

EXHIBIT H

UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:)	
)	ORDER DENYING IN PART
)	RESPONDENTS'
INTEGRITY ADVANCE, LLC and)	MOTION TO OPEN RECORD
JAMES R. CARNES,)	FOR A NEW HEARING
)	
Respondents.)	

Procedural History

On August 14, 2019, counsel for Respondents (RC) filed *Respondents' Motion to Open Record For A New Hearing (Motion)* (Doc. 229) and accompanying memorandum of law in support of the motion (Doc. 229A). In the memorandum, Respondents stated that they were merely identifying, but not asking for dispositive rulings on the issues therein, and that the memorandum did not contain their full arguments on the merits. Rather than addressing all the issues identified in the *Motion*, I chose to first address the issues related to the Statutes of Limitations,¹ followed by other issues which arose in the interim. On March 13, 2020, I issued a *Scheduling Order for Issues in Respondents' August 14, 2019, Motion*, in which I directed the parties to return to the issues raised in the *Motion* and set forth a briefing schedule. I ordered Respondents to file any supplemental brief in support of their motion no later than March 26, 2020.

On March 26, 2020, RC filed *Respondents' Supplemental Brief in Support of Their Motion to Open Record for a New Hearing* (Doc. 261). On April 9, 2020, Enforcement Counsel (EC) for the CFPB filed *Enforcement Counsel's Opposition to Respondents' Motion to Open Record for New Hearing* (Doc. 263). On April 15, 2020, RC filed a consolidated reply brief which addressed *inter alia Respondents' Motion to Open Record for a New Hearing* (Doc. 265).

Respondents' Motion

RC make four main arguments in the motion: 1) a new hearing is required by the Supreme Court's Ruling in *Lucia v. SEC*² and the CFPB Director's Order; 2) a new hearing is needed to assess witness credibility; 3) a new hearing is needed to supplement the record on issues where the

¹ The issues related to the Statute of Limitations have already been adjudicated and will not be addressed further in this Order.

² *Lucia v. SEC*, 128 S. Ct. 2044 (2018).

credibility determinations. Doc. 263 at 4. They assert that Respondents have not demonstrated that it is necessary to evaluate a particular witness' demeanor. *Id.* They further assert that it is unnecessary to disbelieve the testimony in order to find Respondent Carnes personally liable. *Id.* at 5. Furthermore, they assert that the prior ALJ's credibility determinations were based on the weight of the evidence and not on witnesses' demeanor. *Id.* at 7. They assert that recalling the witnesses would be cumulative.

As the CFPB Director stated in her remand order, I am to give no weight to nor presume the correctness of any prior opinions, orders, or rulings issued by the previous ALJ in this matter. Doc. 216 at 9. Therefore, whether the previous judge found some or all of the witnesses' testimony to be credible or not, and what method he used to do so, is totally irrelevant to my adjudication of this matter.

The case that RC cites refers to witness demeanor in the context of appeals courts granting deference to trial courts' credibility determinations because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985).

There is much discussion and disagreement in the legal and psychiatric community as to whether it is possible to determine whether someone is lying by evaluating their demeanor.¹¹ While demeanor is one factor that a judge *may* use to evaluate a witness' credibility, a judge is not *required* to utilize this factor. I do not find this factor to be reliable and I do **not** plan to consider it to determine credibility in this matter. I do not believe that I have any special power to determine whether someone is lying based on observing their demeanor and I believe it is possible for a dishonest person to portray an air of utter confidence, sincerity and seeming honesty, while an honest person can seem to be lying based on nervousness, gestures, and mannerisms that make them appear to be uncertain or untruthful. An exception to this is where someone is obviously joking or being sarcastic and means the opposite of what he or she says.¹²

The Merit Systems Protection Board has established a number of factors that a fact-finder may consider in assessing witness credibility. Specifically:

To resolve credibility issues, the trier of fact must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the

¹¹ *E.g.*, Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 Am. U. L. Rev. 1331 (2015); Honorable James P. Timony, *Demeanor Credibility*, 49 Cath. U. L. Rev. 903 (2000).

¹² If the parties can identify any specific instance of this in the record and want to bring it to my attention, I will consider it.