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

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INTRODUCTION

Respondents have moved to exclude many of Enforcement Counsel's exhibits. Respondents' motion relies on three overarching flaws. Respondents ignore the fact that evidence regarding the appropriate relief—including, *inter alia*, restitution, disgorgement, damages, injunctive relief, and civil money penalties—is within the scope of the issues remaining for trial. Respondents also ignore the fact that under the rules governing this proceeding, hearsay is admissible as long as it is relevant, material, and reliable (the same standard applied to all evidence), 12 C.F.R. §§ 1081.303(b)(1),(3), instead relying repeatedly on the federal rules. Finally, Respondents erroneously claim that relevant and material evidence should be excluded solely because it dates from before the designated transfer date (July 21, 2011).

Respondents do not make specific arguments as to why evidence from the earlier period is not relevant; they simply assert that no evidence of conduct that occurred before the actual violations could be relevant because it happened earlier. This argument is ludicrous on its face. First, evidence from before July 2011 clearly is relevant to the violations that occurred after July 2011, especially as the loan agreements and Respondents' use of them did not change materially from 2008 through 2013. Further, under Respondents' theory, evidence relating to Respondent Carnes's formation, direction, and control of Integrity Advance would not be relevant to his individual liability. That result is patently absurd. Second, the trial is not limited to conduct that occurred post July 21, 2011. The Administrative Law Judge has found that there were EFTA and TILA violations prior to July 21, 2011, and evidence related to the appropriate relief for those violations is relevant and material to the trial, including, *inter alia*, evidence related to the number of the violations and the harm suffered by the consumers.

All of Respondents' remaining arguments on the specific exhibits also are without merit. For the reasons described herein, the evidence that Respondents seek to exclude is directly tied to the issues that are outstanding in this case. Therefore, Enforcement Counsel respectfully requests that the Administrative Law Judge deny Respondents' motion in full.

Motion *in Limine* No. 1: Evidence Relating to Conduct that Pre-Dates July 21, 2011

Respondents argue broadly that the "Court [should] preclude Enforcement Counsel from offering any evidence relating to conduct that pre-dates July 21, 2011." Mot. 4. Respondents do not explain why any of these specific exhibits or testimony are irrelevant, immaterial, or unreliable. Instead, they assert broadly that these exhibits and testimony should be excluded simply because the exhibits "are dated before July 21, 2011 and/or necessarily concern conduct that occurred before this date" or the testimony "concerns conduct that occurred before July 21, 2011." *Id.* 4-5. The mere fact that an exhibit is dated prior to the date of the alleged violation or that an exhibit or testimony involves conduct that occurred prior to the violation is not sufficient, by itself, to demonstrate why any of the exhibits or testimony is irrelevant, immaterial, or unreliable. For that reason alone, Respondents' motion as to these exhibits should be denied.

In any case, as noted above, Respondents' argument appears to be that the Administrative Law Judge cannot consider *any* evidence prior to this period even though evidence related to conduct that occurred prior to July 2011 clearly is relevant to the remaining issues in this matter. For example, neither the loan agreement nor Respondents' use of remotely created checks (RCCs) changed in any material way during the period in which Integrity Advance offered loans. Thus, evidence from before July 2011 on those topics is relevant and material to the violations that occurred after July 2011.

Further, evidence related to Respondent Carnes's involvement in Integrity Advance's founding and operations clearly goes to his liability for the deceptive and unfair practices regardless of the fact that some of that conduct occurred prior to the violations. An individual is liable for the unfair, deceptive or abusive acts of a corporation if the individual: (1) had authority to control the corporate defendants or participated directly in the wrongful acts or practices and (2) had some knowledge of the acts or practices. *See F.T.C. v. Tax Club, Inc.*, 994 F. Supp. 2d 461, 471 (S.D.N.Y. 2014) (*quoting F.T.C. v. Five-Star Auto Club*, 97 F.Supp.2d 502, 535 (S.D.N.Y. 2000)). Authority to control the company can be inferred from active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer. *Id*. at 471 (*quoting F.T.C. v. Med. Billers Network, Inc*., 542 F.Supp.2d 283, 320 (S.D.N.Y. 2008)). Evidence and testimony of Respondent Carnes's involvement in the founding and operating of Integrity Advance is clearly relevant and material to this analysis. *See, e.g.*, EC-EX-051-054 (Carnes signed lead purchase agreements), EC-EX 057-058 (invoices from vendors sent to Carnes), EC-EX-085-090 (communications between Carnes and vendors used by Integrity Advance).

In addition, given the findings that Integrity Advance violated TILA and EFTA both before and after July 21, 2011, evidence related to the harm to consumers before July 2011 clearly is relevant to the appropriate relief for those violations (*e.g.*, the consumer complaints in EC-EX-075 and Mr. Hughes's testimony and exhibits).[1] Further, the Administrative Law Judge must impose civil money penalties for any violations he finds. *See* 12 U.S.C. § 5565(c)(1) ("Any person that violates, through any act or omission, any provision of Federal consumer financial

[1] In their prehearing statement, Respondents misconstrue 28 U.S.C. § 2462 as prohibiting any monetary relief for violations prior to November 18, 2010 in this matter. Resp. Prehearing Stmt. 6 n.3. This position is wrong as will be demonstrated in post-trial briefing, and in any case, is no basis for excluding relevant and material evidence.

law *shall* forfeit and pay a civil penalty pursuant to this subsection.") (emphasis added). Evidence related to Respondents' knowledge (including complaints made by consumers) and actions prior to July 21, 2011 is relevant to the calculation of both the appropriate tier and the appropriate amount of the penalties. Similarly, evidence of the harm suffered by consumers from those actions is illustrative and goes to assessing the gravity of the violations. Finally, the financial documents that Respondents seek to exclude (EC-EX-015-021) also are directly relevant to the assessment of an appropriate penalty.

Finally, although Respondents seek to exclude most of Enforcement Counsel's exhibits that are dated prior to July 21, 2011, they have themselves offered exhibits from that time period. *See, e.g.*, RX 2, 7, 15, 16. And they did not object to documents related to Integrity Advance's income for 2011 and 2012, apparently conceding that documents demonstrating Integrity Advance's income are relevant. They have failed to explain why some evidence from this time period (mostly theirs) is relevant, while the Bureau's is not.

Motion *in Limine* No. 2: Consumer Complaints

Respondents next move to exclude consumer complaints submitted by the Bureau. As noted above, Respondents erroneously rely on the Federal Rules of Evidence rather than the rules governing this proceeding. Those rules expressly provide both that hearsay is admissible, 12 C.F.R. § 1081.303(b)(3), and that evidence is *not* inadmissible solely because it would be inadmissible under the Federal Rules, *id.* § 1081.303(b)(4). Respondents baldly assert that the complaints do not bear satisfactory indicia of reliability and are not relevant, but they provide no basis for these assertions. Mot. 5. These failures alone justify denying their motion.

In any case, as noted above, these complaints are relevant to the appropriate relief and some of them apply directly to consumers' experiences with Respondents' use of the RCCs.

They also are relevant to Respondent Carnes's knowledge regarding Integrity Advance's operations. Further, they are also reliable: they are complaints submitted by consumers to the Better Business Bureau that Respondents would have first received directly from the Better Business Bureau (and that Respondents subsequently received from the Bureau). Because Respondents do not assert any particular basis for claiming that these complaints are unreliable, their position appears to be that complaints are per se unreliable in all contexts. Under that theory, complaints never would be admissible even though hearsay expressly is admissible, an untenable result.

Respondents also attempt to exclude complaints involving conduct before July 21, 2011, but that argument fails for the same reasons addressed above in response to Motion No. 1.[2]

Motion *in Limine* No. 3: Investigational hearing Transcripts of James Carnes and Edward Foster.

Respondents seek to exclude the transcripts from the investigational hearings of Respondent Carnes and Edward Foster. As an initial matter, given that both parties have indicated that they will call both persons as witnesses at the trial, there is no legitimate argument that the transcripts may not be used to impeach the witnesses. Further, Rule 303(b)(3) expressly states that transcripts of hearings such as these shall be admissible and shall not be excluded solely on the basis of hearsay. 12 C.F.R. § 1081.303(b)(3). Nonetheless, Respondents again erroneously seek to exclude these exhibits claiming that they are hearsay and relying on the Federal Rules of Evidence. Mot. 6. Respondents also erroneously rely on the provision of the rules governing the admission of prior sworn statements, 12 C.F.R. § 1081.303(h). First, on its face Rule 303(h) does not apply to any statements by Respondent Carnes because he is a party,

[2] Respondents complain that EC-EX 75 creates an undue burden because it includes 18 different complaints. Enforcement Counsel are happy to re-submit the 18 complaints as individually marked exhibits if the Administrative Law Judge so desires.

and Rule 303(h) expressly applies only to statements by *non-parties*. *Id.* § 1081.303(h). Further, the Administrative Law Judge may allow introduction of Mr. Foster's transcript pursuant to § 1081.303(h)(5). Given that both witnesses will testify, there is no argument that the transcripts are unreliable. Nor is there an argument that introduction of the transcripts will prejudice Respondents. For the foregoing reasons, Enforcement Counsel respectfully requests that the Administrative Law Judge deny Respondents' motion with respect to both transcripts.[3]

Motion *in Limine* Nos. 4 & 5: The Declarations of Mr. Hughes and Mr. Albanese

Respondents object to the admission of the declarations of two Bureau employees. In both cases, Respondents again erroneously rely on an objection to hearsay and the federal rules. Mot. 8-9. In addition, because these declarations constitute prior, sworn statements by a party (namely the Bureau), Rule 303(h) does not apply. Mr. Hughes's declaration describes his methods for analyzing the payments data produced by Respondents and calculating the number of harmed consumers and the amount of their harm. As such, it is relevant, material, and reliable.

Respondents argue that the introduction of Mr. Hughes's declaration would "cause confusion of the issues." Mot. 8. However, this Administrative Law Judge already has indicated his ability to sort through and process evidence appropriately. *See*, *e.g.*, Ord. Deny Resp. Mot. 4-5 (dated July 5, 2016).

Respondents also go into detailed criticism of Mr. Hughes's analysis of the loan data provided by Respondents. Such arguments are appropriate for cross-examination and post-trial briefing. They do not go to the admissibility of Mr. Hughes's declaration.

[3] Although Respondents claim that their counsel was not able to object during these hearings, she did in fact object during them; she also provided instructions to Respondent Carnes and Mr. Foster regarding their answers and asked clarifying questions herself. *See*, *e.g.*, EC-EX 69 (87:22-88:4; 125:11-24).

Respondents also argue that Mr. Albanese's declaration is unreliable because it does not provide the questions he asked Ms. Miller and paraphrases her responses. Mot. 9. As noted in the declaration, Mr. Albanese is a trained investigator who worked as a Special Agent with the United States Secret Service for eight and one-half years, was a State Investigator with the N.J Attorney's General's Office for four years and, among other qualifications, has received extensive training in criminal investigation procedures. Mr. Albanese's training and background provide the necessary indicia of reliability. Furthermore, both Mr. Hughes and Mr. Albanese were listed as witnesses on Enforcement Counsel's list of witnesses, and Respondents reserved the right to call all witnesses listed by Enforcement Counsel. To the extent, they wish to probe particular statements they may call those witnesses themselves. For the foregoing reasons, Enforcement Counsel respectfully requests that the Administrative Law Judge deny Respondents' motion with respect to the declarations of Mr. Hughes and Mr. Albanese.

Motion *in Limine* No. 6: The Loan Management System Operations Manual and Section 7.9 of the Loan Management System Operations Manual.

Respondents claim that the TranDotCom Loan Management System Manual (EC-EX 79) is "not relevant to the alleged conduct of Respondents that remains at issue before the Court in this matter." Mot. 10. EC-EX 81 is simply an excerpt of EC-EX 79. Counsel for Respondents represented to Enforcement Counsel and to the Administrative Law Judge that the manual contains definitions of some of the columns used in the data Respondents produced in response to the subpoena in this matter. Resp Reply to Bureau's Resp. to Feb. 8, 2016 Ord. 4 n.3 (Dkt. 39). Counsel for Respondents also stated to Enforcement Counsel that the Loan Manual was responsive to the request for a data dictionary in the subpoena issued by the Administrative Law Judge. As such, there can be no legitimate argument that the manual is not reliable.

Further, as noted in Mr. Hughes's declaration, Mr. Hughes used the manual to interpret the data that Respondents produced. Analysis of this data goes directly to the remaining issue of the appropriate relief for any violations found by the Administrative Law Judge. Respondents' motion should be denied, as the manual is relevant, material, and reliable.

Motion *in Limine* No. 7: Publications

Respondents move to exclude the NACHA manual and two publications explaining remotely created checks. Mot. 11-12. Again, Respondents erroneously rely on a hearsay objection. *Id.* 11. They also argue that the Bureau "has not listed any witness who could speak about the relative significance of these publications as learned treatises," citing 12 C.F.R. § 1081.303(b)(1). By its terms, Rule 303(b)(1) does not require that a witness testify to an exhibit in order for that exhibit to be admissible. Evidence is admissible if it is relevant, reliable, and material. 12 C.F.R. § 1081.303(b)(1).

As with the Loan Manual above, the NACHA manual contains information about the codes contained within the data provided by Respondents pursuant to the subpoena issued by this Administrative Law Judge. Thus, the NACHA manual is admissible for many of the same reasons that the Loan Manual is. It provides relevant, material, and reliable information regarding the interpretation of the data provided by Respondents.

In addition, the Administrative Law Judge cited the necessity of additional information about remotely created checks in his July 1st decision, writing: " . . . the record must be supplemented with additional information about remotely created checks before I can make appropriate findings. This is a poorly-understood mechanism for effectuating debits from a bank account. Thus, I will not rule on whether it constitutes an unfair practice until the record is full and complete on this issue." Ord. 43. These exhibits provide important information on this

obscure payment mechanism. Respondents object that the treatises will cause unfair prejudice or confusion solely because they present the views of the individual authors. Mot. 11-12. This objection is not well taken. Respondents could have, but did not, seek to introduce other treatises. Moreover, Respondents have not claimed, nor could they, that there is any reasonable dispute as to how RCCs function. As such, the Administrative Law Judge may take official notice of how they work from these exhibits. *See* 12 C.F.R. § 1081.303(c).

For the foregoing reasons, Respondents' motion with respect to these exhibits should be denied.

Motion *in Limine* No. 8: Federal Agency Rulemaking.

Respondents object to the admission of a notice that appeared in the Federal Register announcing an amendment to the Telemarketing Sales Rule. Under this Rulemaking,[4] the Federal Trade Commission banned the use of remotely created checks in telemarketing transactions.

Respondents appear to suggest that in seeking to admit this public document of a federal regulation, the Bureau is seeking to hold Respondents retroactively liable for violations of the Telemarketing Sales Rule. Mot. 12. This argument is a red herring.

As with the treatises on remotely created checks, this document provides important background information about RCCs. Further, under 12 C.F.R. § 1081.303(c), the Administrative Law Judge can take official notice of any material fact that is ". . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned". A notice of a rulemaking that appears in the Federal Register is such a document, and there is no legitimate argument that it is not relevant, material, or reliable. It is therefore admissible.

Conclusion

[4] The Exhibit contains the notice of a final rule, not a proposed rule as represented by Respondents. Mot. 12.

The Rules governing admissibility of evidence in this proceeding favor the admission of evidence. Enforcement Counsel have offered reliable evidence that are relevant and material to the resolution of the remaining issues in this matter. Therefore, Enforcement Counsel respectfully request that the Administrative Law Judge deny Respondents' motion in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July 2016, I caused a copy of the foregoing Enforcement Counsel's Opposition To Respondents' Omnibus Motion *In Limine* To Exclude Evidence Pursuant To 12 C.F.R. § 1081.303, to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather.L. MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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