

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

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In the Matter of:)	
)	ENFORCEMENT
)	COUNSEL'S RESPONSE TO
)	RESPONDENTS'
)	PROPOSED FINDINGS
)	OF FACT
INTEGRITY ADVANCE, LLC and)	
JAMES R. CARNES,)	
)	
)	
Respondents.)	
)	
)	

ENFORCEMENT COUNSEL'S RESPONSE TO RESPONDENTS'
PROPOSED FINDINGS OF FACT

In Respondents' Proposed Findings of Fact, Respondents offer citations to the record that do not support their proposed findings, and offer argument rather than facts. Specifically:

1. Respondents' #4: "Integrity Advance ceased offering loans in December 2012. Dkt. 111, Order Granting In Part and Denying In Part Bureau's Mot. for Sum. Disp. and Denying Respondents' Mot. for Sum. Disp. at 5; Hr'g Tr. II-92:8-9."

EC Response: Respondents' own data scientist, Dr. Ang, testified that consumers took out loans from Integrity Advance through May 2013. Tr. III 76:20-25. The last date on which Integrity Advance processed a loan transaction was July 9, 2013. Tr. II 133:10-18.

2. Respondents' #10: "Mr. Madsen's job did not involve any aspect of Integrity Advance's loan agreement. *Id.* at I-67:7-20."

EC Response: The testimony cited refers only to Mr. Madsen's conversations with Mr. Carnes about the loan agreement, not Mr. Madsen's job:

7 Q. And when you spoke with Mr. Carnes about
8 conversion rates, conversion rates do not concern the
9 language or disclosures of a loan agreement, do they?
10 A. Not as a rule, no.
11 Q. And performance of leads does not concern the
12 language or disclosure in a loan agreement, does it?
13 A. No.
14 Q. And first payment defaults does not concern
15 the language of a loan disclosure, does it?
16 A. No.
17 Q. And in general, lead generation doesn't
18 concern the language of a loan agreement or a loan
19 disclosure?
20 A. Not in general, no.

3. Respondent's #25: "The evidence shows that Mr. Carnes' job focused on the external business aspects of Integrity Advance, including business relationships with vendors and customer intake (i.e., lead generation and conversion), as well as troubleshooting high priority issues that rose to his attention. *See supra ¶¶ 12, 18; infra ¶¶ 35-38* (discussing instances of Mr. Carnes' specific involvement in Integrity Advance's business.)"

EC Response: This proposed fact mischaracterizes the evidence. Carnes's duties were expansive and encompassed virtually all aspects of Integrity Advance's business. *See* Enforcement Counsel's Proposed Findings of Fact [Dkt. 163] (EC FOF) ¶¶ 38-73.

4. **Respondents' #26:** "Mr. Carnes's job did not involve Integrity Advance's loan agreement, other than possibly 'flipping through it.' *See id.* at I-229:2-6."

EC Response: This proposed fact is misleading in that it suggests that the loan agreement was somehow outside of Carnes's authority. The undisputed evidence establishes that as Integrity Advance's chief executive, Carnes exercised authority over all company practices, policies, and procedures. *See* EC FOF ¶¶ 38-73. In addition, the cited testimony involves only Carnes's self-serving statements about his review of the loan agreement, not whether his job "involved" the loan agreement.

5. **Respondents' #30** (first sentence): "Mr. Carnes did not substantively approve of Integrity Advance's loan agreement template or loan disclosures. *See, e.g.* Tr. I-228:6-I-229:6."

EC Response: The testimony cited indicates that Mr. Carnes ultimately approved everything as CEO, and flipped through the agreement before it was used by Integrity Advance. It does not support a finding that he did not "substantively approve" of the agreement or the use of the agreement:

6 Q. As CEO did you have to approve the loan
7 agreement template?

8 A. Again as CEO you are ultimately approving
9 everything and I -- that is something that I have had
10 and have no knowledge about, and relied on outside
11 counsel, as well as Mr. Foster to take care of that.

12 Q. But is it your testimony that you had to
13 approve the loan agreement template?

14 MS. BAKER: Objection, asked and answered.

15 JUDGE MCKENNA: Well, misstated too, misstated
16 his testimony.

17 MS. BAKER: Yes, Your Honor, it misstates his
18 testimony as well. Thank you.

19 JUDGE MCKENNA: All right. So you -- you got
20 to just backup a little bit all right. So, Mr. Carnes
21 testified that he was the CEO and as the CEO he is
22 responsible for everything. And that he reviewed the
23 template at the time that it was being prepared. Is
24 that correct, Mr. Carnes?

25 THE WITNESS: I probably didn't do -- when it

1 was being prepared it was more, you know. And I don't
2 even recall flipping through it, but I could have
3 flipped throughout at some point after it had been
4 prepared that it was going to be put into action.
5 Between attorneys doing -- preparing it and between it
6 going into action.

6. Respondents' #31: "Mr. Carnes did not substantively approve of Integrity Advance's website or website contents. *Id.* at I-216:24 – I-217:15."

EC Response: Respondents' citation unfairly characterizes Mr. Carnes's testimony, in which he actually states that he did approve of the content of Integrity Advance's website, albeit at a high level:

24 Q. Did you approve the contents of Integrity
25 Advance's website?

1 A. I don't -- you -- did I approve the contents?
2 Yeah, I mean I guess I was ultimately responsible being
3 the CEO, but I don't know that I ever even read the
4 contents of each, in it -- each actual link. Like our
5 privacy policy, for instance, was given us to us by
6 outside counsel and that is not something that I would
7 go through and read. I assume they figured out what
8 they should be -- we should be saying.

9 Q. So, do you remember approving the contents of
10 the website?

11 MS. BAKER: Objection asked and answered.

12 JUDGE MCKENNA: No, it wasn't.

13 THE WITNESS: I did approve the contents of
14 the website. I mean, I, you know to the -- at a high
15 level.

7. Respondents' #33 (second phrase) "... Mr. Carnes . . . was in charge of Integrity Advance merely to the extent that 'any CEO is in charge . . .' *Id.* at I-210:8."

EC Response: The testimony cited does not support this statement:

7 | Q. Were you accessible to the employees under
8 | Edward Foster?

Further, the undisputed evidence established that as Integrity Advance's chief executive, Carnes exercised authority over all company practices, policies, and procedures. *See EC FOF ¶¶ 38-73.*

8. Respondents' #51: "There is no evidence that Mr. Carnes was ever alerted to the fact that the TILA disclosure on Integrity Advance's loan agreements might be incorrect, or that the Company's customers may have been confused about their repayment obligations."

EC Response: As seen in Enforcement Counsel's Post-Hearing Responsive Brief, Carnes's awareness of Respondents' wrongdoing is irrelevant. Additionally, in his investigational hearing, Carnes testified that he was aware that consumers complained that they did not understand that their payments were not going to principal.

6 A. I'm aware that there are complaints out there
7 that people said that, but there again, there are -- one
8 common complaint that people -- that consumers would
9 have to try to get out of paying what they owed or
10 paying less was to say, I didn't understand I was being
11 -- that these payments weren't going towards principal
12 and that they were going toward interest only.
13

EC-EX-068 at 243:6-12.

9. Respondents' # 55: "The evidence shows that Integrity Advance received only a *de minimis* number of complaints from consumers, which did not rise to the level of Mr. Carnes' personal awareness. *See id.* at I-233:18-22."

EC Response: The testimony cited by Respondents does not support the assertion that there were only a *de minimis* number of complaints. Indeed, there is no evidence in the record about the total number of complaints Integrity Advance received during its operations.

10. Respondents' # 60: "Licensure by the Delaware Office of the State Bank Commissioner and annual renewal of Integrity Advance's license indicated to Mr. Carnes and other HIP personnel that there were no issues with Integrity Advance's loan agreement."

EC Response: This is argument, not a fact based upon the record. Respondents have provided no citation to any document or testimony to support this proposed finding.

11. Respondents' #62: "The Delaware regulator's licensing process involves a review of an applicant's financial documents, business references, personal information of executives, and the applicant's loan contract. *See id.* III-125:23-III-126:22."

EC Response: This statement is misleading to the extent that it suggests that approval of the loan agreement was a prerequisite to licensure. Ms. Miller specifically testified that as part of the licensing process they "do not approve the loan contract." *See Tr. III 126:16-*

16 Q. If you were processing an application for a
 17 lender would your office also seek some kind of copy of
 18 the loan agreement?

19 A. Yes, we do. We try to get the loan contract
 20 so we can have it on file we do not approve the
 21 contract. Although, I know to look for certain things
 22 that I might come up with questions about the contract.
 23 But we don't actually rubber stamp it, and say it's
 24 perfect, we don't approve it that way.

12. Respondents' # 65: "Ms. Miller also indicated that lenders' loan agreement [sic] were reviewed during the examination process. *Id.* at III-131:16-21."

EC Response: This statement mischaracterizes Ms. Miller's testimony, as she specifically said that she would "not be the one to ask about that."

16 Q. So at what point would your office be involved
 17 in looking at a loan agreement once a license has been
 18 granted?

19 A. I would assume, not being the expert in this
 20 area, that it would come up at examination, but I'm not
 21 the one to ask about that.

13. Respondents' #68: "Mr. Carnes' understanding of Integrity Advance's compliance with the Delaware law, licensing and review process, access to information on Integrity Advance's returning customer rate, as well as the lack of consumer complaints that rose to his attention, and Mr. Carnes' lack of involvement in the creation or substantive review

of Integrity Advance's loan agreement show that Mr. Carnes did not have any knowledge or reason to think that Integrity Advance's loan agreement disclosure might be found to be deceptive."

EC Response: This statement is argument, not fact, and contains no citations to the record.

14. Respondents' # 75: "The decision to use RCCs was made by the third-party call center on a case-by-case basis. Mr. Foster testified that repayment issues were 'handled specifically by the call centers on a day-to-day basis.' *See id.* at II-16:4-6."

EC Response: This statement was not made in the context of remotely created checks and Mr. Foster specifically testified that his answer about the actions of the call centers would call for speculation:

1 Q. If a consumer took a loan with Integrity
2 Advance and didn't contact the company prior to their
3 next pay date, what would happen?
4 A. So that calls for speculation because those
5 matters were handled specifically by the call centers
6 on a day-to-day basis. If you want me to discuss the
7 content of the contract and what their options are, I
8 might be able to speak to that.

15. Respondents' #83: "Integrity Advance customers signed an ACH authorization that expressly acknowledged the possibility that Integrity Advance could use demand drafts to satisfy unpaid balances. *See e.g.*, EC-EX-001."

EC Response: The loan agreement does not expressly communicate to consumers that Integrity Advance might use remotely created checks. The language in the ACH agreement does not use the term remotely created check, demand draft, check draft, or any of the other terms associated with this product. Moreover, the language does not explain to consumers that Integrity Advance could write a check drawn on their account without their knowledge, signature, or approval. *See e.g.*, EC-EX-001.

16. Respondents' # 87: "Regarding RCCs, Mr. Carnes knew only that RCCs were a possible repayment mechanism under Integrity Advance's loan agreement, and that RCCs were used infrequently as a last resort repayment option. *Supra ¶¶ 73-77.*"

EC Response: This statement mischaracterizes the evidence. Carnes testified that he saw remotely created checks being printed and knew that Integrity Advance used this product when consumers had withdrawn ACH authorization. EC FOF ¶¶ 119-121.

17. Respondents' #91: "Moreover, Mr. Carnes testified that consumer complaints did not rise to the level of his personal attention and awareness. *Supra ¶ 55.*"

EC Response: In his investigational hearing, Carnes testified that he was aware that consumers complained that they did not know that their payments were not going to principal:

6 A. I'm aware that there are complaints out there
 7 that people said that, but there again, there are -- one
 8 common complaint that people -- that consumers would
 9 have to try to get out of paying what they owed or
 10 paying less was to say, I didn't understand I was being
 11 -- that these payments weren't going towards principal
 12 and that they were going toward interest only.
 13

EC-EX-068 at 243:6-12.

18. Respondents' # 92: "There is no evidence that Mr. Carnes knew, should have known, or recklessly avoided knowing that the use of RCCs might later be found to result in consumer [sic] unavoidable consumer injury."

EC Response: As seen in Enforcement Counsel's Post-Hearing Responsive Brief, Carnes's awareness of Respondents' wrongdoing is irrelevant. In any case, Carnes was aware that Integrity Advance used remotely created checks. More specifically, he was aware that his company used remotely created checks as a way to obtain funds from consumers who had revoked their ACH authorizations. EC FOF ¶¶ 119-121.

19. Respondents' # 93: "There is no evidence that the Integrity Advance loan agreement disclosures or Integrity Advance's use of RCCs caused injury to any consumers."

EC Response: This is argument, not a fact based upon the record. Further, there is evidence in the record of the consumer injury arising from Respondents' unlawful use of remotely created checks. *See* EC FOF ¶¶ 122- 136.

20. Respondents' #95: "Thus, before Integrity Advance customers became repeat customers, they were necessarily fully informed of how the loan agreement, including rollovers, worked."

EC Response: This is argument, not a fact based upon the record. Once the Administrative Law Judge found that the loan agreement was deceptive, Respondents had the burden to demonstrate that specific consumers (or groups of consumers) were not

harmed by the deception. There is no evidence in the record on which to base a finding that repeat customers understood the cost of the loans and therefore were not harmed. The fact that a consumer took out more than one loan, by itself, does not demonstrate that the consumer was not harmed. To take just the simplest example, the fact that a returning customer repaid an initial loan in a single repayment would not shed any light on whether that customer understood the cost of the loan rollovers.

21. Respondents' #99: "The lack of evidence of consumer injury shows that Enforcement Counsel is not entitled to equitable monetary relief against Integrity Advance or Mr. Carnes."

EC Response: This is argument, not a fact based upon the record. Further, Enforcement Counsel has provided detailed evidence of consumer injury. *See EC FOF ¶¶ 122-128.*

22. Respondents" #100: "The lack of evidence of any potential future injury shows that Enforcement Counsel is not entitled to injunctive relief against Integrity Advance or Mr. Carnes."

EC Response: This is argument, not a fact based upon the record. Further, injunctive relief lies within the discretion of the Administrative Law Judge and does not require proof of potential future injury.

23. Respondents' #101: "The evidence shows that Enforcement Counsel is not entitled to any civil money penalties against Integrity Advance."

EC Response: This is argument, not a fact based upon the record.

24. Respondents' #102 "The evidence shows that Enforcement Counsel is not entitled to any civil money penalties against Mr. Carnes."

EC Response: This is argument, not a fact based upon the record.