

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

<p style="margin: 0;">In the Matter of:</p> <p style="margin: 0;">PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS LLC, ATRIUM INSURANCE CORPORATION, and ATRIUM REINSURANCE CORPORATION</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>REQUEST FOR ISSUANCE OF SUBPOENA FOR DEPOSITION OF VINCENT BURKE</p>
---	---	--

Pursuant to 12 C.F.R. §§ 1081.208, 1081.209 and 1081.210(d), Enforcement Counsel respectfully requests the issuance of the attached subpoena to Vincent Burke, Respondents’ rebuttal expert witness, requiring him to testify for a deposition before the hearing recommences on May 28, 2014. Enforcement Counsel has attached hereto as **Exhibit A** the proposed subpoena. In support of this request and in accordance with 12 C.F.R. § 1081.208(b), below is a brief statement showing the general relevance and reasonableness of the testimony sought.

On April 21, Respondents filed a rebuttal expert report prepared by an individual named Vincent Burke. Mr. Burke did not submit an initial report in this proceeding, and has not previously been deposed. Rule 210(d) of the Rules of Practice for the Bureau’s Adjudication Proceedings (Administrative Adjudication Rules) provides: “A party may depose any person who has been identified as an expert whose opinions may be presented at trial.” Accordingly, Enforcement Counsel requested that Respondents make Mr. Burke available for a deposition before the hearing recommences. *See* Exhibit B attached hereto. The testimony sought is reasonable and relevant

because it is expressly allowed by the Administrative Adjudication Rules and because Enforcement Counsel is entitled to discovery regarding Mr. Burke's qualifications and the opinions expressed in his report.

Respondents, however, have refused to make Mr. Burke available for a deposition unless Enforcement Counsel agrees to pay his "hourly rate for the time spent in the deposition." *Id.* Mr. Burke's hourly rate is \$600. There is no basis for the condition Respondents have imposed on Mr. Burke's availability. Rule 210(d) provides: "Expert depositions shall be conducted pursuant to the procedures set forth in § 1081.209(g)." *See* 12 C.F.R. § 1081.210(d). The commentary to Rule 210 states: "Paragraph (d) also provides that expert depositions shall be conducted pursuant to the procedures set forth in § 1081.209." Rule 209 generally, and Rule 209(g) specifically, applies to depositions conducted pursuant to subpoenas. *See* 12 C.F.R. § 1081.209. Therefore, the appropriate payment for Mr. Burke is set forth in Rule 116, which provides: "The Bureau shall pay to witnesses subpoenaed for testimony or depositions on behalf of the Office of Enforcement the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, but the Bureau need not tender such fees in advance." That payment is also referenced specifically in Rule 209(e). Accordingly, Enforcement counsel has agreed to pay fees for Mr. Burke's attendance and mileage consistent with Rule 116.

Respondents, however, contend that Rule 26(b)(4)(E) of the Federal Rules of Civil Procedure requires Enforcement Counsel to pay Mr. Burke's \$600 hourly rate for time spent in his deposition. *See* Exhibit B attached hereto. Rule 26(b)(4)(E) of the Federal Rules of Civil Procedure does not apply to this administrative proceeding. If the Bureau's administrative process required the party taking the deposition of an expert to pay the expert's hourly fees, the Administrative Adjudication Rules would have contained a provision to that effect. It does not. Enforcement Counsel submits that the provisions of the Administrative Adjudication Rules discussed in the

preceding paragraph are the operative rules, and that they make clear that the appropriate amount of payment to Mr. Burke are the fees provided for in Rule 116.

This is the first time that Respondents have asserted the position that the deposing party must pay the expert's hourly fees. When the parties deposed Mark Crawshaw and Michael Cascio – the experts who submitted the initial reports for Enforcement Counsel and Respondents, respectively – each party paid its own expert's fees for time spent in the deposition.¹

Enforcement Counsel requests that the Tribunal issue the attached subpoena and rule that Mr. Burke is entitled to receive the fees for attendance and mileage specified in Rule 116.

Enforcement Counsel respectfully requests a ruling sufficiently in advance of May 28 to allow the deposition to occur before the hearing recommences.

DATED: May 7, 2014

Respectfully Submitted,

Lucy Morris
Deputy Enforcement Director for Litigation

s/ **Donald R. Gordon**

Donald R. Gordon
Kimberly J. Ravener
Navid Vazire
Thomas Kim
Enforcement Attorneys
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Telephone: (202) 435-7357
Facsimile: (202) 435-7722
e-mail: donald.gordon@cfpb.gov

Enforcement Counsel

¹ Subpoenas, and thus subpoena fees, were not necessary for these depositions because they were already provided for in the Scheduling Order.

Certificate of Service

I certify that on this 7th day of May 2014, I caused the **Request for Issuance of Subpoena for Deposition of Vincent Burke** to be filed and to be served upon the following parties by electronic service:

Mitch Kider
kider@thewbkfirm.com

David Souders
souders@thewbkfirm.com

Sandra Vipond
vipond@thewbkfirm.com

Roseanne Rust
rust@thewbkfirm.com

Michael Trabon
trabon@thewbkfirm.com

Leslie Sowers
sowers@thewbkfirm.com

s/ **Donald R. Gordon**
Donald R. Gordon
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Telephone: (202) 435-7357
Facsimile: (202) 435-7722
e-mail: donald.gordon@cfpb.gov