

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

ORDER GRANTING IN PART
AND DENYING IN PART
RESPONDENTS' MOTION FOR
PRODUCTION OF WITNESS
STATEMENTS

Hon. Parlen L. McKenna

The Consumer Financial Protection Bureau ("Bureau") filed this proceeding against Integrity Advance, LLC and James R. Carnes ("Respondents") on November 18, 2015. A Scheduling Conference was held with the parties on December 14, 2015. At that conference, the parties agreed on certain prehearing deadlines and also set a firm hearing date. However, although Respondents' counsel said she would be filing a motion regarding the production of witness statements pursuant to 12 C.F.R. § 1081.207(a) ("Rule 207"), the parties did not discuss or reach any resolution on that issue.

On December 14, 2015, Respondents submitted their Motion for the Production of Witness Statements. The Motion asked the Bureau "to produce any statement of any person to be called as a witness by the Bureau that is expected to pertain to that witness' direct testimony and that would be required to be produced under 18 U.S.C. § 3500 ["Jencks Act"] if the adjudication were a criminal proceeding." Motion at 1

(paraphrasing Rule 207). Respondents asked for these statements to be provided on or before December 21, 2015. Id.

On December 18, 2015, the Bureau filed a Response. Bureau counsel stated that the Office of Enforcement had already produced “all transcripts of hearings conducted during the investigation.” Response at 1. Bureau counsel also argued that the Bureau has not yet determined who it will call as witnesses during the hearing, and that the deadline for Rule 207 disclosures should be identical to the May 27, 2016 deadline for identification of hearing witnesses that the parties had agreed to at the Scheduling Conference. Id. at 1-2.

On December 23, 2015, Respondents’ counsel filed a Reply. The Reply noted that, under the Bureau’s anticipated schedule for Rule 207 disclosures, Respondents would have less than a month before the scheduled June 21, 2016 hearing to receive and review the witness statements. Reply at 1. Therefore, Respondents requested that all Rule 207 disclosures be made on or before January 29, 2016, in advance of the February 11, 2016 due date for the exchange of expert reports and the close of discovery on March 31, 2016. Id. at 1-2. Respondents’ counsel also suggested that the Bureau file a Witness List and Witness Statements by January 29, with the understanding that these dates could be amended if necessary. Id. at 2.

In support of this request, Respondents’ counsel noted that Respondents “contemplate a circumstance in which the Bureau could proffer Witness Statements that could affect any opinion offered by one or more of Respondents’ experts, thus prejudicing Respondents.” Reply at 2. Respondents’ counsel also argued that their clients could suffer prejudice if the Rule 207 disclosures are submitted after the close of

discovery because they will not have a reasonable amount of time to interview witnesses and examine witness statements before the hearing. Id. Finally, in the alternative, Respondents asked to extend discovery to accommodate the exchange of witness lists and Rule 207 statements. Id.

For the reasons provided below, Respondents' Motion is **Granted in Part and Denied in Part.**

Legal Principles

These proceedings are conducted under the Bureau's rules found at 12 C.F.R. Part 1081 and the statutory framework authorized by section 1052 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"). 12 C.F.R. § 1081.100. On July 28, 2011, the Bureau promulgated initial procedural rules pursuant to section 1053(e) of the Dodd-Frank Act, 12 U.S.C. 5563(e), which were then followed by a final rulemaking. See Rules of Practice for Adjudication Proceedings, 77 FR 39058-01 (June 29, 2012). The final rulemaking stated, in part, that the Part 1081 Rules were:

modeled on the uniform rules and procedures for administrative hearings adopted by the prudential regulators pursuant to section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 56 FR 38024 (Aug. 9, 1991) (Uniform Rules); the Rules of Practice for Adjudicative Proceedings adopted by the Federal Trade Commission, 16 CFR part 3 (FTC Rules); and the Rules of Practice adopted by the Securities and Exchange Commission (SEC), 17 CFR part 201 (SEC Rules).

Rules of Practice for Adjudication Proceedings, 77 FR 39058-01.

Here, in particular, Rule 207 directly borrows from the SEC's rule found at 17 C.F.R. § 201.231 ("SEC Rule 231"). See Rules of Practice for Adjudication Proceedings, 77 FR 39058-01 (noting that Rule 207 was "modeled after the SEC Rules, 17 CFR 201.231."). The Bureau noted specifically that Rule 207 was:

intended to promote the principles of transparency and efficiency discussed with respect to § 1081.206. Note, however, that the respondent is required to move for the production of these statements

The Jencks Act does not require production of a witness's prior statement until the witness takes the stand. The Bureau expects that in most cases, the Office of Enforcement will provide prehearing production voluntarily. Submission of a witness's prior statement, however, may provide a motive for intimidation of that witness or improper contact by a respondent with the witness. This section provides, therefore, that the time for delivery of witness statements is to be determined by the hearing officer, so that a case-specific determination of such risks can be made if necessary. Upon a showing that there is substantial risk of improper use of a witness's prior statement, the hearing officer may take appropriate steps. For example, a hearing officer may delay production of a prior statement, or prohibit parties from communicating with particular witnesses.

Rules of Practice for Adjudication Proceedings, 77 FR 39058-01. The final rulemaking also noted that, like SEC Rule 231, Rule 207 provides for a "harmless error" standard in the event the Office of Enforcement fails to make available a statement required to be made available by Rule 207. See 12 C.F.R. § 1081.207(b) (if such statements are not provided, "no rehearing or rededication of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to make the statement available was not harmless error.").

With respect to the general affirmative disclosure obligations referenced in the discussion of Rule 207, the Bureau noted that Section 1081.206's goal was "to ensure that respondents have prompt access to the non-privileged documents underlying enforcement counsel's decision to commence enforcement proceedings, while eliminating much of the expense and delay often associated with pre-trial discovery in civil matters." Rules of Practice for Adjudication Proceedings, 77 FR 39058-01. Furthermore, the Bureau noted that the rules "will promote the fair and speedy resolution

of claims while ensuring that parties have access to the information necessary to prepare a defense.” Id.

In addition to analyzing the regulatory language and rulemaking concerning Rule 207, I also look to decisions concerning SEC Rule 231 for non-binding guidance on interpreting Rule 207. This is particularly appropriate where final, formal adjudications within Bureau or definitive rulings on the subject at issue in the current Motion are lacking. SEC case law indicates that, like the Bureau’s Rule 207, no date is required for the production of witness statements in SEC proceedings. Rather, the concern centers on whether a respondent suffers any undue prejudice from the agency’s production timeframe. See, e.g., In the Matter of Thomas C. Bridge, James D. Edge & Jeffrey K. Robles, SEC Release No. 9068, 2009 WL 3100582 (Sept. 29, 2009) (approving SEC counsel’s (1) production of prior witness statements under 18 days before the hearing where respondents did not indicate any dissatisfaction with such production at that time and (2) withholding of certain financial statements not within the scope of required disclosures); In the Matter of Monetta Fin. Servs., Inc., Robert S. Bacarella, William M. Valiant, Paul W. Henry, & Richard D. Russo, SEC Release No. 563, 1998 WL 211406 (Apr. 21, 1998) (denying respondents’ motion for production of witness statements where the agency produced for copying all written statements that the agency previously obtained from prospective witnesses); In the Matter of Orlando Joseph Jett, & Melvin Mullin, SEC Release No. 504, 1996 WL 271642 (May 14, 1996) (recognizing respondents’ right to material contemplated by the rules; but, in the interests of expediting the flow of the proceedings, deciding to review any such disputed, withheld

material at the hearing, immediately prior to the testimony of the witness to determine whether it should be turned over to respondents).

Analysis

In the Order Following Scheduling Conference, issued December 18, 2015, I set the following relevant deadlines: (1) the exchange of expert reports by February 11, 2016; (2) completion of expert depositions by March 3, 2016; (3) rebuttals to expert reports by March 17, 2016; (4) depositions of rebuttal experts by March 31, 2016; (5) completion of discovery by March 31, 2016; (6) exchange of prehearing statements, witness lists, exhibit lists, and exhibits by May 27, 2016; and (7) a hearing to commence on June 21, 2016. During the Scheduling Conference, Respondents' counsel stated her intention to file the Rule 207 Motion currently under consideration. However, the timing suggested by Respondents' counsel and its impact on the other deadlines was not considered during the Scheduling Conference. Therefore, I will rule on these issues in light of the dates I have already set, the parties' arguments concerning the Motion, and the legal principles discussed above.

Upon motion to the Court, Respondents are clearly entitled to receipt of any witness statements contemplated by Rule 207. To the extent the Bureau has not already provided those materials under the disclosure obligations found in Rule 206, it should do so at the earliest practicable time. The Bureau's rules contemplate that Respondents should receive materials necessary to their defense to ensure the fair and expeditious adjudication of this proceeding. See 12 C.F.R. §§ 1081.101, 1081.206. Indeed, the Bureau itself anticipated in its rulemaking that it would normally provide Rule 207

witness statements voluntarily, absent any concerns not articulated here. See Rules of Practice for Adjudication Proceedings, 77 FR 39058-01 (discussed above).

Therefore, the fundamental question revolves around the timing of these disclosures. I appreciate both Respondents' need to receive the Rule 207 witness statements in a timely manner to prepare their defense and the Bureau's right to fully develop its case and decide which witnesses to present at hearing. As I read Rule 207, one of its fundamental goals is that a respondent could use any potentially inconsistent statements for the purpose of impeachment, and therefore the need to receive those statements well in advance of the hearing is somewhat minimized. However, I also see no reason to make Respondents wait until the close of discovery or the eve of hearing to receive those statements. Moreover, the Bureau has not articulated any concerns about potential witness intimidation or improper contact by Respondents.

At this stage, Bureau counsel must have at least some idea of which witnesses the Bureau intends to call at the hearing. The charges against Respondents are clearly stated, so Bureau counsel surely knows the basis for such charges and the extent to which they may rely on fact witness testimony. Therefore, no reason exists to unnecessarily delay the production of those witnesses' statements. These statements presumably already exist and might contain information useful to Respondents' defense. While I have not ordered the production of witness lists and associated summaries of anticipated testimony until May 27, 2016, the production of Rule 207 statements, if any, should occur prior to that date.

However, in order to maintain an adequate schedule to keep these proceedings moving forward efficiently, I do not accept Respondents' counsel's proposed timeframe

or, in the alternative, the associated movement of other dates (e.g., exchange of expert reports/close of discovery). Instead, I find that requiring the Bureau to produce any Rule 207 statements by February 11, 2016 adequately considers both Respondents' need to receive those statements and the Bureau's concerns about its own case development. Expert reports are due the same day and the Bureau will surely have developed its case to the point where most, if not all, witnesses are known and the statements covered under Rule 207 can be provided. If the Bureau becomes concerned about the risk of improper use of a particular witness statement, Bureau counsel may file a motion to delay production of that statement until a later date.

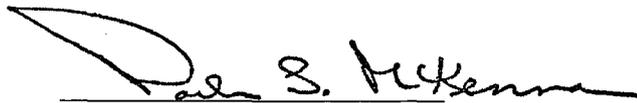
WHEREFORE:

ORDER

IT IS HEREBY ORDERED THAT Respondents' Motion for Production of Witness Statements is **GRANTED IN PART** to the extent that the Bureau is to produce to Respondents any statements covered by 12 C.F.R. § 1081.207 no later than **February 11, 2016** and **DENIED IN PART** to the extent that Respondents' proposed dates for the production of such statements and/or in the alternative an adjustment to the currently ordered prehearing deadlines are **DENIED**.

IT IS HEREBY FURTHER ORDERED THAT if the Bureau identifies additional witnesses it intends to call at the hearing after the February 11, 2016 deadline has passed, the Bureau is under a continuing good faith obligation to simultaneously produce any associated Rule 207 statements.

SO ORDERED.



HON. PARLEN L. MCKENNA
Administrative Law Judge

**Done and dated this 8th day of
January, 2016 at Alameda, California.**

CERTIFICATE OF SERVICE

I hereby certify that I have served the forgoing *Order Granting in Part and Denying in Part Respondents' Motion for Production of Witness Statements* (2015-CFPB-0029) upon the following parties and entities in this proceeding as indicated in the manner described below:

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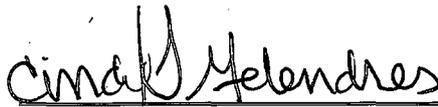
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Done and dated: January 8, 2016
Alameda, California.



Cindy J. Melendres, Paralegal Specialist
to the Hon. Parlen L. McKenna