Integrity Advance's misrepresentations regarding the loans' costs or its unfair use of remotely created checks. *See CashCall*, 2016 WL 4820635, at *11.

In their motion for summary disposition, Respondents ignore these critical admissions, and argue that Carnes did not have the required knowledge because he (1) did not personally participate in any of the unfair or deceptive practices; and (2) believed, based on the advice of counsel and based on the State of Delaware's granting of a license, that Integrity Advance complied with the law. None of these reasons can overcome the admissions that entitle Enforcement Counsel to summary disposition on these claims, and they certainly do not entitle Respondents to summary disposition.

First, it isn't true that Carnes needed to draft, edit, revise, or substantively review the loan agreement template in order to know of the misrepresentations in it. Courts routinely hold individuals liable for deceptive materials even when they did not personally author the materials. *See, e.g., FTC v. World Media Brokers*, 415 F.3d 758, 764-66 (7th Cir. 2005); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 539 (S.D.N.Y. 2000); *cf. FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 770 (7th Cir. 2019) (holding individual liable for ROSCA violations where he controlled websites at issue and was aware of their content). For example, in *CashCall*, a district court held a lender's president had the "requisite factual knowledge to subject him to individual liability" for the lenders' deceptive conduct without relying on the individual's authorship or review of the deceptive communications because he knew the company was telling consumers

[8] Carnes's testimony regarding remotely created checks also disputes Respondents' suggestion that all decisions regarding remotely created checks were made at a third-party call center. Carnes testified that Integrity Advance created remotely created checks for the purposes of collecting consumer debt, Tr. I 235:24-236:3, and that it used "a package, or a module" in its software to print them at its Kansas City office. Tr. I 236:4-7, 236:16-22.

they owed certain payments, which wasn't true. 2016 WL 4820635, at *12. In fact, the single case that Respondents cite for their assertion that Carnes lacked the requisite knowledge supports just the opposite conclusion. In *Consumer Financial Protection Bureau v. Mortgage Law Group, LLP*, the court held that an individual who had the authority to control two companies was liable for the misrepresentations in the companies' retainer agreements with consumers because unrebutted evidence that he "reviewed the . . . initial retainer agreements and was aware of the general operations of the businesses" permitted the conclusion that "he knew or should have known . . . that the retainer agreement led consumers to believe that they would receive legal representation." 196 F. Supp. 3d 920, 946-47 (W.D. Wis. 2016). Here, Carnes's role is even more straightforward. The ALJ does not need to infer knowledge from Carnes's review of the loan agreement and can instead rely on Carnes's own admissions that he was aware of the loan agreement's misrepresentations.

Even if Enforcement Counsel needed to present evidence of Carnes's personal involvement in the creation or approval of the loan agreement, summary disposition in Respondents' favor still would not be merited because the evidence contradicts Carnes's self-serving assertion that he was not personally involved in substantively approving the loan agreement.[9] Indeed, the record shows that Carnes was the only Integrity Advance employee who could have plausibly reviewed and initially approved the loan agreement. In 2008, when Integrity Advance was developing its loan agreement and loan product, the company only had

[9] Without legal basis, Respondents urge the ALJ to subvert the summary disposition standard, and simply accept as true Carnes's testimony regarding his personal participation with the loan agreement despite contrary evidence. Resps. MSD at 27 n.6. The ALJ should not entertain this or Respondents' latest request to present new testimony. As the ALJ has already held, no change in the law that would justify supplementing the record and Respondents had reason to develop such testimony previously but declined to do so. *See* Ord. Denying in Part Resps.' Mot. to Open Record for a New Hr'g (Apr. 24, 2020) [Dkt. 269] at 8-9.

four employees—Carnes, Edward Foster (the general counsel), an IT person, and a receptionist. *See* EC Resp. to Resps. Statement of Undisputed Facts at ¶¶ 62, 64, 66. Foster testified that he was not responsible for the business decisions behind Integrity Advance's loan product and loan agreement. Tr. II 28:4-23; Tr. II 43:8-44:17. There is no evidence in the record to suggest that either the IT employee or the receptionist played any role in the approval of the loan agreement, and it would strain credulity that such an important task about the company's sole product would be delegated to those employees. This leaves Carnes as the only person who plausibly could have reviewed and approved the loan agreement before Integrity Advance started using it with customers.[10]

Respondents also argue that Carnes enlisted outside counsel to draft the loan agreement and suggest that "it is reasonable to infer that Mr. Carnes believed the Loan Agreement to be legally compliant." Resps. MSD at 27-28. This is no different than arguing that Carnes reasonably relied on advice of counsel. *See CashCall*, 2016 WL 4820635, at *12 (declining to consider individual's assertion that he "believed that the loans were payable and fully collectible based on the advice of counsel."). But as the ALJ has recognized and Respondents have previously conceded, whether Carnes relied on outside counsel's opinion is not a defense to individual liability here. *See* Order Denying Respondents' Motion to Amend Answer at 3 (Apr.

[10] As explained in Enforcement Counsel's motion for summary disposition, Carnes was, at a minimum, recklessly indifferent to Integrity Advance's misrepresentations. He had "ultimate authority "over Integrity Advance during the company's entire existence. EC SMF ¶¶ 12, 40, and the loan agreement was the operative document for Integrity Advance's only loan product, which generated millions of dollars of income for the company and for him. *See id.* ¶¶ 4-5, 140-143, 145-146. And he 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. *Id.* ¶¶ 95-105. Thus, there is no basis for granting Respondents' summary disposition as to his liability for the deceptive loan agreement.

24, 2020) [Dkt. 267]; *see also Cyberspace.com*, 453 F.3d at 1202; *CashCall*, 2016 WL 4820635, at *12 (C.D. Cal. Aug. 31, 2016); *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1102 (9th Cir. 2014). Thus, the fact that Carnes may have hired outside counsel to draft loan agreements is irrelevant to the question of his liability.[11]

Finally, Respondents' suggestion that Carnes is not liable due to an alleged reliance on Integrity Advance's Delaware lending license is misplaced. As an initial matter, any such reliance would go to Carnes's intent, which is not relevant to his liability. *See Grant Connect*, 763 F.3d at 1102; *United States v. Johnson*, 541 F.2d 710, 712 (8th Cir. 1976). Moreover, as explained above, Delaware's licensing and renewal process was not a comprehensive review for adherence to federal law, and Respondents have provided no evidence that they reasonably could have believed otherwise. *See* Section IV.F., *supra*.

H. The Bureau is Entitled to Restitution

As explained in Enforcement Counsel's motion for summary disposition, the ALJ should award restitution to Enforcement Counsel for Respondents' violations of law. *See* EC MSD at 25-30. The undisputed evidence shows that the Bureau is entitled to restitution because it has both proved violations of law and reasonably approximated consumers' losses and Respondents' unjust gains. *See Gordon*, 819 F.3d at 1195. Respondents, relying on inapplicable equitable principles, argue that any restitution is inappropriate because they acted with good faith and consumers received the benefit of the bargain. But neither reason supports denying restitution. First, Enforcement Counsel seeks legal restitution rather than equitable restitution, so equitable

[11] Respondents have previously disavowed that they are asserting that they reasonably relied on advice of counsel and declined to waive attorney-client privilege. *See* Tr. I at 230:11-24. Respondents should not now be permitted now to suggest for any purpose, whether it relates to liability or remedies, that Carnes's reliance on the work of outside counsel was reasonable.

considerations have no place in determining whether Respondents must pay restitution. Second, even if restitution here were discretionary, neither ground asserted by Respondents would support denying it.

Restitution here is mandatory because Enforcement Counsel seeks legal rather than equitable restitution.[12] *See* 12 U.S.C. § 5565(a) (authorizing the Bureau to grant "any appropriate legal or equitable relief," including restitution). Legal restitution is a judgment imposing "a merely personal liability upon [Respondents] to pay a sum of money," as opposed to equitable restitution, which seeks to recover traceable, "identifiable assets in [a wrongdoer's] possession." *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)). Unlike with equitable relief, there is generally no discretion to deny "legal" relief on any grounds. Indeed, the Supreme Court has held that while an equitable remedy is "committed to the discretion of the trial judge", for an award of damages "there is no comparable discretion" because that is not "equitable relief." *See Curtis v. Loether*, 415 U.S. 189, 197 (1974); *see also United States v. City of Hayward*, 36 F.3d 832, 839 (9th Cir. 1994) (citing *Curtis*, 415 U.S. 189); *EEOC v. Baltimore Cty.*, 904 F.3d 330, 332-33, 335-36 (4th Cir. 2018) (explaining that the remedy of back pay is a "discretionary *equitable* remedy" in the context of Title VII, but a mandatory legal remedy in the context of the

[12] Respondents mischaracterize Enforcement Counsel's past briefing to incorrectly assert that Enforcement Counsel is taking a new position that it seeks legal restitution. In its post-hearing brief, Enforcement Counsel did not characterize restitution as discretionary. Rather, it accurately described the ALJ's authority in administrative adjudication proceedings to award the CFPA's broad set of legal and equitable remedies, which includes legal restitution. *See* Enforcement Counsel's Post Hearing Brief at 31, 32 (Aug. 29, 2016) [Dkt. 162] (describing the ALJ's authority to award "any appropriate legal or equitable relief" available under 12 U.S.C. § 5565(a)(2), which includes restitution). Further, judicial estoppel cannot apply here given the status of the remand. In addition to not taking a position that is inconsistent or incompatible with any of its prior positions, Enforcement Counsel has not prevailed on any of its claims or obtained any remedies.

ADEA that a court must award upon the finding of liability). Rather, where a plaintiff seeking legal relief proves both a violation and resulting harm, it "is entitled to judgment for that amount." *Curtis*, 415 U.S. at 197; *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").

To be sure, the statute provides that the Bureau "shall have jurisdiction to grant" relief for violations of federal consumer financial law, not that it "shall grant" such relief. But nothing in the jurisdictional grant language overrides the principle that legal relief is mandatory once the violation and resulting harm have been established. *See Curtis*, 415 U.S. at 189-90, 197 (legal relief of damages was non-discretionary even though statute used permissive language in providing that courts "may" grant such relief). Both cases on which Respondents rely have no bearing on this matter because the courts there simply assumed, without actually confronting the issue, that awarding restitution was subject to their equitable discretion. *See CFPB v. Nationwide Biweekly Admin., Inc.*, Case No. 15-cv-02106-RS, 2017 WL 3948396, at *12 (N.D. Cal. Sept. 8, 2017), *appeal pending*, No. 18-15431 (9th Cir.); *CFPB v. CashCall, Inc.*, No. CV 15-07522-JFW (RAOx), 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018), *appeal pending*, No. 18-55407 (9th Cir.).

Even if the restitution that Enforcement Counsel seeks were subject to the ALJ's discretion, neither reason provided by Respondents would support denying restitution here. The suggestion that restitution is inappropriate because consumers received the benefit of their bargain is without merit, and, in any event, has been waived by Respondents.[13] Consumers

[13] The ALJ previously ruled that Respondents have waived this issue. *See* Ord. Denying in Part Resps.' Mot. to Open Record for a New Hr'g (Apr. 24, 2020) [Dkt. 269] at 9, n.18. Indeed, Respondents have not previously asserted on this basis that no restitution is appropriate, nor have they pointed to a change in the law that would justify making such an argument now. *See id.* at 5.

decidedly did *not* get the benefit of their bargain here. The bargain was that consumers would get a loan for a disclosed amount of total payments—but instead they got the loan for a far higher price. *See* EC MSD at 21. Even *CashCall* supports restitution under these facts. Although the court there denied restitution after concluding that consumers "received the benefit of their bargain—i.e., the loan proceeds," its decision turned on the fact that the loan agreements "plainly and clearly disclosed the material terms of the loans . . . including fees and interest rates." 2018 WL 485963, at *13. Under that reasoning, restitution is appropriate here because Respondents' loan agreement itself was deceptive. *See id.*; *see also FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 427-28 (9th Cir. 2018) (affirming award of $1.27 billion in restitution for use of a similarly-deceptive loan agreement).

Respondents' bare assertion that consumers must have received the benefit of their bargain because repeat customers took out multiple loans does not change this. Respondents cite to no evidence or authority that would support this proposition. *See* Resps. MSD at 32. Nor can they. Being a repeat customer is not evidence of customer satisfaction, nor is it evidence that the loans operated as disclosed, and courts have routinely rejected efforts to deny restitution to repeat customers based on the conclusory assertion that they were not deceived. *See, e.g., AMG Capital Mgmt.*, 910 F.3d at 425, 428 (explaining that the fact that a borrower is a repeat customer is not evidence "one way or another" that they "were actually deceived"); *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008) (explaining that a company cannot exclude from restitution repeat customers by merely speculating that they did not rely on material misrepresentations). If companies cannot exclude consumers from receiving restitution solely on the basis that they are repeat customers, there is simply no basis to flatly deny restitution to all customers.

Because Enforcement Counsel has demonstrated that consumers did not receive the benefit of their bargain, the Bureau is entitled to restitution even under Respondents' incorrect standard. It is therefore unnecessary to address the issue of Respondents' good faith. *See* Resps. MSD at 31 (arguing that Enforcement Counsel must establish either that Respondents intended to defraud consumers or that consumers did not receive the benefit of the bargain). In any event, even if Respondents acted in good faith, they still improperly took money from consumers without telling them they would have to pay those amounts. No equitable principle supports allowing Respondents to keep that money even if they thought they were acting within the bounds of the law. Denying restitution on the grounds that Respondents did not act in bad faith or reasonably relied on advice of counsel would flatly contradict the CFPA's purpose and thus be inappropriate. As the Supreme Court explained in *Albemarle Paper Co. v. Moody*, considering a defendant's good faith in the context of Title VII's compensatory remedies would render the remedy "a punishment for moral turpitude, rather than a compensation for workers' injuries" and "read the 'make whole' purpose right out of [the statute], for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'" 422 U.S. 405, 422 (1975). This reasoning applies to the CFPA, which authorizes relief to consumers, including restitution, without limiting it to those who have violated the law in bad faith. *See* 12 U.S.C. § 5565(a).[14] In fact, the CFPA provides that "[a]ny person that violates . . . any provision of Federal consumer financial law shall . . . pay a civil penalty," 12 U.S.C. § 5565(c)(1), including those who acted in good faith. *See* 12 U.S.C. § 5565(c)(2)(A) (establishing a penalty cap for those who violated the

[14] *See* S. Rep. No. 111-176, at 177 (2010) (explaining that this section "provides for relief for consumers").

law without doing so recklessly or knowingly).[15] It strains credulity that Congress would permit a person to avoid paying compensatory remedies to consumers on account of good faith while still authorizing penalties for the same conduct.

I. The Bureau Does Not Seek Actual Damages under TILA or EFTA

Respondents' arguments that they are entitled to summary disposition on the issue of actual damages for both the TILA and EFTA claims are nonsensical because Respondents do not request such relief. Resps. MSD at 34-35; Notice at 14-15 (Prayer for Relief).

Enforcement Counsel properly requested relief pursuant to 12 U.S.C. § 5565 for Integrity Advance's violations of TILA and EFTA. Notice at 14-15 (Prayer for Relief). That statutory provision provides that in an adjudication proceeding brought under Federal consumer financial law, the Bureau "shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law." 12 U.S.C. § 5565(a)(1). This proceeding is brought under Federal consumer financial law, 12 U.S.C. § 5563(a), and both TILA and EFTA are enumerated consumers laws, 12 U.S.C. §§ 5481(12)(C), (12)(O), and therefore Federal consumer financial laws, 12 U.S.C. § 5481(14). Thus, the ALJ in this matter has authority pursuant to § 5565 to order "any appropriate legal or equitable relief," including but not limited to all of the relief listed in § 5565(a)(2), for TILA and EFTA violations as part of her recommended decision. 12 U.S.C. §§ 5481(12)(C), (12)(O), (14); 5565(a).

Respondents' arguments regarding "actual damages" are nothing more than a red herring. Respondents' request that the Administrative Law Judge deny the Bureau actual damages under

[15] Of course, a person's good faith may provide a reason to mitigate any civil penalty. *See* 12 U.S.C. § 5565(c)(3)(A).

15 U.S.C. § 1640(a)(1) for the TILA violations and under 15 U.S.C. § 1693m(a) for the EFTA violations. Resps. MSD at 34-35. This argument is premised on two incorrect notions: that Enforcement Counsel's claims are governed by these provisions and that Enforcement Counsel has sought actual damages pursuant to these provisions. As noted above, Enforcement Counsel has sought relief under 12 U.S.C. § 5565, not any provisions of TILA or EFTA. In any event, the particular TILA and EFTA provisions that Respondent cite have no bearing on the Bureau's ability to seek relief at all because they govern actions brought in court by private litigants. As the ALJ has held, Enforcement Counsel's TILA claim is brought under 15 U.S.C. § 1607 rather than § 1640, and Enforcement Counsel's EFTA claim is brought under 15 U.S.C. § 1693o, not 15 U.S.C. § 1693m. *See* Order Denying Respondents' Motion to Dismiss (Jan. 24, 2020) [Dkt. 249] at 28, 29. Thus, the framework for actual damages to private litigants of TILA and EFTA claims, as outlined in 15 U.S.C. §§ 1640 and 1693m, is simply not applicable here.[16]

V. Conclusion

Respondents have failed to provide evidence that would justify summary disposition in their favor. Respondents have provided no evidence to refute the most basic fact in this proceeding—they provided loans to consumers that automatically renewed and never, through any means, disclosed the costs of those renewals to consumers. Respondents also fail to provide any evidence to counter the fact that they improperly required electronic access to consumer accounts, and when consumers blocked that access, they resorted to unfair and poorly disclosed

[16] In any case, courts have held that—despite Respondents' insinuations otherwise—government agencies do not need to prove individual damages in order to establish liability. "Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of the section." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993).

remotely created checks. Finally, Respondents cannot counter the fact that Carnes had authority over these practices and knew of them. Respondents' motion should be denied in its entirety.[17]

Dated: June 4, 2020

Respectfully submitted,

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[17] Enforcement Counsel respectfully submits that the issues raised by Respondents' motion are sufficiently clear and well-trodden to be resolved without oral argument. Enforcement Counsel stands ready, however, to present oral argument if the ALJ determines that it would be of assistance in resolving the motions.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June 2020, I caused a copy of the foregoing Enforcement Counsel's Opposition to Respondents' Motion for Summary Disposition, along with Enforcement Counsel's Response to Respondents' Statement of Undisputed Facts 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 Respondents' counsel at the following addresses:

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