UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of:	)
PHH CORPORATION, **PHH MORTGAGE CORPORATION,** **PHH HOME LOANS LLC,** **ATRIUM INSURANCE CORPORATION,** **and ATRIUM REINSURANCE CORPORATION**	)

ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR FEES OF REBUTTAL EXPERT WITNESS VINCENT BURKE

Enforcement Counsel opposes Respondents' Motion for Fees of Expert Witness Vincent Burke for the reasons below.

1. Rule 116 Does Not Require the Bureau to Pay Burke's Hourly Rate for Time Spent at his Deposition

Respondents' motion rests on their interpretation of Rule 116 of the Bureau's Rules of Practice for Adjudication Proceedings ("Rules of Practice"), which they contend incorporates Fed. R. Civ. P. 26(b)(4)(E). Respondents' argument based on Rule 116 fails for several reasons.

First, Rule 116 does not apply where, as here, the witness did not testify pursuant to a subpoena. Rule 116 provides: "[T]he Bureau shall pay to *witnesses subpoenaed for testimony or deposition* on behalf of the Office of Enforcement the same fees for attendant and mileage as are paid in the United States district courts in proceedings in which the United States is a party..." 12 C.F.R. § 1081.116 (emphasis added). Enforcement previously requested that the Tribunal issue a subpoena for Burke's deposition, but Respondents objected.[1] As a result, the Tribunal denied the request and ordered the parties to proceed with Burke's deposition without a subpoena.[2] Because Rule 116 is expressly limited to "witnesses subpoenaed for testimony or deposition," and Burke was not "subpoenaed for testimony or deposition," Rule 116 is irrelevant to the instant dispute. Respondents' argument based on Rule 116 must be rejected because it

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[1] *See* Respondents' Objections to Enforcement Counsel's Request for Issuance of Subpoena for Deposition of Vincent Burke (Dkt. # 132) at 1 ("Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, 'Respondents'), request that the Tribunal deny Enforcement Counsel's request for issuance of a subpoena to Respondents' rebuttal expert witness, Vincent Burke, as inappropriate, unreasonable and unduly burdensome.").

[2] *See* Order Denying Without Prejudice Request for Subpoena for Deposition of Vincent Burke (Dkt. # 144).

renders the central qualification for application of that rule – the witness must be "subpoenaed for testimony or deposition" – meaningless.

Second, in previous briefing on this issue, Respondents asserted that "[t]he Bureau's Rules of Practice, and Commentary to the Rules, *are silent* with respect to the payment of expert fees accrued during pre-hearing expert depositions."[3] This is an admission that Rule 116 does not speak to the issue of which party must pay for expert depositions. Enforcement Counsel agrees. Because there is no dispute that the Rules of Practice are silent on this issue, the Tribunal should apply the "American Rule." Under the "American Rule," the parties "must bear their own costs absent a specific statutory provision shifting them." *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 876 (8th Cir. 1994); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) ("[W]e are mindful that Congress legislates against the strong background of the American Rule."). The Supreme Court has explained that "the American Rule applies not only to attorney's fees but also other costs of litigation, including expert witness fees ...." *Kansas v. Colorado*, 556 U.S. 98, 102-03 (2009) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975)). Thus, because there is no provision in the Rules of Practice (or any other statute) that provides for shifting of expert deposition costs from the party that retained the expert to the other party, Respondents should be required to bear the costs of their own expert to attend his deposition.

Third, even if the Tribunal were to assume – contrary to reality – that Burke had testified pursuant to a subpoena, Rule 116 would still fail to support Respondents' claim because there is no credible argument that Rule 116 "incorporates" Fed. R. Civ. P.

[3] *See* Respondents' Objections to Enforcement Counsel's Request for Issuance of Subpoena for Deposition of Vincent Burke (Dkt. # 132) at 3 (emphasis added).

26(b)(4)(E). For witnesses subpoenaed for testimony or deposition on behalf of the Office of Enforcement, Rule 116 requires that the Office of Enforcement pay "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." 12 C.F.R. § 1081.116 (emphasis added). This is clearly a reference to 28 U.S.C. § 1821, the rule that specifies the fees for attendance and mileage paid in the United States district courts in proceedings in which the United States is a party. In contrast to Fed. R. Civ. P. 26(b)(4)(E), which makes no reference to any "attendance" or "mileage" fees, 28 U.S.C. § 1821 expressly refers to both. The attendance fee is set forth in 28 U.S.C. 1821(b): "A witness shall be paid an *attendance fee* of $40 per day for each day's attendance ...." 28 U.S.C. 1821(b) (emphasis added). The mileage fee is set forth in 28 U.S.C. 1821(c)(2): "A travel allowance equal to the *mileage allowance* which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness ...." 28 U.S.C. 1821(c)(2) (emphasis added).

28 U.S.C. § 1821 applies to both fact and expert witnesses in federal district court. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) ("We think that it is clear that in §§ 1920 and 1821, Congress comprehensively addressed the taxation of fees for litigants' witnesses...a federal court may tax expert witness fees in excess of the $30–per-day limit set out in § 1821(b) only when the witness is court-appointed."). Recent courts have followed the Supreme Court's directive. For example, in *Duhn Oil Tool, Inc. v. Cameron International Corp.*, the defendant paid $1,350 to its expert witness for his deposition. Upon prevailing, the defendant sought recovery of that amount, but the court held that the defendant was "not entitled to the requested $1,350

in fees paid to [the expert], but only $40 in costs" pursuant to 28 U.S.C. § 1821. No. 1:05–CV–01411–MLH–GSA, 2012 WL 4210104, at *4 (E.D. Cal. Sept. 19, 2012). Similarly, in *Illinois v. Sangamo Construction Co.*, the district court awarded the prevailing party $2,041.36 of expert witness fees for attendance at a deposition, but the Seventh Circuit held: "Because of our decision that expert witness fees in excess of the statutory amount in 28 U.S.C. § 1821 are not recoverable costs, we reverse the district court's award of $2,041.36 for expert witness fees paid in conjunction with depositions taken in this case." 657 F.2d 855, 867 (7th Cir. 1981).

As Respondents point out, many federal courts have, based on Fed. R. Civ. P. 26(a)(4)(A), required the deposing party to pay the expert's hourly fee for time spent in the deposition (if the fee is deemed "reasonable). But as shown in the cases discussed in the preceding paragraph, other federal courts have not imposed such a requirement; rather, the party who retained the expert absorbed the cost of the deposition, and was permitted to recover a $40 attendance fee plus mileage pursuant to 28 U.S.C. § 1821 after prevailing in the lawsuit. Some courts have expressly discussed the tension between Fed. R. Civ. P. 26(b)(4)(E) and 28 U.S.C. § 1821. *See, e.g.*, *Halasa v. ITT Educ. Servs.*, 690 F.3d 844, 849-852 (7th Cir. 2012) (discussing conflict between two rules and noting "district courts have taken different approaches to the way in which § 1821 applies to motions for costs under Rule 26(b)(4)(E) when those particular items are also addressed in § 1821"). Here, there is no such tension because the Rules of Practice contains no rule similar to Fed. R. Civ. P. 26(b)(4)(E), and Rule 116 requires the Bureau to pay "the same fees for attendance and mileage" as those provided for in 28 U.S.C. § 1821.

Respondents provide no basis to interpret Rule 116 as "incorporating" Fed. R. Civ. P. 26(b)(4)(E). They merely assert that it does, but point to no language that might support their interpretation. Fed. R. Civ. P. 26(b)(4)(E) provides that "the party seeking discovery" must "pay the expert a reasonable fee *for time spent* in responding to discovery under Rule 26(b)(4)(A) or (D)." Fed. R. Civ. P. 26(b)(4)(E) (emphasis added). If Rule 116 incorporated Fed. R. Civ. P. 26(b)(4)(E), it would have either expressly referred to that rule or used similar language – for example, by stating that expert witnesses (unlike fact witnesses) must be paid "for time spent" testifying pursuant to a subpoena, which would have indicated that the amount due to the expert would be scaled to the amount of "time spent" by the expert (*i.e.*, his or her hourly rate) – as opposed to simply paying the expert a fee for attending the deposition and a mileage fee, regardless of the "time spent." Such language would have made clear that the amount due to *expert* witnesses would be determined differently from the amount due to *fact* witnesses testifying in Bureau administrative proceedings. Without any such language in Rule 116, there is no basis to exclude expert witnesses from the general provision of Rule 116 requiring application of 28 U.S.C. § 1821.

Indeed, in their opposition to Enforcement's request for subpoena, Respondents unequivocally asserted that "Rule 116 applies to *fact witnesses*." Respondents' Objections to Enforcement Counsel's Request for Issuance of Subpoena for Deposition of Vincent Burke (Dkt. # 132) at 4 (emphasis added). *See also id.* at 3 ("Enforcement Counsel rely on Rules 116 and 209, which apply to *fact witnesses* ...") (emphasis in original). They also took the position that the requirement in Rule 116 to pay subpoenaed witnesses "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" is

different from the hourly rate requirement under Fed. R. Civ. P. 26(b)(4)(E). *Id.* at 4. If, as Respondents admit, Rule 116 applies to fact witnesses, what language in that rule indicates that it does not apply to expert witnesses? And if, as Respondents admit, the amount due to *fact* witnesses is not based on an hourly rate, but rather "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," what basis is there to interpret that same phrase as requiring *expert* witnesses to be paid their hourly rate? Respondents do not answer these questions because no part of Rule 116 supports their argument.

2. Burke's $600 Hourly Rate is Unreasonable

Regardless of whether Burke's $600 hourly rate may be deemed "reasonable" for the value he adds in performing his regular duties as an accountant, the testimony elicited by Enforcement Counsel at the deposition and hearing demonstrated that charging $600 was highly unreasonable *for the work he performed for this proceeding*, which was perfunctory and admittedly irrelevant to any issue. Even if the Rules of Practice required the Bureau to pay expert witnesses for "time spent" testifying at depositions (it does not), it would be unreasonable to require the Bureau to pay such an exorbitant rate because his opinions add no value to the resolution of any issue in dispute.

Burke's testimony at the hearing revealed a lack of knowledge about even the most basic facts of the arrangements at issue – the result of the cursory nature of the work he performed for this proceeding. Burke concludes that it was reasonable for Atrium's accountant KPMG to rely on Milliman's risk transfer opinions, but to reach that conclusion, he merely perused the Milliman reports, spending about thirty minutes

looking at each one. Hearing Tr. at 1760:4-21 (5/30). Thus, it is not surprising that, at the time he prepared his report, Burke was under the mistaken belief that:

- the UGI arrangement "was not a very large program" that commenced sometime in the mid-2000s;
- the Radian arrangement "was a larger program" that commenced in the late 1990s; and
- the CMG arrangement commenced in the early to mid-2000s.

Id. at 1749:25-1752:1.[4]

In addition, Burke believes that, when auditing a risk transfer analysis, it is "important to understand the terms of the contract" such as "how the amount of claims the reinsurer is responsible for are calculated," *id.* at 1747:25-1748:10, but he did not know the most elementary fact about how Atrium's responsibility for claims was calculated. He believes that the "attachment point" under Atrium's arrangements was "4 percent of *losses*," rather than 4% of *aggregate risk*. *Id.* at 1748:11-1748:22. Similarly, he believes that the 14% detachment point refers to 14% of losses, rather than 14% of aggregate risk. *Id.* at 1748:19-22. He understands that measuring liability using "percent of losses" is different from measuring liability using "percent of aggregate risk." *Id.* at 1749:8-11. They are, in fact, completely different, and the attachment/detachment points were based on aggregate risk, not losses. *See* Expert Report of Dr. Mark Crawshaw at 18 n.34 (citing contract provisions).

Burke's failure to learn the basics of the arrangements does not meet his own standard for analyzing complex arrangements such as Atrium's captive arrangements. He believes that because the Atrium arrangements were so complex, a proper risk

[4] The UGI arrangement was, by far, the largest of Atrium's four captive arrangements, and it commenced in 1995. The Radian arrangement was one of the two smallest arrangements, and it commenced in 2004. The CMG arrangement commenced in 2006.

transfer assessment would have required "deep knowledge of the product" including a detailed understanding of "everything from what the estimated premiums are, how many claims are expected to come in, the timing of those claims, what discount rate to use." *Id.* at 17:25:20-23, 1730:19-1733:1. Nothing Burke did for this proceeding can be characterized as reflecting a "deep knowledge of the product." It is not reasonable to charge $600 per hour to essentially rubber stamp the Milliman reports based on such a superficial and misinformed review.

Burke also admitted at his deposition, and again at the hearing, that his opinions are not relevant to Respondents' defense based on RESPA Section 8(c)(2). He admitted that whether a reinsurance service was actually furnished to a mortgage insurance company under a captive arrangement – the issue under RESPA Section 8(c)(2) – is a different concept from the proper accounting treatment for a transaction, which is the subject of his opinions. *Id.* at 1782:6-11. He emphasized that his own opinions deal solely with whether each of Respondents' arrangements "meets the reinsurance accounting requirements" and are unrelated to "what [Atrium's] exposure to loss is" and "doesn't affect the potential losses that [Atrium] could incur under the terms of the contract." *Id.* at 1809:6-1810:4; *see also id. at* 1780:19-25 (agreeing that "whether a transaction is ... an actual service for the mortgage insurance company under the Real Estate Settlement Procedures Act is not covered by the discussion of the accounting issues in" the EITF paper he cited in his rebuttal report). It is not reasonable for an expert to charge $600 per hour to provide opinions that he admits are unrelated to the issues in dispute.[5]

[5] Respondents did not cite Burke's report or testimony once in their post-hearing brief.

3. Conclusion

The Tribunal should deny Respondents' motion because Rule 116 does not apply to depositions taken without a subpoena, and there was no subpoena issued for Burke's deposition. Because the Rules of Practice are silent on the issue of payment of the costs of deposing an opposing expert, the Tribunal should apply the "American Rule" and refrain from shifting those costs where there is no authorization to do so. Moreover, even if Rule 116 applied, the rule requires payment of the same fees for attendance and mileage as those required under 12 C.F.R. § 1081, not the hourly rate "for time spent" by the expert at the deposition as under Fed. R. Civ. P. 26(b)(4)(E). Finally, Burke's $600 fee is excessive given the superficial nature of his work and the irrelevance of his conclusions.

DATED: August 11, 2014

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 11th day of August 2014, I caused a copy of the foregoing "Enforcement Counsel's Opposition to Respondents' Motion for Fees of Rebuttal Expert Witness Vincent Burke" 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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