

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.

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**ENFORCEMENT
COUNSEL'S OPPOSITION
TO MOTION TO QUASH
SUBPOENA OF EDWARD
N. FOSTER**

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Enforcement Counsel respectfully requests that the Administrative Law Judge deny Edward Foster's motion to quash the subpoena for his testimony.

BACKGROUND

On Friday July 1, 2016, the Administrative Law Judge partially granted Enforcement Counsel's Motion for Summary Disposition and thereby established the issues that remained for trial. Since it became clear that Enforcement Counsel would need to present evidence on Respondent Carnes's role at Integrity Advance, an issue that Respondents did not contest in their summary disposition papers, Enforcement Counsel has made diligent attempts to reach Mr. Foster. Decl. of A. Wheeler ¶¶ 2-14, dated July 15, 2016. For example, on July 5, 2016, Chris Albanese, an investigator in the Office of Enforcement, called Mr. Foster at a number associated with him in the Thomson Reuters CLEAR database. The CLEAR database is a nationally recognized online investigative platform that collects public and proprietary records concerning individuals and companies. *Id.* ¶¶ 2,5. The home address for Mr. Foster in the CLEAR database is the same address Mr. Foster provided during his investigational hearing testimony. *Id.* ¶ 2. Mr. Albanese also emailed Mr. Foster at an address listed in the CLEAR database. *Id.* ¶ 5. In the email, Mr. Albanese stated that he wanted to inform Mr. Foster that he might be subpoenaed to testify in a hearing involving Integrity Advance in or around July 19th or 20th. *See* Ex. A to Decl. of A. Wheeler (email from C. Albanese to E. Foster, dated July 5, 2016). The email also asked Mr. Foster or his attorney to contact Mr. Albanese. *Id.* Alusheyi Wheeler also called Mr. Foster at the same number on July 5. Wheeler Decl. ¶ 2. Mr. Foster did not respond to any of these contacts. *Id.* ¶¶ 3,7.

Since she represented Mr. Foster during his investigational hearing, on July 6 Mr. Wheeler asked Allyson Baker (counsel for Respondents) whether she represented Mr. Foster. Wheeler Decl. ¶ 8. Ms. Baker stated that she did not. *Id.*

On Friday July 8, the Administrative Law Judge issued a subpoena requiring Mr. Foster's testimony at the hearing. Enforcement Counsel served Mr. Foster with the subpoena via overnight delivery on Monday July 11 to the address he provided during his prior testimony, which was also the address listed in the CLEAR database. *Id.* ¶ 10. UPS made three attempts to deliver the subpoena on three successive days. *Id.* ¶ 11. On July 13, Enforcement Counsel also sent the subpoena to Ms. Baker as she had indicated that Mr. Foster could be reached through her. *Id.* ¶ 12. Ms. Baker refused to provide the subpoena to Mr. Foster and stated that Mr. Foster was represented by Gerald Sachs at Paul Hastings. *Id.*

Having learned of Mr. Sachs's representation for the first time, Wendy Weinberg called Mr. Sachs twice and emailed Mr. Sachs asking him whether he would accept service for Mr. Foster. *Id.* ¶ 13. On July 13, Mr. Sachs indicated to Ms. Weinberg that he did represent Mr. Foster but was not authorized to accept service at that time. *Id.* On July 14, Mr. Sachs emailed Ms. Weinberg and stated that he would accept service on behalf of Mr. Foster. *Id.* ¶ 14. Ms. Weinberg emailed the subpoena to Mr. Sachs on July 14. *Id.*

Finally, during a phone call on July 14 with Mr. Sachs, Ms. Weinberg asked, *inter alia*, whether Mr. Foster had any prior commitments that would interfere with his ability to testify at the hearing. Mr. Sachs did not mention any upcoming conflicts. Ms. Weinberg also stated that the Bureau would pay for Mr. Foster's reasonable travel expenses, including both airfare and lodging. Ms. Weinberg also discussed the possibility of alternatives to testifying in D.C., including testifying by video-conference, SKYPE, or some similar process that would allow Mr.

Foster to testify from outside of D.C. (assuming that the Administrative Law Judge approved such an arrangement).

ARGUMENT

Enforcement Counsel respectfully suggests that despite the short formal notice to Mr. Foster by Enforcement Counsel, requiring his testimony would not be “unreasonable, oppressive, or unduly burdensome” within the meaning of Rule 208(g)(2). As an initial matter, nowhere in his motion does Mr. Foster state when he first learned of the dates of the hearing or of the possibility that he would testify. Enforcement Counsel sent him an email with that information on July 5. In addition, Respondents included Mr. Foster on their witness list on July 6 with a statement that Mr. Foster could be reached through Respondents’ counsel. This statement strongly suggests, if not outright requires, that Respondents’ counsel and Mr. Foster had communicated prior to that date about both the dates of the hearing and the possibility that at least Respondents might call him to testify at the hearing. Otherwise it is not clear how Respondents’ counsel could have stated that Mr. Foster could be reached through her. Thus, although the formal notice may have been short, it appears that Mr. Foster likely knew that he might have to testify the week of July 19th for some time prior to Mr. Sachs’s acceptance of service of the subpoena.

As noted above, Mr. Foster’s counsel did not raise any prior commitments that would interfere with Mr. Foster’s ability to testify next week during the call with Ms. Weinberg on July 14. In the motion today, Mr. Foster does mention several concerns: previously scheduled meetings, childcare responsibilities, and a previously arranged meeting with a college friend. While understating the importance of childcare and business concerns, Enforcement Counsel respectfully notes that all witnesses face these burdens when they are required to testify, and Mr.

Foster's motion does not state the precise dates of these meetings, does not state that he is the sole or primary caregiver, and does not state that he could not make other childcare arrangements. *Cf. Croom v. Western Conn. State Univ.*, 218 F.R.D. 15, 17 (D.Conn.2002) (noting that inconvenience alone will not justify an order to quash a subpoena that seeks potentially relevant testimony).

Enforcement Counsel estimates that Mr. Foster could testify in several hours. It is possible that he could fly to Washington D.C. in the morning, testify in the afternoon, and fly home in the evening. At most, his testimony should only require a single night in D.C., not four nights as his counsel claims. Enforcement Counsel is willing to work with Mr. Foster's schedule (and has expressed as much to his counsel) if he has specific commitments that cannot reasonably be changed and that were scheduled prior to his knowledge of the hearing dates. If Mr. Foster cannot make reasonable arrangements to travel to Washington D.C. to testify and if the Administrative Law Judge is willing, Enforcement Counsel is willing to take his testimony remotely as an accommodation. *Cf. Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C.Cir.1984) (noting that a court should refrain from quashing a subpoena if undue burden can be avoided through modification).

Finally, Mr. Foster relies extensively on the Federal Rules and caselaw that do not apply to this proceeding. In particular, Mr. Foster cites Federal Rule of Procedure 45, which limits the power of subpoenas in federal litigation. The rules governing this proceeding, however, do not contain the same limitations. The rules expressly allow the service of subpoenas in any state and on any person or company doing business in any state. 12 C.F.R. § 1081.208(e). And nowhere do the rules state that a subpoena issued by the Administrative Law Judge cannot require a witness's

attendance at a hearing outside the judicial district in which he or she resides or more than 100 miles from his or her residence.

CONCLUSION

Enforcement Counsel recognizes the burdens placed on all witnesses who are required to testify in hearings like this one, but the instant motion does not provide sufficient detail to demonstrate that it would be unreasonable, oppressive, or unduly burdensome for Mr. Foster to testify at all on any day of the hearing. For all the foregoing reasons, Enforcement Counsel respectfully requests that the Administrative Law Judge deny Mr. Foster's motion to quash the subpoena requiring his testimony. In the alternative, if the Administrative Law Judge believes that additional facts would be helpful in making the determination, Enforcement Counsel respectfully requests a short telephonic conference on the record with Mr. Foster, his counsel, and the parties in this matter to explore precisely what commitments Mr. Foster has, what alternative arrangements might be possible, and when Mr. Foster first learned of the hearing dates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July 2016, I caused a copy of the foregoing Enforcement Counsel's Opposition to Motion to Quash Subpoena of Edward N. Foster, along with the supporting declaration and exhibits, to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather.L.MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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