

**UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU**

**ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029**

In the Matter of:)	ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE TESTIMONY OF JOSEPH BARESSI
INTEGRITY ADVANCE, LLC and)	
JAMES R. CARNES,)	
Respondents.)	
)	
)	

**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION
TO STRIKE TESTIMONY OF JOSEPH BARESSI**

On July 1, 2016, the Administrative Law Judge (ALJ) stated, in the *Order Granting in Part and Denying in Part Bureau's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition*, that "the record must be supplemented with additional information about remotely created checks before I can make appropriate findings. This is a poorly understood mechanism for effectuating debits from a bank account." *Order* at 43 (Dkt. 111).¹ In response to the ALJ's request, Enforcement Counsel disclosed Joseph Baressi as a witness on July 6, 2016, the

¹ The ALJ's request that the record be supplemented was well within the rights of a Hearing Officer, pursuant to the Rules of Practice for Adjudicative Proceedings, to "direct further proceedings in the action" in the course of granting partial summary disposition (12 C.F.R. § 1081.213) and to exercise "authority ... to regulate the course of a proceeding" (12 C.F.R. § 1081.104).

deadline for filing witness lists, and indicated that Mr. Baressi would testify about remotely created checks (RCCs). At trial, Mr. Baressi relied on his experience as a financial services project leader at the Federal Reserve Board and an attorney-advisor in the CFPB's Regulations Office to provide testimony about what RCCs are and how they operate.

Mr. Baressi was never offered as an expert. During the hearing, Respondents' counsel inquired into the scope of Mr. Baressi's testimony, and Enforcement Counsel reiterated that he was not being offered as an expert, explaining “[h]e will be offering general knowledge testimony on what RCC's are and how they work, not opinion testimony. And he will not opine about the specifics of Integrity Advance's use of RCC's.” Tr. II 167:16-19.² In response, Respondents' counsel indicated she did not object to Mr. Baressi's testimony “to the extent his testimony is relegated to the scope” described. Tr. II 168:4-7.

As the record reflects, Mr. Baressi, in fact, testified as to what constitutes an RCC and how the product works. Although Respondents make vague claims of undue prejudice, they have not articulated how they have been prejudiced nor have they shown that any prejudice is unfair and outweighs the probative value of the testimony. Thus, Enforcement Counsel respectfully requests that the ALJ deny Respondents' motion to strike Mr. Baressi's testimony.

Mr. Baressi's Testimony Was Admissible under the Bureau's Rules of Practice for Adjudication Proceedings

Respondents first contend that Mr. Baressi's testimony was impermissible opinion testimony from a lay witness, citing Federal Rule of Evidence (FRE) 701.

² Enforcement Counsel cites throughout to the corrected hearing transcript provided by the Court to counsel on August 10, 2016.

Respondents assert the Bureau's Rules of Practice for Adjudication Proceedings are silent on how opinion testimony should be used. However, Rule 303(b)(1) provides the standard for admission of evidence—"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. Irrelevant, immaterial, and unreliable evidence shall be excluded." 12 C.F.R. § 1081.303(b)(1). No provision of the adjudicatory rules indicates that the admissibility of purportedly opinion testimony should be analyzed utilizing any standard other than Rule 303(b). Indeed, the adjudicatory rules provide that "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). Accordingly, Respondents' reliance on the FRE 701 standard is misplaced.

The relevant inquiry is whether Mr. Baressi's testimony was admissible under Rule 303(b), and it clearly is. The Respondents' use of RCCs was one of the issues being tried, and Mr. Baressi's testimony simply provided background information on RCCs. Further, the testimony was responsive to the ALJ's request for more information about RCCs. For these reasons, the testimony was relevant and material.

Despite Respondents' claims, there is no unfair prejudice to Respondents pursuant to 12 C.F.R. § 1081.303(b)(2). Respondents claim that Mr. Baressi's testimony implied that RCCs are used to engage in fraudulent conduct, thereby prejudicing Respondents. Enforcement Counsel has repeatedly stated that it is not our position that Respondents used RCCs to engage in fraudulent conduct. Fraud is not an element of the Count VII unfairness claim, and Enforcement Counsel does not need to show fraud in order to prevail on that claim. Mr. Baressi clearly testified that he had not reviewed

Integrity Advance's practices, and at no point did he testify regarding Integrity Advance specifically. Respondents have provided no evidence that Mr. Baressi's testimony risks causing the ALJ to reach a decision on an improper basis.³

Mr. Baressi's testimony has probative value. General information about RCCs provides context for the ALJ's consideration of the unfairness claim arising out of Respondents' use of RCCs. Respondents have failed to identify what prejudice they have suffered, and certainly have not established an unfair prejudice that outweighs the probative value of Mr. Baressi's testimony.

Mr. Baressi Did Not Provide Impermissible Lay Opinion Testimony

Even if FRE 701 applied here, Mr. Baressi did not provide lay opinion testimony in contravention of that rule. Respondents' contention regarding opinion testimony is premised on Respondents' unsupported assertion that Mr. Baressi offered opinion—not fact—testimony about RCCs. Respondents' assertion that Mr. Baressi's overview of RCCs is opinion testimony is supported by neither the law nor the record.

Mr. Baressi, relying on experience working on RCC issues as a financial services project leader at the Federal Reserve Board and an attorney-advisor in the CFPB's Regulations Office, provided facts about what RCCs are, how they operate, and how they differ from other financial products such as regular checks, ACH debits, and credit cards. Tr. II 165:3-192:17. In addition, he testified about the mechanics of how payees create RCCs on behalf of consumers and testified about issues with RCCs that the Federal Reserve faced during his time there. *Id.* Finally, having responded to consumer

³ In fact, contrary to Respondents' claim that Mr. Baressi's testimony could be misconstrued as implying that RCCs are used to engage in fraudulent conduct (Mot. at 6), at trial, the ALJ assured Respondents that he did not view Mr. Baressi's testimony to imply that. Tr. III 170:18-23.

complaints about RCCs at the Federal Reserve, Mr. Baressi described consumer issues with RCCs that he observed. *Id.* In sum, Mr. Baressi properly testified to general facts about RCCs based on his experience gained during the course of his career.⁴ See, e.g., *United States v. Caballeros*, 277 F.3d 1235, 1247 (10th Cir. 2002) (witnesses who testified about “INS procedures and operations of which they had first-hand knowledge ... expressed neither a lay nor an expert opinion, as distinguished from a statement of fact as to what they had witnessed during their respective careers.”); *Nicastle v. Adams County Sheriff’s Office*, No. 10-CV-00816-REB, 2011 WL 1655547 at *4 (D.Colo April 29, 2011) (concluding that testimony addressing law enforcement administration, policies, what the policies mean in practice, and how the practices differ from actual policy was fact testimony to which FRE 702 was not applicable).

Mr. Baressi’s broad overview of the features and functions of this financial product, based on his experience, is fact testimony. See, e.g. *Silver State Intell. Techs., Inc. v. Garmin Int’l, Inc.*, No. 2:11-CV-01578-GMN, 2015 WL 2152658 at *4 (D.Nev. May 7, 2015) (Descriptions of “what features and functions are contained in ... products and how they operate” is fact testimony that may be presented at trial). Indeed, Mr. Baressi did not provide any testimony about Respondents’ use of RCCs, or opine on whether Respondents’ use of RCCs was proper. As Respondents admit, Mr. Baressi did not testify about facts pertaining to the elements of Respondents’ unfair use of RCCs (Mot. at 5), but instead provided a general overview of RCCs to aid the ALJ in understanding this financial product. Thus, Respondents’ claim that Mr. Baressi offered improper opinion testimony as a lay witness must fail.

⁴ In fact, the ALJ instructed Mr. Baressi, during his testimony, to limit his answers to facts based on his personal knowledge. Tr. II 179:15-24.

Further, under FRE 701 lay opinion testimony is permissible where it concerns opinions and inferences “(a) rationally based on the witness’s perception” and “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” Mr. Baressi repeatedly testified that he had “direct professional knowledge” of RCCs (Tr. II 179:21-22) and that his testimony was based on his personal knowledge and first-hand experience with RCCs (Tr. II 166:16-21; Tr. II 168:17-169:20; Tr. II 177:12-17; Tr. II 178:11-17; Tr. II 183:6-11). His testimony, provided in response to the ALJ’s request for more information about RCCs, was intended to provide background information and respond to the ALJ’s specific request to supplement the record with additional information about RCCs. Thus, even if any part of Mr. Baressi’s testimony included his opinion (which Enforcement Counsel argues it does not) that testimony would be permissible lay opinion testimony predicated on Mr. Baressi’s personal knowledge, observations, and experiences in the financial services industry. See, e.g. *Argo Air Assoc. Inc. v. Houston Casualty Co.*, 128 F.3d 1452, 1455-56 (11th Cir. 1997) (witness testimony on opinions about why airplane leasing company’s insurance rates and premiums increased, based on personal observations, knowledge of, and experience in the aviation industry, was lay opinion testimony); *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 263 (5th Cir. 1980) (testimony pertaining to whether a business relationship existed was admissible where the deponent’s “inference was predicated upon conduct he observed personally, the inference is one that a normal person might draw from those observations, and it is an inference that the district court could ... consider helpful in the determination of a disputed fact.”). “As long as a witness’s opinion is rationally based on his perception, that testimony is not barred by Fed. R.Evid. 701.” *Joy Mfg. Co. v. Sola Basic Industries, Inc.*, 697 F.2d 104, 111-12 (3rd

Cir. 1982) (*quoting* 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶602[01] (1981)) (witness opinion testimony about the percentage of downtime at heat treating facility was proper lay opinion testimony based on witness's extensive personal knowledge about heat treating facility's furnace operation gained from on-the-job observations).

Accordingly, even if FRE 701 applied to these proceedings, Mr. Baressi's testimony would be admissible. Given the testimony would be admissible under the Federal Rules of Evidence, it is also admissible in this proceeding.⁵

The Rules for Timely Disclosure of Expert Witness Are Not Applicable to Mr. Baressi

As discussed above, Mr. Baressi provided fact testimony based on his experience in the financial services industry. In keeping with this proceeding's scheduling order, on July 6, 2016, Mr. Baressi was timely disclosed as a fact witness for Enforcement Counsel who would provide testimony about RCCs. *EC Witness List* (Dkt. 115). The rule governing timely disclosure of *expert* testimony on which Respondents rely, 12 C.F.R. § 1081.210, applies only to opinion testimony of an expert witness and is not applicable here.

Conclusion

Following Mr. Baressi's testimony at trial, Respondents made an oral motion, on July 21, 2016, to have his testimony struck. The ALJ denied Respondents' motion on that day. Respondents now attempt, without any support, to paint Mr. Baressi's fact testimony as improper opinion testimony or untimely expert testimony. They also seek, again without support, to construe Mr. Baressi's testimony as irrelevant, not material, or

⁵ The Rules of Adjudication provide that “[e]vidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this part.” 12 C.F.R. § 1081.303(b)(4).

unduly prejudicial. But as seen above, Respondents have not provided evidence to support their position and therefore have not shown any reason why Mr. Baressi's testimony should be struck from the record in this proceeding. For all the reasons stated above, Enforcement Counsel respectfully requests that the Administrative Law Judge deny Respondents' renewed Motion to Strike Testimony of Joseph Baressi.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August 2016, I caused a copy of the foregoing Enforcement Counsel's Opposition to Respondents' Motion to Strike Testimony of Joseph Baressi 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:

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