

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 TO
STRIKE TESTIMONY

Hon. Parlen L. McKenna

On August 5, 2016, Respondents moved to strike entirely the testimony of Joseph Baressi from the hearing transcript because they believe “Enforcement Counsel’s entire line of questioning of Mr. Baressi was improper and prejudicial.” Motion at 2. In the alternative, Respondents identified specific sections of Mr. Baressi’s testimony they would have me strike. Respondents contend that, as a lay witness, Mr. Baressi gave improper opinion testimony under Federal Rule of Evidence 701(c); that his testimony is better characterized as “de facto expert” testimony. Motion at 5; that he was not disclosed as an expert witness; and that Respondents therefore did not have the opportunity to rebut his testimony. In addition, Respondents claim that Mr. Baressi’s testimony was both irrelevant and unduly prejudicial.

The Bureau responded on August 22, 2016, stating that Mr. Baressi was not offered as an expert and Respondents’ counsel indicated during the hearing she would not object to his testimony as long as it remained within the scope of general knowledge testimony about what remotely created checks (RCCs) are and how they work. Response

at 2. The Bureau contends that Respondents' reliance on Fed. R. Evid. 701(c) is misplaced because the Bureau's Rules of Practice, found at 12 C.F.R. Part 1081 govern this proceeding. Enforcement counsel asserts that the admissibility of opinion testimony is controlled solely by Rule 303(b) of its Rules of Practice. Response at 3. Even so, the Bureau argues that Mr. Baressi gave a factual overview of the way RCCs work and did not offer any opinions about Respondents' use of RCCs. Thus, Mr. Baressi gave neither improper lay nor expert testimony.

Respondents filed a reply brief on August 26, 2016, reiterating their position. Respondents also stated that Mr. Baressi's 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." Reply at 2.

Respondents' counsel mischaracterizes my response! I did not "admonish" Mr. Baressi and was, in fact, speaking to Enforcement Counsel at the time. Moreover, I note that one element of the Bureau's argument as to RCCs is that consumers could not have known what they were authorizing when they signed the loan agreement. This is because the wording was vague and opaque, and few people understand what RCCs are or how they work. I have not yet ruled on this issue. Thus, the question of whether Integrity Advance's consumers gave effective authorization for the use of RCCs is still an open question.

After considering the parties' arguments and reviewing the hearing transcript, I will not strike Mr. Baressi's testimony entirely. I stated in my order granting partial summary disposition that RCCs are poorly understood and I expected to hear testimony

about them at the hearing. Mr. Baressi's testimony was, in general, tailored to my request and is clearly relevant. While there is other evidence about RCCs in the record, namely two academic or professional articles describing the mechanics and use of RCCs, I do not find the use of live witness testimony cumulative. Indeed, Mr. Baressi was able to provide some context concerning RCCs as a former Federal Reserve Board employee and current CFPB employee that was not available in the other evidence.

However, I will partially grant Respondents' motion to strike a specific portion of the transcript. The testimony at II-192:-25 – 194:9¹ could be construed to create an unfair and prejudicial impression of Respondents' business practices. I note that I struck the pertinent question and answer at the hearing; this ruling merely expands the stricken testimony to include the related objection, response, discussion, and a follow-up question to which I sustained an objection.

The motion to strike as it applies to Mr. Baressi's remaining testimony is denied. I find that his lay testimony offered no opinions tailored to the facts in this matter. *See* Fed. R. Evid. 702. Moreover, his testimony about the mechanics of how RCCs are created and processed within the financial system was factual and relevant to the issues remaining for decision. The portions of the transcript at II-170:20 – 171:21, II-176:7 – 176:13, and II-177:12 – 179:12 clearly fall within this scope.

Testimony about the issues a consumer may face when an RCC is created on his or her bank account is also relevant, and was drawn from Mr. Baressi's personal knowledge and professional experience. I considered Respondents' objection to the testimony at II-182:6 – 183:4 at the hearing, and denied both the objection to the question

¹ Citations are to the corrected transcript transmitted to the parties on August 10, 2016.

and the request to strike the testimony from the record. I do not find any reason to reverse my earlier ruling.

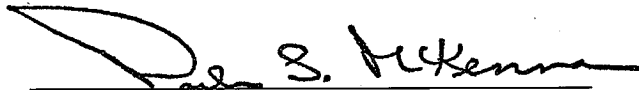
To the extent that an opinion is contained at II-175:8 – 176:1, I find it is permissible lay opinion testimony. Although the Federal Rules of Evidence are nonbinding, they do offer guidance in this administrative proceeding and I will consider the standards found at Fed. R. Evid. 701. Accordingly, I find this testimony is rationally based on Mr. Baressi’s perceptions, and is helpful to my understanding of the issues at hand. With respect to whether it is based on scientific, technical, or specialized knowledge within the scope of expert testimony, “lay opinion testimony based on ‘the particularized knowledge that the witness has by virtue of his or her position in the business’ [sic] is permissible, even if such testimony concerns highly technical subject matter that could also be addressed through expert testimony.” *In the Matter of Certain Activity Tracking Devices, Sys., & Components Thereof*, Order No. 62, USITC Inv. No. 337-TA-963 (May 6, 2016). *See also L.A. Times Commc’ns, LLC v. Dep’t of the Army*, 442 F.Supp.2d 880, 887 (C.D.Cal.2006) (“Generally, lay witnesses can testify to inferences or opinions that are drawn from a series of personal observations over time ... [and can] testify to opinions based on a combination of their personal observations ... and their specialized knowledge obtained through their vocation.”).

Finally, as to the testimony at II-170:5-19, I find it is also permissible lay opinion testimony. Mr. Baressi testified that, while he did not believe he had ever actively participated in responding to a consumer complaint about an RCC while working at the CFPB, he had done so when he worked at the Federal Reserve Board. (Tr. II-185:21 – 186:20). In this regard, he testified that he had worked at the Federal Reserve for nearly

13 years. (Tr. II-184:4 – 184:8). His firsthand contact with consumers who had experienced RCC use in their bank accounts is sufficient to allow him to offer an opinion as to whether consumers have a general understanding of RCCs. *See L.A. Times Commc'ns, supra; see also Glob. Computer Enterprises, Inc. v. United States*, 88 Fed. Cl. 52, 67 (2009) (holding that “lay opinion testimony based upon extensive experience in an industry is admissible under Rule 701”). As this testimony is permissible under the Federal Rules of Evidence, it is also clearly permissible here and will remain in the record.

Accordingly,

IT IS HEREBY ORDERED that Respondents Motion to Strike is hereby **GRANTED IN PART and DENIED IN PART** in accordance with my rulings set forth herein.



Hon. Parlen L. McKenna
Administrative Law Judge
United States Coast Guard

Done and dated this 29th day of August, 2016 at
Alameda, California.

CERTIFICATE OF SERVICE

I hereby certify that I have served the *Order Granting In Part and Denying In Part Respondents' Motion to Strike Testimony* (2015-CFPB-0029) upon the following parties and entities in this proceeding as indicated in the manner described below:

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Done and dated this 29th day in August, 2016
Alameda, California


Cindy June Melendres
Paralegal Specialist to the
Hon. Parlen L. McKenna