**UNITED STATES OF AMERICA**
**Before the**
**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**ADMINISTRATIVE PROCEEDING**
**File No. 2015-CFPB-0029**

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| **In the Matter of:** | ) | **RECOMMENDED DECISION GRANTING ENFORCEMENT COUNSEL'S MOTION FOR SUMMARY DISPOSITION AND DENYING RESPONDENTS' MOTION FOR SUMMARY DISPOSITION** |
| **INTEGRITY ADVANCE, LLC and JAMES R. CARNES,** | ) | |
| **Respondents.** | ) | **Hon. Christine L. Kirby, Presiding** |

**APPEARANCES:**

Stephen C. Jacques, Benjamin J. Clark, Thomas Ward, Deborah Morris, and Alusheyi J. Wheeler for the Consumer Financial Protection Bureau

Richard J. Zack, Michael A. Schwartz, Christen M. Tuttle, and Saverio S. Romeo for the Respondents


**SUMMARY**

This Recommended Decision finds Respondent Integrity Advance liable for: Count I (Truth in Lending Act "TILA"); Count II (Consumer Financial Protection Act "CFPA" due to violation of TILA); Count III (CFPA-Deception with regard to Loan Agreement TILA disclosures); Count IV (CFPA-Unfairness with regard to Loan Agreement TILA disclosures); Count V (Electronic Funds Transfer Act "EFTA"); Count VI (CFPA due to violation of EFTA); and Count VII (CFPA-Unfairness with regard to use of remotely created checks "RCCs"). It finds Respondent James R. Carnes individually liable for Counts III, IV, and VII.

The decision recommends that Respondent Integrity Advance be held liable for restitution in the total amount of $132,580,041.06 and as a subset of that amount, both Respondent Integrity Advance and Respondent James R. Carnes be held jointly and severally liable for restitution in the amount of $38,453,341.62. It recommends that Respondents be ordered to cooperate in assisting the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress. Finally, it orders the imposition of a civil money penalty in the amount of $7,500,000.00 against Respondent Integrity Advance and in the amount of $5,000,000.00 against Respondent James R. Carnes.

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## I. **PROCEDURAL HISTORY**

On November 18, 2015, Enforcement Counsel ("EC") for the Consumer Financial Protection Bureau ("CFPB" or "Bureau") filed a *Notice of Charges* (Dkt. 1) alleging that Respondent Integrity Advance, LLC ("IA") violated TILA (Count I), EFTA (Count V), and the CFPA (Counts II, III, IV, VI, and VII). They alleged that Respondent James R. Carnes ("Carnes"), IA's Chief Executive Officer, violated the CFPA (Counts III, IV, and VII). The CFPB alleged that Respondents misled consumers regarding the terms of small dollar loans, wrongfully required electronic access to consumer bank accounts, and unfairly undermined consumers' ability to contest withdrawals from their accounts. (Dkt. 1 at 1).

The matter proceeded to a formal administrative hearing before Administrative Law Judge ("ALJ"), Parlen L. McKenna, who issued a *Recommended Decision* on September 27, 2016. (Dkt. 176). Both parties appealed the *Recommended Decision* to the Director of the CFPB ("Director"). (Dkt. 177, 178). However, based on two cases[1] that were pending before the D.C. Circuit Court of Appeals and the United States Supreme Court that had the potential to impact this matter, the Director placed the appeal in abeyance. (Dkt. 208, 210). On May 28, 2019, the Director remanded this matter to me for a new hearing and recommended decision, directing that I was to give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna. (Dkt. 216).

After adjudicating several issues and motions relating to the new hearing, on April 29, 2020, I issued a scheduling order, setting forth dates for the parties to file motions for summary disposition and related documents. (Dkt. 271). On May 15, 2020, the parties filed cross-motions for summary disposition.[2] EC seek summary disposition as to liability for all claims asserted in

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[1] *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) and *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

[2] Documents filed include: Dkt. 272, *Respondents' Motion for Summary Disposition*; Dkt. 273, *Respondents' Statement of Undisputed Facts in Support of Their Motion for Summary Disposition*; Dkt. 274, *Declaration of Richard J. Zack in Support of Respondents' Motion for Summary Disposition*; Doc. 274-A, *Exhibits to Zach Declaration*; Dkt. 275, *Enforcement Counsel's Motion for Summary Disposition*; Dkt. 276, *Enforcement Counsel's Memorandum of Points and Authorities in Support of Its Motion for Summary Disposition* (*PUBLIC*); Dkt. 276-A, *Enforcement Counsel's Memorandum of Points and Authorities in Support of Its Motion for Summary Disposition* (*UNDER SEAL*); Dkt. 277, *Enforcement Counsel's Statement of Material Facts in Support of Its Motion for Summary Disposition* (*PUBLIC*); Dkt. 277-A, *Enforcement Counsel's Statement of Material Facts in Support of Its Motion for Summary Disposition* (*UNDER SEAL*).

the *Notice of Charges* and for appropriate remedies relating thereto. (Dkt. 275). Respondents' Counsel ("RC") also seek summary disposition as to all counts in the *Notice of Charges* and thus deny that any remedies are appropriate. (Dkt. 272). On June 4, 2020, the parties filed opposition briefs. (Dkt. 278, 281). On June 10, 2020, the parties filed reply briefs. (Dkt. 283, 284). RC requested oral argument on its motion, which I hereby am denying because the parties have fully presented their positions in their multiple briefs.

On July 6, 2020, RC filed *Respondents' Notice of Supplemental Authority and Request for Reconsideration* (Dkt. 285), requesting that I reconsider my *Order Denying Motions to Stay and Dismiss* (Dkt. 257), which I issued on March 13, 2020, and dismiss the current matter. Due to the necessity of adjudicating this request and providing the parties the allotted time to file their briefs, it was necessary to delay issuance of the current order and exceed the 30-day issuance requirement set forth in the *Rules of Practice for Adjudication Proceedings*. *See* 12 C.F.R. § 1081.212(h). On August 3, 2020, I issued an *Order Granting Respondents' Request for Reconsideration In Part and Denying Respondents' Motion to Dismiss*. (Dkt. 288).

## II. <u>CFPB'S MOTION</u>

In their *Memorandum of Points and Authorities in Support of Its Motion for Summary Disposition*, EC assert that the undisputed facts show that Respondents failed to disclose the true cost of loans to consumers by disclosing the loan costs as if they were single-payment loans when, in reality, the default operation of the loans called for automatic, multiple rollovers that caused the costs to be significantly higher than disclosed, in violation of TILA [and the related CFPA provision] and the CFPA's prohibition on unfair and deceptive acts or practices. (Dkt. 276 at 1). They assert that Respondent IA violated the EFTA [and the related CFPA provision] by requiring consumers to preauthorize electronic fund transfers as a condition of receiving a loan. (*Id.*). They also assert that both IA and Carnes engaged in unfair and deceptive practices in relation to the disclosure of the loan costs and repayment procedures. (*Id.* at 1-2). They assert that Carnes bears individual liability for the alleged unfair and deceptive practices. (*Id.* at 2). Finally, they assert that the remedies in this matter should include restitution, civil money penalties, and injunctive relief. (*Id.*).

## III. RESPONDENTS' MOTION

RC assert that the undisputed facts show that the CFPB cannot support any of its allegations. (Dkt. 272 at 2-3). They assert that the terms of IA's Loan Agreement included all material terms and that a reasonable consumer would not have been misled or suffered substantial unavoidable harm. (*Id.* at 1). They also assert that the repayment procedures were not unfair but were legal and legitimate. (*Id.*). They assert that the undisputed facts do not establish that Carnes had the requisite level of knowledge or intent or that he engaged in "misrepresentations" or "fraud" as would be required to impose individual liability. (*Id.* at 2). They assert that since Respondents relied on the work of outside legal counsel and approval of Delaware state regulators to ensure that the Loan Agreement was legally compliant, that restitution should not be a remedy in this matter for any claims. (*See id.* at 1, 3). They further assert that "actual damages" cannot be recovered for Counts I, II, V, and VI. (*Id.* at 3).

## IV. LEGAL STANDARD FOR SUMMARY DISPOSITION

Pursuant to the CFPB's *Rules of Practice for Adjudication Proceedings* ("Rules"), 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 any 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). This standard is virtually identical to the standard for summary judgment set forth in Federal Rule of Civil Procedure ("FRCP") 56.

Neither Rule 212(c) nor FRCP 56 addresses the procedure for analyzing cross-motions for summary disposition. In this matter each party has filed its own motion for summary disposition, a response to the opposing party's motion, and a reply in support of its own motion. Although I have considered each party's motion and related documents in their entirety, I will address all the parties' arguments within the body of this one order rather than two separate orders, in the interest of efficiency.

In considering a motion for summary disposition, all evidence must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The party seeking summary disposition bears the initial burden of identifying the specific evidence that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party has met 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). Rather, the party opposing summary disposition must specifically show what facts create a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

A factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. *Anderson*, 477 U.S. at 247-48. A dispute is genuine if the evidence is such that a reasonable fact finder could return a decision for the nonmoving party. *See id.* at 251-52; *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 467 (3d Cir. 2005). "Material facts" are facts that may affect the outcome of the case. *See Anderson*, 477 U.S. at 248.

## V. FINDINGS OF FACT

Both parties have presented their own statements of undisputed facts and responses to the opposing party's statement of undisputed facts. After reviewing all of the statements and responses, I find that the underlying material facts necessary to decide these motions are not in dispute, although the parties differ as to their interpretation of what particular facts indicate. In cases where the parties have attempted to insert their own characterization of what a particular fact means, I have adhered to the exact language of the exhibit or testimony in question, rather than the party's interpretation of that language. "Where the operative facts are substantially undisputed, and the heart of the controversy is the legal effect of such facts, such a dispute effectively becomes a question of law that can, quite properly, be decided on summary judgment." *FTC v. Gill*, 71 F. Supp. 2d 1030, 1035 (C.D. Cal. 1999), *aff'd* 265 F.3d 944 (9th Cir. 2001).

After reviewing all of the parties' statements and the cited evidentiary support therefor, I find the following facts are undisputed, supported by the documentary evidence cited,[3] and deemed established:

**<u>Company Information</u>**

1. Integrity Advance was a Delaware licensed limited liability company that offered short term loans. Parties' Joint Stipulations of Fact (Dkt. 56) ("JSF") ¶¶ 2, 8.

2. Integrity Advance was formed on July 2, 2007. RX-007.

3. Integrity Advance originated loans from May 15, 2008 though December 2012. Its final loan transaction occurred on July 9, 2013. JSF ¶ 8; Reporter's Official Transcript of Proceedings Hearing ("Tr.") II 132:23-133:18.

4. Integrity Advance offered loans to consumers in amounts ranging from $100 to $1000. JSF ¶ 11.

5. Integrity Advance did not offer any products other than consumer loans. Tr. I 94:19-22.

6. Consumer loans were the sole source of Integrity Advance's revenues and operating profits. Tr. I 94:14-95:8.

7. Integrity Advance was a wholly owned subsidiary company to Hayfield Investment Partners ("HIP"). JSF ¶ 4; Tr. I 100:14-17; EC-EX-067.

8. Respondent James Carnes ("Carnes") was the Chief Executive Officer of HIP. Tr. I 94:7-12.

9. At some points in time, Carnes owned 52% of Hayfield Investment Partners. JSF ¶ 5.

10. Willowbrook Marketing LLC, which was wholly owned by Carnes, owned a majority share of Hayfield Investment Partners. EC-EX-067; Tr. I 102:8-10.

11. EZ Corp., Inc. purchased a set of assets of Integrity Advance in December 2012. Tr. I 237:19-238:13; Tr. II 70:22-23.

[3] Citations to Volumes I-III of the previous hearing transcripts refer to the final, sealed versions of the official transcripts of the Adjudication Proceeding Hearing held on July 19, 20, and 21, 2016 (Dkt. 150, 151, 152). Citations to "EC-EX-" and "RX-" refer to exhibits offered by EC and RC at the previous hearing. Citations to "EC SMF Exh." refer to documents that EC previously submitted as evidence in support of *EC's Statement of Material Facts in Support of its Motion for Summary Disposition as to Liability* (May 10, 2016) (Dkt. 88). Citations to "RC SMF Exh." refer to documents that RC submitted as *Exhibits to the Declaration of Richard J. Zack in Support of Respondents' Motion for Summary Disposition* (May 15, 2020) (Dkt. 274).

12. In order to obtain and maintain its lending license, Integrity Advance had to renew it each year with the Delaware State Bank Commissioner. Del. Code Ann. tit. 5 § 2207; *see also* RC SMF Exh. 7.

13. Elizabeth Quinn Miller ("Miller"), Senior Investigator for the Delaware Office of the State Bank Commissioner testified that her office would try to get the loan contract to have on file and they did not approve the contract. Tr. III 126:16-24.

14. Miller testified that in her review she would look to make sure that certain things like the four fed[eral] boxes (i.e., the TILA disclosures) were in the loan contract. Tr. III 127:1-18.

15. Miller testified that for license renewals, there is an abbreviated application process that involves sending in the abbreviated application and fee and unless they see a "horrendous problem," the license is renewed. Tr. III 129:19-130:10.

16. Miller testified that in reviewing an application, she checked to see if there was a separate Truth in Lending box and checked the Annual Percentage Rate ("APR") calculation for mathematical correctness. Tr. III 150:24-151:5; 151:14-153:6.

**Integrity Advance's Loan Application, Agreement, and Cost and Fee Disclosures**

17. Integrity Advance generated all of its loan contracts with consumers using one of two application and Loan Agreement templates. *See* EC SMF Exh. 1 (first application and Loan Agreement template); EC-EX-063 (second application and Loan Agreement template).

18. Integrity Advance's Loan Agreement did not change significantly between 2008 and 2013. Tr. II 38:20-39:1; *see also* EC SMF Exh. 1 at 3-8; EC-EX-063 at 2-8.

19. Carnes testified that over the years in which Integrity Advance offered loans, "[t]he product never changed." EC-EX-068 at 22:13.

20. Most Loan Agreements contained up to eight lines for consumers to sign or initial. EC SMF Exh. 1 at 3-8; EC-EX-063 at 2-8.

21. Integrity Advance, either directly or through a third-party vendor, serviced the loans that it originated. EC-EX-068 at 15:1-8, 193:2-19, 197:2-198:21; EC-EX-069 at 151:17-22, 172:13-22, 175:5-13. *See also* EC-EX-057 (invoice from Clearvox to Integrity Advance).

22. Integrity Advance's call center manual instructed call center representatives to tell potential applicants who asked about the cost for a loan, "It is our policy not to disclose cost information until you apply for a loan. Should you decide you do not wish to take the loan, you are under no obligation to do so." EC-EX-078 at 13.

23. Carnes testified that call center representatives called prospective customers with pending applications to explain the components of the loan and the pay down and payoff procedure. EC-EX-068 at 188:1-189:13.

24. Carnes testified that Integrity Advance sent customers a "welcome email" explaining the terms of the loan with a copy of the executed Loan Agreement attached. EC-EX-068 at 224:3-10; *see also* RC SMF Exh. 3.

25. Carnes testified that Integrity Advance sent payment reminder emails to alert customers that a payment was coming and what to do to pay off or pay down their loans. EC-EX-068 at 243:14-21; *see also* RC SMF Exh. 4.

26. The Loan Agreement included two tables of fees based on the loan amount, set forth in the Schedule of Charges and Fees. EC SMF Exh. 1 at 6-8; EC-EX-063 at 6-7.

27. The fee schedules that Integrity Advance used for VIP customers and for new and non-VIP customers did not change over time. Tr. II 15:24-25; Tr. II 48:14-22.

28. The Loan Agreement included a Truth in Lending Act disclosure box ("TILA box"). EC SMF Exh. 1 at 3; EC-EX-063 at 2; Answer and Affirmative Defenses to Notice of Charges Seeking Restitution, Disgorgement, Other Equitable Relief, and Civil Money Penalties (Dkt. 21) ("Answer") ¶ 25.

29. The TILA box was modeled on the sample provided in Regulation Z. *See* 12 C.F.R. pt. 1026, app. H (H.2).

30. The TILA box contained four individual boxes stating the amount of the loan APR, finance charge, amount financed, and total of payments. EC SMF Exh. 1 at 3; EC-EX-063 at 2; Answer ¶ 25.

31. The disclosures in the TILA box reflected calculations as if the loan were a single-payment, "payment-in-full" loan. Answer ¶ 26.

32. Some Integrity Advance loan contracts included a statement immediately below the TILA box stating that the payment schedule was "[o]ne (1) payment of" an amount equal to the loan amount plus a single finance charge. EC SMF Exh. 1 at 3.

33. Some Integrity Advance loan contracts contained a statement below the TILA box that read "Itemization of Amount Financed." EC-EX-063 at 2.

34. For a $300 loan to a new consumer, the "Itemization of Amount Financed" statement would read: "Amount given to you directly: $300.00. Amount Paid on Loan#: [XX] with us: $390.00." *See, e.g.*, EC-EX-014 at 1-2.

35. The Loan Agreement described two loan "Payment Options": "Payment in full" and "Renewal." EC SMF Exh. 1 at 3; EC-EX-063 at 3.

36. The Loan Agreement required consumers to select a payment option by telephone. *Id.*

37. The Loan Agreement required consumers to select a payment option no later than three days prior to their payment due date. EC SMF Exh. 1 at 3; EC-EX-063 at 3.

38. If a consumer did not contact Integrity Advance and choose "Payment in Full," Integrity Advance auto-renewed the consumer's loan. Answer ¶ 29; EC SMF Exh. 1 at 4; EC-EX-063 at 3.

39. If a consumer did not contact Integrity Advance and choose to pay the loan in-full prior to a payment due date, Integrity Advance automatically renewed the loan up to four times. Answer ¶¶ 29, 30; EC SMF Exh. 1 at 4; EC-EX-063 at 3.

40. When Integrity Advance auto-renewed a loan, it would debit an amount equal to the first finance charge from the consumer's account, but this amount would not be applied to the principal of the loan. EC-EX-070 at 9; EC SMF Exh. 1 at 4; EC-EX-063 at 3.

41. If a consumer did not contact Integrity Advance and choose to pay the loan in-full after four auto-renewals, Integrity Advance automatically placed the loan into "auto-workout" status. EC SMF Exh. 1 at 4; EC-EX-063 at 3.

42. During the auto-workout process, Integrity Advance would debit the consumer an amount equal to a finance charge plus $50 which would be applied to the loan principal. EC-EX-070 at 9; EC SMF Exh. 1 at 4; EC-EX-063 at 3.

43. During the auto-workout process, unless a consumer contacted Integrity Advance and chose to pay the loan in-full, Integrity Advance would continue to debit $50 along with a new finance charge on each payment due date until the loan principal was zero. *Id.*

44. Integrity Advance consumers whose loans auto-renewed paid more in finance charges than the amount disclosed in the "Finance Charge" in the TILA box. Answer ¶¶ 26, 31.

45. Integrity Advance consumers whose loans auto-renewed paid more than the amount that was disclosed in the "Total of Payments" in the TILA box. *Id.*

46. In order to pay only the amount disclosed in the "Total of Payments" in the TILA box, consumers had to contact Integrity Advance and affirmatively choose to pay the loan in-full. EC SMF Exh. 1 at 3-4; EC-EX-063 at 2-3.

47. Neither in the TILA box nor elsewhere did Integrity Advance's Loan Agreements disclose to consumers the amounts they would pay under the auto-renewal and auto-workout process. *See* EC SMF Exh. 1; EC-EX-063.

48. For a $300 loan that went through the auto-renewal and auto-workout process, the consumer would be debited $1,065.00, although the "Total of Payments" in the TILA box would state the amount as $390. Answer ¶ 31.

49. The Loan Agreement contained a promise to pay which stated, "You promise to pay us the Total of Payments according to the terms of our disclosures set forth below on the Payment Due Date and all other amounts owed to us under the Loan Agreement." EC SMF Exh. 1 at 4; EC-EX-063 at 4.

50. The Loan Agreement contained a "special notice" displayed in all capital letters, stating that "(1) This loan is designed as a short-term cash flow solution and not designed as a solution for longer term financial problems. (2) Additional fees may accrue if the loan is refinanced or 'rolled over.'" EC SMF Exh. 1 at 5; EC-EX-063 at 6.

51. The Loan Agreement contained a notice that, "A payday loan is not intended to meet long-term financial needs." EC SMF Exh. 1 at 6; EC-EX-063 at 6.

52. Edward Foster ("Foster") testified that returning customers were classified as "VIP" because they had successfully paid back their loans. Tr. II 15:19-22.

53. Since July 21, 2011, a total of 26,129 customers (48% of Integrity Advance customers since July 21, 2011) took out two or more loans with Integrity Advance. RX-021.

54. Of the 82,980 loans originated on or after July 21, 2011, 66% were loans to repeat customers. *Id.*

55. From May 2007 through July 2013, on 207,426 loans, Integrity Advance obtained $132,580,041.06 more from its customers than the amount disclosed in the "Total of Payments" boxes in their TILA disclosures, excluding all payments denoted as refunds or rebates. Decl. of Robert J. Hughes in Supp. Of EC's Aug. 2016 Post-Hearing Br. (Dkt. 163B) ("Hughes PH Decl.") ¶ 8; see also EC-EX-101.

56. Loans where the first transaction occurred on or after August 13, 2011, originated on or after July 21, 2011. Tr. III 36:4-37:25; Tr. II 128:13-129:4.

57. On 55,661 loans originated on or after July 21, 2011, Integrity Advance obtained $38,453,341.62 more from its customers than the amount disclosed in the "Total of Payments box in their TILA disclosures, excluding all payments denoted as refunds or rebates. Hughes PH Decl. ¶ 8a.

**<u>Integrity Advance's ACH Agreement and use of Remotely Created Checks</u>**

58. As part of the online application and approval process, Integrity Advance consumers were presented with an automated clearing house ("ACH") agreement that authorized

electronic debits from their bank accounts. EC SMF Exh. 1 at 9-11; EC-EX-063 at 8-10.

59. The same form was used to authorize both electronic credits to and debits from a consumer's bank account. *Id.*

60. The Loan Agreement and related documents stated that Integrity Advance used electronic means to disburse customers' loan proceeds but did not provide an alternate method of receiving loan proceeds. EC SMF Exh. 1 at 4, 9; EC-EX-063 at 3-4, 8.

61. Integrity Advance consumers could only receive loan proceeds by way of an electronic deposit which was authorized by the ACH authorization form. Answer ¶ 40.

62. The Loan Agreement stated, "In order to complete your transaction with us, you must electronically sign the Loan Agreement by clicking the 'I Agree' button at the end of the Loan Agreement, as well as all other 'I Agree' buttons that appear within the Loan Agreement and related documents that appear below." EC SMF Exh. 1 at 4; EC-EX-063 at 3-4.

63. Foster testified that "[t]here would be no provisional or initial approval of the application without additional contact with the customer" if all signatures, including those on the ACH authorization, were not completed. EC-EX-069 at 83:24-84:13.

64. Integrity Advance's loan documents did not contain any indication that consumers could obtain a loan from the company without completing and agreeing to the ACH authorization. *See* EC SMF Exh. 1; EC-EX-063.

65. Integrity Advance's loan documents did not explain what a consumer must do to complete the loan application without signing and agreeing to the ACH authorization. *See id.*

66. Approximately 95% of Integrity Advance's consumers signed the ACH authorization. Notice of Charges (Dkt. 1) ¶ 41.

67. The ACH authorization stated, "[y]ou agree that you may repay your indebtedness through other means, including by providing timely payment via cashier's check or money order directed to: Integrity Advance, 300 Creek View Road, Suite 102, Newark DE 19711." EC SMF Exh. 1 at 10; EC-EX-063 at 9.

68. Carnes testified that Integrity Advance "accepted all forms of payments besides cash that we could think of." Tr. II 97:12-24.

69. The ACH authorization form authorized Integrity Advance to withdraw auto-renewal and auto-workout payments. EC SMF Exh. 1 at 9-10; EC-EX-063 at 8-9.

70. The ACH authorization contained the language stating it "remain[s] in full force and effect" until a consumer's indebtedness to Integrity Advance is repaid. EC SMF Exh. 1 at 10; EC-EX-063 at 9; Answer ¶ 45.

71. The ACH authorization permitted consumers to revoke the authorization by contacting Integrity Advance directly. EC SMF Exh. 1 at 10; EC-EX-063 at 9.

72. The ACH authorization contained a provision that allowed Integrity Advance to execute remotely created checks ("RCCs"), also known as "demand drafts" or "check drafts," on consumers' bank accounts. *Id.*

73. The ACH authorization stated, "[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." This was the provision that authorized Integrity Advance to execute RCCs on consumers' bank accounts. EC SMF Exh. 1 at 10; EC-EX-063 at 9.

74. The RCC provision appeared only once in the Loan Agreement, at the end of a paragraph, in the middle of the ACH authorization section. *Id.*

75. The RCC provision was not emphasized by any bolded, underlined, capitalized, or enlarged font. *See id.*

76. The ACH authorization form contained lines for consumers to sign or initial at various places throughout the document, including three paragraphs below the RCC provision. *See* EC SMF Exh. 1 at 9-11; EC-EX-063 at 8-10.

77. Integrity Advance did not require consumers to sign or initial the RCC provision separately. *See* EC SMF Exh. 1 at 10; EC-EX-063 at 9.

78. The RCC provision did not explicitly refer to "remotely created checks," "RCCs," "demand drafts," "check drafts," or any other specific term. *See id.*

79. The RCC provision did not inform consumers that the checks to be drawn on a consumer's bank account did not have to be signed by the consumer. *See id.*

80. The RCC provision did not inform consumers that the checks to be drawn on a consumer's bank account could be submitted without prior warning to the consumer. *See id.*

81. Carnes testified that Integrity Advance used RCCs only when the consumer revoked the ACH authorization and the company was unable to set up alternate payment arrangements. Tr. II 84:15-85:11.

82. Integrity Advance used RCCs to withdraw funds from consumers' bank accounts in instances where consumers had revoked the company's authorization to electronically debit their accounts using the ACH network or stopped ACH withdrawals made by the company, and after those consumers had already paid more than the "Total of Payments" disclosed in the TILA box. Tr. II 142:15-148:4; Tr. II 152:15-153:11; EC-EX-097 at 4-5.

83. Even if the consumer's bank account had insufficient funds, Integrity Advance continued to attempt to use RCCs on consumers who had revoked the company's ACH authorization or stopped ACH debits by Integrity Advance. Tr. II 142:15-148:4; EC-EX-097 at 4; EC-EX-100.

84. Integrity Advance used RCCs in less than one percent of all loans during the post-July 21, 2011 period. EC-EX-097 at 1, 4.

85. Integrity Advance used RCCs 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. Tr. II 151:6-11; EC-EX-097 at 4.

86. On or after July 21, 2011, Integrity Advance used RCCs to obtain $115,024.50, excluding all payments denoted as refunds or rebates, from consumers who had revoked or stopped their authorization for Integrity Advance to withdraw funds from their accounts after having paid an amount equal to the "Total of Payments" in the TILA box. Hughes PH Decl. ¶¶ 9, 9a; EC-EX-097 at 5; Tr. II 152:15-153:1.

**<u>James Carnes's Authority, Control, and Participation in Integrity Advance's Business</u>**

87. Carnes founded Integrity Advance. EC-EX-068 at 7:12-13; Tr. I 94:3-4.

88. Carnes was the President and CEO of Integrity Advance. JSF ¶ 7.

89. Carnes was the president and chief executive of Integrity Advance throughout the entire time that it offered short term or "payday" loans to consumers. EC-EX-065; EC-EX-068 at 31:1-3.

90. Carnes testified that his active involvement with HIP, as well as with Integrity Advance, changed over time: he spent 75% of his time on all HIP businesses in 2008, 70% in 2009, 60% in 2010, 50% in 2011, and 80-90% in 2012 (which involved HIP's asset sale to EZ Corp.). Tr. II 67:8-12; Tr. II 68:23-69:9.

91. Carnes testified that of his time spent on HIP businesses, he focused a percentage on Integrity Advance: 66% in 2008, 50% in 2009, 25% in 2010, 15% in 2011, and 15% in 2012. Tr. II 67:8-12; Tr. II 69:10-71:3.

92. Foster and Bruce Andonian ("Andonian") testified that Carnes was ultimately the decision maker for Integrity Advance's business decisions. Tr. I 51:4-7; Tr. I 82:2-4.

93. Everyone that was involved with Integrity Advance as an employee reported directly or indirectly to Carnes. EC-EX-065; EC-EX-068 at 32:4-9; EC-EX-069 at 21:23-22:5.

94. Carnes made the final decision to hire all employees who were involved with Integrity Advance. EC-EX-068 at 40:24-25.

95. Carnes worked in the Kansas City office, where the senior executives worked, on a daily basis. EC-EX-068 at 23:9-11; 32:4-9.

96. Carnes had an open-door policy and was accessible to any Integrity Advance employee who wanted to talk. EC-EX-068 at 37:11-13.

97. Foster worked for Integrity Advance as its executive vice president, general counsel, secretary, and assistant treasurer. Tr. II 8:10-12.

98. Carnes directly hired Foster. Tr. I 96:15-16.

99. Carnes set Foster's salary. Tr. II 9:17-18.

100. Foster reported to Carnes. Tr. II 9:19-24.

101. Carnes spoke daily with Foster. EC-EX-069 at 22:19-24; EC-EX-068 at 35:15-17.

102. Carnes met with Foster "a few times a week" about Integrity Advance business. EC-EX-068 at 35:18-21.

103. Foster spoke to Carnes about Integrity Advance business if there "was a significant problem." Tr. I 215:5-18.

104. Foster discussed all of the HIP subsidiaries with Carnes as part of his job duties. While Foster and Carnes discussed Integrity Advance more often towards the beginning of the business and almost daily during setup and formation, the time spent on Integrity Advance matters eventually "became a very small percentage of time spent on things." Tr. II 10:2-11:9.

105. Timothy Madsen ("Madsen") worked for HIP as Vice President of Marketing for approximately five years, from August 2008 until some of Integrity Advance's assets were purchased by EZ Corp. Tr. I 28:4-8; Tr. I 29:6-12.

106. Madsen's job was to purchase leads and manage relationships with lead providers for Integrity Advance, as well as manage leads internally and coordinate with Integrity Advance's call center regarding leads. Tr. I 28:9-13; Tr. I 28:24-29:5.

107. Carnes and Foster together hired Madsen. Tr. I 98:4-6.

108. After he was originally hired, Madsen reported directly to Carnes. Tr. I 39:3-7.

109. Carnes spoke with Madsen on a daily basis. Tr. I 35:8-10.

110. Carnes spoke to Madsen about "the behavior of the lead purchase systems that we had in place, how well they were performing, our different partners, and any adjustments that we need to make sure that it backed out for us what it needed to from a business perspective." Tr. I 31:11-16.

111. The adjustments that Carnes spoke to Madsen about included how much Integrity Advance would pay for a lead and whether the company needed to change its underwriting model in order to purchase more leads. Tr. I 31:19-23.

112. Madsen and Carnes discussed lead volume conversion rates, long-term performance of sources, and default rates. Tr. I 47:13-21.

113. Integrity Advance had a dashboard system that was used to monitor the performance of leads. Tr. I 45:13-19.

114. Both Carnes and Madsen monitored and reported results from the dashboard. Tr. I 48:16-49:1; Tr. I 68:20-22.

115. Madsen had to consult with Carnes about changes in the credit scores Integrity Advance would accept from its customers if they departed by more than a couple of points from set parameters. Tr. I 33:15-21.

116. Madsen did not discuss Integrity Advance's Loan Agreement with Carnes. Tr. I 67:21-24.

117. Andonian worked for HIP as Director of Software Development for approximately two years, from February 2011 until May 2013. Tr. I 70:12-13; Tr. I 71:5; Tr. I 71:11-12.

118. Andonian reported directly to Foster, and ultimately to Carnes. Tr. I 72:5-6.

119. Andonian's job for Integrity Advance was to address issues with Integrity Advance's website and database. Tr. I 89:10-16.

120. In conjunction with his duties, Andonian attended weekly IT meetings with Carnes, Foster, and the project manager for Willowbrook, to discuss the different products under the Willowbrook/HIP umbrella. Tr. I 75:16-76:24.

121. "Most of the time" Carnes set the priorities for the tasks that were addressed at the weekly IT meetings. Tr. I 75:16-76:13.

122. Carnes would bring Integrity Advance matters to Andonian's attention when there were issues such as "if the data base was running slow or if we weren't accepting leads or the conversion rate was low." Tr. I 75:7-15.

123. Carnes had final say over the contents of Integrity Advance's website and approved the contents of the website at a high level. EC-EX-068 at 41:1-6; Tr. I 217:1-15.

124. Carnes directed Andonian to make changes to Integrity Advance's website to reflect adjustments in the credit score that the company would accept from its potential customers. Tr. I 77:19-78:5.

125. Carnes directed Andonian to remove states from Integrity Advance's website. Tr. I 77:1-3.

126. Andonian did not discuss the Loan Agreement with Carnes. Tr. I 87:24-88:12.

127. Carnes and Foster together hired Stephanie Schaller, Integrity Advance's Vice President of Decision Science. Tr. I 98:17-20.

128. Carnes directly hired George Davis, the Delaware Office Manager. Tr. I 98:24-99:1.

129. Carnes directly hired Hassan Shahin, Integrity Advance's Vice President of Technology. Tr. I 99:6-7.

130. Carnes and Foster together hired Mark Rondeau, Integrity Advance's Director of IT Operations. Tr. I 99:15-18.

131. As chief executive, Carnes had the ultimate say over Integrity Advance's policies and procedures. EC-EX-068 at 32:15-17.

132. Carnes testified that he "had ultimate authority over the company and making sure that it complied with the Delaware law." Tr. I 221:24-222:1.

133. Carnes ultimately made the call on what Integrity Advance would pay for a lead. Tr. I 35:1-6; Tr. I 32:10-16.

134. Carnes was the main decision-maker regarding Integrity Advance's underwriting policies. EC-EX-069 at 22:17-18; Tr. I 59:18-25.

135. Carnes was the signatory on the contract with the vendor that provided debt collection services to Integrity Advance. EC-EX-085 at 5.

136. Carnes was the signatory on the lead purchase agreement between Integrity Advance and T3 Leads. EC-EX-053; Tr. I 122:22-123:14.

137. Carnes was the signatory on the lead purchase agreement between Integrity Advance and Partner Weekly. EC-EX-054; Tr. I 126:17-127:13.

138. Carnes was the signatory on the ACH origination agreement between MoneyGram and Integrity Advance. EC-EX-056.

139. Carnes was an authorized signatory for the bank account used by Integrity Advance. EC-EX-055; Tr. I 141:16-20.

140. Integrity Advance's Loan Agreement was implemented by a third-party call center. Tr. I 133:16-135:23.

141. Carnes testified that he did not review, edit, revise, discuss, or see call center scripts. Tr. II 74:13-75:10.

142. Carnes had communications with the call centers used by Integrity Advance. Tr. I 64:3-6.

143. Carnes was involved in the decision to move Integrity Advance's business from one call center to another. Tr. I 64:13-19.

144. Invoices from ClearVox, LLC, a call center used by Integrity Advance, were directed to Carnes's attention. EC-EX-057; EC-EX-058.

145. When a call center used by Integrity Advance had an employee who was allegedly committing fraud, Carnes directed the resolution of the problem. EC-EX-087; Tr. I 177:3-178:3.

146. Consumer complaints were handled primarily by customer service representatives at the third-party call center or escalated to a call center manager. Tr. II 30:2-7.

147. Consumer complaints that were escalated beyond the third-party call center were ultimately the responsibility of Integrity Advance's legal group and Foster. Tr. II 30:10-16.

148. Carnes testified that he did not draft, edit, or revise Integrity Advance's Loan Agreement template or any version of the agreement. Tr. II 75:11-76:13.

149. Integrity Advance hired outside counsel to create loan documents that conformed with Delaware and federal law. Tr. II 95:10-13.

150. Carnes testified that he may have flipped through the Loan Agreement at some point after it had been prepared and before putting it into action. Tr. I 228:19-229:6.

151. Carnes testified that he did not discuss the Loan Agreement with outside counsel, that he did not recall Foster ever explaining Integrity Advance's Loan Agreement to him,

and that he did not recall specific conversations with Integrity Advance personnel about the Loan Agreement. Tr. I 227:10-12; Tr. I 231:11-12; Tr. I 232:14-17.

152. Carnes testified that he did not discuss Integrity Advance's Loan Agreement with the Delaware regulator. Tr. II 96:21-23.

153. Carnes testified that his attorneys had his approval to use the Loan Agreement. Tr. I 232:7-12.

154. Carnes testified that as the CEO, even though he did not give express approval to use the loan documents created by outside counsel, he knew they would be used and gave tacit approval for their use. Tr. II 96:2-14.

155. Carnes testified that as chief executive he was "ultimately approving everything." Tr. I 228:8-11.

156. Carnes knew that for a "fictional consumer . . . who had $100 loan, . . . their TILA disclosure would say $130" for the sum of payments. Tr. II 50:18-51:3.

157. Carnes knew that if a consumer "didn't call or email, and it was their first payment . . . they would be renewed." Tr. I 219:13-20.

158. Carnes knew that if the consumer did nothing on the next payday, the loan would be renewed again. Tr. I 219:21-23.

159. Carnes knew that an Integrity Advance loan would automatically rollover four times before it went to auto-workout. Tr. I 219:24-220:3.

160. Carnes testified that about ninety percent of Integrity Advance's loans experienced at least one rollover. He later testified that he did not have a specific number in mind at the time he was running Integrity Advance. EC-EX-068 at 227:13-16, 244:12-15; Tr. I 222:17-20, 225:18-21.

161. Carnes understood at the time Integrity Advance was in business that the majority of Integrity Advance's loans would experience at least one rollover. Tr. I 225:6-10.

162. Carnes understood that consumers who had their loans rolled over would pay more than the amount that had been disclosed in their TILA disclosures. EC-EX-068 at 245:10-25.

163. Carnes testified that a common consumer complaint was that they did not understand that their renewal payments would not reduce loan principal. EC-EX-068 at 243:1-12.

164. Carnes later testified that he was unaware of any consumer complaints. Tr. I 233:16-22.

165. Carnes had the authority to change Integrity Advance's fee structure. Tr. II 49:15-18.

166. Carnes knew that Integrity Advance used RCCs to withdraw money from the accounts of consumers who had withdrawn ACH authorization. EC-EX-068 at 219:7-18; Tr. II 84:6-85:11.

167. Carnes saw RCCs being printed using a printer in Integrity Advance's Kansas City office. Tr. I 236:10-11; Tr. I 236:20-22.

168. Carnes testified that RCCs were "probably printed weekly" and used to collect consumer debt. Tr. I 23:24-236:15.

**Respondents' Financial Resources**

169. Carnes received an annual salary of $250,000 when he was the chief executive of Integrity Advance. Tr. I 167:11-17.

170. Carnes received approximately twenty-five million dollars from the sale of Integrity Advance and other Hayfield entities to EZ Corp. Tr. I 239:4-8.

171. Carnes testified that Integrity Advance was the most profitable of HIP's companies and it contributed most of the income to HIP. EC-EX-068 at 88:24-89:6.

172. Integrity Advance contributed more than 75% of Hayfield's profits in 2010. EC-EX-068 at 92:19-93:9; Tr. I 114:11-25.

173. Integrity Advance contributed more than 75% of Hayfield's profits in 2011. EC-EX-068 at 93:10-14; Tr. I 115:8-21.

174. Integrity Advance contributed more than 75% of Hayfield's profits in 2012. EC-EX-068 at 93:15-16; Tr. I 115:22-116:2.

## VI. DISCUSSION AND FINDINGS

### A. COUNT I (TILA) AND COUNT II (CFPA) AGAINST RESPONDENT INTEGRITY ADVANCE

#### 1. Legal Standard

Count I alleges that IA inaccurately disclosed the terms of the legal obligation between the parties in violation of TILA. Count II alleges that by virtue of violating TILA, IA also violated the CFPA. TILA is set forth at 15 U.S.C. § 1601 *et seq.*, which states that its purpose is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing . . . ." 15 U.S.C. § 1601(a). The required creditor disclosures are set forth at 15 U.S.C. § 1638(a) and require, *inter alia*, disclosure of the amount financed; finance charge; finance charge expressed as an annual percentage rate; sum of the amount financed and the finance charge, which shall be termed the "total of payments;" number, amount, and due dates or period of payments scheduled to repay the total of payments; and descriptive explanations of the terms "amount financed," "finance charge," "annual percentage rate," and "total of payments."

TILA is implemented by Regulation Z, 12 C.F.R. pt. 1026. Regulation Z requires creditor disclosures be set forth "clearly and conspicuously in writing." 12 C.F.R. § 1026.17(a)(1). It requires that the disclosures "reflect the terms of the legal obligation between the parties." *Id.* § 1026.17(c)(1). It further states that "if any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided to the consumer, and shall state clearly that the disclosure is an estimate." *Id.* § 1026.17(c)(2)(i).

Under the CFPA, violations of an enumerated statute, such as TILA, by any "covered person"[4] are considered to be violations of the CFPA. 12 U.S.C. § 5536(a)(1)(A). Therefore, if Respondent IA is found to have violated TILA, then it will also have violated the CFPA.

### 2. CFPB's Position

EC assert in their *Memorandum of Points and Authorities in Support of Its Motion for Summary Disposition* that IA violated TILA because it failed to disclose consumers' legal

[4] In *EC's Memorandum of Points and Authorities in Support of Its Motion for Summary Disposition* (Dkt. 276), EC assert that IA and Carnes are "covered persons." I already resolved this issue, finding that Respondents are "covered persons" in my *Order Denying Respondents' Motion to Dismiss.* (Dkt. 268 at 4). I note that RC have not addressed this issue in *Respondents' Brief in Opposition to EC's Motion for Summary Disposition* (Dkt. 278), and I will not address it further.

obligation. (Dkt. 276 at 9). Specifically, EC assert that IA disclosed the cost of consumers' loans as if they were single-payment loans when, in fact, they were multi-payment, automatically renewing loans with much higher costs and payments that were authorized at the time the loan documents were signed. (*Id.* at 8-9). They assert that although consumers had a prepayment option, it did not lessen their legal obligation, just as the ability to prepay a 30-year mortgage does not lessen the initial obligation to make 360 monthly payments. (*Id.* at 9). They thus assert that IA's TILA disclosure failed to inform consumers of the correct APR, finance charge, and total of payments for the consumer's actual obligations under the Loan Agreement. (*Id.*). They assert that each of IA's Loan Agreements during its five years of operation included a false TILA disclosure. (*Id.* at 10). They assert that because IA violated TILA, it therefore also violated the CFPA. (*Id.*)

In *EC's Opposition to Respondents' Motion for Summary Disposition*, EC also assert that consumers were not *required* to make a payment election, as RC assert, because the default payment option was for auto-renewal and auto-workout payments, and the company automatically renewed the loan if the consumer did not change the default payment option. (Dkt. 281 at 6). They state that the Loan Agreement automatically included rollovers unless the consumer took additional action *after* signing the agreement and receiving the funds. (*Id.* at 7). Furthermore, they assert that IA required consumers to authorize electronic fund transfers for all the auto-renewal and auto-workout payments at the time they signed the Loan Agreements. (*Id.*). They state that the default option was the "legal obligation" within the meaning of TILA. (*Id.*). EC also state that the format of Respondents' TILA disclosures is irrelevant, because the claim goes to the inaccurate *content* of the disclosures, rather than to whether they were in the proper format. (*Id.* at 6).

In support of their position, EC rely on the case of *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). (*See* Dkt. 276 at 9-10; Dkt. 281 at 7-8; Dkt. 284 at 2-3).

### 3. Respondents' Position

RC assert in their *Motion for Summary Disposition* that IA clearly and conspicuously disclosed consumers' legal obligations at the time the loans were made. (Dkt 272 at 22). They assert that at the time the loans were made, a consumer owed only the amount reflected in the TILA "Total of Payments" box. (*Id.* at 22). They assert that the Loan Agreement also *obligated* the consumer to select a payment option and that under the Loan Agreement, when consumers did not select a payment option, the Loan Agreement *could* renew automatically (emphasis added). (*Id.* at 23). They assert that the "auto-renewal" and "auto-workout" provisions did not constitute the legal obligation between the parties at the time the loan was made and that the CFPB's allegations conflate "default option" with "legal obligation." (*Id.*). They explain that a "default option" is merely the consequence of a failure to meet an obligation, not the obligation itself. (*Id.*). They assert that the CFPB's allegations implicitly read into Regulation Z a requirement that a loan agreement include a disclosure that predicts post-consummation events and incorporates them into the TILA disclosure. (*Id.*).

RC further assert that the Loan Agreement disclosures used the appropriate format, labels, and terminology prescribed by Regulation Z, and therefore the company has a legal safe harbor and the Loan Agreement is presumptively compliant with the TILA "clear and conspicuous" requirement. (*Id.* at 22).

In *Respondents' Brief in Opposition to Enforcement Counsel's Motion for Summary Disposition*, RC further clarify that at the time the loans were made, the consumer had a legal obligation to pay the loan in full on the payment due date or set up an alternative payment option, including electing to renew the loan, by contacting IA. (Dkt. 278 at 4). Only when a consumer failed to take affirmative action by contacting IA and otherwise failing to pay the loan in full on the Payment Due Date would the loan be automatically renewed. (*Id.*). They state that at loan signing, customers were not obligated to renew their loans and thereby make a "series of payments." (*Id.* at 5).

In their O*pposition Brief*, RC also assert that the CFPB's reliance on the *AMG* case is misplaced because the loan agreement at issue in *AMG* differed in critical respects from IA's Loan Agreement. (*Id.* At 6-8). They also distinguish *AMG* in their *Reply Brief*. (Dkt. 283 at 2, 4-5).

In their *Reply Brief*, RC assert that if a consumer took no action and the loan therefore rolled over automatically, the consumer had breached their obligations under the terms of the loan which required them to select a payment option at least three business days prior to the Payment Due Date. (*Id.* at 5). They further assert that the Loan Agreement accurately disclosed that additional fees would be incurred if a loan were renewed. (*Id.* at 6).

### 4. Analysis

#### a. Was the consumer's legal obligation at the time of signing IA's Loan Agreement clearly and conspicuously disclosed?

In analyzing liability for Counts I and II, the relevant questions are: a) what was the consumer's legal obligation at the time of signing IA's Loan Agreement? and b) was the consumer's legal obligation "clearly and conspicuously" disclosed in the TILA disclosures section of the Loan Agreement?

In analyzing these questions, it is helpful to view exactly how IA's Loan Agreement form[5] set forth the "Federal Truth in Lending Disclosures":

[5] IA had two versions of the Loan Agreement Form, which I will refer to as Version 1 and Version 2. The two forms were very similar except the second version did not contain the line in the second box below the "Federal Truth In Lending Disclosures" Box which contains the language: "Your Payment Schedule will be: One (1) payment of [dollar amount] due on [date] ("Payment Due Date")." Both versions may be found in full at *Respondents' Exhibits to their Motion for Summary Disposition*, Dkt. 274-A, Exhibit 11, Appendices B and C. They are also contained in EC SMF Exh. 1 (Version 1) and EC-EX-063 (Version 2).

FEDERAL TRUTH IN LENDING DISCLOSURES

| ANNUAL PERCENTAGE RATE | FINANCE CHARGE | Amount Financed | Total of Payments |
|---|---|---|---|
| The cost of your credit as a yearly rate. CALCULATED_APR% | The dollar amount the credit will cost you. FINANCE_CHARGE | The amount of credit provided to you or on your behalf. LOAN_AMOUNT | The amount you will have paid after you have made all payments as scheduled. TOTAL_OF_PAYMENTS |

**Your Payment Schedule will be:** One (1) payment of **TOTAL_OF_PAYMENTS** due on **LOAN_DUE_DATE** ("Payment Due Date").
**Security:** You are giving a security interest in the ECHECK/ACH Authorization.
**Prepayment:** If you pay off early, you will be entitled to a refund of the unearned portion of the finance charge.

See the terms of the Loan Agreement below for any additional information about nonpayment, default, and prepayment refunds.

**Itemization of Amount Financed:** Amount given to you directly: **LOAN_AMOUNT** . Amount paid on Loan#: **APPLICATION_NUMBER** with us: **TOTAL_OF_PAYMENTS**.

**PAYMENT OPTIONS**: You must select your payment option at least three (3) business days prior to your Payment Due Date by contacting us at (800) 505-6073. At that time, you may choose:

(a) Payment in full: You may pay the Total of Payments shown above, plus any accrued fees, to satisfy your loan in full. When you contact us and choose this option, we will debit Your Bank Account (defined below) for the Total of Payments plus any accrued fees, in accordance with the ACH Authorization below; OR

(b) Renewal: You may renew your loan (that is, extend the Payment Due Date of your loan until your next Pay Date[1]) by authorizing us to debit Your Bank Account for the amount of the Finance Charge, plus any accrued fees. If you choose this option, your new Payment Due Date will be your next Pay Date[1], and the rest of the terms of the Loan Agreement will continue to apply.

**AUTO-RENEWAL**: If you fail to contact us to confirm your Payment Option at least three (3) business days prior to any Payment Due Date, or otherwise fail to pay the loan in full on any Pay Date, Lender may automatically renew your loan as described under (b) above, and debit Your Bank Account on the Payment Due Date or thereafter for the Finance Charge and any accrued fees. Your new Payment Due Date will be your next Pay Date[1], and the rest of the terms of the Loan Agreement will continue to apply. You must contact us at least three (3) business days prior to your new Payment Due Date to confirm your payment option for the Renewal. If you fail to contact us, or otherwise fail to pay the loan in full on your new Payment Due Date, we may automatically renew the loan until your next Pay Date.[1] After your initial loan payment, you may obtain up to four (4) Renewals. All terms of the Loan Agreement continue to apply to Renewals. All Renewals are subject to Lender's approval. Under Delaware law, if you qualify, we may allow you to enter into up to four (4) Renewals, also known as a "refinancing" or a "rollover". The full outstanding balance shall be due upon completion of the term of all Renewals, unless you qualify for Auto-Workout, as described below.

**AUTO-WORKOUT.** Unless you contact us to confirm your option for Payment in Full prior to your Fourth Renewal Payment Due Date, your loan will automatically be placed into a Workout Payment Plan. Under the Workout Payment Plan, Your Bank Account will automatically be debited on your Pay Date[1] for accrued finance charges plus a principal payment of $50.00, until all amounts owed hereunder are paid in full. This does not limit any of Lender's other rights under the terms of the Loan Agreement. All Workout Payment Plans are subject to Lender's approval

(EC SMF Exh. 1 at 3-4)

The material facts as to how IA's loan process operated are undisputed. The majority of consumers filled out a loan application online. If the loan was approved, IA would electronically deposit the funds in a bank account specified by the consumer. As shown above, the Loan Agreement contained four boxes ("TILA boxes") under the heading "Federal Truth in Lending Disclosures" which included a box each for the Annual Percentage Rate, Finance Charge, Amount

Financed, and Total of Payments. The amounts in these boxes were disclosed as if the loan were a single-payment loan. For example, in *Respondents' Exhibits to their Motion for Summary Disposition* (Dkt. 274-A, Exhibit 1), for a $500.00 loan the boxes would have contained the following figures: APR = 684.38%; Finance Charge = $150.00; Amount Financed = $500.00; and Total of Payments = $650.00.

As shown above, Version 1 of the Loan Agreement contained a box directly under the TILA boxes which informed the consumer that their payment schedule would be one payment of the amount of "Total of Payments" due on a specific date called the "Payment Due Date." The other version of the Loan Agreement did not contain this line.

Both versions of the Loan Agreement contained a paragraph under the TILA boxes with the heading "Payment Options" in bold, all capital letters. According to this paragraph, a consumer "must select" a "payment option" by calling IA at least three days prior to his or her Payment Due Date. The consumer "may" then "choose" to pay the loan in-full as a single-payment loan, in which case IA would debit the consumer's bank account for the "Total of Payments" as set forth in the "Total of Payments" box in the TILA disclosure, plus any accrued fees. The consumer could alternatively affirmatively "choose" to renew their loan, in which case their bank account would be debited for the amount of the finance charge, plus any accrued fees. The new "Payment Due Date" would then be the consumer's next pay date and consumers were told, "**the rest of the terms of the Loan Agreement will continue to apply**." (emphasis added). This sentence is vague and given that it is below the TILA boxes, the phrase, "the rest of the terms" could reasonably indicate the terms in the TILA boxes, i.e., the APR, Finance Charge, Amount Financed, and Total of Payments.

However, if the consumer did not affirmatively choose to pay the loan in full on the payment due date and took no further action, then IA would *not*, in fact, debit the consumer's account for the full amount of the loan and accrued fees, i.e., the disclosed "Total of Payments," on the payment due date. Instead, the loan would *automatically* renew, and the consumer's bank account would be debited for a finance charge, plus accrued fees. These payments would not be applied to paying down the loan's principal. The automatic renewals would happen up to four times, unless the consumer telephoned IA and affirmatively chose to pay the loan off in-full on the next payment due date. After the fourth renewal, if the consumer took no other affirmative action, the loan would automatically be placed into an "auto-workout" payment plan. Under the auto-workout payment plan, the consumer's bank account would be debited on the payment due date for the accrued finance charges plus a principal payment of $50, until all amounts owed on the loan were paid in full. The Loan Agreement does not disclose the terms of the loan (the APR, Finance Charge, Amount Financed, and Total of Payments) under the auto-renewal and auto-workout schedule.

Under this scenario of "auto-renewal" and "auto-workout," the loan costs to the consumer would be substantially higher than those disclosed in the TILA boxes. For example, as set forth in the *Notice of Charges* (Dkt. 1 ¶ 31) and admitted by Respondents in their *Answer* (Dkt. 21 ¶ 31), a consumer who took out a $300.00 loan that was disclosed in the TILA box as having a "Total of Payments" of $390.00 and took no further affirmative action to choose "payment in full" would, in fact, have paid $1,065.00 after all of the "auto-renewal" and "auto-workout" payments had been made. The Loan Agreement, however, does not disclose the amounts consumers would pay under the auto-renewal and auto-workout schedule.

EC argue that the loans were, accordingly, multi-payment, automatically renewing loans, with a prepayment option. (Dkt. 276 at 8). They allege that by disclosing the loans as if they were single-payment loans, Respondent IA failed to disclose consumers' legal obligations and thus violated the TILA and CFPA. (*Id.* at 8-9).

RC argue in opposition that IA properly disclosed the loans as one-payment loans due on a particular date. (Dkt. 272 at 22). They assert that consumers were "obligated" to select a payment option at least three days prior to the payment due date and that if they did not do so, then the loan "could" renew automatically. (*Id.* at 23).

I find, however, contrary to RC's assertion, that consumers were not, in fact, "obligated" to select a payment option. As IA's procedures demonstrate, if a consumer did not select a payment option, then the loan would automatically renew. Also, it is inaccurate to state that the loan "could" renew as RC state in their brief (*id.*) and imply in the Loan Agreement in the section entitled "Auto Renewal" (*see supra*) (stating that IA "may" renew the loan and that "if you qualify, we may allow you to enter into up to four (4) Renewals"). Rather, if the consumer did not make a specific payment selection, then the loan *would* renew without any further procedure necessary. This was the default procedure. If, as RC assert, the loan was, in fact, a single-payment loan, then, absent an affirmative selection of payment renewal by the consumer, the logical default procedure should have been for IA to debit the consumer's account for the "Total of Payments" as disclosed in the TILA box on the Payment Due Date.

RC also argue that the CFPB is implicitly reading into Regulation Z a requirement that any loan agreement include a disclosure that predicts post-consummation events and incorporates that prediction into the TILA disclosure. (Dkt. 272 at 23). They argue that the "auto-renewal" and "auto-workout" provisions did not constitute the legal obligation between the parties at the time the loan was made and were instead the consequence of the consumer's failure to meet the obligation of affirmatively paying the loan in full. (*Id.*). Accordingly, they implicitly assert that IA could not have known at the time of loan consummation whether a consumer would choose to pay the loan as a single-payment loan or to renew the loan.

With this reasoning, it appears that Respondent is attempting to have it both ways. On one hand, RC is arguing that IA properly disclosed the loan costs in the TILA boxes as a single-payment loan because that was the legal obligation. However, with this argument comes the implication that the only way the TILA disclosures are inaccurate is if consumers choose to do anything other than pay the loan in-full on their pay date. On the other hand, RC imply that they cannot predict how a consumer will choose to repay because choosing to pay in-full or choosing to renew the loan are equally valid options. However, if a single full payment was the consumer's "legal obligation" as RC assert, then it does not make sense why IA clearly presented it as a "payment option."

Furthermore, if IA truly could not predict how a consumer would choose to repay the loan, RC (and EC) ignore that Regulation Z provides for the possibility that a creditor may be missing some necessary information at the time a loan is consummated and a TILA disclosure is made. As stated above in the section discussing the "legal standard," Regulation Z provides that "if any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided to the consumer, and **shall state clearly that the disclosure is an estimate**." 12 C.F.R. § 1026.17(c)(2) (emphasis added). IA did not adhere to this mandate, although it could have clarified that the figures in the TILA boxes were for a single-payment loan. Since automatic renewal was the default procedure when a consumer did not affirmatively choose "Payment in Full," IA could have also set forth the costs based on the default operation of the loan and provided cost estimates in accordance with the "Payment Options" specifically referred to in the Loan Agreement. The undisputed testimony of Respondent Carnes shows that about 90% of IA's loans experienced at least one renewal, which reinforces the conclusion that automatic renewal was IA's default procedure for its loan product. (Tr. I 222:17-20).

RC also argue that because the TILA boxes were in the proper format and used the proper labels and terminology, that IA cannot be found liable for a violation. (Dkt. 272 at 22). However, under such reasoning, putting form entirely over substance, a creditor could hypothetically write any false terms that it chose in the TILA boxes, as long as they were in the proper format, without fear of liability. Such an interpretation would ignore the purpose of TILA, as stated above, which is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing . . . ." 15 U.S.C. § 1601(a); *see also Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) (stating purpose of TILA).

EC cite to the *AMG*[6] case in support of its position. (Dkt. 276 at 9-10; Dkt. 281 at 7-8; Dkt 284 at 2-3). While *AMG* does not constitute binding precedent, I do find the facts to be sufficiently similar for it to serve an instructive role. In *AMG*, the Federal Trade Commission ("FTC") brought action against payday lenders, their owner, and others alleging, *inter alia*, that high-interest, short-term payday loans did not accurately disclose the loans' terms and thus were deceptive under the

[6] *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).

FTC Act.[7] The defendants disclosed the loan terms in the TILA boxes as if the loans were single-payment loans. However, unless a consumer took affirmative action to decline the "option" of renewing the loan, the loan would automatically renew, resulting in significantly higher costs to the consumer than had been disclosed. The court found that renewing the loan was the default payment schedule and thus found that the defendants-appellants had violated the FTC Act by disclosing the terms as if the loan were a single payment loan. *AMG Capital*, 910 F.3d at 423-24.

Although RC highlight some factual differences between *AMG* and the current matter to argue that EC's reliance on *AMG* is misplaced (Dkt. 278 at 6-8), I do not find these differences to necessarily be significant. For example, RC argues that in *AMG* the "consumers could agree to the loan by clicking four boxes, without needing to read the terms and conditions," but in the current matter, IA "required that consumers read through the entire agreement and electronically sign . . . ." (*Id.* at 6-7). However, I fail to see how this is pertinent. A consumer in the current matter, just as in *AMG* potentially could have electronically signed or initialed the Loan Agreement without reading through the entire agreement. Similarly, RC argue that *AMG* consumers could only decline renewal of the loan through confusing email and hyperlink procedures, but in the current matter, consumers could simply call IA at a telephone number. (*Id.* at 7). However, RC did not cite to any evidence in the record demonstrating that this was, in fact, a simple procedure. RC also state that IA demarcated the auto-renewal and auto-workout provisions in bold, all caps font telling consumers that if they failed to contact IA then their loans may automatically renew. (*Id.*). However, without also clearly disclosing the cost implications of these provisions, this would merely seem to reinforce the impression to consumers that if they did nothing then the "Total of Payments" would eventually be deducted from their accounts, not that the costs would be significantly higher than the disclosed "Total of Payments."

In reply, EC argue that RC's analysis ignores the striking similarities between the loan agreement in *AMG* and IA's Loan Agreement. (Dkt. 284 at 2). They state that both companies calculated the amounts disclosed in the TILA boxes by assuming a single payment and, absent further action by consumers after signing, both companies automatically renewed the loans. (*Id.*). Also, both companies required consumers to select their payment option at least three business

[7] 15 U.S.C. § 45(a)(1).

days before the payment due date if they did not want the loan to auto-renew, and both had customers accept terms and conditions by electronically checking boxes, signing or initialing. (*Id.*). They state that both agreements contained renewal provisions directly below the TILA box. (*Id.*). They also assert that *AMG's* contract provided more information that IA's contract because it provided, in bold, an example showing how much in total finance charges a consumer who renewed a $200 loan four times would have to pay. (*Id.* at 2-3). I find these points to be accurate and relevant to the current matter.

Based on my review of the relevant portions of the Loan Agreement and consideration of the undisputed facts and parties' arguments, I find that Respondent IA disclosed multi-payment loans as if they were single payment loans. I thus find that Respondent IA failed to clearly and conspicuously disclose consumers' legal obligations, in violation of the TILA (Count I), and related CFPA provision (Count II).

## B. COUNT III (CFPA - DECEPTION) AGAINST RESPONDENTS INTEGRITY ADVANCE AND JAMES R. CARNES[8]

### 1. Legal Standard

Count III alleges that Respondents engaged in deceptive practices by providing consumers with TILA disclosures that were false and misleading in violation of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a)(1)(B). (Dkt. 1 at 11). 12 U.S.C. § 5531(a) states, in relevant part, that the Bureau may take action to prevent a covered person from engaging in a deceptive practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. 12 U.S.C. § 5536(a)(1)(B) states, in relevant part, that it shall be unlawful for a covered person to engage in any deceptive practice.

The term "deceptive" is not statutorily defined in the CFPA. However, courts interpreting CFPA claims asserting unfair, deceptive, and abusive conduct recognize that the FTC Act applies

[8] I will discuss the issue of Carnes' individual liability for Counts III, IV, and VII in a separate section of this recommended decision.

a "similar, if not identical, standard" in analyzing unfair and deceptive conduct. *See CFPB v. IrvineWebWorks, Inc.*, SACV 14-1967 JVS, 2016 WL 1056662, at *12 (C.D. Cal. Feb. 5, 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1193 n.7 (9th Cir. 2016); *CFPB v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 WL 7188792, at *14 (S.D.N.Y. Dec. 2, 2016).

Under both the CFPA and analogous FTC law, the Bureau must prove 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 Gordon*, 819 F.3d at 1192-1193; *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006); *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012).

**2. CFPB's Position**

EC assert that Respondents' Loan Agreements were facially deceptive because they disclosed a multi-payment loan as if it were a single-payment loan. (Dkt. 276 at 11). They assert that the TILA disclosure of the APR, amount of the finance charge, number of finance charges, total amount owed, and total number of payments are "material" representations. (*Id.*). They assert that Respondents' disclosures were "likely to mislead consumers acting reasonably under the circumstances" and that proof of "actual deception" is not required. (*Id.*) They assert that a court can grant summary judgment based on a facial analysis of a document. (*Id.* at 12). They further assert that although proof of actual deception is not required to establish a deception claim, the consumer complaints contained in the record demonstrate that many consumers were, in fact, misled. (*Id.*).

In their *Opposition Brief*, EC clarify that, although the record contains evidence such as Dr. Hastak's expert report and consumer complaints that reinforce the deceptive nature of Respondents' Loan Agreement, it is the language of the Loan Agreement *alone* that justifies a finding that Respondents' practices were likely to mislead reasonable consumers. (Dkt. 281 at 8-9). They assert that any alleged steps that Respondents took to ensure customers understood the loans are irrelevant and that there is no evidence in the record that representatives informed consumers of the cost of the loans when the default renewals were included, which is the heart of the deceptive practices claim. (*Id.* at 10). Similarly, they assert that additional signatures cannot cure Respondents' failure to accurately disclose the costs of the loans. (*Id.*)

In their *Reply Brief* in support of their motion, EC again emphasize that the cost of the loans was material, reasonable consumers would have been misled, and the language of the Loan Agreement alone justifies a finding that Respondents' practices were likely to mislead, regardless of other evidence. (Dkt. 284 at 3-4).

**3. Respondents' Position**

In their *Motion* and *Opposition Brief*, RC assert that the CFPB must establish that a "reasonable" consumer would be misled, not merely that the "least sophisticated consumer" would be misled. (Dkt. 272 at 9; Dkt. 278 at 9). They assert that Respondents took steps to ensure that consumers understood and appreciated the terms of the loan for which they applied, such as requiring signatures in multiple locations; having a customer representative walk customers through the loan; informing consumers that the payment schedule was one payment due on a specific date; providing a "special notice," in all capital letters, that the loan was a short-term cash solution and additional fees could accrue if the loan were refinanced or rolled over; and providing another notice that the loan was not intended to meet long-term financial needs. (Dkt. 272 at 9-10). They emphasized that the payment options and instructions were located directly below the TILA boxes. (*Id.* at 11).

RC also assert that Respondents' intent for the loan documents to comply with the law can reasonably be inferred from the fact that they hired outside counsel to draft the loan documents and were licensed by Delaware banking regulators, with annual renewals of their license. (*Id.*). They assert that consumer complaints are insufficient to prove violations of the law and the CFPB did not put on testimony from any consumers at the hearing. (Dkt. 278 at 10). Furthermore, they state that the CFPB's expert witness, Dr. Hastak, did not talk to any consumers or rely on complaints, and explained that complaints are not representative of IA's customers. (Dkt. 272 at 12; Dkt. 278 at 10). RC also argue that IA's high rate of repeat customers establishes that a reasonable consumer understood the Loan Agreement. (Dkt. 272 at 12-13; Dkt. 278 at 11-12; Dkt. 283 at 2).

**4. Analysis**

Although I have found above that IA violated TILA and the related provision of the CFPA, the portion of the CFPA addressing deceptive practices requires that different elements be proved to establish liability. Specifically, the CFPB must establish that the representations in question were "material." If the CFPB can establish that the representations were "material," it must then also establish that the material representations were likely to mislead consumers "acting reasonably under the circumstances."

**a. Were the TILA disclosures "material representations?"**

Several courts have discussed the definition of what makes a representation "material." A representation is "material" if it is "likely to affect the consumer's decision to buy the product or service." *FTC v. Int'l Computer Concepts, Inc.*, No. 5:94cv1678, 1995 WL 767810, at *3 (N.D. Ohio Oct. 24, 1995). Stated differently, "[a] misleading impression created by a solicitation is material if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Cyberspace.com*, 453 F.3d at 1201 (internal quotation marks and citation omitted).

In the context of TILA, the Fifth Circuit has held that because TILA's purpose is "to promote the informed use of credit by assuring a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him . . . [a] material disclosure, then, relates to information that would affect the credit shopper's decision to utilize the credit." *Bustamante v. First Fed. Sav. & Loan Ass'n of San Antonio*, 619 F.2d 360, 364 (5th Cir. 1980) (internal quotation marks, alterations, and citations omitted). The Eleventh Circuit has stated that in the context of TILA, "any understatement of the finance charge is a material non-disclosure, although the possibility of a *de minimis* exception has not been ruled out." *Steele v. Ford Motor Credit Co.*, 783 F.2d 1016, 1018 (11th Cir. 1986). The court analyzed Fifth Circuit precedent and concluded that those cases support "the proposition that any understatement of the finance charge is material *because* any understatement would be of some significance to a reasonable consumer." *Id.* at 1019. They held that "cost would likely be of prime importance to most reasonable consumers shopping for loans." *Id.* at 1020.

RC argue that the evidence does not establish that the possibility of loan renewals was material to a consumer's decision-making at the time they entered into a loan agreement with IA. (Dkt. 272 at 14). They further argue that IA's high rate of repeat customers shows that the automatic renewal provision was not material to a consumer's decision to obtain a loan. (*Id.*).

EC respond to this argument by stating that the deception claim does not center on the *fact* that IA's loans renewed, but rather on the fact that the *costs* of the renewals were never disclosed, even though the renewals were automatically initiated by IA. (Dkt. 281 at 11). They note that Respondents have not even tried to argue that cost is not material, as that assertion would be belied by common sense and well-established case law. (*Id.* at 12).

I find that RC is missing the crux of the materiality issue. It is, indeed, the *cost* of a loan renewal that is the issue here and not the *possibility* of a loan renewal. Certainly, if the loans in this case had renewed with no additional cost or *de minimis* cost to the consumer and simply extended the payment due date, there would be no issue of whether the renewals were material. However, that is not the case here, where customers incurred substantial additional costs due to loan renewals.

Also, RC have not explained how the high rate of repeat customers shows that the automatic renewal provision was not material to the customer's decision to obtain a loan, as they assert. (Dkt. 272 at 14). They cite no authority for this position. A similar argument regarding the motivation of repeat customers was made in the *AMG* case. There the defendants-appellants introduced an expert witness to attempt to explain what motivated repeat borrowers to take out multiple loans. The court found that there were other plausible explanations for a repeat customer's behavior besides that put forth by the expert witness and that a speculative analysis of repeat customers' motivation did not, in fact, establish what influenced their behavior. *AMG*

*Capital*, 910 F.3d at 425-26. The court highlighted a lack of "evidence that indicates one way or another whether repeat customers were actually deceived." *Id.* at 428. I find that to also be true in the current matter.

Similarly, the Northern District of Georgia, in response to the defendants' argument that damages should be reduced by the amount of sales to repeat customers, noted that "the fact that the customers' experiences played a role in their purchasing decisions does not mean or even imply that the customers did not also rely upon the representations in the advertisements when making their subsequent purchases." *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008). Like the Ninth Circuit in the *AMG* case, the court also highlighted a lack of evidence supporting the defendants' position, noting that "defendants do not introduce any evidence of what actually influenced the customers' decisions to reorder the products; instead, they merely speculate that it was the customers' experiences rather than the advertisements." *Id.* The court ultimately concluded that since the FTC met its burden in proving the misrepresentations, it could presume that consumers actually relied upon the advertisements even for subsequent purchases and that defendants would therefore have to introduce evidence demonstrating the absence of reliance. *Id.* (citing *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993)).

I find that while both sides speculate as to what motivated a repeat customer's behavior, neither party has established what actually motivated a repeat customer to take out a subsequent loan. Therefore, if I conclude that EC have met their burden in proving the deceptive nature of the loans, I will presume that consumers actually relied upon the deceptive disclosures even for subsequent purchases. *See id.*

Based on the case law discussed above, particularly those cases involving TILA, I find that the credit terms including the APR, finance charge, and total of payments disclosed in the TILA boxes were "material" representations to consumers taking out loans. RC do not provide a plausible explanation as to why the cost of credit would not be material to consumers who were already in the financial position of seeking out a payday loan, and they have introduced no convincing authority in support of such a position.

**b. Were the representations likely to mislead consumers acting reasonably under the circumstances?**

The next issue in determining liability is whether the material representations were "likely to mislead" consumers "acting reasonably under the circumstances." Under FTC case law, "[a representation] may be likely to mislead by virtue of the net impression it creates even though the [representation] also contains truthful disclosures." *Cyberspace.com*, 453 F.3d at 1200; *see also FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) ("Deception may be found based on the net impression created by a representation."); *Int'l Computer Concepts*, 1995 WL 767810, at *3 ("In determining the message conveyed by a representation, it is the overall net impression that counts. Fine print or ineffective disclaimers do not change the message conveyed if the overall net impression is different."). Furthermore, "[t]he deception need not be made with intent to deceive; it is enough that the representations or practices were likely to mislead consumers acting reasonably." *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006).

The Ninth Circuit summarized a series of cases in which they and other courts analyzed various advertisements to determine whether they were deceptive based on the net impressions they created. *Cyberspace.com*, 453 F.3d at 1200-01. Factors that were noted include the appearance and repetition of certain words, inclusion of fine print that conveys a different message than the overall advertisement, placement of fine print, and the predominant visual message of an advertisement compared to the accompanying verbal message. *See id.*

Additionally, "while consumer surveys conducted by independent experts may arguably constitute the best way to establish consumer understanding . . . , such surveys are not the exclusive form of probative evidence of public perception." *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 (D.C. Cir. 1985). And "[p]roof of actual deception is unnecessary to establish a violation of [the FTC Act's prohibition on deceptive acts or practices]." *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979); *see also FTC v. Commerce Planet, Inc.*, 642 F. App'x 680, 682 (9th Cir. 2016) ("The FTC Act does not require a showing of actual deception; a showing that a practice is *likely* to deceive will suffice.").

As RC highlight (Dkt. 272 at 9), the "CFPA's prohibition against using deceptive acts or practices uses a 'reasonable person' standard rather than a 'least sophisticated consumer' standard" like the Fair Debt Collection Practices Act. *CFPB v. Weltman, Weinberg & Reis Co.*, No. 1:17 CV 817, 2018 WL 3575882, at *3 n.1 (N.D. Ohio July 25, 2018). The reasonable person standard is higher than the least sophisticated consumer standard. The latter "is to be considered uninformed, naïve, and trusting, but also possessing reasonable intelligence, and capable of making basic logical deductions and inferences." *Id.* at *3. An FTC case analyzing the deceptiveness of an advertisement noted that "[a]n interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers." *ECM BioFilms, Inc. v. FTC*, 851 F.3d 599, 610 (6th Cir. 2017) (quoting FTC Policy Statement on Deception, 103 F.T.C. 174, 177 n.20 (1984)).

RC argue that the "process" through which consumers applied for and were extended credit was not deceptive under the CFPA because Respondents took steps to ensure consumers understood and appreciated the terms of the loans for which they applied. (Dkt. 272 at 9). Specifically, they assert that applicants were required to sign the Loan Agreement in multiple locations and that a customer representative walked customers through the loan and answered questions. (*Id.* at 9-10). They assert that the Loan Agreement clearly indicated to consumers that the loans were required to be repaid in a single payment. (*Id.* at 10). They further state the Loan Agreement provided a "special notice" in all capital letters which informed consumers that the loan was designed as a short-term cash flow solution and not as a solution for longer term financial problems, and that additional fees may accrue if the loan is refinanced or rolled over. (*Id.*). There was also another notice that stated, again in all capital letters, that a payday loan is not intended to meet long-term financial needs. (*Id.*). Moreover, they state that the requirement that consumers were to select a payment option and instructions were included directly below the TILA box. (*Id.* at 11).

EC respond that Respondent's assertion that the loan application "process" was not deceptive is a strawman argument and that while EC do not endorse Respondents' loan application "process," the gravamen of the deception claim is that Respondents failed to disclose the loans' actual costs. (Dkt. 281 at 10). They assert that they must show only that Respondents misrepresented the loans' costs. (*Id.*). They state that Respondents have offered no evidence that they provided consumers with the APR, finance charge, and total of payments for a loan that went through the default process. (*Id.*).

As discussed above in the section on TILA, I find that Respondents' Loan Agreement failed to clearly and conspicuously disclose consumers' legal obligations. Specifically, I find that the Loan Agreements disclosed the terms of consumer loans as if they were for single-payment loans, when the loans were, in fact, multi-payment loans with substantially higher costs. I therefore agree with EC that the loan document was facially deceptive. Furthermore, I find that the representations of the loans' terms were "material." I therefore disagree with RC's assertion that the Loan Agreement *clearly* indicated to consumers that the loans were required to be repaid in a single payment. I will not repeat my analysis of this point as it is fully set forth above. *See supra* Section VI.A.4.

Considering the factors the Ninth Circuit highlighted in *Cyberspace.com*, I find the visual message created by the placement, language, and prominence of the TILA boxes, the summary of the payment schedule, and the itemization of the amount financed, as compared to the fine print, contributed to the net impression that the Loan Agreement was for a single-payment loan that would cost only the "Total of Payments." Indeed, RC do not dispute that the Loan Agreement's disclosures were based on a single-payment loan, as RC contend that the disclosures properly reflected the single payment that was the consumers' legal obligation at the time the loans were made. (Dkt. 272 at 21-24). Relevant to the current matter, the Ninth Circuit concluded in *AMG* that "a reasonable consumer might expect to pay only" the amount displayed in the TILA box, where "the TILA box suggested that the value reported as the 'total of payments'—described further as the 'amount you will have paid after you have made the scheduled payment'—would equal the full cost of the loan." *AMG Capital*, 910 F.3d at 423. Because the default terms of the loan would require a consumer to pay much more than the amount disclosed and the loan note's fine print did not reasonably clarify the terms, the *AMG* court ultimately found the loan note to be deceptive. *See id.* at 423-24. The Loan Agreement in the current matter contains almost identical language, with the "Total of Payments" described as "[t]he amount you will have paid after you have made all payments as scheduled." I have also similarly found that the default terms of the loan would require a consumer to pay much more than the amount disclosed and the Loan Agreement's fine print did not reasonably clarify the terms, so I find a reasonable consumer could similarly expect to pay only the amount disclosed by Respondents.

I am not convinced by RC's argument that a "special notice," stating that the loan is designed as a short-term cash flow solution and not for longer term financial problems or to meet long-term needs, clarified the true costs of the loans for consumers. Without defining "short-term" and "long-term," the notices gave no information about the intended length of the loan term. Also, although RC are correct that the Loan Agreement did include language to the effect that additional fees may accrue if the loan is refinanced or rolled over, the Loan Agreements did not clearly set forth what those additional fees would be for a loan that followed the default renewal procedure or explain how a reasonable consumer was to calculate these additional fees. It was also misleading to present the accrual of additional fees upon renewal as a possibility rather than the certainty that it was, further contributing to the overall impression that consumers could expect to pay only the "Total of Payments" disclosed.

Respondents also argue that a customer had to sign the loan in multiple places. However, since the Loan Agreement did not clearly and conspicuously disclose the terms of the loan, it is unclear how additional signatures would cure this defect. I also find that later "welcome" and "follow-up" emails, even if they clarified the loan terms, which I do not find they do, would not be sufficient to eliminate Respondents' liability for making deceptive claims in the first instance. *See Gordon*, 819 F.3d at 1194 (later corrective written agreement does not eliminate liability for deceptive claim); *Resort Car Rental Sys., Inc. v. FTC*, 5118 F.2d 962, 964 (9th Cir. 1975) (an advertisement is deceptive if it induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract); *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-02106-RS, 2017 WL 3948396, at *6 (N.D. Cal. Sep. 8, 2017) (quoting and agreeing with *Gordon* that later corrective written agreement does not eliminate defendant's liability for deceptive claims in the first instance); *AMG Capital*, 910 F.3d at 424 (nondeceptive business practices do not cure the deceptive nature of the loan note); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496-97 (1st Cir. 1989) (each advertisement must stand on its own merits).

Respondents also state that Carnes testified that a "customer representative walked customers through the loan and answered questions." (Dkt. 272 at 9-10). In support of this assertion, they cite to Carnes' deposition testimony. (EC-EX-068 at 188:18-189:13). In examining the exact testimony cited, I see that Carnes did testify that everyone who applied for a loan was called and talked to. (*Id.* at 189:13). However, other than this testimony, the record does not contain evidence of the content of such calls or support the characterization that a "customer representative **walked customers through the loan and answered questions**." (emphasis added). The record also does not indicate, and RC do not assert, that customer representatives informed consumers of the cost of loans under the auto-renewal and auto-workout process. Additionally, even if customer representatives fully explained the details of the loans, for the same reasons as above, I do not find these calls to be sufficient to eliminate Respondents' liability for making deceptive claims in the first instance.

RC also argue that Respondents' intent to comply with the law can be inferred because they hired outside counsel to draft the loan documents and later provided the Loan Agreement to Delaware banking regulators for review. (Dkt. 272 at 11). In opposition, EC respond that the fact that Respondents hired outside counsel to draft the Loan Agreement and shared it with Delaware banking regulators, even if true, has no bearing on whether the Loan Agreement disclosed the actual cost of the loans or were likely to mislead consumers. (Dkt. 281 at 10-11). I find that the law is clear that the Respondents' intent is irrelevant and good faith is not a defense to liability for a deceptive practice under the CFPA. *FTC v. LoanPointe, LLC*, No. 2:10–CV–225DAK, 2011 WL 4348304, at *9 (D. Utah Sept. 16, 2011) (good faith is not a defense to liability for deceptive act under the FTC Act) (citing *Cyberspace.com*, 453 F.3d at 1202).

RC also assert that the CFPB cannot establish deception because it did not introduce testimony of any consumers and its expert witness, Dr. Hastak, did not talk to customers or rely on complaints, which were just a small sampling of consumers and not representative of a typical IA consumer. (Dkt. 272 at 12). Regardless of their number, RC assert that complaints are insufficient to prove violations of the law. (*Id.*).

In response, EC assert that summary disposition is appropriate where the loan agreement, like the one in this case, is facially deceptive. (Dkt. 276 at 12). They assert that additional evidence such as Dr. Hastak's report and consumer complaints, while demonstrating that many consumers were, in fact, misled about their loans, is not required to prove the charge. (*Id.*). They further state that "actual deception" is not required to prove a deception claim, citing to *AMG* which, on similar facts, found deception based on the face of the loan agreement alone. (*Id.*) (citing *AMG Capital*, 910 F.3d at 423).

In reaching my decision on Count III, as with Counts I and II, I clarify that I am relying on the undisputed facts, the specific language of the loan documents in question, the statutes, and relevant case law. I am not relying on any expert reports or consumer complaints. Contrary to RC's assertions, the case law is clear that a representation may be likely to mislead by virtue of the "net impression" it creates. *See Cyberspace.com*, 453 F.3d at 1200; *Stefanchik*, 559 F. 3d at 928; *Int'l Computer Concepts*, 1995 WL 767810 at *3; *Verity Int'l*, 443 F.3d at 63; *AMG Capital*, 910 F.3d at 422; *Nationwide Biweekly Admin.*, 2017 WL 3948396, at *2; *Gordon*, 819 F.3d at 1193.

The CFPA also is clear by the language "likely to mislead" that proof of "actual deception" is unnecessary. This point is reinforced by the decisions of various courts. *See AMG Capital*, 910 F.3d at 422, 425 (proof of actual deception is unnecessary to establish violation); *LoanPointe*, 2011 WL 4348304, at *4 (FTC not required to prove each consumer relied on deceptive claims; presumption of actual reliance arises once FTC has proven that there were material misrepresentations widely disseminated and that consumers purchased the product); *Cyberspace.com*, 453 F.3d at 1201 (proof of actual deception not required, but may bolster deception).

After reviewing all of the parties' arguments and the relevant law, I find that the net impression of IA's Loan Agreement was deceptive because it was likely to misrepresent to reasonable consumers that the loans were single-payment loans with set "Total of Payments" costs when they were, in fact, multi-payment loans with significantly higher costs, and those costs are material. I find that the record contains sufficient undisputed material facts to establish that Respondent Integrity Advance engaged in deceptive practices in violation of Count III.

## C. COUNT IV (CFPA - UNFAIRNESS) AGAINST RESPONDENTS INTEGRITY ADVANCE AND JAMES R. CARNES

### 1. Legal Standard

Count IV alleges that Respondents engaged in unfair practices by supplying consumers with deceptive loan cost disclosures that misled them about their repayment obligations and prevented them from properly assessing the actual loan costs. (Dkt. 1 at 12). Under the CFPA, an act or practice is "unfair" if: 1) it is likely to cause substantial injury to consumers; 2) the substantial injury is not reasonably avoidable by consumers; and 3) the substantial injury is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1). The standard for the meaning of "unfair" acts or practices mirrors the FTC Act. *See NDG Fin. Corp*., 2016 WL 7188792, at *13; CFPB v. *ITT Educ. Servs.*, 219 F. Supp. 3d 878, 903 (S.D. Ind., Mar. 6, 2015); *LoanPointe*, 2011 WL 4348304, at *4.

### 2. CFPB's Position

EC assert that Respondents' failure to accurately disclose the costs of their loans, with regard to all loans issued on or after July 21, 2011, was legally unfair. (Dkt. 276 at 13, 15; Dkt. 281 at 12-13). They assert that customers suffered "substantial injuries" when the company electronically debited more money from their accounts than had been disclosed and cite to case law supporting their position that monetary harm is considered a "substantial injury." (Dkt. 276 at 13; Dkt. 281 at 13-14). They assert that according to Respondents' own data, consumers who took out loans after July 21, 2011, paid $38,453,341.62 more than the total amounts disclosed. (Dkt. 276 at 13-14; Dkt. 281 at 13).

EC also assert that customers could not have "reasonably avoided" substantial injury. (Dkt. 276 at 14-15; Dkt. 281 at 14-17). They state that Respondents did not tell customers the total loan costs and took affirmative steps to prevent customers from learning such information by instructing their call representatives not to tell consumers the total costs of loans during the application process and failing to provide a unified version of the contract until consumers had agreed to the loan. (Dkt. 276 at 14). They further assert that Respondents structured the repayment method in a way that gave them control over the amounts collected by pulling the loan repayments directly from consumers' accounts. (*Id.*). They state that even if consumers revoked their ACH authorizations or otherwise tried to block ACH withdrawals, Respondents nevertheless withdrew funds through the use of RCCs. (*Id.* at 15).

Finally, EC assert that there is no possible argument that hiding the total cost of loans provided any legitimate benefit to consumers or competition. (*Id.).* In their *Opposition Brief*, EC assert that Respondents' argument that they provided benefits to consumers in the form of increased consumer options is both unsupported by the record and irrelevant. (Dkt. 281 at 17). They argue that even if a Bureau White Paper supported the general point that payday loans can provide a benefit to a consumer in the abstract, it has no bearing on whether IA's deceptive cost disclosures provided a benefit to consumers in the current matter that outweighed the substantial harm caused. (*Id.*). They assert that even if Respondents helped consumers find credit when other avenues were foreclosed, it does not justify failing to disclose the true loan costs and there is no argument that inaccurate disclosures benefited consumers or competition, let alone outweighed substantial injury. (*Id.*; Dkt. 284 at 5). Furthermore, they state that Respondents never explain why they could not offer credit while also truthfully disclosing loan costs. (Dkt. 284 at 5).

In their *Reply Brief*, EC assert that even if some consumers were not injured or could have reasonably avoided the harm, that would not make the *practice* fair or necessarily create a genuine issue of fact. (*Id.* at 4-5). They assert that Respondents offer no evidence that any returning consumers understood loan costs given that Respondents' own expert testified that it was possible consumers who experienced renewals never calculated the total costs. (*Id.* at 5; Dkt. 281 at 17). They further assert that the harm was not reasonably avoidable and that actions such as requiring multiple signatures, bolding certain language in the Loan Agreement, and sending follow-up emails after loan consummation did nothing to cure the fact that the cost of the loans was not accurately disclosed, because consumers could not avoid costs that they did not know about. (Dkt. 284 at 5; Dkt. 281 at 16-17).

### 3. Respondents' Position

RC argue that the CFPB cannot prove that Respondents caused substantial injury to consumers by supplying deceptive disclosures and withholding information about the costs of its loans, because the CFPB cannot support its claim [in Count III] that the Loan Agreement was "deceptive." (Dkt. 272 at 16; Dkt. 278 at 15). Therefore, RC assert that the claim of "unfairness" must fail. (Dkt. 272 at 16; Dkt. 278 at 15). They assert that "speculative harms" do not meet the requirement for "substantial injury." (Dkt. 272 at 16; Dkt. 278 at 15). They state that consumers received the credit for which they applied and dissatisfaction with the eventual total price of the loan is not a cognizable injury under the injury prong of the unfairness analysis. (Dkt. 272 at 17).

With regard to the second and third unfairness elements, RC argue that any injury to consumers was "reasonably avoidable" and the fact of any injury was "outweighed by countervailing product benefits." (*Id.*). RC assert that consumers were allowed to repay their loans ahead of schedule, penalty-free, which would have reduced the amount of interest owed. (*Id.*). Also, they state the Loan Agreement contained a notice of rescission rights, which enabled consumers to decline a loan before expiration of a three-day rescission period. (*Id.*). They state that the Loan Agreement contained multiple places for consumers to assent to the loan terms, coupled with bold fonts and other elements that made any injury avoidable. (*Id.* at 18). Furthermore, they state that after the expiration of the right to cancel, consumers received alerts regarding their repayment obligations and could have taken reasonable steps to avoid any injury. (*Id.* at 18-19). They argue that any injury arising from the terms of the Loan Agreement would have been entirely avoidable by returning customers, who had already seen and experienced the loan operations. (Dkt. 272 at 19; Dkt. 278 at 16).

With regard to whether the alleged injury was outweighed by countervailing consumer benefit, RC assert that the loans increased consumer options. (Dkt. 272 at 19). They state that the CFPB has publicly acknowledged in a White Paper that some consumers have provided favorable responses about the speed at which payday loans are given and their availability for consumers who may not qualify for other credit products. (*Id.*; Dkt. 278 at 17). Therefore, they assert that it is undisputed that such loans provided a consumer benefit. (Dkt. 272 at 19-20; Dkt. 278 at 16-17; Dkt. 283 at 7).

**4. Analysis**

**a. What is "substantial injury?"**

In analyzing this count, it is first necessary to define the term "substantial injury." In a 1980 policy statement provided to Congress defining its unfairness authority, the FTC clarified that "in most cases substantial injury would involve monetary harm" and that it "is not concerned with trivial or merely speculative harms." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (citing Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), available at https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness) (internal quotation marks omitted); *see also LoanPointe*, 2011 WL 4348304, at *6 (quoting *Am. Fin. Servs. Ass'n*, 767 F.2d at 975) ("risk of substantial economic and monetary harm to the consumer is significant"). "An injury may be sufficiently substantial, however, if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm." *Am. Fin. Servs. Ass'n,* 767 F.2d at 972 (quotation marks omitted); *see also Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) ("[A]lthough the actual injury to individual customers may be small on an annual basis, this does not mean that such injury is not 'substantial.'"). In the context of a CFPB case, a district court also stated that a substantial injury in the context of consumer protection is most often a financial one, citing to the same sources. *ITT Educ. Servs.*, 219 F. Supp. 3d at 913 (citing *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 299 (D. Mass. 2008); *Am. Fin. Servs. Ass'n*, 767 F.2d at 972).

RC assert that "a 'substantial injury' exists only if the CFPB can show '[t]hat consumers were injured by a practice for which they did not bargain." (Dkt. 272 at 15) (quoting *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008)). However, I note that the *Neovi* case cites to *FTC v. J.K. Publications, Inc.*, for this proposition, which merely states that "[t]he substantial injury prong *can be satisfied* if the FTC establishes that consumers were injured by a practice for which they did not bargain." *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000) (emphasis added). There are no other cases RC cite that hold this as a requirement to prove "substantial injury." Thus, while a showing that consumers did not receive the benefit of their bargain can prove that consumers suffered substantial injury, it is not true that this necessarily must be a factor to find substantial injury.

RC also assert that because Respondents did *not* provide "deceptive" disclosures (Count III), consumers could not have been deceived or misled, and consequently could not have suffered substantial injury. (Dkt. 272 at 16). They therefore argue that the CFPB cannot prove "substantial injury" and the claim of "unfairness" must fail. (*Id.*).

I do not find this argument convincing because, as discussed above (see analysis of Counts I, II, and III), I have, in fact, found that IA provided consumers with inaccurate, deceptive TILA disclosures which did not clearly and conspicuously disclose the true costs of the loans.[9] Contrary to RC's argument, I find that consumers could not have bargained for loan terms that were not disclosed and thus by their very nature were deceptive. I also find that monetary harm does constitute substantial injury.

**b. Were Respondents' acts or practices "likely to cause" substantial injury that was "not reasonably avoidable?"**

RC assert, as stated in *Am. Fin. Servs. Ass'n*, that "merely speculative harms" do not typically qualify as "substantial injury." (Dkt. 272 at 16-17) (quoting *Am. Fin. Servs. Ass'n,* 767 F.2d at 972). However, I note that the statutory language is that the act or practice is "likely to cause" the injury, not that it "actually" causes the injury. The Eleventh Circuit has determined that "likely" means "probable" or "reasonably expected," which requires a higher threshold than "significant risk" but lower than "high probability of occurring." *LabMD, Inc. v. FTC*, 678 F.

[9] I note that an "unfairness" claim requires different elements of proof than a "deception" claim, so a finding of "deception" does not necessarily equate to a finding of "unfairness," even if the same underlying facts relate to both claims.

App'x 816, 821 (11th Cir. 2016). The Third Circuit has also noted that "[a]lthough unfairness claims usually involve actual and completed harms, they may also be brought on the basis of likely rather than actual injury." *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3rd Cir. 2015) (quoting *In the Matter of Int'l Harvester Co.*, 104 F.T.C. 949, 1061, 1061 n.45 (1984)) (internal citation and quotation marks omitted). The court stated that "the FTC Act expressly contemplates the possibility that conduct can be unfair *before* actual injury occurs." *Id.* (emphasis added). Since this conclusion is based on the "likely to cause substantial injury" language of the FTC Act, and identical language is contained in the CFPA, I conclude that the CFPA also expressly contemplates this possibility.

RC assert that since Integrity Advance ceased all consumer facing operations in June 2013, the CFPB must prove that the unfair act or practice "actually" caused substantial injury to consumers because there is no potential for any future injury. (Dkt. 272 at 15 n.3). They cite no authority, nor have I found any, for this proposition. Regardless of this deficiency, given the deceptive disclosures of loan costs in the Loan Agreement, which stated the terms as if the loans were single-payment loans when, in fact, they were multi-payment loans with higher costs, I find that many consumers paid significantly more than they anticipated and thus, Respondents' deceptive disclosures were "likely to cause" and did cause substantial injury to consumers.

RC also argue that any injury to consumers was "reasonably avoidable." (Dkt. 272 at 17). "An injury is reasonably avoidable if consumers have reason to anticipate the impending harm and the means to avoid it, or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact." *ITT Educ. Servs.*, 219 F. Supp. 3d at 916 (quoting *Davis*, 691 F.3d at 1168) (internal quotation marks omitted); *see also Orkin Exterminating Co.*, 849 F.2d at 1365; *CFPB v. Navient Corp.*, No. 3:17-CV-101, 2017 WL 3380530, at *21 (M.D. Pa. Aug. 4, 2017). "In determining whether consumers' injuries were 'reasonably avoidable,' courts look to whether the consumers had a free and informed choice." *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010) (citing *Am. Fin. Servs. Ass'n*, 767 F.2d at 976).

RC specifically assert that a consumer could have avoided injury by repaying the loan ahead of schedule or by declining the loan before the expiration of the three-day rescission period and thus aborting their applications. (Dkt. 272 at 17). They assert that consumers were told about the loan terms and prepayment options and received alerts regarding repayment obligations, and thus could have avoided any injury. (*Id.* at 18-19). They also repeat their argument, which they set forth with regard to Count III, that returning customers knew what to expect and therefore would have anticipated and had the means to avoid any impending harm. (*Id.* at 19).

EC argue that consumers could not have avoided injury because they could not make a free and informed choice about the true costs of the loans which were not disclosed to them. (Dkt. 281 at 14). They assert that even though consumers could have rescinded the loans, the true loan costs would not have been apparent to them during the rescission period. (*Id.* at 14-15). They state that the fact that a consumer could try to change the payment options and prepay did not allow the consumer to make a free and informed choice to avoid injury. (*Id.* at 15). In order to avoid injury, they argue consumers would have needed to prepay their loan in full before the first auto-renewal but at that time, there would have been no indication that the loan costs were more than the disclosed amounts. (*Id.*). They also assert that the fact that consumers had to sign the loan in several places was not a cure for the defect of failing to disclose the actual costs of the loans and thus would not have allowed consumers to avoid injury. (*Id.* at 15-16). They argue that there is no evidence that returning customers actually understood the costs of the loan renewal process and could have reasonably avoided injury. (*Id.* at 17).

I find that because the actual loan costs were not clearly and conspicuously disclosed, injury to consumers was not "reasonably avoidable." Consumers would not have been aware of the additional costs of their loans until they had already made several payments and thus were being debited an amount in excess of the "Total of Payments," as disclosed in the TILA box. At that point, they would have already suffered monetary harm. Even though consumers may have signed the loan documents in several places and received follow-up emails with prepayment options, such steps would not have served to cure the problem, because IA still did not disclose the actual costs of the multi-payment loans. Consumers thus could not avoid what was not revealed to them. As for returning customers, as I discussed above, the record does not establish the reason for returning consumers' behavior and whether they understood the costs of the loan renewal process. *See supra* Section VI.B.4.a. After reviewing the parties' arguments, statutory language, undisputed facts, and case law, I find that consumers could not have reasonably avoided substantial monetary injury from IA's loans.

**c. Was the injury "outweighed by countervailing benefit to consumers or competition?"**

RC assert that any injury to consumers was outweighed by countervailing product benefits. (Dkt. 272 at 19-20; Dkt. 278 at 16-17; Dkt. 283 at 7). Specifically, they assert that the availability of the loans and possibility of renewing those loans provided substantial consumer benefits because it increased consumer options. (*Id.*). They cite to case law stating that, "an increase in services or benefits to consumers or by benefits to competition" can outweigh adverse consequences to consumers. (Dkt. 272 at 19) (quoting *J.K. Publ'ns,* 99 F. Supp. 2d at 1201). They also cite to a CFPB White Paper which stated that, "some consumers provided favorable responses about the speed at which these [payday] loans are given, the availability of these loans for some consumers who may not qualify for other credit products, and consumers' ability to use these loans as a way to avoid overdrawing a deposit account or paying a bill late." (*Id.* at 19-20) (quoting CFPB White Paper, "Payday Loans and Deposit Advance Products," available at https://files.consumerfinance.gov/f/ 201304_cfpb_payday-dap-whitepaper.pdf).

EC counter that Respondents' claim of increased consumer options is unsupported by the record in this matter and it is irrelevant that, in a White Paper discussing the general benefits of payday loans, some consumers identified certain general benefits. (Dkt. 281 at 17). They assert that whether a consumer, in the abstract, can benefit from a payday loan has no bearing on whether IA's deceptive cost disclosures provided benefits to consumers in this matter that outweighed the substantial harm. (*Id.*). Furthermore, they argue that even if Respondents helped consumers find credit when other avenues were foreclosed, that did not justify failing to disclose the actual costs of the loans and there is no logical argument that inaccurate disclosures benefited consumers or competition, let alone outweighed the substantial injury. (*Id.*; Dkt. 284 at 5).

The record appears to support the proposition that consumers received the "amount financed" as stated in the TILA box.[10] So, in that sense consumers did, in fact, receive a benefit. However, the issue for this analysis is whether that benefit was enough to *outweigh* the substantial injury to consumers who were led to believe that the benefit, i.e., the amount financed, would cost them substantially less than they ultimately were debited. Furthermore, it raises the question of whether consumers would have taken loans from Respondents if the "actual" loan costs had been disclosed, without misrepresentations or deception, i.e., whether they had a "free and informed choice" that would have enabled them to avoid the unfair practice. *See Neovi*, 604 F.3d at 1158 (citing *Am. Fin. Servs. Ass'n*, 767 F.2d at 976).

I have not found a case directly on point and the parties do not cite to one, but in a CFPB case claiming abusive and deceptive conduct, the court discussed consumer benefit in the context of a discussion about remedies. The court stated, "[t]he law is . . . clear that it is not automatically a defense to claim a consumer realized some benefit from a product that he or she would not have bought, absent misrepresentations." *Nationwide Biweekly Admin.*, 2017 WL 3948396, at *12. The court cited to another case which found that a seller's misrepresentations tainted the customers' purchasing decisions and commented that the fraud was in the selling, not in the value of the things sold, and that is what entitled consumers to refunds. *Figgie Int'l*, 994 F.2d at 604.

I find that the harm to consumers in the current matter was not outweighed by a countervailing benefit to consumers or competition. I find that consumers' decisions regarding Respondents' loan product was tainted by IA's failure to reveal the actual costs of the loans. Furthermore, the benefit of the loans could have been provided to consumers while accurately disclosing the costs. There is no plausible argument that can be made that Respondents had to misrepresent the costs in order for consumers to receive the benefit of a payday loan.

For the reasons discussed above, I conclude that IA's acts or practices caused or were likely to cause substantial injury to consumers which was not reasonably avoidable and was not

[10] EC have not claimed that the consumers did not receive the amount financed and it has not come up as an issue for discussion in any of the briefs. I am assuming that consumers did, in fact, receive the amount financed, as disclosed in the TILA box.

outweighed by countervailing benefit to consumers or competition. I therefore find that the record contains sufficient undisputed material facts to establish that Respondent Integrity Advance engaged in unfair acts or practices in violation of Count IV.

## D. COUNT V (EFTA) AND COUNT VI (CFPA) AGAINST RESPONDENT INTEGRITY ADVANCE

### 1. Legal Standard

Count V alleges that IA conditioned extensions of credit on repayment by preauthorized electronic fund transfers in violation of EFTA. (Dkt. 1 at 13). Count VI alleges that IA violated the CFPA by virtue of having violated EFTA. (*Id.*). EFTA is set forth at 15 U.S.C. § 1693 *et seq.* and aims primarily to protect consumers engaging in electronic fund transfers. EFTA is implemented by Regulation E, 12 C.F.R. pt. 1005. EFTA and Regulation E prohibit extensions of credit to a consumer conditioned on the consumer's repayment by preauthorized electronic fund transfers. 15 U.S.C. § 1693k; 12 C.F.R. § 1005.10(e). A "preauthorized electronic fund transfer" is "an electronic fund transfer authorized in advance to recur at substantially regular intervals." 15 U.S.C. § 1693a(10); 12 C.F.R. § 1005.2(k).

Under the CFPA, it is unlawful for any "covered person or service provider" to "commit any act or omission in violation of a Federal consumer financial law," such as EFTA. 12 U.S.C. § 5536(a)(1)(A). Therefore, if Respondent IA is found to have violated EFTA, then it will also have violated the CFPA.

### 2. CFPB's Position

EC assert in their *Memorandum of Points and Authorities in Support of its Motion for Summary Disposition* that IA violated EFTA by conditioning its offers of credit on preauthorized electronic repayments. (Dkt. 276 at 22). Specifically, EC assert that the payments authorized by IA's Loan Agreement were preauthorized electronic fund transfers under the definitions in EFTA and Regulation E because once consumers signed the loan documents and accepted their loans, IA had the authority to debit the entire series of default auto-renewal and auto-workout payments, which were deducted approximately every two weeks, from their accounts without any further action or authorization from consumers. (*Id.* at 23). EC also assert that IA conditioned its loans on consumers agreeing to repay the loans via ACH because consumers could not obtain a loan without signing the ACH authorization and the form authorized both the deposit of the loan proceeds and the withdrawals for payments via ACH. (*Id.* at 24-25). EC cite to *FTC v. PayDay Fin. LLC*, 989 F. Supp. 2d 799, 811-13 (D.S.D. 2013) for the proposition that 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. (*Id.* at 24).

In *EC's Opposition to Respondents' Motion for Summary Disposition*, EC also assert that despite the fact that 95% of consumers signed the ACH authorization, and therefore 5% did not sign it, limited exceptions do not change the fact that IA's Loan Agreements required consumers to complete the ACH authorization in order to receive the loans. (Dkt. 281 at 20-21). They state that the evidence demonstrates that IA failed to offer consumers an alternative to granting electronic access as part of the origination, which is itself a violation of EFTA. (*Id.* at 21). They also assert that additional language in the ACH agreement stating that IA accepted alternative forms of payment does not cure the fact that Respondents required virtually every consumer to preauthorize electronic fund transfers. (*Id.*). Furthermore, the meaning of that language is clouded by another clause stating that the ACH agreement "remains in full force and effect" for as long as the consumer owed money to IA. (*Id.*).

### 3. Respondents' Position

Respondents assert in their *Motion for Summary Disposition* that IA's Loan Agreement did not condition extension of credit on the consumer's agreement to repay the loan through a preauthorized EFT. (Dkt. 272 at 24). Specifically, the express terms of the Loan Agreement provided that consumers could repay their loans through other means. (*Id.*). Furthermore, 95% of consumers that obtained loans with IA signed the ACH authorization, meaning 5% of consumers received loans without signing the ACH authorization, and 98.5% of initial loan repayments were made by electronic means. (*Id.* at 24-25). RC assert that these facts mean, by definition, that providing electronic access to consumers' bank accounts or repaying the loan via electronic means was not a condition for a loan. (*Id.* at 25).

In *Respondents' Brief in Opposition to Enforcement Counsel's Motion for Summary Disposition*, they distinguish the *PayDay Financial* case cited by EC by noting that IA's Loan Agreement gave consumers the ability to choose their payment method whereas in *PayDay Financial*, the loan agreement provided that repayment "shall" be made by ACH debit and was therefore required. (Dkt. 278 at 20). RC conclude that because IA did not require consumers to pay back their loans via electronic transfers as a precondition to getting a loan, they did not violate EFTA. (*Id.* at 20-21).

RC do not assert that the payments authorized by IA's Loan Agreement were not preauthorized electronic fund transfers under the definitions in EFTA and Regulation E.

**4. Analysis**

In analyzing liability for Counts V and VI, the relevant questions are: a) were consumers' repayments "preauthorized electronic fund transfers?" and b) did IA condition its loans on the authorization of such electronic fund transfers?

**a. Were consumers' repayments "preauthorized electronic fund transfers?"**

As noted above, a "preauthorized electronic fund transfer" is defined by EFTA and Regulation E as "an electronic fund transfer authorized in advance to recur at substantially regular intervals." 15 U.S.C. § 1693a(10); 12 C.F.R. § 1005.2(k). The "Official Interpretations" to Regulation E clarify that preauthorized electronic fund transfers are ones "authorized by the consumer in advance of a transfer that will take place on a recurring basis, at substantially regular intervals, and will require no further action by the consumer to initiate the transfer." 12 C.F.R. pt. 1005, Supp. I, 1005.2(k).

The ACH authorization in IA's Loan Agreement authorized IA to initiate credit and debit entries to consumers' bank accounts. Specifically, by signing the ACH authorization, consumers authorized debit entries as follows:

> (a) for the Total of Payments plus any accrued fees on the Payment Due Date, or on any subsequent Renewal Payment Due Date, if you contact us at least three (3) business days prior to such date and select Payment Option (a) in the Loan Agreement (Pay in full);
>
> (b) for the Finance Charge plus any accrued fees on the Payment Due Date, or on any subsequent Renewal Payment Due Date, if you contact us at least three (3) business days prior to such date and select Payment Option (b) in the Loan Agreement (RENEWAL), or if you fail to contact us to confirm your payment option;
>
> (c) for the accrued finance charges and fees, plus $50.00 on each Pay Date[1] after the fourth (4th) Renewal Payment Due Date, until all amounts owed under the Loan Agreement are paid in full; and
>
> (d) for any accrued Returned Payment charges, subject to the Loan Agreement.

(EC SMF Exh. 1 at 9-10; EC-EX-063 at 8-9).

The provisions above authorized the withdrawal of all payments, including those under the auto-renewal (paragraph (b)) and auto-workout (paragraph (c)) provisions. By signing the ACH authorization, a consumer gave IA the authority to debit all of the payments under the auto-renewal and auto-workout process without requiring any further action by the consumer. Despite the possibility that a consumer could pay off the loan in one payment (paragraph (a)), EFTA "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).

The section above also makes it clear that the debits would recur at substantially regular intervals. According to the Loan Agreement, "Pay Date" "refers to the next time following the Payment Due Date, that you receive regular wages or salary from your employer. Because Renewals are for at least fourteen (14) days, if you are paid weekly, your loan will not be Renewed until the next Pay Date that is at least fourteen days after the prior Payment Due Date." (EC-EX-063 at 3; *see also* EC SMF Exh. 1 at 8). Thus, the Renewal Payment Due Date and the Pay Date referred to in the paragraphs above are dates occurring at substantially regular intervals because they coincide with the date on which a consumer receives regular wages or salary. Under the renewal, auto-renewal, and auto-workout provisions, a consumer would be debited every Pay Date.

There can be no question, therefore, that by signing the ACH authorization form, a consumer authorized payment in advance of a transfer, that would take place on a recurring basis, at substantially regular intervals, and that required no further action by the consumer to initiate the transfer. RC do not dispute this in their briefs. Thus, I find that the repayments authorized by IA's ACH form are "preauthorized electronic fund transfers" as defined by EFTA and Regulation E.

**b. Did IA condition its loans on consumers executing an ACH authorization?**

Because the repayments authorized by IA's ACH form were "preauthorized electronic fund transfers" under EFTA, IA's loans were conditioned on repayment by preauthorized electronic fund transfers if the loans were conditioned on consumers executing the ACH authorization. RC assert that because the Loan Agreement provided that consumers could repay their loans through other means, the extension of credit was not conditioned on the consumer's agreement to repay the loan through a preauthorized EFT. (Dkt. 272 at 24; Dkt. 278 at 19-20). RC further assert that because 98.5% of initial loan repayments were made by electronic means, and therefore 1.5% were made by other means, consumers could not have been required to repay their loans by electronic means. (Dkt. 272 at 25; Dkt. 278 at 20). "However, the right to later cancel EFT payments does not allow a lender who conditions the initial extension of credit on such payments to avoid liability." *O'Donovan v. CashCall, Inc.*, No. C 08-03174 MEJ, 2009 WL 1833990, at *3 (N.D. Cal. June 24, 2009); *see also PayDay Fin.*, 989 F. Supp. 2d at 812-13 (quoting and applying *O'Donovan*).

The undisputed facts establish that the ACH form authorized both electronic credits to and debits from a consumer's bank account. Therefore, if the ACH authorization was a condition for the loan, it inherently required consumers to agree to repay by ACH, even if they could later choose to "repay [their] indebtedness through other means." (EC SMF Exh. 1 at 10; EC-EX-063 at 9). This would mean that if the ACH authorization was a condition for the loan, IA violated EFTA.

The undisputed facts establish that IA's loan documents did not contain an indication that consumers could obtain a loan from the company without completing and agreeing to the ACH authorization. Respondents admitted that consumers could only receive loan proceeds by way of an electronic deposit which was authorized by the ACH form. Furthermore, the Loan Agreement provided:

**DISBURSEMENT**: In order to complete your transaction with us, you must electronically sign the Loan Agreement by clicking the "I Agree" button at the end of the Loan Agreement, as well as all other "I Agree" buttons that appear within the Loan Agreement and related documents that appear below. We will then approve or deny your application and the Loan Agreement.

(EC SMF Exh. 1 at 4; EC-EX-063 at 3-4). The ACH authorization stated, "[t]his ACH Authorization is a part of and relates to the Loan Agreement . . . ." (EC SMF Exh. 1 at 10; EC-EX-063 at 9). Together, these two provisions indicated to a reasonable consumer that agreeing to the ACH authorization was a requirement to obtain a loan from IA.

RC assert that since 5% of consumers obtained loans with Integrity Advance without signing the ACH authorization, it could not have been a condition for a loan. (Dkt. 272 at 24; Dkt. 278 at 20). However, those consumers were the exception to the rule. Foster testified that without a completed ACH authorization, "[t]here would be no provisional or initial approval of the application without additional contact with the customer." (EC-EX-069 at 83:24-84:13). The Loan Agreement itself contained no provision indicating that consumers could obtain a loan without signing the ACH authorization, nor did it provide alternate means of receiving loan proceeds. There was no straightforward path, therefore, to obtaining a loan from IA without signing the ACH authorization. Foster's testimony indicates that it would require an incomplete application and a follow-up call from IA for that option to be presented to a consumer. That process simply cannot be considered evidence that consumers were not required to sign the ACH authorization in the normal course of business.

In *PayDay Financial*, the court noted in a similar situation that "that there is no language expressly stating that the extension of credit is not conditioned on agreement initially to EFT or explaining how a consumer might obtain a consumer loan from Defendants otherwise." *PayDay Fin.*, 989 F. Supp. 2d. at 812. Despite the fact that the defendant lenders in that case did not condition the extension of credit on consent to EFTs in practice, the court held that "in reality their loan agreements did just that." *Id.* Similarly, although IA accepted repayment of loans by other means and there may have been a way for consumers to obtain a loan without consenting to EFTs, the Loan Agreements made the loans conditioned on the ACH authorization.

RC try to distinguish their Loan Agreements from those in *PayDay Financial* by asserting that unlike those loan agreements, which provided that payment "shall" be made by ACH debit, IA's Loan Agreements gave consumers the ability to choose their payment methods. (Dkt. 278 at 20). This argument fails for two reasons. First, as EC correctly note in their *Reply Brief* (Dkt. 284), only a portion of the loan agreements in *PayDay Financial* that the court found to violate EFTA included the "shall" language. In fact, two of the three examples that the court cited in its opinion provided that the consumer was "authorizing [the lender] to effect both debit and credit entries into your Bank Account to fulfill your obligations under this Loan Agreement." *PayDay Fin.*, 989 F. Supp. 2d at 810. IA's ACH authorization similarly authorized IA "to initiate automatic credit and debit entries to Your Bank Account in accordance with the Loan Agreement." (EC SMF Exh. 1 at 9; EC-EX-063 at 8).

The second reason RC's attempt to distinguish IA from *PayDay Financial* fails is because the court's conclusion ultimately rested on the fact that the language of the loan agreements conditioned the loans on authorizing EFTs, even if consumers could later revoke that authorization and/or repay the loans through other means. Here, RC argue that since consumers could and did repay by other means, the loans could not have been conditioned on requiring repayment by EFT. But the facts here show that in order to obtain a loan from IA, consumers had to first agree to authorize ACH debits even if they later chose to repay by other means.

Thus, I find that Respondent IA conditioned its loans on consumers' repayment by preauthorized electronic fund transfers, in violation of the EFTA (Count V) and related CFPA provision (Count VI).

## E. COUNT VII (CFPA - UNFAIRNESS) AGAINST RESPONDENTS INTEGRITY ADVANCE AND JAMES R. CARNES

### 1. Legal Standard

Count VII alleges that Respondents' practice of obtaining authorization for demand drafts (also referred to as "remotely created checks" or "RCCs") in a confusing manner, and then initiating such demand drafts, constituted an unfair practice under the CFPA. (Dkt. 1 at 13-14). Under the CFPA, an act or practice is "unfair" if: 1) it is likely to cause substantial injury to consumers; 2) the substantial injury is not reasonably avoidable by consumers; and 3) the substantial injury is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1). The standard for the meaning of "unfair" acts or practices mirrors the FTC Act. *See NDG Fin. Corp*., 2016 WL 7188792, at *13; *ITT Educ. Servs.*, 219 F. Supp. 3d at 903; *LoanPointe*, 2011 WL 4348304, at *4.

**2. CFPB's Position**

EC assert that Respondents' use of RCCs unfairly interfered with consumers' ability to contest the company's debits on their accounts. (Dkt. 276 at 15). They assert that by using RCCs, Respondents could withdraw funds from a consumer's account by means of a check that the consumer never completed, signed, or saw, subjecting them to substantial financial harm. (*Id.* at 15-17). They assert that consumers are unfamiliar with RCCs and the FTC has banned them in the telemarketing space. (*Id.* at 16). Furthermore, EC assert that IA's customers were required to sign an ACH agreement which contained the following opaque language in one sentence to justify initiating RCCs: "[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." (*Id.*).

EC assert that some consumers discovered that IA had rolled over their loans repeatedly such that the total costs of the loans were greater than the amount that had been disclosed in the TILA "Total of Payments" box, and in response, they attempted to stop IA's ACH debits or revoke IA's ACH authorization to debit their bank accounts. (*Id.* at 16-17). However, Respondents then created RCCs and continued to extract funds from the consumers' accounts. (*Id.* at 17).

EC assert that this practice resulted in substantial financial harm to IA's consumers, because they suffered financial harm when IA used RCCs to take additional funds from their bank accounts. (*Id.*). They state that according to IA's own data, the company used RCCs 602 times after July 21, 2011, for a total amount of $115,024.50, on consumers who had revoked or stopped their authorization for IA to withdraw funds and had already paid an amount equal to the "Total of Payments." (Dkt. 276 at 17; Dkt. 281 at 18).

EC assert that the injury was not reasonably avoidable because consumers did not have a free and informed choice regarding the use of RCCs since the RCC provision, on its face, was neither clear nor conspicuous. (Dkt. 276 at 18). In support of this argument they state that the RCC language appeared only once in the contract and was not emphasized in any way. (*Id.*). They cite to their expert witness, Dr. Hastak, who concluded, without rebuttal, that the provision, even if read, was unlikely to be correctly understood and had the potential to confuse and misdirect borrowers rather than illuminate them. (*Id.*).

EC also assert that there is no possible 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 prevented consumers from stopping unauthorized charges after they had paid the disclosed loan costs. (*Id.*).

**3. Respondents' Position**

RC assert that the CFPB failed to present any evidence of consumer injury, much less injury that is not outweighed by the benefits of the availability of RCCs. (Dkt. 272 at 20). They state that CFPB employee, Joseph Baressi, testified that RCCs are and have been lawful.[11] (*Id.*; Dkt. 278 at 17). They assert that RCCs were used in less than 1% of all loans during the post-July 21, 2011 period. (Dkt. 272 at 20). They further assert that the decision to use RCCs was made by a third-party call center on a case-by-case basis and they were used sparingly, only as a last resort. (*Id.* at 21). They state that Carnes testified that consumers could stop the RCC process by contacting IA and informing it of an alternative payment method. (*Id.*). They further assert that speculative harm is not the type of injury that can be addressed through the unfairness provision of the CFPA. (*Id.*).

[11] I note that although Respondents are relying here on the testimony of Mr. Baressi, they also moved previously to exclude the testimony of this witness. EC has not relied on the testimony of Baressi in any of the briefing in this matter. However, since the testimony RC are relying on has to do with applicable law and is not a question of fact, I do not see a need to rule on the admissibility of this testimony. The issue is whether the use of RCCs was unfair, not whether it was legal.

RC assert that any alleged injury was reasonably avoidable because the Loan Agreement expressly provided an alternative to RCCs since consumers could and did provide IA with other forms of payment such as cashier's checks or money orders. (Dkt. 278 at 18). They also assert that consumers could have stopped the RCC process by informing the company of an alternative payment method. (*Id.*). They emphasize that IA's customers explicitly agreed to the provision authorizing the use of RCCs. (*Id.*). RC also assert that Dr. Hastak's conclusion that the RCC provision was unlikely to be correctly understood and had the potential to confuse and misdirect borrowers rather than illuminate them was rebutted by Respondents' expert, Dr. Novemsky, who stated that there was no data provided about how many consumers read the RCC authorization provision and no empirical analysis as to what consumers understood from that authorization.[12] (*Id.* at 18-19). They state that the CFPB identified only one potentially relevant consumer complaint that post-dates July 21, 2011, but even the CFPB's expert [Dr. Hastak] acknowledged that consumer complaints do not equate to violations of the law. (*Id.* at 19).

RC also assert that the CFPB did not meet its burden of proving that consumers did not benefit from the use of RCCs. (Dkt. 283 at 7). They state that the benefit to consumers who seek payday loans is readily apparent because RCCs can provide a payment alternative if a consumer attempts to renege on his or her payment obligations. (*Id.*). The use of RCCs protects lenders, which in turn allows lenders to extend credit to consumers who might not otherwise be eligible. (*Id.*). They assert that such a benefit is not outweighed by any purported injury and the CFPB has not established the reason why consumers withdrew their ACH authorizations. (*Id.*).

**4. Analysis**

**a. Did Respondents' use of RCCs cause Substantial Injury?**

As I discussed in my analysis of Count IV, above, the term "substantial injury" does include monetary harm. *See supra* Section VI.C.4.a.

[12] I note that in my analysis I am relying on the language of the Loan Agreement rather than on the expert witnesses' interpretation of that language.

With regard to Count VII, EC assert that using RCCs to withdraw funds from consumers' bank accounts caused them to suffer substantial financial harm. (Dkt. 276 at 17). They cite to undisputed data that shows IA used RCCs 602 times to collect a total amount of $115,024.50 from consumers who had attempted to block IA's ability to withdraw money from their accounts by revoking ACH authorization or blocking ACH debits, after they had paid an amount equal to the disclosed "Total of Payments." (*Id.*; Dkt. 281 at 18). They further assert that such harm is not merely speculative, but is direct, substantial injury, because it was taken from consumers' bank accounts that they were specifically trying to protect. (Dkt. 281 at 18). They state that it is well settled that "billing customers without permission causes injury for the purposes of asserting" an unfairness claim and cite to several cases in support of this position. (*Id.*; Dkt. 276 at 17).

RC argue in opposition that the CFPB has not presented any evidence of consumer injury. (Dkt. 272 at 20). They assert that the CFPB identified only one potentially relevant consumer complaint that postdates July 21, 2011, and that consumer complaints do not equate to violations of the law. (Dkt. 278 at 19). They also assert that RCCs were used in less than one percent of all loans, as a last resort. (Dkt. 272 at 20-21).

I find that the undisputed facts do show that IA used RCCs 602 times after July 21, 2011, to collect a total amount of $115,024.50 from consumers who had attempted to block IA's ability to withdraw money from their accounts by revoking ACH authorization or blocking ACH debits after they had already paid an amount equal to the disclosed "Total of Payments." It is reasonable to conclude that consumers who attempted to block IA's access to their bank accounts did not consent to IA's use of RCCs to withdraw the money and suffered financial harm when IA continued to do so. Although RC argue that consumers consented to having money withdrawn from their accounts, it is clear in the cases where consumers took affirmative action to stop the automatic withdrawal of money, that they were not consenting to the continued use of RCCs to withdraw funds. Although the numbers of cases in which RCCs were used may have represented a small percentage of the total of loans, they were still used 602 times to collect money from consumers who were trying to protect their accounts. Furthermore, because I found the Loan Agreement to be deceptive and violative of TILA, the amounts obtained effectively were not owed to Respondents. Thus, taking the money from consumers' accounts, regardless of amount, is inherently substantial injury. I therefore do not find RC's argument that there is no evidence of consumer injury in the record to be convincing. I find that IA's use of RCCs to withdraw funds from the accounts of consumers who had attempted to stop ACH withdrawals from their bank accounts caused substantial injury.

**b. Was the injury caused by RCCs Reasonably Avoidable?**

EC argue that the substantial injury was not avoidable because the sentence which authorized IA to use RCCs in the Loan Agreement, on its face, was neither clear nor conspicuous. (Dkt. 276 at 16, 18). They state that it is boilerplate language that appeared only once in the contract, in a single, opaque sentence that was not emphasized or explained in any way. (Dkt. 276 at 2, 18).

RC argue in opposition that the use of RCCs was reasonably avoidable because consumers authorized their use and they could have provided IA with another form of payment. (Dkt. 278 at 18). They also state that consumers could have stopped the RCC process once it was initiated by informing IA of an alternative payment method. (*Id.*).

In analyzing this issue, it is helpful to look at the exact language of the Loan Agreement that authorized the use of RCCs.

This ACH Authorization is a part of and relates to the Loan Agreement dated 3/24/2009 (the "Loan Agreement"). The words "you", "your" and "I" mean the borrower who has electronically signed it. The words "we", "us" and "our" mean Integrity Advance, LLC ("Lender"), a licensed lender of payday loans regulated by the Delaware State Bank Commissioner. You hereby voluntarily authorize us, and our successors and assigns, to initiate automatic credit and debit entries to Your Bank Account in accordance with the Loan Agreement. You agree that we will initiate a credit entry to Your Bank Account for the Amount Financed on or about the Disbursement Date.
You also authorize us to initiate an ACH debit entry to Your Bank Account:

(a) for the Total of Payments plus any accrued fees on the Payment Due Date, or on any subsequent Renewal Payment Due Date, if you contact us at least three (3) business days prior to such date and select Payment Option (a) in the Loan Agreement (Pay in full);

(b) for the Finance Charge plus any accrued fees on the Payment Due Date, or on any subsequent Renewal Payment Due Date, if you contact us at least three (3) business days prior to such date and select Payment Option (b) in the Loan Agreement (RENEWAL), or if you fail to contact us to confirm your payment option;

(c) for the accrued finance charges and fees, plus $50.00 on each Pay Date[1] after the fourth (4th) Renewal Payment Due Date, until all amounts owed under the Loan Agreement are paid in full; and

(d) for any accrued Returned Payment charges, subject to the Loan Agreement.

You agree that we may re-initiate a debit entry for the same amount if the ACH debit entry is dishonored or payment is returned for any reason. The ACH Authorizations set forth in the Loan Agreement are to remain in full force and effect for this transaction until your indebtedness to us for the Total of Payments, plus any other charges or fees incurred and described in the Loan Agreement, is fully satisfied. You may only revoke the above authorizations by contacting us directly. If 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.

The relevant sentence appears in the document which is the "ACH Authorization" Form. At the top of the form above this section are several spaces for the consumer to fill in personal information. The paragraph with the relevant language, the last paragraph above, consists of six lines of text all in the same font with no bolding or capital letters. In the last sentence of this paragraph is the language that grants IA the power to use RCCs: "[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." There is nothing to highlight this sentence in any way. The sentence is then followed by three more paragraphs of text, which further hinders it from standing out.

I find it significant that this sentence does not use the term "remotely created check," "RCC," "demand draft," or any other special term that would alert the consumer to gravity of what this sentence permits. It is not apparent from this sentence that IA could prepare a check without the consumer's knowledge or signature. Furthermore, it is significant that the sentence states in relevant part, "[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 . . . ." (emphasis added). By using the word "and" IA is still permitted to withdraw funds using RCCs even if a consumer provides another form of payment. This language prevents the consumer from avoiding the substantial harm caused by the use of RCCs, because IA can continue to use RCCs, regardless of whether the consumer offers another form of payment. If, as RC assert, the sentence provides consumers with an alternative to the use of RCCs, then instead of the word "and" the sentence should have included the word "or."

Additionally, consumers did not know when RCCs were initiated, so they would not have known to provide an alternate payment method at that point. RCCs were used specifically after consumers took action to try to protect their bank accounts. They were thus trying to avoid harm, but since there was no way to prevent RCC use, other than paying money which they were actively trying not to pay, almost by definition, the harm was not reasonably avoidable. Accordingly, I find that substantial injury to consumers was not reasonably avoidable.

**c. Was the substantial injury outweighed by countervailing benefit to consumers or competition?**

RC assert that any alleged harm to consumers was outweighed by a countervailing benefit to consumers or competition. Specifically, they state it is readily apparent that consumers benefited from the use of RCCs because by allowing their use, lenders were protected, which enabled them to extend credit to consumers who might not otherwise be eligible. (Dkt. 283 at 7). Since they raised this argument for the first time in *Respondents' Reply Brief in Support of Their Motion for Summary Disposition* (Dkt. 283), it was not addressed by EC. They also argue that the CFPB did not prove that consumers did *not* benefit from the use of RCCs. (*Id.*).

In examining RC's argument, they appear to argue that the general population of consumers who need payday loans benefit when lenders, in general, are able to recoup payments from consumers and thus continue in the loan business. This is a rather broad argument. They do not explain why the particular consumers in the current case who had their accounts debited by the use of RCCs, after they had specifically tried to prevent continued withdrawals from their accounts, reaped a benefit, especially not one that outweighed the substantial harm suffered when their accounts were debited using RCCs. Furthermore, while RC's argument may explain why RCCs are a valuable payment mechanism in the payday loan space, it does not justify their authorization and use in situations where consumers are not fully informed about the payment mechanism. I am not convinced by this argument and I find that the harm to consumers in the current matter was not outweighed by a countervailing benefit to consumers or competition.

For all of the reasons discussed above, I conclude that IA's acts or practices regarding RCCs caused or were likely to cause substantial injury to consumers which was not reasonably avoidable and was not outweighed by countervailing benefit to consumers or competition. I therefore find that the record contains sufficient undisputed material facts to establish that Respondent Integrity Advance engaged in unfair acts or practices in violation of Count VII.

## F. COUNTS III, IV, AND VII, INDIVIDUAL LIABILITY OF RESPONDENT JAMES R. CARNES

### 1. Legal Standard

The CFPB alleges that Respondent James R. Carnes bears individual liability for Counts III (deception relating to TILA disclosures), IV (unfairness relating to TILA disclosures), and VII (unfairness relating to use of RCCs). (Dkt. 1 at 2-3, 11-14). In order to hold an individual liable for deceptive or unfair corporate acts under the CFPA, the CFPB must prove: 1) he participated directly in, or had the authority to control, the deceptive/unfair acts or practices at issue; 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. *See Gordon*, 819 F.3d at 1193 (quoting *Stefanchik*, 559 F.3d at 931); *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016).

### 2. CFPB's Position

EC assert that Carnes had authority to control IA and either knew or was recklessly indifferent to the facts that the Loan Agreement deceptively and unfairly misrepresented the cost of IA's loans and that IA was unfairly using RCCs when consumers had blocked electronic access to their bank accounts.

EC assert that the undisputed evidence demonstrates that Carnes had authority to control IA during all relevant times and, in his testimony, he admitted that he "had ultimate authority over the company." (Dkt. 276 at 20). Specifically, they assert that Carnes was the founder of IA and functioned as its chief executive the entire time it originated loans. (*Id.*). He was the majority owner and CEO of IA's parent company. (*Id.*). They also assert that authority to control a company directly can be inferred from active involvement in business affairs and making of corporate policy, including assuming duties of a corporate officer. (*Id.*). They assert that Carnes assumed the duties of a corporate officer and was actively involved. (*Id.*). In his role as chief executive, he supervised all individuals who provided services to IA, participated in day-to-day business, made final hiring decisions, decided how much IA would pay for leads, set underwriting policies, approved website content, directed website changes, and signed several agreements on behalf of IA with vendors, service providers, and the company's bank. (*Id.*).

In their *Reply Brief*, EC assert, in opposition to RC's implication that Carnes needed to directly participate in practices in order to control them, that they need not prove that Carnes directly participated in practices, that he was aware of their illegality, or that they went beyond ordinary deception. (Dkt. 284 at 7).

EC also assert that Carnes had knowledge of IA's misrepresentations as to the loan costs. (Dkt. 276 at 21). Specifically, they state Carnes was fully aware that IA disclosed expensive multi-payment loans as if they were much cheaper single-payment loans. (*Id.*). They assert that Carnes admitted he understood that IA disclosed its loans as single-payment loans and that all loans rolled over by default and would be renewed repeatedly and automatically placed into the auto-workout process. (*Id.*). They state that Carnes admitted in testimony that 90% of IA's customers experienced loan rollovers and he knew that consumers who experienced loan rollovers would pay more than had been disclosed in the "Total of Payments" TILA box. (*Id.*).

Alternatively, EC argue that, at the very least, Carnes was recklessly indifferent to the truth or falsity of the misrepresentations and should have known about the unfair or deceptive practices given that he had "ultimate authority" over IA and was an active and engaged manager who exercised control over all business decisions. (*Id.* at 21-22). They also assert reckless indifference because the Loan Agreement was the operative document for IA's only product which generated millions of dollars of income for the company and for Carnes. (*Id.* at 22). Carnes knew that the Loan Agreement disclosed the cost of loans by assuming it would be repaid in a single payment, even though IA automatically renewed loans by default, and he admitted most of IA's loans were, in fact, automatically renewed. (*Id.*).

With regard to the unfairness of using RCCs, EC assert that Carnes knew that IA was using RCCs when consumers had blocked electronic access to their bank accounts. (*Id.*). They assert that Carnes testified that he saw a printer being used to create RCCs, likely on a weekly basis. (*Id.*).

In their *Opposition Brief*, EC assert that establishing knowledge of the misrepresentation only requires establishing "the requisite factual knowledge" of acts or practices that are deceptive and does not require evidence that the individual knew the acts or practices were illegal or that the individual "intended to defraud" consumers. (Dkt. 281 at 23-24).

With regard to Carnes's reliance on outside counsel to draft the Loan Agreement and on the Delaware regulator to review IA's documents and grant and renew a lending license, EC argue that such reliance, even if true, would merely go to Carnes's intent, which is neither relevant nor a defense to his liability. (*Id.* at 27-28). They also emphasize that Carnes did not need to draft, edit, revise, or substantively review the Loan Agreement templates in order to know of the misrepresentations it contained, and courts routinely hold individuals liable for deceptive materials even when they did not personally author them. (*Id.* at 25).

### 3. Respondents' Position

RC assert that the courts have set a high bar before an individual can be held responsible for corporate acts and that an individual cannot be held liable simply because he or she had authority over the corporate entity. (Dkt. 272 at 25). They assert that courts have found individuals liable where the individual drafted or provided input into the creation of the deceptive, fraudulent, or violative material, or the individual substantively reviewed, edited, or revised the materials. (*Id.*

at 26). They assert that summary disposition is inappropriate where, as here, the individual lacked knowledge of the allegedly deceptive material, even where the individual exercised control over the company. (*Id.* at 26-27).

In support of their argument, RC assert that the undisputed facts establish that Carnes was the *de facto* CEO of IA, who did not draft, edit, revise, substantively review, or approve the Loan Agreement template other than possibly flipping through it, and that he relied on outside counsel to draft an agreement that conformed with Delaware and federal law. (*Id.* at 27). They further assert that because the Loan Agreement was provided to Delaware banking regulators, it is reasonable to infer that Carnes believed it was legally compliant. (*Id.* at 28).

With regard to the use of RCCs, RC assert that they were a legitimate payment mechanism and the decision to use them was made by a third-party call center on a case-by-case basis, sparingly, and only as a last resort. (*Id.*). RC argue that the CFPB cannot show that Carnes knew, had reason to know, or recklessly avoided knowledge of the specific contents of the Loan Agreement templates or the use of RCCs. (*Id.*). Additionally, they assert that Carnes cannot be held liable because he had no reason to know either could be considered "deceptive" or "unfair" under the CFPA. (*Id.*).

RC also assert that the CFPB must show that Carnes had actual knowledge of "misrepresentations," was recklessly indifferent to their "truth or falsity," or was otherwise aware of a high probability of "fraud" with intentional avoidance of the truth. (*Id.* at 29). They assert that the repayments and cost information, as well as information regarding RCCs were, at worst (if Dr. Hastak's testimony that the information was not clear or conspicuous is correct), merely hidden in the fine print, but that the information was nevertheless contained in the Loan Agreement. (*Id.*). Therefore, they assert that the CFPB cannot establish the level of "misrepresentation," "falsity," or "fraud" that would be necessary to find Carnes liable. (*Id.* at 29-30).

In their *Opposition Brief*, RC again emphasize that a heightened standard of awareness beyond the authority to control is necessary in order to find individual liability. (Dkt. 278 at 21).

They dispute EC's version of the facts. Specifically, they dispute whether Carnes supervised all individuals who provided services to IA, whether they reported to him, and whether he consulted with them. (*Id.* at 22). They again emphasize that Carnes did not draft, edit, or substantively review the Loan Agreement and that the decision to use RCCs, which were rarely used, was made by a third-party call center. (*Id.* at 23).

In their *Reply Brief*, RC again emphasize that there is a heightened standard of awareness, that the Loan Agreement was created by outside counsel, and Carnes was unaware of any purported deception or unfairness, because any complaints would have been handled by a third-party call center. (Dkt. 283 at 8-9). RC also clarify that they are not arguing that Carnes is not liable due to his good faith reliance on counsel, but rather that he is not liable because he did not know about the *specific disclosures* in the Loan Agreement or that they were deceptive or unfair. (*Id.* at 9) (emphasis added).

**4. Analysis**

In analyzing Carnes's individual liability for Counts III, IV, and VII, the relevant questions are: a) whether Carnes participated directly in,[13] or had the authority to control, the deceptive and unfair acts or practices at issue; and 2) whether Carnes had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of the high probability of fraud along with an intentional avoidance of the truth.

**a. Did Carnes have the authority to control the deceptive and unfair acts or practices?**

EC assert in their motion for summary disposition that Carnes had the authority to control IA during all relevant times. (Dkt. 276 at 20). They assert that he had ultimate authority over the company, was the founder of IA and functioned as its chief executive the entire time it originated loans and was the majority owner and CEO of IA's parent company. (*Id.*). They also assert that his authority to control IA can be inferred from his active involvement in the company because

[13] EC do not argue that Carnes "directly participated" in the alleged unlawful acts or practices, but rather that he had the "authority to control" them.

Carnes supervised all individuals who provided services to IA, participated in day-to-day business, made final hiring decisions as to all individuals who provided services to the company, decided how much IA would pay for payday loan leads, set IA's underwriting policies, approved the contents of the company's website, directed changes to the website, and signed several agreements on behalf of IA with vendors, service providers, and the company's bank. (*Id.*).

In their *Motion for Summary Disposition*, RC did not initially argue that Carnes did not have the authority to control IA, but instead focused their argument on disputing whether the CFPB had established the second knowledge element for liability, discussed in the legal standard above. (Dkt. 272 at 25-30). In their *Opposition Brief*, RC stated that while Carnes was the *de facto* CEO of IA and did have ultimate authority over IA, this was not enough to hold him individually liable because the CFPB must show a heightened standard of awareness beyond the authority to control. (Dkt. 278 at 21-22). They assert that the facts relied upon by the CFPB to establish day-to-day management are disputed because there were multiple layers in the chain of command and Carnes did not supervise all of the individuals claimed by EC. (*Id.* at 22). Additionally, they assert that IA outsourced key functions to third parties; specifically, a third-party call center was hired to administer the loans and outside counsel was hired to create the Loan Agreement. (*Id.*). However, I find that these facts go to the question of "direct participation" rather than authority to control, and thus are not pertinent to my finding on this prong of the legal standard. The CFPB is only required to establish "direct participation" *or* "authority to control."

I note that RC cite to *FTC v. Freecom Communications, Inc.*, for the proposition that the CFPB must show a "heightened standard of awareness *beyond the authority to control*" in order to hold Carnes individually liable. *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1207 (10th Cir. 2005) (emphasis added). However, RC fail to include that court's explanation of the heightened standard of awareness: the FTC (or CFPB) "may fulfill its burden by showing the individual had 'actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *Id.* (quoting *FTC v. Amy Travel Serv.*, 875 F.2d 564, 574 (7th Cir. 1989)). This heightened standard is merely the second prong of the analysis established by

*Gordon*, which is already necessary to establish individual liability.[14] *See supra* Section VI.F.1. for the legal standard. Thus, I conclude that establishing authority to control is sufficient to establish the first prong of the analysis.

I have examined the evidence regarding Carnes' role in the company in detail and have set forth the undisputed facts regarding his authority to control the company. (*See* Section V, Facts Deemed Established, for full discussion of facts with citations to evidentiary support). In determining the undisputed facts, I examined the exact language of the testimony cited by each party as well as any referenced exhibits and disregarded either party's attempt to characterize the evidence. I will not repeat every such fact here, but will highlight some of the more significant ones that establish Carnes' authority to control IA:

> Carnes founded Integrity Advance and was its President and CEO during the entire period it offered loans to consumers. His active involvement with IA business decreased from 2008 to 2012. However, Carnes was the ultimate decision maker for IA's business decisions. Everyone who was involved with IA reported either directly or indirectly to Carnes and he made the final decision to hire all HIP employees who were involved with IA.
>
> Carnes worked in the Kansas City office, where the senior executives worked, on a daily basis, had an open-door policy, and was accessible to any IA employee who wanted to talk. Carnes met with Foster, who served at various times as IA's Executive Vice President, General Counsel, Secretary, and Assistant Treasurer, a few times a week about IA business and spoke to him if there was a significant problem with IA. Carnes, together with Foster, hired Madsen whose job was to purchase leads and manage relationships with lead

[14] I also note that the court distinguished between the FTC's burden of proof for obtaining injunctive relief against an individual for a business entity's acts or practices, for which the FTC need only prove that the individual participated directly in the business entity's deceptive acts or practices or had the authority to control them (*Freecom Commc'ns*, 401 F.3d at 1202-1203), and for holding an individual personally liable for consumer redress, for which the "heightened standard" is applicable (*Id.* at 1207). However, I find this distinction is inapplicable here, where *Gordon* establishes the test for individual liability in CFPA cases and requires both prongs to be proven, and where EC seek both injunctive relief and consumer redress, so both prongs would need to be proven regardless.

> providers. Madsen reported directly to Carnes and spoke to him on a daily basis about the behavior of the lead purchase system, conversion rates, long-term performance of sources, and default rates. Both Carnes and Madsen monitored and reported results from the dashboard system that was used to monitor lead performance. Madsen had to consult with Carnes about changes in the credit scores IA would accept from customers. Andonian's job for IA was to address issues with its website and database. He attended weekly IT meetings with Carnes, Foster, and the Willowbrook project manager where Carnes usually set the meeting priorities. Carnes would bring IA matters to Andonian's attention when there were issues with the database and Carnes had final say over the contents of IA's website and approved its contents at a high level. Carnes directed Andonian to make changes to the website and remove states from it.
>
> As chief executive, Carnes had the ultimate say over IA's policies and procedures and testified that he had ultimate authority over the company and making sure it complied with Delaware law. Carnes ultimately made the call on what IA would pay for a lead and was the main decision-maker regarding IA's underwriting policies. He was a signatory on the contract with the vendor that provided debt collection services to IA, on various lead purchase agreements, on the ACH origination agreement, and for IA's bank account. Carnes had communications with the call centers used by IA and was involved in the decision to move IA's business from one call center to another. When a call center used by IA had an employee who allegedly committed fraud, Carnes directed resolution of the problem. Carnes testified that his attorneys had his approval to use the Loan Agreement and that as chief executive he was ultimately approving everything. Carnes had the authority to change IA's fee structure.

Having examined the undisputed facts, law, and arguments of the parties, I find that the evidence is overwhelming that Carnes, in fact, had the "authority to control" IA and the deceptive and unfair practices at issue.

**b. Did Carnes have knowledge of the misrepresentations or was he "recklessly indifferent" to the truth or falsity of the misrepresentations?[15]**

The relevant facts regarding this issue are not in dispute and are set forth in Section V, above. With regard to the TILA loan disclosures, Carnes testified that IA hired outside counsel to draft a Loan Agreement that conformed with the law and that he did not draft, edit, revise, or substantively review it, although he may have looked through a template and could have "flipped through" it at some point before it was put into action and he gave his attorneys approval to use it. He also testified that he did not discuss the Loan Agreement with outside counsel or the Delaware regulator and could not recall whether he discussed it with in-house counsel or any IA personnel. He testified that IA had a lending license from the state of Delaware and that it was renewed. He testified that he knew the loan documents would be put into the loan management system and while he did not expressly approve it, he knew it was happening and did not prevent it, and thus gave tacit approval.

With regard to the loan process set forth in the Loan Agreement, Carnes' testimony makes clear that he understood the loan disclosures, auto-renewal, and auto-workout process. For example, he testified that he knew that for a fictional consumer with a $100 loan, their TILA disclosure would say they owed $130 for the "Total of Payments." He knew that if a consumer did not call or email IA, and it was their first payment, the loan would be automatically renewed, and if the consumer continued to do nothing, the loan would continue to renew or rollover four times before it went into the auto-workout process. He knew that about 90%[16] of IA's loans would experience at least one rollover and that consumers whose loans rolled over would pay more than had been disclosed in their TILA disclosures. He testified that IA did not have any products or sources of revenue besides the loans. He also testified that IA was the most profitable of HIP's subsidiary companies and it contributed most of the income to HIP.

[15] The CFPB alleges that Carnes had knowledge of the misrepresentation or alternatively that he was recklessly indifferent to the truth or falsity of the misrepresentations. It does not argue that he was aware of a high probability of fraud.

[16] He later testified that the 90% number was not in his head at the time he was the CEO, but he understood at the time that the majority of loans would have at least one rollover.

With regard to knowledge of consumer complaints, Carnes' testimony during the formal hearing was inconsistent with his testimony at the investigational interview. At the formal hearing he testified that he did not know there were consumer complaints about the loan product. (Tr. I 233:16-22). However, during his earlier investigational interview, he testified that he was, in fact, aware of consumer complaints and a common complaint consumers made was that they did not understand that their payments were not going toward the principal. (EC-EX-068 at 243:6-244:5).

With regard to RCC usage, Carnes' testimony establishes that he knew that IA used RCCs to withdraw money from the accounts of consumers who had withdrawn ACH authorization. He had first-hand knowledge of RCC usage because he saw RCCs being printed "probably weekly" using a printer in the Kansas City office.

While the underlying facts are thus clear, the parties disagree as to the appropriate standard for determining Carnes' level of knowledge of the misrepresentations.

EC assert that establishing knowledge of a misrepresentation merely requires establishing "'the requisite factual knowledge' of acts or practices that are deceptive." (Dkt. 281 at 23) (quoting *CFPB v. CashCall, Inc.*, No. CV 15-07522-JFW, 2016 WL 4820635, at *11 (C.D. Cal. Aug. 31, 2016)). They assert that it does not require evidence that the individual knew the acts or practices were illegal, (citing *CashCall*, 2016 WL 4820635, at *11-12), or evidence that the individual "intended to defraud" consumers (citing *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)). (Dkt. 281 at 24). They assert that individuals can be held liable for any acts or practices that meet the elements of deception. (*Id.*) (citing *Nationwide Biweekly Admin.*, 2017 WL 3948396, at *6-9, 12 (holding individual liable for deceptive statements that were "literal[ly] true" and had "an articulable basis in fact.").

RC argue for a higher standard, specifically that Carnes must have known, had reason to know, or recklessly avoided knowledge of the specific contents of the Loan Agreement template and the use of RCCs, as well as that he must have known that either could be considered "deceptive" or "unfair" under the CFPA. (Dkt. 272 at 28-29). In their *Reply Brief*, RC clarify that their argument is *not* that Carnes had to know the actions were illegal but rather that he had to know they were deceptive and/or unfair.

In the *CashCall* case cited by EC, the district court noted that "a mistake of law is not typically a defense to liability, no matter how reasonable that mistake." *CashCall*, 2016 WL 4820635, at *11 (citing *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010) ("We have long recognized the common maxim, familiar to all minds that ignorance of the law will not excuse any person, either civilly or criminally.")). Specifically on the question of individual liability, the court addressed the individual's claim "that he believed that the loans were payable and fully collectible based on the advice of his counsel" by noting that "[r]eliance on advice of counsel is not a valid defense on the question of knowledge required for individual liability" and again cited the *Jerman* case regarding ignorance of the law. *Id.* at *12 (quoting *Grant Connect*, 763 F.3d at 1102). Similarly, RC assert that due to reliance on counsel and on the Delaware regulator's review of their annual license renewal, Carnes believed the Loan Agreements were lawful.

To the extent *CashCall* is persuasive, it holds that as long as Carnes knew of the misrepresentations in the Loan Agreements and that RCCs were used in circumstances that were unfair to consumers, he can be held individually liable despite believing the activities were nonetheless lawful. I have not found, and RC do not cite to, any case law supporting RC's assertion that Carnes had to know specifically that IA's actions were "deceptive" or "unfair." But taking this argument one step further, unless RC are asserting that Carnes had to have personal knowledge of each of the elements of a deception and unfairness claim to know that the company's actions were deceptive or unfair, which would make the bar for individual liability excessively high and has no support in the analyses of any of the cases cited by either party, the knowledge element must be satisfied if Carnes knew that the Loan Agreements were misleading and that RCCs were used in circumstances that were unfair to consumers. RC seem to support this as the standard, arguing that Carnes must have had knowledge of "misrepresentations," been recklessly indifferent to their "truth or falsity," or been otherwise aware of a high probability of "fraud." (Dkt. 272 at 29).

RC contend that the CFPB cannot show that Carnes knew, had reason to know, or recklessly avoided knowledge of the specific contents of the Loan Agreement Template or the use of RCCs. (Dkt 272 at 28). They also make this argument in their *Opposition Brief*, citing to *CFPB v. Mortgage Law Group, LLP*, which granted summary judgment in favor of an individual defendant where "there is no evidence that [Defendant] knew or should have known about the content of the [allegedly violative materials]." (Dkt. 278 at 23-24) (quoting *CFPB v. Mortgage Law Group, LLP*, 196 F. Supp. 3d 920, 946-47 (W.D. Wis. 2016)). RC try to equate Carnes' level of knowledge to that case's defendant's knowledge with regard to the content of loan disclosures they assert Carnes never reviewed. They compare *Mortgage Law Group* to *Gordon*, in which the individual defendant reviewed, edited, and modified the deceptive materials and was responsible for "assur[ing] that all advertising is legal," and thus was held individually liable. *Gordon*, 819 F.3d at 1193.

However, RC's argument fails as I find that Carnes did know and understand the contents of the Loan Agreement, as demonstrated by his testimony, even if he did not play a role in drafting, editing, revising, or substantively reviewing it. The relevant facts recited above support that he knew the information in the TILA boxes would be disclosed as if the loan were a single-payment "payment-in-full" loan and he knew and understood the default auto-renewal and auto-workout processes which the vast majority of the loans experienced.

RC also argue that the CFPB cannot possibly prove that Carnes had knowledge of misrepresentations in the Loan Agreement because the Loan Agreement did not contain misrepresentations or fraudulent statements, and the CFPB instead alleged that the repayment and cost information, as well as the information regarding RCCs were "hidden in fine print." (Dkt. 272 at 29). However, a "misrepresentation" does not require a "falsity" or "fraud." A misrepresentation is defined as "[t]he act or instance of making a false or misleading assertion about something, usually with the intent to deceive." Black's Law Dictionary (11th ed. 2019). I found that the Loan Agreement was deceptive which, by definition, means that I found it was likely to mislead consumers about a material representation—i.e., a misrepresentation. Thus, this argument fails.

Similarly, I also find that Carnes did know and understand that RCCs were being used in circumstances when consumers had revoked their ACH authorization and tried to prevent IA from debiting their bank accounts. Even if he believed that IA was utilizing a lawful payment mechanism that was properly disclosed to collect money that IA was legally owed, Carnes knew the circumstances under which they were used. As I have found these circumstances to be unfair, I find that Carnes had the requisite knowledge to hold him individually liable for this practice.

Alternatively, considering that consumer loans were IA's only product and that IA was the most profitable of all of HIP's subsidiaries and contributed most of the income to HIP, if Carnes did not know the contents of the Loan Agreement as RC assert, then I find he was recklessly indifferent to the misrepresentations contained therein.

Accordingly, I conclude that Carnes had the "authority to control" IA and the deceptive and unfair practices at issue, and that he had knowledge of the deceptive and unfair misrepresentations in the Loan Agreement and of the unfair circumstances under which RCCs were used. Therefore, I find that the record contains sufficient undisputed material facts to establish that Respondent Carnes may be held individually liable for the deceptive practices in Count III, the unfair practices in Count IV, and the unfair practices in Count VII.

## G. REMEDIES

EC seek the imposition of restitution, injunctive relief, and civil money penalties as remedies for Respondents' violations of law. As I have found the violations alleged in all counts proven, I must decide what relief is appropriate for each count. The CFPA provides me "jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law . . . ." 12 U.S.C. § 5565(a)(1). This relief may include, *inter alia*, restitution, "limits on the activities of functions of the person" (i.e., injunctive relief), and civil money penalties. 12 U.S.C. § 5565(a)(2)(C), (G), (H).

### 1. Restitution

**a. CFPB's Position**

EC assert that because they have established Respondents' legal violations and the resulting harm to consumers, they are entitled to judgment for that amount, as they seek legal restitution. (Dkt. 276 at 25-26). EC further assert that restitution under the CFPA is determined using a two-step burden-shifting framework under which EC bear the initial burden of proving that the amount they seek approximates consumer loss or unjust gain and then the burden shifts to Respondents to demonstrate that the approximation overstates consumer loss or unjust gains. (*Id.* at 26-27).

EC calculate consumer losses as the amount paid by consumers in excess of the "Total of Payments" disclosed by Respondents in the TILA box. (*Id.* at 27). EC considered only consumers for whom Respondents withdrew more than the "Total of Payments" and rolled over the loan at least once. (*Id.*). They excluded loans where consumers paid less than the disclosed "Total of Payments" and those loans that did not roll over at least once. (*Id.* at 27-28).

For Count I, EC calculate the aggregate amount of all consumer overpayments as $132,580,041.06.[17] (*Id.* at 28). As the CFPB is pursuing CFPA claims only for violations that occurred on or after July 21, 2011, EC calculate the harm for Count II as a subset of that for Count I, totaling $38,453,341.62.[18] (*Id.* at 28-29). For Counts III and IV, EC calculate the harm at an amount identical to Count II, note that it also overlaps with the harm quantified for Count I, and note that both Respondents are jointly and severally liable for Count III and IV relief. (*Id.* at 29). For Count VII, EC calculate that Respondents used RCCs generated after July 21, 2011, to collect $115,024.50 from consumers in excess of what IA had disclosed after consumers had revoked or stopped the company's authorization to withdraw funds from their bank accounts. (*Id.*). EC also assert that IA and Carnes are jointly and severally liable for Count VII relief.

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[17] EC clarify that this figure excludes any potential refunds and rebates. (Dkt. 276 at 28 n.15.)
[18] Again, EC clarify that this figure excludes potential refunds and rebates. (Dkt. 276 at 29 n.17.)

For Count I, EC calculate the restitution amount based on conduct dating back to 2008. In their *Reply Brief*, EC assert that 12 U.S.C. § 5565, which authorizes legal or equitable relief with respect to a violation of Federal consumer financial law, took effect on July 21, 2011, but does not limit relief to violations that occurred after that date. (Dkt. 284 at 9-10). EC assert that since the statute does not expressly prescribe whether the statutory remedies apply to earlier violations, the question is whether applying the statute to earlier conduct would have a retroactive effect. (*Id.* at 10) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). EC conclude that there would not be an impermissible retroactive effect because the FTC could have obtained relief for the same violations and it does not matter whether EC seeks restitution in an administrative forum. (*Id.* at 10).

**b. Respondents' Position**

RC assert that restitution in CFPA matters is an equitable remedy subject to the discretion of the ALJ. (Dkt. 278 at 26). They assert that the CFPB should be precluded from seeking legal restitution because this is a new position directly contrary to that taken by EC in the earlier proceeding and there is no authority for the proposition that restitution is mandatory. (Dkt. 272 at 32-33). They further assert that equitable restitution is not appropriate unless the CFPB establishes that Respondents intended to defraud consumers or that consumers did not receive the benefit of their bargain, which they assert the CFPB has not done. (Dkt. 272 at 31-32; Dkt. 278 at 27-28).

Additionally, RC claim that the CFPB has not matched their calculations to actual harm to consumers and has not established that their figures approximate "unjust gains." (Dkt. 278 at 29-30; Dkt. 272 at 34-35). They also contend that even if Respondents were found liable and restitution were to be granted, repeat customers should be excluded from the restitution calculation, as they could not have been harmed by the disclosures in the Loan Agreement. (Dkt. 278 at 30).

RC further assert that the CFPB cannot recover for conduct prior to July 21, 2011, since the CFPB's enforcement authority is expressly limited to conduct occurring on or after July 21, 2011. (*Id.* at 31). They argue that the CFPB's attempt to impose retroactive liability violates due process provisions within the Constitution. (*Id.*). Furthermore, RC assert that the FTC never had authority to obtain equitable monetary relief in administrative hearings so the CFPB cannot rely on the FTC's authority to regulate TILA established under the FTC Act for conduct pre-dating the CFPA. (*Id.* at 31-32).

In their *Reply Brief*, RC assert that the CFPB cannot seek legal restitution as a form of money damages in an administrative setting where Respondents did not have the ability to exercise their right to a jury trial. (Dkt. 283 at 10) (citing *Curtis v. Loether*, 415 U.S. 189, 197 (1974); *Verity Int'l*, 443 F.3d at 67). Additionally, RC assert that because Respondents transparently provided the Loan Agreement and other documents to the Delaware regulators for their review and were accordingly licensed, it demonstrates that Respondents were acting in good faith and reasonably believed they were legally compliant. (*Id.*).

**c. Analysis**

EC assert that the restitution they are seeking is "legal" restitution, "which is a judgment imposing 'a merely personal liability upon [Respondents] to pay a sum of money.'" (Dkt. 276 at 25-26) (quoting *Commerce Planet*, 815 F.3d at 601). According to EC, legal remedies are awarded "as a matter of course when the right [is] established." (*Id.* at 26) (quoting Dan B. Dobbs, *Law of Remedies* at 12, § 1.2 (2d ed. 1993)). They thus assert that if I find Respondents liable for the violations, I must award restitution. I note, however, that EC do not cite to any authority or cases applying this theory in the context of a CFPB case and RC argue that no such authority exists. I have not found any such applicable case law. I therefore am not convinced that EC's theory of "legal" restitution is applicable to the present matter. However, I need not decide this issue because I find that an award of "equitable" restitution is nevertheless appropriate.

RC assert, in opposition to EC's argument, that restitution is an "equitable" remedy subject to my discretion and that I cannot award restitution unless I find that Respondents either intended to defraud consumers or that consumers did not receive the benefit of their bargain.[19] (Dkt. 272 at

[19] I note RC's statement that the reason they did not previously request to reopen the record on the issue of whether consumers received the benefit of their bargain was because the evidence was already in the record. (Dkt. 272 at 32 n.8). I clarify that I am, in fact, considering their arguments that consumers received the benefit of the bargain and I am not treating that as a waived issue.

31). They assert that Respondents' lack of intent to deceive or mislead consumers is evident from the fact that they hired outside counsel to create a Loan Agreement that complied with the law and Delaware regulators granted the company approval to make loans to consumers, which further reinforced Respondents' belief that they were in legal compliance. (*Id.* at 31-32; Dkt. 283 at 10). They also argue that the CFPB did not prove that consumers did not receive the benefit of their bargain or that no fully-informed consumer would ever elect to take out a loan with IA because the existence of repeat customers establishes that fully informed consumers did elect to take out loans from IA. (Dkt. 278 at 28).

EC assert that if I find that the award of restitution is subject to my discretion, then Respondents' purported good faith or lack of intention to defraud are not appropriate bases to deny restitution and would undermine restitution's compensatory purpose. (Dkt. 276 at 26 n.11). They also assert that consumers did not get the benefit of their bargain because the bargain was that consumers would get a loan for the amount disclosed in the "Total of Payments" section of the TILA box, but instead they got a loan for a far higher price when the loan went into the auto-renew and auto-workout processes by default. (Dkt. 281 at 30-31).

As discussed above, I do find that consumers did *not* get the benefit of their bargain. *See supra* Section VI.C.4.c. Although consumers did receive loans, those loans, in the vast majority of cases, came at a substantially higher cost than was disclosed by Respondents. Also, I find that there is insufficient evidence to support RC's assertion that repeat customers were fully informed when taking out subsequent loans. *See supra* Section VI.B.4.a. However, I do find that all of the loans were deceptive on their face. Therefore, I find that I can award restitution, including for returning customers, and that it is appropriate in this case. Since I have found that consumers did not receive the benefit of their bargain, I need not address the issue of whether Respondents intended to defraud consumers for purposes of determining the appropriateness of restitution.

This brings us to the questions of the appropriate method for calculating restitution and the appropriate amount of restitution. The parties seem to be in agreement that the calculation method consists of a two-step burden shifting framework: 1) the CFPB bears the initial burden of proving that the amount it seeks approximates consumer loss or unjust gains; and 2) if the threshold showing has been made, the burden shifts to Respondents to demonstrate that the approximation overstates consumer loss or unjust gains. *See Gordon*, 819 F.3d at 1195. Although in *Gordon* the first step in this framework is quoted as identifying a defendant's unjust gains, the court also cited to *Stefanchik*, stating that, "[r]estitution may be measured by the 'full amount lost by consumers rather than limiting damages to a defendant's profits.'" *Id.* (quoting *Stefanchik*, 559 F.3d at 931). I agree with EC that the distinction is irrelevant since consumers made payments directly to IA, so unjust gains are equal to consumers' loss. (*See* Dkt. 276 at 26 n.12).

The disagreement comes in terms of deciding the amount of restitution. EC assert that the proper amount of restitution is the full amount lost by consumers and is not limited to a defendant's profits. (Dkt. 276 at 26). They assert that the CFPB is entitled to a presumption of actual reliance and does not have to prove actual reliance by consumers. (Dkt. 284 at 9). EC assert that it is reasonable to calculate consumer loss as the amount paid by consumers in excess of the "Total of Payments" disclosed by Respondents and they are only considering consumers for whom Respondents withdrew more that the "Total of Payments" and rolled over the loan at least once. (Dkt. 276 at 27). EC assert that the following amounts are appropriate:

Count I: $132,580,041.06 (aggregate amount of all consumer overpayments dating back to 2008; IA only) (*Id*. at 28).

Count II: $38,453,341.62 (a subset of Count I, for violations on or after July 21, 2011;[20] IA only) (*Id*. at 28-29).

Counts III & IV: $38,453,341.62 (same figure as Count II; also a subset of Count I, for violations on or after July 21, 2011; IA and Carnes jointly and severally liable) (*Id*. at 29).

Count VII: $115,024.50 (for violations on or after July 21, 2011; IA and Carnes jointly and severally liable) (*Id*.).

[20] The Bureau is not seeking damages under the CFPA for any conduct prior to July 21, 2011.

RC assert that restitution is not appropriate because the CFPB has not shown "actual harm" to consumers and has not established that their figures approximate "unjust gains." (Dkt. 278 at 29-30). They assert that repeat consumers should be excluded from the restitution calculation. (*Id.* at 30). They also assert that the CFPB cannot recover for conduct prior to July 21, 2011, the transfer date to the CFPB. (*Id.* at 31).

Having examined the cases cited by the parties, I do not find support for RC's assertion that the CFPB must prove damages for each consumer and its allegedly required four-factor analysis and agree that the CFPB is entitled to a presumption of actual reliance. *See Figgie Int'l*, 994 F.2d at 605 (proof of reliance by each purchasing customer not needed); *Gordon*, 819 F.3d at 1196 (government entitled to presumption that individuals who used services relied on misrepresentations); *AMG Capital*, 910 F. 3d at 428 (appellants failed to offer reliable method of quantifying whether customers purchased product free from deception). With regard to excluding repeat customers from the calculation, I have discussed returning customers at length above and do not find that there is a sound basis to exclude them from the calculation. Indeed, I concluded that if I found that EC met their burden in proving the deceptive nature of the loans, I would presume that consumers actually relied upon the deceptive disclosures even for subsequent loans. *See supra* Section VI.B.4.a. Since I have found that EC proved the deceptive nature of the loans, I therefore presume that returning customers relied upon the deceptive disclosures and, consequently, suffered harm.

The next question is whether the CFPB can recover for pre-transfer date violations of TILA. EC assert that pursuant to Section 1055 of the CFPA, the CFPB has authority to seek "any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law," including TILA. (Dkt. 284 at 9) (quoting 12 U.S.C. § 5565(a)(1)). They assert that this authority took effect on July 21, 2011, and does not limit the CFPB to only seeking relief for violations that occurred after that date. (*Id.*). They further state that because the statute does not "'expressly prescribe[] whether the statutory remedies apply to earlier violations, the question is whether applying the statute to earlier conduct 'would have retroactive effect.'" (*Id.* at 10) (quoting *Landgraf*, 511 U.S. at 280). EC assert that there would be no impermissible retroactive effect in seeking such a remedy since IA was subject to TILA and the accompanying equitable remedies, including restitution, during its entire existence. (Dkt. 284 at 9-10).

RC assert in opposition that there would be an impermissible retroactive effect since the FTC could not have recovered for TILA in administrative proceedings and the CFPB did not have authority to enforce the FTC Act until the transfer date. (Dkt. 278 at 31-32).

The Court in *Landgraf* set forth a two-part test for determining whether to apply a statute to conduct that pre-dates it. *See Landgraf*, 511 U.S. at 280. First, a court must determine whether Congress expressly prescribed the statute's proper reach. If Congress indicated a clear position, then the court is to apply that preference and no further inquiry is required. Where, as here, the statute is silent or unclear as to its reach, however, then the court must determine whether the new statute would have a retroactive effect, i.e., whether it would: a) impair the rights a party possessed when it acted; b) increase a party's liability for past conduct; or c) impose new duties with respect to transactions already completed. *Id.*

I do not find that the CFPA would impair any rights that Respondents possessed when they acted. Clearly there was no right pre-July 21, 2011, to fail to fairly and conspicuously disclose the terms of the Loan Agreement. The statute similarly does not impose any new duties. The relevant issue is whether it increases Respondents' liability for past conduct. Prior to July 21, 2011, Respondents were subject to TILA and its enforcement, including the possibility of being ordered to pay restitution. However, RC argue that they would not have been subject to this potential remedy in an administrative adjudication because the FTC never had authority to obtain equitable monetary relief in administrative hearings. (Dkt. 278 at 31-32) (citing *Heater v. FTC*, 503 F.2d 321, 326-27 (9th Cir. 1974)).

While that is true, it is clear that the FTC had authority to obtain restitution in a judicial forum. *See* 15 U.S.C. § 53(b) (authorizing the FTC to seek injunctive relief in district court for violations of "any provision of law enforced by the [FTC]," including TILA); *Commerce Planet*, 815 F.3d at 598 (reiterating previous holdings that 15 U.S.C. § 53(b) "empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution").

Therefore, Respondents would have been subject to this liability prior to July 21, 2011, if the FTC had brought an action in district court. As EC correctly note, the choice of forum is a procedural question that does not raise concerns about retroactivity. *See Landgraf*, 511 U.S. at 217; *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997).

Although I agree with RC's assertion that the CFPB may not rely upon the FTC's authority to regulate TILA prior to July 21, 2011, as the FTC Act was expressly excluded from the definition of "federal consumer financial law" which the CFPB has authority to enforce (12 U.S.C. § 5481(14)), EC assert, and I agree, that they do not seek to rely on the FTC's authority to enforce the FTC Act. Rather, whether the FTC had the authority to obtain restitution is relevant to the question of whether the CFPA increases Respondents' liability for past conduct under the *Landgraf* test. Since the FTC had this authority, I thus find that the CFPA does not increase Respondents' liability for past conduct, and the statute does not have a retroactive effect. Therefore, the CFPB may recover for violations of TILA prior to July 21, 2011.

The final question is whether EC's calculations appropriately capture the amount of consumer loss or Respondents' unjust gains.[21] I find that they do. Since I found liability for Counts I, II, III, and IV based on Respondents' incorrect disclosure of the "Total of Payments" as the amount of principal and one finance charge, consumers lost, and Respondents unjustly gained any amounts consumers paid in excess of the "Total of Payments" disclosed. I find that the methodology implemented by the CFPB's data scientist, Robert Hughes, was appropriate: to obtain the appropriate set of loans, he only considered consumers for whom Respondents withdrew more than the "Total of Payments" and rolled over the loan at least once, and excluded loans where consumers paid less than the disclosed "Total of Payments" and loans that did not roll over at least once. (Dkt. 276 at 27-28). From that population of loans, Hughes then took the sum of the total amount paid in excess of the "Total of Payments" for each Loan Agreement and aggregated those

[21] I note that in the prior proceeding, EC provided restitution calculations that excluded fees charged to consumers after the ALJ expressed a concern that some fees may have been charged prior to consumers repaying the amounts disclosed in the "Total of Payments" box. *See* Dkt. 162 at 29. In the current proceeding, neither party addressed the issue of fees. I consider any potential argument from RC that fees should be excluded to be waived since RC did not raise the inclusion of fees as an issue when the burden was theirs to demonstrate that EC's proposed figures overstated consumer harm or unjust gains. Furthermore, in proposing an alternative restitution figure that excluded repeat customers (*see* Dkt. 278 at 30-31), RC failed to exclude fees and thereby indicated that they chose to waive that theory of calculation.

amounts, subtracting rebates and refunds, to reach a total of all overpayments on IA loans of $132,580,041.06. (*Id.* at 28). I find this amount reasonably approximates consumer loss and Respondents' unjust gains under Count I.

For Counts II, III, and IV, the CFPB employed the same methodology for loans originated on or after July 21, 2011, arriving at a total of $38,453,341.62 for each Count. (*Id.* at 28-29). Since loan origination dates are not explicitly captured in the IA data on which CFPB relied, they approximated the population of loans by excluding loans with transaction dates that occurred fewer than 23 days after July 21, 2011, since the IA Loan Agreement provides that the first transaction on a loan occurs between 8 and 23 days after origination. (*Id.* at 29 n.16). I find that this methodology conservatively approximates the population of applicable loans, and therefore reasonably approximates consumer loss and Respondents' unjust gains under Counts II, III, and IV. Respondents IA and Carnes are jointly and severally liable for this amount for Counts III and IV.

For Count VII, where I found liability based on Respondents' use of RCCs in situations where consumers attempted to revoke their ACH authorization or block ACH debits after they had already paid an amount equal to the "Total of Payments" in the TILA box, the CFPB calculated consumer loss based on RCC usage in those exact situations. Specifically, the CFPB calculated that Respondents used RCCs generated after July 21, 2011, to collect $115,024.50 from consumers in excess of what IA had disclosed after consumers had revoked or stopped the company's authorization to withdraw funds from their bank accounts. (*Id.* at 29). This figure is a subset of the harm calculated under Count I, as it is comprised of amounts paid in excess of the disclosed "Total of Payments." Respondents IA and Carnes are jointly and severally liable for this amount.

I therefore find that EC has demonstrated that it is entitled to restitution in the amounts set forth below:

| | |
|---|---|
| Count I: | $132,580,041.06 (aggregate amount of all consumer overpayments dating back to 2008; IA only) |

Count II: $38,453,341.62 (a subset of Count I, for violations on or after July 21, 2011; IA only)

Counts III & IV: $38,453,341.62 (same figure as Count II; also, a subset of Count I, for violations on or after July 21, 2011; IA and Carnes jointly and severally liable)

Count VII: $115,024.50 (also a subset of Count I; for violations on or after July 21, 2011; IA and Carnes jointly and severally liable)

I clarify here that I am not allowing recovery for the same damages multiple times for violations that encompass the same injury under different legal theories. Rather, I am stating the appropriate restitution figure for each of the counts, which will result in a single recovery and are not meant to be cumulative, which would result in impermissible double recovery. *See Medina v. D.C.*, 643 F.3d 323, 326-27 (D.C. Cir. 2006) (noting that "a jury is not prohibited from allocating a single damages award between two distinct theories of liability" and contrasting that with impermissible double recovery); *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 497 (2d Cir. 1995) (holding that while "[a] plaintiff seeking compensation for the same injury under different legal theories is of course only entitled to one recovery[,] . . . [a] jury's award is not duplicative simply because it allocates damages under two distinct causes of action."). Thus, restitution is awarded in the amount of $132,580,041.06 as to Respondent IA, of which IA and Carnes are jointly and severally liable for $38,453,341.62.

**2. Injunctive Relief**

**a. CFPB's Position**

EC assert that injunctive relief is appropriate to remedy potential ongoing non-monetary consumer harm caused by Respondents' conduct, including harm caused by efforts to collect outstanding consumer debt and by IA's furnishing of derogatory information to consumer reporting agencies. (Dkt. 276 at 30). EC seek four types of injunctive relief: 1) that I permanently enjoin Respondents and any successors from taking any action that would result in the collection, sale, assignment, or transfer of IA debt owed by payday loan customers; 2) that I 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 IA; 3) that I require Respondents to cooperate fully to assist the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress; and 4) that I enjoin Respondents from committing any future violations of Federal consumer financial laws, including but not limited to, TILA, the CFPA, and EFTA. (*Id.*).

**b. Respondents' Position**

RC assert that the CFPB has not met its burden to demonstrate that it is entitled to injunctive relief. (Dkt. 278 at 32). They assert that the CFPB merely speculates about "potential" harm, which is not sufficient to meet the CFPB's burden to demonstrate irreparable harm or to justify injunctive relief. (*Id.* at 33). Additionally, they assert that since IA stopped offering loans nearly eight years ago, its assets were sold to another company, and there have been no loan payment transactions since July 2013, the CFPB has no basis to conclude that Respondents will commit any future violations and they are legally prohibited from violating consumer financial laws without the need for a permanent injunction. (*Id.*).

**c. Analysis**

The CFPB seeks injunctive relief pursuant to 12 U.S.C. § 5565(a)(2)(G) which provides that relief may include limits on activities or functions [of the Respondents]. EC assert that there is potential ongoing non-monetary harm to consumers, including harms caused by any efforts to collect outstanding consumer debt and by IA's furnishing derogatory information to consumer reporting agencies. (Dkt. 276 at 30). They therefore request the four types of injunctive relief enumerated above. (*Id.*).

RC assert that injunctive relief is not merited because EC has not cited to any facts to support its claim there is "potential" harm based on any effort to collect outstanding consumer debt or the furnishing of derogatory information to consumer reporting agencies. (Dkt. 278 at 32-33). They assert that injunctive relief is inappropriate because Respondents ceased lending operations in December of 2012. (*Id.* at 33). They also assert that under well-established principles of equity the CFPB must demonstrate four factors before injunctive relief may be granted: 1) that it has suffered an irreparable injury; 2) that remedies at law, such as monetary damages, are inadequate; 3) that, considering the balance of hardships between the CFPB and Respondents, a remedy in equity is warranted; and 4) that a permanent injunction is in the public's interest. (*Id.* at 32) (citing *CFPB v. Siringoringo*, No. SACV 14-01155 JVS, 2016 WL 102435, at *5 (C.D. Cal. Jan. 7, 2016). EC do not respond to this argument or dispute the four-factor framework, but merely state, without citing to any facts or authority, that injunctive relief is appropriate to prevent Respondents from continuing to harm past customers and harming future consumers. (Dkt. 284 at 10).

In general, injunctive relief should be narrowly tailored to remedy specific harms. *See, e.g.*, *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004). The undisputed facts establish that IA ceased offering loans and sold its assets in December 2012. The CFPB did not cite to any evidence to establish that IA or Carnes have continued in the payday loan business during the approximately seven-and-a-half years since that time.

Looking at the four-factor framework above, I find that the CFPB and consumers have not suffered irreparable injury and I find that monetary damages do provide adequate relief. I will now examine each of EC's specific requests and address the remaining two factors where applicable.

First, EC request that I enjoin Respondents and any successors from taking any action that would result in the collection, sale, assignment, or transfer of IA debt owed by payday loan customers. They have not cited to any evidence in support of this request and I agree with RC that this request merely speculates about the potential harm to consumers. I therefore find inadequate support to grant such an injunction. A consideration of the balance of hardships between the CFPB and Respondents and of the public's interest further supports denying EC's request. I also note that, as RC concede, Respondents are prohibited from future violations of consumer financial protection laws and thus may not collect on debt that is not legally owed. (*See* Dkt. 278 at 33).

Second, EC request that I 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 IA. However, again, EC have not cited to any evidence in support of such a request and the potential harm to consumers is speculative. There is no evidence in the record that even indicates that IA ever furnished information to any consumer reporting agency. The four-factor framework weighs in favor of RC and I therefore also decline to grant this request.

Third, EC request that I require Respondents to cooperate fully to assist the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress. Considering the balance of hardships to the CFPB and Respondents, and the public's interest, this is a reasonable request and I do order Respondents to fully cooperate in assisting the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress.

Finally, EC request that I enjoin Respondents from committing any future violations of Federal consumer financial laws including, but not limited to, TILA, the CFPA, and EFTA. I find that this request is overly broad and not narrowly tailored to remedy specific harms. EC have not set forth a factual basis for granting this request. I therefore decline EC's request. As noted above, Respondents are prohibited from future violations of consumer financial protection laws, regardless of the existence of a permanent injunction.

### 3. Civil Money Penalty

#### a. CFPB's Position

EC assert that Respondents engaged in three distinct practices that require the imposition of a civil money penalty ("CMP"): 1) Respondents used a loan agreement that violated TILA (Count I) and the CFPA (Count II), and that was deceptive (Count III) and unfair (Count IV) due to its misrepresentation of the cost of IA's loan product; 2) IA violated EFTA (Count V) and the

CFPA (Count VI) by requiring consumers to satisfy their loans through electronic repayment; and 3) Respondents unfairly used RCCs (Count VII) to debit consumers' accounts. (Dkt. 276 at 31). They assert that each of these practices continued throughout the period from July 21, 2011, until July 9, 2013. (*Id.*).

For each of these practices, EC seek a full first-tier, i.e., lowest tier, penalty, which is assessed "[f]or any violation of a law, rule, or final order or condition imposed in writing by the Bureau." (*Id.* at 31) (quoting 12 U.S.C. § 5565(c)(2)(A)). The maximum permissible first-tier penalty is $5,000 per violation per day, so EC calculate the maximum CMP for each practice as $3,600,000 for the 720 days from July 21, 2011 through July 9, 2013. (*Id.*). EC thus seek a CMP of $10,800,000[22] against IA for all three practices and of $7,200,000[23] against Carnes for the two practices encompassing Counts III, IV, and VII. (*Id.* at 31-32). EC assert that none of the mitigating factors in 12 U.S.C. § 5565(c)(3) support mitigation of the penalties. (*Id.* at 32-34).

**b. Respondents' Position**

RC assert that the CFPB cannot establish that the maximum penalty is appropriate because many of the mitigating factors are present, including the lack of financial resources and good faith. (Dkt. 278 at 34). RC also contend that since the alleged violations occurred within the disclosures in the Loan Agreement itself, Respondents could not have committed any violations after they ceased offering loans, i.e., December 2012. (*Id.* at 35). Accordingly, they assert that December 2012 is the outer limit of the relevant time period. (*Id.*). They also assert that the CFPB has not identified the days or number of days on which RCCs were used and thus EC's request for CMPs for Count VII should be denied. (*Id.* at 35 n.16).

**c. Analysis**

As stated above, EC assert that there are three distinct practices which require imposition of a CMP. (Dkt. 276 at 31). The first practice involves both IA and Carnes, the second involves

[22] $5,000 x 720 x 3= $10,800,000
[23] $5,000 x 720 x 2= $7,200,000

only IA, and the third involves both IA and Carnes. They thus state that there are three practices involving IA and two practices involving Carnes requiring the imposition of CMPs. In their *Opposition Brief* and *Reply Brief*, although they dispute the appropriateness and amount of CMPs, RC do not dispute that there are three distinct practices or even address this as an issue. (*See* Dkt. 278; Dkt. 283). I find that there are, in fact three, distinct practices warranting imposition of CMPs, three of which involved Respondent IA and two of which involved Respondent Carnes. *See CFPB v. Mortgage Law Group*, 420 F. Supp. 3d 848, 858 (W.D. Wis. 2019) (number of violations calculated based on general category of misconduct).

The next issue is the duration of each of the three violations, as the maximum first-tier penalty is $5,000 per violation per day. 12 U.S.C. § 5565(c)(2)(A). EC assert that each of the three violations occurred from July 21, 2011 through July 9, 2013, for a total of 720 days. (Dkt. 276 at 31). RC assert, on the other hand, that the outer limit of the possible timeframe is December 2012 (and for RCCs, CMPs should be denied altogether as the CFPB did not identify the days or number of days on which RCCs were used). (Dkt. 278 at 35). I have found that for the first and second practices, which encompass Counts I-VI, the violations were based on the language of the Loan Agreement. Therefore, the violations occurred at the time of loan origination, which both parties agree ceased in December 2012, and did not continue through the date of the last transaction on an IA loan on July 9, 2013, as EC implicitly assert. The record does not establish the last date in December 2012 on which a consumer obtained a loan, so I will use December 1, 2012 as a conservative end date. Therefore, I find that the relevant time period for the first two violations is July 21, 2011 through December 1, 2012, inclusive, for a total of 500 days. At $5,000 per day for 500 days, the maximum CMP for each of the first two practices is $2,500,000.

For the third practice of unfair use of RCCs, RC are correct that EC did not identify the days or number of days on which RCCs were used. However, I disagree that this practice does not warrant the imposition of a CMP. On the other hand, assuming that RCCs were used until the date of the last transaction on an IA loan on July 9, 2013, as EC implicitly assert, is likely an overestimation. The undisputed facts establish that RCCs were used in less than one percent of all loans after July 21, 2011. Therefore, I will assume they were used throughout the same time period as has been established for the first two practices, with an end date of December 1, 2012. This date is likely conservative, but EC have not established that the practice of using RCCs continued after December 1, 2012, and a more conservative end date reflects the relative infrequency with which they were used compared to all loan transactions. Thus, I find that the relevant time period for the third violation is July 21, 2011 through December 1, 2012, inclusive, for a total of 500 days. At $5,000 per day for 500 days, the maximum CMP for the third practice is $2,500,000.

Having calculated the maximum first-tier penalty for each violation, the final question is whether there are any mitigating factors that warrant reduction of the penalty amount. *See* 12 U.S.C. § 5565(c)(3). The first factor to examine includes the size of financial resources and good faith of the person charged. The record is silent as to the current status of Respondents' financial resources. It is undisputed, however, that Carnes received an annual salary of $250,000 when he was the CEO of IA and received approximately $25,000,000 from the sale of IA and other Hayfield entities to EZ Corp. Carnes was the sole owner of Willowbrook Marketing which owned a controlling interest in Hayfield. EC set forth additional figures reflecting payments made by Hayfield.[24] The evidence in the record reflects that at the time of the previous hearing, IA had few or no assets. (Dkt. 276 at 32). EC explain this lack of assets as reflecting IA's choice to make distributions and liquidate assets and assert that since IA has ceased operations, a large penalty will not put it out of business. (*Id.* at 33). RC assert that IA does not have financial resources and EC's information regarding Carnes is nearly a decade old. I agree that the information in the record is dated, but also find that it was within the control of Respondents to make distributions and/or sell their assets, so the fact that assets have been liquidated or distributed is not necessarily a mitigating factor.

With regard to "good faith," RC assert that Respondents attempted to comply with the law and thought they were in legal compliance because they hired outside counsel to draft the loan documents and they were licensed by Delaware state regulators to whom they submitted copies of the Loan Agreement. The record does establish that Respondents hired outside counsel to draft the loan documents. They did, therefore, make some effort to comply with the law. However, even though Respondents may have thought these documents were technically in compliance with the law, it is apparent from Carnes' testimony (and as I found above) that he and IA understood

[24] These figures are in Dkt. 276A at 32-33 and Dkt. 277A at ¶¶ 145-146, which are under seal.

that the Loan Agreement disclosed the loans as single-payment "payment in full" loans when, in fact, in 90% of cases they were by default multi-payment loans that automatically renewed and automatically went into a workout process. So even though Respondents may have thought the documents were legally compliant, they nevertheless knew that they disclosed the loan costs deceptively, as well as that they were conditioned on electronic fund transfers and that RCCs were used in cases where consumers had attempted to stop access to their bank accounts.

With regard to the state regulator, it was apparent from the testimony of Miller that the regulator merely took a cursory look at the Loan Agreement to ensure that it contained a TILA box but did not conduct an in-depth review of the documentation. I thus find that RC overstate the role of the state regulator. Even if I assume that, based on their state licensing, they thought they were in legal compliance, the same problems exist as just discussed with regard to outside counsel. I therefore do not find "good faith" to be a mitigating factor.

The second mitigating factor is the gravity of the violation or failure to pay. EC assert that the violations are not minor or technical in nature and that IA's business model was built around a deceptive loan agreement that hid the true cost of loans, required consumers to provide electronic access to their bank accounts, and continued to withdraw money long after consumers thought the loans had been paid in-full and sometimes after the consumer tried to stop access to their accounts. (Dkt. 276 at 33). RC do not address this mitigating factor in their briefs. I find that the violations were, in fact, serious and do not find any mitigation on this factor.

The third mitigating factor is the severity of the risks or losses of the consumer, which may take into account the number of products or services sold or provided. EC assert that the violations were serious, pervasive, and hurt tens of thousands of consumers. (*Id.*). They cite to the number of consumers affected and the amounts paid over the total of payments disclosed, as well as the number of times RCCs were used to obtain money from consumers who had revoked or stopped IA's authorization to withdraw funds from their accounts. (*Id.* at 33-34). RC do not address this mitigating factor in their briefs. I thus find that the severity of losses is not a mitigating factor for Respondents.

The fourth mitigating factor is the history of previous violations. EC assert that because IA faced a public enforcement action in the state of Minnesota in 2012, in which the court awarded $7 million in damages and penalties for violations of payday-lending statutes that this factor does not support mitigation. (*Id.* at 34). RC assert in response that Respondents have no history of any violations or any new violations in the years since RC ceased operating. (Dkt. 278 at 34). While I do not have sufficient information about the previous case to determine its factual similarity to the current matter, I do not find RC's statement of no violations since IA ceased operating to warrant mitigation. It is just common sense that they would not have had any additional violations if they were not operating. Neither party cites to any other potentially mitigating factors and I do not find that any apply.

Because none of the mitigating factors warrant a reduction of the CMPs calculated above, the maximum first-tier penalties are appropriate. Therefore, for all three violations of law, the total civil penalty assessed against IA is $7,500,000 ($2,500,000 x 3). For the two violations of law applicable to Carnes, the total civil penalty assessed against Carnes is $5,000,000 ($2,500,000 x 2).

## VII. CONCLUSIONS OF LAW

1. Integrity Advance violated the TILA by failing to clearly and conspicuously disclose consumers' legal obligations (Count I).

2. Integrity Advance violated the CFPA by virtue of its TILA violation (Count II).

3. Integrity Advance and James R. Carnes violated the CFPA's prohibition on deceptive conduct by creating a net impression in IA's loan disclosures that misled reasonable consumers into believing that their APR, Finance Charges, and Total of Payments were much lower than they actually were (Count III).

4. Integrity Advance and James R. Carnes violated the CFPA's prohibition on unfair conduct by misleading consumers about their repayment obligations and failing to clearly disclose the costs of loans that rolled over automatically (Count IV).

5. Integrity Advance violated the EFTA by conditioning extensions of credit on repayment by preauthorized electronic fund transfers (Count V).

6. Integrity Advance violated the CFPA by virtue of its EFTA violation (Count VI).

7. Integrity Advance and James R. Carnes violated the CFPA's prohibition on unfair conduct by obtaining authorization for Remotely Created Checks in a confusing manner and then using such a method to withdraw money from consumers' bank accounts after consumers attempted to block electronic access to their bank accounts (Count VII).

8. James R. Carnes may be held individually liable for the violations of Counts III, IV, and VII.

9. The CFPB may recover for violations of TILA prior to July 21, 2011 because the CFPA does not increase Respondents' liability for past conduct or have a retroactive effect.

10. A reasonable approximation of the restitution due to consumers for the practices described in Count I is $132,580,041.06.

11. A reasonable approximation of the restitution due to consumers for the practices described in Counts II, III, and IV is $38,453,341.62.

12. A reasonable approximation of the restitution due to consumers for the practices described in Count VII is $115,024.50.

13. Injunctive relief is appropriate to ensure Respondents fully cooperate in assisting the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress.

14. The most reasonable calculation of the civil money penalty is $7,500,000.00 as to Respondent Integrity Advance and $5,000,000.00 as to Respondent James R. Carnes.

## VIII. PROPOSED ORDERS

1. *Enforcement Counsel's Motion for Summary Disposition* for Counts I, II, III, IV, V, VI, and VII against Respondent Integrity Advance is **GRANTED**.

2. *Enforcement Counsel's Motion for Summary Disposition* for Counts III, IV, and VII against Respondent James R. Carnes is **GRANTED**.

3. *Enforcement Counsel's Motion for Summary Disposition* seeking **restitution** is **GRANTED** in the amount of **$132,580,041.06** as to Respondent Integrity Advance, of which Respondents Integrity Advance and James R. Carnes are jointly and severally liable for **$38,453,341.62**.

4. *Enforcement Counsel's Motion for Summary Disposition* seeking **injunctive relief** is **GRANTED IN PART** and Respondents are ordered to cooperate in assisting the CFPB in determining the identity, location, and amount of restitution due to each consumer entitled to redress.

5. *Enforcement Counsel's Motion for Summary Disposition* seeking **civil money penalties** is **GRANTED** in the amount of **$7,500,000.00** as to Respondent Integrity Advance and in the amount of **$5,000,000.00** as to Respondent James R. Carnes.

6. *Respondents' Motion for Summary Disposition* is **DENIED**.

## IX. NOTICE OF APPELLATE RIGHTS

The parties are hereby notified that a notice of appeal may be filed within ten days after service of this recommended decision. Unless a party timely files and perfects a notice of appeal of the recommended decision, the Director of the CFPB may adopt the recommended decision as the final decision and order of the CFPB without further opportunity for briefing or argument. *See* 12 C.F.R. § 1081.400(c)(1).

Christine L. Kirby Digitally signed by Christine L. Kirby
Date: 2020.08.04 14:54:28 -04'00'

**HON. CHRISTINE L. KIRBY**
**Administrative Law Judge**

Signed and dated on this 4th day of August 2020 at Washington, D.C.

## CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Recommended Decision Granting Enforcement Counsel's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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**Jameelah Morgan**
**Docket Clerk**
**Office of Administrative Adjudication**
**Bureau of Consumer Financial Protection**

Signed and dated on this 4th day of August 2020
at Washington, D.C.