UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	
	)	**MEMORANDUM IN SUPPORT OF**
INTEGRITY ADVANCE, LLC and	)	**NON-PARTY EDWARD N. FOSTER'S**
JAMES R. CARNES,	)	**MOTION TO QUASH SUBPOENA**
	)	
Respondents.	)	

MEMORANDUM IN SUPPORT OF NON-PARTY EDWARD N. FOSTER'S MOTION TO QUASH SUBPOENA

Pursuant to 12 C.F.R. § 1081.208(h), non-party Mr. Edward N. Foster respectfully moves this Court to quash the subpoena issued by the United States Consumer Financial Protection Bureau ("CFPB") purporting to require his attendance and testimony at the July 19-22, 2016 hearing in the above-captioned matter. Despite having known about the hearing for nearly seven months—and its precise date for more than four months—the CFPB elected to wait to command Mr. Foster's appearance until the eleventh hour, serving him with the subpoena just three business days before the hearing's commencement. Mr. Foster lives and works in Missouri—more than 1,000 miles from the Washington, D.C. hearing venue. He is an active businessman with full-time employment, family obligations, and children to support. He already has provided more than six hours of sworn testimony to the CFPB, which the CFPB's rules allow to be introduced during the hearing. Requiring Mr. Foster's compliance with the subpoena under these circumstances not only would be unreasonable, oppressive, and unduly burdensome, it would violate the fair notice and due process requirements inherent to the American legal system.

I. FACTUAL BACKGROUND

Mr. Foster provided more than six hours of sworn testimony to the CFPB on June 24, 2014, during the CFPB's investigation in this matter. The CFPB's rules of procedure prescribe virtually no limitations on the questions the CFPB may ask a witness, nor do they impose any time constraints. More than a year after deposing Mr. Foster, on November 18, 2015, the CFPB filed a Notice of Charges against Integrity Advance, LLC and James R. Carnes, the Respondents in this proceeding. *See* ECF No. 1.[1]

On December 18, 2015, this Court issued a Scheduling Order providing that the hearing in this case would "commence in Washington, D.C. . . . on June 21, 2016." ECF No. 27 at 4. On March 3, 2016, the Court issued an order (the "March Order") modifying its original Scheduling Order and designating July 19, 2016 as the date of the commencement of the hearing. ECF No. 48 at 1-2. The March Order, too, provided that the hearing would take place in Washington, D.C., and further identified the courtroom in which it would occur. *Id.* at 2. On April 27, 2016, the Court issued a Supplement to its March Order, which reiterated the July 19, 2016 hearing date. ECF No. 80 at 2 (referencing the "start of the hearing on July 19, 2016").

On July 6, 2016—less than two weeks before the commencement of the hearing—the CFPB requested the issuance of a subpoena to require Mr. Foster's appearance and testimony as a witness at the hearing. *See* ECF No. 117 at 1-3.[2] The CFPB served the subpoena on Mr. Foster more than one week later, on Thursday, July 14, 2016.[3] The July 19, 2016 hearing commencement date remains intact.

[1] Unless otherwise specified, all ECF references herein correspond to the docket numbers of documents filed in this case.
[2] On July 8, 2016, the hearing officer authorized the issuance of the subpoena to Mr. Foster.
[3] Undersigned counsel accepted service on behalf of Mr. Foster.

II. ARGUMENT

This Court should reject the CFPB's last-minute attempt to secure Mr. Foster's appearance and testimony at the hearing in this case. The CFPB's regulations provide that "the hearing officer shall quash or modify [a] subpoena" if "compliance with the subpoena would be unreasonable, oppressive, or unduly burdensome." 12 C.F.R. § 1081.208(h)(2). Requiring Mr. Foster's appearance and testimony in this case unquestionably meets this standard.

First, the CFPB served Mr. Foster with the subpoena on Thursday, July 14, 2016—only three business days, and five calendar days, before the hearing's commencement.[4] That is patently unreasonable. Federal Rule of Civil Procedure 45(d)(3) provides a close analogue to CFPB Rule 208(h) and provides that on timely motion, a court "must" quash (or modify)[5] a subpoena that "fails to allow a reasonable time to comply" or "subjects a person to undue burden."[6] Although Rule 45 "does not define 'reasonable time,' many courts have found fourteen days from the date of service as presumptively reasonable." *Brown v. Hendler*, No. 09 Civ. 4486, 2011 WL 321139, at *2 (S.D.N.Y. Jan. 31, 2011) (citing cases) (citations and internal quotation marks omitted).[7] By the same token, "[f]ederal courts have also found compliance

[4] The CFPB's own regulations make clear that Saturdays and Sundays are to be included in computation of time "except when the time period within which an act is to be performed is ten days or less." 12 C.F.R. § 1081.114(a). Here, the CFPB seeks to procure Mr. Foster's attendance at a hearing to take place less than ten calendar days from the date he was served with the subpoena. Accordingly, weekend days should not be counted.

[5] Modification of the subpoena to Mr. Foster would not cure its deficiencies, as detailed below.

[6] Although the Federal Rules of Civil Procedure do not govern this proceeding, they provide relevant guidance, particularly given the dearth of CFPB administrative case law and the fact that any attempt to enforce the subpoena to Mr. Foster would entail application to a United States District Court. *See* 12 C.F.R. § 1081.208(i).

[7] *See McClendon v. TelOhio Credit Union, Inc.*, No. 2:05-CV-1160, 2006 WL 2380601, at *2 (S.D. Ohio Aug. 14, 2006) (same); *see also Fernandez v. Penske Truck Leasing Co.*, No. 2:12-cv-00295, 2013 WL 438669, at *1-3 (D. Nev. Feb. 1, 2013) (acknowledging that "Non-Parties are also entitled to 'reasonable time' to comply with subpoenas under Rule 45," denying motion to compel appearance for deposition where, "[a]fter nearly a year of pendency, Plaintiff delayed until two weeks before the close of discovery to notice the subject depositions," finding that

times of eight and seven days not to be reasonable." *Id.* (citing cases and granting motion to quash subpoena to appear for deposition upon finding that "nine days was not a reasonable time to comply with the subpoena"). Here, Mr. Foster received even less notice than that: just three business days. But "notice of three business days . . . does not constitute 'reasonable notice'" to a subpoenaed witness. *United States v. Philip Morris Inc.*, 312 F. Supp. 2d 27, 36-37 (D.D.C. 2004) (granting motion to quash subpoena).

The CFPB's own rules are in accord. 12 C.F.R. § 1081.209 governs depositions of witnesses "unavailable for hearing" and provides that "no deposition under this section shall be taken on fewer than 14 days' notice to the witnesses and all parties." 12 C.F.R. § 1081.209(a)(4). Thus, witnesses are entitled to at least 14 days' notice for a deposition, and it stands to reason that they are entitled to at least that much notice in connection with an appearance at a hearing. Further, CFPB regulations afford a subpoena recipient up to 10 days after service to file a motion to quash. 12 C.F.R. § 1081.208(h)(1). Yet that is even less than the length of time that the CFPB afforded Mr. Foster to comply with the subpoena here.

Significantly, the July 19, 2016 hearing date came as no surprise to the CFPB. It has known about the hearing—and its Washington, D.C. location—for nearly seven months, and the July 19 date for more than four months. *See* ECF Nos. 27, 48. The CFPB had ample time to subpoena Mr. Foster but inexplicably failed to do so until just days before the hearing. That is unacceptable.

These notice and reasonableness requirements are not hollow, insignificant technical requirements that may be casually cast aside. To the contrary, they are necessary to enable witnesses sufficient time to "prepare to testify about events"—some of which may have occurred

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"Plaintiffs did not give the proposed deponents reasonable notice," and awarding reasonable costs and attorneys' fees as sanctions for cost associated with opposing the motion to compel).

years ago. *Philip Morris*, 321 F. Supp. at 36-37. The CFPB failed to provide Mr. Foster with sufficient notice or a reasonable time to comply with the subpoena, and as such, Mr. Foster's appearance and testimony at the July 19-22, 2016 hearing would be unreasonable, oppressive, and unduly burdensome. The subpoena should be quashed on that basis alone.[8]

Second, Mr. Foster works and resides in Kansas City, Missouri—several states away from Washington, D.C. He does not regularly visit Washington, D.C., nor does he regularly transact business in person there. Requiring his attendance at the July 19-22, 2016 hearing would be unreasonable, oppressive, and unduly burdensome for this reason as well—particularly when compounded with the exceptionally short notice he received.

Federal Rule of Civil Procedure 45 underscores this conclusion: it mandates that subpoenas commanding a person to attend a hearing or trial more than 100 miles away from where that person "resides, is employed, or regularly transacts business in person" be quashed (subject to certain exceptions for in-state subpoenas, which are not relevant here). FED. R. CIV. P. 45(c)(1)(A), (d)(3)(A)(ii). These "territorial restrictions . . . are imposed to protect [non-party] witnesses from being subjected to excessive discovery burdens in litigation in which they have little or no interest." *Hermitage Global Partners L.P. v. Prevezon Holdings Ltd.*, No. 14-mc-00318, 2015 U.S. Dist. LEXIS 20080, at *10-11, *14-15 (S.D.N.Y. Feb. 19, 2015) (citation and internal quotation marks omitted) (granting motion to quash for violation of the 100-mile rule). Mr. Foster, a non-party, works and resides more than ten times the maximum distance a non-party may be required to travel to comply with a subpoena under the Federal Rules. That unquestionably renders his attendance at the July 19-22 hearing unduly burdensome, oppressive,

[8] A modified subpoena permitting Mr. Foster to testify on the last day of the hearing, July 22, would not cure this deficiency; even that would afford Mr. Foster a maximum of eight days' notice, which is still insufficient. *See Brown*, 2011 WL 321139, at *2.

and unreasonable.

Third, although distance and inadequate notice afford ample basis to quash the subpoena, complying with it would subject Mr. Foster to additional undue burdens beyond time and place. Mr. Foster has full-time employment in Kansas City. Requiring him to attend the hearing would mandate that he miss at least four days of work, thereby significantly interfering with his professional responsibilities.[9] Mr. Foster has preexisting business meetings scheduled with internal team members, vendors, and strategic partners in Kansas City the week of July 19-22, 2016. Those meetings would be difficult—not to mention unprofessional—to cancel at this late date. Further, Mr. Foster works to support his family and also has childcare responsibilities. He has two minor daughters who are out of school for the summer months. Mr. Foster transports his daughters to and from activities and appointments, attends their activities, and arranges for or prepares their meals. Travel to Washington, D.C. for the hearing inevitably would interfere with these responsibilities—particularly on such short notice. Additionally, one of Mr. Foster's best friends from college, whom Mr. Foster has not seen in more than 20 years, is traveling to Kansas City from Dallas, Texas, with his son—whom Mr. Foster has never had the opportunity to meet—on Tuesday, July 19. Mr. Foster has plans to meet his friend and his friend's son in Kansas City that evening. It would be inequitable to require Mr. Foster to comply with the subpoena under these circumstances.

Finally, Mr. Foster's non-appearance at the hearing would not leave the CFPB without recourse. Mr. Foster already provided more than six hours of sworn testimony to the CFPB, and

[9] The CFPB has indicated that it may be able to limit Mr. Foster's testimony to one day. Even if it could do so, that would not alter the unreasonableness of the CFPB's demand or erase the undue burden it would impose upon Mr. Foster. Any appearance—even if for only one day of testimony—still would require him to be away from home and work, travel to and from Washington, D.C., and prepare for his testimony—all with essentially no notice.

the CFPB's own regulations provide that that testimony may be admitted into evidence at the hearing. *See* 12 C.F.R. § 1081.303(h) (prior sworn statement of a non-party witness may be admitted into evidence at a hearing where the witness's attendance cannot be procured by subpoena). The CFPB had its opportunity to question Mr. Foster in detail, and Mr. Foster previously afforded the CFPB some six-plus hours of his time. That is more than enough—particularly given the utter lack of consideration that the CFPB has shown Mr. Foster in seeking to procure his attendance at a hearing several states away with virtually no notice.

III. CONCLUSION

Compliance with the CFPB's subpoena would subject Mr. Foster to unreasonable, oppressive, and undue burdens. Service of a subpoena commanding appearance and testimony just three business days away is unreasonable under any measure. Compounding that fact with the 1000+-mile travel required, interference with professional and personal obligations, and the existence of Mr. Foster's prior sworn testimony that may be admitted at the hearing, the Court should quash the CFPB's subpoena under 12 C.F.R. § 1081.208(h)(2). Indeed, the Federal Rules of Civil Procedure would require a federal court to do so, and Mr. Foster respectfully requests that this Court take that same well-reasoned approach here.

Dated: July 15, 2016

Respectfully submitted,

/s/ *Gerald S. Sachs*

Gerald S. Sachs
geraldsachs@paulhastings.com
Daren F. Stanaway
darenstanaway@paulhastings.com
PAUL HASTINGS LLP
875 15th Street, NW
Washington, DC 20005
Telephone: (202) 551-1700

Counsel for Non-Party Edward N. Foster

CERTIFICATION OF SERVICE

I hereby certify that on the 15th day of July, 2016, I caused a copy of the foregoing to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Heather L. MacClintock (Heather.L.MacClintock@uscg.mil), and Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), and served by email on the following parties who have consented to electronic service:

Deborah Morris, Esq.
Deborah.Morris@cfpb.gov

Craig A. Cowie, Esq.
Craig.Cowie@cfpb.gov

Alusheyi J. Wheeler, Esq.
Alusheyi.Wheeler@cfpb.gov

Wendy J. Weinberg, Esq.
Wendy.Weinberg@cfpb.gov

Vivian W. Chum, Esq.
Vivian.Chum@cfpb.gov

Allyson B. Baker, Esq.
ABBaker@venable.com

Danielle R. Foley, Esq.
DRFoley@venable.com

Peter S. Frechette, Esq.
PSFrechette@venable.com

Hillary S. Profita, Esq.
HSProfita@venable.com

Joanna P. Boyd, Esq.
JPBoyd@venable.com

Christine E. White, Esq.
CEWhite@venable.com

Andrew T. Hernacki, Esq.
ATHernacki@venable.com

/s/ *Gerald S. Sachs*
Gerald S. Sachs