

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
RESPONDENTS' MOTION IN
LIMINE**

Hon. Parlen L. McKenna

I. Procedural History

The Consumer Finance Protection Bureau (CFPB or Bureau) initiated this administrative action against Integrity Advance, Inc. and James R. Carnes (Respondents) on November 18, 2015. The Bureau alleges Respondents violated numerous federal consumer finance protection laws when they provided short-term, small-dollar, high-cost loans (commonly referred to as “payday loans”). Specifically, CFPB alleges Respondents violated the Truth in Lending Act (TILA), 12 U.S.C. § 1601; the Electronic Fund Transfer Act (EFTA), 12 U.S.C. § 1693 *et seq.*; and the Consumer Financial Protection Act (CFPA), 15 U.S.C. § 5481 *et seq.*

On June 7, 2016, Respondents filed a Motion in Limine to Preclude Expert Testimony of Dr. Manoj Hastak. Dr. Hastak is proffered by the Bureau as an expert to testify in this proceeding. Enforcement Counsel filed an Opposition to Respondents’ Motion in Limine on June 22, 2016, and Respondents filed a reply on June 28, 2016. For the reasons stated below, Respondents’ Motion in Limine is **DENIED**.

II. The Parties' Arguments

a. Respondents

Respondents argue that I should apply the factors found in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and Federal Rules of Evidence (FRE) 702 in conjunction with CFPB rule 12 C.F.R. § 1801.303(b)(1) to exclude Dr. Hastak's expert testimony as unreliable and irrelevant. Specifically, Respondents argue that Dr. Hastak's testimony (1) is not based on sufficient facts or data; 2) is not based on reliable methods and principles; 3) that Dr. Hastak did not apply his methods to the facts in this case; and 4) that FRE 403 and 12 C.F.R. § 1801.303(b)(1) require the exclusion of Dr. Hastak's expert testimony. As to this last argument, Respondents argue that Dr. Hastak's testimony will unduly prejudice, confuse, and mislead me as the trier of fact.

b. The Bureau

In its opposition, the Bureau argues that the Federal Rules of Evidence do not apply in these proceedings. Alternatively, the Bureau asserts neither FRE 702 nor 403 would exclude Dr. Hastak's testimony. The Bureau asserts Dr. Hastak's testimony is relevant under section 1081.303(b)(2) because it supports a finding that the language contained in the Integrity Advance loan agreement was deceptive and unfair. Furthermore, the Bureau states Dr. Hastak's testimony is reliable because he uses a systematic analysis applying Federal Trade Commission (FTC) Guidelines on making disclosures and disclaimers clear and conspicuous in an on-line environment. The Bureau also points to Dr. Hastak's peer-reviewed publications and his 21 years of experience evaluating contracts for the FTC as evidence of his subject matter expertise. Finally, the Bureau asserts that Respondents' arguments concerning Dr. Hastak's principles and methodology are better suited for cross-examination and not a motion in limine.

III. Analysis

The purpose of administrative proceedings is to create a full and complete record on which to apply the controlling law in order to prepare a well-reasoned decision. *See* 5 U.S.C. § 556(d). Furthermore, the hearing provides for the creation of a record for appeal in the event that a party seeks judicial review of the agency's final determination. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Strict rules of evidence apply to federal court proceedings and are governed by the FRE. However, the evidentiary standard in administrative proceedings is more lenient and allows for the inclusion of evidence which is sometimes inadmissible under the FRE. *Gallagher v. National Transp. Safety Bd.* 953 F.2d 1214, 1218 (10th Cir. 1992). CFPB evidentiary rules state that "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).

As noted above, Respondents assert that FRE 702, *Daubert*, *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), and 12 C.F.R. § 1801.303(b)(1) mandate the exclusion of Dr. Hastak's testimony. However, *Daubert* and its progeny are not controlling in administrative proceedings. Indeed, both *Daubert* and *Kumho Tire Co.* apply the Federal Rules of Civil Procedure in Article III courts, and have limited applicability in administrative proceedings. Whether or not these cases might lead to the exclusion of Dr. Hastak's testimony in federal court is not before me. CFPB evidentiary rules specifically state that evidence inadmissible under the FRE may *not* be deemed inadmissible in a CFPB administrative proceeding solely on that basis. *See* 1081.303(b)(4) (emphasis added).

Nevertheless, the *spirit* of *Daubert* does apply in an administrative hearing: "[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) (quoting *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir.2004)). Respondents believe Dr. Hastak's testimony is unreliable because they disagree with the methodology he used to reach his opinions. Specifically, Respondents argue Dr. Hastak should have used a consumer survey to support his conclusions. Again, as stated in my Order Denying CFPB's Motion to Strike Portions of Respondents' Rebuttal Expert Report, if Dr. Hastak's methodology is flawed, it affects the credibility of both his testimony and report. Thus, such an outcome will affect the weight to be afforded to his testimony. However, at this juncture, I will wait until after the hearing to determine what weight Dr. Hastak's testimony should be accorded.

The rules governing CFPB proceedings clearly promote the admission of relevant and reliable evidence to the fullest extent possible. Dr. Hastak is well-credentialed and has rendered an opinion on the issues involved in this case. Whether or not his testimony is ultimately found to be credible is for me to decide after the hearing. This approach is exactly the same for the testimony of Respondents' expert witness and any report(s) attached thereto. Accordingly, I find Dr. Hastak's report, along with his potential testimony, relevant as to whether Respondents engaged in unfair or deceptive acts or practices¹, and sufficiently reliable as required by 12 C.F.R. § 1081.303(b)(1). It is up to Respondents' counsel at hearing to present evidence to discredit his statements and opinions.

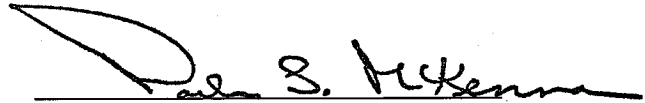
Finally, Respondents argue that 12 C.F.R. § 1801.303(b)(1) in conjunction with FRE 403 require the exclusion Dr. Hastak's testimony. Respondents assert that the probative value of Dr. Hastak's testimony is substantially outweighed by the danger that I will be unfairly prejudiced,

¹ The issue of whether Integrity Advance engaged in deceptive practices has been resolved by my Order Granting in Part and Denying in Part Bureau's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition. However, the question of whether Respondent Carnes engaged in deceptive acts or practices remains open for resolution.

confused or misled. I disagree. This is not a trial by jury and I am capable of rendering a decision based upon the facts and the law. Indeed, after receiving all the evidence presented by both sides at the hearing, I will give each piece of evidence its due weight, including evaluating the credibility, reliability and usefulness thereof. Therefore, Respondents' bald, unsupported assertions of unfair prejudice and confusion are hereby rejected at this time.

Accordingly, I am **DENYING** Respondents' Motion in Limine to Preclude the Testimony of Dr. Manoj Hastak.

IT IS SO ORDERED.



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

Done and dated on this 6th day of July, 2016 at Alameda, California.

CERTIFICATE OF SERVICE

I hereby certify that I have served the *Order Denying Respondents' Motion in Limine* (2015-CFPB-0029) upon the following parties and entities in this proceeding as indicated in the manner described below:

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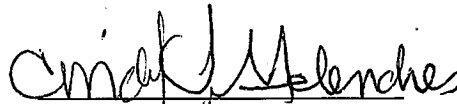
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Done and dated this 5th day in July, 2016
Alameda, California


Cindy June Melendres
Paralegal Specialist to the
Hon. Parlen L. McKenna