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.**	**BRIEF IN SUPPORT OF ENFORCEMENT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE EVIDENCE DISPUTING ISSUES DECIDED AND FACTS ESTABLISHED AT SUMMARY DISPOSITION**

BRIEF IN SUPPORT OF ENFORCEMENT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE EVIDENCE DISPUTING ISSUES DECIDED AND FACTS ESTABLISHED AT SUMMARY DISPOSITION

During a July 8, 2016 phone conference with Enforcement Counsel concerning the withdrawal of Count IV, Respondents represented that their position is that the summary disposition order as written is wrong as a matter of law and that—despite the facts deemed established in the July 1, 2016 Order Granting in Part and Denying in Part Bureau's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition (Order)—Enforcement Counsel must prove at trial the mechanics of how the loans operated. According to Respondents, by not stipulating to the withdrawal of Count IV, Respondents will keep open the opportunity to dispute related claims decided in the Order.

Enforcement Counsel attempted repeatedly to clarify Respondents' position, but Respondents refused to unequivocally state that they would not attempt to offer evidence or argument at trial to contest the findings and conclusions in the Order. As a result, Enforcement Counsel informed Respondents that they would file the instant motion. Ex. A to Decl. of A. Wheeler.

Rule 212 of the Bureau's Rules of Practice for Adjudication Proceedings permits the Administrative Law Judge to grant summary disposition where properly submitted evidentiary materials show that 1) there is no genuine issue as to any material fact; and 2) the moving party is entitled to a decision in its favor as a matter of law. Pursuant to Rule 212, the Administrative Law Judge's Order granted summary disposition in the Bureau's favor as to the TILA claim (Count I), the accompanying CFPA claim (Count II), the EFTA claim (Count V), and the accompanying CFPA claim (Count VI). The Administrative Law Judge also granted summary disposition in the Bureau's favor on the deception claim (Count III) as to Respondent Integrity Advance, but denied the motion on Count III as to Respondent Carnes and on Counts IV and VII as to both Respondents.

Similar to Federal Rule of Civil Procedure 56(g), Rule 213 of the Bureau's Rules of Practice for Adjudication Proceedings on Partial Summary Disposition (12 C.F.R. § 1081.213) permits the Administrative Law Judge to "issue an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established." Pursuant to Rule 213, the Order deemed established, among others, numerous facts pertaining to how the Integrity Advance loan agreement functioned. Order at 5-11.

Well-settled case law, the law of the case doctrine, and judicial economy all support precluding any attempts by Respondents to introduce evidence at trial to contradict the facts deemed established or to offer legal argument regarding counts decided at summary disposition. Further, any such evidence or testimony is no longer relevant or material under Rule 303. Accordingly, pursuant to Rule 303 (12 C.F.R. §1081.303), Enforcement Counsel moves the Administrative Law Judge for an order precluding Respondents from introducing evidence or offering argument that is not pertinent to the limited issues remaining for trial: Respondents Carnes's personal liability under Count III, Count VII, and the appropriate relief (including, *inter alia*, appropriate damages and civil money penalties) for all counts.[1] Given that trial is scheduled to begin on July 19, Enforcement Counsel respectfully requests that the Administrative Law Judge order expedited briefing of this matter.

I. Respondents Should Not Be Permitted to Circumvent the ALJ's Summary Disposition Ruling by Presenting Evidence or Argument at Trial Disputing that Decision.

Trial is not an opportunity for Respondents to re-litigate issues that have been decided and facts deemed established at summary disposition. If Respondents had any evidence relevant to the facts deemed established in the Order or any legal arguments relevant to the issues decided, they were obligated to raise those issues during the summary disposition briefing. Having failed to do so, they have waived their rights to do so now, and they cannot raise them at trial. If Respondents intend simply to re-argue the points they made previously, it would not be an efficient use of judicial resources.

[1] Enforcement Counsel has moved contemporaneously to withdraw Count IV. If that motion is granted, evidence related solely to that count will not be relevant or material.

Respondents will have the opportunity to raise any properly preserved arguments to the Director after the Administrative Law Judge issues his recommended decision.

Courts repeatedly refuse to allow parties to re-litigate issues decided at summary judgment because to do otherwise would allow parties to "circumvent [their] failure to come forward with evidence . . . at the summary judgment phase" and renders summary judgment "virtually useless as a procedure for . . . narrowing issues at trial." *Bordenkircher v. Burlington Air Exp., Inc.*, 87 C 3897, 1990 WL 91258, at *1 (N.D. Ill. June 25, 1990) (noting that when a party fails to offer evidence at summary judgment, a party "cannot escape this failure by attempting to adduce such evidence at the trial"); *see also, e.g. Sky Zone, LLC v. Flip N Out, LLC*, No. 2:10-CV-567 JCM (PAL), 2015 WL 4548694, *2 (D. Nev. July 28, 2015) (granting motion *in limine* to preclude party from relitigating claims decided at summary judgment); *Disability Advocates, Inc. v. Paterson*, 03-CV-3209 NGG MDG, 2009 WL 1312112, at *2 (E.D.N.Y. May 8, 2009) ("This trial ... will not be an opportunity for Defendants to present 'additional or different evidence than was before the Court on the motion for summary judgment' ... on issues this court already decided.").

Moreover, permitting Respondents to essentially relitigate matters already decided undermines the law of the case doctrine, which "commands that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case[.]"*Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) (*quoting United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) (internal quotes marks omitted)); *see also United States v. Thomas*, 572 F.3d 945, 948 (D.C. Cir. 2009) ("Under the [law of the case] doctrine, we will not reconsider issues already decided in the absence of extraordinary circumstances[.]") (internal quotes omitted). In

this administrative proceeding, the Administrative Law Judge has already ruled against Integrity Advance on Counts I, II, III, V, and VI. As such, in keeping with the law of the case doctrine, the Order should be adhered to in the subsequent trial by limiting the scope of evidence presented at trial to issues remaining after the Order.

Finally, in the interest of narrowing the issues before the Administrative Law Judge, issues already decided and facts deemed established should not be relitigated at trial. "Summary judgment is an important method of promoting judicial economy by preventing" trial on matters in which no genuine issue of fact remains. *Inland Oil and Transport Co. v. U.S.*, 600 F.2d 725, 728 (8th Cir. 1979).

Conclusion

For the reasons set forth above, Enforcement Counsel requests that the Administrative Law Judge preclude evidence not pertinent to the issues remaining after the July 1, 2016 Order.

Respectfully submitted,

Attorneys for Plaintiff
Consumer Financial Protection Bureau

ANTHONY ALEXIS
Enforcement Director

DEBORAH MORRIS
Deputy Enforcement Director

CRAIG COWIE
Assistant Litigation Deputy

s/Alusheyi J. Wheeler

Alusheyi J. Wheeler
Wendy J. Weinberg
Vivian W. Chum
1700 G Street NW
Washington, DC 20552
Phone: (202) 435-7786
Facsimile: (202) 435-7722
Email: alusheyi.wheeler@cfpb.gov
Enforcement Counsel