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' REPLY TO BUREAU'S RESPONSE TO THE FEBRUARY 8, 2016 ORDER REQUIRING THE BUREAU TO SUBMIT ADDITIONAL INFORMATION**

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Pursuant to the Order Requiring the Bureau to Submit Additional Information ("Order"), entered February 8, 2016, Integrity Advance, LLC and James R. Carnes (collectively, "Respondents") respectfully reply to the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") February 10, 2016 Response to the Order ("Resp.").

The Bureau seeks "all consumer transaction data" since 2008 and a data dictionary specific to this requested information. In order to produce the materials that the Bureau seeks in Request Numbers 1 and 2 of its intended subpoena, Respondents would have to hire at least one contractor to secure the transactional data, review it, compile it and produce it. Respondents' contractor would be required to undertake a comprehensive review of all transactional data to ascertain when a customer may or may not have revoked an ACH authorization and how that customer might have then continued loan repayment. A contract worker of this type costs approximately $150 an hour and would likely work for at least two months to gather all of the data and information the Bureau now seeks in its requested subpoena.

The Bureau asserts that it needs this transactional data in order to "quantify the amount of . . . [consumer] harm" alleged to have been caused by Respondents. Resp. at 2. The Bureau fails to explain exactly why it needs this data—that is, why this is critical to its case. And given the substantial burden of this request, the agency should have to make this showing as a threshold matter; it does not. The Bureau also fails to explain why it waited until three months *after* initiating suit in an expedited administrative forum to first seek such purportedly necessary information. Indeed, the need for such information, as characterized by the Bureau, at least, is clearly foreseeable from the outset of any investigation. The Bureau could have requested this information when Integrity Advance still had ready access to former employees who could assist in the gathering and production of this data, as they did in 2013. In fact, what is readily apparent from the Bureau's requested subpoena is that, until recently, the agency paid little—if any—attention to Integrity Advance's initial data production.[1] The Bureau Rules governing this administrative forum, which the agency wrote, clearly contemplate expedited litigation and minimal, if any, fact discovery. The Rules certainly do not contemplate a transactional data request that goes back eight years and encompasses every single consumer transaction and an accompanying, difficult-to-create data dictionary.

Furthermore, the Bureau also seeks previously unproduced fields of data, contending that these fields are necessary to support its "unfairness" claim in Count VII of the agency's Notice of Charges ("Notice"), which concerns the use of remotely created checks. First, the Bureau has

[1] Although Integrity Advance stopped making loans in December 2012, as Respondents have explained, the Company was able to readily rely on employees who had previously worked at the Company when it was operational. Specifically, Integrity Advance was sold to another lending concern and Integrity Advance's former employees were at that lending concern. They assisted Integrity Advance with the production of documents in response to the CID. Those former employees are no longer readily available to do this.

already conceded that any claim arising under its authority to prohibit unfair, deceptive or abusive acts or practices ("UDAAP") reaches only conduct that occurred on or after July 21, 2011. Thus, by its own admission, the Bureau has no argument that it "needs" these two fields of data for transactions that go back to 2008. Second, the Bureau's justification for these two new data fields relies on a misrepresentation of Respondents' Answer.[2] The Bureau's argument here is a red herring to justify, post-hoc, the need for additional fields of data to accompany an already-excessive data request. For the reasons discussed herein and in the Respondents' February 5, 2016 Objection ("Obj."), Respondents ask that this Court exercise its discretion to refuse to issue Request Nos. 1 and 2 of the subpoena. Respondents will begin a rolling production of any statements in response to Request No. 3 within twenty days from issuance of any subpoena. Respondents further address the Court's questions and the Bureau's responses below.

Responses 1 and 2: **Respondents have fully complied with Instruction E of the CID.**

Respondents have preserved all materials relied upon to respond to the CID, in compliance with Instruction E of the CID. While this information has been preserved, retrieving, processing, and compiling it presents a great burden to the Respondents since Integrity Advance has not been operational for several years.

[2] In supporting this request, the Bureau misrepresents the Respondents' Answer, which admits, in relevant part, that "Integrity Advance's contracts included a provision allowing the company to create remotely created checks in certain instances." Answer ¶ 89. The Respondents deny the Bureau's averment that remotely created checks were used "when consumers were *contesting the company's right to those funds* by withdrawing the consumer's consent to ACH withdrawals," Notice ¶ 48 (emphasis added), and that remotely created checks were used "if a consumer successfully canceled their authorization for ACH withdrawals," *id.* ¶ 89. *See* Answer ¶¶ 48, 89.

Response 3: **A data dictionary specific to Document Request No. 16 (and the information now requested by the Bureau) does not currently exist.**

There is no data dictionary specific to the information obtained by the Bureau in response to Document Request No. 16 of the CID (CFPB003126). If that data dictionary existed, Respondents would produce it. Respondents are not withholding any data dictionaries. Here, producing a data dictionary will require that Respondents create "an entirely new document," notwithstanding the Bureau's uninformed claims to the contrary. Order at 3.[3] And at this point in time, only an hourly contractor could create this document.

Response 4 and 5: **The requested subpoena would be untimely, excessive, and unduly burdensome and present a significant challenge for Respondents to meet its requirements.**

The Bureau contends, also in an uninformed manner, that its requested subpoena would not be unduly burdensome because it is a larger version of the data set that Integrity Advance already produced. *See* Resp. at 2. But Respondents cannot "simply repeat the export" that the CFPB assumes was conducted to generate the response to Document Request No. 16. This is true because the data is no longer readily accessible and because Integrity Advance no longer has ready access to former employees who were familiar with the data and able to retrieve, cull, and produce it in December 2013, one year after the Company stopped making loans. As the Bureau correctly points out, Respondents did not object to providing transactional data in response to the CID, and, in fact, Respondents made every effort to comply fully and promptly with the

[3] The Bureau has asked whether "[p]ortions of 'Updated File Exports,' Section 7.9 of a Loan Management System Operations Manual (CFPB039775–39790) may serve as a data dictionary for interpreting the data in CFPB003126." Resp. at 17 n.14. While this document defines various abbreviations also used in CFPB003126, this document does not, as the Bureau requests, appear to "define[] all column headings used" in CFPB003126.

Bureau's CID. Indeed, if anything, for this reason, the Bureau has less excuse for its significant delay in making the instant transactional data request.[4]

The request seeking transactional data is also excessive and burdensome because it exceeds the scope of the claims and time period concerning conduct alleged in the Notice. Specifically, the Bureau has already conceded that its claims arising under its UDAAP authority are limited to conduct that occurred on or after July 21, 2011.[5] Moreover, this transactional data request, which would have been a substantial, but potentially reasonable request during the investigation, is now unfair and unduly burdensome. And the Bureau never answers the question of why it has waited so long to propound this request. *See* Resp. at 2.

***Response 6*: Rule 208 subpoenas are not intended for broad, generalized requests.**

Rule 208's specific limitations and the general framework of the Bureau's investigative and enforcement authority make it abundantly clear that a Rule 208 subpoena is not intended to obtain the type of threshold-level transactional data that the Bureau seeks here. The preamble in the Federal Register concerning the Rules of Adjudication explains that since "administrative adjudications will take place *after* a Bureau investigation intended to gather relevant evidence . . . the Final Rule does not provide for certain other traditional forms of pre-trial discovery . . . ." 77 Fed. Reg. 39058-01, 39059 (June 29, 2012) (emphasis added). A request for all transactional data is, in fact, the textbook example of a "traditional form of pre-trial

[4] The Bureau cites authority that is inapposite to the facts of this case. Respondents have not "archived" or stored documents in a way that adds to the burden described herein. *See Sefic v, Marconi Wireless*, 9 O.C.A.H.O. 1123, 2007 WL 4928773 at *15 (Feb. 15, 2007); *Tropicana Casino & Resort*, 9 O.C.A.H.O. 1060, 2000 WL 33113961 at *6 (Sept. 8, 2000), nor used any "self-serving indexing scheme," *see Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976).

[5] Further expanding the Bureau's already voluminous request, as the CFPB suggests, Resp. at 8 n.15, is not an appropriate solution to the agency's failure to adequately tailor its subpoena request.

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.

The Bureau's last minute, all-encompassing transactional data request is unduly burdensome. In order to comply, Respondents would incur substantial costs and time, and asking Respondents to incur such costs now—when the Bureau could have sought this information more than two years ago—would be profoundly unfair. Moreover, the Bureau has failed to explain the reason for its delay, and also why it now needs this information.

CONCLUSION

For all of the foregoing reasons, the Court should decline to issue the Bureau's subpoena request as to Request Nos. 1 and 2.

Dated: February 12, 2016

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CERTIFICATION OF SERVICE

I hereby certify that on the 12th day of February 2016, I caused a copy of the foregoing Answer 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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