

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING)	RESPONDENTS' MOTION
File No. 2015-CFPB-0029)	TO STRIKE ENFORCEMENT
)	COUNSEL'S CONTROVERTED
In the matter of:)	ISSUES OF FACT AND
)	JUSTIFICATION FOR ITS
INTEGRITY ADVANCE, LLC and)	REJECTED PROPOSED
JAMES R. CARNES)	STIPULATIONS
)	

**RESPONDENTS' MOTION TO STRIKE ENFORCEMENT
COUNSEL'S CONTROVERTED ISSUES OF FACT AND
JUSTIFICATION FOR ITS REJECTED PROPOSED STIPULATIONS**

Respondents Integrity Advance, LLC and James R. Carnes move to strike Enforcement Counsel's Controverted Issues of Fact and Justification for Its Rejected Proposed Stipulations ("Controverted Facts") and attached exhibits.

On March 9, 2016, the Court issued an Order Directing Parties to Meet and Confer for the Purpose of Entering Into Joint Stipulations of Fact ("Order"), instructing the parties in the above-captioned proceeding to develop and file a joint stipulation of uncontested facts to inform oral arguments on Respondents' Motion to Dismiss the Notice of Charges. The Court also ordered that the parties submit a list of controverted issues of fact where the opposing party "proposes a stipulation which cannot be agreed to." Order at 1. Respondents so filed on March 23, and subsequently updated their filing on March 24 to include a filing under seal and a redacted public version. *See, e.g.*, Resp.'s List of Controverted Issues of Fact ("Resp.'s Cont. Issues"); Respondents' Motion for Leave to Amend List of Controverted Issues of Fact.

The Court ordered that the list of controverted issues of fact contain: (1) the party's objection to the proposed stipulation of fact; (2) the factual basis of the party's objection; and (3) a specific list of the legal authority that supports the party's position. *See id.* The Order *does not* contemplate either party's submission of an extensive list of purported evidence, including nearly 1,000 pages of materials. Nonetheless, the Bureau has made such a submission, which is improperly before the Court. Indeed, the Bureau's filing appears to be little more than a back-door way of untimely submitting materials that are not properly admitted into evidence or otherwise appended to a motion for summary judgment.

Respondents respectfully request that the Court strike this filing in its entirety and request that the Bureau re-file its Controverted Issues of Fact to conform to the letter and ostensible spirit of the Court's March 9 Order.

The Bureau's "Justifications for the Bureau's Proposed Stipulations," (the "Justifications") further undercut the joint stipulation process set out by this Court by withdrawing twelve proposed statements of fact. Those proposals were included in the final list of the Bureau's proposals shared with Respondents, leading Respondents to include the proposals as part of its List of Controverted Issues of Fact.¹ Moreover, it bears noting that most of those proposals address—directly—the issues before the Court in Respondents' Motion to Dismiss. Indeed, the fact that the Bureau "pulled" these proposed fact stipulations in the eleventh hour and without notifying Respondents, likely out of concern that the agency would be

¹ The parties exchanged finalized versions of their respective proposals to facilitate the drafting of responses pursuant to the Court's Order. At no point prior to the Bureau's actual filing did the Bureau indicate that additional proposals would be withdrawn. Counsel for Respondents drafted their List of Controverted Issues of Fact with the understanding that Enforcement counsel had shared its final list of proposals.

forced to argue prematurely its opposition to Respondents' Motion to Dismiss, underscores the improper nature of its entire filing.²

In filing its "Justifications," the Bureau seeks to place the ultimate burden in this proceeding on the Respondents, contrary to the Bureau's Rules. *See* 12 C.F.R. § 1081.303(a). Enforcement counsel's filing is unfair and untimely. Enforcement counsel seeks to litigate its entire case before this Court has issued a ruling on Respondents' Motion to Dismiss the Notice of Charges.

Indeed, Respondents are not obligated—much as the Bureau may prefer—to stipulate to the inferences and implications drawn from certain documents that it appears the Bureau obtained during its investigation. Nor are Respondents obligated to stipulate to Enforcement counsel's characterizations, general descriptions, and conclusions that may be drawn from materials produced to or otherwise obtained by the Bureau. Furthermore, Respondents cannot stipulate to matters of law that are properly addressed by the Court and not by any party. *See generally* Resp.'s Cont. Issues at 2–4.

To the extent that certain evidence may not be admissible at the hearing, a joint stipulation to such evidence or inferences drawn from it is improper. In partial support of its "Justifications," the Bureau cites Rule 303, which governs the admissibility of evidence at the hearing and provides several bases for which evidence may be inadmissible. 12 C.F.R. § 1081.303(b) ("Irrelevant, immaterial, and unreliable evidence shall be excluded"). The Rules provide for objections to the admissibility of evidence, which are then preserved (whether or not sustained) on the hearing record. *Id.* § 1081.303(e). But Rule 303 does not support the Bureau's

² Proposed stipulations of fact withdrawn for the first time in Enforcement counsel's "justifications" include: Bureau's Proposed Stipulations Nos. 97, 98, 142, 143, 144, 145, 148, 149, 165, 166, 167, and 168.

“Justifications” filing here, and such due process protections as Rule 303 provides would be lost if the Bureau were permitted to exceed the Court’s Order through Enforcement counsel’s “Justifications”.

Enforcement counsel seems to circumvent the policies underlying evidentiary rules, stipulations, and the Court’s Order. Stipulations by the parties do not fall within the evidentiary rules because factual stipulations are “admitted into evidence upon commencement of the hearing” unless the hearing officer directs otherwise.” *Id.* § 1081.303(f). The apparent purpose of the Court’s Order was to narrow factual issues and provide clarity regarding the upcoming oral arguments on the Respondents’ motion to dismiss. Enforcement counsel’s proposed stipulations of fact and accompanying “Justifications” undermine the apparent purpose of the Court’s Order—as well as the policy underlying stipulations generally—by seeking to admit via stipulation such a large amount of material.

At the present status of this proceeding—prior to a ruling on the Respondents’ Motion to Dismiss—the Bureau’s arguments regarding the admissibility of certain facts are untimely. The Bureau’s attempt to shortcut these arguments is without legal justification under such rules.

For the reasons stated above, Respondents respectfully request that the Court strike this filing in its entirety and request that the Bureau re-file its Controverted Issues of Fact. Alternatively, Respondents’ respectfully request that this Court strike Enforcement counsel’s “Justifications”, CFPB’s Cont. Issues at 10–65, as well as the accompanying lettered exhibits (Exhibit A and Exhibit B) and numbered exhibits (Exh. 1–59).³

³ Respondents request that this motion to strike apply to both the redacted and “under seal” versions of the Bureau’s filing and exhibits.

Respectfully submitted,

Dated: March 24, 2016

By: Allyson B. Baker

Allyson B. Baker, Esq.
Peter S. Frechette, Esq.
Hillary S. Profita, Esq.
Christine E. White, Esq.
VENABLE LLP
575 7th St. N.W.
Washington, D.C. 20004
(202) 344-4000

Attorneys for Respondents
Integrity Advance, LLC and James R. Carnes

CERTIFICATION OF SERVICE

I hereby certify that on the 24th day of March 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:

Deborah Morris, Esq.
Deborah.Morris@cfpb.gov

Craig A. Cowie, Esq.
Craig.Cowie@cfpb.gov

Alusheyi J. Wheeler, Esq.
Alusheyi.Wheeler@cfpb.gov

Wendy J. Weinberg, Esq.
Wendy.Weinberg@cfpb.gov

Vivian W. Chum, Esq.
Vivian.Chum@cfpb.gov

/s/ Peter S. Frechette

Peter S. Frechette, Esq.