UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	**ENFORCEMENT COUNSEL'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF RESPONDENTS' REBUTTAL EXPERT REPORT**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

ENFORCEMENT COUNSEL'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF RESPONDENTS' REBUTTAL EXPERT REPORT

On December 18, 2015, the Hearing Officer set a schedule for this proceeding, including specific dates for the simultaneous exchange of expert reports followed by the exchange of rebuttal reports. Section 1081.210(a) provides that "a rebuttal report *shall be limited* to rebuttal of matters set forth in the expert report for which it is offered in rebuttal." (emphasis added). Respondents did not limit their rebuttal report to matters rebutting Dr. Hastak's report, but instead proffered new theories supporting Respondents' arguments in this proceeding. Section 1081.210(a) specifically provides that a party may move to strike portions of a rebuttal report when "material outside the fair scope of rebuttal is presented," as it was here. The prejudice to Enforcement Counsel is clear: motions for summary disposition are due in less than two weeks, and sur-rebuttal reports simply are not feasible given the schedule in this matter. Respondents had ample opportunity to submit an expert report; indeed, during the December 14, 2015 scheduling hearing, Respondents' counsel asked for time to prepare an expert report. Respondents ultimately chose not to submit such a report. They cannot now profit from their

failure to abide by the Hearing Officer's schedule. Given the time constraints of this proceeding, the only equitable response is to strike the non-rebuttal material in Dr. Novemsky's report.

Dr. Manoj Hastak analyzed three distinct issues in his report. He first concluded that Integrity Advance's loan agreement did not clearly disclose that "costs (fees and charges) associated with the loan are significantly higher if borrowers renew the loan (either actively or by default) rather than paying it off in full." Next, he found that the auto-renewal/auto-workout default option in the loan agreements could cause a large proportion of borrowers to pay renewal costs that they did not affirmatively choose to incur. Lastly, he concluded that the loan agreement did not clearly and conspicuously disclose Integrity Advance's authority "to create remotely created checks and use these to debit borrower accounts."

Dr. Novemsky, Respondents' rebuttal expert witness, has completely failed to rebut any of these conclusions. In his deposition, Dr. Novemsky either admitted that he had no opinion on these issues, or agreed with Dr. Hastak. Specifically, he stated that without empirical data, he could not opine on whether the costs of loan renewals were disclosed in a clear and conspicuous manner in Integrity Advance's loan agreements. Ex. A 81:22-82:9. On the impact of defaults, Dr. Novemsky agreed with Dr. Hastak's conclusion that the default option could lead to more renewals. Ex. A 167:22-168:7. Finally, Dr. Novemsky stated that he had no opinion on whether the remotely created check disclosures were either conspicuous or clear. Ex. A 175:2-11.

Instead of rebutting Dr. Hastak's conclusions that Respondents' contracts did not clearly disclose the total costs of the loans given the auto-renewal and auto-workout provisions, Dr. Novemsky makes abstract arguments that consumers *might* not care about the total costs. These arguments do not rebut the conclusion that the contract failed to disclose those amounts clearly. Rather, they hypothesize that other factors *may* have influenced consumers' decisions about the

loans. Furthermore, Dr. Novemsky admits that his argument is only theoretical and would require empirical analysis—empirical analysis that he did not do—before one *might* be able to reach a conclusion that consumers did not care about the total cost of the loans. When specifically asked about how these theories applied to Integrity Advance customers, Dr. Novemsky repeatedly stated that he could offer no opinion on how the research that he had cited applied to the case at hand without conducting empirical research. *See, e.g.,* Ex. A 157:8-12 (whether loan costs are important to consumers); *id.* 161:3-8 (whether renewal costs are important to consumers borrowing money); *id.* 163: 2-8 (whether loan fees are important to consumers). This is precisely the type of scattershot rebuttal that is disfavored.

Striking the Relevant Paragraphs of Dr. Novemsky's Report Is the Appropriate Result

Rule 1081.210(a) explicitly provides that a party may move to strike rebuttal testimony that is beyond the fair scope of rebuttal. The rule does not require a showing of prejudice, but even if it did, the prejudice in this case is clear as noted above.

Furthermore, the cases cited by Respondents do not support the conclusion that the Bureau is not harmed. In two of the cases cited by Respondents, courts did not strike the rebuttal reports relying in part upon the fact that the moving party could submit sur-rebuttal reports as well as deposing the rebuttal expert. *See Park West Radiology v. CareCore Nat. LLC*, 675 F.Supp.2d 314 (S.D.N.Y. 2009); *Associated Elec. Gas Ins. Serv. v. Babcock & Wilcox Power Generation Grp., Inc.*, No. 3:11CV715, 2013 WL 5771166 at *4 (D. Conn. Oct. 24, 2013).

The Bureau does not have the opportunity for sur-rebuttal here given the time constraints inherent in this proceeding. Should the court admit those portions of Dr. Novemsky's report that go beyond the scope of Dr. Hastak's report, the Bureau would have no ability to directly address the many theories of consumer decision making propounded by Respondents' expert.

In the third case cited by Respondents, *Withrow v. Spears*, 967 F. Supp. 2d 982, 1000 (D. Del 2013), the court relied on a 6 factor test in deciding whether to exclude improper expert disclosure: "1) the surprise or prejudice to the moving party; (2) the ability of the moving party to cure any such prejudice; (3) the extent to which allowing the testimony would disrupt the order and efficiency of trial; (4) bad faith or willfulness in failing to comply with the court's order; (5) the explanation for the failure to disclose; and (6) the importance of the testimony sought to be excluded." Respondents only refer to prejudice to the moving party, but many of the factors—including prejudice—weigh strongly against allowing Respondents to sneak affirmative evidence in through a rebuttal report at this stage: it is unfair surprise, causes prejudice and disruption, and demonstrates an unwillingness to comply with the Hearing Officer's order.

Respondents Improperly Introduced New Evidence

Respondents attempt to defend their introduction of evidence about emails and phone calls that consumers may have received from Integrity Advance by claiming that it is not "new" evidence because it is in the record of documents that the Bureau has generated during its investigation. If the standard for the "fair scope" of rebuttal were any documents the Bureau has generated during its investigation, and not what Dr. Hastak has opined about in his report, there would be almost no limit to the potential breadth or scope of a rebuttal report. Dr. Hastak's report was limited to the four corners of the loan agreement. That is also the proper scope for rebuttal.

Although Respondents argue that an analysis of phone calls and emails is necessary in order for Dr. Novemsky to fulfill his obligation to provide "a complete statement of all opinions to be expressed and the basis and reasons therefore," Dr. Novemsky testified that he had drawn no conclusions about either the phone calls or the emails. Concerning the phone calls, Dr.

Novemsky testified that he did not know when the phone calls happened in relation to consumers signing the agreements, Ex. A 57:5-13, and that he did not consider the telephonic communications to be critical, *id.* 59:5-9. Dr. Novemsky also testified that he had drawn no conclusions about how many people read the emails from Integrity Advance, *id.* 119:4-7, and admitted that consumers could even read emails from Integrity Advance to confirm their misunderstanding of the amounts that they owed Integrity Advance, *id.* 132:6-14. In sum, Respondents have provided no justification for citing to evidence that goes beyond the fair scope of rebutting Dr. Hastak's analysis of the language of the loan agreements.

Dr. Novemsky's Recitations of Decision-Making Research Fail to Rebut Dr. Hastak's Report

The cases cited by Respondents do not support the conclusion that rebuttal reports need only be generally responsive to the initial report. Respondents cite *United States v. Luschen*, 614 F.2d 1164, 1170 (8th Cir.), *cert. denied*, 446 U.S. 939 (1980) for their proposition that "Dr. Novemsky is not foreclosed from rendering his opinions in a rebuttal report." *Luschen*, however, involved the court's discretion to allow the government to reopen its case at trial to present rebuttal testimony. Furthermore, unlike the case here, the testimony presented on rebuttal in *Luschen* directly rebutted the opposing expert's testimony: the government's expert testified that the substance in question was cocaine, and the defendant's expert testified that the government had used the wrong test to prove that the substance was cocaine. The court then exercised its discretion to allow the government to run the test advanced by defendant as properly within the scope of rebuttal. Here, Dr. Novemsky did not apply the FTC guidelines used by Dr. Hastak to come up with a different result. He simply posited new theories for *possibly* reaching a conclusion about a different question regarding the transaction between consumers and Integrity Advance. This is beyond the fair scope of a proper rebuttal report.

In re Piasecki, 745 F.2d 1468, 1472 (Fed.Cir.1984), also fails to support Respondents' position. *Piasecki* was an appeal from a decision of the patent office. The court focused on the proper evidence to rebut a finding of 'obviousness' under patent law, section 35 U.S.C.A. § 103. As Respondents note, the court stated that a rebuttal expert report must include "a showing of facts supporting the opposite conclusion." However, Dr. Novemsky does not reach an opposite conclusion. He reaches no conclusions. Further, Dr. Novemsky does not show facts, such as the "extensive evidence" submitted in *Piasecki*. He posits that *if* he had done an analysis, a different analytical framework might produce a different view of the transaction. This is empty theorizing, not proper rebuttal evidence.

Conclusion

Dr. Novemsky's report provides testimony outside the fair scope of rebuttal, fails to address the analysis conducted by Dr. Hastak, and fails to offer any analysis that counters Dr. Hastak's conclusions. Accordingly, the Bureau respectfully requests that the Hearing Officer strike paragraphs 11, 13, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 35, 46, 48, and 50 of Dr. Novemsky's report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April 2016, I caused a copy of the foregoing Enforcement Counsel's Reply in Support of Its Motion To Strike Portions of Respondents' Rebuttal Expert Report, 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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