UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

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| ADMINISTRATIVE PROCEEDING | ) | **REPLY IN SUPPORT OF MOTION TO STRIKE TESTIMONY OF JOSEPH BARESSI** |
| File No. 2015-CFPB-0029 | ) | |
| In the matter of: | ) | |
| INTEGRITY ADVANCE, LLC and JAMES R. CARNES | ) | |

**RESPONDENTS' REPLY IN SUPPORT OF MOTION TO STRIKE TESTIMONY OF JOSEPH BARESSI**

It is clear that Mr. Joseph Baressi improperly offered opinion testimony on remotely created checks ("RCCs") and that this testimony is not relevant to the RCC issue before the Court. Moreover, his testimony is highly prejudicial to Respondents. The clear purpose of Mr. Baressi's testimony was to use his "specialized knowledge" as a way to impermissibly taint Integrity Advance's lawful use of RCCs. Instead of responding to the Court's request for guidance about RCCs, Mr. Baressi offered opinion testimony about the impact of RCC's on consumers. This, of course, is impermissible testimony for a lay witness, and Mr. Baressi was not proffered as an expert, nor could he have been proffered as an expert in this case.

Mr. Baressi's testimony offered no information that was not already available to the Court through Enforcement Counsel's pre-marked Exhibits 94 and 98, which the Court admitted before trial. (Dkt. 139). Indeed, to the extent Mr. Baressi's testimony could have offered additional guidance about the operation of RCCs, such testimony would have been "unduly repetitive," in contravention of Rule 303(b)(1). 12 C.F.R. § 1081.303(b)(1). Enforcement

Counsel does not explain – nor can they explain – why Mr. Baressi's testimony is required to explain RCCs, in light of Exhibits 94 and 98.

Mr. Baressi's testimony regarding his experience with RCCs while serving as an attorney and financial services project leader at the Board of Governors of the Federal Reserve, Hr'g Tr. II-166:1-12, is also not relevant. There, his testimony was based only on situations in which there was no consumer authorization for the use of RCCs, which, as the Court admonished Mr. Baressi, is not at issue in this case. *See* Hr'g Tr. II-175:4-13. Here, too, Mr. Baressi's testimony is unduly prejudicial and provides the Court with no additional guidance.

Specifically, Mr. Baressi also offered his opinion regarding what he believes consumers understand about RCCs. *See, e.g.*, Hr'g Tr. II-170:7-11; 175:23 – 176:1. This opinion testimony was not based on Mr. Baressi's personal first-hand knowledge of RCCs as they were used by Integrity Advance. *See* Hr'g Tr. II-192:11-15. Instead, it was based on his "experience working on RCC issues as a financial services project leader at the Federal Reserve Board and an attorney-advisor in the CFPB's Regulations Office," Opp. at 4, which makes his opinions improper testimony from a lay witness.[1] Mr. Baressi's testimony describing the work he did in those jobs at both agencies, further underscores his lack of qualifications to testify – even if he were an expert witness – about consumers' perceived understanding of how RCCs operate.

Enforcement Counsel attempts to characterize Mr. Baressi's testimony as fact, rather than, opinion testimony by relying on inapposite case law.[2] For example, in *United States v.*

[1] Enforcement Counsel's argument that Fed. R. Evid. 701 does not apply to this proceeding ignores the fact that the CFPB Rules of Practice for Adjudication Proceedings specifically address expert opinion testimony, *see* 12 C.F.R. § 1081.210, thus joining the Federal Rules of Evidence in acknowledging the differences between opinion testimony and factual evidence.

[2] Enforcement Counsel relies on *Silver State Intellectual Techs., Inc. v. Garmin Int'l, Inc.*, No. 2:11-CV-01578-GMN, 2015 WL 2152658 (D. Nev. May 7, 2015) for the proposition that "Mr. Baressi's broad overview of the features and functions of [RCCs], based on his experience, is

*Caballero*, 277 F.3d 1235 (10th Cir. 2002), the Tenth Circuit stated that "the nature and object of [a witness'] testimony determines whether" opinion testimony must be offered through an expert witness pursuant to Fed. R. Evid. 702. *Caballero*, 277 F.3d at 1247. The court determined that the testimony in dispute did not involve opinion testimony because the witnesses "testified to relevant, *readily understandable* INS procedures or operations." *Id.* at 1247 (emphasis added). Here, however, the Court has acknowledged that RCCs are "poorly understood." Dkt. 111 at 45. Therefore, Mr. Baressi's testimony explaining the mechanics of RCCs and how he "hopefully" thinks "a typical, reasonable consumer" would act, Hr'g Tr. II-175:18-25, was not merely non-opinion lay witness fact testimony; it served the purpose of providing impermissible expert opinion.

Similarly, Enforcement Counsel incorrectly asserts that in *Nicastle v. Adams Cty. Sheriff's Office*, No. 10-CV-00816-REB-KMT, 2011 WL 1655547 (D. Colo. Apr. 29, 2011), the court "conclude[ed] that testimony addressing law enforcement administration, policies, what the policies mean in practice, and how the practices differ from actual policy was fact testimony to which FRE 702 was not applicable." Opp. at 5. Regarding "how the practices differ from actual policy," Opp. at 5, the *Nicastle* court was referring to "how the practices of the Adams County Sheriff's Office on various topics such as county vehicle policy, political activity, and computer usage differ from the actual policy" and concluded that it was factual testimony. *Nicastle*, 2011 WL 1655547, at *3-4. There, the testimony was directly related to activities at issue in the case

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fact testimony." Opp. at 5. However, *Silver State* was a patent infringement action in which the court analyzed proffered testimony under the local rule regarding non-infringement contentions. The court concluded that the defendant could "present fact testimony at trial regarding what features and functions are contained in the accused products and how they operate for the purposes of demonstrating that the Nuvi 3490LMT is not representative of all the accused products," but that the defendant could *not* offer such testimony "for the purpose of establishing non-infringement." *Silver State*, 2015 WL 2152658, at *3–4.

because the Adams County Sheriff's office was a defendant.[3] *Id.*; *see also Agro Air Assocs., Inc. v. Houston Cas. Co.*, 128 F.3d 1452, 1455–56 (11th Cir. 1997) (testimony in dispute was offered by former employees of the plaintiff company, including the President and two former insurance brokers); *Joy Mfg. Co. v. Sola Basic Indus., Inc.*, 697 F.2d 104, 110 (3d Cir. 1982) (testimony in dispute was offered by witness who was plaintiff's supervisor of production control, and, therefore, had "personal knowledge" of the facility at issue); *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 262, 264 (5th Cir. 1980) (testimony in dispute was offered by the former business partner of an individual involved in an action for the unpaid price of cattle in a sales transaction)

Here, Mr. Baressi's opinion testimony was not "based on his knowledge, as a personal observer" of Integrity Advance's practice of using RCCs. *See Joy Mfg.*, 697 F.2d at 112. Mr. Baressi testified that not only did he not have any first-hand knowledge of Integrity Advance, but also, that he had no first-hand knowledge of any consumer complaints about RCCs that have been brought before the CFPB. Hr'g Tr. II-185:16-24; II-192:11-15. Indeed, when Mr. Baressi was asked directly by the Court whether he has "personal knowledge," Mr. Baressi only replied that "I would say I have direct professional knowledge, yes." Hr'g Tr. II-179:19-22.

Any potential probative value of Mr. Baressi's testimony "is substantially outweighed by the danger of unfair prejudice or confusion of the issues." 12 C.F.R. § 1081.303(b)(2).

[3] In *Nicastle*, the court determined that testimony regarding "1) law enforcement administration" and "2) various law enforcement policies and what they actually mean in practice" was "quite general and it is not clear what, if any, opinion testimony the plaintiff may seek to present on these general topics." *Nicastle*, 2011 WL 1655547, at *3–4. As a result, the court "d[id] not analyze these general topics in resolving" defendants' motion to limit the proposed testimony of plaintiff's liability experts. *Id.* at 1, 3.

Therefore, for the foregoing reasons, the Court should order the hearing testimony of Enforcement Counsel's witness Joseph Baressi stricken from the record of this proceeding.[4]

Respectfully submitted,

Dated: August 26, 2016

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[4] As an alternative to striking the entirety of Mr. Baressi's testimony, which Respondents continue to maintain is warranted, Respondents propose that the following portions be stricken from the record of Hearing Transcript II: II-170:5 – 171:21; II-175:8 – 176:1; II-176:7 – 176:13; II-177:12 – 179:12; II-182:6 – 183:4; and II-193:2 – 194:9.

**CERTIFICATION OF SERVICE**

I hereby certify that on the 26th day of August, 2016, I caused a copy of the foregoing Reply 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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