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 TO PRECLUDE EXPERT TESTIMONY OF DR. MANOJ HASTAK**

RESPONDENTS' MOTION IN OPPOSITION TO ENFORCEMENT COUNSEL'S MOTION TO STRIKE PORTIONS OF RESPONDENTS' REBUTTAL EXPERT REPORT

PRELIMINARY STATEMENT

On March 25, 2016, Integrity Advance, LLC and James R. Carnes ("Integrity Advance") submitted the Rebuttal Expert Report of Dr. Nathan Novemsky (the "Novemsky Report," attached as **Exhibit A**). The Novemsky Report directly rebuts the February 11, 2016 Expert Report of Dr. Manoj Hastak (the "Hastak Report," attached as **Exhibit B**) by critiquing Dr. Hastak's methodology for its lack of empirical data collection and analysis regarding consumers' understanding of Integrity Advance's Loan Agreement that Dr. Hastak examined (the "Loan Agreement.")

On April 1, 2016, the Bureau filed a Motion to Strike Portions of Respondents' Rebuttal Expert Report (the "Bureau's Motion.") On April 15, 2016, the Bureau deposed Dr. Novemsky.

The Bureau's Motion argues that paragraphs 11, 13, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 35, 46, 48 and 50 of the Novemsky Report (the "Proposed Paragraphs") be stricken, notwithstanding the Bureau's failure to enumerate how or whether it is prejudiced by the

inclusion of the Proposed Paragraphs. For the reasons discussed herein, Integrity Advance respectfully requests that the Bureau's Motion be denied in its entirety.

ARGUMENT

As stated by the Bureau in its Motion, under Fed.R.Civ.P. 26(a)(2)(D)(ii), the corollary to 12 C.F.R §1081.210(a), expert rebuttal evidence is allowed if it "is intended solely to contradict or rebut evidence on the same subject matter identified by another party[.]" Dr. Novemsky's Report directly rebuts Dr. Hastak's report by critiquing Dr. Hastak's methodology, primarily for its lack of empirical data. Nonetheless, in its perfunctory analysis, the Bureau appears to argue that the Proposed Paragraphs should be stricken because Dr. Novemsky "largely fails to address the issues set forth in Dr. Hastak's report, and instead promotes Respondents' theory of the case." *See* Bureau's Motion at 2. More specifically, the Bureau argues that Dr. Novemsky "improperly attempts to introduce new theories and research" and "improperly attempts to introduce new evidence." *Id*. at 4-5. The Bureau's argument reflects a fundamental misreading of federal jurisprudence regarding Fed. R. Civ. P. 26(a)(2). It also reflects a fundamental misreading of Dr. Novemsky's report and opinions.

A. The Bureau Fails To Argue Prejudice Because No Prejudice Exists

The Bureau is not prejudiced by any aspect of the Novemsky Report and it makes no argument that it is. It is axiomatic that the absence of prejudice weighs heavily against striking portions of an expert report. Indeed, even a case cited by the Bureau did not ultimately strike a reply to a rebuttal report in part because the "[p]laintiff's arguments as to prejudice are not strong or well-developed." *See Withrow v. Spears*, 967 F.Supp.2d 982, 1005 (D. Del. 2013). Here, the Bureau fails to even make a prejudice argument. Further, even if the Bureau's Motion had argued prejudice, this argument would fail because the Bureau has *already exercised* its

opportunity to depose Dr. Novemsky – who made himself available for an eight-hour deposition – regarding his report and his current opinions regarding this matter. Courts have expressly recognized that any prejudice created by a rebuttal report is cured by a deposition of the challenged expert. *See Associated Elec. Gas Ins. Serv. v. Babcock & Wilcox Power Generation Grp., Inc.*, No. 3:11CV715, 2013 WL 5771166 at *4 (D. Conn. Oct. 24, 2013) (denying motion to strike expert rebuttal report where the court found that the inclusion of the evidence *did* prejudice defendant because "plaintiffs have an opportunity to cure the prejudice by conducting continued depositions" of the challenged experts); *see also Allen v. Dairy Farmers of America, Inc.*, No. 5:09–cv–230, 2013 WL 211303, at *4 (D.Vt. Jan. 18, 2013) ("[p]rejudice from the introduction of a rebuttal report is commonly addressed by allowing the other party an opportunity to depose the expert.") Thus, it is entirely unclear how the Bureau could possibly be prejudiced by the inclusion of the Proposed Paragraphs.

B. Dr. Novemsky Properly Introduced Evidence To Contradict Dr. Hastak's Flawed Methodology

Dr. Novemsky does not introduce new evidence, contrary to the Bureau's incorrect assertion. *See* Bureau's Motion at 5. Moreover, even if Dr. Novemsky did introduce new evidence, this, too, would be allowed in the context of rebuttal expert reports of the type at issue here. Indeed, even the Bureau acknowledges in citing *Withrow v. Spears*, 967 F.Supp.2d at 1002, that "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.'" Bureau's Motion at 3. Notably, however, the *Withrow* court did not strike a rebuttal report merely because it "advanced novel evidence," as the Bureau argues. *Id.* Instead, the court found that a reply to a rebuttal report exceeded the scope of a reply because it "does not attempt to contradict or rebut the contents of [the rebuttal report], and thus exceeds the scope of a proper reply report."

Withrow at 1002. Notably – and contrary to the Bureau's characterization – as discussed above, the court ultimately did not strike the reply report. *Id.* at 1008. It is this fundamental distinction – that a rebuttal expert may introduce new evidence and data *to directly contradict the opposing party's expert* – that the Bureau fails to acknowledge in moving to strike the Proposed Paragraphs.

The Novemsky Report criticizes as fundamentally flawed Dr. Hastak's methodology in reaching his three primary conclusions. Specifically, the crux of the Novemsky Report is that Dr. Hastak gathered no empirical data and performed no analysis of such data in making several flawed hypotheses that formed the basis for Dr. Hastak's conclusions. *See, e.g.*, **Ex. A** ¶12 ("Dr. Hastak provides no empirical analysis (such as a consumer survey) of consumers' understanding (or lack thereof) with regard to the fees associated with renewal of their loans").

Dr. Hastak's flawed hypotheses include that "consumers do not realize that they will incur fees if they renew their loans" (*see* **Ex. A** ¶11) and that consumers find cost disclosures relevant in making their initial decisions to take out loans.[1] Dr. Novemsky expressly states that "the need for actual empirical support of the claim that renewal costs are in fact considered at all when deciding to take out a loan is particularly important in assessing Integrity Advance customers' understanding of cost disclosures." *Id*. ¶13. In order to establish that there are equally plausible – and opposing – alternatives to Dr. Hastak's untested hypotheses, Dr. Novemsky necessarily must articulate what those equally plausible alternatives could be. This is

[1] *See also id*. ¶13 (noting that Dr. Hastak "provides no empirical support for the idea that consumers find [renewal cost disclosures] relevant in the first instance when taking out a loan"); *see also id*. ¶21 ("Underlying Dr. Hastak's report is the assumption that loan renewal costs have an influence in the first instance on consumers' decision making when evaluating the loan agreement.")

precisely what Dr. Novemsky does in paragraphs 21-25, 32-33 and 35.[2] In these paragraphs, and in paragraphs 11 and 13, Dr. Novemsky identifies Dr. Hastak's untested hypotheses and then describes the alternative bodies of research that suggest that the opposite of Dr. Hastak's assumptions may be true.

Dr. Novemsky also addresses Dr. Hastak's flawed methodology as it relates to the default renewal option. In rebutting Dr. Hastak's conclusion that because the renewal option is a default option, a large proportion of borrowers may not have actively chosen it, (*see* **Ex. B** at 22) Dr. Novemsky again criticizes Dr. Hastak's methodology in reaching this conclusion by identifying an untested assumption embedded within it – that the default renewal option is necessarily worse for consumers. **Ex. A** ¶46. Specifically, because Dr. Hastak "provides no empirical analysis for the costs and benefits" of a pay-in-full default (a possible alternative to the renewal default) versus a loan renewal default, it "impossible to determine which default is better for consumers." *Id.* In rebutting Dr. Hastak's recommendation that the loan agreement "spell out multiple

[2] *See id.* ¶21 ("[B]ecause of the existence of an equally plausible alternative to Dr. Hastak's untested assumption, any assertion that these costs are considered at all by consumers in this particular context demands empirical support. Nonetheless, Dr. Hastak provides no data to support his untested assumption that consumers consider renewal costs at all when taking out a loan"); *see also id*. ¶24 (noting that the two bodies of research discussed in ¶22 and ¶23 "provide a competing perspective on the question of whether loan renewal costs impact consumers' decisions to initiate payday loans. . . data, such as a consumer survey, [is] required to shed light on which idea actually describes consumer behavior in this particular situation"); *id*. ¶25 (Dr. Hastak's report "further assumes that a better understanding of the renewal costs would not only affect consumers' decision making about taking out a loan, but more specifically it would dissuade consumers from getting loans from Integrity Advance . . . there exist competing ideas that might apply in this particular context"); *id*. ¶32 (noting that consumers "have the opportunity to consider more than one provider when choosing a loan" suggesting that "they either are not finding disclosures about renewal costs a critical piece of information … or they find Integrity Advance's offering complete with disclosures about renewal costs sufficiently attractive . . . ."); *id*. ¶33 (summarizing the "multiple observations that suggest that consumers do not find renewal costs to be a reason not to choose Integrity Advance"); *id*. ¶35 (noting that renewal costs "may not be the information consumers are interested in understanding or using for their loan origination decision . . . it is not clear that better consumer understanding will result from making renewal cost information more prominent.")

repayment scenarios," Dr. Novemsky again criticizes Dr. Hastak's methodology and basis for that conclusion. *Id*. ¶48. "To be confident that more information would indeed enhance understanding requires data regarding consumers' understanding with and without that additional information. Dr. Hastak does not provide such data." *Id.*

Novemsky also addresses Dr. Hastak's flawed methodology as it relates to authorization for remotely created checks. In rebutting Dr. Hastak's conclusion that the authorization is "unlikely to be noticed, read, or correctly understood by borrowers," (**Ex. B** at 26) Dr. Novemsky criticizes Dr. Hastak's methodology in reaching this conclusion by noting that "there is no data provided to suggest that consumers consider this authorization important when agreeing to take out the loan." *See* **Ex. A** ¶50. In other words, Dr. Hastak offers a series of hypotheses that must be tested with empirical data – gathered through a consumer survey – in order to be proven accurate. Dr. Hastak has no such data.

Dr. Novemsky is *not*, as the Bureau argues, "focus[ing] largely on introducing alternative theories, rather than rebutting Dr. Hastak's view." *See* Bureau's Motion at 6. Instead, as detailed above, Dr. Novemsky *is squarely rebutting* Dr. Hastak's view by identifying the flawed assumptions upon which Dr. Hastak's conclusions are premised, including the lack of any empirical data to test them. More importantly, the Bureau's misapprehension of Dr. Novemsky's opinions stems from a failure to connect consumer comprehension of disclosures with why consumers make decisions to take out the loans in the first instance.

In *Associated Elec. Gas Ins. Serv.*, the court found that a rebuttal report was proper under Fed. R. Civ. P. 26(a)(2)(D)(ii) in offering "new analysis and calculations," because they "were undertaken in an effort to rebut and/or contradict the theory posited by the defendant's expert." 2013 WL 5771166 at *3. (citing *Allen v. Dairy Farmers of America, Inc*., 2013 WL 211303, at

*4). The rebuttal report's "central argument" was that the defendant's expert report was flawed "because it is based on an incorrect assumption" and the rebuttal report "offers reasons why [the defendant's expert's] statements are inaccurate and offers explanations of the inaccuracies." *Id.*

Indeed, Dr. Novemsky's report and testimony are "archetypal rebuttal testimony: [they] identif[y] a flawed premise in an expert report that casts doubt on both that report's conclusions and its author's expertise." *See Associated Elec. Gas Ins. Serv.*, 2013 WL 5771166 at *3 (quoting *Scientific Components Corp. v. Sirenza Microdevices, Inc.*, No. 03 CV 1851, 2008 WL 4911440, at *2 (E.D.N.Y. Nov. 13, 2008) (internal citations omitted); *see also Park West Radiology v. CareCore Nat. LLC*, 675 F.Supp.2d 314, 326 (S.D.N.Y. 2009) (denying motion to exclude rebuttal report that defendant's alleged "contain new assertions and analysis" because the "new methodologies used" by plaintiffs' expert "were for the purpose of rebutting or critiquing the opinions" of the defendants' expert witness).

C. The Evidence Discussed In Paragraphs 26, 27, 28, 30, 31 and 33 Is Not "New" And Was Properly Introduced

The Bureau disingenuously describes the evidence discussed in Paragraphs 26, 27, 28, 30, 31 and 33 as "new" (*see* Bureau's Motion at 5). Such evidence, of course, is not new; indeed, it stems from documents and materials that the Bureau generated during the investigation in this matter. In addition, the Bureau examined Dr. Novemsky about much of this material at length during his deposition.

For example, the welcome email and the reminder email discussed in paragraphs 26, 28, 30 and 33 were previously produced to the Bureau. Dr. Hastak acknowledged during his deposition that he "looked at" template emails that customers received from Integrity Advance after their loan applications had been approved. *See* Excerpts from March 11, 2016 Deposition of Dr. Hastak (attached as **Exhibit C)** at 275:13-276:3. Moreover, during his deposition, the

Bureau spent substantial time examining Dr. Novemsky about these emails and how they informed the opinions he is offering.

Similarly, Dr. Hastak acknowledged during his deposition that he was aware of the phone calls between Integrity Advance and its customers discussed in paragraphs 27, 28, and 33. *See* **Ex. C,** 51:13-16; 275:7-12. And, here, too, the Bureau examined Dr. Novemsky about these phone calls at length during his deposition. The Bureau clearly had knowledge about these phone calls, and any arguments of prejudice are also waived because the Bureau had the opportunity to – and, in fact, did – examine Dr. Novemsky about these calls during his deposition.

The Bureau describes paragraph 30 as that in which Dr. Novemsky "discusses another email that he alleges Integrity Advance sent to consumers." Bureau's Motion at 5. Paragraph 30 refers to the welcome e-mail and the reminder email introduced in the preceding paragraphs (25-26), and discussed above. All of the other information mentioned in this paragraph has also previously been presented to the Bureau. Indeed, Dr. Hastak also stated during his deposition that he understood that 80 percent of Integrity Advance customers rolled over their loans – a number similar to what Dr. Novemsky stated. *See* **Ex. C,** 117:4-7.

Finally, the information regarding consumers who take out more than one loan with Integrity Advance is derived from the document cited in paragraph 31, Bates stamped CFPB035849-50. This document was listed as being among those documents upon which Dr. Hastak relied in drafting his report. *See* **Ex. B** (Appendix D, List of Documents and Materials Considered, Narrative Responses to January 7, 2013 Civil Investigative Demand Issued to Integrity Advance, LLC (CFPB035835-CFPB035850)). Thus, the Bureau appears to be arguing that it is improper for Dr. Novemsky to analyze a document that Dr. Hastak expressly listed in

his report as being among those that he examined to draft his report. The Bureau does not – because it cannot – cite any authority for this proposition.

Furthermore, all of this evidence was introduced to directly rebut Dr. Hastak's methodology as flawed because it did not include an analysis of documents that may have contributed to a consumer's understanding of the cost disclosures in the loan agreement. That Dr. Hastak "explicitly limited his report to an analysis of the disclosures in Integrity Advances' loan agreement" does not foreclose Dr. Novemsky from opining on that methodological flaw. *See* **Ex. A** ¶28 ("Dr. Hastak provides no analysis of these email messages or the phone call [described in paragraphs 25-27] despite his own acknowledgement that the phone call could have facilitated consumers' understanding of the renewal costs.") Accordingly, Dr. Novemsky necessarily had to identify the evidence that Dr. Hastak opted not to discuss – despite the fact that Dr. Hastak was aware of it – to establish this point. *See Haskins v. First American Title Ins. Co.*, No. 10–5044, 2013 WL 5410531 at *4 (D.N.J. Sept. 26, 2013) (noting that the rebuttal expert "has a right to explain why he believes the [opposing expert] is wrong"); *see also* Fed.R.Civ.P. 26(a)(2)(B)(i)-(ii) (stating that expert reports must include "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them.") To argue that Dr. Novemsky is prevented from introducing this information would necessarily mean that Dr. Novemsky could not fulfill his obligations under 12 CFR § 1081.210(c) ("Each report shall be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data, material or other information considered by the witness in forming the opinions . . . .").

D. Dr. Novemsky Is Not Foreclosed From Rendering His Opinions In A Rebuttal Report

Contrary to the Bureau's argument, "[r]ebuttal reports do not need to mirror the initial expert's report or provide tit-for-tat testimony. Rebuttal reports must simply address 'the same subject matter,' 'contradict' the initial expert's conclusion, and offer facts in support of the opposite conclusion." *See Slagowski v. Central Washington Asphalt*, No. 2:11–cv–00142, 2014 WL 3001951 at *4 (D. Nev. July 1, 2014) (quoting Fed.R.Civ.P. 26(a)(2)(D)(ii)); *see also In re Piasecki*, 745 F.2d 1468, 1472 (Fed.Cir.1984) (stating that rebuttal expert reports must include "a showing of facts supporting the opposite conclusion"); *United States v. Luschen*, 614 F.2d 1164, 1170 (8th Cir.), *cert. denied*, 446 U.S. 939 (1980) ("'The function of rebuttal is to explain, repel, counteract or disprove evidence of the adverse party,' and the decision to admit rebuttal testimony 'is entrusted to the sound discretion of the district court.'")

Specifically and inexplicably, the Bureau argues that because Dr. Hastak "does not address consumer decision-making," notwithstanding Dr. Hastak's actual report and deposition testimony. Dr. Hastak's report expressly relied upon the Federal Trade Commission (FTC) guidelines, which Dr. Hastak's report described as "emphasiz[ing] several key factors in assessing the likelihood that a disclosure in a document or promotional material will be *noticed and comprehended by readers*." **Ex. B** at 10 (emphasis added). In fact, during his deposition, Dr. Hastak himself described the loan agreement as "a document that communicates information to consumers *that's relevant to their decision-making*." *See* **Ex. C** at 43:13-16 (emphasis added.) Dr. Hastak described himself as an expert in "consumer behavior [and] in consumer response to advertising and other promotional materials . . . ." **Ex. B** at 3. Nonetheless, the Bureau argues that a self-described consumer behavior expert's analysis of the likelihood that a disclosure, which "communicates information to consumers that's relevant to their decision-making," will

be "noticed and comprehended by readers" is *not* a matter of consumer decision-making upon which a rebuttal expert may opine.

The Bureau further argues that Dr. Novemsky's opinions regarding whether a consumer would find the cost of renewing a loan relevant in the first place should be disregarded because they "concern consumer decision making or motivations, not the clarity of the loan document itself." *See* Bureau's Motion at 5. The argument that the rebuttal report is narrowly restricted only to opinions derived from the precise disciplines that the opposing expert raised has been flatly rejected. In *Haskins*, 2013 WL 5410531 at *4, the defendant argued that since its expert "did not opine on forensic accounting, financial reporting or record-keeping" the plaintiff's expert "was foreclosed from opining on those subjects for the first time in his rebuttal report." Finding the defendant's argument "wrong," the court noted that the defendant "ignores the fact that [plaintiff's expert] raised these issues in direct rebuttal to [the defendant's expert's] conclusions." *Id.* The plaintiff's expert's rebuttal "is not strictly limited to only the specific items that [the defendant's expert] raised. *Id*. As he has done, [the plaintiff's expert] may rely upon new evidence and opinions to rebut [the defendant's expert's] opinions." *Id*. The plaintiff's expert "has a right to explain why he believes [the defendant's expert] is wrong."

Further, Dr. Novemsky's rebuttal report is distinguishable from the rebuttal reports, or portions thereof, that were excluded in the cases that the Bureau cites. In *Int'l. Bus. Machines Corp. v Fasco Indus., Inc*., No. C–93–20326, 1995 WL 115421 at *3 (N.D. Cal. Mar. 15, 1995), the testimony of two rebuttal experts was excluded because both were opining on issues that the opposing party had not addressed at all. *Id. See also e.g., id.* ("IBM has not designated an expert to opine on these issues so [the rebuttal witness] will have nothing to rebut.") The Bureau's citation to *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1065 (C.D. Cal. 2010) and *Marmo v. Tyson*

Fresh Meat, Inc., 457 F.3d 748, 760 (8th Cir. 2006) are similarly inapposite. In *Plumley*, portions of the defendant's rebuttal expert's report were excluded because they were "not reasonably prompted by [the plaintiff's expert's] report nor responsive to it." 836 F. Supp. 2d at 1066. In *Marmo,* the Eighth Circuit upheld the trial court's exclusion of a rebuttal witness because "there was no evidence for the [rebuttal expert] to rebut." 457 F.3d 748 at 755.

Of course, here, this is clearly not the case. In identifying the flaws in Dr. Hastak's methodology, and explaining the justification for identifying them as such, Dr. Novemsky has offered evidence that is directly prompted by and responsive to Dr. Hastak's report. The premise of Dr. Novemsky's report is that Dr. Hastak failed to collect and empirically analyze the behavior of any actual consumers and, thus, Dr. Hastak's conclusions about what they are likely to comprehend are necessarily flawed. Accordingly, Dr. Novemsky is well within the ambit of Fed. R. Civ. P. 26(a)(2)(D)(ii) – and, by extension, 12 C.F.R. §1081.201(a) – in discussing data and research in the realm of consumer behavior in order to explain the basis of his rebuttal to Dr. Hastak's report.

The Bureau's citation of *Vu v. McNeil-PPC, Inc*., No. CV 09–1656, 2010 WL2179882 at *3 (C.D. Cal. May 7, 2010), is also misplaced. There, the testimony of two rebuttal experts was excluded because they included the examination of possible specific alternative causes of death that were unrelated to the opposing expert's conclusion regarding the cause of death. *Id.* at *2. Unlike those experts, Dr. Novemsky has articulated that possible alternatives to Dr. Hastak's untested assumptions exist – which is precisely why Dr. Hastak's assumptions must be empirically tested. *See* **Ex. A** ¶21 ("[B]ecause of the existence of an equally plausible alternative to Dr. Hastak's untested assumption, any assertion that these costs are considered at all by consumers in this particular context demands empirical support.") Taken to its conclusion,

the Bureau's argument appears to be that Dr. Novemsky may not opine on Dr. Hastak's methodology at all. Because without identifying the nature of the flawed methodology, there would be no way for Dr. Novemsky to rebut the Hastak Report.

Finally, offering evidence in a rebuttal expert report that advances a party's case in chief is not a basis for excluding the Proposed Paragraphs. *See Associated* at *3 (citing ***Allen,*** 2013 WL 211303, at *6) (holding that to the extent defendant argues the rebuttal report "only serve[s] to bolster plaintiffs' case-in-chief, such concerns are typically left for exposure on cross-examination, not addressed by excluding the report"); *see also Slagowski* at *5 (holding that the defendant's argument that rebuttal report is improper because rebuttal evidence may not be used to establish a party's case-in-chief was "misplaced" because "the question is limited to whether [the rebuttal] report complies with Rule 26(a)(2)(D)(ii).")

CONCLUSION

For the reasons stated above, Respondents respectfully request that the Bureau's Motion to Strike be denied in its entirety.

Respectfully submitted,

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