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' MOTION *IN LIMINE* TO PRECLUDE EXPERT TESTIMONY OF DR. MANOJ HASTAK**

RESPONDENTS' BRIEF IN SUPPORT OF MOTION *IN LIMINE* TO PRECLUDE EXPERT TESTIMONY OF DR. MANOJ HASTAK

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INTRODUCTION

On February 11, 2016 the Bureau submitted the Expert Report of Dr. Manoj Hastak. *See* Dkt. 63A, CFPB Mot. To Strike Portions of Resp's. Exp. Rep., Ex. A, Expert Report of Dr. Manoj Hastak (heretofore, the "Hastak Report.") On March 11, 2016, Respondents deposed Dr. Hastak. *See* Dkt. 102C, Frechette Declaration ¶3, Ex. 2, Deposition of Dr. Manoj Hastak (heretofore, the "Hastak Test."). Dr. Hastak did not perform a consumer survey in his report. Indeed, Dr. Hastak employed no articulable methodology in drafting his report beyond reading the "Federal Trade Commission's guidelines on making disclosures and disclaimers clear and conspicuous in an *online* environment" (*see* Dkt. 63A, Hastak Report at 10) and a non-online version of the Loan Agreement. Dr. Hastak was not even sure if the Loan Agreement he reviewed was in the same format as the Loan Agreement reviewed by consumers. In short, Dr. Hastak's proposed testimony offers no greater insight into whether the disclosures in the Loan Agreement were clear and conspicuous than a lay person would otherwise provide to the fact finder in this matter. It is, thus, unreliable under Section 1081.303(b), and Respondents respectfully request that Dr. Hastak be precluded from testifying at trial.[1]

ARGUMENT

I. Applicable Standards Of Admissibility

A. Standard For Admissibility Under Section 1081.303(b)(1)

The Bureau provides that "[i]rrelevant, immaterial and unreliable evidence shall be excluded." 12 C.F.R. § 1081.303(b)(1) Similarly, under Fed. R. Evid. 702 – which governs the admissibility of expert testimony under the Federal Rules of Evidence and substantially codifies the holdings of *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993) – a qualified expert

[1] Respondents notified Enforcement Counsel of their intention to file this motion on June 7, 2016.

may testify if "the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Testimony is reliable if "[1] the testimony is based upon sufficient facts or data; [2] the testimony is the product of reliable principles and methods; and [3] the expert has reliably applied the principles and methods to the facts of the case." *Id.* Further, "on its face, Rule 702 draws no distinction between the requirements for qualifying opinion testimony based on scientific knowledge and the requirements for qualifying opinion testimony based on any other specialized knowledge." *U.S. v. Stagliano*, 729 F. Supp. 2d 222, 225 (D.D.C. 2010).

"Rule 702 also places an obligation on the court to 'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" *See Arias v. DynCorp*, 928 F. Supp. 2d 10, 16 (D.D.C. 2013) (quoting *Daubert* at 589). That is, the trial court must conclude: (1) that the reasoning or methodology underlying the testimony is scientifically valid, and (2) that the reasoning or methodology will assist the trier of fact to understand or determine a fact in issue. *Daubert* at 592-93. "In all cases, 'the trial judge . . . must find that the proffered testimony is properly grounded, well-reasoned and not speculative before it can be admitted.'" *Estate of Gaither ex rel. Gaither v. District of Columbia*, 831 F. Supp. 2d 56, 62 (D.D.C. 2011) (quoting Fed. R. Evid. 702 advisory committee's note (2000 amends.))

Courts have recognized that "the standards by which an expert's reliability is measured may be less stringent at an administrative hearing than under the Federal Rules of Evidence . . ." *McKinnie v. Barnhart*, 368 F.3d 907, 910 (7th Cir. 2003). However, "because an ALJ's findings must be supported by substantial evidence, an ALJ may depend upon expert testimony *only if the testimony is reliable*." *Id.* (emphasis added). In *Lobsters, Inc. v. Evans*, 346 F. Supp.2d 340, 344 (D. Mass. 2004) the rules governing evidence in National Oceanic and Atmospheric

Administration (NOAA) hearings provided that "'[a]ll evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing.'" (quoting 15 C.F.R. § 904.251(b)). The court found that "[t]he reliability requirement of this Regulation, therefore, adopts the 'spirit of *Daubert*' as the standard to be used in connection with administrative hearings." *Id.* Pursuant to this standard, courts have found that the exclusion in administrative proceedings of such unreliable expert evidence is proper. *See Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005) (holding that "the 'spirit of *Daubert*' is applicable" to administrative proceedings); *see also Lobsters, Inc.*, 346 F. Supp.2d at 345 ("The *Daubert* factors can, in fact, be used to exclude evidence from an administrative hearing if the ALJ finds the evidence to be unreliable . . . .")

B. Standard For Admissibility Under Section 1081.303(b)(2)

Section 1081.303(b)(2) provides: "Evidence, 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." This is nearly identical to Fed. R. Evid. 403.[2] "Even if the proposed expert testimony comports with Fed. R. Evid. 702, it may nonetheless be excluded under Rule 403 . . . ." *See Parsi v. Daioleslam*, 852 F. Supp. 2d 82, 86 (D.D.C. 2012).

[2] "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

II. Dr. Hastak's Proposed Testimony Is Inadmissible Under Section 1081.303(b)

A. Hastak's Proposed Testimony Is Not Based On Sufficient Facts Or Data

Dr. Hastak did not conduct a survey of any consumers – let alone a survey of consumers that have or might take out payday loans. *See* Hastak Test. 59:12-14. While he applied the "Federal Trade Commission's guidelines on making disclosures and disclaimers clear and conspicuous in an *online* environment," (the "FTC Guidelines") (*see* Dkt. 63A, Hastak Report at 10), Dr. Hastak in fact reviewed a black and white, PDF version of the Loan Agreement, which he could not confirm was the same document that Integrity Advance customers viewed in an online environment. *See* Hastak Test. 33:15-34:3; 105:8-17; 121:3-16. While he stated that he did not conduct a consumer survey because he could not replicate the "consumer reality" of the phone calls that took place between Integrity Advance staff and loan applicants (*see* Hastak Test. 60:7-22), he did not include any analysis of such calls in his own evaluation of the Loan Agreements. *See* Hastak Test. 93:1-8. Finally, Dr. Hastak "looked at a template of . . . a couple of emails" that were sent to Integrity Advance customers further explaining the repayment terms of their loans (*see* Hastak Test. 275:16-21) but he did not "review the emails in terms of their impact on the customer." *Id*. 276:4-10.

i. Hastak Did Not Conduct A Consumer Survey

Numerous courts have held that expert evidence on the issue of consumer confusion should be based on data from consumer surveys. *See Patsy's Italian Restaurant, Inc. v. Banas*, 531 F. Supp. 2d 483, 485 (E.D.N.Y. 2008) ("The usual method to introduce evidence on the issue of likelihood of confusion is through consumer surveys"); *see also New Century Financial, Inc. v. New Century Financial Corp.*, No. C-04-437, 2005 WL 5976552 at *2 (S.D. Tex. Nov.

29, 2005) ("[t]he expert's testimony and the ultimate conclusion on the issue of confusion should be based on results from surveys and studies the expert has conducted.")

Indeed, where experts opining on consumer confusion *did not* conduct consumer surveys, and instead relied on their own personal knowledge and expertise, courts have routinely excluded such testimony. *See Patsy's*, 531 F. Supp. 2d at 486 (excluding testimony of expert witness who "appears not to have relied on such a consumer survey but, rather, he drew his conclusions based upon his own personal knowledge and expertise"); *see also Tovey v. Nike*, No. 1:12CV448, 2014 WL 3510636 at *5 (N.D. Ohio July 10, 2014) (excluding expert's testimony where expert acknowledged that a consumer survey is the best way to determine whether consumer confusion exists, but chose to rely on her "experience and expertise and judgment"); *see also New Century*, 2005 WL 5976552 at *3 (excluding testimony of expert who "did not conduct an independent study or survey or research or analysis.")

Dr. Hastak acknowledged that "consumer data provides the best way to assess consumer, you know, take-away from materials." (*see* Hastak Test. 90:14-16). But did not use or conduct a consumer survey because, he explained that: (1) he could not replicate the "consumer reality," which included a phone call from Integrity Advance (*id*. 60:7-22); and (2) too much time had passed to render a "retrospective survey," that could yield "truthful information" and capture consumer-related issues that were "more subtle." *Id*. 61:14-20; 62:12-21. Dr. Hastak concluded that his own facial evaluation of the Loan Agreement was the "next best approach," despite the fact that this analysis *also* did not replicate the consumer reality or address the timing issues that prevented Dr. Hastak from conducting the survey in the first place. *Id*. 91:4-16. In sum, despite courts' reliance on consumer surveys, and despite Dr. Hastak's own acknowledgment that a consumer survey is the "best way" to assess consumer take-away, he instead utilized a

methodology that did not consider empirical data and relied solely on his own comparison of the FTC Guidelines to the Loan Agreement.

In drawing his conclusions, Dr. Hastak also assumed that the cost of renewing the loan would be "an important factor" to Integrity Advance consumers. *See id*. 97:10-17. But, he did not conduct any empirical assessment of what factors would be important to Integrity Advance customers (*id*. 209:8-16) or payday lending customers generally, in reaching that conclusion. *Id*. 99:22-100:8. Instead, his opinion is based *solely* on his own "experience and understanding of the kinds of things that consumers typically focus on." *id.* 99:7-17; 208:11-13. But, even Dr. Hastak acknowledged that "if you make the assumption that cost disclosures – cost doesn't matter to consumers, then yes, I would agree the disclosure don't [sic] matter.") *Id*. 205:14-17.

ii. Hastak Performed No Independent Research Into Consumer Behavior In The Payday Lending Context

Dr. Hastak performed no independent fact-gathering regarding how consumers would interpret Integrity Advance's Loan Agreement. *See id*. 98:16-100:8; 118:15-119:1; 133:12-134:1; 141:13-142:5. Dr. Hastak said he had a "general understanding" of the consumer population that would have received loans from Integrity Advance (*see* Hastak Test. 76:6-12) from looking at "literature" that he could not specifically identify. *Id*. 77:15-18.

Dr. Hastak further stated that he did not rely on the consumer complaints, which he reviewed at random, in reaching his conclusions. *See id*. 138:14-16; 139:7-14. Indeed, he expressly discredited these complaints, explaining that they "are not representatives [sic] of the customers of Integrity Advance . . . they're just a small sampling of individuals who had a problem with Integrity Advance so I don't take that as . . . representative in any way of . . . what a typical consumer . . . might take." *Id.* 139:16-22.

Even in opining on the issue of default options, Dr. Hastak expressly acknowledged that while he "understand[s] the area," he would not call himself an expert in it. *See id.* 238:12-15. Despite this acknowledgment, he performed no empirical research regarding his conclusion that "default options may partly be driving the high proportion of individuals who roll over the loan." *Id*. 236:9-13. This conclusion was instead based on this theory being "very strongly accept[ed] and supported in the literature." *Id*. 239:4-13.

While Dr. Hastak stated that he had no understanding of what percentage of Integrity Advance customers understood how remotely created checks work (*id*. 261:2-9), he nonetheless assumed "when [he] read the sentence" in the Loan Agreement that "consumers would expect at least some form of notification when the check is used, and that they might also expect that they provide authorization each time . . . this system is used. . . ." *Id*. 261-17-22. Other than his reading of the sentence, Dr. Hastak stated that the basis for this assumption was "based on my understanding of how these remotely created checks work." *Id*. 265:1-3. He further stated that "it's also based to some extent on the consumer complaints," (*id*. 265:5-6), then contradicted that statement by stating that while the complaints were "consistent with this interpretation," they were "not something I relied on to form the opinion." *Id*. 265:15-20.

The court "is not required to 'admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert,'" as is the case with Dr. Hastak's opinions. *Estate of Gaither*, 831 F.Supp.2d at 66 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). In *Gaither*, the court precluded an expert from testifying as to a particular judge's sentencing patterns where that expert "had not reviewed data specific to [the judge's] historical sentencing patterns, as opposed to judges of the Superior Court as a whole." *Gaither* at 65. Because "[t]he record is devoid of *any meaningful measure of detail* about the extent of [the expert's]

experience with and knowledge of [the judge's] sentencing practices specifically" the court found that "there is too great an analytical gap between the factual basis and the proffered opinion to satisfy the Court that [the expert's] opinion is 'based on sufficient facts or data' and 'the product of reliable principles and methods.'" *Id.* at 66 (quoting Fed.R.Evid. 702) (emphasis in original). Like the expert in *Gaither*, there is too great an analytical gap between the factual bases and the opinions that Dr. Hastak offers because he has conducted no research – empirical or otherwise – regarding the ability of the population about which he purports to offer an expert opinion to interpret disclosures in the Loan Agreement.

iii. Hastak Did Not Analyze An Online Version Of The Loan Agreement, Nor Documents Related To Integrity Advance's Phone Calls Or Email Communications With Applicants

While he applied the FTC Guidelines on making disclosures and disclaimers clear and conspicuous in an *online* environment, Dr. Hastak, in fact, reviewed a black and white, PDF version of the Loan Agreement, which he could not confirm was the same document that consumers viewed online. *See* Hastak Test. 28:7-10; 33:15-34:3; 105:8-17; 121:3-16. Notably, Dr. Hastak himself acknowledged that a proper analysis of the "prominence" factor under the FTC Guidelines would include attention to details such as color. *See id.* 104:15-18 ("[T]here are various techniques for increasing the prominence of a stimulus. . . You could use color.") Nonetheless, he did not know whether actual consumers had seen the Loan Application in color. *Id.* 105:8-17. Nor did Dr. Hastak analyze the impact of the phone calls between Integrity Advance and consumers or the follow up emails that consumers received. *Id.* 93:1-8; 276:4-10. Yet, Hastak acknowledged that, according to the FTC Guidelines, "[y]ou need to look at the disclosure or disclosures in context so as a part of the entire document . . . ." *Id.* 80:12-14. He further stated that the FTC Guidelines say that "the context that's truly important is the document

within which the disclosure or communication is embedded." *Id*. 83:14-16. In sum, despite acknowledging the critical importance of context in analyzing disclosures under the FTC Guidelines, Dr. Hastak himself did not have a clear sense of the precise context in which consumers viewed and understood the Loan Agreement.

In *Arias v. DynCorp*, 928 F. Supp. 2d at 18, the court found that an expert's reliability was further undermined in comparing the manufacturer's label with quantity and application rates because "he based his opinion on incomplete excerpts from the label" and "ignor[ed] the surrounding sections of the label." Similarly, without having viewed the Loan Agreement in the context in which consumers viewed it, and without an analysis of the phone calls or emails, Dr. Hastak's analysis is incomplete. It is impossible to reconcile Dr. Hastak's view that the full context in which the consumer views the document is "truly important," with his actual method, which did not include a review the Loan Agreement in the same context that consumers viewed it.

B. Hastak's Proposed Testimony Is Not The Product Of Reliable Principles And Methods

i. Dr. Hastak Has No Articulable Methodology

It is challenging to readily identify Dr. Hastak's methodology. When pressed during his deposition to explain the basis for his conclusions regarding the Loan Agreement, Dr. Hastak had no explanation other than his own deductions based on reading the Loan Agreement and the FTC Guidelines. For instance, when asked how he had determined whether a particular consumer interpretation was "possible" or "likely," Dr. Hastak stated: "I don't know that there's something very systematic in that sense that I'm doing here. I'm writing the report and I'm expressing my judgment based on my evaluation." *See* Hastak Test. 144:7-10. When asked about the basis for one of his conclusions regarding the TILA disclosure, Dr. Hastak said "the basis is again my

reading of those sentences and interpreting – trying to interpret them as a – as a consumer might." *Id*. 150:4-8. This explanation is repeated regarding the basis for several other conclusions. *See* Hastak Test. 149:4-8; 145:15-146:1; 146:22-147:4; 153:11-19; 155:9-12. In sum, it appears that Dr. Hastak has done nothing more than compare the FTC Guidelines and the Loan Agreement side-by-side and drawn conclusions based on reading these two documents.

Such a "methodology" has been expressly rejected by courts in the context of expert opinions on the likelihood of consumer confusion. In *Arias*, 928 F. Supp. 2d at 18, the expert's methodology entailed comparing two sources of information. The court found that this testimony was "not proper because 'the jury is just as competent to consider and weigh this evidence as is an expert witness and just as well qualified to draw the necessary conclusions therefrom." *Id.* (citing *Evans v. Wash. Metro. Area Transit Auth.*, 674 F.Supp.2d 175, 179–80 (D.D.C.2009)). Similarly, in *Parsi v. Daioleslam*, the expert opined that the standard of care for journalists was set out in a Code of Ethics by the Society of Professional Journalists (the "SPJ Code") and concluded that the defendant had not followed it. 852 F. Supp. 2d at 89. The expert "refused to give any description of his methodology beyond 'reading and viewing.'" *Id*. The court found that "while reading defendant's works was a necessary component of evaluating them . . . that does not mean that 'reading' standing alone, is an acceptable methodology." *Id.*

Dr. Hastak repeatedly stated that his conclusions are based on "common sense" and his own reading of the English language. *See* Hastak Test. 130:15-19 ("I'm just calling it sort of just common sense that says if you state something, people are more likely to get it . . . ."); *see also id*. 138:14-19 ("The basis for this inference is very simple. It's simply reading the sentence and trying to understand it as an English sentence"); *id*. 260:16-18 ("[T]hat analysis is simply based on looking at this sentence and – and trying to interpret it.") Dr. Hastak has not explained how

the application of his experience and knowledge is any different than the standard means of literacy and deductive logic otherwise available to the fact finder in this matter.

This is unreliable because it requires no specialized knowledge or expertise. In *Estate of Gaither*, the plaintiff claimed its expert's methodology of comparing: (1) relevant sentencing factors in a particular case; with (2) thousands of prior sentences involving similar factors was sound because the expert was a former Assistant Public Defender. 831 F. Supp. 2d at 68. The court found that while "'an expert might draw a conclusion from a set of observations based on extensive and specialized experience,'" (quoting *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 156 (1999)) that "'does not mean that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express.'" *Gaither* at 68 (quoting *U.S. v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) (*en banc*), *cert denied*, 544 U.S. 1063 (2005))

Courts have similarly rejected proffered expert testimony on the issue of the likelihood of confusion where the expert had not presented the error rate of his purported technique; had not shown "the existence and maintenance of standards controlling the technique's operation"; nor presented evidence that the technique used was generally accepted by the marketing or advertising community to determine the existence of a likelihood of confusion . . . ." *New Century* at *3. Dr. Hastak's methodology has demonstrated none of these characteristics. He has merely put two documents side by side, read them, and drawn his own conclusions, which are based on vague representations of his experience, his understanding of the Loan Agreement's language, and his own "common sense." It is unclear how this purported methodology is sound, why it would require any specialized knowledge, and most importantly, how it would otherwise differ from a fact-finder's own abilities.

ii. Dr. Hastak Has Not Established That The FTC Guidelines Are The Appropriate Standard Against Which The Loan Agreement Should Be Measured

In *Parsi v. Daioleslam,* the expert was further critiqued by the court for failing to explain why he relied exclusively on the SPJ Code as the applicable standard. 852 F. Supp. 2d at 89. The Court noted that, "[a]n expert proposing to testify about professional standards must, however, identify specific and objective standards, not rely on his personal opinions about what professional standards should be." *Id.* Dr. Hastak has presented no evidence as to why the FTC Guidelines are the appropriate standard against which the Loan Agreement must be measured, other than his "understanding" that "the FTC uses the term 'advertising' or 'promotion' in a fairly broad manner." *See* Hastak Test. 42:18-43:2. When pressed during his deposition, Dr. Hastak offered no explanation for this understanding beyond his own characterization of the Loan Agreement as:

> "a document that communicates information to consumers that's relevant to their decision making. It's information communicated by a marketer to a consumer, and it includes information that's relevant to their decision-making. So I see it as including promotional or marketing information." *Id*. 43:13-19.

Dr. Hastak points to no scholarly literature, including his own, that establishes the FTC Guidelines as the appropriate standard for measuring whether disclosures in Loan Agreements are clear and conspicuous. Further, he notes – without citation – that his analysis "is applicable regardless of whether borrowers encounter the Loan Agreement in an on-line or off-line environment." *See* Dkt. 63A, Hastak Report at 10, FN. 2.

C. Dr. Hastak Has Not Reliably Applied Reliable Principles And Methods To The Facts Of The Case

"It has long been the law in this Circuit that 'where the jury is just as competent to consider and weigh the evidence as is an expert witness and just as well qualified to draw the

necessary conclusions therefrom, it is improper to use opinion evidence for the purpose.'" *Evans*, 674 F. Supp. 2d at 179-80 (quoting *Henkel v. Varner*, 138 F. 2d 934, 935 (D.C. Cir. 1943)).

i. Dr. Hastak's Method Is Not Reliably Applied

The court in *Gaither* ultimately excluded the expert's testimony because "[f]ramed in such generalized and non-specific terms, the Court has no basis to meaningfully assess whether [the expert] has reliably applied her methodology. . . . Further, it is not really clear what weight [the expert] herself applied to each factor . . . ." 831 F.Supp.2d at 71. The same issues arise in Dr. Hastak's application of his methodology. For example, Dr. Hastak had trouble articulating why he concluded that certain consumer interpretations were "likely" or "possible." Indeed, Dr. Hastak acknowledged that he was "sort of in the middle between" whether an outcome he indicated in his report was "possible" or "likely." *See* Hastak Test. 190:22-191:20. Further acknowledging the fundamentally nebulous and subjective nature of his methodology, he expressly stated that his conclusion of whether an outcome was "likely" or "possible" was not based on "something very systematic." *See id*. 143:15-144:16. Beyond reading a sentence, Dr. Hastak could articulate no other basis for his conclusion that a certain interpretation by consumers was "possible" versus "likely." *Id*. 148:9-149:8. Dr. Hastak's *own uncertainty* regarding his methodology is perhaps the best illustration of its unreliability; because he does not rely upon a systematic methodology, even Dr. Hastak himself is unsure of the foundation for his conclusions.

ii. Dr. Hastak's Testimony Does Not Assist The Fact Finder's Ability To Understand The Facts

Dr. Hastak repeated throughout his deposition his only articulable methodology in reaching his conclusions – his own reading of the words contained in the Loan Agreement. *See*

id. 149:4-8; 145:15-146:1; 146:22-147:4; 153:11-19; 155:9-12. Dr. Hastak's ability to read a sentence does not reflect any "specialized knowledge" beyond the capacity of the fact-finder. Further, even assuming, *arguendo*, that the FTC Guidelines constitute the appropriate standards against which the Loan Agreement should be measured – which Dr. Hastak has not articulated in his report or in his deposition – the fact-finder is similarly capable of reading the guidelines and comparing them to the Loan Agreement.

In *De Boulle Diamond & Jewelry, Inc. v. Boulle, Ltd*., No. 3:12–CV–1462, 2014 WL 4413608 at *4 (N.D. Tex. Sept. 5, 2014), the court found that the expert's opinion that one logo was "confusingly similar" to another "would not be helpful to the jury because it is primarily based on his personal observations . . . ." While the expert "has extensive experience with and knowledge of luxury retail markets, he does not rely on any specialized knowledge in forming his opinions. He simply compares the 'sight and sound' of the different marks and examines the similarities of their various components." *Id.* Accordingly, the court precluded the expert's testimony because [t]he jury is fully capable of considering the same evidence, provided it is admitted at trial, and making its own determination regarding any similarities between the marks." *Id.*

D. Dr. Hastak's Proposed Testimony Will Unfairly Prejudice, Confuse And Mislead The Fact Finder

Even if the Court finds that Dr. Hastak's testimony is reliable under Section 1081.303(b)(1) – which Respondents do not concede – his testimony should nonetheless be excluded under Section 1081.303(b)(2) because its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues, it is misleading, and it would result in undue delay and a waste of time.

Dr. Hastak has performed no empirical research. His methodology is nebulous and subjective, yielding conclusions that he admits are derived from his own "common sense" and reading of the FTC Guidelines and the Loan Agreement. Without empirical data and a reliable methodology, Dr. Hastak's testimony offers no greater insight into a payday lending consumer's interpretation of the Loan Agreement than that which the fact finder would have in examining the same documents. It is for precisely such reasons that courts have excluded such expert testimony under Fed. R. Evid. 403, which is substantively the same as Section 1081.303(b)(2).

In *U.S. v. Libby*, 461 F. Supp. 2d 3, 18 (D.D.C. 2006), the court denied a motion to admit the testimony of an expert who would testify about principles of human memory in support of the defendant's faulty memory defense. *Id.* The court found that even if the expert's testimony was reliable under Fed. R. Evid. 702, the court would still exclude it under Fed. R. Evid. 403 because "the jurors will have the ability to collectively draw upon their common-sense understanding of memory and render a fair and just verdict." *Id.*

Indeed, Dr. Hastak's personal opinions regarding the Loan Agreements necessarily do not represent, replicate, or even resemble the opinions of the *actual population* that would have been taking out loans with Integrity Advance. It would only serve to confuse – rather than assist – the factfinder in understanding the facts of this case. Accordingly, to the extent that Dr. Hastak's testimony is actually probative – which it is not – its potential to confuse or mislead the finder of fact is too substantial to overcome the hurdle of Section 1081.303(b)(2).

CONCLUSION

For the reasons stated above, Respondents respectfully request that the Court preclude expert testimony from Dr. Hastak pursuant to Section 1081.303(b).

Respectfully submitted,

Dated: June 7, 2016

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CERTIFICATION OF SERVICE

I hereby certify that on the 7th day of June, 2016, I caused a copy of the foregoing 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 e-mail on the following parties who have consented to electronic service:

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