UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of INTEGRITY ADVANCE, LLC and JAMES R. CARNES.	)))))))	**DECISION OF THE DIRECTOR**

INTRODUCTION

When lenders fail to comply with all applicable consumer protection statutes, consumers can suffer substantial harms. Integrity Advance (IA) was a payday lender, and it violated the law. In particular, it failed to comply with the Truth in Lending Act (TILA), the Consumer Financial Protection Act (CFPA), and the Electronic Fund Transfer Act (EFTA). IA violated TILA by making disclosures as if its loans were single payment loans, but then structuring its loan agreements so that the loans functioned as multi-payment installment loans. IA violated the CFPA through its unfair and deceptive loan disclosure practices, as well as by using remotely created checks (RCCs) to withdraw funds from the accounts of consumers who had attempted to block access. And it violated EFTA by conditioning its loans on repayment by preauthorized electronic fund transfers.

The Consumer Financial Protection Bureau (Bureau) initiated this case by filing a Notice of Charges in November 2015 naming both IA and its CEO, James Carnes, as Respondents. In 2016, Administrative Law Judge Parlen L. McKenna conducted a trial. However, after he had issued his Recommended Decision (and both Respondents and the Bureau's Enforcement Counsel had filed appeals), this case was put on hold pending the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). As a result of that decision, it was apparent that Judge McKenna had not been appointed in a manner that was consistent with the Constitution's Appointments Clause. Accordingly, in May 2019, I directed that this case be remanded to Administrative Law Judge Christine Kirby (ALJ), who was then the Bureau's Administrative Law Judge, and who had been appointed in a manner consistent with the Constitution. In the course of the proceedings before Judge Kirby, both parties filed motions for summary disposition. She resolved those motions when she issued her Recommended Decision on August 4, 2020, granting the motion filed by Enforcement Counsel, and denying the motion filed by Respondents. She held that IA had violated TILA and EFTA. She also held that both Respondents had violated the CFPA.

Respondents appealed the ALJ's Recommended Decision, and both parties filed briefs. Case Documents (Docs.) 295-297.[1] On December 8, 2020, the parties presented oral argument.

I affirm the ALJ's conclusion that IA violated both TILA and EFTA. I also affirm her holding that both Respondents violated the CFPA. With respect to the appropriate remedy, I conclude that Respondents should be jointly and severally liable for restitution amounting to $38,453,341.62. I further hold that IA is liable for a civil penalty of $7.5 million, and Mr. Carnes is liable for a civil penalty of $5 million. With respect to injunctive relief, I order that Respondents assist the Bureau in identifying and locating the consumers who are entitled to redress.

To the extent that the ALJ's findings and conclusions are consistent with this decision, I adopt them as my own.

FINDINGS OF FACT AND LEGAL BACKGROUND

The following facts are not disputed.

A. Integrity Advance and James Carnes

IA was licensed by the state of Delaware as a short-term, small-dollar lender. Case Document (Doc.) 273 at 1. It had a single store in Delaware, but made most of its loans online. Enforcement Counsel Exhibit (ECX) 68at 10, 24; Doc. 173 at 42.[2] These loans ranged in amount from $100 to $1000. Doc. 56 at 2. IA offered only one product – consumer loans – and these loans were its sole source of revenue. Doc. 172 at 94-95. IA made its first consumer loan in May of 2008, and its last in December of 2012, but it continued processing loan payments until July of 2013. Doc. 173 at 132-33, Doc. 273 at 2. IA was a wholly owned subsidiary of Hayfield Investment Partners, Doc. 165 at 1, but had no employees of its own, Doc. 173 at 6. Instead, it was operated by individuals who, for the most part, were paid by Hayfield. *Id.* At the time IA began making loans to consumers, it was operated by four Hayfield employees. Doc. 172 at 53. When it reached its maximum size in 2010 or 2011, approximately 20 employees operated IA. ECX 68 at 11-12. Although Hayfield owned other companies, most of its profits came from IA. Doc. 172 at 114-115. IA is no longer offering loans. ECX 68 at 9.

Respondent James Carnes was both a founder of IA and its de facto CEO. Doc. 172 at 94. He owned more than 50% of IA. Doc. 172 at 100-103. Mr. Carnes was the ultimate decision maker for IA, *id.* at 51, and he had the responsibility for approving everything related to IA's business, *id.* at 209. For example, he had final say over what appeared on IA's website, *id.* at 217; he made the final decision regarding IA's underwriting policies, *id.* at 59; and he was involved in the decision as to which call center IA would use, *id.* at 64. As he explained, he had authority to make all decisions

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[1] Documents on the docket of this case are available at https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/integrity-advance/.

[2] In her Scheduling Conference Order (Doc. 227), the ALJ indicated that she would rely on exhibits that were admitted during the hearing conducted by Judge McKenna. The parties have not objected to this, and I will rely on those exhibits as well.

regarding IA's policies and procedures, *Id.* at 209. Mr. Carnes' role with respect to IA did not change throughout the time period relevant to this proceeding. *Id.* at 52.

B. IA's loans

IA provided short-term loans to consumers. Doc. 56 at 2. To get a loan, the consumer had to provide IA with employment information, length of pay period, and pay dates. Doc. 88B at 2. Consumers were also required to provide an ACH authorization. ECX 2. This authorization gave IA access to the consumer's bank account, thereby allowing IA to deposit the money that the consumer borrowed directly in the consumer's bank account, and also allowing IA to make withdrawals directly from that account. Nearly all payments on IA loans were made automatically through ACH authorization. Doc. 87D at 3.

IA had a standard price for its loans. It charged new customers $30 per hundred dollars borrowed, and it charged repeat customers $24 per hundred dollars borrowed. ECX 1. To illustrate, the following is a portion of IA's loan agreement, including the TILA disclosure and description of the consumer's obligation to repay, that IA provided to a first-time borrower who was borrowing $300:

FEDERAL TRUTH IN LENDING DISCLOSURES

ANNUAL PERCENTAGE RATE **The cost of your credit as a yearly rate.** **644.12%**	**FINANCE CHARGE** **The dollar amount the credit will cost you.** **$90.00**	**Amount Financed** **The amount of credit provided to you or on your behalf.** **$300.00**	**Total of Payments** **The amount you will have paid after you have made all payments as scheduled.** **$390.00**

Your Payment Schedule will be: One (1) payment of **$390.00** due on **7/15/2011** ("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: **$300.00** . Amount paid on Loan#: [redacted] with us: **$390.00**.

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

ECX 2. (Footnote "1" in the loan agreement refers to the following sentence that appears several pages later: "The term '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.")

As the above example shows, IA calculated and disclosed the annual percentage rate (APR), the finance charge, and the total of payments based on the assumption that the loan would be paid off in a single payment on the consumer's next payday. But as a result of the way in which IA structured repayment options, that rarely happened. Although the line captioned "Your Payment Schedule" described a one-payment loan, the "Payment Options" paragraph described things somewhat differently. That paragraph explained that the consumer must, at least three days prior to the payment due date, select one of two payment options. If the consumer selected the "Payment in full" option, then IA would debit the consumer's account for the full amount of the principal and finance charge on the due date in a single payment.

If the borrower made no selection (or selected the "renewal" option), then the loan defaulted to "auto-renewal" status. The loan agreement provides that when a loan went into auto-renewal status, IA would debit the consumer's account for only the finance charge ($90 in the above example), and would then renew the loan until the consumer's next pay date. *See* Doc. 172 at 219-220. There is no indication in the record that IA would provide the consumer with new TILA disclosures when it "renewed" the loan and began withdrawing multiple payments.

At the end of this first renewal, *i.e.*, the consumer's next payday, the pattern would repeat unless the consumer took affirmative action: IA would again debit the finance charge from the consumer's account and would again "renew" the loan for another term. *Id.* Unless the consumer took affirmative action to stop the process, IA would automatically renew the loan four times. (Delaware law precludes any additional renewals. 5 Del. Admin. Code 2210-3.1.2; *see* Doc. 172 at 219-220.) If the consumer continued to take no action after four renewals, the loan would automatically switch from "auto-renewal" status into "auto-workout" status. Doc. 172 at 220. This meant that IA would debit the consumer's account for the finance charge plus $50 of principal (*i.e.*, $140 in the above example). Doc. 88D at 239. And if the consumer continued to take no action, then IA would continue, each subsequent payday, to debit the (declining) finance charge and $50 of principal until the loan was paid in full. *Id.*

Although the loan agreement described two payment options (Payment in full; Renewal), IA sent borrowers a "welcome email" that described the options differently. Doc. 91A at 24. IA sent this email after approving loans, but before disbursing loan proceeds. Doc. 90 at 2. This email described three repayment options:

Dear CUSTOMER_FIRST_NAME,

CONGRATULATIONS! Your loan for LOAN_AMOUNT has been approved. This email confirms your loan has been processed. It will be sent to your bank tonight and the funds will be available to you within 1 to 2 business days. Your first due date will be LOAN_DUE_DATE.

Remember you have 3 options of paying the loan back:

*1) **YOU CAN LET THE LOAN AUTOMATICALLY RENEW**. All renewals are on your pay dates. After the **first** initial payment, the next 4 renewals will only require payment of the finance charge. Starting with the 5th renewal, in addition to the finance charge, we will also take out $50 of principal. This will continue until the loan is repaid in full, unless of course you select either option 2 or 3 below. **NOTE: PLEASE REMEMBER, YOU CAN SELECT OPTIONS 2 OR 3 AT ANYTIME DURING YOUR LOAN REPAYMENT PROCESS***

*2) **PAY THE LOAN DOWN IN PART**. If you want to increase your payment so you pay the loan back faster, you may do so in any amount ($50 increments required) which will bring down the principal of your loan. Just call us 3 business days in advance of your pay date so we can make the change.*

*3) **PAY THE LOAN IN FULL**. Once again, just call us 3 business days in advance so we may make the change on your account. If you pay your loan off before your next pay date, you only pay the finance charge for the days the loan remains unpaid.*

Thank You and Have a Great Day!

Integrity Advance
Cust Svc: (800) 505-6073
Fax: (800) 581-8148

Doc. 91A at 24. But just like the loan agreement, if the consumer took no action, the loan would renew four times, and then go into auto-workout status. The following chart shows the debits that IA would deduct from the consumer's account (assuming a $300 loan to a first-time borrower) if the consumer took no action:

PAYDAY	PAYMENT	FINANCE CHARGE (30% OF REMAINING PRINCIPAL BALANCE)	AMOUNT APPLIED TO PRINCIPAL	REMAINING PRINCIPAL BALANCE	TOTAL PAID TO DATE
1	$90	$90	$0	$300	$90
2	$90	$90	$0	$300	$180
3	$90	$90	$0	$300	$270
4	$90	$90	$0	$300	$360
5	$90	$90	$0	$300	$450
6	$140	$90	$50	$250	$590
7	$125	$75	$50	$200	$715
8	$110	$60	$50	$150	$825
9	$95	$45	$50	$100	$920
10	$80	$30	$50	$50	$1000
11	$65	$15	$50	$0	$1065
TOTAL	**$1065**	**$765**	**$300**	-	**$1065**

See Doc. 1 at 6; Doc. 21 at 5. Thus, this table shows that, if the consumer took no action with respect to the loan, the total amount of the finance charge and the total of payments that the consumer would ultimately pay would far exceed the amounts disclosed on the TILA disclosure.

To get a loan from IA, a borrower had to initial or sign the loan agreement in seven places. *See* ECX 2. The borrower's fourth signature accepted the ACH authorization. That portion of the agreement included the following paragraph:

> 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.

ECX 2. Pursuant to this paragraph, if the consumer attempted to revoke the ACH authorization, IA could create paper checks (remotely created checks or RCCs) ("you authorize us to prepare and submit one or more checks drawn on Your Bank Account") and use them to withdraw payments from the consumer's account. *See* Doc. 172 at 235-236. The consumer would not prepare or sign the RCC, nor would the consumer even see the RCC. *See* ECX 94 at 1-2.

C. Procedural history

1. The Notice of Charges

The Bureau's Enforcement Counsel filed its Notice of Charges with the Bureau's Office of Administrative Adjudication on November 18, 2015. Doc. 1. The Notice contained seven counts. Count I alleged that IA violated TILA because it based its TILA disclosures on the assumption that the consumer would pay off the loan in a single payment on the consumer's first post-loan payday, even though that would happen only if the consumer took affirmative action. Count II alleged that IA's violations of TILA also violated the CFPA. Count III alleged that both IA and Mr. Carnes had engaged in a deceptive act or practice in violation of the CFPA because the net impression created by the loan agreement misled consumers to believe that the finance charge and the total of payments were lower than the amounts consumers would actually pay. Count IV alleged that both IA and Mr. Carnes had prevented consumers from assessing the actual costs of the loans they entered into, and that this was unfair, in violation of the CFPA. Count V alleged that, by requiring consumers to accept the ACH authorization as a condition of getting a loan, IA had conditioned its loans and the extension of credit on repayment by preauthorized electronic fund transfer, in violation of EFTA and its implementing Regulation E (Reg. E). Count VI alleged that IA's violations of EFTA and Reg. E also violated the CFPA. Count VII alleged that IA and Mr. Carnes had committed an unfair practice in violation of the CFPA when they used RCCs to withdraw money from the accounts of consumers who believed they did not owe money to IA.

The Notice sought a variety of remedies, including a permanent injunction prohibiting future violations of TILA, its implementing Regulation Z, EFTA, its implementing Reg. E, the CFPA, and any other federal consumer financial law. The Notice also sought an award of restitution to compensate injured consumers, as well as disgorgement, and a civil penalty.

2. Proceedings before Judge McKenna

This matter was originally assigned to the Administrative Law Judge Office of the U.S. Coast Guard because in 2015 the Bureau did not have an administrative law judge of its own. Doc. 8. The matter was then heard by Coast Guard Administrative Law Judge Parlen McKenna. At the conclusion of several days of hearings, Judge McKenna issued his Recommended Decision. Doc. 176. Both IA and the Bureau's Enforcement Counsel filed notices of appeal. Docs. 177, 178. However, resolution of those appeals was delayed, first pending a decision by the D.C. Circuit in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), and then pending a decision by the Supreme Court in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). Docs. 208, 210. As a result of the Court's decision in *Lucia*, I concluded that Judge McKenna had not been constitutionally appointed. Doc. 216. Accordingly, I directed that the matter be remanded to the Bureau's Administrative Law Judge, Christine Kirby, for a new hearing and Recommended Decision. *Id.* I further directed that Judge Kirby "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna." *Id.*

3. Proceedings before the Bureau's ALJ, Christine Kirby

On October 28, 2019, the ALJ issued an order denying further discovery regarding Respondents' statute of limitations argument. Doc. 238. Then, on January 24, 2020, she issued an order denying IA's Motion to Dismiss. Doc. 249. Finally, she issued her Recommended Decision on August 4, 2020. Doc. 293. All three of these decisions are relevant to this appeal.

a. Order denying further discovery

On October 28, 2019, the ALJ denied Respondents' motion for additional discovery. Doc. 238. Respondents had requested that the ALJ issue a subpoena requiring Enforcement Counsel to provide 1) all consumer complaints regarding IA; 2) all external correspondence regarding IA; 3) all internal correspondence regarding IA; and 4) any other internal documents regarding IA. With respect to the first two requests, the ALJ concluded that Enforcement Counsel had already provided those documents to Respondents when it fulfilled its obligation to make disclosures pursuant to Bureau Rule 206, 12 C.F.R. § 1081.206. She denied the third and fourth requests because she concluded that Respondents were seeking documents that were privileged and could be withheld pursuant to Rule 206.

b. Order denying IA's motion to dismiss

On November 15, 2019, Respondents filed a Motion to Dismiss and/or for Summary Disposition. Doc. 239. On January 24, 2020, the ALJ denied that motion in its entirety. Doc. 249. First, she rejected Respondents' argument that Enforcement Counsel were precluded from asserting the allegations in Count IV of the Notice of Charges. (Count IV alleged that IA's loan disclosures were unfair in violation of the CFPA.) During the proceedings before Judge McKenna, Respondents and

Enforcement Counsel filed a joint stipulation agreeing to dismiss Count IV with prejudice. Doc. 127. A week before the parties filed the stipulation, Judge McKenna had entered an order granting in part Enforcement Counsel's motion for summary disposition. Doc. 111. In that order, he granted summary disposition with respect to Count III of the Notice of Charges, which alleged that IA's loan agreement was deceptive. In the stipulation, the parties agreed that the consumer harm resulting from Count III was coextensive with the harm caused by Count IV. Accordingly, in the interest of judicial economy, the parties agreed to the dismissal of Count IV. Judge Kirby observed that the stipulation was based on Judge McKenna's order on the motion for summary disposition, and that, pursuant to my remand (Doc. 216), I had directed that she give no weight to that order. Because the parties had agreed to the dismissal based on an order that no longer has any effect, the ALJ held that Enforcement Counsel was not precluded from pursuing the allegations in Count IV.

Next, Judge Kirby addressed Respondents' contention that the three counts in the Notice of Charges that applied to Mr. Carnes (Counts III, IV, and VII) were time-barred. (Counts that apply to IA were not time-barred because Enforcement Counsel had entered into tolling agreements with IA that tolled the statute of limitations with respect to IA, but those agreements did not apply to Mr. Carnes. *See* Docs. 200, 201.) The relevant statute of limitations, 12 U.S.C. § 5564(g)(1), provides that the Bureau may not bring an action "more than 3 years after the date of discovery of the violation." Respondents argued that the statute of limitations should be interpreted to run for three years from the time the Bureau discovers, *or should have discovered*, the violations. The ALJ declined to decide whether the statute of limitations incorporates a constructive discovery rule. Doc. 249 at 23. However, she held that even if it did, the statute of limitations had not expired with respect to Mr. Carnes by November 18, 2015, when the Bureau filed its Notice of Charges. She recognized that, prior to November 18, 2012 (three years before the Bureau filed its Notice of Charges), the Bureau had information regarding IA's violations. But it was only after that date that the Bureau either knew, or should have known, of evidence supporting the conclusion that Mr. Carnes was liable for IA's misrepresentations. This was, in part, because IA took 11 months to comply with the Bureau's civil investigative demand. Finally, the ALJ concluded that the CFPA's statute of limitations also applied to the allegations that IA violated TILA and EFTA (Counts I, V), as well as to Counts II and VI, which alleged CFPA violations derived from the TILA and EFTA violations.

c. Recommended decision

On May 15, 2020, both Enforcement Counsel and Respondents filed motions for summary disposition. Docs. 272, 275. On August 4, 2020, the ALJ issued her Recommended Decision granting Enforcement Counsel's motion and denying the one filed by Respondents. Doc. 293. With respect to the first two counts of the Notice of Charges, the TILA count and the associated CFPA count, the ALJ concluded that, because IA's loans would automatically roll over unless the consumer took affirmative steps, the loan was actually a multi-payment loan. Because IA made disclosures as if the loan were a single payment loan, it violated TILA, and thus also committed the associated violation of the CFPA. *Id.* at 22-29.

Next, the ALJ concluded that, not only did IA's loan disclosures violate TILA, but they were also deceptive and unfair (Counts III and IV). She held that the net impression of the loan agreement was that the loan was a single payment loan, thereby misrepresenting the costs of the loan. She concluded that this misrepresentation of costs was material. With respect to unfairness, she held that consumers were injured when they paid more than they expected to pay, that they could not avoid the injury because the costs were never revealed to them, and that IA's disclosure practices did not benefit consumers. *Id.* 29-50.

Counts V and VI alleged a violation of EFTA and an associated CFPA violation. The parties agreed that, by signing the ACH authorization in the loan agreement, the consumer was thereby agreeing to a preauthorized electronic fund transfer in the form of both credits to, and debits from, the consumer's bank account. The ALJ observed that there was nothing in the loan agreement indicating that the ACH authorization was optional. Further, IA disbursed funds electronically and provided no alternate means whereby consumers could receive the money they borrowed. This meant that consumers had to sign the ACH authorization to receive funds. As a result, the ALJ concluded that IA had conditioned its loans on consumers' repayment by preauthorized electronic fund transfer, thereby violating EFTA and the CFPA. *Id.* at 50-56.

The ALJ held that IA's use of remotely created checks (RCCs) was unfair, as alleged in Count VII. She held that, because IA used RCCs only when consumers attempted to block IA from accessing their bank accounts, RCCs substantially harmed consumers. She held that consumers could not avoid the injury caused by the RCCs because the single sentence in the loan agreement that authorized RCCs was unclear. She also held that RCCs did not provide offsetting benefits when used to collect payments for loans whose costs were never adequately disclosed. *Id.* at 56-64.

The ALJ next held that Mr. Carnes could be held liable for IA's violations of the CFPA as alleged in Counts III, IV, and VII. She reviewed undisputed facts and concluded that there was overwhelming evidence that Mr. Carnes had authority to control both IA and the practices at issue in those three counts. She also concluded that Mr. Carnes knew and understood the contents of the loan agreement, knew that the TILA boxes disclosed the loans that IA offered as if they were single payment loans, and also knew that the vast majority of loans would default into auto-renewal and auto-workout status. Accordingly, she held that Mr. Carnes had both the requisite authority to control and the knowledge sufficient to hold him liable for IA's violations. *Id.* at 64-76.

Finally, the ALJ addressed the appropriate remedy. She held that IA should be held liable for restitution related to its TILA violations, and that this restitution should be used to provide redress for consumers who borrowed from IA because they did not get the benefit of the bargain they thought they had entered into – they paid a substantially higher cost for loans than disclosed by IA. She rejected Respondents' contention that repeat borrowers were not entitled to restitution because she concluded that there was insufficient evidence for her to conclude that repeat customers understood those costs any better than first-time borrowers. She also held that Enforcement Counsel did not have to show that a particular consumer had suffered actual damages before that consumer could receive restitution. She held that the appropriate amount of restitution was the amount that each consumer had paid over and above the amount disclosed in the loan agreement, and that, because the FTC could have obtained restitution for TILA violations committed prior to July 21, 2011 (the date that TILA enforcement authority transferred to the Bureau), IA should be held liable for restitution for all the loans that it made going back to 2008. This amount totaled $132.5 million. Mr. Carnes' liability for restitution was different because he was only named in Counts III and IV, which alleged violations of the CFPA. The FTC could not enforce the CFPA and as a result, no restitution was appropriate with respect to these counts for violations that occurred before July 21, 2011. Thus, the ALJ recommended that Mr. Carnes be held jointly liable with IA for $38.4 million. (This did not increase IA's liability because consumers who were entitled to redress pursuant to Counts III and IV were also entitled to redress as a result of IA's TILA violation. Thus, IA was liable for $94.1 million for consumers who entered into loans before July 21, 2011, and was jointly liable with Mr. Carnes for $38.4 million with respect to consumers who borrowed after that date.) She also recommended that Mr. Carnes and IA be held jointly liable for restitution for the amount of the RCCs – $115,024.50. *Id.* at 76-86.

The ALJ denied most of Enforcement Counsel's request for injunctive relief because she concluded that monetary relief would be adequate to remedy Respondents' violations. However, she did recommend that Respondents be ordered to assist the Bureau in identifying and locating consumers who are entitled to restitution. *Id.* at 89.

Finally, the ALJ held that there were three distinct practices that warranted civil money penalties: 1) the use of a loan agreement that violated TILA and that was deceptive and unfair; 2) the EFTA violations; and 3) the use of RCCs. She held that IA was liable for all three practices, and Mr. Carnes was liable for the first and third. The relevant time period for each of the violations was 500 days (from July 21, 2011, until IA ceased offering loans in December 2012) and the appropriate penalty was $5000 per day. Accordingly, she recommended that IA be liable for a civil penalty of $7.5 million and Mr. Carnes be liable for $5 million. *Id.* at 90-94.

c. Respondents' Appeal

On August 11, 2020, Respondents filed their Notice of Appeal. Doc. 294. Respondents argued that: 1) the ALJ erred in holding that I could ratify this action; 2) the ALJ erred by failing to hold that the statute of limitations had expired with respect to all claims against Mr. Carnes, and all but three of the claims against IA; 3) the ALJ denied Respondents due process; 4) the ALJ's holding that Respondents were "covered persons" was erroneous; 5) the ALJ erred in concluding that summary disposition was appropriate with respect to all seven counts of the Notice of Charges; and 6) the ALJ's recommendations with respect to remedies were erroneous. Respondents' Opening Appeal Brief, Doc. 295. Enforcement Counsel filed an Answering Brief, Doc. 296, and Respondents filed their Reply, Doc. 297. Respondents requested the opportunity to present oral argument, and I conducted an argument on December 8, 2020.

ANALYSIS

I. STANDARD OF REVIEW

As explained in the Decision of the Director in *In the Matter of PHH Corp.*, File No. 2014-CFPB-0002 (June 4, 2015), *rev'd on other grounds sub nom. PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), the Bureau's rules provide that when a party appeals an ALJ's recommended decision, "the Director will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will to the extent necessary or desirable, exercise all powers which he or she could have exercised if he or she had made the recommended decision." 12 C.F.R. 1081.405(a). That means my review as to both facts and law is *de novo*.

Pursuant to the CFPA, the Bureau conducts its administrative adjudications "in the manner prescribed by chapter 5 of Title 5, United States Code." 12 U.S.C. § 5563(a). That is, this adjudication is on the record, and is governed by a preponderance of the evidence standard. *See*

Steadman v. SEC, 450 U.S. 91, 95-102 (1981) (holding that when hearings are held on the record, the Administrative Procedure Act requires a preponderance of the evidence standard).

II. LIABILITY

Respondents have appealed the ALJ's Recommended Decision. They raise nineteen separate arguments, challenging the Bureau's authority, the ALJ's holdings with respect to liability, and the recommended relief. I disagree with most of Respondents' arguments, although I agree that it should not be held liable for violations that occurred prior to the date that enforcement authority was transferred to the Bureau.

A. Preliminary arguments

1. Mr. Carnes may be held liable for IA's violations of the CFPA as alleged in Counts III, IV, and VII of the Notice of Charges

Count III alleges that IA's disclosures were deceptive, Count IV alleges that those disclosures were also unfair, and Count VII alleges that IA's use of RCCs was unfair. Each of those counts named not only IA but also Mr. Carnes. Before I address IA's liability with respect to those allegations, I will explain why Mr. Carnes may be held liable.

a. Standard of liability

In *CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016), the court held that an individual may be held liable for a corporation's violations of the CFPA:

> if "(1) he participated directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud along with an intentional avoidance of the truth."

Id. at 1193, quoting *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). In *Gordon*, as well as in other cases brought by the Bureau, courts have held that cases interpreting the FTC Act provide guidance as to when an individual may be held liable under the CFPA. *See*, *e.g.*, *CFPB v. Mortg. L. Grp., LLP*, 366 F. Supp. 3d 1039, 1058 (W.D. Wis. 2018); *CFPB v. NDG Fin. Corp*., No. 15-cv-5211, 2016 WL 7188792, at *17 (S.D.N.Y. Dec. 2, 2016). Indeed, the parties have also relied on FTC Act cases to assess Mr. Carnes' liability. *See* Enforcement Counsel's Answering Brief, Doc. 296 (EC Br.) at 11-13; Doc. 272 at 35-36. I will do so as well.

As the court explained in *FTC v. Amy Travel Services, Inc*. 875 F.2d 564, 574 (7th Cir. 1989), it is not appropriate for an individual to enjoy benefits from violating the FTC Act, but then insulate himself from liability by contending that he did not participate directly in the illegal conduct. Accordingly, the court established a two-part test to determine individual liability for corporate violations. That test is described in detail in *FTC v. Freecom Communications, Inc*, 401 F.3d 1192 (10th Cir. 2005), where the court explained the significance of both parts. Once the FTC has shown that the corporate defendants had violated the FTC Act, "it only had to show [that the individual defendant] had the authority to control [the corporate] defendants to establish its case for injunctive relief against [the individual]." *Id*. at 1205. Thus, if the FTC, or the Bureau, establishes that a corporation has violated the law, and also establishes that an individual has the authority to control the corporation's wrongful acts, the FTC, or the Bureau, is entitled to forward-looking injunctive relief against the individual.

As to the second part of the test, *Freecom* held that:

> to hold an individual personally liable for consumer redress, the FTC must show a heightened standard of awareness beyond the authority to control. This awareness, however, need not rise to the level of an intent to defraud. In particular, the FTC need only show the individual had or should have had knowledge or awareness of defendants' misrepresentations. The FTC 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. at 1207. Thus, to obtain monetary relief from an individual defendant, the FTC or the Bureau must make an additional showing: that the individual knew, or should have known of, the corporate defendant's wrongful acts. As the court explained in *Amy Travel*, this means that the FTC (or the Bureau) must show that "the individual had some knowledge of the practices." 875 F.2d at 573. But if the Bureau can show that the individual knew of the acts or practices that constitute the violation of the CFPA, that is, the elements of the violation, the Bureau need not also show that the individual knew that the acts or practices violated the law. *See id.* at 575.

b. Mr. Carnes is liable for IA's unfair and deceptive practices

The ALJ held that Mr. Carnes satisfied the first part of the test – participation in, or authority to control IA's unlawful conduct – and I agree. As explained above, the evidence shows that Mr. Carnes had ultimate control over all aspects of IA's business, even though he was not necessarily directly involved in every aspect. *See*, *e.g*., Doc. 172 (Hearing Transcript) at 51 (testimony of Timothy Madsen) ("any large decision [at IA] would have been made by Mr. Carnes"); *id.* at 221 (testimony of James Carnes) ("I had ultimate authority over the company"); *id.* at 228 (testimony of James Carnes) ("Q. As CEO, did you have to approve the loan agreement template? A. Again, as CEO you are ultimately approving everything"); ECX 68 (Deposition Transcript of James Carnes) at 32 ("Q. As the CEO, I assume you had ultimate say over the company's policies and procedures; is that correct? A. Yes.").

With respect to the first part of the test, IA argues that Mr. Carnes did not have the authority to control IA's violations because he "did not draft, edit, or substantively review the loan agreement." Respondents' Opening Appeal Brief (Resp. Br.) at 16; Transcript of Proceedings on Appeal, Dec. 8, 2020 (Appeal Tr.), at 8-9. But this argument focuses only on the "participation" element of the first part of the test. Thus, Respondents have not disputed that Mr. Carnes had control over IA's conduct. *See also* Respondents' Reply Brief in Support of Appeal (Resp. Reply) at 3 n.2 (focusing on who wrote the loan agreement). The fact that Mr. Carnes could control IA's conduct (and, in particular, that he authorized use of IA's loan agreement) is sufficient to satisfy the first part of the test. *See FTC v. AMG Servs., Inc.*, No. 2:12-cv-0536, 2016 WL 5791416, at *6 (D. Nev. Sept. 30, 2016), *aff'd* 910 F.3d 417 (9th Cir. 2018), *cert. granted*, No. 19-508, 141 S. Ct. 194 (2020) ("[a]n individual's position as a corporate officer … is sufficient to show requisite control").

I also agree with the ALJ that Enforcement Counsel has shown that Mr. Carnes had sufficient knowledge to hold him liable for monetary relief. IA offered only one product, short-term consumer loans, and that product was its sole source of revenue. Doc. 172 at 94-95 (testimony of James Carnes). Although Mr. Carnes did not personally draft the loan agreement that IA used for those loans, he approved its use. Doc. 172 (testimony of James Carnes) at 232 ("Q. But isn't it true that they had your approval to implement this loan agreement? … A. Did they have my approval to use the loan agreement? Yes.") Mr. Carnes knew that IA's loan agreement made disclosures as if IA's loans were single-payment loans. Doc. 173 (Hearing Transcript) (testimony of James Carnes) at 50-51 ("A. Are you saying, did I understand that on the – in the TILA box [for a consumer who borrowed $100] that it said, sum of payments was $130? … Yes.") He was aware that, unless a consumer took affirmative action, the loans would not be paid off in a single payment, but would renew, and would continue to renew, until the loans went into auto-workout status. Doc. 172 at 218-220; Appeal Tr., at 10 (Mr. Carnes "was aware of the structure of the loan"). Mr. Carnes also knew that a large portion of IA's loans would renew at least once, Doc. 172 at 222, and that as a result of those renewals, consumers would pay more than the amount disclosed in the loan agreement. ECX 68 at 245 ("Q. And in most cases they would pay substantially more than the amount that's reflected in the total amounts of payments box; is that right? A. They would pay more."). As explained below, I have concluded that IA's loan agreement was deceptive on its face. Because Mr. Carnes' testimony establishes that he was aware of the elements of IA's deceptive conduct – that the loan agreement made disclosures as if the loan were a single payment loan when the loan was actually a multi-payment loan – Mr. Carnes had sufficient knowledge to hold him personally liable for IA's unfair and deceptive practices.

Mr. Carnes also had sufficient knowledge to hold him liable for the unfair acts or practices that resulted from IA's use of RCCs. He testified that he knew what RCCs were, he knew that IA used RCCs, and he knew the circumstances in which IA used RCCs. Doc. 173 at 84-85 (testimony of James Carnes). In particular, he knew that IA used RCCs when consumers revoked ACH authorization and IA was unable to induce payment by any other means. *Id*.

Thus, I conclude that Mr. Carnes had sufficient knowledge to hold him liable for monetary relief as a result of the conduct challenged in Counts III, IV, and VII of the Notice of Charges.

None of the arguments raised by IA convinces me otherwise. IA's central argument is that Mr. Carnes did not know the specific contents of the loan agreement. Resp. Br. at 17; Resp. Reply at 5; Appeal Tr. at 12 (Mr. Carnes reviewed the loan agreement for the first time in connection with the trial of this proceeding). But as explained above, Mr. Carnes had ample knowledge of how IA's loans worked. In particular, he was aware that the disclosures in the loan agreement did not comport with the default repayment process that the vast majority of IA's borrowers experienced. That is the basis of Counts III and IV, and it is sufficient knowledge to hold Mr. Carnes liable for restitution.

Respondents also argue that, because the loan agreement was drafted by an attorney (in 2008), Mr. Carnes was entitled to assume that the agreement complied with all laws, even the CFPA (which was not enacted until 2010). Based on this, Respondents claim that Mr. Carnes did not have sufficient knowledge to hold him liable for IA's violations. Doc. 173 at 27-28 (testimony of IA's vice president, Edward Foster) (the loan agreement was drafted by outside counsel); Resp. Br. at 18, Resp. Reply at 3; Appeal Tr. at 10. While Respondents resist the label, *see* Doc. 172 at 230, this is an advice-of-counsel defense. But no such defense is available here. *See CFPB v. CashCall, Inc.*, No. 15-cv-7522, 2016 WL 4820635, at *12 (C.D. Cal. Aug. 31, 2016) ("'reliance on advice of counsel is not a valid defense on the question of knowledge required for individual liability'"), quoting *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1102 (9th Cir. 2014); *FTC v. J.K. Publ'ns, Inc.* 99 F. Supp. 2d 1176, 1206 (C.D. Cal. 2000) (court held individual defendant liable even though she claimed that she had not read the documents she signed); *Amy Travel*, 875 F.2d at 575 ("reliance on advice of counsel was not a valid defense on the question of knowledge"). The reason for this is that the relevant question is whether Mr. Carnes "had some knowledge of the practices" that harmed consumers, *Amy Travel*, 875 F.2d at 573, not whether he knew that those practices violated the law. *See CFPB v. CashCall*, 2016 WL 4820635, at *12 ("'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'"), quoting *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010). As explained above, there is ample evidence that Mr. Carnes knew that IA's loan agreement misrepresented the amount that consumers were likely to pay, and also knew that consumers were likely to pay more than the amount disclosed unless they took affirmative action. Thus, he was aware of the essential facts that form the basis of the violations of the CFPA alleged in Counts III and IV. It is irrelevant that he may have (incorrectly) believed that the loan agreement complied with the law, and it also irrelevant that he reached this belief because the agreement was drafted by a lawyer.[3] What counts is what he knew would occur, not what he believed regarding the law.

Respondents also argue that Mr. Carnes did not have sufficient knowledge because state regulators reviewed IA's loan agreement as a part of Delaware's annual licensing process. Resp. Reply at 3 & n.3; Appeal Tr. at 10. But just as Mr. Carnes cannot escape liability because a lawyer drafted the loan agreement, he cannot escape liability for the deception in IA's loan agreement merely because it was reviewed by an employee of the Office of the State Bank Commissioner of Delaware. This would be so even if Delaware had reviewed the agreement for compliance with the CFPA, and there is no evidence that it did.

Finally, Respondents argue that it was reasonable for Mr. Carnes to conclude that IA's customers were not deceived because IA had so many repeat customers. Resp. Reply at 4; Appeal Tr. at 8. But this argument assumes its own conclusion – that if a consumer sought a second loan from IA, then that consumer was not deceived. This argument also ignores that IA had a substantial number of customers who were one-time customers. Indeed, there were more than 120,000 customers who borrowed once, but only once, from IA. Doc. 173 (testimony of Robert Hughes) at 158. Even if it

[3] Even if advice of counsel were a valid defense, that defense has been waived by Respondents. Throughout the administrative trial in this matter, they repeatedly asserted attorney-client privilege and refused to permit the disclosure of any advice they were actually given by their outside counsel who drafted the loan agreement, or by IA's in-house general counsel. *See, e.g.*, Doc. 172 at 230; Doc. 173 at 20, 22, 27-28, 86, 95. The attorney-client privilege "may not be used both as a sword and a shield." *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001). By repeatedly asserting the privilege, they waived the defense. *See id.*

were proper for Mr. Carnes to assume that repeat customers were not deceived (but see the discussion of repeat customers below), he could not make the same assumption regarding IA's one-time customers. What is relevant is that Mr. Carnes had sufficient knowledge of facts that established that customers were likely to be deceived by IA's loan agreement. Thus, he may be held liable for IA's violations even if there may have been some customers who were not deceived.[4]

Similarly, Respondents argue that Mr. Carnes did not have sufficient knowledge to hold him liable for the RCCs because he was not familiar with how RCCs were disclosed in the loan agreement. Resp. Br. at 18; Resp. Reply at 5. As explained above, the authorization for RCCs was set forth in one sentence of the loan agreement that was buried in the ACH authorization. But Mr. Carnes was aware that IA used RCCs, and he knew the circumstances under which they were used. Doc. 173 at 84-85. That is, he knew that IA used RCCs in situations where consumers had withdrawn ACH authorization, presumably to block IA from gaining access to their bank accounts, and that IA used the RCCs to evade that block. While Mr. Carnes asserts that as CEO he was not familiar with the details of IA's loan agreement, I conclude that he was at least recklessly indifferent to those details, and that is sufficient to hold him liable. *Amy Travel*, 875 F.2d at 574.

2. The Bureau's TILA and EFTA claims are not time-barred

Respondents contend that both TILA and EFTA impose a one-year statute of limitations on Bureau enforcement actions and that as a result, the Bureau's TILA and EFTA claims (Counts I and V) are time-barred. Resp. Br. at 9, citing 15 U.S.C. § 1640(e) (TILA) and 15 U.S.C. § 1693m(g) (EFTA). Respondents claim that these one-year limitations periods also apply to the two CFPA claims brought under 12 U.S.C. § 5536(a)(1)(A) (Counts II and VI) that derive from IA's violations of TILA and EFTA. These arguments fail because both 15 U.S.C. § 1640(e) and 15 U.S.C. § 1693m(g) specify that the prescribed one-year statute of limitations applies only to actions "under this section." Administrative enforcement actions of TILA and EFTA are governed by different sections of those statutes. *See* 15 U.S.C. § 1607 ((TILA); *id.* § 1693*o* (EFTA); *see also BCFP v. Citizens Bank, N.A.*, No. 20-cv-044, 2020 WL 7042251, at *6 (D.R.I. Dec. 1, 2020) ("In sum, TILA's plain language dictates that § 1640 governs civil suits brought by individuals and state attorneys general, while § 1607 provides the cause of action for federal enforcement agencies such

[4] Respondents claim that Mr. Carnes did not receive customer complaints. Resp. Reply at 4; *see* Doc. 172 (testimony of James Carnes) at 233 ("Q. So you were unaware personally of any complaints? A. I wasn't aware of complaints."). However, when Enforcement Counsel sought to probe whether consumer complaints had been brought to Mr. Carnes attention, Respondents asserted the attorney-client privilege and refused to provide any information. Doc. 173 (testimony of Edward Foster) at 29-31. Respondents may not argue that Mr. Carnes never received consumer complaints when they refuse to provide necessary evidence to support or refute that argument. In any event, although knowledge of consumer complaints may be probative of an individual's knowledge, there are other ways to establish knowledge, and there is ample evidence here showing that Mr. Carnes was well aware of the essential facts of IA's violations. *See also FTC v. NHS Sys., Inc.*, 936 F. Supp. 2d 520, 535 (E.D. Pa. 2013) (individual defendant, who may not have had actual knowledge of misrepresentations, was nonetheless liable because of his degree of involvement in corporate affairs).

as the CFPB."). Respondents do not claim that either § 1607 or § 1693*o* restricted Enforcement Counsel's ability to bring any of the claims asserted in the Notice of Charges.[5]

Even if the one-year statute of limitations in § 1640(e) or § 1693m(g) somehow applied to Bureau enforcement actions notwithstanding the clearly contrary statutory text, the Bureau's related claims (Counts II and VI), which are brought under 12 U.S.C. § 5536(a)(1)(A), would not be affected. Actions brought by the Bureau are governed by the CFPA's general three-year limitations period, *id.* § 5564(g)(1), unless those actions are brought "solely under" one of the other laws (such as TILA or EFTA) that the Bureau enforces, *id.* § 5564(g)(2)(A). But actions brought under § 5536(a)(1)(A) (such as Counts II and VI), do not arise "solely under" TILA or EFTA. Accordingly, these claims are governed by the CFPA's general three-year limitations period, *see id.* § 5564(g)(1).

3. The Bureau satisfied the statute of limitations with respect to Mr. Carnes

Respondents argue that the CFPA's three-year statute of limitations bars Enforcement Counsel's claims against Mr. Carnes because the Bureau either discovered or should have discovered Mr. Carnes' violations more than three years before the filing of the Notice of Charges.[6] I disagree. Like the ALJ, I find that Respondents have failed to demonstrate that there is a genuine question whether the Bureau discovered or with due diligence should have discovered Mr. Carnes' violations three years before the Notice of Charges was filed on November 18, 2015. As a result, I do not need to address the question of whether the CFPA's statute of limitations begins to run when a reasonably diligent agency plaintiff could have discovered a violation as opposed to when the Bureau actually discovered the violation.

Under 12 U.S.C. § 5564(g)(1), "no action may be brought under [the CFPA] more than 3 years after the date of discovery of the violation to which an action relates." Here, as discussed more fully above, Mr. Carnes' violations of the CFPA were based on his liability for IA's deceptive and unfair conduct. To obtain consumer redress for Mr. Carnes' violations of the CFPA on this theory, the Bureau had to prove that "(1) he participated directly in the deceptive acts or had the authority to

[5] Respondents have not, for instance, claimed that relief sought pursuant to Counts I and II is restricted by 15 U.S.C. § 1607(e). I find that Respondents have intentionally waived any such arguments by failing to present them either to the ALJ or in their appeal. A finding of waiver is particularly appropriate because Respondents have long been on notice that § 1607(e) could potentially be relevant, *see, e.g.*, Doc. 193 at 1; Doc. 199 at 1, and because any effect of § 1607(e) might have depended on factual matters that, due to Respondents' waiver, were not addressed by the ALJ or by the parties on this appeal, *see, e.g.*, 15 U.S.C. § 1607(e)(3)(C) (setting time limitation on certain relief except with respect to "a willful violation which was intended to mislead the person to whom credit was extended").

[6] Respondents have not identified any evidence concerning the Bureau's discovery of IA's unfair practices in connection with RCCs, let alone Mr. Carnes' knowledge or participation in that conduct. As a result, even if I accepted Respondents' arguments regarding the Bureau's discovery of Mr. Carnes' violations related to the loans' costs, Mr. Carnes would still be liable for IA's use of RCCs. Mr. Carnes would also be liable for restitution (and the related injunctive relief) for all of IA's unfair and deceptive conduct that occurred after November 18, 2012.

control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Gordon*, 819 F.3d at 1193; *see also* Resp. Br. at 17.

Because it is undisputed that the Bureau could not recover from Mr. Carnes (or obtain injunctive relief requiring Mr. Carnes to cooperate in identifying consumers entitled to redress) without proving participation in or authority over the unlawful conduct as well as his knowledge, recklessness, or intentional avoidance of the truth, I find that these are important and necessary elements of the "violation" that must be discovered before the statute of limitations clock begins to run. *See Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648-49 (2010) (holding that scienter is a fact constituting a § 10(b) securities violation because it is "an important and necessary element" of such a violation without which "[a] plaintiff cannot recover"); Doc. 249 at 19 ("[T]he CFPB claims against Respondent Carnes could not have accrued until the CFPB discovered evidence that he participated directly in or had actual knowledge of the misrepresentations involved, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud and intentionally avoided learning the truth.").

Respondents have not identified any reason to suggest that the Bureau discovered, or that a reasonably diligent agency would have discovered, Mr. Carnes' violations of the CFPA before November 18, 2012 (*i.e.* three years before the filing of the Notice of Charges). Instead, Respondents identify evidence that pertains, at most, to the discovery of *IA*'s violations. Respondents point to five pieces of evidence, one concerning the Bureau's focus on the payday lending industry, one about the Office of Enforcement's general investigatory policies, and three related to the Bureau's awareness of consumer complaints about IA's conduct. *See* Resp. Br. at 7-8; *accord* Appeal Tr. at 15-16. Because Respondents failed on appeal to identify a genuine factual issue concerning the Bureau's discovery of Mr. Carnes' violations, I find that Mr. Carnes' affirmative statute of limitations defense fails.

In their brief to the ALJ (but not on appeal), Respondents asserted that the Bureau obtained IA's loan agreement and learned that Mr. Carnes' was IA's CEO (or should have done so) before November 2012. Doc. 239 at 9-10. Even if these arguments had not been waived for failure to press them on appeal, they do not suggest that the Bureau discovered (or should have discovered) Mr. Carnes' liability, *i.e.*, his participation in, or knowledge of, IA's violations more than three years before the filing of the Notice of Charges. Indeed, as the ALJ explained (and Respondents have failed to dispute in this appeal), Mr. Carnes' individual liability "would not have been evident merely from the loan agreement, Carnes' title as CEO of the company, and complaints against Integrity Advance." Doc. 249 at 24. Instead, such a conclusion "required further documentation and investigational testimony." *Id.*

Under the CFPA, the Bureau obtains that kind of documentation and investigational testimony through administrative subpoenas. Here, the Bureau sent IA an administrative subpoena on January 7, 2013. Doc. 234, ¶ 3. IA provided an initial, partial production on October 25, 2013, and a largely complete production in December 2013. *Id.* ¶ 5. Enforcement counsel conducted investigational hearings in June 2014. *Id.* ¶¶ 7-8. As a result, I find that even based on their arguments to the ALJ, IA failed as a matter of law to show that the Bureau discovered Mr. Carnes' violation before November 18, 2012. I likewise find that Respondents did not show that a reasonably diligent agency in the Bureau's position would have discovered Mr. Carnes' violations before November 18, 2012. After all, even if the Bureau had sent IA an administrative subpoena as fast as possible – for instance, immediately after an enforcement attorney accessed complaints concerning IA's conduct on March 29, 2012, *id.* ¶ 2 – the Bureau would not have even had any documents relevant to Mr. Carnes liability until 2013 given the time it took IA to respond to the Bureau's administrative subpoena.

4. Ratification provides Respondents with an appropriate remedy for the CFPA's unconstitutional for-cause removal provision

As is apparent from the conclusions I have reached here, I ratify the Bureau's decision to file the Notice of Charges and to prosecute this action. *See Guedes v. BATFE*, 920 F.3d 1, 13 (D.D.C. 2019). This provides Respondents with an appropriate remedy for the CFPA's unconstitutional removal restriction. *See FEC v. Legi-Tech, Inc*., 75 F.3d 704, 708 (D.C. Cir. 1996).

Respondents cite *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994), and argue that I cannot ratify this action because, if the Bureau were to bring this action now, the statute of limitations would have expired. This is incorrect for three reasons. As explained above, the statute of limitations in the CFPA is satisfied once the Bureau has "brought" an action. 12 U.S.C. § 5564(g)(1). Nothing in the CFPA's statute of limitations suggests that it can be satisfied only if the action is brought at a time when the Bureau is headed by a Director who can be removed by the President at will. Here, the Bureau brought an action against Respondents when it filed the Notice of Charges in 2015. Because the Bureau has already satisfied the statute of limitations, my ratification is timely.

Second, if the Bureau did not satisfy the statute of limitations when it filed the Notice of Charges, then the statute of limitations has not yet expired. Pursuant to the CFPA, the limitations period is triggered by the date that the Bureau discovers the violation. By tying the limitations period to the discovery of the violation, Congress indicated that it did not want violations of the CFPA to be placed beyond the reach of the Bureau's diligent enforcement efforts. Respondents' argument flies in the face of Congress's will. Respondents essentially contend that the Bureau was constitutional enough to discover their violations and thereby begin the ticking of the statute of limitations clock, but not constitutional enough to issue a Notice of Charges that would satisfy the limitations period. There is no reason to believe that Congress intended this kind of heads-I-win, tails-you-lose result. Accordingly, if the statute of limitations was not satisfied when the Bureau issued the Notice of Charges, then the limitations period has yet to expire, and my ratification is timely.

Third, the CFPA's statute of limitations expressly states that the limitations period applies "[e]xcept as otherwise permitted … by equity." 12 U.S.C. § 5564(g)(1). So even if the statute of limitations might have otherwise run, the limitations period should be equitably tolled. *See Holland v. Fla.*, 560 U.S. 631, 649 (2010) (holding that a party is entitled to equitable tolling if it pursued its rights diligently and some extraordinary circumstance prevented timely filing). As I have explained above, the Bureau has pursued its rights diligently. Indeed, it filed a timely Notice of Charges. And, to the extent that the filing did not satisfy the statute of limitations, that was only because of an extraordinary circumstance – the unconstitutionality of the for-cause removal provision, a circumstance over which the Bureau had no control.

Respondents argue that the equitable tolling of the statute of limitations would be to their detriment. Resp. Br. at 3. But "statutes of limitations are designed to insure fairness to defendants by preventing the revival of stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise." *Johnson v. Ry. Express Agency, Inc*., 421 U.S. 454, 473 (1975) (Marshall, J., concurring in part, dissenting in part). None of those purposes would be served here since Respondents have long had notice of the Bureau's claims. Accordingly, if the statute of limitations has not been satisfied, but has nonetheless expired, it should be equitably tolled.

Respondents cite the district court's decision in *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018), *vacated and remanded for further proceedings*, No. 18-2743, 2020 WL 6372988 (2d Cir. Oct. 30, 2020), and argue that ratification would be impossible because the Bureau's structure was unconstitutional at the time of the filing of the Notice of Charges. Resp. Br. at 4. But the district court in *RD Legal* reached that decision because it concluded that, as a result of the for-cause removal provision, the entire CFPA should be struck down. The Supreme Court rejected this conclusion in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). Indeed, it held that even though the for-cause removal provision was unconstitutional (and severable from the remainder of the CFPA), "[t]he provisions of the [CFPA] bearing on the [Bureau's] structure and duties remain fully operative." *Id.* at 2209 (emphasis added); *see BCFP v. Citizens Bank, N.A*., No. 20-cv-044, 2020 WL 7042251, at *8 (D.R.I. Dec. 1, 2020) ("This Court thus interprets the Supreme Court's use of the word 'structure' to refer to attributes of the CFPB's top brass, not deeper issues with the authority or makeup of the Bureau as a whole."). That is, despite the unconstitutional removal restriction, the Bureau had the authority to file the Notice of Charges.

5. Respondents have not been denied due process

Respondents make two arguments in which they contend they were denied due process. First, they argue that they were denied due process when the ALJ refused to grant their request for additional discovery. Second, they contend that they were denied due process because the ALJ did not conduct a new hearing with witnesses and an opportunity for cross-examination. I reject both of those arguments.

a. Respondents' request for issuance of a subpoena

First, on August 23, 2019, Respondents filed a request with the ALJ pursuant to Bureau Rule 208, 12 C.F.R. § 1081.208, seeking to have her issue a subpoena directed to the Bureau that required the production of:

> 1) All consumer complaints received by the Bureau from July 21, 2011, to November 18, 2012, regarding IA or Mr. Carnes;
>
> 2) Records of all communications (from July 21, 2011, to November 18, 2012) between anyone employed by the Bureau and any other person regarding IA or Mr. Carnes;
>
> 3) Records of all internal Bureau communications (from July 21, 2011, to November 18, 2012) regarding IA or Mr. Carnes;

4) Any document drafted by any Bureau employee regarding IA or Mr. Carnes.

Doc. 232. Respondents argue that they sought this information in support of their contention that, by the time the Bureau filed its Notice of Charges, the statute of limitations had expired. Appeal Tr. at 17, 43. They contend that their proposed subpoena was narrowly tailored, and that pursuant to the Bureau's rules, the ALJ was required to issue the subpoena unless the subpoena was "unreasonable, oppressive, excessive in scope, or unduly burdensome." Resp. Br. at 10.

As explained above, I have concluded that the statute of limitations set forth in the CFPA applies to all the violations alleged in the Notice of Charges. On June 2, 2014, and on March 16, 2015, the Bureau and IA entered into tolling agreements. Docs. 200, 201. Because enforcement authority was not transferred to the Bureau until July 21, 2011, and because the Bureau entered into the tolling agreements less than three years after that date, the statute of limitations did not expire with respect to IA. However, the Bureau and Mr. Carnes never entered into a tolling agreement. So the issue is whether the ALJ's denial of Respondents' subpoena request denied them due process with respect to their argument that the statute of limitations had expired as to Mr. Carnes.

Bureau Rule 206, 12 C.F.R. § 1081.206, seeks "to ensure that respondents have prompt access to the non-privileged documents underlying enforcement counsel's decision to commence enforcement proceedings, while eliminating much of the expense and delay often associated with pre-trial discovery in civil matters." 77 Fed. Reg. 39058, 39059 (June 29, 2012). Rule 206 therefore required Enforcement Counsel to make available to Respondents those documents obtained by the Bureau's Office of Enforcement from outside sources in connection with its investigation of Respondents. Enforcement Counsel state (and Respondents do not dispute) that they complied with Rule 206 and provided Respondents all consumer complaints and all external correspondence upon which Enforcement Counsel might have relied, regardless of which office in the Bureau initially received those documents. EC Br. at 23. Nonetheless, Respondents now speculate that other offices at the Bureau might have received consumer complaints or other documents regarding IA and Mr. Carnes, that these documents might never have come to the attention of the Office of Enforcement, and that if these other offices had received these documents, this might have triggered the running of the statute of limitations.

Respondents' request for additional discovery is based on far too many assumptions. They ask me to assume: 1) that there are consumer complaints (or other external communications) regarding IA or Mr. Carnes that were received by the Bureau but that never came to the attention of the Office of Enforcement (and thus were not turned over to Respondents pursuant to Rule 206); 2) that these documents contained information regarding Mr. Carnes' role as the CEO of IA; and 3) that the Bureau received these documents prior to November 18, 2012 (*i.e.*, more than three years before the Bureau filed its Notice of Charges). Even assuming that there are complaints or other external documents that never came to the attention of Enforcement Counsel, I am unwilling to assume that these documents might have contained the sort of information regarding Mr. Carnes that would be relevant to Respondents' statute of limitations argument. Pursuant to Rule 206, Respondents have already received complaints and other communications that came from external sources. And yet, Respondents have not pointed to anything in those documents to support the claim that the Bureau did discover or should have discovered Mr. Carnes' violations (as opposed to IA's violations) before November 18, 2012. There is thus no reason for me to assume that any documents responsive to the first two specifications of Respondents' proposed subpoena, documents that are of the same character as the documents that Respondents have already received, would be relevant to their statute of limitations argument. Respondents' request flouts the purpose of Rule 206. Accordingly, these two specifications are excessive in scope and unreasonable.

The third and fourth specifications of Respondents' proposed subpoena seek internal Bureau communications and documents. Pursuant to Bureau Rule 206(b), as part of its initial production to Respondents, the Office of Enforcement was not required to provide privileged documents, internal memoranda, other notes or writings prepared by Bureau employees, or documents subject to the work-product privilege. Respondents do not dispute that the documents requested by the third and fourth specifications are exempt from disclosure under Rule 206. Instead, they argue that the exemptions in Rule 206 do not apply to documents requested by subpoena pursuant to Rule 208, and that even if the documents are exempt, the ALJ should have required Enforcement Counsel to provide a privilege log for those documents. Resp. Br. at 11.

As the Bureau explained when it issued Rule 206, the purpose of that rule is to:

> provide the respondent with access to, in effect, the documents they would likely seek and obtain in the course of a protracted discovery period soon after service of the notice of charges. … By automatically providing respondents with the factual information gathered by the Office of Enforcement in the course of the investigation leading to the institution of proceedings, this provision helps ensure that respondents have a complete understanding of the factual basis for the Bureau's action and can more accurately and efficiently determine the nature of their defenses or whether they wish to seek settlement. Because this approach renders traditional document discovery largely unnecessary, it will lead to a faster and more efficient resolution of Bureau administrative proceedings, saving both the Bureau and respondents the resources typically expended in the civil discovery process.

77 Fed. Reg. 39058, 39070 (June 29, 2012). By seeking a subpoena for documents that do not have to be disclosed under Rule 206, Respondents seek to thwart the purpose of that rule. Such a subpoena undermines the goal of a faster and more efficient resolution of the administrative proceeding. Thus, to the extent that a respondent seeks issuance of a subpoena to obtain from Enforcement Counsel documents that are specifically protected from disclosure by Rule 206, that subpoena is "excessive in scope" pursuant to Rule 208, and a request for issuance of such a subpoena is properly denied.

In connection with their request for a subpoena, Respondents also requested that, if the ALJ were not willing to issue a subpoena, she should require Enforcement Counsel to provide a list of withheld documents. Resp. Br. at 11-12. The ALJ denied that request because she concluded that requiring Enforcement Counsel to produce such a list would be "an unnecessary and dilatory exercise." Doc. 238 at 9. I agree. Bureau Rule 206(c) states that the administrative law judge "may require the Office of Enforcement to produce a list of documents or categories of documents" that were not provided to the respondent in connection with the disclosures required by Rule 206. It is not clear to me whether Respondents' request is even appropriate when it is made not at the time Enforcement Counsel complied with Rule 206, but in conjunction with a meritless request for a subpoena pursuant to Rule 208. In any event, the ALJ correctly denied the request because there is no question that the documents requested by specifications 3 and 4 are privileged. Respondents claim that if Enforcement Counsel provided the date of each of the requested documents, this would be relevant to when the Bureau discovered Respondents' violations. Resp. Br. at 11. But disclosure of the date on which documents responsive to specifications 3 and 4 were created would not advance Respondents' argument regarding when the Bureau should have discovered Mr. Carnes' role in connection with IA's violations. Nor would it advance this argument even if Respondents were able to show that the Bureau had access to IA's loan agreement prior to November 2012, *see* Resp. Br. at 11 n.9, because the loan agreement does not reveal Mr. Carnes' role. Accordingly, the ALJ did not err when she denied IA's request for issuance of a subpoena, and Respondents were not thereby denied due process.

b. Respondents' request for a second evidentiary hearing

On May 29, 2019, I remanded this matter to the ALJ "for a new hearing and recommended decision in accordance with Part 1081 of the Bureau's Rules." Doc. 216. I further directed that the ALJ was to "seek submissions from the parties regarding the conduct of further proceedings." *Id.* The ALJ ultimately resolved this matter based on the parties' cross motions for summary disposition. However, Respondents argue that they were denied due process because the ALJ did not conduct a second evidentiary hearing "with the opportunity for both sides to present evidence and examine witnesses." Resp. Br. at 12; *see* Appeal Tr. at 44. (Respondents had an evidentiary hearing before Judge McKenna, and the transcript of that hearing is part of the record of this proceeding. *See* Docs. 172-174.) Respondents contend that *Lucia v. SEC*, 138 S. Ct. 2044 (2018), entitles them to such a hearing. Resp. Br. at 12-13.

In *Lucia*, the Court held that the appropriate remedy for an administrative adjudication conducted by an administrative law judge who had not been appointed in a manner consistent with Article II of the Constitution was a new hearing before a properly appointed official. 138 S. Ct. at 2055. But the Court did not indicate the nature of the new hearing that the properly appointed official was required to conduct. *See Kornman v. SEC*, 592 F.3d 173, 181-82 (D.C. Cir. 2010) (upholding SEC's use of summary disposition as consistent with statutory requirement for an "opportunity for hearing"). Indeed, the Constitution does not automatically require an in-person evidentiary hearing whenever an agency such as the Bureau makes an adjudicative determination. *See Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010). Rather, "[a]dministrative summary judgment is not only widely accepted, but also intrinsically valid." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994). Respondents received the process due under the Constitution: notice of the charges against them and a meaningful opportunity to be heard before an impartial tribunal. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Nor did my order require the ALJ to conduct the sort of hearing that Respondents seek. It is true that the hearing Respondents seek is provided for by Bureau Rules 300-306, 12 C.F.R. §§ 1081.300-306. But my order directed the ALJ to "seek submissions from the parties regarding the conduct of further proceedings." Doc. 216. I thus implicitly left it to her to determine the scope of further proceedings, so long as those proceedings were consistent with the Bureau's rules. Those rules permit an administrative law judge to resolve a proceeding on motions for summary disposition. 12 C.F.R. § 1081.212(c). Here, both Respondents and Enforcement Counsel filed such motions. *See* Docs. 272, 275. A motion for summary disposition may be supported by "documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position." 12 C.F.R. § 1081.212(d). Thus, it was wholly appropriate, and consistent with Bureau Rule 212(d), for the ALJ to consider documentary evidence from the proceedings in this matter held before Administrative Law Judge McKenna. Respondents complain that the ALJ was not able to consider the demeanor of the witnesses who testified at the evidentiary hearing held before Judge McKenna. Resp. Br. at 13-14. Nothing in the Bureau's rules required that she do so. *Puerto Rico Aqueduct*, 35 F.3d at 606 ("Due process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way."). In any event, Respondents have not raised any argument that calls the veracity of any witness into question.

B. IA violated TILA (Counts I and II)

As relevant here, TILA requires that before closed-end credit is extended, the creditor must disclose to the consumer the "finance charge," and the "total of payments" (which is the sum of the amount the consumer financed and the finance charge). 15 U.S.C. § 1638(a)(2)(A), (3), (5). Accurate disclosure of the finance charge and total of payments is foundational to the Congressional scheme: A primary purpose of TILA 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 uniformed used of credit." *Id.* § 1601(a).

Regulation Z specifies that these required "disclosures shall reflect the terms of the legal obligation between the parties." 12 CFR § 1026.17(c)(1). The Bureau's official interpretation of Regulation Z further clarifies that "[t]he disclosures shall reflect the terms to which the consumer and creditor are legally bound as of the outset of the transaction." Comment 17(c)(1)-1.

In this case, IA disclosed the finance charge and the total of payments as if consumers were obligated to repay the loans in full by the consumer's next pay date. I find that consumers were not under any such obligation.

Under IA's contract, immediate repayment was purely optional. The contract says that the consumer "may choose" either the "option" of fully repaying the loan by her next pay date "OR" the "option" of "renew[ing] [the] loan," which meant "extend[ing]" the payment due date until the consumer's following pay date. When consumers entered into an agreement with IA, they were not obligated to immediately repay the loan in full. Instead, consumers would only have that obligation if they affirmatively chose the immediate repayment option by contacting IA three business days before the payment due date. As a result, IA's TILA disclosures did not "reflect the terms of the legal obligation between the parties," 12 C.F.R. § 1026.17(c)(1), "as of the outset of the transaction," comment 17(c)(1)-1. *See United States v. Moseley*, 980 F.3d 9, 26 (2d Cir. 2020) (affirming TILA conviction because the evidence showed that "the 'total of payments' disclosure included just one finance charge in addition to the loan principal amount … notwithstanding Moseley's knowledge (and in fact, his intention) that, unless the borrower acted, the total she would pay would amount to much more than a single finance charge").[7]

[7] At argument, Respondents attempted to distinguish *Moseley* by claiming that the rest of IA's contract clearly disclosed the consumer's obligations. Appeal Tr. at 15. But even if that were true

Respondents argue that IA's TILA disclosures were lawful because "consumers had a legal obligation to pay the loan in full on the Payment Due Date or to set up an alternative payment option, including electing to renew the loan, by contacting IA." Resp. Br. at 19. This argument is wrong. Consumers did not have a legal obligation to pay the loan in full on the payment due date because, as Respondents concede, unless consumers took affirmative action, IA automatically renewed the loans and deducted multiple payments from their accounts. Thus, consumers' legal obligation was to pay the loan according to the contractually-defined renewal and auto-workout schedule. Under TILA therefore, IA was required to provide consumers with disclosures that reflected consumers' ultimate legal obligation to complete repayment of the loan by the end of the renewal and auto-workout schedule. Contrary to Respondents' suggestion, Resp. Br. at 20, disclosures based on the full renewal and auto-workout term would not reflect consumers' "post-consummation choices," but rather consumers' legal obligation at the time loans were issued. *See also Moseley*, 980 F.3d at 27 (rejecting similar argument).

Allowing IA to make disclosures that reflected consumers' option to repay the loan immediately would neuter TILA's requirements that creditors prominently disclose a closed-end loan's finance charge and total payments. After all, closed-end loans commonly permit a consumer to repay the loan ahead of schedule, often without a penalty for prepayment. *See, e.g.*, 12 C.F.R. § 1026.18(k) (requiring disclosures about prepayment of closed-end loans). On Respondents' theory, lenders who offer consumers a 30-year home mortgage with a prepayment option would only need to disclose a tiny fraction of the finance charge and total payments that consumers are obligated to repay.

To the extent that there were any doubt about whether consumers had a legal obligation to immediately repay the loans based on the terms of the contracts alone, the undisputed evidence concerning the parties' course of conduct removes it. Most significantly, Respondents admitted in their answer "that unless a consumer contacted Integrity Advance *to change the terms of the loan* – through one of several available means – Integrity Advance renewed the consumer's loan." Doc. 21, at ¶ 29 (emphasis added); *accord id.* ¶ 30 (Respondents admit that "$50 would be automatically applied to a consumer's loan principal after four loan renewals, unless a consumer contacted Integrity Advance – through one of several available means – *to change the terms of payment*." (emphasis added)). *See, e.g.*, *AT&T Corp. v. Lillis*, 970 A.2d 166, 172 (Del. 2009) ("It is hornbook law that the contracting parties' course of conduct may be considered as evidence of their intended meaning of an ambiguous contractual term. In this case, that course of conduct included the undisputed fact that AT&T made certain admissions in its original answer, which it later withdrew."). Consistent with this admission, Respondents do not point to any evidence to suggest that IA could or did treat consumers as having an obligation to immediately repay the loans. Unless a consumer affirmatively chose to repay her loan right away, IA would not debit the consumer's account for the full amount of the loan. Nor would IA treat the consumer as if she had breached the agreement for failing to either repay the loan or affirmatively renew the loan. Indeed, the first repayment option that IA identified for consumers in their welcome was: "**YOU CAN LET THE LOAN AUTOMATICALLY RENEW**." Doc. 274A at 24. Instead, as Respondents concede in their brief on appeal, the contract "informed consumers that their loans would be automatically

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(and it is not, for the reasons discussed in the next section), the alleged clarity of the remainder of IA's contract is irrelevant to whether IA's mandatory TILA disclosures were accurate.

renewed if they failed to select a payment option, and … allowed consumers to decline renewals ….” Resp. Br. at 21.

Accordingly, I find that IA's disclosures violated TILA as implemented by Regulation Z. Because IA is a covered person,[8] I find that IA also violated 12 U.S.C. § 5536(a)(1)(A) by providing consumers disclosures that violated Federal consumer financial law.

C. Through IA's use of the loan agreement, IA and Mr. Carnes engaged in deceptive practices (Count III)

Under the CFPA, "an act or practice is deceptive if (1) there is a representation, omission, or practice that, (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material." *Gordon*, 819 F.3d at 1192 (quotation marks omitted); *see also id.* at 1192 n.7.

Here, the ALJ concluded that IA's loan agreement was deceptive as a matter of law because it was likely to mislead reasonable consumers about how much the loans cost. Doc. 293, at 40-41. The loan agreement's TILA disclosures identified the total of payments that applied only to those consumers who affirmatively chose, at least three days before the first payment due date, to pay the loan in full. *Id.* at 8 ¶¶ 37, 38, 46. But neither in the TILA disclosures nor elsewhere in the loan agreement did IA disclose to consumers how much they would have to pay under the loan's default payment schedule pursuant to which IA made ACH withdrawals according to the auto-renewal and auto-workout process. *Id.* at 8, ¶ 47. As the Ninth Circuit recently concluded in affirming summary judgment on the FTC's deception claim in a case involving a very similar loan agreement, a reasonable consumer who received the loan agreement "might expect to pay only" the amount listed in the "total of payments." *FTC v. AMG*, 910 F.3d at 423 (2018); *cf. also Moseley*, 2020 WL 6437737, at *12 ("[A] jury could rationally have found that Moseley's "total of payments" disclosure of just the loan principal plus one finance charge – despite the fact that no such payment was actually scheduled – was inaccurate and misleading.").

On appeal, Respondents challenge the ALJ's deception conclusion in three ways.

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[8] In a two-sentence paragraph, Respondents assert that they were not covered persons "during the period of the CFPB's authority," by which they mean the period after the CFPA took effect but before the Senate confirmed Richard Cordray as the Bureau's first director in July 2013. Resp. Br. at 14. This argument has been waived. To the extent that this drive-by assertion is not waived, I reject it. The definition of covered person became effective on July 21, 2010, and the prohibition on unfair, deceptive, and abusive acts or practices by covered persons took effect on July 21, 2011. *See* 12 U.S.C. § 5301 note (setting the general effective date of the Dodd-Frank Act that is applicable to 12 U.S.C. § 5481's definition of covered person); *id*. § 5531 note (providing that subtitle C of the CFPA, which includes 12 U.S.C. §§ 5531, 5536's prohibitions on unfair, deceptive, or abusive acts and practices would take effect on the designated transfer date); 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010) (establishing July 21, 2011 as designated transfer date). Accordingly, as of July 21, 2011, Respondents were covered persons subject to the CFPA's requirements and restrictions, including the prohibitions on unfair and deceptive acts or practices.

First, they say that Enforcement Counsel failed to establish as a matter of law that IA's misrepresentations about the full cost of the loans were material to consumers. In support of this argument, Respondents note that Enforcement Counsel did not present any extrinsic evidence of materiality. Resp. Br. at 21-22. But Respondents' argument misunderstands the law of materiality.[9] A misrepresentation is "material if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). Not surprisingly, the FTC and the courts have long treated misrepresentations about how much a product or service costs as presumptively material. *See, e.g.*, FTC Policy Statement on Deception, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 1984 WL 565319, at *49; *In re Sanctuary Belize Litig.*, Civ. No. 18-3309, 2020 WL 5095531, at *11 (D. Md. Aug. 28, 2020); *accord FTC v. Freecom*, 401 F.3d at 1203 (10th Cir. 2005) ("Misrepresentations concerning anticipated income from a business opportunity generally are material and likely to mislead consumers because such misrepresentations strike at the heart of a consumer's purchasing decision."). Where the presumption of materiality applies, additional evidence of materiality is unnecessary. *See* FTC Policy Statement on Deception, 1984 WL 565319, at *49-50; *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992). I find that the application of this presumption was particularly appropriate here because IA's misrepresentation concerned a nearly $700 discrepancy in the total cost of a $300 loan. Accordingly, Enforcement Counsel was not required to provide additional evidence to prove that IA's misrepresentation was material.

Respondents also attempt to rebut the presumption of materiality by noting that IA had repeat customers. Resp. Br. at 22-23. But as the court explained in *FTC v. AMG*, "[i]t is equally plausible that the repeat borrowers were just as confused as those taking out their first loans." 910 F.3d at 425; *see also* discussion below. Indeed, Respondents have no evidence that a cost difference of several hundred dollars would somehow be less important to the decision of a repeat borrower. After all, materiality does not require proof that, but for the misrepresentation, no consumer would ever purchase a product. Instead, the question is whether the misrepresentation was likely to affect consumer behavior. The existence of some consumers willing to repay more than $1000 in order to borrow $300 does not mean that price is irrelevant to IA's borrowers, even to repeat borrowers. All it shows is that *some* consumers were willing to pay that price.

Second, Respondents dispute, in passing, the ALJ's conclusion that the net impression of the loan agreement was deceptive as a matter of law. They claim that IA "took steps" to ensure consumers understood the loan, and that there was "ample other evidence" establishing a genuine issue of fact on this issue. Resp. Br. at 22. But Respondents' brief on appeal did not specify the "steps" or the "evidence" on which Respondents hoped to rely, citing instead pages of argument that it made to the ALJ. To the extent that Respondents have not waived this argument, I reject it. As the Ninth Circuit explained in *AMG*, "the TILA box suggested that the value reported as the 'total of payments' … would equal the full cost of the loan," but in fact, "under the default terms of the loan, a consumer would be required to pay much more." 910 F.3d at 423. None of the steps or evidence Respondents identified in the proceeding before the ALJ could have even arguably corrected that misimpression. *See* Doc. 272 at 9-11. Indeed, the closest IA came to disclosing to consumers that,

[9] Notably, Respondents failed in their opening brief to specifically identify *any* basis to rebut the presumption of materiality, instead citing to various pages of their briefs to the ALJ. Resp. Br. at 21-22.

as a result of the loan's default terms, consumers "would be required to pay much more" than the amount disclosed in the total of payments box was a generic statement in the loan agreement in all capital letters that "Additional fees may accrue if the loan is refinanced or 'rolled over.'" Doc. 293 at 9, ¶ 50. But as the ALJ pointed out (and Respondents have failed to meaningfully dispute, *see* Appeal Tr. at 46-47) this disclosure "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." Doc. 293 at 38. Even worse, this disclosure was itself "misleading" because it "present[ed] 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." *Id.*

Finally, Respondents contend that because IA had repeat customers, this shows that the loan agreements would not have misled reasonable consumers. This misstates the standard for proving deception. To prove that an act or practice is deceptive, the Bureau did not need to prove that every consumer was, in fact, misled. *See, e.g.*, *FTC v. Johnson*, 96 F. Supp. 3d 1110, 1119 (D. Nev. 2015) ("The FTC is not required to show that all consumers were deceived, and the existence of satisfied consumers does not constitute a defense."). Rather, all Enforcement Counsel had to show was that the act or practice was *likely* to mislead reasonable consumers. Here, consistent with the Ninth Circuit's decision in *AMG*, I find that as a matter of law IA's loan agreement was likely to mislead reasonable consumers, and as explained above, Mr. Carnes is liable for that violation of the CFPA.

D. Through IA's use of the loan agreement, IA engaged in unfair practices (Count IV)

Under the CFPA, an act or practice is "unfair" if it is likely to cause substantial injury that is not reasonably avoidable by consumers and that is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1). The ALJ held, and I agree, that IA's use of loan agreements that misrepresented the total cost of credit was unfair, and as I explain above, Mr. Carnes was liable for that violation of the CFPA.

First, IA's practice was likely to cause (and did cause) substantial injury because many consumers paid significantly more than they would have anticipated based on the loan agreement. This harm easily clears the "substantial injury" bar, which can be satisfied by showing that an act or practice does "a 'small harm to a large number of people, or if it raises a significant risk of concrete harm.'" *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010) (quoting *Am. Fin. Servs. Ass'n v. FTC*, 767 U.S. 957, 972 (D.C. Cir. 1985)).

Second, the injury consumers suffered was not reasonably avoidable because it was not properly disclosed in the loan agreement. *See Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) ("Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it…."). And once consumers realized that IA had deducted more money from their bank accounts than the amount disclosed in the loan agreement's total of payments box, they still could not avoid injury because, as illustrated by the example set forth above in the Findings of Fact and Legal Background, at that point they still owed IA more than the principal amount of the loan. Respondents claim, Resp. Br. at 24, that the evidence would support the inference that reasonable consumers "*did* understand that they would incur additional costs if they did not pay off the loans in full on the Payment Due Date" because the loan agreement said that "additional fees may accrue if the loan is refinanced or 'rolled over.'" *Id.* But as explained above in connection with Respondents' liability pursuant to Count III, the mere fact that the loan agreement stated that there *may* be some unspecified additional fees does not permit the inference that consumers understood that they were actually authorizing IA to charge them more than twice as much as the loan agreement actually disclosed. Nor is it persuasive that IA had repeat customers. *See id.* Even if there were a subgroup of IA customers who understood IA's loan agreement well enough to avoid paying more than the total of payments (and IA has not demonstrated that there were such customers), that would not excuse IA's violations with respect to other customers.

Third, whatever benefits IA's loans might have provided to consumers, there is no evidence that the challenged practice of misrepresenting or otherwise obscuring the material terms of those loans provided a countervailing benefit to consumers or competition. As the ALJ observed (and Respondents do not challenge), "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 IA had to misrepresent the costs in order for consumers to receive the benefit of a payday loan." Doc. 293 at 49.

Respondents attempt to avoid liability for their unfair practice by asserting that the Bureau is estopped from pursuing its unfairness claim because when this matter was being considered by Judge McKenna, Enforcement Counsel agreed to dismiss this claim (*i.e.*, Count IV) with prejudice in light of Judge McKenna's summary disposition order. *See* Doc. 127. But dismissal of the unfairness claim came before I ordered that Respondents be given a new hearing in light of the Supreme Court's decision in *Lucia* and before I directed Judge Kirby to "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna." Doc. 216. Consistent with that order, the parties were permitted to proceed as if Judge McKenna had not issued any opinions, orders, or rulings.

In this context, I find that it was appropriate for Judge Kirby to allow Enforcement Counsel to pursue a claim that it had abandoned in reliance on a now-inoperative opinion by Judge McKenna. That decision makes particular sense because Respondents have not shown that the stipulated dismissal in the proceeding before Judge McKenna provided an unfair advantage to Enforcement Counsel in the proceeding before Judge Kirby or imposed an unfair detriment on Respondents. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (observing that one consideration in a claim of judicial estoppel is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped"). Nor can the stipulated dismissal be understood to have persuaded Judge McKenna to adopt the Bureau's position on a contested matter. *Cf. id.* at 750 (courts ask "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled" (quotation marks omitted)).

E. IA violated EFTA (Counts V and VI)

Count V of the Notice of Charges alleged that IA violated a provision of EFTA, 15 U.S.C. § 1693k, and its implementing Regulation E, 12 C.F.R. § 1005.10(e), when IA conditioned extensions of credit on repayment by preauthorized electronic fund transfers. Count V alleged that IA required consumers to complete IA's ACH Authorization as part of the loan application process. By doing this, consumers authorized repeated electronic fund transfers every payday until the principal reduced to zero. This ACH authorization constituted a "preauthorized electronic fund transfer" as that term is defined in Regulation E, and there was no indication in IA's documents that a consumer could obtain a loan without signing the ACH Agreement.

Count VI of the Notice of Charges alleged that by virtue of its violation of EFTA and Regulation E, IA also violated the CFPA. In particular, the CFPA provides that when a covered person violates an enumerated statute, that covered person also violates the CFPA. 12 U.S.C. § 5536(a)(1)(A). Respondents have not disputed that if they violated EFTA, they also violated the CFPA. *See* Resp. Br. at 25.

I conclude that IA violated EFTA and Regulation E, and as a result, also violated the CFPA.

EFTA provides that "No person may … condition the extension of credit to a consumer on such consumer's repayment by means of preauthorized electronic fund transfers." 15 U.S.C. § 1693k. Regulation E has a similar prohibition: "No financial institution or other person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers[.]" 12 C.F.R. § 1005.10(e). Regulation E defines an "electronic fund transfer" as "any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account." 12 C.F.R. § 1005.3(b)(1). A "preauthorized electronic fund transfer" is defined as "an electronic fund transfer authorized in advance to recur at substantially regular intervals." 12 C.F.R. § 1005.2(k). The parties do not dispute that the payments that IA extracted from consumers' bank accounts were "preauthorized electronic fund transfers."

As an initial matter, there is no dispute that IA is a "person" for purposes of EFTA and Regulation E. Regulation E defines a person to mean "a natural person or an organization, including a corporation, government agency, estate, trust partnership, proprietorship, cooperative, or association." 12 C.F.R. § 1005.2(j). The parties jointly stipulated that IA is a Delaware limited liability company. Doc. 56 at 1. Respondents have also not disputed that IA extended credit to consumers.[10] EFTA does not specifically define the term "credit," but that term is defined elsewhere in the Consumer Credit Protection Act (of which EFTA is Title IX) as the right to "incur debt and defer its payment." 15 U.S.C. § 1602(e). The parties jointly stipulated that IA made loans to consumers. Doc. 56 at 2.

[10] It has been argued that Regulation E limits the scope of EFTA's prohibition to extensions of credit granted by financial institutions. *See McCready v. eBay, Inc.*, No. 03-cv-2117, 2005 WL 6082528, at *5 (C.D. Ill. Feb. 4, 2005), *aff'd*, 453 F.3d 882 (7th Cir. 2006). Respondents have not made this argument, and it is accordingly waived. In any event, I would reject the argument because a regulation cannot limit the scope of a violation defined by a statute. *See Zuniga v. Barr*, 946 F.3d 464, 470 (9th Cir. 2019) (court must reject an interpretation of a regulation if it is inconsistent with the statute under which the regulation has been promulgated). *See also* 61 Fed. Reg. 19662, 19667 (May 2, 1996) (promulgating what is now codified as 12 C.F.R. § 1005.10(e) and noting that the provision applies not just to financial institutions).

The question that remains is whether IA conditioned its extensions of credit on the consumer's repayment by preauthorized electronic fund transfers. I conclude that it did.

The following provisions of the loan agreement (ECX 2) demonstrate that IA required consumers to agree to preauthorized electronic fund transfers to repay their loans as a condition of getting the loans:

- "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 the other 'I Agree' buttons that appear within the Loan Agreement and related documents that appear below." ECX 2 at 4. (The ACH Authorization was one of these buttons.) *Id.* at 11.

- "By entering your name and clicking the 'I Agree' button below, you are electronically signing and agreeing to all the terms of the Loan Agreement, the Arbitration Provision, and the ACH Authorization ('the Loan Documents') as providing or confirming your electronic signature on all of the Loan Documents…." *Id.* at 15.

- "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." *Id.* at 10.

- "You grant us a security interest in your ECheck/ACH Authorization in the amount of the Total of Payments (the 'ECheck/ACH') which we may negotiate on the Payment Due Date or thereafter…. Pursuant to the ECheck/ACH Authorization, you have directed us to initiate one or more ECheck/ACH debit entries to Your Bank Account for the amounts owed to us under the Loan Agreement on the Payment Due Date or thereafter and for certain fees that may be assessed in the event of dishonor when presentment is made to your bank on your ECheck/ACH Authorization." *Id.* at 4-5.

There is no indication in the loan agreement that a borrower could obtain a loan from IA without agreeing to the ACH authorization. Accordingly, I conclude that the loan agreement violates EFTA.

Respondents argue that the loan agreement did not condition the extension credit on repayment by recurring electronic fund transfer because the ACH Authorization indicated that consumers could repay their loan through other means. Resp. Br. at 25; Resp. Reply at 13. Indeed, a provision of the ACH Authorization did say, "You understand and agree that this ACH authorization is provided for your convenience, and that you have authorized repayment of your loan by ACH debits voluntarily. You 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." ECX 2.

While this provision allowed borrowers, at least in theory, to make payments by a means other than preauthorized electronic fund transfer, it did not allow the borrower to obtain credit from IA without agreeing to allow IA to make preauthorized electronic fund transfers from the borrower's account to repay the loan. Although IA made loans to a small number of borrowers who, despite the provisions of the loan agreement did not agree to the ACH Authorization, Doc. 272 at 34, there is no clear explanation in the record as to why. (I do not read the Notice of Charges to allege that IA violated either EFTA or Regulation E with respect to this small number of borrowers who were the exception to the rule.)

I disagree with Respondents' interpretation of the relevant provisions of EFTA and Regulation E. EFTA and Regulation E prohibit a lender from conditioning a loan on repayment by preauthorized electronic fund transfers. Respondents, however, would apparently permit a creditor to require that a consumer agree to repayment by preauthorized electronic fund transfer, but contend that the creditor would not violate EFTA so long as the creditor does not then require the consumer to actually make every single payment by preauthorized electronic fund transfer. There is no evidence that Congress intended such a result and IA has offered none. Indeed, the legislative history of EFTA is to the contrary. Two bills that were precursors to EFTA contained the same language that was ultimately enacted as section 1693k. *See* S. 3499, 95th Cong. § 913 (1978); S. 3156, 95th Cong., § 913 (1978). The Senate reports explained that these bills provided that "a creditor could not condition the extension of credit on a consumer's agreement to repay by automatic EFT payments." S. Rep. No. 95-915, at 7 (1978); S. Rep. No. 95-1273, at 14 (1978) (emphasis added). That, of course, is exactly what IA required.

The court in *De La Torre v. CashCall, Inc*., 56 F. Supp. 3d 1073 (N.D. Cal. 2014), considered, and rejected, the same argument made by Respondents here. The defendant in that case argued that what EFTA actually prohibited was "conditioning the extension of credit upon a requirement to make all loan payments by [electronic fund transfer] during the life of the loan." *Id*. at 1088. However, the court concluded that EFTA's language is "unambiguous" that a violation of EFTA's compulsory use provision "occurs at the moment of conditioning – that is, the moment the creditor requires a consumer to authorize EFT as a condition of extending credit to the consumer." *Id*. at 1089. The court also concluded that the legislative history of EFTA confirmed its unambiguous meaning. *Id*. It further held that the mere fact that a borrower may revoke an agreement to repay by preauthorized electronic fund transfer does not allow a creditor who conditions the extension of credit on entering into such an agreement to avoid liability under EFTA and Regulation E. *Id.* at 1089-91. Other court decisions have reached a similar conclusion. *See* Doc. 111 at 34-35 (citing *O'Donovan v. CashCall, Inc*., No. 08-cv-3174, 2009 WL 1833990, at *3 (N.D. Cal., June 24, 2009), and *FTC v. PayDay Financial LLC*, 989 F. Supp. 2d 799, 811-13 (D.S.D. 2013)).

I therefore conclude that EFTA's text is best read as prohibiting a person from conditioning a loan on a consumer's agreement to authorize repayment by preauthorized electronic fund transfers and reject Respondents' contrary argument.

As explained above, because IA violated EFTA and Regulation E, it also violated the CFPA, as alleged in Count VI.

F. As a result of IA's use of RCCs, both IA and Mr. Carnes engaged in unfair practices (Count VII)

Count VII of the Notice of Charges alleged that Respondents engaged in an unfair practice in violation of the CFPA when IA obtained authorization for RCCs in a confusing manner and then initiated the RCCs. IA's loan agreement included a provision allowing IA to create RCCs if consumers successfully canceled their authorization for ACH withdrawals. But IA buried this provision in the section of the loan agreement regarding ACH authorization, and, even if a consumer had focused on the provision, that consumer would not have reasonably known that the provision also authorized IA to use RCCs. IA then used this provision to withdraw funds from consumers' bank accounts in situations where consumers had cancelled the ACH authorization. I conclude that IA's use of RCC was unfair – it caused substantial injury to consumers that they could not reasonably avoid, and that injury was not offset by benefits to consumers or competition.

I conclude that IA's use of RCCs imposed two types of injury on consumers. As I explained above in connection with Count IV, IA caused substantial injury to consumers whenever IA debited consumers' accounts for amounts in excess of what was disclosed in the total of payments box in the loan agreement. IA used RCCs to make such withdrawals 602 times on or after July 21, 2011. These withdrawals totaled $115,024.50. ECX 97 at 4-5. I also conclude that consumers suffered substantial injury because IA withdrew funds from consumers' accounts when, as explained below, consumers reasonably believed that IA no longer had access to their accounts. *See FTC v. Neovi, Inc*., 604 F.3d 1150, 1157-58 (9th Cir. 2010) (facilitating unauthorized access to consumers' bank accounts constitutes substantial injury). This second type of injury would occur regardless of whether the consumers had already paid the amount disclosed in the total of payments box – consumers might have other reasons for withdrawing ACH authorization. Nonetheless, Enforcement Counsel have only alleged violations for those RCCs that IA used after consumers had paid the amount in the total of payments box. Accordingly, I will only consider the violations caused by those RCCs.

This injury is enhanced by the fact that consumers are not likely to be aware that, by entering into the loan agreement, they have authorized IA to create RCCs. The authorization for RCCs is buried in the loan agreement's ACH authorization. The ACH authorization is more than a page of dense text that begins in the middle of the lengthy loan agreement. The main purpose of the ACH authorization section is to permit IA to deposit borrowed funds into the consumer's bank account and then to withdraw funds in amounts and at times as agreed to in the loan agreement. ECX 92 at 22-23. However, approximately half-way through the ACH Authorization, there is a paragraph that grants IA powers that are distinct from the central purposes of the ACH authorization. One sentence in that paragraph authorizes RCCs: "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." Nothing in this sentence, or anywhere else in the loan agreement, explains that by signing the ACH Authorization, consumers are also authorizing IA to write checks on consumers' accounts without notifying consumers about the checks, and without obtaining their signatures. And the only instruction in the ACH authorization regarding revocation reads as follows: "You may only revoke the above authorizations by contacting us directly." This does nothing to inform consumers that, if they contact their bank and revoke ACH authorization, this will have no impact on IA's authority to use RCCs. I conclude that as a matter of law the sentence authorizing RCCs is neither clear nor conspicuous, and not likely to be read or understood by borrowers. *See* ECX 92 at 26.

Although Respondents argue that "consumers did consent to the use of RCCs when they signed the Loan Agreement," Resp. Br. at 26, they did not do so knowingly. Respondents also argue that extrinsic evidence is necessary to show that consumers did not understand the authorization. *Id.* Given the placement of the RCC authorization, and given its wording, extrinsic evidence is unnecessary to support my conclusion that consumers were not likely to understand that they had authorized IA to use RCCs. *See Frendreis v. Blue Cross Blue Shield*, 873 F. Supp. 1153, 1157 (N.D. Ill. 1995) ("[j]udges need not check their common sense at the door when interpreting" contractual agreements).

Consumers could not reasonably avoid this injury because, as explained above, it was unlikely that consumers even knew that they had authorized IA to use RCCs. Even if consumers somehow did know that they had authorized IA to use RCCs, it would have been very difficult for them to revoke that authority. Consumers could have contacted their financial institutions to stop payment of RCCs, but this might not have been successful since it is doubtful they would have the basic information (such as the check number) necessary for the financial institution to stop payment. And of course, even if the financial institution did stop payment, the financial institution might impose stop-payment fees. Consumers could also have closed their accounts at the financial institutions, but that could have resulted in fees for overdrafts and nonsufficient funds on items outstanding at the time the account was closed, as well as the other potential costs and inconvenience of such a process. Further, even if consumers had contacted their financial institutions after discovering the unauthorized RCCs and sought reimbursement by asserting the RCCs were not properly payable, see Uniform Commercial Code § 4-401, obtaining reimbursement would likely have required a "substantial investment of time, trouble, aggravation, and money." *See F.T.C. v. Neovi, Inc.*, 604 F.3d at 1158. And consumers still would have incurred injury during the time they lost access to and use of the funds taken using RCCs. *Id*. So even if consumers' financial institutions eventually restored the consumers' money, consumers likely would have suffered unavoidable injuries that could not be fully mitigated. *Id*.

Respondents argue that consumers could have avoided the injury by contacting IA and offering another form of payment. Resp. Br. at 26. But consumers cancelled ACH authorization because, as I have determined, IA was attempting to collect amounts that exceeded what was disclosed in the total of payments box, amounts that consumers did not owe. Offering payment in some other form would not have diminished that injury.

I also conclude that the substantial injury was not outweighed by countervailing benefits to consumers or to competition. It is hard to imagine a situation in which policy considerations would justify withdrawing money from consumers' accounts without authorization. Here, the only benefit that has been suggested is that, because of RCCs, IA made loans to some consumers who would not otherwise have been eligible for credit. *See* Resp. Br. at 26. But this argument fails given the minuscule number of instances in which IA actually used RCCs. *See* Doc. 278 at 22. Nor does this justify IA's failure to provide adequate disclosure of the RCC authorization. Finally, if consumers were actually delinquent, IA had other means at its disposal, such as bringing a lawsuit to collect the debt. Accordingly, I conclude that, as a result of IA's use of RCCs, IA engaged in an unfair practice in violation of the CFPA, and as explained above, Mr. Carnes is liable for that violation.

REMEDIES

The ALJ recommended restitution, monetary civil penalties, and injunctive relief. I agree.

A. Restitution

The ALJ recommended that IA and Mr. Carnes be ordered to pay restitution. In particular, as a result of the TILA and CFPA violations stemming from the loan agreement, she ordered IA to pay $132,580,041.06. This amount included restitution for loans that IA originated both before and after July 21, 2011. Part of that total, $38,453,341.62, was for loans that IA originated after July 21, 2011, and she held that Mr. Carnes was jointly and severally liable with IA for that amount. I have decided not to impose restitution for loans that IA originated before July 21, 2011, but I do order that it pay restitution for loans it originated on or after that date. That amount – $38,453,341.62 – is the amount paid by consumers to IA that exceeded what was disclosed to them in IA's TILA disclosures. I also conclude that Mr. Carnes should be held jointly and severally liable for this amount because, as explained above, the loans agreements for loans originated on or after July 21, 2011, violated the CFPA's prohibition of unfair and deceptive practices, violations for which both IA and Mr. Carnes are liable.

The CFPA authorizes the Bureau in a proceeding such as this one "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). Appropriate legal or equitable relief includes "restitution." 12 U.S.C. § 5565(a)(1). Here, Enforcement Counsel sought restitution as "measured by the amount consumers paid to Integrity Advance above what the company disclosed in its loan agreements." Doc. 276 at 2. As the ALJ found, because consumers made payments directly to IA, this amount captures both consumer losses and Respondents' unjust gains. Doc. 293 at 81; *see also Gordon*, 819 F.3d at 1195; *FTC v. Stefanchik*, 559 F.3d 924, 931-32 (9th Cir. 2009). As explained above, I have determined that IA's loan agreement violated TILA and was unfair and deceptive. As a result, consumers who did not take affirmative steps to pay their loans in full prior to the first payment-due date paid IA more than the amount disclosed in the loan agreement. Whether as a matter of equity or law, *see* Doc. 293 at 79, I find that an award of restitution is justified both to remedy the losses consumers suffered as a result of Respondents' unlawful practices and to deprive Respondents of the amounts that they gained as a result of their unlawful conduct.

The ALJ recommended that restitution be awarded for IA's TILA violations that occurred prior to the date that TILA enforcement authority was transferred to the Bureau. She based this on her belief that the FTC could have sought such relief pursuant to its authority under 15 U.S.C. § 53(b). Doc. 293 at 83-84. However, the Supreme Court has granted certiorari in *AMG v. FTC*, No. 19-508, and the only question presented by the petitioner in that case is whether § 53(b) authorizes the FTC to obtain monetary equitable relief. Rather than further delay this proceeding by waiting for a decision in *AMG*, I have decided to drop all charges against IA to the extent that they apply to acts that occurred prior to July 21, 2011, the date that enforcement authority was transferred to the Bureau. Similarly, Counts III, IV, and VII allege violations of the CFPA, and because the CFPA did not take effect until July 21, 2011, I will award restitution only for loans that IA originated, or for RCCs that IA issued, on or after that date. (Enforcement Counsel does not dispute that restitution for pre-transfer date CFPA violations would be inappropriate.) Thus, the same loans that give rise to restitution as a result of TILA violations – loans originated on or after July 21, 2011 – also give rise to restitution as a result of CFPA violations.

The record shows that IA originated 55,661 loans on or after July 21, 2011, on which the borrower paid more than the amount disclosed in the total of payments box. Doc. 163B at 2. In connection with those loans, I award restitution only for the amounts that consumers paid to IA over and above the amount disclosed in the total of payments box on IA's loan agreement – that is the amount IA gained as a result of its wrongful conduct. The record in this case shows that this amount totals $38,453,341.62. Doc. 163B at 2. With respect to Count VII, the record shows that, in connection with loans that IA originated on or after July 21, 2011, IA used 602 RCCs to withdraw money from the accounts of consumers who had already paid an amount that was at least equal to the amount disclosed in the total of payments box of their loan agreements. Doc. 163B at 3. Those RCCs totaled $115,024.50. *Id*. Because these RCCs collected amounts over and above the amounts disclosed in the total of payments box, any separate award of restitution would duplicate amounts encompassed by the award of $38,453,341.62. Because both IA and Mr. Carnes are liable for the violations alleged in Counts III, IV, and VII, the ALJ correctly held that they are jointly liable for the restitution.[11] Doc. 293 at 85. "If an individual may be held personally liable for corporate violations … nothing more need be shown to justify imposition of joint and several liability for the corporation's restitution obligations." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016). This is particularly appropriate because IA was merely a shell. *See* Doc. 173 at 6.

Respondents argue that restitution is not appropriate because there was no showing of fraudulent intent, and because Respondents used the loan agreement with advice of counsel. Resp. Br. at 27. These arguments are based on a misunderstanding of the purpose of restitution. The "primary purpose of restitution is to restore the victims to their position prior to the deceptive sale." *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 386 (D. Conn. 2009), *aff'd* 654 F.3d 359 (2d Cir. 2011). Restitution is not based on any particular degree of culpability of the wrongdoer, other than responsibility for the deceptive conduct. *See Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988) ("a practice may be deceptive without a showing of intent to deceive"). It is true that knowledge is relevant when assessing whether an individual may be held responsible for a corporation's violations, but that knowledge need not rise to the level of fraudulent intent. And, as explained above, "[o]btaining the advice of counsel did not change the fact that the business was engaged in deceptive practices." *FTC v. Amy Travel*, 875 F.2d at 575. That is because the degree of knowledge is irrelevant with respect to IA, and as to Mr. Carnes, "counsel could not sanction something that the [individual defendant] should have known was wrong." *Id*. To the extent that *CFPB v. CashCall, Inc*., No. 15-cv-07522, 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018), suggests that advice of counsel may be relevant to a determination of whether an award of restitution is appropriate, *see* Resp. Reply at 14, I conclude that case is inconsistent with the cases discussed above and will follow the weight of authority.

Respondents argue that restitution was inappropriate because there was no showing that consumers failed to receive the benefit of the bargain. Resp. Br. at 27. But as I have explained, consumers contracted to pay the amount in the loan agreement's total of payments box. Respondents were not entitled to whatever they collected in excess of that amount. Respondents argue that Enforcement

[11] Respondents have raised no argument regarding my authority to hold them jointly and severally liable, and have therefore waived any such challenge.

Counsel failed to present testimony from consumers who were deceived by IA. Resp. Br. at 27. No such testimony is necessary. *FTC v. Colgate-Palmolive* Co. 380 U.S. 374, 391-92 (1965) (holding that no consumer testimony is necessary to establish deception); *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 n.10 (3d Cir. 1982) (same); *FTC v. Medlab, Inc.*, 615 F. Supp. 2d 1068, 1078 (N.D. Cal. 2009) (same).

Respondents cite *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006), and *CFPB v. CashCall*, 2018 WL 485963, at *13, and argue that any award of restitution must be limited to unjust gains. Resp. Br. at 28. Even assuming that the redress in this case must be limited to Respondents' unjust gains (as opposed to consumers' losses), Respondents' argument does not apply here. As the court explained in *CFPB v. Gordon*, 819 F.3d at 1195, the first step in calculating an award of restitution is calculating the defendant's unjust gains. The problem in *Verity* was that the district court based its calculation on consumer losses, not on the defendants' gains. As a result, the district court ordered the defendants to pay, as part of an award of restitution, money that they had never received. Nothing like that happened here. Respondents have never disputed that IA actually received the amounts that consumers paid in excess of what was disclosed in the total of payments box. That is, Respondents' unjust gains equaled consumers' losses. In *CashCall*, the court faulted the Bureau for failing to present any evidence that the award the Bureau sought approximated defendants' unjust gains. 2018 WL 485963, at *14. The court was concerned that the Bureau was seeking restitution for loans that were legal, and that the proposed restitution might thereby have created a windfall for certain consumers. Whatever the merits of the concerns raised in *CashCall*, they are not applicable here because the restitution I have awarded is based on amounts that consumers paid above and beyond the total of payments disclosed in IA's TILA disclosures. No consumer will get a windfall.

Respondents argue that IA's repeat customers are not entitled to restitution. Resp. Br. at 28. In particular, Respondents suggest that repeat customers understood, and were satisfied with, the loans they got from IA, and this explains why they were repeat customers. *See* Resp. Reply at 6. In *FTC v. AMG*, 910 F.3d at 428, the court rejected a very similar argument. That case involved a loan agreement and loan repayment arrangement that were nearly identical to what was involved in this case. *See id.* at 422. Defendants in *AMG* argued that repeat customers demonstrated that AMG's loan agreement was not deceptive. Unlike Respondents here, the defendants in *AMG* presented evidence regarding repeat customers – a study conducted by an economist, Dr. David Scheffman. *Id.* at 425. This study purported to show that repeat borrowers behaved the same as first-time borrowers when it came to paying off their loans. *Id.* at 425. Because Dr. Scheffman assumed that repeat borrowers could not be misled (based on experience gained from their first loan), he concluded that no borrowers had been misled. *Id.* But the court held otherwise: "Dr. Scheffman's reasoning begs the question. … While Dr. Scheffman concludes that first-time borrowers were just as well informed as the repeat ones, it is equally plausible that the repeat borrowers were just as confused as those taking out their first loans."[12] *Id.* Respondents here have provided no evidence that IA's repeat borrowers were any less confused than its first-time borrowers.

[12] Respondents note that AMG used a variety of different corporate names, and they contend that AMG's repeat borrowers did not know they were dealing with the same company. Appeal Tr. at 45. However, regardless of the corporate name, AMG used the same loan agreement, with the same repayment terms, for all its customers. 910 F.3d at 421.

Respondents also cite *FTC v. Publishers Business Services, Inc.*, 540 F. App'x 555 (9th Cir. 2013), and *FTC v. Kuykendall*, 371 F.3d 745 (10th Cir. 2004), Resp. Br. at 28, but those cases merely recognize that a defendant charged with engaging in deceptive practices should have the opportunity to show that certain customers suffered no injury. Here, there is no dispute that Respondents used the same loan agreement for all its borrowers, both first-time and repeat. That means that Respondents made the same misrepresentations with respect to all their borrowers, first-time as well as repeat. It is Respondents' burden to show that repeat borrowers were not deceived. *FTC v. Ewing*, No. 2:14-cv-0683, 2017 WL 4797516, at *11 (D. Nev. Oct. 24, 2017); *FTC v. Bronson Partners*, 674 F. Supp. 2d at 386; *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008). Respondents had ample opportunity to satisfy that burden but failed to do so. For instance, Respondents apparently assumed that all repeat borrowers necessarily understood how much they were agreeing to pay IA without providing evidence to support this assumption, particularly with respect to consumers who may have ended up paying more for their second or third loan than they did for their first. Accordingly, I reject their argument that repeat customers are not entitled to restitution.

B. Civil Money Penalty

The CFPA provides that "[a]ny person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty …." 12 U.S.C. § 5565(c)(1). The CFPA establishes three tiers of penalties with statutory maxima ranging from $5000 to $1 million (before adjustments for inflation) for each day during which a violation continues. I conclude that IA and Mr. Carnes are separately liable for civil penalties for violations that occurred on or after July 21, 2011.

Enforcement Counsel has sought only first tier penalties ($5000 per day), and the ALJ accepted that recommendation. She identified three distinct practices that merited civil penalties: 1) the use of the loan agreement that violated the CFPA (as well as TILA); 2) EFTA violations; and 3) the use of RCCs. She held that IA and Mr. Carnes were separately liable for civil penalties with respect to the first and third of those practices, and that only IA was liable for the second. She concluded that the relevant time period for each of these practices was from July 21, 2011, until December 1, 2012, inclusive, a total of 500 days. Accordingly, she recommended that IA pay a penalty of $7.5 million (500 (days) x $5000 (penalty amount) x 3 (practices)), and that Mr. Carnes pay a penalty of $5 million (500 x $5000 x 2). Enforcement Counsel have not challenged this amount. Respondents' only argument is that the amount recommended with respect to the RCCs was excessive because there was no showing that IA actually used RCCs on each of the 500 days. Resp. Br. at 30. They also argue that the award should be reduced based on their good faith and on their lack of history of violations of federal consumer laws. *Id.*

I agree with the ALJ that the relevant time period for violations relating to the use of the loan agreement (practices 1 and 2 above) is from July 21, 2011, until December 1, 2012, inclusive, a total of 500 days. During that period, IA originated 82,980 loans. ECX 97 at 1. I could impose a $5000 penalty for each of those loans, an amount that far exceeds the $2.5 million recommended by the ALJ. However, as an exercise of my discretion, I will limit the award to a single $5000 per each of the 500 days during which Respondents consummated loans using the loan agreement. Thus, I determine that the appropriate penalty is $5000 x 500 = $2,500,000 for each of the first two practices. Since both IA and Mr. Carnes are responsible for the CFPA violations in the loan agreement, I hold each of them separately liable for $2,500,000. (I do not impose any additional civil penalty on IA as a result of its TILA violations.) With respect to the second distinct practice, EFTA violations, I hold IA liable for a penalty of $2.5 million. As to the third practice, Respondents argue that the record does not show that they used RCCs on each of the days from July 21, 2011, until December 1, 2012. Resp. Br. at 30. But the record does show that, during that period, IA used RCCs on 602 occasions. I could impose a $5000 for each of those 602 RCCs. However, as an exercise of discretion, I will limit the award to a single $5000 for each of days during which Respondents consummated loans that authorized the use of those RCCs. This again totals $2,500,000, and again I hold IA and Mr. Carnes separately liable for this amount. Thus, the total award imposed on IA is $7,500,000, and the total award imposed on Mr. Carnes is $5,000,000.

There are five factors in the CFPA that I must consider in determining an appropriate civil penalty. 12 U.S.C. § 5565(c)(3). I conclude that the amount I award – substantially less than the statutory maximum – is appropriate in light of those factors. The first factor is the size of the financial resources and good faith of the person charged. With respect to the financial resources, although IA may no longer have financial resources, it is not apparent that the same is true with respect to Mr. Carnes. Indeed, information with respect to Mr. Carnes' resources is within his control and since he has not attempted to justify mitigation on this basis I will not do so. Respondents do argue, however, that they acted in good faith because they consulted with a lawyer, they provided the loan agreement to Delaware state regulators, and they "intended to act lawfully." Resp. Br. at 30. As explained above, consulting with counsel provides no excuse for conduct that Mr. Carnes should have known was wrong. (Otherwise, patently unreasonable, incompetent, or corrupt legal advice could shield a wrongdoer. But that is not the law.) Moreover, in April 2012, the FTC filed a complaint against AMG Services alleging that a loan agreement very similar to the one used by Respondents was deceptive and violated TILA and EFTA. *FTC v. AMG Servs., Inc.*, No. 2:12-c-v536 (D. Nev. Filed Apr. 2, 2012). And yet Respondents' practices continued unabated. There is also no reason to believe that Delaware state regulators evaluated compliance with all the statutes that are at issue in this case. Accordingly, I decline to conclude that Respondents acted in good faith or that their financial resources render any further reduction in the amount of the recommended penalty amount appropriate.

The next factor is the gravity of the violation. Respondents committed their violations over an extended period of time, and their violations affected thousands of consumers. This factor does not favor any further reduction in the penalty amount. The third factor looks to the severity of the violations and the number of "products or services sold." Again, Respondents' violations were extensive. Thus, this factor does not favor mitigation. The fourth factor considers the history of previous violations. Respondents conceded that, prior to the filing of the Bureau's Notice of Charges, IA was subject to an enforcement action brought by the State of Minnesota. Doc. 239 at 17; *see Minnesota v. Integrity Advance, LLC*, 846 N.W.2d 435, 438 (Minn. Ct. App. 2014), *aff'd* 870 N.W.2d 90 (Minn. 2015). It is irrelevant that, since the filing of the Notice of Charges, IA has not engaged in any additional violations because IA has not functioned since 2013. ECX 68 at 9-10. The final factor looks to such other matters as justice may require. I am not aware of any, and Respondents have not brought any to my attention. Accordingly, there is no reason to further reduce the award of civil monetary penalties.

C. Injunctive relief

The ALJ ordered Respondents to cooperate in assisting the Bureau in determining the identity, location, and amount of restitution due to each consumer who was entitled to redress. I agree that this is appropriate injunctive relief. The ALJ did not impose other conduct prohibitions, and I agree that this is appropriate because there is no evidence that Respondents are engaging in the conduct that led to this proceeding, or that they have done so for many years.

Respondents make one argument: They contend that because IA ceased operations seven years ago and sold its assets, they should not be ordered to assist the Bureau. However, one of the goals of injunctive relief is to promote compliance with other terms of the order. *FTC v. Direct Mktg. Concepts*, 648 F. Supp. 2d at 212. The Order that I am entering includes an award of restitution, and the injunctive provision will assist in effectuating that award. Even if IA's assets have been sold, there may be assistance that Respondents (including Mr. Carnes) can provide to the Bureau in locating consumers who are entitled to relief.

CONCLUSION

For these reasons, I AFFIRM the Recommended Decision in part, and REVERSE it in part.

Kathleen L. Kraninger

Kathleen L. Kraninger
Director
Consumer Financial Protection Bureau

January 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Decision of the Director* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

Via Electronic Mail to Representatives for Consumer Financial Protection Bureau
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Jameelah Morgan
Docket Clerk
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Signed and dated on this 11th day of January 2021
at Washington, D.C.