

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING)	RESPONDENTS' RESPONSE TO ENFORCEMENT COUNSEL'S NOTICE OF PROPOSED REMEDY TO CURE PREJUDICE
File No. 2015-CFPB-0029)	
In the matter of:)	
INTEGRITY ADVANCE, LLC and)	
JAMES R. CARNES)	

**RESPONDENTS' RESPONSE TO ENFORCEMENT COUNSEL'S NOTICE OF
PROPOSED REMEDY TO CURE PREJUDICE**

Respondents Integrity Advance, LLC and James R. Carnes (collectively, “Respondents”) respectfully submit this response to Enforcement Counsel’s Notice of Proposed Remedy to Cure Prejudice. Enforcement Counsel proposes to introduce new evidence to purportedly cure some undefined prejudice that the Bureau suffered as a result of Respondents’ proper rebuttal to Robert J. Hughes’ testimony. Enforcement Counsel’s proposal should be denied for the following reasons.

First, Dr. Xiaoling Lim Ang’s testimony and summary exhibits were presented as rebuttal to Mr. Hughes’ testimony; Enforcement Counsel has suffered no prejudice. Indeed, *as a rebuttal witness*, Dr. Ang observed Mr. Hughes’ testimony and critiqued Mr. Hughes’ analysis. As Dr. Ang testified, she started from the same analytical premises as Mr. Hughes, her critiques were limited solely to Mr. Hughes’ analysis, and her calculations derived only from the *exact same data set* on which Mr. Hughes’ relied. Nevertheless, Enforcement Counsel starts from the

proposition that it has suffered prejudice as a result of Dr. Ang's rebuttal testimony and summary exhibits introduced at the hearing. To this end, Enforcement Counsel mischaracterizes the record when it vaguely asserts that it "did not have sufficient opportunity to prepare its response to Dr. Ang or the new exhibits." Crucially, Dr. Ang's testimony and exhibits do not derive from new information, and Enforcement Counsel suffered no prejudice.

Moreover, Enforcement Counsel, which unquestionably bears the burden of proof in this matter, introduced evidence on the second day of a three day hearing that it had not previously disclosed (EC-EX-102) to Respondents. Indeed, Enforcement Counsel acknowledged to the Court that Mr. Hughes or his team had created this new exhibit, consisting of new calculations, *the night before*. This was the case, even though Enforcement Counsel had initiated an investigation more than three years earlier, had obtained the underlying data several months earlier, and had been on notice that nearly three decades worth of case law mandates that its theory of damages address cognizable consumer injury.

Dr. Ang's testimony nonetheless incorporated a response to this newly-created evidence *as rebuttal* to Mr. Hughes. Enforcement Counsel cannot credibly argue that it suffered prejudice by virtue of a rebuttal Mr. Hughes, who testified about his late-disclosed analysis. Under Enforcement Counsel's logic, the mere presentation of any testimony or exhibit that responds to its witness's testimony is prejudicial. This, of course, is not the law.

In addition, at the hearing the Court offered to defer Enforcement Counsel's cross-examination of Dr. Ang until it had an opportunity to review the rebuttal testimony she had provided. Enforcement Counsel took time to review and digest Dr. Ang's testimony and chose then to proceed to cross-examine Dr. Ang during the second day of the hearing. Now, having had the benefit of cross-examining Dr. Ang, Enforcement Counsel seeks to introduce sur-rebuttal

evidence in the form of a new declaration and exhibits. Allowing Enforcement Counsel to expand its case-in-chief with new testimony and exhibits after Enforcement Counsel rested would greatly prejudice Respondents.

Second, Enforcement Counsel patently mischaracterizes the record by asserting that Respondents “late-filed” their witness list and exhibits. The Court explicitly held in its pre-hearing order that rebuttal witnesses did *not* have to be disclosed. July 15, 2016 Order on Enforcement Counsel’s Objections to Respondents’ Proposed Exhibits and Witnesses at 5 (“I am also DENYING the Bureau’s request to preclude Respondents from calling rebuttal and impeachment witnesses. It is well established in administrative law that rebuttal and impeachment witnesses do not need to be named in advance.”) (citing Fed. R. Civ. P. 26(a)(1)(A)(ii); *Weber v. Twin Bridges School Dist.*, No. CV-05-83-BU-RFC, 2010 WL 2425984 (D. Mon. June 11, 2010)). Respondents were under no obligation to disclose rebuttal witnesses or evidence before the hearing. Nevertheless, Enforcement Counsel is imputing some procedural significance – which it claims rises to the level of prejudice – to a request from the Court that the parties *estimate* the general number of rebuttal witnesses and exhibits for purposes of estimating the length of the hearing. Respondents complied with the Court’s request to the best of their knowledge at the time, and supplemented their response with more information as it became available. Enforcement Counsel has suffered no prejudice as a result.

Third, Enforcement Counsel now seeks to re-open its case-in-chief and take a second bite at the apple to fill in its glaring holes. Enforcement Counsel has the burden of proof. And it cannot, more than one week after resting, manufacture prejudice where none exists in order to justify the presentation of new testimony and exhibits. If Enforcement Counsel is permitted to submit new evidence after having rested its case-in-chief, Respondents will be deprived of their

due process right to oppose and rebut such evidence. It follows that if Enforcement Counsel presents new testimony and exhibits to the Court, then Respondents must have the right to respond with supplemental exhibits, a declaration from Dr. Ang, and an opportunity to cross-examine Mr. Hughes during an in-person proceeding.

For the foregoing reasons, Respondents' respectfully request that the Court deny Enforcement Counsel's request to introduce new evidence.

Respectfully submitted,

Dated: July 29, 2016

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CERTIFICATION OF SERVICE

I hereby certify that on the July 29, 2016, I caused a copy of the foregoing Request 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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