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' REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE* TO PRECLUDE TESTIMONY OF DR. MANOJ HASTAK**

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE*
TO PRECLUDE TESTIMONY OF DR. MANOJ HASTAK

INTRODUCTION

Nothing in the Bureau's Opposition alters the central fact that Dr. Hastak's opinion is unreliable and should be excluded. Dr. Hastak purports to offer an opinion regarding consumer understanding of the Loan Agreements at issue in this matter. Despite acknowledging that empirical data, such as consumer surveys, constitutes the best evidence of consumer understanding, Dr. Hastak conducted no consumer survey nor any other empirical research of how payday lending consumers were likely to understand the Loan Agreements. Instead, Dr. Hastak departed from this generally accepted approach and based his opinion on his own assumptions about what a consumer was likely to have thought about the Loan Agreement. Such *ipse dixit* opinions have been repeatedly excluded as unreliable. Indeed, the problems with Dr. Hastak's proposed testimony demonstrate fundamental issues regarding the principles and methodology underlying his opinion, and preclude his ability to offer any reliable opinion regarding what Integrity Advance consumers were likely to have understood. Accordingly, the Court should exclude Dr. Hastak's testimony.

ARGUMENT

I. Dr. Hastak's "Conceptual Analysis" is Not Based on Sufficient Facts or Data

There is no dispute that empirical data – such as consumer surveys – constitutes the best evidence of consumer understanding and Dr. Hastak did not conduct a consumer survey here. *See* Dkt. 102C, Testimony of Dr. Hastak ("Hastak Test.") 88:19-22; *see also* Dkt. 63B, Expert Report of Dr. Nathan Novemsky ("Novemsky Report") ¶¶ 14-17. Despite its efforts, the Bureau's Opposition does not explain how Dr. Hastak's opinion can be reliable absent such empirical data.

The Bureau first attempts to excuse Dr. Hastak's failure to conduct a consumer survey by arguing that consumer surveys are not required, as a matter of law, in consumer deception cases. CFPB Opposition ("Opp.") at 7. The Bureau articulates no reason why the analysis of expert evidence in a trademark-related consumer deception matter is inapplicable to the instant case. Indeed, the Bureau itself relies upon a trademark case. *See id.* (quoting *Flowers Bakeries Brands, Inc. v. Interstate Bakeries Corp*., No. 1:08cv2376, 2010 WL 3075318 (N.D. Ga. Aug. 2010). Regardless, the Bureau's argument is a red-herring. Respondents do not argue that consumer surveys are required as a matter of law in every consumer deception case. Respondents argue that consumer surveys are the best method of determining consumer understanding and Dr. Hastak's non-empirical "conceptual analysis" is not a reliable alternative. The fact that consumer surveys may not have been necessary under certain circumstances distinct from those presented here does not render Dr. Hastak's opinion reliable.[1]

The Bureau next attempts to distinguish the cases in which an expert's testimony was excluded for failing to conduct a consumer survey by arguing that their testimony was actually rejected on "other grounds." This is incorrect. For example, in *Tovey v. Nike*, No. 1:12cv448, 2014 WL 3510636 at *6 (E.D. Oh. July 10, 2014) the court expressly held that the expert's "explanation for failing to conduct a survey" was "not sufficient, particularly in light of her concession at deposition that a consumer survey is the generally accepted method of demonstrating consumer confusion in a trademark infringement case and her failure to articulate any other generally accepted methodology."

[1] In *F.T.C. v. Brown & Williamson Tobacco Corp*., 778 F.2d 35, 41-42 (D.C. Cir. 1985), a consumer survey was not required as a matter of law where the court found there was other evidence in the record to show that consumers relied upon the tar milligram ratings at issue.

Dr. Hastak similarly conceded that a consumer survey offers the "best evidence" of how consumers process information. Hastak Test. 88:19-22. Like the expert in *Tovey*, he has not explained why the alternative method he employed is a generally accepted one or is otherwise an appropriate barometer for consumer understanding in this context. While Dr. Hastak used the "conceptual analysis" because he could not replicate the "consumer reality" and too much time had passed to render a "retrospective survey," neither Dr. Hastak nor the Bureau has explained how these issues were resolved by his "conceptual analysis." *See* Hastak Test. 60:7-22, 61:14-20. Indeed, they were not. To avoid these issues, Dr. Hastak simply substituted his own unfounded assumptions – which, in many regards, contradict consumer behavior research in this area – for empirical data from consumers.[2] An opinion based on such unfounded assumptions is not reliable. *See* Mot. at 5.

The Bureau's attempt to excuse Dr. Hastak's failure to consider other data, such as the phone calls and emails from Integrity Advance, similarly misses the mark. The Bureau argues that the emails and calls are "irrelevant," because they came "after origination" and because there is "no evidence in the record that Respondents told consumers anything at origination that contradicted Dr. Hastak's conclusions." Opp. at 12. However, this argument ignores Dr. Hastak's own acknowledgement that the disclosures must be considered within the context in which consumers viewed and understood them. *See* Dkt. 106A, Respondents' Mot. ("Mot.") at 9. Given that Dr. Hastak understood that consumers were called at the time of origination (*see* Hastak Test. 51:13-16) and the fact that Respondent James R. Carnes testified that "every

[2] For example, while Dr. Hastak and the Bureau argue that the cost of a payday loan is presumptively material, this assumption is at odds with consumer behavior research finding payday lending consumers were more concerned with the speed of obtaining a loan than its cost. *See* Dkt. 63B, Novemsky Report ¶13.

consumer that got a loan was called and talked to so we understood what the product was and what they were getting" (Dkt. 102B, Carnes Testimony 188:1-6), the telephone calls and emails are part of the context in which consumers viewed and understood the Loan Agreements. Dr. Hastak's failure to consider the emails and phone calls, thus, is another fundamental flaw in his opinion rendering it incomplete and unreliable.

Nor does the Bureau explain how Dr. Hastak's "conceptual analysis" could be reliable given that it was not applied to the online experience consumers would have encountered. While Dr. Hastak explained that his "conceptual analysis" focuses on factors related to the physical layout of the disclosures (such as their "prominence") to determine whether they were clear and conspicuous in an *online* environment, Dr. Hastak's analysis was based on a review of a black and white, PDF version of the Loan Agreement, which he could not confirm was the same document that consumers viewed online. *See* Mot. at 8. The Bureau attempts to downplay the significance of this by claiming that Dr. Hastak "relied on the available version of the evidence." Opp. at 11. This only underscores why his "conceptual analysis" cannot reliably assess consumer understanding in this case – it did not involve a review of the Loan Agreement in the same physical context that consumers viewed it.

II. Dr. Hastak's "Conceptual Analysis" is Not The Product of Reliable Principles And Methods That Have Been Reliably Applied

Dr. Hastak's opinion should also be excluded because the Bureau has not established that the FTC Guidelines are the appropriate standard for measuring consumer understanding of Loan Agreements. The Bureau merely states that because the FTC uses them and Dr. Hastak has determined that they are well accepted, then they are applicable to "any kind of document." *See* Opp. at 6. In other words, because the Bureau's expert thinks they are applicable here, they are applicable here. The Bureau offers no evidence as to why the FTC Guidelines are the

appropriate standard against which the Loan Agreement must be measured. They cite no cases or scholarly literature that found the FTC Guidelines were the appropriate standard for measuring whether disclosures in a Loan Agreement were clear and conspicuous.[3] Indeed, *United States v. Locascio*, 357 F.Supp.2d 536, 539 (E.D.N.Y. 2004) was not even a consumer deception case. It was a RICO case. *Id*. The FTC Guidelines were discussed only in the context of whether privilege had been waived when an attorney provided advice regarding the FTC Guidelines. *Id.* at 548. In *F.T.C. v. Direct Benefits Grp., LLC*, No. 6:11cv1186, 2013 WL 3771322 at *16 (M.D. Fla. July 18, 2013), the court did not engage in an analysis of whether the FTC Guidelines were the appropriate standard to measure disclosures on the defendants' web sites. 2013 WL 3771322 at *16-17. Instead, the FTC Guidelines were one data point the court considered, upon the defendants' assertion of their relevance, in its overall analysis.

Even if the FTC Guidelines were the applicable benchmark (which Respondents do not concede), Dr. Hastak's opinion should still be excluded because he failed to employ a reliable methodology in applying them. Far from the "systematic analysis" Dr. Hastak and the Bureau claim he applied, Dr. Hastak employed no methodology beyond merely reading the Loan Agreement and comparing the language to the FTC Guidelines. When pressed to explain how he arrived at the conclusion that a consumer interpretation was "likely" or "possible," Dr. Hastak said that "I don't know that there's something very systematic in that sense that I'm doing here." Hastak Test. 143:15-144:16. In fact, Dr. Hastak repeatedly described his "methodology" as merely reading the terms of the Loan Agreement and "trying to interpret them . . . as a consumer might." Hastak Test. 150:4-8; *see also* Mot. at 9-10. Dr. Hastak performed no study of the

[3] Because the Bureau can offer no such explanation for why the FTC Guidelines are the appropriate standard, it seeks to shift its burden of proof to Respondents. *See* Opp. at 8.

payday lending consumer population,[4] and employed no specialized knowledge of how such consumers were likely to interpret and understand the Loan Agreement. If anything, Dr. Hastak's description of his "methodology" demonstrates why his testimony should be excluded: reading the Loan Agreement and the FTC Guidelines do not require any specialized skill and is something the fact finder is well-equipped to do on its own.[5] *See* Mot. at 9-11.

III. Dr. Hastak's Testimony Will Unfairly Prejudice Respondents

The Bureau argues that because this matter will not be tried by a jury, Respondents' reference to Fed. R. Evid. 403 is misplaced. *See* Opp. at 13. This argument is without merit. Section 1081.303(b)(2) contains language nearly verbatim to Rule 403 and permits the court to *exclude* evidence "if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. . . ." Absent empirical data and a reliable methodology, Dr. Hastak's testimony is unreliable and offers nothing to assist the fact-finder in determining how a payday lending consumer would have interpreted the Loan Agreement. Allowing Dr. Hastak to present his unfounded opinions would confuse the fact finder and unfairly prejudice Respondents.

CONCLUSION

For the reasons state above, the court should exclude the testimony of Dr. Manoj Hastak.

[4] The CFPB claims Dr. Hastak has "conducted research on consumers in the alternative financial sector," (*see* Opp. at 9) but that research related to "rent-to-own," not payday lending consumers, and the research took place "quite some time ago." Hastak Test. 77:18-78:4.

[5] In *Direct Benefits*, cited by the Bureau, the court examined the FTC Guidelines without the aid of expert testimony. 2013 WL 3771322 at *16-17.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 28th 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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