UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

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.	

Respondents' Opposition fails to actually dispute the material facts of each claim. As such, summary disposition for Enforcement Counsel is warranted on all claims.

I. Integrity Advance's Disclosures Regarding the Cost of Its Loans Violated TILA

Respondents do not dispute that Integrity Advance calculated each part of the TILA box in each loan agreement by assuming that the loan would be repaid in a single payment. EC's Statement of Material Facts (May 15, 2020) [Dkt. 277] ("EC SMF") ¶ 66. Nor do they dispute that if the borrower did nothing else after signing the loan agreement, Integrity Advance automatically renewed the loan. Respondents' Opp. to EC MSD (June 4, 2020) ("Resps. Opp.") at 4; Respondents' Answer (Dec. 14, 2015) [Dkt. 21] ("Ans.") ¶ 29; *see also* EC SMF ¶¶ 70-72.[1] Nor do they dispute that consumers authorized Respondents' electronic withdrawal of all of the auto-renewal and auto-workout payments at origination. *See* EC SMF ¶¶ 115-116.[2]

The parties only disagree on whether consumers' legal obligation at signing included just a single payment or the auto-renewal and auto-workout payments. The legal obligation here was for the full set of payments authorized by the loan and ACH agreements. EC's Mot. for Summ. Dispos. (May 15, 2020) [Dkt. 276] ("EC MSD") at 9. The language Respondents quote from the loan agreement that consumers "must" select a payment option or they "may" be renewed, Resps. Opp. at 4, does not render the TILA box accurate. And both statements are misleading: consumers *were not* required to select a payment option and consumers who did not *were* renewed. Because Integrity Advance disclosed the finance charge, APR, and total of payments based on a single payment, it violated TILA. EC MSD at 8-10.

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[1] Respondents purport to dispute EC SMF ¶¶ 70-72, but their responses only confirm that consumers' failure to act led to auto-renewal. Respondents' Statement of Disputed Facts in Opp. to EC MSD (June 4, 2020) ("Resps. SDF") ¶¶ 7-8.

[2] Respondents purport to dispute EC SMF ¶ 116, but not with respect to the fact cited here. Resps. SDF ¶¶ 9, 30.

Respondents attempt to factually distinguish *FTC v. AMG Services, Inc.*, 29 F. Supp. 3d 1338 (D. Nev. 2014), *aff'd sub nom. FTC v. AMG Capital Management, LLC*, 910 F.3d 417 (9th Cir. 2018), but Respondents' analysis ignores the striking similarities between the lenders' loan agreements. Both AMG and Integrity Advance were online payday lenders that calculated the amounts disclosed in the TILA boxes by assuming a single payment. Absent further action by the consumers after signing, both companies automatically renewed the loans. EC SMF ¶¶ 66, 70-76; *AMG Servs.*, 29 F. Supp. 3d at 1351. In fact, both companies' loan agreements required customers to "select [their] payment option . . . at least three business days" before the payment due date if they did not want the loan to auto renew, *compare* EC SMF Exh. 1 at 3 and EC-EX-063 at 3 *with* [Dkt. 104A] Att. 2 to Exh. A at 4, and had customers accept terms and conditions by electronically checking boxes or signing or initialing. *AMG Servs.*, 29 F. Supp. 3d at 1343; EC Resp. to Resps. Statement of Undisputed Facts (June 4, 2020) ¶ 6. And both agreements contained renewal provisions directly below the TILA box. *Compare* EC SMF Exh. 1 at 4-5 and EC-EX-063 at 2-3 *with* [Dkt. 104A] Att. 2 to Exh. A at 4.[3]

AMG Services' fundamental holding is that a single payment TILA box does not disclose a consumer's legal obligation where the lender automatically renews.[4] And AMG's contracts actually provided *more* information than Integrity Advance's. AMG's provided, in bold, an example showing how much in total finance charges a consumer who renewed a $200 loan four

[3] Respondents also provide no evidence to support their claim that their loan agreement differed from AMG's because it "required that consumers read through the entire agreement." Resps. Opp. at 6. The paragraph cited by Respondents does not support this specific claim.

[4] Respondents baselessly object to Enforcement Counsel's citation to their Answer's admissions. Those admissions are unequivocal. Respondents cannot provide any justification for why they should be allowed to walk away from those admissions at this late stage of the proceedings. There is no basis to hear new testimony on this issue or to entertain yet another motion by Respondents to amend their Answer. *See* Resps. Opp. at 5 n.1.

times would have to pay. [Dkt. 104A] Att. 2 to Exh. A at 3. In contrast, Respondents did not explain the costs associated with automatic renewals, and cannot show that their loan agreements disclosed the costs of automatic renewals. EC SMF ¶¶ 89-92; Resps. SDF ¶ 18.[5] The holding of *AMG Services* applies with equal force, if not more, to Integrity Advance's loan agreements.

II. Respondents' Disclosures Regarding the Cost of Their Loans Were Deceptive

Respondents essentially argue the loan agreement was not deceptive because its disclosures comported with TILA. But that is incorrect, and the same undisputed facts that prove the TILA violation also prove Respondents' disclosure practices were deceptive. EC SMF ¶¶ 66, 70-72, 89-92, 115-116; EC MSD at 10-13. Respondents' claim that the cost of the legal obligation is not material defies common sense and established law. Resps. Opp. at 13.[6] Respondents do not explain why costs would not be important, except to point to some general principles set forth by their expert, which he did not specifically apply to the facts here. Resps. Opp. at 13-14.[7] Nor do Respondents cite to any cases holding that the cost of a product is not material. Rather, the caselaw holds that cost is presumed material. *Novartis Corp. v. FTC*, 223 F.3d 783, 786-87 (D.C. Cir. 2000); *U.S. v. Zaken Corp.*, 57 F. Supp. 3d 1233, 1239-40 (C.D. Cal. 2014); *see also Thompson Med. Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986) (presuming materiality without independent evidence).

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[5] The other supposed differences between the *AMG Services* case and this matter, *see* Resps. Opp. at 8-9, are irrelevant. Respondents again ignore that in order to prove its claims, Enforcement Counsel does not need to rely on consumer complaints, employee testimony, or proof of intentional misconduct. *See* EC's Opp. to Resps. MSD (June 4, 2020) ("EC Opp.") at 8-9 & n.3, 12; EC's MSD at 10-13 & n.2.

[6] Respondents' argument that Enforcement Counsel has not shown that "the possibility of loan renewals" is material to consumers, Resps. Opp. at 13, misstates Enforcement Counsel's claims and thus is irrelevant to whether summary disposition is warranted here. *See* EC Opp. at 11-12.

[7] Any broad critique of Enforcement Counsel's expert's statements does not create a disputed fact. *See Akzo Nobel Coatings, Inc. v. Dow Chem. Co.*, 811 F.3d 1334, 1343 (Fed. Cir. 2016).

Similarly, Respondents have failed to show that a genuine issue of fact exists as to whether reasonable consumers would be misled by Respondents' misrepresentations. Resps. Opp. at 9-13; *see* EC MSD at 11-13. The language of Respondents' loan agreement alone justifies a finding that Respondents' practices were likely to mislead, regardless of the other evidence. *AMG Servs.*, 29 F. Supp. 3d at 1350. In any case, Respondents' expert's 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. And even if the ALJ chose to disregard the findings of Enforcement Counsel's expert, Dr. Hastak, summary disposition would still be appropriate—the loan agreement is deceptive on its face.[8] Finally, Enforcement Counsel does not depend on complaints in its motion for summary disposition, but notes that the unrebutted complaints are admissible. 12 C.F.R. § 1081.303(b)(3).[9]

III. Respondents' Disclosures Regarding the Cost of Their Loans Were Unfair

Respondents cannot create any genuine issue of material fact with respect to the unfairness claim. Respondents suggest it is speculative to assert that all customers who paid more than what was disclosed were harmed, and they argue repeat customers "got what they bargained for." Resps. Opp. at 15. But even if some consumers were not injured or could have

[8] As previously noted, Enforcement Counsel cited to two figures erroneously, *see* EC Opp. at 4 n.1, but these figures are not material to the claims here. Moreover, Respondents' assertion that 31% of loans were "repaid" in the amount of the TILA box or less is misleading, because some consumers made no payment on their loans. *See* EC-EX-068 at 227:8-16.

[9] None of the other facts Respondents raise bear on whether Integrity Advance's loan agreement disclosed the actual cost of its payday loans or whether the disclosures were likely to mislead consumers. Whether outside counsel drafted the loan agreement or Delaware banking regulators reviewed it is simply irrelevant, and the existence of repeat customers does not prove that a reasonable consumer understood the loan agreement. *See* EC Opp. at 10-11.

reasonably avoided the harm, that would not make the *practice* fair or necessarily create a genuine issue of fact. *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988); *Int'l Harvester, Co.*, 104 F.T.C. 949, 1064 n.55 (1984). And 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. Respondents' own expert even testified that it was possible that consumers who experienced renewals never calculated the total costs. Novemsky Dep. (April 15, 2016) [Dkt. 87E] at 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. Resps. Opp. at 15-17. Requiring multiple signatures and bolding certain language does nothing to cure the fact that the cost of the loan was not disclosed. And neither the ability to rescind nor repay realistically enabled consumers to avoid undisclosed costs they did not know about. Finally, there is no connection between Respondents' asserted alleged benefit—access to credit—and their unlawful practices. Respondents never explain why they could not offer credit while also truthfully disclosing the costs of the loans. *See* Resps. Opp. at 16-17.; EC Opp. at 17-18.

IV. Respondents' Use of Remotely Created Checks Was 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 unfair. They do not rebut Carnes's testimony regarding the use of RCCs, and do not dispute that they used RCCs 602 times on or after July 21, 2011, on consumers who had both already paid the cost disclosed in the TILA box and revoked or stopped their ACH authorizations. *See* EC SMF ¶¶

132, 133, 134; Resps. SDF ¶ 36.[10] That a consumer signed a loan agreement with the RCC provision does not mean they provided their express, informed consent for RCCs to be used in this way. *See FTC v. Amazon.com, Inc.*, 71 F. Supp. 3d 1158, 1163 (W.D. Wash. 2014). And the harm was not reasonably avoidable. The loan agreement's RCC disclosure was neither emphasized nor actually explained. EC SMF ¶¶ 124, 126, 127, 128, 129, 130.[11] Respondents failed to rebut Dr. Hastak's conclusions that the provision was "neither clear nor conspicuous," was "unlikely to be noticed, read, or correctly understood by borrowers," and had "the potential to confuse and misdirect borrowers rather than illuminate them." Hastak Expert Report (Feb. 11, 2016) [Dkt. 87A] at 26. Indeed, their expert had no opinion on that issue. Novemsky Dep. at 175:2-11.

V. Integrity Advance Violated EFTA

Respondents do not genuinely dispute the facts material to the EFTA analysis: consumers could only receive loan proceeds by an electronic transfer that was authorized by the ACH agreement; consumers authorized all of the renewal payments at signing; 98.5% of initial payments were made through electronic fund transfers; and the loan agreement did not state that consumers could receive a loan without authorizing the electronic fund transfers. EC SMF ¶¶ 114, 115, 116, 117, 119, 121, 122; Resps. SDF ¶¶ 30, 32; Hughes MSD Decl. ¶ 8. These facts prove an EFTA violation, *see* EC MSD at 22-25, because they show that consumers were in fact required to preauthorize EFTs from their accounts in order to get a loan. Neither consumers' ability to repay by check or money order nor any exceptions for a small number of consumers

[10] Enforcement Counsel does not claim that RCCs are *per se* unlawful. Resps. Opp. at 17-18.

[11] Instead of disputing that consumers did not need to sign or initial the RCC provision, Respondents point to a later part of the agreement where a consumer would need to sign. Resps. SDF ¶ 34. Instead of disputing that the RCC provision did not include additional information, Respondents just quote a portion of the RCC provision. *Id.* ¶ 35.

who refused to sign the ACH authorization, Resps. Opp. at 19-20, cure the fact that the agreement never stated that a borrower could receive credit without signing the ACH authorization. Finally, Respondents' argument regarding *PayDay Financial* is misplaced, as not all of the contracts that the court found to violate EFTA there included the "shall" language. *FTC v. PayDay Fin. LLC*, 989 F. Supp. 2d 799, 812 (D.S.D. 2013).

VI. James Carnes Is Individually Liable for Integrity Advance's Practices

The undisputed facts show that Carnes had the authority to control Integrity Advance's unfair and deceptive practices and that he was aware of or recklessly indifferent to them. *See CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016). Enforcement Counsel does not need to prove that Carnes directly participated, *see id.*, that he was aware of the practices' illegality, *see CFPB v. CashCall, Inc.*, No. CV 15-07522-JFW (RAOx), 2016 WL 4820635, at *11-12 (C.D. Cal. Aug. 31, 2016), or that the practices went beyond ordinary deception. *See* EC Opp. at 24.

Respondents do not genuinely dispute that Carnes had authority to control the deceptive and unfair practices, that he was Integrity Advance's president and chief executive, or that he had the authority to change Integrity Advance's fee structure. EC SMF ¶¶ 12, 14, 39, 40, 106. Rather, Respondents argue that he delegated core business responsibilities and imply that he needed to participate in practices in order to control them. *See* Resps. Opp. at 21-23; Resps. SDF ¶ 2. But as already shown, Respondents are simply wrong on the law. EC Opp. at 25-28.

Respondents also do not genuinely dispute Carnes's knowledge of Integrity Advance's practices. They do not dispute facts showing he knew exactly how a loan's cost was disclosed, *see* EC SMF ¶ 96, nor do they dispute that he knew the overwhelming majority of Integrity Advance's loans and consumers experienced at least one automatic rollover. *See* EC SMF ¶¶ 100, 101. They do not genuinely dispute that Carnes understood how Integrity Advance's auto-

renewal and auto-workout provisions worked. *See* EC SMF ¶¶ 97-99.[12] And they do not dispute that he knew about Integrity Advance's use of remotely created checks, and confirm he believed Integrity Advance printed them weekly. EC SMF ¶¶ 135-137, Resps. SDF ¶ 37. Together, this shows that Carnes had the "heightened standard of awareness beyond the authority to control" needed to establish individual liability. *See FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1207 (10th Cir. 2005).

VII. The ALJ Should Award Restitution, Injunctive Relief, and Civil Penalties

The ALJ has the authority to award restitution, injunctive relief, and civil penalties, *see* 12 U.S.C. § 5565(a)(2)(C), (a)(2)(G), (c)(1), and each are merited here. The legal restitution Enforcement Counsel seeks is automatic,[13] but even if it were not, there is no equitable basis to deny it. *See* EC Opp. at 29-33. The proper amount of restitution is "the full amount lost by consumers," *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009), which can be measured as Respondents' net revenue. *CFPB v. Mortg. Law Grp., LLP*, 196 F. Supp. 3d 920, 948-49 (W.D. Wis. 2016), *appeal pending*, Nos. 19-3396, 20-1708 (7th Cir.). Enforcement Counsel has reasonably approximated consumer loss as the net amount paid in excess of the total payments disclosed by Respondents. *See AMG Capital Mgmt.*, 910 F.3d at 427-28.[14]

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[12] Respondents purport to dispute these facts along with EC SMF ¶¶ 102, 103, and 104, s*ee* Resps. SDF ¶¶ 22, 23, 24, but in fact only repeat arguments for why the cost disclosures are not deceptive or unfair. But consumers' ability to affirmatively pre-pay their loans does not change Carnes's knowledge, nor does the existence of other provisions of the loan agreement.

[13] Respondents have not shown that restitution is equitable here, and their attempt to explain *FTC v. Commerce Planet, Inc.*, 815 F.3d 593 (9th Cir. 2016) fails. The court there recognized that the FTC sought legal restitution, but explained that all restitution is equitable "for Seventh Amendment purposes." *Id.* at 602. Here, there is no issue involving the Seventh Amendment jury trial right.

[14] Respondents' expenses are not properly a part of the calculation of restitution. *See, e.g., Mortg. Law Grp., LLP*, 196 F. Supp. 3d at 948-49; *Commerce Planet*, 815 F.3d at 603.

Respondents do not dispute the calculations' accuracy. Instead, they try to fault Enforcement Counsel for not presenting consumer testimony or excluding Integrity Advance's repeat customers. This inverts the parties' burdens. Enforcement Counsel is entitled to a "presumption of actual reliance," because it has proven that every loan agreement Integrity Advance issued violated TILA and was facially deceptive. *See FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). Thus, it does not have to show actual reliance for the consumers who took out the over 200,000 renewed loans. Rather, Respondents must demonstrate that the approximation is overstated. *Gordon*, 819 F.3d at 1195. They have failed to offer evidence of non-reliance, and thus have not met that burden. *See id.* at 1196. Respondents only offer a conclusory suggestion that returning customers were not deceived. This is not "specific evidence that indicates one way or another whether repeat customers were actually deceived." *See AMG Capital Mgmt., LLC*, 910 F.3d at 428. Thus, it is "insufficient to create a genuine dispute of material fact that repeat customers were not misled." *See FTC v. AMG Servs., Inc.*, No. 2:12-cv-00536-GMN-VCF, 2017 WL 1704411, at *13 (D. Nev. May 1, 2017).[15]

Finally, there is no basis to exclude redress for pre-transfer-date TILA violations. Section 1055 of the CFPA authorizes "any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law," 12 U.S.C. § 5565(a)(1), including TILA. *See* 12 U.S.C. §§ 5481(12)(O), (14). That provision took effect on July 21, 2011. 12 U.S.C. § 5561 note. As of that date, courts and the Bureau could grant the relief authorized by that section. But the statute does not limit courts and the Bureau to granting relief only for violations that occurred after that

[15] Respondents' citation to *FTC v. Publishers Business Services, Inc.*, 540 F. App'x 555 (9th Cir. 2013) is unavailing. *See* Resps. Opp. at 30. There, without commenting on evidence, the appellate court remanded a case and stated that the district court could consider arguments about repeat customers. *Publishers Bus. Servs.*, 540 F. App'x at 558.

date. Because the statute does not "expressly prescribe[]" whether the statutory remedies apply to earlier violations, the question is whether applying the statute to earlier conduct "would have retroactive effect." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). It would not. Granting restitution for TILA violations that occurred before July 21, 2011, does not have an impermissible retroactive effect because the FTC could have obtained that relief for those violations. 15 U.S.C. §§ 53(b), 1607(c). Since the time of Integrity Advance's conduct, section 13(b) of the FTC Act has authorized the FTC to seek restitution for violations of "any provision of law enforced by the [FTC]," including TILA. 15 U.S.C. § 53(b)(1); *see also, e.g.*, *Commerce Planet*, 815 F.3d at 598.[16] Imposing that relief does not have an impermissible retroactive effect, so it is available here for pre-transfer-date TILA violations.

That Enforcement Counsel seeks restitution in an administrative forum does not change this. *See Landgraf*, 511 U.S. at 275. Whether relief may be sought in a particular forum is a purely procedural question that regulates the secondary conduct of litigation. *See Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997). As *Landgraf* held, "the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." 511 U.S. at 275.

The ALJ can also award injunctive relief and civil penalties. Limited injunctive relief is appropriate to prevent Respondents from continuing to harm past customers and harming future consumers. Maximum available civil penalties are also appropriate given Respondents' pervasive violations and the large number of harmed consumers.[17]

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[16] Enforcement Counsel is not seeking to enforce the FTC Act. Rather, it seeks the same remedies for TILA violations that were available to the FTC before the transfer date.

[17] Respondents have not requested oral argument on this motion, and Enforcement Counsel does not believe it is necessary. Enforcement Counsel stands ready, however, to present oral argument if the ALJ determines that it would be of assistance in resolving the motion.

Dated: June 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June 2020, I caused a copy of the foregoing Enforcement Counsel's Reply in Support of Its Motion for Summary Disposition, to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on Respondents' counsel at the following addresses:

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