

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING)
File No. 2015-CFPB-0029) **MOTION TO STRIKE TESTIMONY
OF JOSEPH BARESSI**
In the matter of:)
INTEGRITY ADVANCE, LLC and)
JAMES R. CARNES)

)

RESPONDENTS' MOTION TO STRIKE TESTIMONY OF JOSEPH BARESSI

Respondents Integrity Advance, LLC and James R. Carnes (collectively, "Respondents") respectfully renew their previous objections as to the testimony of Enforcement Counsel's witness Joseph Baressi and move to strike hearing testimony elicited from Mr. Baressi. Per the Court's instructions, the parties met and conferred telephonically on August 4, 2016 and also over email on August 4 and August 5.

Respectfully submitted,

Dated: August 5, 2016

By: Allyson B. Baker

Allyson B. Baker, Esq.
Danielle R. Foley, Esq.
Peter S. Frechette, Esq.
Andrew T. Hernacki, 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

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**MEMORANDUM IN SUPPORT OF MOTION STRIKE
TESTIMONY OF JOSEPH BARESSI**

Respondents Integrity Advance, LLC (“Integrity Advance”) and James R. Carnes (“Mr. Carnes”) (collectively, “Respondents”) submit this memorandum in support of their motion to strike hearing testimony elicited from Enforcement Counsel’s witness Joseph Baressi.

Excluding or striking from the record improper evidence is a critical aspect of the construction of the hearing record in this proceeding. Enforcement Counsel’s entire line of questioning of Mr. Baressi was improper and prejudicial. Given the intertwining and comprehensive nature of the various issues with Mr. Baressi’s testimony, striking the entire line of questioning is warranted.¹ Mr. Baressi’s testimony was improper and prejudicial for, *inter alia*, the reasons listed below:

¹ In the alternative to striking the entire line of questioning, Respondents identify below portions of Mr. Baressi’s testimony that should be stricken. During the parties’ meet and confer, Enforcement Counsel indicated that it does not agree that Mr. Baressi’s testimony should be struck in its entirety, but noted that it would not object to striking the redirect testimony.

- **Improper opinion testimony by a lay witness**
- **Untimely disclosure of an expert witness**
- **Irrelevant testimony**
- **Unduly prejudicial**

Improper opinion testimony by a lay witness: It is without doubt that Enforcement Counsel elicited testimony regarding Mr. Baressi's opinions regarding remotely created checks ("RCCs"). Such opinion testimony from a non-expert is only appropriate if it is offered as the opinion of a lay witness – which carries with it important restrictions under Fed. R. Evid. 701.² Under Rule 701:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Id. Thus, opinion testimony from a lay witness is improper if "based on scientific, technical or other specialized knowledge." *See* Fed. R. Evid. 701(c); *see also Freedom Wireless, Inc. v. Boston Commc'ns Grp., Inc.*, 369 F. Supp. 2d 155, 157 (D. Mass. 2005) (barring a lay witness's testimony when based on his "highly technical and specialized knowledge of telecommunications."); *Daniels v. D.C.*, 15 F. Supp. 3d 62, 71 (D.D.C. 2014) (noting the importance of distinguishing between opinion and fact testimony).

² The CFPB's Rules of Practice for Adjudication Proceedings are silent as to whether or how the opinion testimony should be used, thus, the Federal Rules of Evidence provide helpful guidance. The Court has recognized the analogical value of the Federal Rules of Evidence when the CFPB Rules are silent. *See Order Granting in Part and Denying in Part Motion to Quash Subpoena*, at 2.

It became clear during the course of his testimony that, rather than testifying as to actual and concrete personal knowledge, Mr. Baressi was testifying as to his opinion, which was informed by his experience working in a legal capacity (including writing regulations and providing guidance to consumers) at the Board of Governors of the Federal Reserve (“FRB”), and, to a lesser extent, at the CFPB. Mr. Baressi testified that the basis for his knowledge and understanding of how consumers felt about RCCs came from his time at the FRB, including responding, in his capacity as a lawyer with the FRB, to Congressional inquiries regarding RCCs. Additionally, Mr. Baressi’s testimony was informed by a rulemaking proceeding and recent regulatory amendment by the Federal Trade Commission, as well as by his knowledge and understanding of various federal laws and regulations. Indeed, the sole stated purpose of Mr. Baressi’s testimony was to use his specialized knowledge to explain RCCs and their impact on consumers – this, at its core, contravenes the definition of lay opinion testimony.

Untimely disclosure of an expert witness: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a qualified witness may provide opinion testimony if (1) the testimony is based on sufficient facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. *See Fed. R. Evid. 702.* Mr. Baressi’s testimony was ostensibly offered to explain the “mechanism behind remotely created checks and the consumer implications of their use.” Enforcement Counsel’s Witness List. Enforcement Counsel represented that Mr. Baressi’s testimony would respond to the Court’s statement that RCC’s are “a poorly-understood mechanism for effectuating debits from a bank account.” Order on Summary Disposition at 43. It is unclear how Mr. Baressi could have

provided such understanding other than through his technical and specialized knowledge in the area of payment instruments law and regulation.

While Enforcement Counsel denies offering Mr. Baressi as an expert witness, his testimony showed that he was indeed providing his opinion based on his technical knowledge. Respondents are highly prejudiced by a record that contains the testimony of this *de facto* expert, since he was not proffered according to the Rules and schedule set out by this Court pursuant to 12 C.F.R. § 1081.210, and Respondents had no opportunity to review an expert report and seek a rebuttal expert.³

The Bureau attempts to couch its offer of Mr. Baressi's testimony as a response to the Court's comments on RCCs in the Order on Summary Disposition is unavailing. The CFPB's Rules on this matter are clear: "No party may call an expert witness at the hearing unless he or she has been listed and has provided reports as required by this section, unless otherwise directed by the hearing officer at a scheduling conference." *Id.* § 1081.210(b). The Court gave no such direction and the use of Mr. Baressi as a *de facto* expert witness violates the Bureau's rules.

Irrelevant testimony: Under the Bureau's Rules, "[i]rrelevant, immaterial, and unreliable evidence shall be excluded." *Id.* § 1081.303(b)(1). Mr. Baressi's testimony did not speak to any facts relevant to the elements of unfairness under the Consumer Financial Protection Act. As such, his testimony is not relevant or material to any argument remaining in this proceeding.

³ Expert reports were due in this matter on February 11, 2016. Enforcement Counsel had well over three years to prepare their case against Respondents and included allegations regarding RCCs in their initial pleading. Nothing factually changed as to RCCs or Integrity Advance's business during the pendency of the investigation, let alone during this proceeding. Enforcement Counsel bears the burden of proof in this matter and cannot claim prejudice if it is prevented from shoehorning an expert witness into the hearing at the last minute, rather than properly disclosing the expert during the prehearing stages and allowing for review by a rebuttal expert.

Unduly prejudicial testimony: Under the CFPB's Rules, “[e]vidence, even if 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.” *Id.* § 1081.303(b)(2). Application of this rule is warranted here. Mr. Baressi’s testimony repeatedly implied that RCCs, while lawful, are used to engage in fraudulent conduct. Such an allegation, of course, is not at issue in this matter. While the Court ordered several of the most egregious instances of such testimony to be stricken (or sustained objections to that effect), the prejudice of Mr. Baressi’s testimony as a whole still vastly outweighs any probative value.

In the alternative to striking the entirety of Mr. Baressi’s testimony, which Respondents maintain is warranted, Respondents propose that the following portions be stricken⁴:

- II-170:6 – 171:22
- II-175:9 – 176:2
- II-176:8 – 176:14
- II-177:13 – 179:13
- II-182:7 – 183:5
- II-193:1 – 194:10

CONCLUSION

For the foregoing reasons, the Court should order the hearing testimony of Enforcement Counsel’s witness Joseph Baressi stricken from the record of this proceeding.

⁴ Citations are to the draft transcript provided by the Court to counsel on July 29, 2016.

Respectfully submitted,

Dated: August 5, 2016

By: Allyson B. Baker

Allyson B. Baker, Esq.
Danielle R. Foley, Esq.
Peter S. Frechette, Esq.
Andrew T. Hernacki, 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 5th day of August, 2016, I caused a copy of the foregoing motion 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.