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' OMNIBUS MOTION *IN LIMINE* TO EXCLUDE EVIDENCE PURSUANT TO 12 C.F.R. § 1081.303**

RESPONDENTS' OMNIBUS MOTION *IN LIMINE*
TO EXCLUDE EVIDENCE PURSUANT TO 12 C.F.R. § 1081.303

Pursuant to 12 C.F.R. § 1081.104(b)(10) and § 1081.205, Respondents Integrity Advance, LLC and James R. Carnes (together, "Respondents"), hereby submit the following Omnibus Motion *In Limine* to Exclude Evidence Pursuant to 12 C.F.R. § 1081.303 and the accompanying proposed Order.

On June 17, 2016, this Court issued an Order Revising Dates for Prehearing Submissions ("Order"), instructing the parties in the above-captioned proceeding to develop and file a joint stipulation of exhibits to which neither party objects. On July 8, the Consumer Financial Protection Bureau ("CFPB" or "Enforcement Counsel") filed the Parties' Joint Stipulation Regarding Exhibits to Which Neither Party Objects on behalf of itself and Respondents.

This Court also ordered that, by July 11, 2016, the parties submit "objections to exhibits" and include: (1) "the basis of the objection," and (2) "a short legal narrative in support of the objection." Order at 1. The parties met and conferred regarding their exhibit lists on July 8. Respondents generally object to the relevancy, scope, and number of Enforcement Counsel's

proposed exhibits and are simultaneously filing herewith Respondents' Objections to Enforcement Counsel's Exhibit List.

Respondents move the court *in limine* to enter an Order precluding Enforcement Counsel from introducing testimony and/or evidence, references, or argument relating to:

1. Conduct that pre-dates July 21, 2011, as Enforcement Counsel withdrew its UDAAP claims as to conduct that pre-dates this time
2. Consumer Complaints
3. Investigational Hearing Transcripts of James Carnes and Edward Foster
4. Declaration of Robert J. Hughes
5. Declaration of Christopher Albanese
6. Loan Management System Operations Manual
7. Certain publications
8. Federal Rulemaking issuances

LEGAL STANDARD

Objections to the admissibility of evidence at trial, "are a means for arguing why "evidence should or should not, *for evidentiary reasons,* be introduced at trial." *Graves v. D.C.*, 850 F. Supp. 2d 6, 11 (D.D.C. 2011) (citation omitted) (emphasis in original). Only "relevant, material, and reliable evidence that is not unduly repetitive" is admissible in proceedings before the CFPB. 12 C.F.R. § 1081.303(b)(1). "Irrelevant, immaterial, and unreliable evidence shall be excluded." *Id.* Moreover, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues; if the evidence would be misleading; or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* § 1081.303(b)(2). "In evaluating the admissibility of proffered evidence on a pretrial motion *in limine* the court must assess whether the evidence is relevant and, if so, whether it is admissible, pursuant to Federal Rules of

Evidence 401 and 402." *Daniels v. District of Columbia*, 15 F. Supp. 3d 62, 66 (D.D.C. 2014). "Relevancy is a threshold inquiry[, and] the burden is on the introducing party to establish relevancy . . . ." *Dowling v. United States*, 493 U.S. 342, 351 n.3 (1990).

ARGUMENT

Respondents object to the following proposed witness testimony and other evidence on the grounds that this evidence does not and cannot meet the standards for admissibility of evidence set out in 12 C.F.R. § 1081.303(b). Enforcement Counsel seek to introduce testimony and evidence that are not relevant to the remaining claims and issues in this matter, specifically the deception claim as to Respondent Carnes (Count III) and unfairness claim as to both Respondents related to the use of remotely created checks (Count VII). To the extent that any of the testimony and evidence that Respondents seek to exclude is deemed relevant, any probative value "is substantially outweighed by the danger of . . . confusion of the issues" or by the potential for "undue delay, waste of time, or needless presentation of cumulative evidence." 12 C.F.R. § 1081.303(d)(2). Thus, exclusion of this testimony and evidence identified herein will comply with the Court's Supplement to March 3, 2016 Order Modifying Scheduling Order and will "streamline the hearing process and maximize efficiency." Dkt. 80 at 1.

Motion *in Limine* No. 1:[1] To Preclude Enforcement Counsel from Offering Evidence Relating to Conduct that Pre-Dates July 21, 2011

Respondents respectfully move that the Court preclude Enforcement Counsel from offering evidence relating to conduct that pre-dates July 21, 2011. Enforcement Counsel and the Court have already acknowledged that Enforcement Counsel's UDAAP claims cannot apply to conduct that pre-dates July 21, 2011, which is the CFPA's effective date. *See* Dkt. 33, CFPB Opp'n to Mot. to Dismiss at 19 ("[T]he Bureau . . . clarifies that Counts III, IV, and VII are limited to deceptive or unfair acts and practices that occurred on or after July 21, 2011."); Dkt. 75, Order Denying Mot. to Dismiss at 32. However, more than thirty of Enforcement Counsel's proposed exhibits are dated before July 21, 2011 and/or necessarily concern conduct that occurred before this date. In certain instances, the conduct occurred years before July 21, 2011. Indeed, in several instances, the conduct at issue does not even concern Integrity Advance, as apparent by the fact that the document or communication pre-dates the Company's existence as cited in the Notice of Charges. This evidence is not relevant to Enforcement Counsel's remaining UDAAP claims because Enforcement Counsel has expressly conceded that their claims do not reach conduct that allegedly occurred prior to July 21, 2011.

Specifically, on this ground, the Court should preclude Enforcement Counsel from introducing the following exhibits identified on its Exhibit List, as they are either dated before

[1] Respondents renew their objection as to the admissibility of the expert testimony of Dr. Manoj Hastak as set forth in their Motion *in Limine* to Preclude Expert Testimony of Dr. Manoj Hastak. *See* Dkt. 106. Respondents advance these arguments with respect to the Expert Report of Dr. Manoj Hastak (EC-EX-092), and, accordingly, seek a Court order precluding both the admission of both the testimony and report of Dr. Hastak.

July 21, 2011 and/or concern conduct that predates that time: 1, 2, 3, 6, 15, 16, 17, 18, 19, 20, 21, 42, 51, 52, 53, 54, 56, 57, 58, 74, 75, 77, 78, 79, 81, 83, 84, 85, 86, 87, 88, 89, 90.[2]

The Court should also preclude any witness testimony that concerns conduct that occurred before July 21, 2011.

Motion *in Limine* No. 2: Bar Introduction of Consumer Complaints (EC-EX-075)

Respondents move for an order precluding Enforcement Counsel from introducing consumer complaints produced by the Better Business Bureau (presented as EC-EX-075), which are improperly lumped together as one exhibit.[3] First, the consumer complaints constitute inadmissible hearsay, and Enforcement Counsel has not demonstrated that the consumers are unavailable to testify at the Hearing. *See infra* discussing Fed. R. Evid. 804(a). Moreover, the consumer complaints are neither relevant to the remaining issues, nor do they bear satisfactory indicia of reliability. *See* 12 C.F.R. § 1081.303(b). And, they have the potential to cause confusion of the issues.

In addition, the complaints concern conduct that pre-dates July 21, 2011. For example, of the eighteen consumer complaints that Enforcement Counsel seeks to introduce, *see* EC-EX-075, *two-thirds – or, twelve – of them are dated before July 21, 2011*. Of the six complaints dated after July 21, 2011, at least two of those concern activity that occurred before July 21, 2011.

[2] To the extent any of these exhibits include manuals or other materials that may be persistent, Enforcement Counsel nonetheless has the burden of showing that the materials were used after July 21, 2011, and thus *potentially* relevant.

[3] Enforcement Counsel presents eighteen independent and individual consumer complaints as an aggregated exhibit, EC-EX-075. This is improper and creates an undue burden on the Court and Respondents in evaluating and responding to any individual complaint. To the extent that Enforcement Counsel is allowed to seek the introduction of any of the consumer complaints contained in EC-EX-075, Respondents respectfully request that the Court order Enforcement Counsel to submit each complaint as a separate exhibit.

Moreover, several of the consumer complaints concern conduct that is not alleged in this matter and issues that are not before the Court.

The Court should exclude all of the consumer complaints that Enforcement Counsel has identified as EC-EX-075 as impermissible hearsay. However, to the extent the Court declines to preclude – at this stage – all consumer complaints on the exhibit list, the Court should only allow Enforcement Counsel to introduce those complaints dated after July 21, 2011 and related to conduct that also occurred after July 21, 2011. In addition, complaints that concern conduct not alleged in this matter and not before the Court in the Hearing should be precluded at this stage. *See* 12 C.F.R. § 1081.303(b)(2).

Motion *in Limine* No. 3: Bar Introduction of Investigational Hearing Transcripts of James Carnes and Edward Foster (EC-EX-068 and EC-EX-069)

Respondents also respectfully move for an order precluding Enforcement Counsel from introducing the transcripts from the investigational hearings of Edward Foster ("Foster") (presented as EC-EX-069) and Respondent James Carnes (presented as EC-EX-068) taken on June 24, 2014 and June 17, 2014, respectively. These hearing transcripts are inadmissible hearsay. In addition, to the extent that the transcripts have any probative value, that value is substantially outweighed by the danger of unfair prejudice and the potential for undue delay. Presentation of these transcripts would also be a waste of time and cumulative.

The CFPB's Rules of Adjudication do not provide for the introduction of prior, sworn statements of parties to a hearing, and the Rules generally set a high bar on introducing prior, sworn statements when a witness is available. *See* 12 C.F.R. § 1081.303(h) ("At a hearing, any party wishing to introduce a prior, sworn statement of a witness, *not a party*, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefore." (emphasis added)). Moreover, introduction of the hearing transcripts would violate the requirement in the

Federal Rules of Evidence that a declarant must be unavailable to testify at trial for his prior testimony to be admissible. *See* Fed. R. Evid. 804(a). Specifically, under CFPB Rule 303(h):

> A motion to introduce a prior sworn statement may be granted if:
> (1) The witness is dead;
> (2) The witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;
> (3) The witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;
> (4) The party offering the prior sworn statement has been unable to procure the attendance of the witness by subpoena; or
> (5) In the discretion of the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used."

12 C.F.R. § 1081.303(h). Similarly, under the Federal Rules of Evidence, before it could seek to introduce the investigational hearing transcripts, Enforcement Counsel would need to demonstrate that it used "reasonable means" to procure the presence of the declarants at trial, but was unable to do so. *Cf.* Fed. R. Evid. 804(a)(5). Enforcement Counsel cannot meet this burden. In fact, Enforcement Counsel has taken steps to procure the declarants' attendance by requesting subpoenas for Foster and Respondent Carnes, which the Court granted on July 8, 2016. Thus, because Carnes is a party to this proceeding, and both Carnes and Foster will, by all indication, be present and able to testify at the Hearing commencing July 19, 2016, Enforcement Counsel should be prevented from introducing the transcripts of the testimony Foster and Respondent Carnes gave during the CFPB's investigational hearings.

Moreover, during the investigational hearings, counsel for Foster and Respondent Carnes was not permitted to make objections to Enforcement Counsel's questions, as a matter of CFPB Rules. This, in turn, deprived these witnesses from having adequate representation and from having their rights adequately protected during the investigational hearing proceedings. The Federal Rules of Civil Procedure, for example, require that a witness's counsel be allowed to

make form objections during any deposition, as that deposition can, subsequently, be used for impeachment, among other things, at trial. *See* Fed. R. Civ. P. 30(c). Counsel's inability to make a record of objections during the hearings is, on its own, sufficient to prevent Enforcement Counsel from being able to introduce these investigational hearing transcripts in this proceeding.

The Court should preclude Enforcement Counsel from introducing EC-EX-068 and EC-EX-069 during the Hearing.

Motion *in Limine* No. 4: Bar Introduction of Declaration of Robert J. Hughes (EC-EX-072)

Respondents move for an order precluding Enforcement Counsel from introducing the Declaration of Robert J. Hughes, a data scientist with the CFPB, who performed an analysis of the relevant dataset in the instant case (presented at EC-EX-072). The Hughes Declaration constitutes inadmissible hearsay. Moreover, it is not relevant, and it fails to bear satisfactory indicia of reliability such that its introduction into evidence would be unfair and would cause confusion of the issues. *See* 12 C.F.R. § 1081.303(b)(2)-(3).

Mr. Hughes states that he analyzed 304,227 loans from May 2008 through May 2013 and that 108,789 of loans were serviced on or after July 21, 2011. Hughes Decl. ¶¶ 3–4. Mr. Hughes conflates "loan origination" with "loan servicing," which has the potential to cause confusion of issues at the Hearing. First, Mr. Hughes fails to acknowledge the number of those loans that were *originated* on or after July 21, 2011. Moreover, his analysis considers loan payments made between May 2008 and July 20, 2011, which Enforcement Counsel has expressly conceded are not part of its UDAAP claims. And, Mr. Hughes states that he formulated his analysis based on the information contained in the Loan Management System Operations Manual, which as discussed *infra*, should be excluded. Accordingly, Enforcement Counsel should not be permitted to introduce the Hughes Declaration at the Hearing.

The Hughes Declaration constitutes a prior, sworn statement of Mr. Hughes, and Enforcement Counsel cannot meet the elements required under Rule 303(h) for the statement's admission. 12 C.F.R. § 1081.303(h); *see also* discussion *supra*. Enforcement Counsel lists Mr. Hughes on its witness list. Moreover, since Mr. Albanese is an employee of the CFPB, he is, presumably, able to attend and testify at the Hearing. Thus, Enforcement Counsel has not demonstrated, and cannot demonstrate that Mr. Hughes is unavailable to testify at the hearing. *See* 12 C.F.R. § 1081.303(h); *see also* Fed. R. Evid. 804(a). Further, the interests of justice are in no way served by allowing the admission of a static, ambiguous document containing a brief description of Mr. Hughes's review and calculations, rather than testimony from Mr. Hughes himself. *See* 12 C.F.R. § 1081.303(h)(5). Therefore, the Court should exclude the Hughes Declaration.

Motion *in Limine* No. 5: Bar Introduction of Declaration of Christopher Albanese (EC-EX-073)

Likewise, Enforcement Counsel should not be permitted to introduce the Declaration of Christopher Albanese (presented as EC-EX-073). Among other things, this declaration is impermissible hearsay. Mr. Albanese is an investigator with the CFPB who spoke with E. Quinn Miller, Investigative Supervisor in the Office of the State Bank Commissioner of Delaware, on two occasions in May 2016 regarding Respondent Integrity Advance and the State of Delaware's process for reviewing applications for lending licenses.

The Albanese Declaration does not provide Mr. Albanese's questions to Ms. Miller (precluding any ability by Respondents to evaluate Ms. Miller's supposed responses). Rather, the declaration provides only Mr. Albanese's paraphrasing of Ms. Miller's responses, and provides only one direct quote. The declaration, thus, lacks "satisfactory indicia of reliability so that its use is fair," and it is inadmissible hearsay under Rule 303. 12 C.F.R. § 1081.303(b)(3).

Not only does the Albanese Declaration constitute inadmissible hearsay, but also, offering the declaration for the purpose of proving to the Court what Ms. Miller told Mr. Albanese constitutes inadmissible hearsay within hearsay.

Moreover, the Albanese Declaration constitutes a prior, sworn statement of Mr. Albanese, and Enforcement Counsel cannot meet the elements required under Rule 303(h) for the statement's admission. 12 C.F.R. § 1081.303(h); *see also* discussion *supra*. Enforcement Counsel requested, and the Court authorized, a subpoena for Ms. Miller to appear and testify at the Hearing commencing July 19, 2016. (Respondents have also requested that the Court issue a subpoena to Ms. Miller). Enforcement Counsel also lists Mr. Albanese as a potential rebuttal witness. Moreover, since Mr. Albanese is an employee of the CFPB, he is, presumably, able to attend and testify at the Hearing. Thus, Enforcement Counsel has not demonstrated, and cannot demonstrate, (1) that Mr. Albanese is unavailable to testify at the hearing and (2) that Ms. Miller is unable to do the same. *See* 12 C.F.R. § 1081.303(h); *see also* Fed. R. Evid. 804(a). Further, the interests of justice are in no way served by allowing the admission of hearsay-upon-hearsay and precluding Respondents from examining the declarants. *See* 12 C.F.R. § 1081.303(h)(5). Therefore, the Court should exclude the Albanese Declaration.

Motion *in Limine* No. 6: Bar Introduction of Loan Management System Operations Manual (EC-EX-079) and Section 7.9 of Loan Management System Operations Manual (EC-EX-081).

Respondents respectfully move for an order precluding Enforcement Counsel from introducing the TranDotCom Solutions Loan Management Systems Operations Manual (the "Manual") (presented as EC-EX-079) and Section 7.9 of the Manual (presented as EC-EX-081). The Manual is not relevant to the alleged conduct of Respondents that remains at issue before the Court in this matter. Moreover, the Manual is dated March 2008, which is before Integrity

Advance started operating and well before July 21, 2011.[4] Therefore, the Court should issue an order preventing Enforcement Counsel from introducing the Manual into evidence.[5]

Motion *in Limine* No 7: Bar Introduction of Publications (EC-EX-082, EC-EX-094, and EC-EX-098)

The Court should preclude Enforcement Counsel from introducing these exhibits, because they are impermissible hearsay. Enforcement Counsel seeks to introduce a publication of a private not-for-profit association, NACHA (presented as EC-EX-082),[6] and the personal, academic publications of two authors (presented as EC-EX-094 and EC-EX-098),[7] neither of whom is listed as a witness on Enforcement Counsel's disclosures. Enforcement Counsel also has not listed any witness who could speak about the relative significance of these publications as learned treatises. *See* 12 C.F.R. § 1081.303(b)(1).

Moreover, the Court should exclude the academic publications (EC-EX-094 and EC-EX-098) specifically, because any probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. 12 C.F.R. § 1081.202(b)(2). The publications would

[4] To the extent any of the Manual may have been persistent, Enforcement Counsel nonetheless has the burden of showing that the materials were used after July 21, 2011, and thus even *potentially* relevant. The first page of the Manual states it is "Proprietary and Confidential" and Respondents request that any use of the exhibit, if admitted in whole or in part, be done under seal to protect all confidential business information contained in the Manual.

[5] Respondents note that Enforcement Counsel's proposed Exhibit 81 is duplicative of Exhibit 79, as Exhibit 81 purports to introduce one section of the Manual, the entirety of which is included as proposed Exhibit 79.

[6] Titled "NACHA Table of ACH Return Reason Codes".

[7] EC-EX-094 is titled "'An Examination of Remotely Created Checks' By Ana R. Cavazos-Wright," and EC-EX-098 is titled "'A Guide to Remotely Created Checks' by Dave Mercurio and Angie Spitzley."

be misleading (as they present only the individual authors' views), and would cause undue delay and waste of time. *See id.*

Motion *in Limine* No 8: Bar Introduction of Federal Agency Rulemaking Issuances (EC-EX-096)

The Court should preclude Enforcement Counsel from introducing the rulemaking notice issued by the Federal Trade Commission ("FTC") (EC-EX-096).[8] The publication bears no relevance to Enforcement Counsel's claims as to the conduct, acts, or practices of the Respondents, and is otherwise neither material nor reliable. *See* 12 C.F.R. § 1081.303(b)(1). Indeed, it is a notice of proposed rulemaking, which would not have touched the alleged conduct in this matter, if Respondents were even still engaged in any conduct. Specifically, this exhibit is the proposed rulemaking to limit the use of remotely created checks in the telemarketing sales arena – which is not conduct in which Respondents ever engaged (nor does Enforcement Counsel allege that they did).

This exhibit, a notice of an FTC rulemaking, also must be excluded because any probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. *Id.* § 1081.202(b)(2). Enforcement Counsel would seem to be arguing, through the inclusion of this rulemaking, that Respondents should retroactively be held to a regulatory provision of the Telemarketing Sales Rule that would not apply to Respondents' conduct at any time, as Respondents did not engage in telemarketing. Moreover, this proposed rule was not promulgated as a final rule until December 14, 2015 (almost a month after the CFPB filed its

[8] Titled "16 CFR Part 310: Telemarking Sales Rule: Federal Register Notice Containing Notice of Proposed Rulemaking and Request for Public Comment".

Notice of Charges in this case), did not become effective until February 12, 2016, and indeed, was not even proposed until July 9, 2013—after Integrity Advance had ceased operations.[9]

Moreover, this exhibit will inevitably confuse the issues. Already, the exhibit creates confusion because Enforcement Counsel titles the exhibit "16 CFR Part 310: Telemarking Sales Rule: Federal Register Notice Containing Notice of Proposed Rulemaking and Request for Public Comment"; however, the actual exhibit appears to be the pre-Federal Register issuance of the final rule.

CONCLUSION

For the reasons stated above, Respondents respectfully request that, pursuant to 12 C.F.R. § 1081.104(b)(10) and § 1081.205, the Court grant Respondents' Omnibus Motion *in Limine* to Exclude Evidence Pursuant to 12 C.F.R. § 1081.303.

Respectfully submitted,

Dated: July 11, 2016 By: /s/ Allyson B. Baker

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[9] Telemarketing Sales Rule Notice of Proposed Rulemaking, 78 Fed. Reg. 41200 (Jul. 9, 2013).

CERTIFICATION OF SERVICE

I hereby certify that on the 11th day of July 2016, I caused a copy of the foregoing Omnibus Motion *in Limine* 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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