

**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'
MOTION FOR AN
EXTENSION OF TIME**

**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION
FOR AN EXTENSION OF TIME**

On February 19, 2016, the Hearing Officer issued an Order Granting the Bureau's Request for Issuance of a Subpoena ("Order") requiring Respondents to produce an Excel file containing specified data in a particular format within 30 days of the service of the subpoena. The Excel file was to include—with two exceptions—the same data fields that Respondents had previously produced in response to a Civil Investigative Demand. Enforcement Counsel served the subpoena on February 19, 2016. Wheeler Decl. ¶ 2. Respondents therefore were required to produce the material by March 21, which was actually 31 days after service because the 30th day fell on a Sunday. Instead of producing the material as ordered, Respondents moved for an extension on March 21 ("Motion"), the date the production was due, requesting an additional three weeks.

Respondents Have Not Explained Why They Cannot Produce the Material Required by the February 19 Order.

Respondents' motion has failed to provide detail sufficient to demonstrate a strong showing that denial would substantially prejudice their case. Respondents have made a last-minute, unsupported motion which, if granted, would give them 52 total days to produce the responsive data (although they knew the data's location for at least a week prior to the issuance of the subpoena), while leaving Enforcement Counsel only 21 days to analyze the data before the deadline for filing its summary disposition motion. Respondents rejected Enforcement Counsel's offer that they produce the material by April 4, which would have given Respondents two extra weeks while still allowing Enforcement Counsel to analyze the data. Respondents offered no explanation as to why they could not comply with a two-week extension but could with a three-week extension. Instead, Respondents simply assert that they cannot comply while providing sparse detail to explain why or what they did to try to comply. Respondents failed to explain why they cannot produce the same data fields they produced previously despite their representations to have preserved all the data used to create the previous file. Indeed, based on their motion, it seems that they cannot comply even by April 11 unless Enforcement Counsel writes the queries for them, despite the fact that they have refused to produce the full dataset to Enforcement Counsel or to describe what data is, and is not, included. Finally, Respondents have grossly mischaracterized the past interactions between counsel.

On February 12, 2016, counsel for Respondents represented to the Hearing Officer that Respondents had "preserved all data used to respond to the CID." Respondents' Reply to Bureau's Resp. to the Feb. 8, 2016 Ord. Req'ing the Bureau to

Submit Addt'l Info. Therefore, as of the 12th Respondents must have determined the location and the format of the data used to produce the Excel file in response to the CID. Otherwise it is unclear how they could have represented that they had preserved the material. Nonetheless, counsel for Respondents did not contact Enforcement Counsel regarding problems producing the data by the Order's 30-day deadline until three weeks after service (which was four weeks after having made the representation about preserving the data). Wheeler Decl. ¶ 3.

Even after they did contact Enforcement Counsel, Respondents consistently failed to provide any details about what they have done to attempt to meet the Order's deadline, what data they have, and why they cannot simply query the current data—either by re-running the prior queries or writing new ones—to extract from the current data set the same types of data they used to populate the fields they previously produced in the Excel file. Wheeler Decl. ¶¶ 4, 5, 7, 8, 11.

Indeed, rather than querying the data themselves to produce the fields from the prior Excel report, Respondents have tried to shift the burden of producing their data onto Enforcement Counsel—without even telling Enforcement Counsel what data they have. Respondents have claimed that they would run whatever queries Enforcement Counsel wants. *See, e.g.*, Wheeler Decl. ¶ 8, Mot. at 4. However, when Enforcement Counsel responded that any such queries likely would be based on the Excel file from the Order, which with the exception of two fields is the same data Respondents produced previously, Ord. at 7; Wheeler Decl. ¶ 9, Respondents simply re-stated that—although they allegedly preserved the data in question—they “cannot replicate, with certainty, the data fields reflected on the Excel spreadsheet.” Mot. at 4. Therefore, they demand Enforcement Counsel write the queries for them. *Id.* ¶ 8.

Respondents Have Refused to Produce the Entire Dataset.

Although the Order expressly states that Respondents may comply with the Order and subpoena by producing the relevant database, Ord. at 7, and Respondents claim to have loaded all of the relevant data into a dataset on a server in SAS format, Mot. at 4, Wheeler Decl. ¶ 6, Respondents have refused to produce the entire dataset to Enforcement Counsel. Wheeler Decl. ¶ 16. On March 21, after repeated attempts to understand what data Respondents had and why Respondents could not produce the same data they had previously produced, Enforcement Counsel asked counsel for Respondents whether they would be willing to comply with the Order and subpoena by simply producing the entire dataset, rather than demanding that Enforcement Counsel write queries for them. *Id.* ¶ 15. Counsel for Respondents refused. *Id.* ¶ 16.

Enforcement Counsel Is Not in a Position to Write Queries for Respondents.

Respondents are asking the impossible. Respondents have refused to produce the data set. Enforcement Counsel has not seen the data set, and Respondents have not even told Enforcement Counsel what data is in the data set or what data that was previously produced is not in the data set. But Respondents demand that Enforcement Counsel tell them what queries to run to produce the data required by the Order. Enforcement Counsel is not in a position to do anything other than request that Respondents produce the data required by the Order.

Respondents Fail to Mention that Enforcement Counsel Stated that They Would Not Oppose a Two-Week Extension.

Respondents also have grossly mischaracterized the past dealings between counsel regarding both this motion and prior requests for extensions. First, Respondents note that they raised issues for the first time on March 11. Mot. at 3;

Wheeler Decl. ¶ 3. However, Respondents fail to mention that on March 15 Enforcement Counsel stated that we would not oppose a motion to extend the deadline until April 4 provided that Respondents allowed us to review Respondents' draft motion first.

Wheeler Decl. ¶ 12; Ex. C. Enforcement Counsel reiterated these points on March 18 and 21. Wheeler Decl. ¶ 13. Counsel for Respondents refused to agree to an April 4 deadline and did not provide a draft motion before filing the instant motion. *Id.* ¶ 14. Second, Respondents state that Enforcement Counsel has "declined to reciprocate" their willingness to move deadlines. Respondents Mot. at 3 n.2. This is not true. For example, although it is true that Enforcement Counsel requested to move its expert's deposition four days because he had fallen ill after having to travel to India when his father passed away without warning, Wheeler Decl. ¶ 19, Ex. B, Respondents fail to mention that Enforcement Counsel previously had agreed to Respondents' request to the expert's deposition after the deadline in the scheduling order, Wheeler Decl. ¶¶ 17-18, Exs. A, B.

Conclusion

Respondents have repeatedly attempted to delay this proceeding, and Respondents' Motion here is another example. Respondents have given Enforcement Counsel no details on what data is, and is not, included in the current dataset, and they have refused to produce the dataset. Respondents also have provided no details on why they cannot reproduce the data used to populate the fields in the prior Excel file and virtually no details on precisely what they have done to try to comply with the Order. Instead they have made unsupported assertions that although they have loaded all of the data onto a server in SAS format, they simply cannot comply with the Order. Indeed, given the claims in the Motion, it is not clear how Respondents plan to produce the responsive data by April 11 either, as they claim to not be able to replicate the Excel file.

For all the reasons stated above, Enforcement Counsel respectfully requests that the Hearing Officer deny the motion and order Respondents to produce the subpoenaed material immediately.

Respectfully submitted,

Attorneys for Plaintiff
Consumer Financial Protection Bureau

ANTHONY ALEXIS
Enforcement Director

DEBORAH MORRIS
Deputy Enforcement Director

CRAIG COWIE
Assistant Litigation Deputy

s/Alusheyi J. Wheeler

Alusheyi J. Wheeler
Wendy J. Weinberg
Vivian W. Chum
1700 G Street NW
Washington, DC 20552
Phone: (202) 435-7786
Facsimile: (202) 435-7722
Email: alusheyi.wheeler@cfpb.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March 2016, I caused a copy of the foregoing Enforcement Counsel's Opposition to Respondents' Motion for an Extension of Time, along with the supporting declaration and exhibits, 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:

Allyson B. Baker, Esq.
ABBaker@venable.com

Peter S. Frechette, Esq.
PSFrechette@venable.com

Hillary S. Profita, Esq.
HSProfita@venable.com

Joanna P. Boyd, Esq.
JPBoyd@venable.com

Christine E. White
CEWhite@venable.com

/s/ Alusheyi J. Wheeler
Alusheyi J. Wheeler