

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
ENFORCEMENT COUNSEL'S
NOTICE OF PROPOSED
REMEDY TO CURE
PREJUDICE

Hon. Parlen L. McKenna

On July 21, 2016, the Consumer Financial Protection Bureau (Bureau) objected to Respondents' introduction of six exhibits prepared and used by Dr. Xiaoling Ang during her rebuttal testimony at the hearing. Specifically, the Bureau objected to Respondents' notification of Dr. Ang's identity one day before the start of the hearing because they were not given fair notice.¹ Respondents' counsel asserts "Dr. Ang is a rebuttal witness to Mr. Hughes. She was disclosed -- I have lost track of time -- more than a week ago, roughly, or approximately a week ago. It has been no surprise that we needed to pull somebody together in light of the new exhibits they included from Mr. Hughes . . ." (Tr. III at 20-25). Furthermore, the Bureau stated Respondents' Exhibits RX019-RX024 were first disclosed as Dr. Ang's testimony began.

¹ Title 12 C.F.R. § 1081.215 states a final witness list and final exhibit lists should be produced no later than 10 days prior to the start of the hearing.

I overruled the objection and admitted Respondents' Exhibits RX019-RX024 into evidence, but gave the Bureau five days to propose a remedy to cure any prejudice suffered by the last-minute admission of the six exhibits and the testimony of Dr. Ang.² On July 28, 2016, the Bureau filed a Notice of Proposed Remedy to Cure Prejudice. By that pleading, the Bureau is seeking to submit supplemental evidence consisting of the declaration of Mr. Robert J. Hughes and two attachments describing errors Dr. Ang made in her calculations and errors she made in her critique of Mr. Hughes' calculations. The Bureau asserts allowing this supplemental information into the record cures any prejudice incurred from Respondents' late-filed witness and exhibits. Finally, by this pleading the Bureau informed the Court it will submit this supplemental evidence on or about July 29, 2016.

Respondents filed a response on July 29, 2016, requesting that I deny the Bureau's request because they did not incur any prejudice by Dr. Ang's testimony or by the six exhibits admitted at the hearing. First, Respondents argue the Bureau did not suffer prejudice because Dr. Ang was a rebuttal witness who used the same analytical premises and dataset as Mr. Hughes. Second, Respondents assert the Bureau mischaracterizes the record by asserting Respondents' witness list and exhibits were filed late. Respondents contend my July 15, 2016 Order did not require rebuttal witnesses be named in advance. Finally, Respondents state the Bureau seeks to reopen its case-in-chief by manufacturing a nonexistent prejudice and denying Respondents' their due process right to rebut such evidence.

² At the hearing, I instructed the Bureau to make a determination as to whether it was prejudiced by Dr. Ang's testimony and the admission of the related exhibits, and if so, how it would be cured through either additional exhibits or cross-examination.

Subsequent to Respondents' objection filed on July 29, 2016, the Bureau submitted the Declaration of Robert J. Hughes containing Attachments A and B. In response to this submission, Respondents filed a second response on August 10, 2016, again requesting that I reject the Bureau's supplemental evidence.

Respondents' second response is not authorized by the regulations, as Respondents already submitted their responsive brief, the Bureau has not submitted a reply brief, and no sur-replies are permitted under the Bureau's rules. 12 C.F.R. § 1081.205. However, given the extensive penalties requested by the Bureau in this matter, I am accepting this submission and will consider it in making my decision herein. I note the submission generally reiterates the arguments posed in their initial response dated July 29, 2016, but also includes additional arguments concerning damage calculations. Any further legal arguments concerning the analysis and interpretation of damage calculations may be addressed in the parties' post-hearing briefs.

Respondents' primary argument is Dr. Ang's testimony is rebuttal in nature, did not have to be disclosed prior to the hearing, and therefore, cannot cause prejudice. I agree with Respondents that Dr. Ang's purpose as a witness was to rebut Mr. Hughes' testimony. However, the nature and extent of Dr. Ang's testimony went beyond being a mere rebuttal witness. Respondents' reliance on the argument that she was simply a rebuttal witness whose identity did not need to be disclosed prior to the hearing is misplaced. Dr. Ang's testimony was more akin to that of an expert witness.³ In addition, while the exhibits prepared by Dr. Ang introduced calculations using the same base

³ Neither side proffered expert witnesses. However, Respondents' used Dr. Ang, an economist, to apply her knowledge and expertise to do more than refute Mr. Hughes' calculations or make mere calculations, Dr. Ang interpreted the dataset and make recommendations as to how to properly decide harm based on her expertise.

dataset as Mr. Hughes, she applied a different methodology yielding different monetary amounts.

Rebuttal evidence is evidence offered to disprove or contradict evidence presented by an opposing party. *Black's Law Dictionary* 639 (9th ed. 2009). "The function of rebuttal is to explain, repel, counteract or disprove the evidence of the adverse party." *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1263 (7th Cir. 1975); accord *Crowley v. Chait*, 322 F. Supp. 2d 530, 551 (D.N.J. 2004). Evidence is outside the scope of rebuttal when "it includes opinions on subjects not mentioned in opposing report or introduces new matters." *In the Matter of The North Carolina Board of Dental Examiners, Respondent*, 2011 WL 479902, F.T.C. (Jauary 28, 2011); see also *Duff v. Duff*, 2005 U.S. Dist. LEXIS 46111, at *16-17 (E.D. Ky. Nov. 14,2005). Furthermore, the decision to allow the presentation of evidence in rebuttal or surrebuttal is generally committed to the trial court's discretion. See *Wright Root Beer Co. of New Orleans v. Dr. Pepper Co.*, 414 F.2d 887, 892 (5th Cir.1969); *Louisiana Health Care Self Ins. Fund v. United States*, No. CIV.A. 12-766-JJB, 2014 WL 3720526, at *2 (M.D. La. July 25, 2014).

The admission of exhibits containing new monetary amounts using a different calculation methodology constituted new evidence. Even though Respondents' exhibits were introduced on July 21, 2016, and presented to the Bureau with little notice, I allowed the introduction, discussion, and admission of Dr. Ang's prepared exhibits.⁴ Accordingly, the Bureau's submission of surrebuttal evidence is appropriate. The Bureau

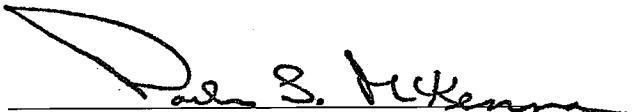
⁴ The Bureau filed its witness list on July 6, 2015, notifying Respondents of their intent to call Mr. Hughes as a data scientist who analyzed the consumer payments data produced by Respondents. Since 12 C.F.R. § 1081.215 states witness and exhibit lists be produced no later than 10 days prior to the start of the hearing, and in light of fact that Dr. Ang's testimony was expert in nature; Respondents should have disclosed her identity along with the exhibits she prepared 10 days prior to the hearing's start.

was not aware of Exhibits RX019-RX024 until the third day of the hearing, and therefore, unable to immediately analyze and refute Dr. Ang's testimony and assertions.

Accordingly, I find the Bureau suffered prejudice by the last-minute introduction of Exhibits RX019-RX024. Therefore, the Bureau's proposed remedy is reasonable.

Accordingly, the Bureau's motion is hereby GRANTED and all prejudice suffered by the Bureau is cured. The declaration of Mr. Robert J. Hughes containing two attachments is ADMITTED as Exhibit 102.

SO ORDERED.



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

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

CERTIFICATE OF SERVICE

I hereby certify that I have served the *Order Granting Enforcement Counsel's Notice of Proposed Remedy to Cure Prejudice* (2015-CFPB-0029) upon the following parties and entities in this proceeding as indicated in the manner described below:

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

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