

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 IN PART
AND DENYING IN PART
RESPONDENTS' OMNIBUS
MOTION IN LIMINE AND
RULINGS ON RESPONDENTS'
OBJECTIONS TO THE
BUREAU'S EVIDENCE

Hon. Parlen L. McKenna

On July 6, 2016, the parties filed their witness and exhibit lists and exchanged the exhibits they intend to introduce into evidence, pursuant to 12 C.F.R. § 1081.215(a) and my June 17, 2016 Order Revising Dates For Prehearing Submissions. On July 8, 2016, the parties stipulated to the admission of Bureau Exhibit EC-EX-065 and Respondents' Exhibits RX 001 and RX 002. These exhibits are hereby ADMITTED into evidence.

On July 11, 2016, Respondents filed objections to all remaining exhibits on the Bureau's prehearing exhibit list and an omnibus motion *in limine* to exclude certain evidence. The Bureau filed a response in opposition on July 13, 2016. My rulings as to each motion *in limine* contained within Respondents' omnibus motion, as well as to Respondents' objections to each individual exhibit, are set forth below.

Evidentiary Standard in a CFPB Administrative Proceeding

The Bureau's Rules of Practice set out the evidentiary standard to be used in administrative enforcement proceedings at 12 C.F.R. § 1081.303. The Federal Rules of Evidence do not control in this proceeding; although evidence admissible under the Federal Rules is also admissible here, "evidence that would be inadmissible under the Federal Rules of Evidence *may not* be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this part solely on that basis." 12 C.F.R. § 1081.303(b)(4) (emphasis added).

As a general rule, "relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law." 12 C.F.R. § 1081.303(b)(1). However, evidence that is irrelevant, immaterial, and unreliable evidence shall be excluded. *Id.* Furthermore, even evidence that is relevant may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues; if the evidence would be misleading; or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 12 C.F.R. § 1081.303(b)(2).

The rules regarding hearsay are also more relaxed in a CFPB administrative proceeding than under the Federal Rules of Evidence. In this proceeding, hearsay evidence is admissible "if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." 12 C.F.R. § 1081.303(b)(3). The rules specifically provide that, subject to the general admissibility standard, "transcripts of depositions, investigational hearings, prior testimony in Bureau or other proceedings, and any other form of hearsay shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay." *Id.*

As to any documents generated by Respondents and which come from their own files, the Rules of Practice provide that Respondents “are in the best position to determine the nature of [such] documents” and thus “the burden of proof is on the respondent to introduce evidence to rebut a presumption that such documents are authentic and kept in the regular course of business.” 12 C.F.R. § 1081.303(d)(4).

If an exhibit is excluded, the offering party is permitted to make an offer of proof, which will be part of the record. See 12 C.F.R. § 1081.303(e)(2). These exhibits are retained by the Office of Adjudication until the decision becomes final agency action or any judicial review is complete. 12 C.F.R. 1081.306(b).

Motion in Limine No. 1: Evidence Relating to Conduct that Pre-Dates July 21, 2011

Respondents ask me to exclude 33 of the Bureau’s exhibits because they are either dated before July 21, 2011 or concern conduct that occurred prior to that date. Respondents correctly assert that, as to the Bureau’s UDAAP claims, only conduct that occurred on or after the designated transfer date of July 21, 2011 is relevant. However, as to the TILA and EFTA claims, conduct that predates the designated transfer date is relevant. The TILA and EFTA claims have already been decided in the Bureau’s favor on summary disposition, and the substance of those claims will not be re-litigated at the hearing. However, the question of appropriate damages and penalties remains open as to all claims, including TILA and EFTA violations.

The Bureau correctly asserts that a document should not be excluded simply because it was dated prior to the designated transfer date. Some of the documents Respondents have objected to may contain potentially relevant information as to Respondent Carnes’ role at Integrity Advance, such as the degree of control he exerted over the company’s operations and

third-party contractors. This information, even if generated prior to July 21, 2011, has general relevance to whether Respondent Carnes bears any personal liability for the company's actions.

Some of these documents are also likely to contain information relevant to damages and penalties. The issue of a sanction for the TILA and EFTA claims is not limited to post-July 21, 2011 conduct. I will make a determination as to the allocation of any sanction to each claim found proved, and will ensure that only post-July 21, 2011 conduct is considered for any UDAAP violation.

Thus, I will DENY Respondents' motion to exclude all the listed documents. However, as set forth below in the individual rulings on Respondents' objections to the Bureau's exhibits, I am deferring ruling on the admissibility of certain exhibits until the hearing so a proper foundation may be laid.

In a footnote to Motion *in Limine* No. 1, Respondents renewed their motion to preclude Dr. Hastak from testifying at the hearing and to exclude his expert report. I have already ruled on the admissibility of Dr. Hastak's report and testimony, and Respondents have not raised any new issues beyond those already addressed in my previous Order. *See* Order Denying Respondents' Motion *in Limine* dated July 5, 2016. For the reasons set forth in that Order, Respondents' renewed motion is DENIED.

Motion *in Limine* No. 2: Consumer Complaints

Respondents also ask that I exclude all consumer complaints to the Better Business Bureau contained in proposed Exhibit EC-EX-075. Respondents claim these exhibits are inadmissible hearsay, are not relevant to the remaining issues, and do not bear satisfactory indicia of reliability. Alternately, Respondents ask that I bar introduction of any consumer complaints made prior to July 21, 2011 or concerning conduct prior to that date.

Conduct prior to July 21, 2011 is not relevant to the remaining UDAAP claims.

Moreover, the consumer complaints predating July 21, 2011 are unlikely to contain evidence that would assist me in determining Respondent Carnes' individual liability or damages. To the extent that the consumer complaints contain information about the loan amounts and total amounts paid by consumers, it is not sufficiently reliable evidence on which to base my calculations. I therefore GRANT Respondents' motion to exclude consumer complaints either made prior to July 21, 2011 or wholly concerning conduct that occurred prior to that date.

As to the complaints dated on or after July 21, 2011, I will DENY Respondents' motion. These complaints provide at least some indication of consumers' experiences with Integrity Advance's loans and business practices. I will make a determination as to the credibility and probative value of these complaints after the hearing, and will give them appropriate weight.

Respondents have also claimed that the Bureau causes undue burden by submitting all consumer complaints as a single exhibit. The Bureau has indicated it is willing to renumber them as separate exhibits. In light of the fact that some consumer complaints are admissible while others are not, I will direct the Bureau to add an additional identifier to each individual complaint, so they will be marked EC-EX-075a, EX-EX-075b, etc.

Motion in Limine No. 3: Investigational Hearing Transcripts

Respondents urge me to exclude the transcripts from the investigational hearings of James R. Carnes and Edward Foster. Respondents claim that these transcripts are inadmissible hearsay, that any probative value they may have is outweighed by the danger of unfair prejudice and potential for undue delay, and that presentation of these exhibits would be cumulative and a waste of time.

Respondents' reliance on Fed. R. Evid. 804(a) is misplaced. The Bureau's Rules of Procedure specifically state that transcripts of investigational hearings are admissible, provided they are relevant, material, and reliable. 12 C.F.R. § 1081.303(b)(3). These transcripts contain significant relevant and material information. They are also sufficiently reliable: they were transcribed by a certified court reporter, and both Mr. Carnes and Mr. Foster were assisted by counsel during the hearings.

As the Bureau points out, 12 C.F.R. § 1081.303(h), which covers prior sworn statements of witnesses, does not apply to Mr. Carnes because that rule explicitly does not apply to prior sworn statements of parties to the proceeding. I also note that both parties have previously relied on the transcripts of both investigational hearings, and those documents are already included in the record of this proceeding. See Bureau Motion for Summary Disposition Exhibits 3-4 and 6; Respondents' Motion for Summary Disposition Exhibits 2 and 5. Both Mr. Carnes and Mr. Foster are scheduled to testify at the hearing and I will give appropriate weight to both their live testimony and the investigational interview transcripts. However, the fact that live testimony may be given greater weight does not necessarily render the transcripts inadmissible. Given that I have already thoroughly reviewed the transcripts of both Mr. Carnes's and Mr. Foster's interviews, admitting them into evidence would cause no additional confusion of issues, delay, or waste of time. Respondents' Motion *in Limine* No. 3 is DENIED.

Motions *in Limine* No. 4 and 5: Declarations of Robert J. Hughes and Christopher Albanese

Respondents have asked me to exclude the declarations of two Bureau employees, which were also previously submitted as exhibits to the Bureau's Motion for Summary Disposition. Again, Respondents claim these documents constitute inadmissible hearsay because they are

unreliable and potentially confusing. Respondents also argue that these documents are not admissible as prior sworn statements under 12 C.F.R. § 1081.303(h).

Both Mr. Hughes and Mr. Albanese are employees of the Bureau, a party to the proceeding, and will testify in that capacity at the hearing. Thus, the rules applicable to prior sworn statements of nonparties do not apply to their declarations. Moreover, I do not find that these declarations are inherently unreliable or that they have the potential to confuse the issues such that their introduction would be unfair. Respondents will have the opportunity to cross-examine both witnesses at the hearing, and have also reserved the right to call any of the Bureau's named witnesses. If any issues exist as to the witnesses' credibility or the reliability of the information they have provided, Respondents may probe them at hearing and I will make an appropriate determination about the weight to give both the testimony and the declarations.

Respondents' Motions *in Limine* 4 and 5 are DENIED.

Motion *in Limine* No. 6: Loan Management Systems Operations Manual and Section 7.9 of the Loan Management System Operations Manual

Respondents ask me to exclude the TranDotCom Loan Management System Manual and an excerpt from that manual. Respondents assert that it is irrelevant because it is dated March 2008, which is before Integrity Advance started operating and before the designated transfer date. However, as Respondents acknowledge, use of the manual may have been persistent. *See* Respondents' Omnibus Motion at 5, fn. 2 and 11, fn. 4. Moreover, in the Bureau's response Enforcement Counsel represents that Respondents provided the manual in response to the subpoena for a data dictionary. Respondents have not provided any information that would lead me to believe it is inauthentic or unreliable. *See* 12 C.F.R. § 1081.303(d)(4). While it appears the manual is sufficiently reliable and relevant, I will reserve ruling on the admissibility of the

manual and excerpt until the hearing, when a proper foundation can be laid. However, at this time, Respondents' Motion *in Limine* No. 6 is DENIED.

Respondents have requested that this document, if admitted, be filed under seal because it contains confidential information. This request is GRANTED.

Motion *in Limine* No. 7: Publications

The Bureau has identified three publications as exhibits, two from academic sources and one from a non-profit organization. These publications relate to the use of electronically created checks. In my July 1, 2016 Order Granting in Part and Denying in Part the Bureau's Motion for Summary Disposition, I specifically identified the use of remotely created checks as an issue requiring additional documentary and testimonial evidence at the hearing. Respondents argue that, in order for these publications to be admissible, a witness must testify about the "relative significance of these publications as learned treatises," and/or the authors must be called as witnesses. Respondents also argue that these exhibits would be prejudicial or confusing because the authors express individual points of view.

The NACHA Table of ACH Return Reason Codes appears to be a widely-used document containing relevant, valuable information. NACHA governs the ACH network and establishes the rules for all institutions using the network, thus its publications are likely reliable. Rather than confusing the issues, this document is likely to assist me in better understanding the ACH process and how electronic transfers are used.

The academic publications, while containing the authors' personal viewpoints, also contain valuable information about how remotely created checks operate. As I have previously noted, this is not a jury trial and I am capable of determining what information is relevant and what is not. Respondents' Motion *in Limine* No. 7 is DENIED.

Motion *in Limine* No. 8: FTC Rulemaking

Respondents ask me to exclude a Federal Register notice published by the FTC on the grounds that it is irrelevant, and is neither material nor reliable. The Bureau states that the rulemaking contains important background information about remotely created checks. It also appears that there is a discrepancy as to whether the Bureau intends to offer the proposed rulemaking, as stated in its evidentiary list, or the final rulemaking, as it states in the Objection to Respondents' Motion *in Limine*.

I have reviewed the final notice of rulemaking, 80 FR 77519 (Dec. 12, 2015), and it appears to contain highly relevant information about how remotely created checks operate. I see no merit in Respondents' argument that the notice is unreliable. Notices published in the Federal Register are publicly available and, had the Bureau requested that I take official notice instead of offering it as an exhibit, I could have appropriately done so. *See* 12 C.F.R. § 1081.303(c).

Respondents' Motion *in Limine* No. 8 is DENIED.

Rulings on Respondents' Objections to Exhibits

#	Description of Exhibit(s)	Ruling
1-14	Completed consumer application and loan agreements	<p>Hearsay objections are overruled. The consumers who completed these agreements are not required to testify at hearing. These documents appear to have been kept in the regular course of business and are presumed reliable; they also contain relevant, material information.</p> <p>Relevance objections are overruled. Conduct prior to July 21, 2011 is relevant to the sanction for the TILA and EFTA violations, though not UDAAP violations.</p> <p>ADMITTED.</p>

15-41	Hayfield income statements and balance sheet	<p>Hearsay objections are overruled. These documents appear to have been kept in the regular course of business and are presumed reliable.</p> <p>These documents may contain information relevant to Mr. Carnes' role as CEO and/or relevant to the appropriate sanction for any violations found proved. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be laid.</p>
42-44	Integrity Advance income statements and balance sheets	<p>Hearsay objections are overruled. These documents appear to have been kept in the regular course of business and are presumed reliable.</p> <p>These documents may contain information relevant to Mr. Carnes' role as CEO and/or relevant to the appropriate sanction for any violations found proved. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be laid.</p>
45-47, 91	Hayfield tax documents	<p>Hearsay objections are overruled. These documents appear to have been kept in the regular course of business and are presumed reliable.</p> <p>These documents may contain information relevant to Mr. Carnes' role as CEO and/or relevant to the appropriate sanction for any violations found proved. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be laid.</p>
48-49	Hayfield partnership distributions to Willowbrook	<p>Hearsay objections are overruled. These documents appear to have been kept in the regular course of business and are presumed reliable.</p> <p>These documents may contain information relevant to Mr. Carnes' role as CEO and/or relevant to the appropriate sanction for any</p>

		violations found proved. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be laid.
50	Asset purchase agreement between Hayfield and EZ Corp.	Hearsay objections are overruled. These documents appear to have been kept in the regular course of business and are presumed reliable. This document may contain information relevant to Mr. Carnes' role as CEO and/or relevant to the appropriate sanction for any violations found proved. However, I will defer ruling on its admissibility until the hearing, when a proper foundation can be laid.
51-54, 83	Lead purchase agreements	These documents may contain information relevant to Mr. Carnes' role as CEO and/or relevant to the appropriate sanction for any violations found proved. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be laid.
55	Signature card for First Bank of Louisburg	This document may contain information relevant to Mr. Carnes' role as CEO. However, I will defer ruling on its admissibility until the hearing, when a proper foundation can be laid.
56	ACH origination agreement between MoneyGram and Integrity Advance	Objections overruled. This document is relevant to show how ACH transfers were effectuated in connection with Integrity Advance loans. Respondents assert that this exhibit contains unredacted PII. It shall be filed under seal. ADMITTED.
57-58	Invoices from ClearVox to Integrity Advance	Objections overruled. The interactions between Integrity Advance and its third-party contractors are relevant to the issues remaining open in this proceeding.

		ADMITTED.
59-64	Loan document templates	Hearsay objections are overruled. These documents appear to have been kept in the regular course of business and are presumed reliable. ADMITTED.
66	Description of Hayfield entities	Objection overruled. This document is relevant to the structure of Integrity Advance, including Mr. Carnes' role as CEO. ADMITTED.
67	Hayfield organizational chart	Objection overruled. This document is relevant to the structure of Integrity Advance, including Mr. Carnes' role as CEO. ADMITTED.
68-69	Investigational hearing transcripts	Objections overruled; see discussion of Motion <i>in Limine</i> No. 3, above. ADMITTED.
70-71	Interrogatory responses	These documents may contain information relevant to the issues remaining for decision. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be laid.
72-73	Declarations of Bureau employees	Objections overruled; see discussion of Motion <i>in Limine</i> No. 4, above. ADMITTED.
74	Nov. 1, 2011 – Dec. 9, 2011 emails regarding a consumer refund requested by the New Hampshire Banking Department	Hearsay and relevance objections overruled. However, due to the assertion that this document contains privileged material and has been the subject of a repeated claw-back, I will defer ruling on admissibility until the hearing.
75	Consumer complaints produced by the Better Business Bureau on June 10, 2014 pertaining to ACH	Hearsay objections overruled. Relevance objections sustained in part and overruled in part; see discussion of Motion <i>in Limine</i>

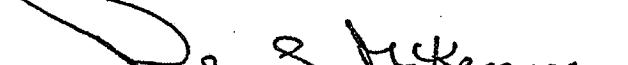
	stop/revocation and RCC issues	No. 2, above. ADMITTED IN PART AND EXCLUDED IN PART.
76	June 10, 2014 email to Alusheyi Wheeler attached to Better Business Bureau complaints	Hearsay and relevance objections overruled for the same reasons set forth in the discussion of Motion <i>in Limine</i> No. 2, above. ADMITTED.
77	ClearVox Facilitators Guide	Ruling deferred until hearing; while this exhibit may contain information relevant to Respondent Carnes' role as CEO of Integrity Advance, a proper foundation must be laid for its admission.
78	Integrity Advance Procedures Manual	Ruling deferred until hearing; while this exhibit may contain information relevant to Respondent Carnes' role as CEO of Integrity Advance, a proper foundation must be laid for its admission.
79 and 81	Loan Management System Operations Manual and excerpt from the manual	Ruling deferred until hearing; while this exhibit may contain relevant information, a proper foundation must be laid for its admission. See discussion of Motion <i>in Limine</i> No. 6, above.
80	Data dictionary produced by Integrity Advance in response to February 19, 2016 subpoena for data	Hearsay objection overruled. This exhibit is relevant and reliable. ADMITTED.
82	NACHA Table of ACH Return Reasons Codes	Relevance objection overruled; the information contained in this document is likely to be highly relevant. See also discussion of Motion <i>in Limine</i> No. 7, above. ADMITTED.
84	Hayfield Investment Partners, LLC Consolidated Income Statement YTD through September 2010	These documents may contain information relevant to Mr. Carnes' role as CEO and/or relevant to the appropriate sanction for any violations found proved. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be

		laid.
85	January 19, 2009 debt collection agreement	These documents may contain information relevant to Mr. Carnes' role as CEO and/or relevant to the appropriate sanction for any violations found proved. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be laid.
86	March 21-23, 2011 emails between ClearVox and Integrity Advance employees	These documents may contain information relevant to Mr. Carnes' role as CEO and/or relevant to the appropriate sanction for any violations found proved. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be laid.
87	February 21-25, 2011 emails between James Carnes, Edward Foster, and ClearVox employees	These documents may contain information relevant to Mr. Carnes' role as CEO and/or relevant to the appropriate sanction for any violations found proved. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be laid.
88	November 13-14, 2008 emails between James Carnes and ClearVox employees	These documents may contain information relevant to Mr. Carnes' role as CEO. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be laid.
89-90	February 20 and 21, 2008 emails between ClearVox employee(s) and James Carnes	These documents may contain information relevant to Mr. Carnes' role as CEO. However, I will defer ruling on their admissibility until the hearing, when a proper foundation can be laid.
92	Expert Report of Dr. Manoj Hastak	Objections overruled; see July 5, 2016 Order Denying Respondents' Motion <i>in Limine</i> and discussion of Motion <i>in Limine</i> No. 3, above. ADMITTED.
93	Respondents' December 11, 2015 Answer and Affirmative Defenses to Notice of Charges	This document has been filed as a pleading in the current matter and either party may refer to and rely on it. However, Respondents' argument that its probative

		value is substantially outweighed by confusion of the issues and that it is cumulative has no merit. ADMITTED
94	"An Examination of Remotely Created Checks" by Ana R. Cavazos-Wright	Hearsay objection overruled. This publication contains information relevant to Count VII. It is a publicly-available document with indicia of reliability. See also discussion of Motion <i>in Limine</i> No. 7, above. ADMITTED.
95	Excel spreadsheet entitled "Check_Draft_Cleared_Payments" produced on May 5, 2016 in response to February 19, 2016 subpoena for data	Hearsay objection overruled; document otherwise meets the admissibility standard for administrative proceedings. ADMITTED.
96	16 C.F.R. Part 310: Telemarketing Sales Rule: Federal Register Notice	This is a publicly available document containing information relevant to Count VII. See discussion of Motion <i>in Limine</i> No. 8, above. ADMITTED.
97	Charts containing Integrity Advance values from transaction data produced in response to February 19, 2016 subpoena for data	Hearsay objection overruled. See also 12 C.F.R. § 1081.303(d)(3) ("Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the hearing officer's discretion, be used with or without being admitted into evidence."). ADMITTED.
98	"A Guide to Remotely Created Checks" by Dave Mercurio and Angie Spitzley	Hearsay objection overruled. This publication contains information relevant to Count VII. It is a publicly-available document with indicia of reliability. See also discussion of Motion <i>in Limine</i> No. 7, above.

		ADMITTED.
99	May 5, 2016 email from Allyson Baker to Vivian Chum and others	Hearsay objection overruled; document otherwise meets the admissibility standard for administrative proceedings. ADMITTED.
100	Consumer #21292653 Transactions on Integrity Advance \$500 loan #54158546	Hearsay objection overruled. Respondents have not shown that this document is inauthentic or not a business record. See 12 C.F.R. § 1081.303(d)(4). This exhibit contains information highly relevant to Count VII and the risk of confusion is low. ADMITTED.
101	Integrity Advance consumer transaction data produced in response to February 19, 2016 subpoena for data	Hearsay objection overruled; document otherwise meets the admissibility standard for administrative proceedings. ADMITTED.

SO ORDERED.



Hon. Parlen L. McKenna
Administrative Law Judge
United States Coast Guard

Done and dated this 15th day of July, 2016 at
Alameda, California.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE SERVED THE ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' OMNIBUS MOTION IN LIMINE AND RULINGS ON RESPONDENTS' OBJECTIONS TO THE BUREAU'S EVIDENCE (2015-CFPB-0029) UPON THE FOLLOWING PARTIES AND ENTITIES IN THIS PROCEEDING AS INDICATED IN THE MANNER DESCRIBED BELOW:

Via Fax and email: D05-PF-ALJBALT-ALJDocket

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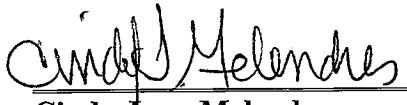
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Done and dated this 15th day in July, 2016
Alameda, California


Cindy June Melendres
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Paralegal Specialist to the
Hon. Parlen L. McKenna