

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
BUREAU'S REQUEST FOR
ISSUANCE OF SUBPOENA

Hon. Parlen L. McKenna

On February 2, 2016, the Bureau filed a Request for Issuance of Subpoena seeking: (1) an Excel file containing transaction-level data; (2) a data dictionary describing the data found in that file; and (3) any prior statements, within the meaning of 12 C.F.R. § 1081.207, of any witnesses Respondent intends to call at hearing.

Respondents filed an objection to the first and second requests, claiming those requests are “inappropriate, unreasonable, excessive in scope, and unduly burdensome.” Respondents do not object to the production of witness statements, though the parties disagree on the production deadline. On February 9, 2016, I issued an order seeking additional information from the Bureau and allowing Respondents to submit a reply brief.

The Bureau asserts that it issued a Civil Investigation Demand (CID) to Respondents on January 7, 2013, requiring them to retain all documents and other tangible things relied on in their responses to the investigation and subsequent enforcement action. The database containing the information the Bureau is seeking is covered by the CID. Other documents or tangible things containing potentially relevant

information are also covered. It is the Bureau's position that there is an ongoing obligation to preserve these documents and things throughout the course of the litigation.

Respondents state that they have fully complied with the preservation requirements, but that production of the Excel document and data dictionary impose a great burden. Respondents say the employees who provided the initial response to the CID are no longer "readily available" to produce the new Excel document and data dictionary. As the company no longer exists and therefore has no employees, a contract worker would need to be hired to process the data. They also claim the use of a subpoena to obtain this information at this stage in the proceedings is contrary to the intent of 12 C.F.R. § 1081.208 (Rule 208).

There is now no dispute between the parties that the requested data exists, is covered by the CID, and has been preserved. The areas of disagreement lie in whether the Bureau may appropriately request the data at this time; and if so, whether the burden placed on Respondents in requiring them to produce the data is so great that a subpoena should not be granted.

Respondents have asserted what is, in essence, a laches defense: this is defined as "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961). I agree with Respondents' argument that the Bureau should have requested this data at an earlier stage in the proceedings. Both parties are aware that CFPB administrative adjudications are expedited, and deadlines for other types of discovery, such as expert reports, are fast approaching. The Bureau has stated that it needs this data to determine which consumers were harmed by Respondents' business practices. This need certainly

could have been anticipated, particularly as the Notice of Charges requests, in part, an order granting “[r]estitution in an amount to be determined at trial to compensate borrowers who were the victims of Respondents’ practices.” *Id.* at 14. The Bureau has been aware for some time that Respondents denied having used demand drafts when consumers withdrew ACH authorizations (Respondents’ Answer was filed on December 14, 2015—a month and a half before the subpoena request was made).

Nevertheless, for the reasons set forth below, I do not find such delay to be consequential and Respondents have not demonstrated actionable prejudice requiring the subpoena request be denied. The information sought is highly relevant and will be necessary in the event the charges are ultimately found proven.

1. The Use of a Subpoena is Proper Under Rule 208

Respondents argue that “a Rule 208 subpoena is not intended to obtain the type of threshold-level transactional data that the Bureau seeks here A request for all transactional data is, in fact, the textbook example of a ‘traditional form of pre-trial discovery’—that is, a request expected to be made during civil litigation or at the outset of any investigation, not in the middle of an expedited administrative proceeding.” In support of this argument, they cite to the preamble to the final rules concerning administrative adjudication, found at 77 Fed. Reg. 39058-01, 39059 (June 29, 2012). However, in reviewing the entirety of the preamble, and not just those portions quoted by Respondents, I find the intent is not so limited:

The goal in adopting the SEC’s basic approach is 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. Recognizing that

administrative adjudications will take place after a Bureau investigation intended to gather relevant evidence, *and in light of the affirmative obligation that the Final Rule places on enforcement counsel to provide access to materials gathered in the course of the investigation*, the Final Rule does not provide for certain other traditional forms of pre-trial discovery, such as interrogatories and discovery depositions. *The Final Rule does provide for the deposition of witnesses unavailable for trial, the use of subpoenas to compel the production of documentary or tangible evidence, and in appropriate cases, expert discovery, thus ensuring that respondents have an adequate opportunity to marshal evidence in support of their defense.* The Bureau believes this approach will promote the fair and speedy resolution of claims while ensuring that parties have access to the information necessary to prepare a defense.

Id. (Emphasis added). The plain language here states that interrogatories and discovery depositions are unavailable, while subpoenas for documents *are* explicitly available. The Bureau's goal was to minimize the need for respondents to identify and request specific materials from enforcement counsel; it was not to prohibit enforcement counsel from obtaining additional information during the course of the proceedings.

The CID contemplates that the Bureau may have a need for additional information as the enforcement proceeding progresses. To prevent the Bureau from obtaining that information when it becomes obvious it is necessary would defeat one of the major purposes of the CID. As long as the Bureau reasonably believes the data it seeks exists within materials covered by the CID, a subpoena is an appropriate method of obtaining it during an administrative adjudication.

2. The Scope of the Bureau's Request is Reasonable, and Respondents Have Not Shown that Production is Unduly Burdensome

The Bureau has adequately explained the need for the data it seeks. It is clear that the *volume* of data produced will be extremely large,¹ but the Bureau's ability to review and make use of the data in the limited time available is not at issue here. What is relevant is whether the *effort* required on the part of Respondents to export this data and provide it in the requested format is extraordinarily burdensome. Respondents have not shown that this is the case given the importance of the issues at bar.

The Bureau stated that the document on which its request is modeled is an Excel spreadsheet which appears to have been exported from an existing database and that Respondents could simply update the fields and re-export the data. Respondents have not contradicted this, nor have they explained why they believe it would take a contract worker two months to perform the export. In the absence of any explanation from Respondents about why repeating the export with an expanded date range and two additional fields is "near impossible," I cannot conclude the burden is unreasonable.

The Bureau has also specified certain documents it believes could serve as adequate data dictionaries, and stated, "Enforcement Counsel's position is that the subpoena would not require Respondents to draft a new data dictionary if one did not already exist." Bureau's Response at 7. Thus, I find that any asserted burden by Respondents regarding Request 2 is clearly outweighed given the seriousness of these charges.

¹ In the document already obtained by the Bureau, which represented one month of data, there were approximately 86,000 lines of data relating to 3,500 separate consumers; the requested file will contain 55 months of data.

Finally, I note that the Bureau has said it is willing to accept in its entirety the database containing the information it seeks. This would relieve Respondents of any need to hire a contract worker to compile/create the subpoenaed data or to incur any significant expense.

3. Time for Production

The Bureau has requested production of all responsive documents within 20 days. I will grant Respondent additional time to comply, and direct that all documents responsive to Requests 1 and 2—or the entire database, if Respondents choose to provide it instead of processing the data themselves—is due within 30 days of the date the subpoena is served.

The parties also disagree as to the timeframe for production of prior witness statements responsive to Request 3. Respondents have stated that they will produce these statements by March 31, 2016. The Bureau has requested these statements within 20 days of the date the subpoena is served, with an ongoing obligation to produce other prior statements as they become available that corresponds to the Bureau's obligation to produce newly-obtained statements to Respondent. I am setting the deadline for production of all known prior statements 30 days from service of the subpoena, with any new prior statements to be produced within five calendar days as such witnesses are identified. The deadline for production is firm and will only be extended upon a written motion demonstrating good cause.

ORDER

Pursuant to 12 C.F.R. § 1081.208, and upon consideration of the Bureau's Request for Issuance of Subpoena Requiring Production of Documents dated February 2,

2016, a subpoena is issued for the following documents. Respondents shall produce all responsive documents within 30 days of service of the subpoena.

1. A Microsoft Excel file, with the data columns set forth in the document entitled "Document Request 16_Transactions_01.01.12-01.31.12.xlsx" (CFPB003126) that Integrity Advance, LLC produced in response to Request for Documents 16 of the Civil Investigative Demand served on Integrity Advance, LLC on January 7, 2013, and the additional data columns described below, that includes all consumer transaction data for all consumers who originated a loan with Integrity Advance.

In addition to the data columns set forth in CFPB003126, include columns that capture:

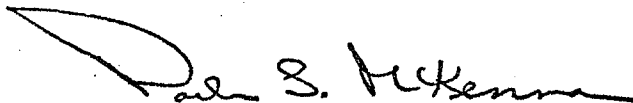
- a) The date on which the consumer revoked his or her ACH authorization (null if the consumer did not revoke his or her ACH authorization); and
- b) Whether Integrity Advance used a demand draft to collect funds from the consumer.

Should the production file exceed Microsoft Excel's capabilities, produce the file in a tab-delimited text file compatible with MS Access.

Respondents may choose to provide Enforcement Counsel with the relevant database in its entirety instead of producing the Excel file or tab-delimited text file described above.

2. A data dictionary that defines all column headings used in the file produced in response to Request 1 or, if no dictionary currently exists, any available documents or portions thereof which would enable Enforcement Counsel to interpret the column headings.
3. The deadline for production of all known prior statements shall be 30 days from service of the subpoena. Any prior statements of newly identified witnesses shall be produced within five calendar days as such witnesses are identified.

SO ORDERED.



HON. PARLEN L. MCKENNA
Administrative Law Judge

Done and dated this 19th day of February, 2016
Alameda, California.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE SERVED THE FORGOING **ORDER GRANTING BUREAU'S REQUEST FOR ISSUANCE OF SUBPOENA** (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: February 19, 2016
Alameda, California.



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