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	**RESPONDENTS' MOTION FOR SUMMARY DISPOSITION**

RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

Pursuant to Rule 211 of the Bureau' Rules of Practice, Respondents move for summary disposition in this matter. Based on the pleadings and evidence in the case, as described in Respondents' Statement of Material Facts as to Which There Is No Genuine Issue ("Statement"), summary disposition is appropriate as to the Bureau's counts as alleged in the Notice of Charges. The arguments supporting Respondents' motion are set forth in the accompanying Memorandum in Support of Respondents' Motion for Summary Disposition.

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BRIEF IN SUPPORT OF
RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

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INTRODUCTION

The Consumer Financial Protection Bureau ("CFPB" or "Bureau") has the burden of proof for the claims alleged in the Notice and it cannot meet that burden. There are no disputes of material fact to the contrary. The record is bereft of evidence to support the claims of deception, unfairness, and statutory claims advanced by the Bureau. Respondents are entitled to judgment as a matter of law and, as to the elements that the Bureau cannot prove, there are no genuine disputes of material fact that might forestall summary disposition. Therefore, the Hearing Officer should grant summary disposition in favor of Respondents for the following reasons:

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

- The undisputed facts shows that a reasonable consumer would not have been "deceived" by the Loan Agreement; thus the Bureau's claims under Count II and III must fail.

- The undisputed facts show that the Bureau cannot supports is allegations of "unfair" acts or practices in Counts IV and VII.

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

FACTUAL BACKGROUND

Integrity Advance was a nonbank short-term, small-dollar lender. Respondents' Statement of Undisputed Facts ("Facts") ¶1. Between May 2008 and December 2012, Integrity Advance offered short-term, small-dollar loans to consumers, which ranged in value from $100–$1000. *Id.* ¶2. Integrity Advance stopped offering loans to consumers three years ago. *Id.*

Throughout its active operations, Integrity Advance was licensed by the Delaware State Bank Commissioner. *Id.* ¶1. Under Delaware law, Integrity Advance could only obtain a Delaware lending license once the State Bank Commissioner determined "that the financial responsibility, experience, character and general fitness of the applicant . . . and of the officers and directors thereof are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently." *Id.* ¶24.

Integrity Advance had to renew its license regularly and furnish the State Bank Commissioner with any materials or information that had changed since the initial filing or any renewal application, including any changes to loan agreements and promissory notes. *Id.* ¶25.

Per statute, the State Bank Commissioner is required to conduct "a thorough examination into the affairs" of any nonbank lender, including its "resources and liabilities, the investment of the funds, the mode of conducting the business and the compliance or noncompliance with this Code or any regulations promulgated thereunder, and any under statutes or regulations of [Delaware] or the United States." *Id.* ¶26. If at any time there is a finding or determination that the licensee has violated any federal or state law, the State Bank Commissioner may revoke or suspend any lending license. *See id.* ¶27. This includes any findings that "[t]he licensee has engaged in business activities or practices in connection with extensions of credit to consumers, which could be deemed unfair or deceptive by nature of intent. *Id.* Such activities and practices include, but are not limited to, the use of tactics which mislead the consumer, misrepresent the consumer transaction or any part thereof or otherwise create false expectations on the part of the consumer." *Id.*

In offering short-term, small-dollar loans to consumers, Integrity Advance primarily used a web-based Application and Loan Agreements. *Id.* ¶3.

The short-term, small-dollar loans offered by Integrity Advance included a set finance charge, with repayment due on the consumers next pay date. *Id.* ¶8. Under the terms of the Loan Agreement, consumers were required to choose a payment option – selecting to either pay the loan in full on the "Payment Due Date," or renew the loan, thus incurring a new finance charge. *Id.* ¶10. For consumers who did not select a payment option – in contravention of the requirement under the Loan Agreement – the loan was automatically renewed. *Id*.

Integrity Advance Loan Agreements contained a TILA Box as required by TILA and Regulation Z. *Id.* ¶13. The TILA Box was structured based on the example provided by the CFPB at 12 C.F.R. 1026 App. H.2. *Id.* Immediately below the TILA Box, the Loan Agreements provided a Payment Schedule, set out in a text box, with bolded headings, which indicated that the loan would be repaid in one payment of the amount listed in the "Total of Payments" section of the TILA Box. *Id.* ¶14.

Below the TILA Box and Payment Schedule, the Loan Agreements stated the consumers' payment options in bold and all capitals. *Id.* ¶11. Under the Loan Agreement, the consumer agreed to select a payment method at least three days before their "Payment Due Date"—choosing either (1) to pay the loan in full or (2) renew the loan, which allowed consumers to pay a renewal fee and wait until the next pay date to repay the loan. *Id.* ¶10. Under the Loan Agreement, if consumers did not select their payment option, Integrity Advance renewed the loan, rather than attempting to collect the full cost of the loan or put consumers into default. *Id.*

A consumer who paid the loan off in full on the Payment Due Date repaid the loan principle, plus the finance charge (typically $30 for every $100 in credit taken out by the consumer). *Id.* ¶19. When a customer renewed his loan, he was charged a renewal fee. *Id.*

Customers who exceeded the four allowed renewals under the Loan Agreement were placed into an "auto-workout" repayment plan, pending contact with the consumer. *Id.*

Integrity Advance accepted a variety of payment methods on its loans; while the most common payment method was ACH withdrawal, Integrity Advance also accepted cashiers' checks and money orders. *Id.* ¶12.

PROCEDURAL POSTURE

The Bureau issued its Notice of Charges on November 18, 2015. On December 21, 2015, as mandated by CFPB rules, Respondents filed an Answer to the Notice. This Court held a scheduling conference on December 14, 2015, and issued a Scheduling Order on December 18, 2015 (Dkt. 27). The Scheduling Order was modified on March 3, 2016 (Dkt. 48), April 25 (Dkt. 79), and April 27 (Dkt. 80). Discovery closed on March 31. The hearing is scheduled to begin on July 19, 2016.

SUMMARY DISPOSITION STANDARD

The Hearing Officer has the authority to grant summary disposition in this matter. Rule 212 states that summary disposition is proper when there is no genuine issue of fact for trial. 12 C.F.R. § 1081.212(c). The Rule 212 standard "is virtually identical to the standard for summary judgment in civil actions. *See* Fed. R. Civ. P. 56(a) ("A party moving for summary disposition must show that "there is no genuine dispute as to any material fact," and that it is "entitled to judgment as a matter of law."); *In the Matter of PHH*, Order (Mar. 13, 2014). Fed. R. Civ. P. 56(a).

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

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

The absence of a fact does not create a material dispute of fact. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (stating that "the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted). Thus, a moving party discharges its "burden" under Fed. R. Civ. P 56 by demonstrating to the court that there is an absence of facts in the record to support a claim on which the non-moving party bears the ultimate burden of proof. *See Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 544-45 (5th Cir. 2005).

The CFPB bears the burden of proof for all claims set forth in its Notice. The undisputed material facts in the record show that the Bureau cannot prevail on any of its claims. The Court should grant summary disposition in favor of Respondents.

ARGUMENT

I. RESPONDENTS' AFFIRMATIVE DEFENSES PRECLUDE THE CFPB'S CLAIMS

Respondents renew their affirmative defenses, including that the CFPB has no authority as to violations of the CFPA. Respondents argue that based on the Bureau's enabling statute, CFPA, the agency never had authority over Respondents' as nonbank "covered persons." Section 1011 of the CFPA calls for a Director to lead the CFPB; Section 1066 of the CFPA indicates Congress's bifurcation the Bureau's authority in the absence of its first Director. 12 U.S.C. §§ 5491(b)(1), 5586. Within Subtitle F, the Secretary of the Treasury is authorized to exercise the "transferred" authorities only—including issuing rules and orders that would have been available to the federal prudential regulators (the so-called "banking agencies")—but *not* including any enforcement authority from the Federal Trade Commission (FTC).

The federal prudential regulators that transferred authority to the CFPB include: The Board of Governors of the Federal Reserve, 12 U.S.C. § 5581(b)(1); the Office of the Comptroller of the Currency (§ 5581(b)(2)); the Office of Thrift Administration (§ 5581(b)(3)); the Federal Deposit Insurance Corporation, (§ 5581(b)(4)); the National Credit Union Administration (§ 5581(b)(6)); and the Department of Housing and Urban Development (§ 5581(b)(7)). Moreover, consistent with the Appointments Clause and proper delegation of executive authority, for similar agencies, 12 U.S.C. § 5581(b) transfers the authority of the relevant Board, Comptroller, or Director—*not the agency itself*—since authority does not vest in an agency itself.

Only extremely limited authorities were transferred from the FTC to the CFPB. Unlike the federal prudential regulators, for which the CFPA transferred "all consumer financial protection functions," the only "consumer financial protection functions" transferred from the FTC consisted of "[t]he authority . . . under an enumerated consumer law to prescribe rules, issue guidelines, or conduct a study or issue a report mandated under such law." 12 U.S.C. § 5581(b)(5). The FTC's authority to enforce consumer financial laws did not transfer to the Bureau.

It is eminently reasonable that Congress would have provided for the continuation of pre-existing authority; however, no agency was authorized to take action under the CFPA against nonbanks such as Integrity Advance, until a Direction was lawfully appointed. The FTC's authority (which did not transfer to the CFPB) was (and is) limited to the FTC Act and other pre-existing laws, including TILA and EFTA, not the "newly-created" CFPA authorities, including UDAAP.

Accordingly, since the CFPB did not have authority over Respondents as nonbank "covered persons" under Subtitle F (through the Secretary of the Treasury), and did not have a lawfully appointed Director that could assume such authority at a time when Respondents offered or provided a consumer financial product or service, the Bureau has no authority to pursue its CFPA claims. Thus, the scope of the Bureau's authority and jurisdiction is a "controlling question of law as to which there is a substantial ground for difference of opinion." *See* 12 C.F.R. § 1081.211(c)(4)(i).[1]

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[1] Respondents also renew and restate their affirmative defense regarding the statute of limitations. Based on the fact that the binding authority controlling the Hearing Officer's order, the Director's final order in *In the Matter of PHH*, is on appeal to the D.C. Circuit regarding this very issue, Respondents have requested that this proceeding be stayed pending the resolution of that appeal.

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

A. Legal Standard

The term "deceptive" is not statutorily defined, but it is defined in the CFPB's examination manual as a "material representation, omission, act or practice that misleads or is likely to mislead a consumer, provided the consumer's interpretation is reasonable under the circumstances." CFPB Examination Manual V.2, UDAAP 5 (October 2012). In a consent order, the CFPB has indicated that acts or practices may be considered deceptive if they "are likely to mislead consumers acting reasonably under the circumstances and [such acts or practices] are material. *See* Consent Order, *In re ACE Cash Express, Inc.*, No. 2014-CFPB-008, at 10–11 (July 10, 2014. ("The standard for "deceptive" practices in the Dodd-Frank Act is informed by the standards for the same terms under Section 5 of the FTC Act." *See* CFPB Bulletin 2013-07 (Jul. 10, 2013)), *available at* http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

Thus, an act or practice is only "deceptive" if (1) "there is a representation, omission, or practice that," (2) "is likely to mislead consumers acting reasonably under the circumstances," and (3) "the representation, omission, or practice is material." *See CFPB v. Frederick J. Hanna & Assocs., P.C.*, 114 F. Supp. 3d 1342, 1370 (N.D. Ga. 2015), *mot. to cert. appeal denied sub nom. CFPB v. Frederick J. Hanna & Assocs., P.C.*, No. 1:14-CV-2211-AT, 2015 WL 10551424 (N.D. Ga. Nov. 16, 2015) (citing *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)).

B. Reasonable consumers were not likely to be misled by the Loan Agreement

The undisputed facts show that the process through which consumers applied for and were extended credit, specifically the Loan Agreements, was not "deceptive" under the CFPA. To show that the Loan Agreement was deceptive, the Bureau must provide evidence that reasonable consumers were likely to misunderstand the nature, operation and/or terms of the loan for which they applied, and to which they agreed.

Thus, the Bureau must show that reasonable consumers thought that: (1) they were effectively receiving an installment loan in the amount listed in the "Amount Financed" section of the TILA Box; (2) to be repaid over an extended period of time; (3) in equal installments totaling the amount in the "Total of Payments" section of the TILA Box. The Bureau has not, because it cannot, present any evidence that Loan Agreement indicated such a repayment structure to a reasonable consumer.

Indeed, the undisputed material facts show that Respondents took steps to ensure that consumers understood and appreciated the nuances of the payday loan for which they applied. For example, most applicants for Integrity Advance loans were required to sign the Loan Agreement in approximately eight different locations (varying by the version of the Loan Agreement). *See* Respondents' Statement of Undisputed Facts ("Facts") ¶4. An Integrity Advance customer representative walked customers through the loan and answered questions. *Id.* ¶5

The Loan Agreement disclosures informed consumers that the Integrity Advance loan was not meant to be an installment loan. For example, on the loan application, a text box immediately beneath the TILA disclosures states, with a header set out in bold:

> **Your Payment Schedule will be:** One (1) payment of **[TOTAL_OF_PAYMENTS]** due on **[LOAN_DUE_DATE]** ("Payment Due Date"). *Id.* ¶14.

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

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

> SPECIAL NOTICE:
>
> (1) THIS LOAN IS DESIGNED AS A SHORT-TERM CASH FLOW SOLUTION AND NOT DESIGNED AS A SOLUTION FOR LONGER TERM FINANCIAL PROBLEMS.
>
> (2) ADDITIONAL FEES MAY ACCRUE IF THE LOAN IS REFINANCED OR "ROLLED OVER." *Id.* ¶15

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

> "A PAYDAY LOAN IS NOT INTENDED TO MEET LONG-TERM FINANCIAL NEEDS." *Id.* ¶16.

Moreover, the requirement that the customer select a payment option and instructions for doing so were included directly below the TILA Box disclosure. *Id.* ¶11. "Payment in Full" was the first option presented to consumers, consistent with the later "special notice" reminding consumers of the nature of the loan. *Id.* ¶¶11, 15. Consumers were also presented with the option to renew the loan, for a fee, to extend the Payment Due Date. *Id.* ¶11.

The Loan Agreement also set out explanatory "Standard Loan Fees" that indicated the range of time periods in which the initial loan would be required to be repaid or renewed. *Id.* ¶18. The "Standard Loan Fees" schedule provided a minimum of 8 days and a maximum of 23 days, indicating a pay date in one week, but less than one month—based on the consumer's upcoming pay date. *Id.* Since Integrity Advance loans were not set up to be repaid in installments, but rather in full on the "Payment Due Date," the charge for the loan does not vary according to the number of days before the consumer repays it. Rather, payment was scheduled to be due on a date set through information obtained from the consumer in the Application.

The Notice alleges that consumer complaints "indicate that the consumers thought the company would debit only the total amount disclosed in the TILA disclosure and did not understand that their loans would rollover four times before the company credited any of their payments to principal." Notice ¶32 (Dkt. 1). However, the Bureau's *own expert witness*, Dr. Manoj Hastak, stated that such complaints are not reliable in assessing consumers' understanding of the Loan Agreement. Indeed, Dr. Hastak stated consumer complaints represented "just a small sampling of individuals who had a problem with Integrity Advance . . . .," and were, thus, not a reliable indicator of a consumer's perception of the Loan Agreement's language. Facts ¶22. He did not rely upon these complaints because "there is a very small fraction of customers who complain, and so while complaints provide useful information, you can't generalize from the complaints to the entire customer base." *Id.*

Courts have noted the same logic employed by the Bureau's expert and found that consumer complaints are insufficient to prove violations of the law. "Simply, 'complaints' do not equate to 'noncompliance . . . .'" *Bennett v. Nationstar Mortg*, LLC, No. CV 15-00165-KD-C, 2015 WL 5294321, at *12 (S.D. Ala. Sept. 8, 2015) (analyzing RESPA's statutory damages requirements). While an exceedingly high volume, thousands of consumer complaints, specific to the representation at issue would likely be probative, *see FTC v. Direct Benefits Group, LLC,* 2013 WL 3771322 (M.D. Fla. July 18, 2013), the Bureau cannot provide this level of complaints, instead relying on discreet consumer statements that are not indicative of Integrity Advance's average customer. Moreover, the source and basis for a consumer's complaint are impossible to know after an intervening period of roughly three to seven years.[2]

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[2] This is especially true for Integrity Advance, which was the target of a debt collection scam later shut down by the FTC. *See* Complaint, *FTC v. Am. Credit Crunchers, LLC*, No. 12cv1028

C. Any confusion or deception would not relate to a material fact

To sustain its "deceptive" claim under the CFPA, the Bureau must also establish that the alleged deception relates to a "material fact." A fact is material if a consumer would have acted differently knowing the information. Materiality is contextual—it is defined by the specific facts and circumstances surrounding the transaction between the parties. *Matter of Cliffdale Associates, Inc*., 103 F.T.C. 110 (1984) ("[A] material representation, omission, act or practice involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.) Undisputed facts actually show that consumers did not consider the possibility of loan renewals to be "material" to their decision making, at the time they entered into the loan agreement. This is true, because Integrity Advance's customers needed access to credit as quickly as possible to meet immediate needs. There are no material facts that dispute this point. For example, the Bureau conducted no consumer survey of what customers might have considered material to their decision making. There is no consumer testimony about what even one consumer might have considered to be important at the time he or she took out a loan from Integrity Advance. The materiality element needed to prove a claim of deception cannot be met. Accordingly, the Bureau cannot meet its burden of showing that the terms of the Loan Agreement were deceptive, and accordingly the Court should grant summary disposition in favor of Respondents on Count III of the Notice.

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

A. Legal Standard

(N.D. Ill. Feb. 21, 2012), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2012/02/120221acccmpt.pdf

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

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

Furthermore, a "substantial injury" exists only if the Bureau can show "[t]hat consumers were injured by a practice for which they did not bargain." *FTC v. Neovi, Inc.*, 598 F. Supp. 2d

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

1104, 1115 (S.D. Cal. 2008), *aff'd* 604 F.3d 1150 (9th Cir. 2010) (quotation omitted). The Bureau must also show that the act or practice *causes* substantial injury to consumers.

An injury is reasonably avoidable if consumers "have reason to anticipate the impending harm and the means to avoid it," or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact. *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1365–66 (11th Cir. 1988) (cited approvingly in *Neovi*, 604 F.3d at 1158). Moreover, benefits to consumers or competition include "an increase in services or benefits to consumers or by benefits to competition." *Neovi*, 598 F. Supp. 2d at 1115.

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

The undisputed facts show that the process and terms by which consumers applied for and were extended credit were not "unfair" under the CFPA. The Bureau's allegations of unfairness also rely on an incorrect recitation of the law. Indeed, the Notice, alleging the basis of the Bureau's "unfairness" claim, conflates the standard for showing "unfairness" with the standard for showing "deception." The "unfair" practices that the Bureau alleges are predicated on the allegation that the Bureau's "deceptive disclosures and withholding [of] information about the costs of its loans . . ." resulted in unfairness. This, of course, is the very same averment the Bureau uses to support its "deception" claim, and this averment does not satisfy any element of unfairness. Rather, the Bureau does little more than allege that Respondents' Loan Agreements were "unfair" because they were "deceptive." Notice ¶ 72. As discussed above, the Bureau cannot support its claim that the Application and Loan Agreement were "deceptive," and therefore cannot maintain a claim of "unfairness" against Respondents.

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

i. The Bureau Fails to Show a "Substantial Injury"

The undisputed facts show that the Loan Agreement disclosures caused no and was not likely to cause consumer injury, let alone "substantial injury," of the type required to prove an unfairness claim under the CFPA. The undisputed facts similarly show that consumers were neither injured nor likely to be injured, let alone substantially injured, as a result of obtaining a loan from Respondents.

Any consumer injury under an unfairness analysis must be tied to an individual consumer's understanding of the loan. The "substantial injury," although undefined by the CFPB, is alleged to be caused by the disclosures and representations regarding the "actual cost of a loan." Notice ¶¶ 72–74. But the undisputed facts show that it would be impossible for a consumer who took out a loan with Integrity Advance and repaid his or her obligation in the amount disclosed to have suffered "substantial injury." This is because logically, no consumer could be found to have suffered a "substantial injury" under the Bureau's theory in this case, unless undisputed material facts also show, that, in the first instance, a consumer did not understand the loan, and Integrity Advance's disclosures caused the lack of understanding. "Merely speculative harms" do not meet the requirement of the first part of the unfairness prong. *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (noting the FTC, in the exercise of its unfairness authority, "is not concerned with trivial or merely speculative harms"); *see also Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 160 (1st Cir. 2011) (using FTC Act principles to conclude that "[t]he substantial injury requirement is designed to weed out 'trivial or merely speculative harms" (internal quotation and citation omitted)).

The undisputed facts show that consumers indisputably received the credit for which they applied. And it is axiomatic that dissatisfaction with the eventual total price of the loan – or any product or service -- is not a cognizable injury sufficient to meet the injury prong of the unfairness analysis. *See e.g., Dzielak v. Whirlpool Corp.*, 26 F. Supp. 3d 304, 335 (D.N.J. 2014) ("A cognizable injury . . . must consist of more than just unmet expectation"); *Mason v. Coca-Cola*, 774 F. Supp. 2d 699, 704 (D.N.J. 2.011) ("dissatisfaction with a product . . . is not a quantifiable loss than can be remedied"). Here, the undisputed facts show that customers got what they bargained for; they certainly did not suffer "substantial injury."

ii. The Bureau Fails to Show Causation

In addition, proving unfairness also requires a showing that there was a "causal relationship" between the alleged unfair acts or practices and the injury. *See* 12 U.S.C. § 5531(c). When showing injury, "[t]he general rule is that the damage to be recovered must be the natural and proximate consequence of the act complained of.' It is not enough if it be the natural consequence; it must be both natural and proximate.'" *United Food & Commercial Workers Unions, Employers Health & Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271, 1273 (11th Cir. 2000); *see also CFPB v. ITT Educ. Servs.*, Inc., No. 1:14-CV-00292, 2015 WL 1013508, at *30 n.34 (S.D. Ind. Mar. 6, 2015) ("proximate cause is indeed a necessarily [sic] element of a theory of liability" for an unfairness claim under §§ 5531 and 5536); *Frappier v. Countrywide Home Loans, Inc.*, 750 F.3d 91 (1st Cir. 2014) (stating under the Massachusetts UDAP statute that, "[i]n the absence of a causal relationship between the alleged unfair acts and the claimed loss, there can be no recovery") (citation and quotation omitted); *In re Firearm Cases*, 24 Cal. Rptr. 3d 659, 673–74 (2005) ("Federal authorities clearly require a causative link between the defendant's actions and the resulting harm.").

The First Circuit's decision in *Frappier v. Countrywide Home Loans, Inc.*, 750 F.3d 91 (1st Cir.), cert. denied, 135 S. Ct. 179 (2014) is instructive here. In that case, the plaintiff's claims arose from the "contention that [the defendant] used improper tactics to draw [the plaintiff] into loan agreements that the [the defendant] knew [the plaintiff] would be unable to satisfy. *Id.* at 94. The plaintiff argued that the defendant mortgage company failed to make disclosures required under state and federal truth-in-lending laws and "imposed substantial harm" on the plaintiff in violation of the Massachusetts unfair or deceptive practices act. The First Circuit, however, agreed with the district court that the plaintiff's financial situation—not the loan he obtained from the defendant—caused any injury, since the plaintiff became unable to repay the loan. Here, too, there are undisputed facts that show that consumers were not injured as a result of any aspect of Integrity Advance's Loan Agreements.

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

The undisputed facts show that even if there was consumer injury – which there was not – such injury would have been reasonably avoidable. Among other things, the facts show that Integrity Advance loans allowed a consumer to repay the loan, ahead of schedule and penalty-free; this would reduce the amount of interest owed. Facts ¶11. The Loan Agreement also contained a notice of the consumers' recession rights, which enabled consumers to decline a loan before expiration of the three-day period runs, in the event the customer changed his or her mind. Specifically, the Loan Agreement stated, set out in a text box:

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

Id. ¶17.

Further, consumers had to separately sign and date their "Right to Cancel" and other areas of the Loan Agreement. *Id.* ¶¶4, 17. The requirements for affirmative consumer assent to the terms of the Loan Agreement, coupled with the bolded fonts and other elements that alerted consumers to the payday loan's terms and conditions, make any injury "certainly avoidable." *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012).

Moreover, even after the expiration of the "Right to Cancel," consumers received alerts regarding their repayment obligations. Facts ¶7. Thus, consumers so alerted to their obligations and options for fulfilling those loan obligations could take reasonable steps to avoid any injury. Certainly, any alleged injury arising from the terms of the Loan Agreement, as alleged by the Bureau, would be entirely avoidable by *returning* customers, who had already seen the operation of the loan first hand. "An injury is reasonably avoidable if consumers 'have reason to anticipate the impending harm and the means to avoid it,' or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact." *Davis*, 691 F.3d 1152, 1168 (9th Cir. 2012) (quoting *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1365–66 (11th Cir. 1988). Logic and undisputed material facts ultimately show that returning customers could have avoided any injury simply by not taking out a second loan with Integrity Advance, or by choosing to pay the loan in full (or prepay the loan) as contemplated in the Loan Agreement. Returning customers that chose to renew their loan, for whatever reason, could also have limited the overall cost of the loan by limiting the number of times they renewed the loan.

Moreover, the Loan Agreement and fact of the loans produced substantial consumer benefits. "[A]n increase in services or benefits to consumers or by benefits to competition" can outweighs adverse consequences to consumers. *See J.K. Publ'ns*, 99 F. Supp. 2d at 1201 (citing *Windward*, 1997 WL 33642380, at *11). The undisputed facts show that, generally, Integrity

Advance provided consumers with credit when few, if any, other creditors were willing or able to do so. Undisputed facts show that the Bureau cannot satisfy the required elements of an "unfairness" claim under §§ 5531, 5536, and thus the Court should grant summary disposition in favor of Respondents on Count IV.

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

Here, too, the Bureau's claim of unfairness fails, as the undisputed facts show that there was no consumer injury arising from the creation of remotely created checks. In order to prevail on its unfairness claim the Bureau must show that there was "substantial injury" that resulted from the authorization for and creation of remotely created check. The undisputed facts show no such injury or causal link. And "merely speculative harms" are not the type of injury that can be addressed through "unfairness." *See, e.g., Am. Fin. Servs. Ass'n v. F.T.C.*, 767 F.2d 957, 972 (D.C. Cir. 1985). The Court should grant summary disposition for Respondents as to Count VII of the Notice.

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

A. Legal Standard

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

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

Undisputed material facts show that the Loan Agreements did meet the standards set out by TILA and Regulation Z. Indeed, the disclosures at issue in the Notice track the very model form that Regulation Z sets forward. Specifically, as the Loan Agreement shows, the disclosure uses the appropriate format, labels, and terminology as the regulation prescribes. As a matter of law, this Regulation Z model form provides a legal safe harbor, meaning that when a company presents a TILA disclosure that tracks this model form, the Loan Agreement is presumptively compliant with the TILA "clear and conspicuous" requirement. *See* 12 C.F.R. Part 1026, app. H (H.2). Furthermore, the facts are also clear that the contract between Integrity Advance and consumers at the time of loan consummation was for a single payment loan which could be extended, at the consumer's option, beyond the maturity date. The Loan Agreement plainly displayed TILA disclosures that track the model form and disclosed a payment schedule reflecting that agreement. Facts ¶12.

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

At the time the loans were made, consumers only owed the "Total of Payments." The undisputed material facts establish that this was the entirety of any consumer's legal obligation at the time the loan was made. The facts also show that, contrary to the Bureau's allegations, the consumer had no legal obligation – at the moment the loan was consummated -- to repay the loan in accordance with the maximum number of renewals allowed or to repay the loan in accordance with the full length of the contracted repayment plan. Thus, as noted above, TILA and Regulation Z preclude a disclosure that would misstate the nature of a consumer's actual legal obligation at the time the loan was consummated.

Under the Loan Agreement, consumers "[p]romise[d] to pay [Integrity Advance] the Total of Payments . . . on the Payment Due Date . . . ." and, contingent on the consumers' choices, "[a]ll other amounts owed to us under the Loan Agreement." Facts ¶20. The Loan Agreement also obligated the consumer to select a payment option. *Id.* ¶11. ("You <u>must</u> select your payment option . . . ."). Under the Loan Agreement, when consumers did not select a payment method as required, the Loan Agreement could renew automatically. *Id.*

The facts are also clear that contrary to the Bureau's allegations, the "Auto-Renewal" and "Auto-Workout" provisions did not constitute the legal obligation between the parties at the time the loan was made. *Id*. ¶19. The Bureau's allegations conflate "default option" with legal obligation. But a "default option" in contracts and other settings is merely the consequence of a failure to meet an obligation, not the obligation itself. The Bureau's allegations also implicitly read into Regulation Z a requirement that any loan agreement include a disclosure that predicts post-consummation events and incorporates that prediction into any TILA disclosure. But such a reading of Regulation Z is actually contradicted by the regulation's plain language. Section 1026.17(e) of Regulation Z makes clear that post-disclosure events (such as the election to renew a loan contract after consummation) do not render the initial disclosure inaccurate.

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

C. The Court Should Deny The Bureau's Request For Actual Damages Arising From Alleged TILA Violations

The Court also show grant summary disposition in Respondents' favor on the issue of the Bureau's Prayer for Relief as it pertains to Claim I and II. Actual damages under TILA require proof that the damages were incurred "as a result" of a party's violation of the statute. 12 U.S.C. § 1640(a)(1). Under this provision, however, plaintiffs must show detrimental reliance. *See Rucker v. Sheehy Alexandria, Inc.*, 228 F. Supp. 2d 711, 719–20 (E.D.Va.2002). To prove actual damages, the Bureau must show—for each consumer—that 1) the consumer read the TILA disclosure statement; 2) the consumer understood the charges being disclosed; 3) had the disclosure statement been accurate, the consumer would have sought a lower price; and 4) the consumer would have obtained a lower price. *See Peters v. Lupient Oldsmobile Co.*, 220 F.3d 915, 917 (8th Cir. 2000); *see also Turner v. Beneficial Corp.*, 242 F.3d 1023, 1026 (11th Cir. 2001) (en banc); *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 436–40 (5th Cir. 2000); *Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000); *In re Smith*, 289 F.3d 1155, 1156-57 (9th Cir. 2002). Even in cases, unlike here, where a loan's actual APR *did* differ from the disclosed APR, courts have denied claims for actual damages because "there is no evidence [that the borrower] would have rejected that loan had he been advised of the actual APR." *See In re Boganski*, 322 B.R. 422, 428 (B.A.P. 9th Cir. 2005). Since the undisputed material facts show that there are no actual consumer damages, the Court should therefore grant summary disposition limiting the Bureau's possible relief to statutory damages and a permanent injunction preventing future violations of TILA and Regulation Z.

VI. RESPONDENTS DID NOT VIOLATE EFTA

A. Legal Standard

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

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

The undisputed facts show that the Loan Agreement did not condition the extension of credit on the consumer's agreement to repay the loan through a preauthorized EFT. The undisputed material facts show that Integrity Advance never required that its customers agree to electronic debits as a condition for receiving credit. Indeed, the Bureau alleges that 95% of consumers that obtained loans with Integrity Advance signed the ACH authorization. Notice ¶ 41. If five percent of loan recipients *did not* provide Integrity Advance with electronic access to their bank accounts, electronic access was – by definition – not a condition for a loan. Logic tells us that if ACH authorization had been a condition of issuing a loan, then 100 percent of loan recipients would have provided Integrity Advance with electronic access to their bank accounts. The Bureau's own pleading undermines its EFTA and Regulation E claims.

Moreover, the undisputed facts also underscore the lack of any EFTA or Regulation E violation. The Loan Agreement did not require *repayment* by EFT. In fact, the Loan Agreement's ACH authorization expressly states that "[y]ou may repay your indebtedness through other means, including by providing timely payment via cashiers check or money order directed to: Integrity Advance, 300 Creek View Road, Suite 102, Newark DE 19711." Facts ¶21.

D. The Court Also Should Deny The Bureau's Request For Actual Damages Arising From An Alleged EFTA Violation

The Court should grant summary disposition in favor of Respondents on the issue of the Bureau's Prayer for Relief as it pertains to Claim V and VI. Actual damages under the EFTA require proof that the damages were incurred "as a result" of a party's violation of the statute. 15 U.S.C. § 1693m(a). Thus, "to recover actual damages [for violation of the EFTA], a plaintiff must establish causation of harm . . . ." *See Martz v. PNC Bank, N.A.*, 2006 WL 3840354, at *5 (W.D.Pa. Nov. 30, 2006); *Brown v. Bank of Ant*., 457 F. Supp. 2d 82, 90 (D. Mass. 2006) (finding that plaintiffs must "establish causation of harm in the form of detrimental reliance" to recover actual damages under the EFTA, relying on case law interpreting the identical actual damages provision in the Truth in Lending Act); *Voeks v. Pilot Travel Ctrs*., 560 F. Supp. 2d 718, 723 (E.D. Wis. 2008) ("[Plaintiff's] actual damages have to be proximately caused by the Defendant's failure as recognized under the [EFTA].")

The undisputed material facts show that there were no actual damages suffered by any consumer because of an EFTA violation, as the Bureau alleges. Indeed, as noted above, in such instances, there must be a showing of actual injury, not merely speculative injury. *See infra* at Sec. B(1)(i). And it is axiomatic that an EFT withdrawal of an amount owed by a consumer does not harm the consumer. *Brown*, 457 F. Supp. 2d at 90.

The Court should grant summary disposition that denies the Bureau's request for actual damages.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court grant this motion for summary disposition and issue a final order that adopts the contents of the proposed order.

Respectfully submitted,

Dated: May 10, 2016 By: /s/ Allyson B. Baker

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