

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING

File No. 2014-CFPB-0002

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)	
In the Matter of:)	
)	
)	
PHH CORPORATION,)	ENFORCEMENT COUNSEL'S
PHH MORTGAGE CORPORATION,)	OPPOSITION TO RESPONDENTS'
PHH HOME LOANS LLC,)	MOTION TO STRIKE THE
ATRIUM INSURANCE CORPORATION,)	EXPERT REBUTTAL REPORT
and ATRIUM REINSURANCE)	OF DR. MARK CRAWSHAW
CORPORATION)	
)	
)	

Filed Under Seal

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Enforcement Counsel files this opposition to PHH's motion to strike the rebuttal report of Dr. Mark Crawshaw. Crawshaw's rebuttal report (Dkt. No. 108) directly counters the opinions expressed in the initial report of PHH's expert, Michael Cascio, and it should be admitted in its entirety.

I. PRELIMINARY STATEMENT

Before this proceeding commenced, PHH asserted **Redacted - Confidential**

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At the hearing in March, PHH moved (unsuccessfully) to exclude Crawshaw's initial report, even after the Tribunal stated that its usual practice is to admit expert reports into the record. Hearing Tr. at 715:8-716:11; 943:9-946:18. More recently, PHH invoked the Protective Order to block any portion of his rebuttal report from public disclosure by asserting that "the entire expert rebuttal report, including all of the attachments and exhibits thereto, must remain under seal," even though much of it discusses public information and little to nothing in the remainder would provide competitors an advantage if disclosed.² Now, in this latest gambit, PHH seeks to expunge that report from the record entirely.

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² See Email from Rust to Kim, April 28, 2014 (attached hereto as Ex. B); Protective Order Governing Discovery Material ¶ 1 (definition of "Competitive Sensitive Information"). PHH's position is also contrary to the stated "goal of transparency" in the Bureau's administrative proceedings. See Rules of Practice for Adjudication Proceedings, 77 Fed. Reg. 39,058, 39,067 (June

PHH's motion is overbroad while its characterization of its expert's initial report is overly narrow. First, there was no legitimate basis for PHH to move to strike the entire 151-page report based on objections limited to less than 50 pages of it.³ There is no dispute that the remaining 100-plus pages rebut Cascio's opinions.⁴

Second, PHH's objections to the approximately 50 pages it identifies as "new" (PHH Br. at 10) do not hold water when one looks more closely at Cascio's opinions. For example, from PHH's

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There is no basis to exclude it because Crawshaw's opinions directly contradict or rebut evidence on the same subject matter provided by Cascio.

II. ARGUMENT

A. Legal Standard

Administrative Adjudication Rule 210 provides: "A rebuttal report shall be limited to rebuttal of matters set forth in the expert report for which it is offered in rebuttal." 12 C.F.R. § 1081.210. Federal courts applying a similar rule in the Federal Rules of Civil Procedure – which

29, 2012) (discussing Rule 119). The Protective Order does not impose any time limit on Enforcement Counsel's ability to challenge spurious designations of confidentiality. Thus, we will address the merits of PHH's "Confidentiality" designation at a later time.

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requires that rebuttal reports be offered “solely to contradict or rebut evidence on the same subject matter identified by another party,” Fed. R. Civ. P. 26(a)(2)(D)(ii) – have consistently interpreted the phrase “same subject matter identified by another party” broadly.⁵ Rebuttal testimony is proper so long as it serves to “explain, repel, counteract, or disprove the evidence of the adverse party.”⁶ 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.”⁷

B. Crawshaw’s Rebuttal Opinions Regarding ^{Redacted - Confidential} are Proper Because They Counter Cascio’s Opinions on the Same Subject

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⁵ See, e.g., *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09–cv–230, 2013 WL 211303, at *5 (D. Vt. Jan. 18, 2013) (“[D]istrict courts have been reluctant to narrowly construe the phrase ‘same subject matter’ beyond its plain language.”) (internal quotations omitted); *TC Sys. Inc. v. Town of Colonie*, 213 F. Supp. 2d 171, 180 (N.D.N.Y. 2002) (the phrase “same subject matter” must not be narrowly construed to restrict a rebuttal expert to the same methodology used by the opposing expert; rather, the rebuttal expert can offer an “independent, fresh opinion” on the subject).

⁶ *U.S. v. Mallis*, 467 F.2d 567, 569 (3d Cir. 1972).

⁷ *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit*, 290 F.R.D. 11, 16 (D. Mass. 2013).

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Crawshaw's rebuttal opinions regarding ^{Redacted - Confidential} directly contradict Cascio's opinions.

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There is no rule barring an expert from relying on a document if it also can be used to rebut a witness other than the opposing expert.¹² It should not be surprising that a document can be used

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C. Crawshaw’s Rebuttal Opinions Regarding Redacted - Confidential are Proper Because They Counter Cascio’s Opinions on the Same Subject

Crawshaw properly offers opinions about the import of Redacted - Confidential because those opinions directly counter Cascio’s opinions, within his area of expertise, and because PHH questioned Crawshaw about his Redacted - Confidential Redacted - Confidential during

Crawshaw’s cross-examination. Principally, it was first Cascio who speculates about the conduct of

Redacted - Confidential by claiming that they exercised

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by Redacted - Confidential itself only increases its force in countering Mr. Cascio’s opinion about the correctness of that methodology.

The fact that the report was prepared

¹³ In his report, Mr. Cascio wrote that a provision of

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At his deposition, he clarified that meant that

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The sections of Crawshaw’s rebuttal report that PHH seeks to exclude are thus properly admitted because they serve to “explain, repel, counteract, or disprove the evidence of the adverse party.”¹⁴

Of the two experts who have opined on Redacted - Co Redacted - Confidential

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Throughout his career,

Crawshaw has

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The

Administrative Adjudication Rules do not have an analog to Fed. R. Evid. 702, but Enforcement

¹⁴ *U.S. v. Mallis*, 467 F.2d 569.

Counsel submits that Crawshaw’s

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While PHH complains that Crawshaw has “interpreted” various supporting documents, there is nothing improper about an expert explaining his opinions by referring to, and describing the relevance of, documents that clearly bear on the issue at hand, in an effort to assist the trier of fact in understanding complex concepts.¹⁵ Those opinions are appropriate because they counter Cascio’s conclusions about the significance

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Finally, PHH’s claim of “shock” that Crawshaw would provide opinions about the relevance of

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PHH’s counsel asked:

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¹⁵ It is particularly bizarre for PHH to complain about the documents that Dr. Crawshaw discusses in this section of his report because many of them are either documents Mr. Cascio relied on or are discussed in the documents he relied on, including:

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^{Redacted} Having laid that foundation, PHH's counsel asked Crawshaw myriad questions on topics that it now contends are totally inappropriate for him to testify about.

For example, PHH's counsel asked Crawshaw:

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D. Crawshaw Properly Relied on Redacted - Confidential

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This is a classic rebuttal

opinion.

It is well-established that an expert may draw conclusions about a particular transaction by analyzing closely comparable transactions, and that a party or its expert may rebut assertions of an opposing party or expert about a particular transaction by citing contrary evidence from such similar transactions. *See, e.g., In re DeCoro USA, Ltd.*, No. 09–10846C–11G, 2014 WL 1089795, at *11 (M.D.N.C. Mar. 18, 2014) (holding that IRS’s expert should have, but failed to, select comparables that “exhibit similar functional and risk qualities to those of the Debtor and the transactions at issue”); *U.S. v. Walls*, 577 F.2d 690, 696-97 (9th Cir. 1978) (allowing “[e]vidence of other loan transactions in which appellant had defaulted” to be “submitted by the government to rebut appellant’s claim that he borrowed from Mrs. Bjerke in good faith.”); *U.S. v. Certain Real Property Located at 21090 Boulder Circle*, 9 F.3d 110 (6th Cir. 1993) (“The district court acted within its discretion in admitting the evidence of a prior similar transaction to rebut Betty’s contention that she was an innocent party to this structuring scheme.”); *Hale v. Firestone Tire & Rubber Co.*, 820 F.2d 928, 934 (8th Cir. 1987)(holding that district court properly admitted “evidence of other accidents” not considered by the opposing party’s expert to “disprove his theories” and “impeach his testimony.”).

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E. PHH is Not Prejudiced by the Admission of Crawshaw's Rebuttal Report

Striking Crawshaw's report would be an extraordinary remedy when ordinary discovery and trial procedures can cure any of PHH's perceived claims of prejudice. If PHH desires to elicit testimony from Crawshaw about his rebuttal report, PHH can "re-open" its cross examination.¹⁹ PHH can also depose Crawshaw; indeed, Enforcement Counsel has already offered to make him available. *See* emails between Souders and Kim (Ex. F). Exclusion of expert testimony is a drastic and extreme remedy, to be avoided when claims of prejudice can be addressed by less severe measures, such as an additional deposition.²⁰

Even if Enforcement Counsel was

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rebuttal opinions should not be excluded simply because they could have been included in an initial report. In *Crowley v. Chait*, for example, the court explained that the "Third Circuit's rule does not automatically exclude anything an expert could have included in his or her original report" because "[s]uch a rule would lead to the inclusion of vast amounts of arguably irrelevant material in an expert's report on the off chance that failing to include any information in anticipation of a particular criticism would forever bar the expert from later introducing the relevant

¹⁹ *See Allen*, 2013 WL 211303 at *6 (any concerns about the scope of a rebuttal report could be addressed through cross-examination).

²⁰ *See, e.g., Plew v. Limited Brands, Inc.*, No. 08 Civ. 3741 (LTS), 2012 WL 379933, at *2 (S.D.N.Y. Feb. 6, 2012) ("Exclusion of expert testimony is a drastic remedy and is inappropriate where the movant could easily have cured the prejudice by seeking more discovery.") (internal quotations / citations omitted); *Freeland v. Amigo*, 103 F.3d 1271, 1280 (6th Cir. 1997) (reversing district court's failure to consider less severe measures before imposing "the drastic sanction of exclusion of plaintiff's expert witness testimony"); *Allen*, 2013 WL 211303 at *6 ("[P]rejudice from the introduction of a rebuttal report is commonly addressed by allowing the other party an opportunity to depose the expert."); *Lab Crafters v. Flow Safe, Inc.*, No. 03 Civ. 4025 (SJF) (ETB), 2007 WL 7034303 (E.D.N.Y. Oct. 26, 2007) ("Courts to address this issue have stated that any prejudice to the opposing party can be alleviated by allowing them to depose the expert prior to trial.").

material.” 322 F. Supp. 2d 530, 551 (D.N.J. 2004). Likewise, in *U.S. v. Luschen*, the Eighth Circuit explained the following general principle regarding rebuttal testimony: “[T]he fact that testimony would have been more proper for the case-in-chief does not preclude the testimony if it is proper both in the case-in-chief and in rebuttal.” 614 F.2d 1164, 1170 (8th Cir. 1980). Thus, in determining whether rebuttal opinions are proper, it does not matter whether those opinions could have been included in an initial report; the test is whether those opinions counter the other expert’s opinions. Moreover, to hold otherwise would be inequitable, because **Redacted - Confidential**

(Dkt. No. 106).²¹

III. CONCLUSION

PHH protests that Crawshaw’s rebuttal opinions do not respond to anything in Cascio’s report; but Crawshaw’s report is a near point-by-point rebuttal. PHH asserts that Crawshaw is unqualified to opine about **Redacted - Confidential** but PHH *voir dire’d* Crawshaw on the topic at the hearing and it thereafter elicited extensive testimony on that subject.

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In light of the above, the Tribunal should deny PHH's frivolous request to exclude Crawshaw's rebuttal report.

DATED: May 13, 2014

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 13th day of May 2014, I caused a copy of the foregoing “Enforcement Counsel’s Opposition to Respondents’ Motion to Strike the Expert Rebuttal Report of Dr. Mark Crawshaw” to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service on behalf of Respondents:

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