UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

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

ENFORCEMENT COUNSEL'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Once the moving party has demonstrated that there is no genuine issue of material fact, the burden shifts to the non-movant to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient." *Anderson*, 477 U.S. at 252. For a genuine issue of fact to be material, the evidence must be such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248.

Enforcement Counsel established the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law as to all claims asserted in the Notice of Charges. *See generally* Enforcement Counsel Mot. Summ. Disp. (EC MSD). Respondents have failed to meet their burden of demonstrating specific facts creating a triable issue on any of the counts. Respondents have either admitted or failed to dispute all of the material facts, and instead of proffering facts to rebut Enforcement Counsel's evidence, Respondents make unsupported assertions or specious legal arguments.

I. THE UNDISPUTED FACTS AS TO RESPONDENTS' DISCLOSURES AND THE OPERATION OF THE LOAN AGREEMENTS ESTABLISH, AS A MATTER OF LAW, THAT INTEGRITY ADVANCE VIOLATED TILA

There is no dispute about the facts material to the TILA analysis. Respondents did not dispute that "[f]or each loan originated by the company, Integrity Advance calculated each part of the TILA box by assuming that the loan would be repaid in a single payment." Enforcement

Counsel Stmt. Material Facts (EC SMF) ¶ 19. Nor do Respondents dispute that if the borrower did nothing else after signing the loan agreement, Respondents automatically renewed the loans. Resp. Opp. to EC MSD (Opp.) at 5 ("Only when consumers failed to contact Integrity Advance and otherwise failed to pay their loan in full would the loan be automatically renewed."); Ans. ¶ 29; *see also* EC SMF ¶¶ 23-25.[1] Nor did Respondents dispute that consumers signing the ACH authorization during origination authorized Respondents' electronic withdrawal of all of the auto-renewal and auto-workout payments. *See* EC SMF ¶¶ 53-54. These are the same facts alleged in the Notice of Charges. EC NOC ¶¶ 21, 29.

The parties only disagree on the legal question of whether consumers' legal obligation at signing included just a single payment or the auto-renewal and auto-workout payments. As addressed in Enforcement Counsel's motion for summary disposition, the legal obligation here was for the full auto-renewal and auto-workout payment schedule that was authorized by the loan agreement and the ACH agreement. EC MSD at 8-9. Because Integrity Advance disclosed the finance charge, APR, and total of payments based on a single payment rather than all of the payments, it violated TILA. EC MSD at 7-10.[2] Indeed, the Administrative Law Judge has already held that "the Notice of Charges sets forth sufficient facts that, if proven true, the Bureau would be entitled to relief under TILA." Ord. Deny Mot. Dismiss at 31. Given that Respondents have not disputed any of the facts alleged in the Notice material to this claim, Enforcement Counsel is entitled to summary disposition on Count I and therefore, as a matter of law, on Count II as well.

[1] Respondents purport to dispute EC SMF ¶¶ 23-25, but their response makes clear that consumers' failure to act led to auto-renewal. Resp. SDF at 2.

[2] Respondents' arguments about the phrases "total cost" and "default" are semantic red herrings. Opp. at 3-6. These terms are merely shorthand for the legal obligation resulting from the fact that Respondents automatically renewed the loans if consumers took no action after signing. EC MSD at 7.

Respondents attempt to distinguish *F.T.C. v. AMG Services, Inc.*, 29 F.Supp.3d 1338 (D. Nev. 2014), but fail to realize that the Bureau's claims do not depend on this decision; Respondents' conduct would be illegal even if the FTC had never brought the AMG matter. Notwithstanding this fact, Respondents' analysis of *AMG* is flawed in two ways. Opp. at 8-11. First, none of the differences claimed by Respondents—even if true—would change the TILA analysis in this matter: Integrity Advance's TILA box did not disclose a consumer's legal obligation and therefore violated TILA. This is not affected by the precise number of signatures or the exact renewal procedure.

Second, Respondents' claims regarding alleged differences between *AMG* and this matter ignore the striking similarities between the lenders. Both AMG and Integrity Advance were online payday lenders that calculated the amounts disclosed in the TILA boxes by assuming a single payment. However, in both cases—absent further action by the consumers after signing—the companies automatically renewed the loans. EC SMF ¶¶ 19, 23-29; *AMG*, 29 F.Supp.3d at 1351. In fact, contrary to Respondents' claim that their contract differed from AMG's because it required customers "to choose their payment option" (Opp. at 9), both AMG's and Integrity Advance's loan agreements stated that "you must select your payment option … at least three business days" before the payment due date. *Compare* EC SMF Exh. 1 at 4 (Loan Agreement Template, CFPB000640) with Att. 2 of Exh. A at 4 (AMG Loan Agreement). Both AMG and Integrity Advance had their customers accept terms and conditions by electronically checking boxes and/or signing or initialing. *AMG*, 29 F.Supp.3d at 1343; EC Response to Resp. Smt. of Facts (EC Resp. SOF) ¶ 4. And contrary to Respondents' claims (Opp. at 8), both agreements contained renewal provisions directly below the TILA box. EC SMF Exh. 1 at 4-5 (Loan Agreement Template, CFPB000640-61); Att. 2 of Exh. A at 4 (AMG Loan Agreement). Finally,

Respondents claim that their loan agreement differed from AMG because it "required that consumers read through the entire agreement," but cite to no evidence supporting this claim.[3] Opp. at 9. The only evidence in the record on this point is Dr. Hastak's statement that based upon the location of the signature boxes in the printed loan agreement, "it is unlikely that having borrowers initial/sign the Loan Agreement in multiple places would significantly increase their attention to key disclosures related to the cost of the loan." EC MSD Exh. A at 14 (Hastak Report, CFPB042533).

Significantly, one of the differences between the AMG and Integrity Advance contracts was an additional consumer-friendly disclosure in the AMG contract. The court in *AMG* held that the lender's conduct violated TILA and was deceptive even though its contract included, in bold, an example that demonstrated how much in total finance charges a consumer who renewed a $200 loan four times would have to pay. Att. 2 to Exh. A at 3 (AMG Loan Agreement). By contrast, there is no evidence in the record that Respondents ever explained the total costs associated with automatic renewals, and Respondents do not meaningfully dispute that their loan agreements did not disclose the costs of automatic renewals. EC SMF ¶¶ 41-44; Resp. Stmt. Disputed Facts (Resp. SDF) at 5.

II. RESPONDENTS' PRACTICES REGARDING DISCLOSURE OF THE COST OF THEIR LOANS WERE DECEPTIVE

The gravamen of Respondents' argument as to why their practices were not deceptive is that the disclosures comported with TILA. However, this premise is incorrect, and the same undisputed facts that demonstrated the TILA violation also demonstrate that Respondents' disclosure practices were deceptive. EC SMF ¶¶ 19, 23-25, 41-44, 53-54. Therefore, for the

[3] The paragraph cited by Respondents in their opposition does not support this specific claim.

reasons stated in its motion for summary disposition, Enforcement Counsel is entitled to summary disposition on Count III. EC MSD at 10-13.

Respondents' arguments otherwise are unavailing. Respondents' claim that the cost of the legal obligation is not material to consumers seeking a payday loan defies common sense and established law. Opp. at 18. Respondents do not explain why costs would not be important, except to point to some general principles set forth by their expert that he did not specifically apply to the facts of this matter. Opp. at 19-20. "Broad conclusory statements offered by [an expert] are not evidence and are not sufficient to establish a genuine issue of material fact." *Akzo Nobel Coatings, Inc. v. Dow Chem. Co*., 811 F.3d 1334, 1343 (Fed. Cir. 2016). Further, even Respondents' expert conceded that consumers likely would have found the loans less attractive if Integrity Advance had advertised the total of payments reflecting full rollover amounts as opposed to the single payment amount. EC MSD Exh. D (Novemsky 94:20-95:11). Nor do Respondents cite to any cases holding that the cost of a product is not material. Opp. at 19. Additionally, Respondents expressly misrepresented the cost of their loans in the TILA boxes, and information about cost is presumed material.[4] Indeed, courts frequently presume materiality without independent evidence,[5] and even the cases cited by Respondents all note that certain

[4] *Novartis Corp. v. F.T.C.*, 223 F.3d 783, 786-87 (D.C. Cir. 2000) (holding that claims regarding cost can be presumed to be material); *U.S. v. Zaken Corp.*, 57 F. Supp. 3d 1233, 1239-40 (C.D. Cal. 2014) (express claims about potential earnings of business opportunity presumed to be material); *F.T.C. v. Patriot Alc. Testers, Inc*., 798 F.Supp. 851, 855 (D. Mass. 1992) (express representations that are shown to be false are presumptively material); *In Re Cliffdale Associates, Inc*., 103 F.T.C. 110, at *49 (*citing In re MacMillan, Inc.*, 96 F.T.C. 208, 303-04 (1980) (FTC considers cost presumptively material).

[5] *Thompson Med. Co*., 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986*)* (rejecting as frivolous manufacturer's argument that it was not material to consumers that their product Aspercreme contained no aspirin).

types of information are presumptively material.[6] Given the undisputed facts in this matter, there simply is no argument that Respondents' misrepresentations regarding the cost of the loans were not material. EC MSD at 10-11.

Similarly, Respondents have failed to show that a genuine issue of fact exists as to whether reasonable consumers would be misled by Respondents' misrepresentations of the cost of their loans. Opp. at 11-14. The evidence in the record, including the loan agreement, Dr. Hastak's testimony, and consumer complaints, along with well-established law, demonstrates that Respondents' practices were likely to mislead consumers acting reasonably. EC MSD at 11-13. Indeed, the language of Respondents' loan agreement alone justifies a finding that Respondents' practices were likely to mislead, regardless of the other evidence. *AMG*, 29 F.Supp.3d at 1350 (holding that the contract was deceptive even in the face of conflicting expert testimony). In any case, Respondents' expert's (Dr. Novemsky) testimony does not create an issue of triable fact. Dr. Novemsky expressly did not conclude that Respondents' disclosure practices were not deceptive; nor did he make any factual findings material to the deception analysis.[7] And even if the ALJ chose to disregard Dr. Hastak's findings, summary disposition would still be appropriate – the loan agreement is deceptive on its face.

Contrary to Respondents' suggestions, summary disposition on this count would be appropriate even if Enforcement Counsel submitted no complaints, EC MSD at 12, but the

[6] *F.T.C. v. Freecom Commun., Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005) (claims concerning anticipated income generally material); *Patriot Alcohol Testers*, 798 F. Supp. at 855 (representations presumptively material); *Cliffdale*, 103 F.T.C. 110, *39 (1984) (representations material by inference).

[7] Dr. Novemsky only stated that Dr. Hastak should have done an empirical study of consumer understanding (EC MSD Exh. D (Novemsky 81:17-82:20)) despite admitting that he was unfamiliar with the FTC guidelines used by Dr. Hastak. *Id*. at 74:19-25. Moreover, Dr. Hastak testified that an empirical study was not feasible in this context. Exh. B (Hastak 60:9-22, 61-65).

complaints introduced into evidence do support granting Enforcement Counsel's motion. EC SMF ¶ 46; EC MSD at 12-13. More importantly, Respondents' arguments regarding the complaints do not create a triable issue of fact. Respondents are simply wrong when they claim, without justification, that the complaints are inadmissible hearsay. Opp. at 17 n.6; 12 C.F.R. § 1081.303(b)(3). Further, aside from complaining about the number of complaints addressed, Respondents offer no actual evidence contradicting the substance of the complaints. In particular, Respondents have access to all the consumer complaints in the record, including those discussed in the Marlow declaration, but they offer no facts disputing the sworn statements. In addition, Respondents offer no evidence whatsoever that consumers were not actually misled, let alone that their practices were not likely to mislead. Thus, Respondents have failed to demonstrate the existence of a genuine dispute of material fact.

III. RESPONDENTS' PRACTICES REGARDING DISCLOSURE OF THE COST OF THEIR LOANS WERE UNFAIR

As described above, Respondents' failure to disclose loan costs is not in dispute. Nor have Respondents demonstrated the existence of a genuine issue of material fact with respect to any of the elements of unfairness. Therefore, for the reasons stated in the motion for summary disposition, Enforcement Counsel is entitled to summary disposition on Count IV. EC MSD at 13-16.

As an initial matter, Respondents appear to misunderstand the elements necessary to prove an unfair practice. Opp. at 22-23. The fact that some consumers may not have been injured or could have reasonably avoided the harm does not make the *practice* fair or necessarily create a genuine issue of fact. *Orkin Exterminating Co. v. F.T.C.*, 849 F.2d 1354 (11th Cir. 1988); *In re International Harvester, Co.*, 104 F.T.C. 949, 1064 n. 55 (1984). Respondents argue that Enforcement Counsel has failed to show substantial injury because the MSD included pre-

transfer-date conduct and returning customers in the amount of injury. Opp. at 24. These arguments are wrong.[8] Setting aside any issues regarding the proper measure of damages, which are not at issue here, Respondents' practices caused, on or after the transfer date, $40,886,753 in injury (calculated by the amount paid above the amount Respondents disclosed) with respect to 59,689 loans. EC MSD Exh. C ¶ 6b (Hughes Decl.). Thus, on average, a consumer suffered $685 in injury per loan during this period. That amount constitutes substantial injury even if it occurred only to a subset of consumers. *See generally, F.T.C.v. Neovi, Inc*., 598 F. Supp. 2d 1104 (S.D. Cal. 2008); *Am Fin. Servs. Ass'n v. F.T.C*., 767 F.2d 957 (D.C. Cir. 1985).

Furthermore, aside from alleging that some consumers took out more than one loan, Respondents offer no evidence that any returning consumers actually understood the costs of the loans. In fact, Respondents' own expert testified that it was possible that consumers who experience renewals never calculate the total costs. EC MSD Exh. D (Novemsky 149:6-9). Respondents' conclusory statements to the contrary do not create a genuine issue of material fact necessary to defeat summary disposition. *Mokhtar v. Kerry*, 83 F. Supp. 3d 49, 61 (D.D.C. 2015), *aff'd,* No. 15-5137, 2015 WL 9309960 (D.C. Cir. Dec. 4, 2015); *Price v. Cushman & Wakefield, Inc.,* 808 F. Supp. 2d 670, 685 (S.D.N.Y. 2011).

Respondents' arguments that the harm was reasonably avoidable are equally unavailing. Opp. at 25-26. As noted above, Respondents proffer no actual evidence that returning consumers understood the cost of the loans and therefore could avoid the harm deriving from Respondents' express misstatements. And even if some returning consumers could understand the costs, it would not create a triable issue as to whether the *practice* as a whole was likely to cause injury

[8] Respondents also argue that some customers *may* have "chosen" to renew, but this unsupported assertion is irrelevant, because if Respondents had disclosed the actual costs, the consumers might have made a different choice.

that consumers could not reasonably avoid. In addition, there simply is no argument that either the ability to rescind or the ability to repay would realistically enable a consumer to avoid undisclosed costs. Consumers would have no reason to rescind or repay if they did not understand that the loans would cost much more than what was disclosed. *See* EC Opp. Resp. MSD 16-18.

Finally, Respondents make an unsupported claim that there is a benefit to consumers or to competition. Opp. at 28. But there is no connection between Respondents' alleged benefit—access to credit—and their unlawful practices. Respondents never explain why they could not offer the credit while also truthfully disclosing the costs of the loans. *See* Opp. at 27; EC Opp. Resp. MSD at 18-19.

IV. RESPONDENTS' PRACTICES REGARDING THE USE OF REMOTELY CREATED CHECKS WERE UNFAIR

Respondents fail to demonstrate a genuine issue as to whether their practice of using remotely created checks (RCCs) after consumers blocked ACH withdrawals was reasonably avoidable, and therefore summary disposition as to Count VII is proper. Respondents effectively admit that they used RCCs after consumers blocked ACH withdrawals. *Compare* EC SMF ¶ 70 (citing, *inter alia*, Carnes's own testimony to that effect) *with* Resp. SDF at 8 (failing to dispute Carnes's testimony or to deny the truth of EC SMF ¶ 70). *See also* EC MSD Exh. C ¶ 10 (Hughes Decl.).[9] There is no dispute as to the contract language regarding the use of RCCs, or the fact the disclosure was neither emphasized in any way nor accompanied by explanatory text. EC SMF ¶¶ 64, 65, 67, 68. Further, Respondents failed to rebut Dr. Hastak's conclusions that the provision was "neither clear nor conspicuous, is unlikely to be noticed, read, or correctly understood by borrowers" and "has the potential to confuse and misdirect borrowers rather than

[9] Enforcement Counsel does not claim that remotely created checks are *per se* unlawful as Respondents contend. Opp. at 28-29; EC MSD at 16-21.

illuminate them." EC MSD Exh. A at 26 (Hastak Report, CFPB042545). Specifically, Respondents' expert had no opinion on whether the RCC disclosures were clear and conspicuous. EC MSD Exh. D (Novemsky 175:2-11). The Administrative Law Judge can determine, simply by looking at Respondents' loan agreements, that the RCC provision was not reasonably avoidable. EC MSD at 16-21.

V. INTEGRITY ADVANCE VIOLATED EFTA

Respondents do not dispute the facts material to the EFTA analysis, including the fact that loan proceeds could only be received by an electronic transfer that was authorized by the ACH agreement, that consumers authorized all of the renewal payments at signing, that 98.5% of initial payments were made through electronic fund transfers, and that there is no evidence, in the loan agreement or otherwise, that Respondents told consumers that they could receive a loan without authorizing the electronic fund transfers as required by the agreement. EC SMF ¶¶ 52-54, 57; EC MSD Exh. C ¶ 8 (Hughes Decl.). These facts demonstrate an EFTA violation, and therefore Enforcement Counsel is entitled to summary disposition on Counts V and VI. EC MSD at 23-27. The fact that the loan agreement contains language stating that consumers can repay by sending a check or money order does not cure the fact that the agreement did not state that a borrower could receive credit without pre-authorizing regular electronic fund transfers by signing the ACH authorization. Opp. at 32. Finally, Respondents' reliance on *Payday Financial* is misplaced, as not all the contracts held to violate EFTA included the "shall" language. *F.T.C. v. PayDay Fin. LLC*, 989 F. Supp. 2d 799, 812 (D.S.D. 2013).

CONCLUSION

Respondents' opposition failed to establish any genuine issues necessitating a trial. Accordingly, Enforcement Counsel respectfully requests that their Motion for Summary Disposition be granted in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June 2016, I caused a copy of the foregoing Enforcement Counsel's Reply in Support of Its Motion for Summary Disposition, along with the supporting declaration and exhibits, to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather.L. MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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