

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING)	
File No. 2015-CFPB-0029)	
)	[PROPOSED]
)	CONCLUSIONS OF LAW
In the matter of:)	
)	
INTEGRITY ADVANCE, LLC and)	
JAMES R. CARNES)	
)	

[PROPOSED] CONCLUSIONS OF LAW

Pursuant to 12 C.F.R. § 1081.305(a), Respondents Integrity Advance, LLC and James R. Carnes (collectively, “Respondents”) hereby submit the following proposed conclusions of law:

I. **Respondent Carnes Is Not Individually Liable for Any Claims of Deceptive Acts or Practices Under the CFPA**

1. Enforcement Counsel has the burden of proof for each of the Consumer Financial Protection Bureau’s (“CFPB’s” or “Bureau’s”) claims. *See* 12 C.F.R. § 1081.303(a). Enforcement Counsel has failed to show by a preponderance of the evidence that it is entitled to relief on any of its claims. *See* 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 103 (1981) (applying the preponderance of the evidence standard to adjudicatory proceedings subject to the APA); *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 277 (1994) (same).

2. To establish that Mr. Carnes is liable for the alleged conduct at issue, Enforcement Counsel has the burden to prove that:

(1) Mr. Carnes participated directly in the wrongful acts or had the authority to control them; *and*

(2) Mr. Carnes had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth. *See CFPB v. Gordon*, 819 F.3d 1179, 1193 (9th Cir. 2016).

3. To hold an individual liable for consumer redress, “the FTC must show a heightened standard of awareness beyond the authority to control.” *See FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1207 (10th Cir. 2005).

4. To meet the “knowledge” requirement for individual liability, the evidence must show that the individual:

- Drafted or otherwise provided input in the creation of the deceptive, fraudulent, or violative materials, *see FTC v. Amy Travel*, 875 F.2d 564, 574 (7th Cir. 1989) (finding that “as authors of the sales scripts,” the liable individuals “were certain of the misrepresentations contained in them”); *see also FTC v. Ross*, 897 F. Supp. 2d 369, 385–86 (D. Md. 2012) (finding the defendant individually liable because she “wrote, edited, reviewed, and participated in the development” of the misleading advertisements at issue);
- Substantively reviewed, edited, or revised the deceptive, fraudulent, or otherwise violative materials, *see FTC v. World Media Brokers*, 415 F.3d 758, 764–65 (7th Cir. 2005) (finding individual defendant liable where there was evidence he knew a scheme was illegal and approved scripts “directing telemarketers to assure consumers” that it was legal); *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006) (finding that the liable individual was “directly involved in the development of the deceptive marketing scheme,” reviewed solicitation forms and “was aware” of resulting consumer injuries); *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1082 (C.D. Cal. 2012) (finding that the former president of the company had knowledge of the company’s practices because he had “seen, reviewed, commented on, and approved various versions” of the misrepresenting documents); or
- Was alerted to the deception, fraud, or other violation through other means, such as (a) the advice of employees and counselors, (*see Freecom*, 401 F.3d at 1207); (b) communications, investigations, or enforcement actions by State or federal regulators, (*see FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502 at 538-539 (S.D.N.Y. 2000)); or (c) direct review of a substantial number of consumer complaints regarding the representation at issue, (*see Commerce Planet* 878 F. Supp. 2d at 1082).

5. Under the governing standard, Enforcement Counsel has failed to prove that Mr. Carnes should be held individually liable under the CFPAs for alleged deceptive acts or practices committed by Integrity Advance.¹ Enforcement Counsel has presented no evidence that Mr. Carnes was involved in creating, editing or revising Integrity Advance’s loan agreement or call center scripts. Enforcement Counsel presented no evidence that Mr. Carnes was ever alerted to consumer complaints regarding confusion about their repayment obligations, nor any other indication that Integrity Advance’s loan agreement disclosures could be found to be deceptive.

II. Integrity Advance Is Not Liable for Unfair Acts or Practices Under the CFPAs Based Upon Its Use of Remotely Created Checks

6. In order to prove an act or practice is unfair under the CFPAs, Enforcement Counsel must establish that the act or practice:

- (1) caused substantial injury to consumers, which is not reasonably avoidable by consumers; and
- (2) substantial injury is not outweighed by countervailing benefits to consumers or competition. *See* 12 U.S.C. § 5531(c).

7. Enforcement Counsel has not proven that Integrity Advance’s use of RCCs caused any injury, let alone substantial injury, to consumers.

8. Remotely created checks (“RCCs”) in the short-term loan context were legal during the entire time of Integrity Advance’s operations and remain legal today. *See* U.C.C. § 3-104(f); *see also* 12 C.F.R. §229.2(f).

9. Enforcement Counsel did not introduce a single consumer complaint regarding RCCs, nor any expert testimony or a consumer survey demonstrating such alleged injury. Enforcement Counsel further failed to adduce evidence linking Integrity Advance’s use of RCCs

¹ Respondents renew their motion for a directed ruling, made at the close of Enforcement Counsel’s case-in-chief. *See* Hr’g Tr. III-49:19 - 54:10.

to consumer injury, relying instead upon irrelevant testimony from a lay opinion witness and a numerical analysis that served only to establish that Integrity Advance used RCCs to withdraw money from the accounts of a small percentage of its customers.

10. Even assuming, *arguendo*, that any injury existed, it was reasonably avoidable because Integrity Advance customers signed an ACH authorization, which was a separate section of the loan agreement, that allowed Integrity Advance to use RCCs to satisfy unpaid balances. Furthermore, Mr. Carnes gave uncontested testimony that Integrity Advance only used RCCs after making multiple attempts to arrange alternative means of remitting payment.

III. Respondent Carnes Is Not Individually Liable for Unfair Acts or Practices Under the CFPA Based on Integrity Advances' Use of RCCs

11. To establish that Mr. Carnes is liable for the alleged conduct at issue, Enforcement Counsel had the burden to prove that:

- (1) Mr. Carnes participated directly in the wrongful acts or had the authority to control them; *and*
- (2) Mr. Carnes had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth. *See Gordon*, 819 F.3d at 1193.

12. Enforcement Counsel failed to prove that Mr. Carnes should be held individually liable for any alleged unfair acts and practices regarding Integrity Advance's use of RCCs.

13. As discussed in Section II, *supra*, Enforcement Counsel has not demonstrated that Integrity Advance is liable for unfair acts and practices regarding RCCs.

14. Further, Enforcement Counsel failed to adduce evidence that Mr. Carnes specifically engaged in the alleged unfair acts or practices regarding RCCs. The evidence shows that Mr. Carnes was not personally involved in policies regarding RCCs, nor was he involved in drafting, reviewing or revising any RCC-related disclosures to consumers.

IV. Enforcement Counsel Has Not Established Any Basis for Equitable Monetary Relief

15. Enforcement Counsel bears the burden to prove that Integrity Advance's conduct caused consumer injury and the reasonable approximation of the injury caused. *See* 12 C.F.R. § 1081.303(a).

16. Enforcement Counsel did not articulate the amount of damages it was seeking until its closing arguments at the hearing and has still failed to state the form of relief it is seeking under 12 U.S.C. §5565, thus prejudicing Respondents' ability to mount a defense. *See Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846, 2013 U.S. Dist. LEXIS 162863 at *21–22 (N.D. Cal., Nov. 12, 2013).

17. To support any request for relief, Enforcement Counsel must provide, and support with evidence in the record, a reasonable approximation of consumer harm caused by Respondent's alleged conduct. *See, e.g., FTC v. Publishers Bus. Servs., Inc.*, 540 F. App'x 555, 558 (9th Cir. 2013) (holding that "the district court should base its calculations [of monetary damages] on the *injury to consumers*, not on the net revenues received by defendants.") (emphasis added).

18. To prove equitable monetary relief arising from alleged deceptive or unfair conduct, Enforcement Counsel, like the FTC, must "first 'show that its calculations reasonably approximated' the amount of the defendant's *unjust gains*, after which 'the burden shifts to the defendants to show that those figures were inaccurate.'" *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006) (quoting *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997)) (emphasis added).

19. Thus, all money paid by Integrity Advance customers above the amount disclosed in the TILA box is not a reasonable approximation of consumer injury caused by Integrity Advance's conduct because, at a minimum, it does not account for: (1) consumers who

affirmatively chose to roll over their loans, and thus received the benefit of their bargain, or (2) repeat customers, who were informed of and understood how the loan operated.

20. Accordingly, the damage amounts sought by Enforcement Counsel must exclude the amounts paid above the total of payments by customers who took out more than one loan.

21. In the alternative, the damage amounts sought by Enforcement Counsel must exclude the amounts paid above the total of payments by repeat customers for their second or greater loans.

22. Enforcement Counsel may not seek separate monetary awards for conduct that: (a) arises from the same act or practice; and (b) is sought from the same pool of payments from consumers. To the extent Enforcement Counsel seeks a triple award of monetary relief based on the same conduct underlying Claims I, II, and III, Enforcement Counsel's request would amount to an impermissible triple recovery based on the same conduct. *See Medina v. District of Columbia*, 643 F.3d 323, 326 (D.C. Cir. 2006).

V. Enforcement Counsel May Not Recover Retroactive Relief

23. Enforcement Counsel may not obtain monetary relief for violations of the CFPA when the “violation” pre-dates July 21, 2011, which is the effective date of the statute. *See* 12 U.S.C. § 5582; *Designated Transfer Date*, 75 Fed. Reg. 57252 (Sept. 20, 2010).

24. Awarding monetary relief for conduct that pre-dates July 21, 2011 would be an impermissible retroactive application of the CFPA. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) (internal quotation marks omitted).

25. Enforcement Counsel incorrectly seeks to rely on the FTC’s authority under Section 13(b) of the FTC Act, which does not include the power to order equitable monetary relief in an administrative forum. *See Heater v. FTC*, 503 F.2d 321, 326–27 (9th Cir. 1974).

Any equitable monetary relief available under Section 13(b) as an extension of the *district courts'* broad equitable powers. *See, e.g., FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982).

26. Enforcement Counsel's requests for relief that predate July 21, 2011, which are made solely against Integrity Advance, are to be denied.

VI. Civil Money Penalties

27. Any award of civil money penalties ("CMPs") must take into account statutory mitigating factors under the CFPA, including:

- (A) the size of financial resources and good faith of the person charged;
- (B) the gravity of the violation or failure to pay;
- (C) the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided;
- (D) the history of previous violations; and
- (E) such other matters as justice may require. *See* 12 U.S.C. § 5565(c)(3).

28. Based upon consideration of the statutory mitigating factors, no award of CMPs is warranted in this matter.

29. In the alternative, to the extent CMPs are awarded against Integrity Advance, based upon the statutory mitigating factors, that award must be reduced and may not be, as Enforcement Counsel requests, an award of the maximum first tier CMP allowed under the CFPA.

30. In the alternative, to the extent CMPs are awarded against Integrity Advance, the no award of CMPS as to Mr. Carnes is not warranted in this matter.

VII. There Is No Basis for Injunctive Relief

31. Enforcement Counsel’s intent to brief an argument for injunctive relief for the first time in its post-hearing brief prejudices Respondents by failing to articulate: (a) what relief it would seek; (b) why such relief was justified; and (c) the legal standard under which it expects this Court to evaluate its propriety.

32. “The purpose of an injunction is to prevent *future* violations.” *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (internal citations omitted, emphasis added). A party moving for an injunction must demonstrate that “there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.” *Id.*

33. Under *W.T. Grant Co.* standard, Enforcement Counsel has not proven that injunctive relief is warranted in this matter. Enforcement Counsel has made no reference to the scope and breadth of the injunctive restriction(s) it seeks (whatever they may be) nor to which of the Respondents it seeks to apply such injunctive restrictions. Enforcement Counsel has adduced no evidence that either Respondent poses a risk of future violations of the TILA, EFTA, or the CFPA – or, indeed, or any law whatsoever. Therefore, Enforcement Counsel may not be granted injunctive relief as to either Respondent.

VIII. Enforcement Counsel’s Claim For Monetary Relief is Limited By 28 U.S.C. § 2462.

34. Even assuming, *arguendo*, that claims prior to July 21, 2011 are valid, the equitable monetary relief requested by Enforcement Counsel would fall within the five-year limitations period of 28 U.S.C. § 2462. *See SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016).

35. Enforcement Counsel’s claims “accrued” as to the conduct alleged against Respondents when the conduct occurred (*i.e.*, when the loans were made). *See 3M Co. (Minn.*

Mining & Mfg.) v. Browner, 17 F.3d 1453, 1460-63 (D.C. Cir. 1994); *see also United States v. Lindsay*, 346 U.S. 568, 568 (1954) (stating that general rule that a cause of action “accrues when it comes into existence”).

36. Thus, Enforcement Counsel cannot obtain monetary damages or penalties related to conduct prior to November 18, 2010.

IX. Integrity Advance’s Loan Agreement Was Not Facially Deceptive

37. Under the CFPA, an act or practice is only deceptive if: (1) there is a representation, omission, or practice that, (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material.

See CFPB v. Frederick J. Hanna & Assocs., P.C., 114 F. Supp. 3d 1342, 1370 (N.D. Ga. 2015), *mot. to cert. appeal denied sub nom. CFPB v. Frederick J. Hanna & Assocs., P.C.*, No. 1:14-CV-2211-AT, 2015 WL 10551424 (N.D. Ga. Nov. 16, 2015) (citing *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)); *see also* Consent Order, *In re ACE Cash Express, Inc.*, No. 2014-CFPB-008, at 10–11 (July 10, 2014) (“The standard for “deceptive” practices in the Dodd-Frank Act is informed by the standards for the same terms under Section 5 of the FTC Act.”).

38. Even after three days of trial, the record contains no evidence as to even one “reasonable consumer’s” interpretation of the Loan Agreement. Instead, the uncontroverted testimony of Elizabeth Quinn Miller, Senior Investigator for the Delaware Office of the State Bank Commissioner, established a contrary conclusion – that consumers were unlikely to be deceived because the State of Delaware repeatedly reviewed the accuracy of Integrity Advance’s TILA box disclosures and examined the company annually for compliance with the State’s lending laws, which expressly allowed for the type of renewal loans that Integrity Advance offered.

39. In light of the new evidence presented at trial, Integrity Advance's loan agreement was not facially deceptive and did not violate TILA.

Respectfully submitted,

Dated: August 29, 2016

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CERTIFICATION OF SERVICE

I hereby certify that on the 29th day of August, 2016, I caused a copy of the foregoing Proposed Conclusions of Law 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), 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:

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