UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION *IN LIMINE* TO PRECLUDE EXPERT TESTIMONY OF DR. MANOJ HASTAK**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION *IN LIMINE* TO PRECLUDE EXPERT TESTIMONY OF DR. MANOJ HASTAK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

I. DR. HASTAK'S TESTIMONY IS ADMISSIBLE.

Respondents have moved to preclude Dr. Manoj Hastak from testifying at the hearing in the above-captioned matter, arguing primarily that his methodology was flawed. The motion fails, however, because Dr. Hastak's testimony is clearly admissible under 12 C.F.R. Part 1081, the rules governing this proceeding (Rules). Furthermore, Respondents' arguments rely primarily on the Federal Rules of Evidence (FRE). The FRE do not apply to this proceeding, but even if they did, Dr. Hastak's testimony still would be admissible.

As an initial matter, the Rules strongly favor admitting evidence: "relevant, material, and reliable evidence that is not unduly repetitive is admissible *to the fullest extent authorized* by the Administrative Procedure Act and other applicable law." 12 C.F.R. § 1081.303(b)(1) (emphasis added); *see also id.* § 1081.303(b)(3) (providing for the admissibility of hearsay); *cf. In re Jerk, LLC*, No. 9361, 2015 WL 1346189, at *3 (F.T.C. Mar. 13, 2015) (stating that evidence in an administrative proceeding "should be excluded in a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds") (internal quotation marks omitted). And, as the Administrative Law Judge has stated, "the standard in administrative proceedings is more lenient and allows the inclusion of evidence that might be excluded under the Federal Rules of Evidence." Order Deny Mot. Strike Resp. Rebuttal Exp. Rpt. (Dkt. 81) at 3-4; *see also* 12 C.F.R. § 1081.303(b)(4) (stating that evidence may not be excluded simply because it would be inadmissible under the FRE).

Dr. Hastak systematically analyzed the Integrity Advance loan agreement (Loan Agreement) using the well-established, six-factor Federal Trade Commission (FTC) Guidelines and concluded that the Loan Agreement did not clearly and conspicuously disclose either (1) the cost of the loan if Respondents automatically renewed the loan under the auto-renewal or auto-workout provisions of the agreement or (2) the fact that the ACH Authorization permitted

Respondents to use remotely created checks (RCCs) to debit consumers' accounts. Relying on the literature on consumer behavior in the context of default options, Dr. Hastak also concluded that because the loans automatically renewed by default (*i.e.*, without any further action by the borrower), a large proportion of borrowers likely ended up with this option without necessarily actively choosing it. Dr. Hastak's analyses are relevant and material to this proceeding because they support a finding that the language in the Loan Agreement was deceptive and unfair.

Dr. Hastak's expertise in consumer behavior, consumer response, marketing and advertising, and deception in the communication of information to consumers qualifies him to make these assessments, particularly given that he has at least 21 years of experience analyzing materials on behalf of the Federal Trade Commission. EC MSD (Dkt. 87) Appx. A of Exh. A (Hastak Rpt.); Exh. 1 (Hastak 42:22-43:19). He has applied the FTC Guidelines to other loan agreements to determine whether disclosures were clear and conspicuous. *Id.* (74:11-18). Dr. Hastak has previously conducted research on consumers in the alternative financial sector. *Id.* (77:18-78:4). His prior research experience has included studies of express and implied claims. *Id.* (131:14-132:3). Dr. Hastak has routinely determined, in his capacity as an expert, whether a conceptual analysis applying a framework such as guidelines or an empirical analysis is the best approach for ascertaining consumer take-away of materials. *Id.* (69:9-70-16). His peer-reviewed publications have included papers on deception, online advertising disclosures, the alternative financial sector, and consumer response, perceptions, experience and behavior. Appx. A of Hastak Rpt. Finally, Dr. Hastak has consulted on consumer issues for government agencies and organizations including the FTC, the Department of Justice, the Food and Drug Administration, and the Department of Housing and Urban Development, as well as private law firms. Appx. A of Hastak Rpt.; Hastak Rpt. at 3. Dr. Hastak's expertise establishes the reliability and

admissibility of his testimony. *Cf. Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) (holding that in an administrative law proceeding, an expert witness's "recognized expertise provides the necessary foundation for his or her testimony. Thus, no additional foundation is required."); *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 539 (7th Cir. 2005) (rejecting the exclusion of expert testimony and stating, "Nothing in the curricula vitae of Professors Rothenberg or Cassel demonstrated that they were unqualified to offer expert evidence, and their testimony undoubtedly would have been helpful ….").

Although "[s]trictly speaking, *Daubert* and its progeny do not apply to administrative proceedings," Order Deny Mot. Strike Resp. Rebuttal Exp. Rep. at 3, even if *Daubert* and FRE 702 did apply here, Dr. Hastak's testimony still would be admissible under those standards. FRE 702 generally favors admissibility. *See, e.g.*, *Arias v. Dyncorp*, 928 F. Supp. 2d 10, 17 (D.D.C. 2013). "Disputes about the strength of an expert's credentials, faults in an expert's decision to use a particular methodology, or the lack of textual authority for an expert's opinion 'go to the weight, not the admissibility, of his testimony.'" *Clark v. LR Sys.*, 219 F. Supp. 2d 323, 333 (E.D.N.Y. 2002) (*quoting McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir.1995)); *see also Zuchowicz v. United States*, 140 F.3d 381, 387 (2d Cir.1998). Moreover, even in *Daubert*, the Court noted, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993).

Although Respondents spend several pages discussing the *Daubert* factors, Mot. at 1-2, the Court has been clear that the "factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (citation

omitted); *see also United States v. Crisp*, 324 F.3d 261, 266 (4th Cir. 2003) (noting "that testing of reliability should be flexible and that *Daubert*'s five factors neither necessarily nor exclusively apply to every expert.").

Indeed, "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized knowledge[,]" *Kumho Tire*, 526 U.S. at 156, and it is well-settled that an expert may testify about a particular standard and draw conclusions based on an assessment against that standard, as Dr. Hastak has done in this case. *See, e.g.*, *Karnofsky v. Mass. Mut. Life Ins. Co.*, 2:14-CV-949-PMD, 2016 WL 741285, at *3 (D.S.C. Feb. 25, 2016) (holding that expert testimony should not be excluded, as the expert was "not simply interpreting the documents. Instead, as is the usual practice of an expert, she reviewed the documents in order to compare Defendant's conduct with the industry standards referenced in her report."); *Thomas v. Cumberland Cnty. Corr. Facility*, No. 09-1323, 2011 WL 6756897 at *19 (D.N.J. 2011) (finding an expert report to be reliable where expert compared training materials at issue against national and state standards); *Ayers Oil Co. v. Am. Bus. Brokers, Inc.*, 2:09 CV 02 DDN, 2010 WL 2990113, at *4 (E.D. Mo. July 27, 2010) ("[A]n expert may testify about the customs and standards of an industry, and how a party's conduct compares to those standards.").

In this case, Dr. Hastak has drawn on his extensive and specialized knowledge to assess—using a method generally accepted by experts in the area—the clarity and conspicuousness of the cost disclosures contained in Integrity Advance's loan agreement through a systematic application of the FTC Guidelines to every cost disclosure in the loan agreement. In addition, he has relied on the accepted literature on default options to assess the effect of the Loan Agreement on Integrity Advance consumers. His testimony is both reliable and admissible under FRE 702 and *Daubert*. *See e.g.*, *Karnofsky v. Mass. Mut. Life Ins. Co.*, 2:14-CV-949-

PMD, 2016 WL 741285, at *3 (D.S.C. Feb. 25, 2016) (holding that testimony that reviewed documents and compared them to industry standards was reliable expert testimony pursuant to FRE 702 and *Daubert*).

II. RESPONDENTS' COMPLAINTS ABOUT DR. HASTAK'S METHODOLOGY ARE NOT WELL FOUNDED.

Respondents contend that Dr. Hastak's testimony should be excluded, arguing that instead of using the FTC Guidelines for his analyses, he should have conducted a consumer survey, tested the relevance of cost to consumers, performed independent research into consumer behavior in the payday lending context, and analyzed phone calls, emails, and an online version of the loan agreement. These arguments fail for two independent reasons. First, each of these contentions is wrong; and second, these arguments go to credibility rather than to admissibility. The Administrative Law Judge should reject Respondents' attempt to exclude Dr. Hastak's testimony on these grounds.

A. The FTC Guidelines Are a Well-Accepted Method for Analyzing Whether Disclosures Are Likely to Mislead Reasonable Consumers.

The Administrative Law Judge should reject Respondents' attempt to exclude Dr. Hastak's testimony based on his use of the FTC Guidelines. The FTC established the guidelines over 15 years ago, and they have been applied in consumer deception cases. *See, e.g.*, *FTC v. Direct Benefits Grp., LLC*, 6:11-CV-1186-ORL-28, 2013 WL 3771322, at *15-17 (M.D. Fla. July 18, 2013) (applying the FTC Guidelines in a deception case and concluding that "the disclosures on the payday loan websites were not clear and conspicuous"); *U.S. v. Locascio*, 357 F. Supp. 2d 536, 548-49 (E.D.N.Y. 2004) (applying the FTC Guidelines in determining that disclosures were deceptive). Indeed, Respondents cite to no cases where use of these guidelines were rejected.

In addition, as Dr. Hastak noted, the FTC Guidelines have been the subject of extensive research, academic literature, workshops, and analysis, and have been applied in the context of litigation and FTC guidance letters. Hastak Rpt. at 10 n.2; Exh. 1 (Hastak 23:14-24:20). Dr. Hastak testified that the FTC Guidelines are "well accepted, based on good research, and [have been] vetted over a long period of time." *Id.* (24:16-19). Dr. Hastak concluded that, in his expert opinion, the guidelines are "the best available framework for evaluating disclosures." *Id.* (24:19-20). The "well defined, well accepted conceptual framework" provides "very clear guidelines for how to evaluate the clarity and conspicuousness of disclosures in … any kind of document." *Id.* (72:10-14). As Dr. Hastak testified, using the guidelines, "[t]wo different people with knowledge of the framework applying it to the same stimulus would use the same approach." *Id.* (72:21-73:1).

Most of Respondents' arguments do not directly attack the use of the guidelines to analyze disclosures such as these. Rather, they argue that Dr. Hastak should have done something else instead. But those arguments go to credibility, not admissibility. Respondents' only argument about the guidelines themselves is that the guidelines cannot be used to analyze a printed copy of an online contract. That argument simply is incorrect, because the FTC Guidelines are applicable to disclosures in both online and offline environments. *See Locascio*, 357 F. Supp. 2d at 549 (stating that the FTC Guidelines "can be applied to any medium"); Hastak Rpt. at 10 n.2.

B. A Consumer Survey Was Neither Appropriate Nor Necessary in This Context.

The Administrative Law Judge also should reject Respondents' claim that Dr. Hastak's testimony is not admissible because he did not conduct a consumer survey. Respondents misstate the law, and in any case, Dr. Hastak explained why a survey was not appropriate in this matter.

Respondents simply are wrong that courts require consumer surveys in deception cases such as this one. *See F.T.C. v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 39-41 (D.C. Cir. 1985) (stating that the "contention … that a consumer survey must be provided as a matter of law is ill-founded" and that "we do not accept [the] contention that consumer survey evidence must, as a matter of law, be presented to supporting a finding" of deception). Indeed, Respondents' statement that "[n]umerous courts have held that expert evidence on the issue of consumer confusion should be based on data from consumer surveys," Mot. at 4, is misleading at best. Each of the cases cited by Respondents involved trademark confusion—an area of the law where both treatises and cases have held that consumer surveys are helpful, but not necessary. *See Patsy's Italian Rest., Inc. v. Banas*, 531 F. Supp. 2d 483, 485-86 (E.D.N.Y. 2008); *New Century Fin., Inc. v. New Century Fin. Corp.*, No. C-04-437, 2005 WL 5976552, at *2, *3 (S.D. Tex. Nov. 29, 2005); *Tovey v. Nike*, No. 1:12CV448, 2014 WL 3510636 at *5 (N.D. Ohio July 10, 2014). In *Tovey*, for example, the court expressly stated that a survey was *not* required, as long as the expert "satisfied her burden of explaining why she chose those other methods, and those other methods are sufficiently reliable to support her conclusion." 2014 WL 3510636 at *5; *see also Patsy's*, 531 F. Supp. 2d at 486 (noting that "consumer surveys are not necessary to prove a likelihood of confusion"); *Flowers Bakeries Brands, Inc. v. Interstate Bakeries Corp.*, 2010 WL 3075318 at *5 (N.D. Ga.) ("failure to introduce any market survey evidence of likely consumer confusion…goes to weight and not to the sufficiency of the evidence."). In each trademark case cited by Respondents, the court rejected the expert's testimony on other grounds. *Patsy's*, 531 F. Supp. 2d at 486 (finding that expert's testimony would usurp the role of the fact finder); *New Century Fin.*, 2005 WL 5976552, at *3 (finding that the expert in question simply had assumed that the trademark in question caused confusion); *Tovey*, 2014 WL 3510636 at *4-5

(finding that expert admitted that she did not do a survey solely because of the cost and that she could not explain her methodology).

In this case, Dr. Hastak testified as to why he analyzed the Loan Agreement using the FTC Guidelines and why he did not conduct a consumer survey. Exh. 1 (Hastak 60:9-73:6; 90:13-92:7). Dr. Hastak, who has been retained by for the FTC for the last 21 years to perform analyses similar to those conducted here, testified that he routinely assesses whether an empirical study or conceptual analysis is the most effective way to ascertain consumer take-away from written material. *Id.* (Hastak 70:3-16). Such assessments are in keeping with the FTC's regular practice of asking experts to make such recommendations. *Id.* (69:17-70:2). As Dr. Hastak explained at length, he concluded that the application of a well-defined conceptual framework was the optimal way to evaluate the clarity and conspicuousness of the disclosures in the loan agreement documents only after careful consideration of all the relevant factors. *Id.* (60:9-72:15).

C. Dr. Hastak's Extensive Experience Qualifies Him to Testify in This Matter.

Respondents incorrectly assert that Dr. Hastak must be an expert in payday loans, default options, and RCCs to provide testimony on the Loan Agreement. Mot. at 6-7. Dr. Hastak's expert testimony will pertain to the disclosures in the Loan Agreement and to the default terms of the Loan Agreement as assessed against the FTC Guidelines and the literature on consumer behavior in response to default options. To provide such testimony, Dr. Hastak is not required to have conducted independent research into consumer behavior in the payday lending context or possess expertise in either payday loans or the specific population that obtained payday loans from Integrity Advance. Respondents have provided no evidence that the payday loan population is unique such that the FTC Guidelines and general principles of consumer behavior and marketing do not apply. And even if they had, such arguments would go to the credibility, not the admissibility of Dr. Hastak's testimony.

In reviewing the disclosures, Dr. Hastak's role was to assess "whether these disclosures make sense to the average consumer[.]" Exh. 1 (Hastak 166:12-14). Dr. Hastak's expertise in consumer behavior, consumer response, marketing and advertising, and deception in the communication of information to consumers qualifies him to make this assessment. *Id.* (42:22-43:19); *see also* Appx. A of Hastak Rpt. Indeed, in a prior matter, Dr. Hastak reviewed loan agreements and conducted "a very similar analysis of clear and conspicuousness of the disclosure using the FTC Guidelines." Exh. 1 (Hastak 75:15-18). In that matter, as in this one, Dr. Hastak found that information on the specific consumer population was not necessary given his systematic review of the loan agreement against the FTC Guidelines. *Id.* (75:19-76:5). He has also conducted research on consumers in the alternative financial sector, *id.* (77:18-78:4), and is an expert in how disclosures function, *id.* (214:7-9).

While Dr. Hastak did not rely on consumer complaints, he did review a random sampling of about 50 consumer complaints. He noted that his assessment that the cost disclosures in the Loan Agreement were not clear and conspicuous was consistent with the fact that "at least some consumers were taking away the message that whether they chose a single payment option or a multiple payment option … they thought the total payment would be the same." *Id.* (136:8-20). While the complaints, as Dr. Hastak explained, were just a small sampling that he could not rely on in the course of a systematic analysis, he did note that the complaints were consistent with his finding that the cost disclosures in the Loan Agreement were neither clear nor conspicuous. *Id.* (138:14-139:6). The consumer complaints "simply validated" Dr. Hastak's assessment. *Id.* (139:13-14).

Respondents erroneously attempt to characterize Dr. Hastak's expert opinion as *ipse dixit*, based on *Gaither v. District of Columbia*, 831 F. Supp. 2d 56 (D.D.C. 2011). Mot. at 7-8.

However, in that case, the court excluded the expert's testimony because she was asked to testify on the sentencing practices of a particular Superior Court judge, but her opinion did not come from her own personal experience. She admitted to having no memory of cases analogous to *Gaither* before the judge in question, and she only had "some sense" of the judge's sentencing practices because her tenure as a PDS attorney overlapped with the time the judge was on the bench. *Gaither*, 831 F. Supp. 2d at 65-66. By contrast, Dr. Hastak has drawn on his extensive expertise as a researcher and academic to systematically compare disclosures in the Loan Agreement to a well-established set of FTC Guidelines and to opine on the default option in the Loan Agreement in the context of the academic literature on consumer behavior in response to default options.

D. Both Parties Have Relied on the Same Template Loan Agreement, and There Is No Evidence in the Record that Consumers' Online Experience Differed in Any Material Way from Reviewing a Hardcopy of the Template.

Respondents complain that Dr. Hastak did not analyze an online version of the Loan Agreement, Mot. at 8, but Respondents have themselves stipulated to and relied on what is essentially the same document in the same format that Dr. Hastak reviewed. Joint Stip. (Dkt. 56) ¶ 12, Exh. A; Resp. MSD (Dkt. 89) at 9-11, 17-21; Resp. Facts (Dkt. 90) ¶¶ 4, 9-11, 13-21. Furthermore, Respondents have never offered any evidence that the online version of the Loan Agreement was different in any way from the Loan Agreement on which Dr. Hastak relied. EC SOF (Dkt. 88) Exh. 6 (Foster 158:19-161:13); EC SOF Exh. 3 (Carnes 213:11-13). Indeed, throughout their motion for summary disposition Respondents cited extensively to a template of the same Loan Agreement analyzed by Dr. Hastak, even excerpting sections of the document throughout their statement of facts supporting their motion. Resp. MSD at 9-11, 17-21; Resp. Facts ¶¶ 4, 9-11, 13-21.

Despite Enforcement Counsel's requests, Respondents have never made an online version of the Loan Agreement available, and Respondents has repeatedly represented that the online version is unavailable. *See, e.g.* EC SMF (Dkt. 88) Exh. 3 (Carnes 185:20-186:10).

Because Respondents could not provide details of consumers' online experience of the Loan Agreement during origination, Dr. Hastak, in keeping with permissible practices of an expert witness, relied on the available version of the evidence. *See, e.g.*, *Lesser ex rel. Lesser v. Camp Wildwood*, 282 F. Supp. 2d 139 (S.D.N.Y. 2003) (expert testimony of tree pathologist not precluded where the expert was unable to test the subject tree because it had been destroyed and the expert based the analysis on examination of photos of the tree). Respondents have never offered any evidence that the online version of the Loan Agreement was different in any way from the Loan Agreement on which Dr. Hastak relied. *See Campmor, Inc. v. Brulant, LLC*, CIV. 09-5465 WHW, 2013 WL 1750009, at *4 (D.N.J. Apr. 23, 2013) (Expert's reliance on a more recent version of the materials at issue "is only unfair if the [newer] version contains material differences from the older version and those differences are relevant to his testimony.") Dr. Hastak reviewed the only versions of the agreement that were available—sample executed PDFs of the Loan Agreement based on the template PDF of the Loan Agreement to which Respondents stipulated, Joint Stip. ¶ 12 and Ex. A thereto, that Integrity Advance produced in the course of the investigation. Appx. B and C of Hastak Rpt. According to Respondents, the PDFs of the Loan Agreement were identical in content to the online versions. EC SOF Exh. 6 (Foster 158:19-161:13); EC SOF Exh. 3 (Carnes 213:11-13).

As Respondents have testified, at some point during the loan approval process, the consumer was presented with the Loan Agreement reviewed by Dr. Hastak and was able to scroll through it before signing. EC SOF Exh. 6 (Foster 161:2-13). By scrolling through the Loan

Agreement on his computer, Dr. Hastak made a good faith effort to replicate the online experience in the course of his analysis. Exh. 1 (Hastak 35:22-36:3). Indeed, Respondents have claimed, albeit without support, that their telemarketers walked consumers through the Loan Agreement, Mot. at 9, and Respondents have proffered no evidence that the actual online experience differed in any way from simply reviewing the PDF on a computer screen.[1] In this context, Dr. Hastak's use of the printed agreement in his analysis is completely appropriate, and in any case, arguments about the format of the online agreement would go to the credibility, not the admissibility of his testimony.

In addition, Respondents have incorrectly likened Dr. Hastak's focus on the Loan Agreement to reviewing only portions of the relevant evidence because he did not analyze calls or emails to consumers. Unlike in *Arias v. Dyncorp*, 928 F. Supp. 2d 10, 18 (D.D.C. 2013), on which Respondents rely, Dr. Hastak's analysis properly considered the entire Loan Agreement, not just 'incomplete excerpts' from the document. Hastak Rpt. at 5-10; *see also* Exh. 1 (Hastak 83:6-22). Dr. Hastak's testimony is limited to the Loan Agreement—the document that all consumers viewed at origination. There is no evidence in the record that Respondents told consumers anything at origination that contradicted Dr. Hastak's conclusions, and emails and calls after origination are irrelevant to the question of whether the agreement is deceptive or unfair. In any case, Respondents have not offered any evidence that the emails or phone calls provided any additional disclosures about the cost of the loan or RCCs.

E. Respondents' Discussion of the Materiality of the Cost of Their Loans Is Both Wrong and Not Relevant to Dr. Hastak's Testimony.

Respondents' claim that Dr. Hastak incorrectly assumed that the cost of renewing the loan would be material to consumers is misplaced. Mot. at 6. Dr. Hastak did not opine in his

[1] Respondents mention that an online version might use different colors, but they do not actually offer any evidence that their loan agreement was presented online with color. Mot. at 8.

report as to whether the cost of the loan was material within the meaning of the deception analysis. In any case, Respondents' claim ignores the fact that, as a matter of law, cost is presumptively material. *See, e.g. Novartis Corp. v. F.T.C.*, 223 F.3d 783, 786-87 (D.C. Cir. 2000) (holding that claims regarding cost can be presumed to be material); *U.S. v. Zaken Corp.*, 57 F. Supp. 3d 1233, 1239-40 (C.D. Cal. 2014) (express claims about potential earnings of business opportunity presumed to be material); *F.T.C. v. Patriot Alc. Testers, Inc.*, 798 F. Supp. 851, 855 (D. Mass. 1992) (express representations that are shown to be false are presumptively material); *In Re Cliffdale Associates, Inc.*, 103 F.T.C. 110, at *49 (*citing MacMillan, Inc.*, 96 F.T.C. 208, 303-04 (1980)) (FTC considers cost presumptively material); *see also* EC Reply in Support of MSD (Dkt. 104) at 5-6. As Dr. Hastak explained during his deposition, "it's not a mystery that cost would be a big consideration, a big factor. … I don't … need a consumer survey to figure out that consumers care about costs. They want loans that cost them less." Exh. 1 (Hastak 198:5-9).

III. RESPONDENTS HAVE FAILED TO DEMONSTRATE THAT DR. HASTAK'S TESTIMONY IS MORE PREJUDICIAL THAN PROBATIVE.

Respondents have not demonstrated that, pursuant to Rule 303(b)(1), 12 C.F.R. §1081.303(b)(1), the probative value of Dr. Hastak's testimony is substantially outweighed by any danger that the Administrative Law Judge will be unfairly prejudiced, confused, or misled. Mot. at 14. Respondents' reliance on *U.S. v. Libby*, 461 F. Supp. 2d 3, 18 (D.D.C. 2006), applying the Federal Rule of Evidence 403 to a jury trial, ignores the significant distinction between a jury trial and an administrative proceeding before a finder of fact capable of according evidence its due weight. *See Oil Spill by Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on Apr. 20, 2010*, No. MDL 2179, 2012 WL 413860 at *2 (E.D. La. 2012) (citing *Gulf States*, 635 F.2d at 519 (5th Cir. 1981)) ("As to the dangers of unfair prejudice, confusion of the issue, or

misleading the jury, these are not valid concerns in the context of a non-jury trial.") Respondents have offered no reason that the Administrative Law Judge is in danger of unfair prejudice, confusion, or being misled. As he previously stated, rather than excluding evidence that may be of value, "[a]s the trier of fact, I will make a determination as to the relevance of … Dr. Hastak's … expert report[.]" Order Deny Mot. Strike at 4.

Conclusion

Enforcement Counsel argues that the Loan Agreements are deceptive on their face. *See, e.g.*, EC MSD at 10-13; *see also F.T.C. v. AMG*, 29 F. Supp. 3d 1338 (D. Nev. 2014). If the Administrative Law Judge agrees, Dr. Hastak's testimony is unnecessary, and Respondents' motion is moot. However, if the Administrative Law Judge determines that additional evidence is required, Dr. Hastak's testimony is relevant, material, and reliable, and therefore should be admitted. Dr. Hastak has simply done what experts often do—he has drawn on his expertise to evaluate materials against well-settled guidelines, industry standards, and the relevant literature. His extensive knowledge, experience, education, and training in consumer behavior, consumer response, marketing, and measuring deception in materials that communicate information to consumers that are relevant to their decision-making qualify him to make this assessment. Exh. 1 (Hastak 42:22-43:19); *see also* Appx. A of Hastak Rpt. As discussed above, Respondents have not met the high bar for precluding evidence by establishing that Dr. Hastak's testimony is "clearly inadmissible on all potential grounds." *In re Jerk, LLC*, 2015 WL 1346189, at *3. Thus, Enforcement Counsel respectfully requests that the Administrative Law Judge deny Respondents' motion to preclude expert testimony from Dr. Hastak.

Respectfully submitted,

Attorneys for Plaintiff
Consumer Financial Protection Bureau

ANTHONY ALEXIS
Enforcement Director

DEBORAH MORRIS
Deputy Enforcement Director

CRAIG COWIE
Assistant Litigation Deputy

s/Alusheyi J. Wheeler

Alusheyi J. Wheeler
Wendy J. Weinberg
Vivian W. Chum
1700 G Street NW
Washington, DC 20552
Phone: (202) 435-7786
Facsimile: (202) 435-7722
Email: alusheyi.wheeler@cfpb.gov

Enforcement Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2016, I caused a copy of the foregoing Enforcement Counsel's Opposition to Respondents' Motion *in Limine* to Preclude Expert Testimony of Dr. Manoj Hastak and Exhibit 1 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:

Allyson B. Baker, Esq.
ABBaker@venable.com

Peter S. Frechette, Esq.
PSFrechette@venable.com

Hillary S. Profita, Esq.
HSProfita@venable.com

Joanna P. Boyd, Esq.
JPBoyd@venable.com

Christine E. White, Esq.
CEWhite@venable.com

Andrew T. Hernacki, Esq.
ATHernacki@venable.com

/s/ Vivian W. Chum
Vivian W. Chum