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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY DISPOSITION**

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

There are no facts, let alone undisputed facts, that support the Bureau's claims, and the Court should grant Respondents' Motion for Summary Disposition.[1]

SUMMARY DISPOSITION STANDARD

The Bureau impermissibly shifts the burden of proof to Respondents. In fact, the Bureau bears the ultimate burden of proof at trial, and in the context of Respondents' motion for summary disposition, "with respect to an issue on which the nonmoving party [here, the Bureau,] bears the burden of proof . . . *the burden on the moving party [here, Respondents,] may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the [Bureau]'s case*." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (emphasis added). There simply is "no express or implied requirement . . . that [Respondents as] the moving party support [their] motion with affidavits or other similar materials *negating* the [Bureau]'s claim." *Id.* at 323; *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) ("[Even] view[ing] the evidence in the light most favorable to the nonmovant, '[a]s 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 trial-worthy issue warrants summary judgment to the moving party.'" (citation omitted)); *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 544 (5th Cir. 2005) ("[B]y simply 'pointing to an absence of evidence to support the nonmoving party's case,'" the movant's burden is satisfied).[2]

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[1] The Bureau incorrectly asserts in its statement of undisputed facts that Integrity Advance stopped originating loans in May 2013, not in December 2012. The Bureau's statement and understanding of the data set is incorrect. Indeed, the data set clearly shows that for every renewed loan, a new loan number was assigned, but Integrity Advance originated no new loans after December 2012.

[2] The Bureau inexplicably cites a recent D.C. Circuit case for the proposition that "[t]o defeat Respondents' motion, Enforcement Counsel does not have to meet its ultimate burden, it only

ARGUMENT

I. Integrity Advance Did Not Violate TILA

The Loan Agreement's disclosures comply with TILA and its implementing regulation. The TILA-mandated disclosures were clear and conspicuous, as required under 12 C.F.R. § 1026.17(a), and were based on the consumer's initial legal obligations, as required under § 1026.17(c). TILA and Regulation Z do not require (or provide for) a "total cost" disclosure, because such a disclosure would call for information unavailable at the time the loan was made. Thus, TILA mandates disclosure of the loan's initial legal obligations. *See* 12 C.F.R. § 1026.17(c). Here, consumers' initial legal obligation under the Loan Agreement was to pay the loan in full on the Payment Due Date or to contact Integrity Advance to set up a payment option, including electing to renew the loan. A loan would be automatically renewed only if the consumer did not pay the loan in full or select a Payment Option. Dkt. 90, Facts ¶ 19.

The Bureau attacks the "entire framework" of the Loan Agreement, highlighting its approach to this case: because the Bureau disapproves of the product in question, it *must* violate a law (notwithstanding the CFPB's inability to support the elements of its claims). Using this "entire framework" approach, for which the Bureau cites no law, the agency seeks to equate "authorization" with "obligation" (*i.e.*, the Loan Agreement authorized an automatic renewal deduction process, so consumers must be obligated to follow this process). *See* CFPB Opp'n at 8. However, TILA and Regulation Z do not look to the "entire framework" of a loan, but instead

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has to demonstrate that Respondents have failed to meet their burden." *See* CFPB Opp'n at 4 (citing *Robinson v. Pezzat*, 818 F.3d 1 (D.C. Cir. 2016)). However, *Robinson* addressed a reversal of summary judgment in which the D.C. Circuit reasoned that "the uncorroborated nature" of certain testimony was wholly irrelevant to the question of whether there was a genuine dispute of material fact, adding that corroboration goes to credibility and the court must not make credibility determinations at summary judgment. *Robinson*, 818 F.3d at 9.

require that specific disclosures of the consumer's initial repayment obligation be made clearly. Even under an "entire framework" approach, to meet its burden, the Bureau must present evidence showing that consumers' legal obligations and repayment options were not disclosed even considering all clarifying statements and steps taken by customer-service representatives throughout the entire loan process. The Bureau has not engaged in any of this analysis and has failed to identify facts in the record that support its version of a TILA claim.[3]

II. Respondents Did Not Deceive Consumers

The Bureau points to no facts, let alone undisputed facts, that show that a reasonable consumer was likely to have been deceived. As the Bureau makes clear, it seeks to prove its deception claim – and by extension its TILA and unfairness claims – with only three types of facts: (1) the plain language of the Loan Agreement; (2) Dr. Manoj Hastak's report; and (3) a handful of cherry-picked consumer complaints. *See* CFPB Opp'n at 9. Such evidence, of course, does not meet the requisite elements of a deception claim.

First, the Bureau relies heavily on the methodologically flawed opinion of Dr. Hastak. Nonetheless, even viewing Dr. Hastak's report in the light most favorable to the Bureau, it is indisputable that Dr. Hastak proffers opinions that have no empirical basis or even a basic relationship to what Integrity Advance customers experienced. He did not perform a consumer

[3] Further, notwithstanding the Bureau's declaration, CFPB Opp'n; Ex. 1, Albanese Decl., under Delaware law, Integrity Advance was required to be reviewed for compliance with both Delaware and federal law. Specifically, per statute, the State Bank Commissioner is required to conduct "a thorough examination into the affairs" of any nonbank lender, including its "compliance or noncompliance with this Code or any regulations promulgated thereunder, and any under statutes or regulations of [Delaware] or the United States." Del. Code Ann. tit. 5 § 2209–2210. This includes any "business activities or practices in connection with extensions of credit to consumers, which could be deemed unfair or deceptive by nature of intent." *Id.* tit. 5, § 2209. "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.*

survey[4]; he did not analyze phone calls between customers and service representatives[5]; he did not analyze the emails from Integrity Advance to customers further describing the Loan Agreement[6]; and he did not review the Loan Agreement in the same format or medium that consumers saw.[7] Furthermore, in this regard, Dr. Nathan Novemsky, Respondents' expert, squarely rebutted Dr. Hastak's flawed methodology. *See generally,* Dkt. 63, CFPB Mot. Strike; Dkt. 63 B, Novemsky Report. Dr. Hastak employed no articulable methodology other than using his own reading of the words contained in the Loan Agreement as a proxy for how he imagines a reasonable Integrity Advance consumer might have read the Loan Agreement.[8]

Second, the Bureau argues the illogical proposition that "even a non-representative sample of consumer complaints can create a genuine issue of material fact." CFPB Opp'n at 12. If a "non-representative sample" of consumer complaints, or in the Bureau's case only ***five*** complaints,[9] were enough to create a genuine issue of material fact, then all that *every* law enforcement agency would have to do to force a trial would be to hand-select a few consumer

[4] *See* Frechette Decl. ¶ 4, Ex. 3, Hastak Test. at 59:12-14. Dr. Hastak acknowledged during his deposition that a consumer survey is the best indicator of what consumers understand, even though he failed to conduct such a survey. *See id.* at 90:14-16 ("consumer data provides the best way to assess consumer, you know, take-away from materials.").
[5] *Id*. at 92:21-93:8.
[6] *Id*. at 275:16-21; 276:4-10.
[7] *Id*. at 28:7-10.
[8] *See, e.g.*, *id*. at 150:4-8 (stating that the basis for his opinion "is again my reading of those sentences and interpreting – trying to interpret them as a – as a consumer might.")
[9] The CFPB's deception argument specifically cites only ***five*** complaints, representing **0.002%** of the total number of loans made. Dkt. 87, CFPB Mot. Summ. Disp. at 13. Further, four of those complaints are dated *before* July 21, 2011, yet the Bureau has readily admitted that "[t]he UDAAP claims in this proceeding are limited to conduct that occurred *on or after July 21, 2011*." Dkt. 94, CFPB Opp'n to Mot. to Stay at 7 (emphasis added). Moreover, the Bureau's factual statement references a total of only 127 unidentified complaints, reflecting at most a total of 0.04% of all loans resulting in complaints. Dkt. 87, CFPB Mot. Summ. Disp.; Dkt. 87C, Marlow Decl. at 2 (stating, without citation, that "in 127 complaints, consumers stated that Integrity Advance charged them more than they believed the loan would cost.").

complaints that, without more, appear to support a certain version of the facts. Such a scenario, of course, contradicts common sense and well-settled law.[10]

The Bureau asserts that consumer complaints are just one aspect of the agency's purported "wealth of evidence" supporting deception. CFPB Opp'n at 12. This, too, is an over-statement. Specifically, the Bureau relies solely on the highly generalized, and unsupported, assertions of Dr. Hastak that complaints "provide useful information." *Id.* The Bureau misleadingly omits the rest of Dr. Hastak's statement, where he confirmed that he did *not* rely on customer 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***."[11] Despite its own expert's admonition, the Bureau, nonetheless, attempts to use a miniscule and admittedly non-representative number of consumer complaints to prove that the *reasonable consumer* was likely to be misled. *See, e.g., FTC v. Direct Benefits Grp., LLC*, 2013 WL 3771322 (M.D. Fla. July 18, 2013) (finding that thousands of complaints would be probative of a likelihood of deception). It is well settled that "a representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." FTC, Policy Statement on Deception (1983).

Lastly, the Bureau contends that the Loan Agreement, standing alone and apart from any context, was facially deceptive because it did not disclose the "actual cost" of the loan. CFPB

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[10] *See, e.g., 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 [fact-finder] could reasonably find for the [non-movant].'" (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986))).

[11] Frechette Decl. ¶ 4, Ex. 3, Hastak Test. at 182:16-21 (emphasis added); *see also id.* at 139:16-22 ("[C]omplaints are not representatives [sic] of the customers of Integrity Advance . . . they're just a small sampling of individuals who had a problem with Integrity Advance so I don't take that as . . . representative in any way of . . . what a typical consumer . . . might take.").

Opp'n at 10–11. But the Bureau's reading of the plain language of the Loan Agreement cannot serve as a substitute for what *reasonable consumers* understood when they read the Loan Agreement more than three years ago. It is undisputed that the Loan Agreement provided for a single payment and a single due date, stated clearly and conspicuously in the TILA Box:

> **Your Payment Schedule will be:** One (1) Payment of [the "**Total of Payments**" amount] due on [the "**Payment Due Date**"] ("Payment Due Date").

Dkt. 90, Facts ¶ 14. The Bureau does not contend and cannot show that a contrary reading is possible, let alone probable. *See Ford v. Hotwire, Inc.*, No. 07-CV-1312HNLS, 2008 WL 5874305, at *3 (S.C. Cal. Feb. 25, 2008) (explaining that a material misunderstanding must be probable, not merely possible, to qualify as likely to deceive). Critically, the unambiguous Payment Schedule represented the borrower's legal obligation at the time the loan was made. *See supra*, Section I. The Bureau's "facial" reading, of course, is also not a proxy for a reasonable *consumer's* reading of the Loan Agreement.

In fact, the undisputed facts demonstrate that nearly one-third of customers in 2011 and 2012 were returning customers. Dkt. 63, CFPB Mot. Strike; Dkt. 63B, Novemsky Report ¶ 31. The Bureau points to no contrary facts, and offers no explanation as to how returning customers were purportedly misled or could not otherwise reasonably avoid potential injury. The Bureau cannot meet its ultimate burden at trial. It offers no facts, let alone undisputed facts, that demonstrate that a reasonable consumer was likely to have been misled.

III. Integrity Advance's Loan Agreements Were Not Unfair

The Bureau also has failed to meet its burden as to its unfairness claim. First, the Bureau's substantial injury analysis rests entirely on the same analysis as its deception claim: that consumers were misled about the "total cost" of the loan, and therefore all amounts that consumers paid above the amount disclosed in the "Total of Payments" constitutes substantial, monetary harm. *See*

CFPB Opp'n at 15–16.[12] To this end, Respondents' criticisms of the Bureau's deception claim described above apply equally here; the Bureau cannot show that reasonable consumers were likely to have been misled, and, thus, the Bureau also fails to show the element of substantial injury. *See supra* Section II. Further, the Bureau's substantial injury theory rests on the flawed assumption that *every single customer* who paid more than the "Total of Payments" presented in the TILA Box was deceived. *See* Resp'ts. Opp'n at 22–25. The Bureau offers no factual support for this contention, and ignores the fact that consumers took out short-term loans and could choose to either extend the deadline for repaying the loan by paying an additional finance charge or could pay off the loan in full on the payment due date. *See* Dkt. 90, Facts ¶ 11.

Second, the Bureau fails to demonstrate the requisite causal nexus between Integrity Advance's practice and the purported substantial injury. Moreover, the Bureau misinterprets relevant case law. For example, *Frappier v. Countrywide Home Loans, Inc*. indicates that "substantial injury" requires proof of causation. *See* 750 F.3d 91, 98 (1st Cir. 2014). *Frappier* also stands for a second proposition: "In the absence of a causal relationship between the alleged unfair acts and the claimed loss, there can be no recovery." *Id*. (quotation omitted). Further, the

[12] The Bureau misinterprets Respondents' position by stating that Respondents "take issue with the fact that the facts underlying the Bureau's unfairness claim also underlie the deception claim." CFPB Opp'n at 19. Respondents, of course, recognize that the same set of facts can lead to both deception and unfairness claims, but here, in contravention of the established law, the Bureau's deception *analysis* is the same as its unfairness *analysis*. For example, the Bureau's substantial injury theory first requires consumers to have been misled about the "total cost" of the loan, because, by operation of logic, if consumers were *not* misled then amounts consumers paid above the amount disclosed in the "Total of Payments" were simply amounts that consumers reasonably understood they were electing to pay by renewing their loans. *See id.* at 15–16.

very cases that the Bureau cites, underscore the need to show a causal link.[13] The Bureau, however, never links the unfair conduct it alleges with the loss it claims consumers suffered.

The Bureau also points to no facts that support its assertion that injury was not reasonably avoidable. Instead, the Bureau merely hypothesizes that "returning customers might not have seen the full operation of the auto-renewal and auto-workout process in the first loan," and queries how many customers were, in fact, returning customers. CFPB Opp'n at 18.

With respect to countervailing benefits, the Bureau again inverts the relevant burdens. The Bureau, which bears the burden of proof, shows no facts, let alone undisputed ones, that demonstrate that any purported harm outweighs the numerous countervailing benefits to consumers. *See* Dkt. 87, CFPB Mot. Summ. Disp. at 16.; Resp'ts. Opp'n at 27–28. Instead, the Bureau makes a conclusory allegation that consumers were deceived, and that there are no benefits to deceiving consumers. *See* Dkt. 87, CFPB Mot. Summ. Disp at 16. Here, too, the Bureau's claim fails.

IV. Integrity Advance's Use Of Remotely Created Checks Was Not Unfair

Summary disposition is appropriate here, too. *Boudreaux*, 402 F.3d at 544. Contrary to the Bureau's assertions, Respondents are not required to "offer facts in support of their claim" regarding remotely created checks. *See* CFPB Opp'n at 21. The Bureau, in turn, points to a *single* consumer complaint to prove that the use of remotely created checks caused substantial injury. And, at that, this single consumer complaint predates July 21, 2011, even though the Bureau's UDAAP claims do not reach conduct that allegedly occurred during that time. The Bureau then argues that there was injury because a financial data analysis shows that remotely created checks

[13] In *American Financial Services Ass'n v. FTC*, the court spends three pages explaining how the practices at issue in an FTC rulemaking (security interests and wage assignments) resulted in specific consumer harm. 767 F.2d 957, 973–75 (1985). Further, the court in *FTC v. LoanPointe, LLC* discusses a laundry list of specific harms that arose from the practice at issue (wage assignment). No. 2:10–CV–225DAK, 2011 WL 4348304, *6–7 (D. Utah Sept. 16, 2011).

were used and that money was withdrawn. Dkt. 87, CFPB Mot. Summ. Disp. at 19. The use of remotely created checks, of course, was not *per se* unlawful. Thus, the Bureau has only shown that demand drafts were used and that a certain amount of money was withdrawn from some limited number of customers. This is insufficient to prove that the use of such demand drafts caused substantial injury to consumers. The Bureau's unfairness claim fails here.

V. Integrity Advance Did Not Violate The EFTA

The Bureau's reliance on *FTC v. PayDay Financial LLC* is misleading. There, the loan agreements at issue provided that loan payments "*shall* be made by us [defendant/lender] effecting one or more ACH debit entries to your Account at the Bank.'" 989 F. Supp. 2d 799, 812 (D.S.D. 2013) (emphasis added). Thus, the defendant in *PayDay Financial required repayment* by EFT, which the Loan Agreement did not. Dkt. 90, Facts ¶ 21. Under the plain language of the Loan Agreement and in practice, loans were not conditioned on EFT *repayment* of consumers' obligations. *Id.* The Bureau cannot prove its version of an EFTA claim either.

VI. The CFPA Cannot Be Applied Retroactively

The Bureau seeks relief under Section 1055 of the CFPA, 12 U.S.C. § 5565, as part of its TILA and EFTA-CFPA claims. CFPB Opp'n at 27. But the Bureau's request for relief under Section 1055 as to conduct that pre-dates July 21, 2011 is impermissibly retroactive, by the Bureau's own admission, and by operation of law.[14] Under *Landgraf v. USI Film Products*, a statute with an express effective date may not be applied retroactively. 511 U.S. 244, 280 (1994). The Bureau and the Court have already acknowledged that the agency's UDAAP claims

[14] The CFPB's reliance on Section 1055's silence on retroactive application stands *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and the whole of retroactivity doctrine on its head. *See* CFPB Opp'n at 25. Laws are not retroactive unless expressly stated otherwise; rather laws are only prospective unless Congress used specific phrases to indicate its intent to apply a law retroactively. *Landgraf*, 511 U.S. at 264–65.

cannot apply to conduct that pre-dates July 21, 2011, which is the CFPA's effective date. *See* Dkt. 75, Order Denying Mot. to Dismiss at 32. Indeed, that is the law of the case.

The Bureau, however, attempts to circumvent well-established retroactivity law by arguing that the FTC's authority under Section 13(b) of the FTC Act stands in for the CFPA and, thus, allows for the retroactive application of the CFPA as to the agency's TILA and EFTA claims. First, Section 13(b) of the FTC Act could not apply anyway, as this provision expressly limits the ability of the FTC to seek preliminary and permanent injunctions in – and *only* in – federal district court. 15 U.S.C. § 53(b). The FTC cannot, as the Bureau seeks to do here, obtain injunctive relief in an administrative adjudication. Because the FTC is bound by TILA's and EFTA's limiting principles under Section 13(b), applying Section 1055 prior to July 21, 2011 clearly "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. This would do more than "simply change[] the tribunal," as the Bureau implies; this impermissible retroactive application of the CFPA would "take away a substantive right" in violation of the due process clause. *See id.* at 274.[15] The Bureau's CFPA-TILA and CFPA-EFTA Claims (Count Nos. II and VI) should also be summarily disposed of, at least as to conduct that pre-dates July 21, 2011.

CONCLUSION

For the reasons state above, the court should grant Respondents' motion for summary disposition in its entirety.

[15] Indeed, under *CFPB v. ITT Educ. Services, Inc.*, No. 1:14-cv-00292-SEB-TAB, 2015 WL 1013508, at *33 (S.D. Ind. Mar. 6, 2015), if the CFPB were to bring this action in federal court, neither its claims would survive TILA's and EFTA's one-year statute of limitations. The other checks and balances long held as paramount in federal court are similarly lacking in administrative adjudication: the Bureau argues that Respondents cannot rely on the Federal Rules of Evidence; the Bureau's rules also subject Respondents to an accelerated proceeding with no right to a jury trial.

Respectfully submitted,

Dated: June 3, 2016

By: /s/ Allyson B. Baker

Allyson B. Baker, Esq.
Peter S. Frechette, Esq.
Andrew T. Hernacki, Esq.
Hillary S. Profita, Esq.
Christine E. White, Esq.
VENABLE LLP
575 7th St., N.W.
Washington, D.C. 20004
(202) 344-4000

Attorneys for Respondents
Integrity Advance, LLC and James R. Carnes

CERTIFICATION OF SERVICE

I hereby certify that on the 3rd day of June, 2016, I caused a copy of the foregoing Proposed Order to be filed by electronic transmission (e-mail) with the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Heather L. MacClintock (Heather.L.MacClintock@uscg.mil), Cindy J. Melendres (cindy.j.melendres@uscg.mil), and Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), and served by electronic mail on the following parties who have consented to electronic service:

Deborah Morris, Esq.
Deborah.Morris@cfpb.gov

Craig A. Cowie, Esq.
Craig.Cowie@cfpb.gov

Alusheyi J. Wheeler, Esq.
Alusheyi.Wheeler@cfpb.gov

Wendy J. Weinberg, Esq.
Wendy.Weinberg@cfpb.gov

Vivian W. Chum, Esq.
Vivian.Chum@cfpb.gov

/s/ Christine E. White
Christine E. White, Esq.