

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.

ENFORCEMENT
COUNSEL’S MOTION TO
STRIKE PORTIONS OF
RESPONDENTS’
REBUTTAL EXPERT
REPORT

ENFORCEMENT COUNSEL’S MOTION TO STRIKE PORTIONS OF
RESPONDENTS’ REBUTTAL EXPERT REPORT

Enforcement Counsel submitted an expert report on three distinct and narrow issues. In response, Respondents submitted a “rebuttal” report that goes far beyond attempting to rebut the original report, and attempts to introduce alternative theories under the guise of rebuttal. Accordingly, pursuant to 12 C.F.R. § 1081.210(a), Enforcement Counsel moves to strike portions of that report.

I. **INTRODUCTION**

The Bureau submitted a report from its expert, Dr. Manoj Hastak, that focused on three narrow issues: 1) “How clearly does Integrity Advance’s Loan Agreement disclose that costs (fees and charges) associated with the loan are significantly higher if borrowers renew the loan (either actively or by default) rather than paying it off in full?”; 2) “What is the effect of the default option of loan renewals on borrower choice?”;

and 3) How clearly is Integrity Advance's authority "to create remotely created checks and use these to debit borrower accounts" disclosed to borrowers? Ex. A at 5.

Respondents have submitted a rebuttal report from Dr. Nathan Novemsky that largely fails to address the issues set forth in Dr. Hastak's report, and instead promotes Respondents' theory of the case. Accordingly, Enforcement Counsel moves to strike the portions of Respondents' rebuttal report that go beyond the proper scope of such report.

II. LEGAL ANALYSIS

Rebuttal reports are limited to rebuttal of matters set forth in the expert report for which it is offered in rebuttal. 12 C.F.R. § 1081.210(a).

Federal courts applying a similar rule in the Federal Rules of Civil Procedure have held that the scope of expert rebuttal reports is narrow and limited to the scope of the initial expert report. "Rebuttal reports are limited to evidence 'intended solely to contradict or rebut evidence on the same subject matter identified by another party' in an expert report." *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1065 (C.D. Cal. 2010) (citing former Fed. R. Civ. P. 26(a)(2)(C)(ii), now Fed. R. Civ. P. 26(a)(2)(D)(ii)) (excluding portions of rebuttal report that went beyond plaintiff's expert report on damages calculation).

Courts have also disallowed rebuttal reports that attempt to introduce alternate theories or evidence. In *Vu v. McNeil-PPC, Inc.*, No., 2010 WL 2179882, at *3 (C.D. Cal. May 7, 2010), the court held that just because plaintiff's expert opined on the cause of death did not mean that defendant's expert could opine on alternative causes of death. "If the phrase 'same subject matter' is read broadly to encompass *any* possible topic that *relates* to the subject matter at issue, it will blur the distinction between 'affirmative expert' and 'rebuttal expert.'" *See also Int'l Bus. Machs. Corp. v. Fasco Indus., Inc.*, No.

C-93-20326 RPA, 1995 WL 115421, at *3 (N.D. Cal. Mar. 15, 1995) (“The supplemental or ‘rebuttal’ experts cannot put forth their own theories; they must restrict their testimony to attacking the theories offered by the adversary’s experts. . . . A party who forgoes designating experts on the initial disclosure date will thus find itself in a purely reactive mode, greatly restricted in its ability to offer expert testimony.”); *Marmo v. Tyson Fresh Meat, Inc.*, 457 F.3d 748 (8th Cir. 2006) (Rebuttal evidence may be used to challenge the evidence or theory of an opponent – and not to establish a case-in-chief.) (citing *Cates v. Sears, Roebuck & Co.*, 928 F. 2d 679, 685 (5th Cir. 1991)).

Consistent with the prohibition on introducing new theories, rebuttal reports should not offer new evidence that simply supports the theories of the opposing party. Rebuttal reports “may cite new evidence and data so long as the new evidence and data is offered to directly contradict or rebut the opposing party’s expert.” *Withrow v. Spears*, 967 F. Supp. 2d 982, 1002 (D. Del. 2013) (disallowing a rebuttal report that advanced novel evidence to explain a tractor-trailer accident).

A. Rebuttal of Dr. Hastak’s Opinion on the Clarity of the Disclosures Regarding Costs

The first part of Dr. Hastak’s report focuses on whether Integrity Advance clearly disclosed the costs of renewing its loans. Dr. Hastak concludes that the disclosures are not clear. *See* Ex. A at 19-21. Nowhere in Dr. Novemsky’s report does he assert that Integrity Advance’s disclosures were clear. Instead, in large part he attempts to introduce new theories or evidence, including whether the disclosures were important to consumers.

1. *Dr. Novemsky improperly attempts to introduce new theories and research.*

As noted above, a rebuttal report should address the theories propounded in the original report, not introduce opposing theories. Yet, Dr. Novemsky repeatedly offers alternate theories about how consumers understood their transaction with Integrity Advance. For instance, in paragraph 13, Dr. Novemsky opines on consumers' concerns when choosing a payday loan. *See* Ex. B at 3-4. This 'rebuttal' does not address the clarity of Integrity Advance's disclosures. Additionally, paragraph 22 of Dr. Novemsky's report begins, "Furthermore, there are two bodies of research in consumer behavior and related fields that cast doubt on the idea that renewal costs have an impact on the original decision to take a loan." Ex. B at 7. As noted above, alternate theories are inappropriate for a rebuttal report and Dr. Hastak's report does not address consumer decision-making. Similarly, paragraphs 23, and 24 of Dr. Novemsky's report explicitly begin by offering summaries of research studies that support an alternative analysis. *Id.*

Additionally, Dr. Novemsky makes numerous statements about the relevance of cost disclosures. For instance, in paragraph 11, rather than analyzing Dr. Hastak's conclusion that the Integrity Advance failed to disclose the costs of renewing a loan clearly and conspicuously, he states that "[Dr. Hastak's] conclusion is relevant only to the extent it implies consumers do not realize that they will incur fees if they renew their loans...." Similarly, in paragraph 13, he writes: "Moreover, Dr. Hastak does not address the relevance of renewal cost disclosures for consumers taking out a loan." In paragraph 33, Dr. Novemsky opines: "To summarize, there are multiple observations that suggest that consumers do not find the renewal costs to be a reason not to choose Integrity

Advance as their loan provider....” And in paragraph 35 he states that “renewal costs may not be the information consumers are interested in understanding....”

All of these points about relevance concern consumer decision making or motivations, not the clarity of the loan document itself. These points are therefore outside the scope of proper rebuttal evidence. Respondents may want to argue that consumers did not care about the cost of loan renewals, but if so, they should have offered such evidence in a primary expert report.¹

Accordingly, the Hearing Officer should strike paragraphs 11, 13, 21, 22, 23, 24, 25, and 32, 33 and 35 of Dr. Novemsky’s report.

2. Dr. Novemsky improperly attempts to introduce new evidence.

Dr. Hastak explicitly limited his report to an analysis of disclosures in Integrity Advance’s loan agreement. Yet in his rebuttal report, Dr. Novemsky discusses a variety of evidence outside of the Loan Agreement itself. For instance in paragraph 26, he discusses a welcome email allegedly sent by Integrity Advance to its customers. *Id.* at 8. In paragraph 27, he discusses phone calls that Integrity Advance consumers allegedly received. *Id.* In paragraph 30, he discusses another email that he alleges Integrity Advance sent to consumers. In paragraph 31 he discusses consumers who take out more than one loan from Integrity Advance. *Id.* at 9-10. None of this evidence contradicts or rebuts Dr. Hastak’s analysis of the Loan Agreement itself. Rather, it is outside of the scope of Dr. Hastak’s report and is used to bolster Respondents’ alternate theories of the case.

¹ Further, courts routinely find cost considerations to be material to consumer choices. *See FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993); *Steele v. Ford Motor Credit Co.*, 783 F.2d 1016, 1019-20 (11th Cir. 1986).

Accordingly, the Hearing Officer should strike paragraphs 26, 27, 28, 30, 31 and 33 of Dr. Novemsky's report.

B. Rebuttal of Dr. Hastak's Opinion on the Effect of the Default Renewal Option

The second part of Dr. Hastak's report focuses on whether the default option had an effect on the number of consumers who rolled over their loans. Dr. Hastak concludes that the default option could cause a large proportion of borrowers to end up with renewal costs that they did not affirmatively choose to incur. *See Ex. A at 21-22.* Dr. Novemsky concurs with Dr. Hastak that the default option impacts the number of renewals that consumers experience. However, as with the section above on the clarity of cost disclosures, Dr. Novemsky focuses largely on introducing alternative theories, rather than rebutting Dr. Hastak's view that the default option increases renewals; a view that Dr. Novemsky, citing his own research, endorses at least in principal.

Instead of rebutting the default option effect, Dr. Novemsky argues that payment in full might be more costly to consumers than repeated renewals (paragraph 46), and that additional information about renewals might cause "information overload" to consumers (paragraph 48). As argued above, a rebuttal report is not an appropriate place to posit theories that should be part of a party's case in chief.

Accordingly, the Hearing Officer should strike paragraphs 46 and 48 of Dr. Novemsky's report.

C. Rebuttal of Dr. Hastak's Opinion on the Clarity of the Disclosures on Remotely Created Checks

The final part of Dr. Hastak's report focuses on whether Integrity Advance's disclosure regarding its authority to create remotely created checks was clear and conspicuous. Dr. Hastak concludes that it was not. *See Ex. A at 26.* As with the

disclosure on cost, Dr. Novemsky does not attempt to argue that the disclosure was clear and conspicuous. Instead of rebutting Dr. Hastak's conclusion about the lack of clarity of the remotely created check disclosure, Dr. Novemsky appears to argue that it would not matter to consumers.

As noted above, this is an improper argument for a rebuttal report, and the Hearing Officer should strike paragraph 50 of Dr. Novemsky's report.

III. CONCLUSION

Dr. Novemsky's report is in large part an attempt by Respondents to argue their theories of the case rather than to rebut the specific analysis of Integrity Advance's Loan Agreement performed by Dr. Hastak. Such arguments should have been set forth in a primary expert report, not a rebuttal report. Accordingly, Enforcement Counsel respectfully requests that the Hearing Officer strike paragraphs 11, 13, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 35, 46, 48, and 50 of Dr. Novemsky's report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April 2016, I caused a copy of the foregoing Enforcement Counsel's Motion To Strike Portions of Respondents' Rebuttal Expert Report, 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:

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