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 DENYING CFPB'S MOTION TO STRIKE PORTIONS OF RESPONDENTS' REBUTTAL EXPERT REPORT** **Hon. Parlen L. McKenna**

On April 1, 2016, the Bureau filed a motion to strike portions of an expert report submitted by Respondents to rebut the findings of the Bureau's expert. Respondents filed their opposition to the motion on April 18, 2016. The Bureau filed a reply on April 22, 2016. This motion is now ripe for ruling.

The Bureau's regulations require rebuttal expert reports to be limited to matters set forth in the report it is intended to rebut. If a party believes a rebuttal report exceeds its proper scope, they may file a motion for appropriate relief. 12 C.F.R. § 1081.210(a). This rule is similar to Federal Rule of Civil Procedure 26(a)(2)(D)(ii).[1] Although I am not bound by the Federal Rules, as I am by the Bureau's regulations, I find that the case law relevant to this issue offers appropriate guidance to use in my determination here.

The Bureau contends that Respondents' expert, Dr. Novemsky, advances alternate theories of the case instead of directly contradicting or rebutting the opinions of the Bureau's expert, Dr. Hastak, and impermissibly relies on new evidence. Respondents

[1] Formerly Fed. R. Civ. P. 26(a)(2)(C)(ii).

argue that Dr. Novemsky introduced new data and evidence in his report for the purpose of criticizing the methodology Dr. Hastak used in reaching his conclusions. Respondents also point out that Dr. Novemsky relied on documents explicitly mentioned by Dr. Hastak in the appendix to his report as among those he relied on, even if he did not mention the documents by name in the body of the report.

The admissibility of rebuttal evidence is within the trier of fact's discretion. *U.S. v. Chrzanowski*, 502 F.2d 573, 576 (3d Cir. 1974). While the Bureau's regulations clearly limit rebuttal reports to "matters set forth in the expert report for which it is offered in rebuttal," *see* 12 C.F.R. § 1081.210(a), the regulations do not explain precisely what constitutes a "matter set forth" in the initial report. The Bureau asks me to interpret the phrase narrowly, while Respondents believe a broader interpretation is appropriate.

In reviewing case law that interprets Fed. R. Civ. P. 26(a)(2)(D)(ii), it is apparent that courts have interpreted the Rule both ways. *See, e.g., Blake v. Securitas Sec. Servs., Inc.*, 292 F.R.D. 15, 19 (D.D.C. 2013) (court excluded a purported expert rebuttal report it considered to be "an untimely and improperly disclosed initial expert report"); *Crowley v. Chait*, 322 F.Supp.2d 530, 551 (D.N.J.2004) (automatic exclusion of anything contained in a rebuttal report that could have been included in an initial report could lead to vast amounts of irrelevant material in initial reports, for fear it would subsequently be barred; "[a]ll that is required is for the information to repel other expert testimony"); *T.C. Sys. Inc. v. Town of Colonie, N.Y.*, 213 F.Supp.2d 171, 179–80 (N.D.N.Y.2002) (limiting rebuttal report to only those methods proposed by the initial expert "would impose an additional restriction on parties that is not included in the Rules"); *Vu v. McNeil-PPC, Inc.*, 2010 WL 2179882, at *3 (C.D.Cal. May 7, 2010) (a broad reading of the term

"same subject matter" would blur the line between an affirmative expert report and an rebuttal report); *Kirola v. City & County of S.F.*, 2010 WL 373817, at *2 (N.D.Cal. Jan. 29, 2010) (rebuttal reports can use data not found in the expert report if it relates to the same subject matter).

In order to properly rule on this motion, a case-specific analysis of the context and purpose of the expert report is necessary. "[M]otions to strike, as a general rule, are disfavored." *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 201 (D.C. Cir. 1981). As I stated in a previous order, the purpose of an administrative proceeding is to create a full and complete factual record on which the administrative decision is based, as well as the record for appeal in the event of judicial review. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The Administrative Procedures Act permits the trier of fact to receive any documentary or oral evidence. *See* 5 U.S.C. § 556(d); *Gallagher v. National Transp. Safety Bd.*, 953 F.2d 1214, 1214 (10th Cir. 1992). While strict rules of evidence govern jury trials, the standard in administrative proceedings is more lenient and allows the inclusion of evidence that might be excluded under the Federal Rules of Evidence. *See Gallagher* at 1218.

Respondents have made a colorable argument as to why Dr. Novemsky's rebuttal report relates to the same subject matter as Dr. Hastak's report. Administrative proceedings favor the introduction of evidence over its exclusion; the salient questions are whether the evidence is credible, reliable, and the degree of weight it should be accorded. This is particularly true of expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Strictly speaking, *Daubert* and its progeny do not apply to

administrative proceedings because they interpret the Federal Rules of Civil Procedure, not administrative procedural rules. *See, e.g., Nat'l Taxpayers Union v. Social Sec. Admin.*, 302 Fed.Appx. 115, 121 (3d. Cir. 2008); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 n. 4 (9th Cir. 2005). However, "'[j]unk science' has no more place in administrative proceedings than in judicial ones." *Lobsters, Inc. v. Evans*, 346 F. Supp. 2d 340, 344 (D. Mass. 2004). If, as Respondents contend, Dr. Hastak used a flawed methodology in developing his report, it would affect his credibility and consequently the weight accorded to his opinion.

Here, the Bureau has chosen to prosecute its case in an administrative rather than judicial forum. Given the scope and purpose of administrative proceedings, I am not inclined to exclude evidence that might have some value. As the trier of fact, I will make a determination as to the relevance of both Dr. Hastak's initial expert report and Dr. Novemsky's rebuttal report, and the weight to be accorded thereto. In addition, in rendering my decision, I will make credibility and reliability determinations. The Bureau has already deposed Dr. Novemsky. Thus, it has had the opportunity to cure any potential prejudice created by a broad reading of 12 C.F.R. § 1081.210(a). The Bureau's Motion to Strike is therefore DENIED.

IT IS SO ORDERED.

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

Done and dated on this 28th day of April 2016 at Alameda, California.

CERTIFICATE OF SERVICE

I hereby certify that I have served the forgoing *Order Denying CFPB's Motion To Strike Portions Of Respondents' Rebuttal Expert Report* (2015-CFPB-0029) upon the following parties and entities in this proceeding as indicated in the matter described below:

(Via Fax and email: D05-PF-ALJBALT-ALJDocket)
United States Coast Guard
40 South Gay Street, Suite 412
Baltimore, Maryland 21202-4022
Bus: (410) 962-5100 Fax: (410) 962-1746

Via Electronic Mail to CFPB Counsel(s) and CFPB electronic_filings@cfpb.gov:
Alusheyi J. Wheeler, Esq.
1700 G Street, NW
Washington, DC 20552
Bus: (202) 435-7786
Fax: (202) 435-7722
Email: alusheyi.wheeler@cfpb.gov

Deborah Morris, Esq.
Email: deborah.morris@cfpb.gov
Craig A. Cowie, Esq.
Email: craig.cowie@cfpb.gov
Wendy J. Weinberg, Esq.
Email: wendy.weinberg@cfpb.gov
Vivian W. Chum, Esq.
Email: vivian.chum@cfpb.gov

Via Electronic Mail to Respondents' Counsel as follows:
Allyson B. Baker, Esq.
Hillary S. Profita, Esq.
Peter S. Frechette, Esq.
Venable LLP
575 7th Street, NW
Washington, C.D., 20004
Bus: (202) 344-4708
Email: abbaker@venable.com
Email: hsprofita@venable.com
Email: psfrechette@venable.com
Email: jpboyd@venable.com

Done and dated this 28th day of April, 2016
Alameda, California

Cindy J. Melendres

Cindy J. Melendres, Paralegal Specialist to the Hon. Parlen L. McKenna