

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)

**RESPONDENTS’ OBJECTIONS TO ENFORCEMENT
COUNSEL’S REQUEST FOR ISSUANCE OF A SUBPOENA
FOR THE DEPOSITION OF REBUTTAL EXPERT VINCENT BURKE**

INTRODUCTION

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. 12 C.F.R. § 1081.208(d). Specifically, Enforcement Counsel refuses to pay Mr. Burke’s standard fee. Rather, Enforcement Counsel misconstrue the Rules of Practice for Adjudication (“Rules of Practice”), and assert that Mr. Burke should be paid as a fact witness. Respondents disagree, and respectfully request that Enforcement Counsel pay Mr. Burke’s standard expert witness fee as required by Fed. R. Civ. P. 26(a)(4)(E).

FACTS

As an initial matter, Enforcement Counsel misrepresent their interactions with Respondents regarding this expert fee dispute. Respondents have offered to make Mr. Burke

available to Enforcement Counsel in Philadelphia, under the condition that Enforcement Counsel pay Mr. Burke's standard hourly rate. Enforcement Counsel demanded that Mr. Burke be compensated at the hourly rate of a fact witness, relying on Rules of Practice 209 and 210. Respondents responded with their interpretation – that Rules of Practice 209 and 210 do not provide for the payment of expert witnesses – and asked whether Enforcement Counsel were in agreement. Apparently having determined that the parties' differences were irreconcilable, Enforcement Counsel filed this request for a subpoena the next day, forgoing any opportunity to resolve this discovery issue informally. Enforcement Counsel's assertion that Respondents' request for payment of fees is somehow undermined by not having previously taken issue with the parties' payment of their own expert witness fees during the first round of depositions misrepresents the circumstances at the time. Then, the parties' financial obligations for deposing the expert witnesses were commensurate, i.e., each side elected to take a single deposition. Although Michael Cascio's hourly rate was slightly higher than Mark Crawshaw's rate, Respondents' overlooked that fee discrepancy – in Enforcement Counsel's favor – in an attempt to avoid a discovery dispute early on in the proceedings. It is unclear, however, how this gesture might now support Enforcement Counsel's refusal to pay Respondents' rebuttal expert a reasonable fee.

ARGUMENT

The Hearing Officer has broad discretion to resolve discovery disputes relating to the deposition of expert witnesses. 12 C.F.R. §§1081.210(f) and 1081.208(d). Respondents respectfully request that the Tribunal exercise such authority here because Enforcement Counsel's attempt to depose Respondents' expert rebuttal witness, while refusing to pay his regular hourly fee, is unreasonable and not supported by the Bureau's Rules of Practice.

Enforcement Counsel rely on Rules 116 and 209, which apply to *fact witnesses*, in refusing to pay a reasonable hourly fee for the deposition of Respondents' rebuttal expert. In reaching this conclusion, Enforcement Counsel misconstrue, and broadly apply, Rules 116 and 209. Instead, Federal Rule of Civil Procedure 26(a)(4)(E), which has long provided for the payment of expert fees, should apply.

The 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. The Federal Trade Commission's Rule of Practice § 3.31A, on which Rule 210 for expert discovery was modeled, is similarly silent on this issue. *See* 77 Fed. Reg. 39058, 39076. Enforcement Counsel translate this silence into: Expert witnesses shall be compensated as fact witnesses. The Rules of Practice, however, cannot be read so broadly, and, in fact, explicitly distinguish between fact witnesses and expert witnesses. *Compare* 12 C.F.R. § 1081.209 *with* 12 C.F.R. § 1081.210.

Rule 210(d) provides that expert depositions shall be conducted pursuant to the procedures listed in Rule 209(g)—a rule typically reserved for the deposition of witnesses unavailable for hearing. Significantly, subsection (g) of Rule 209 *does not address the payment of fees*. While subsection (e) of Rule 209 specifically provides for the payment of fees to witnesses unavailable at the hearing, referring to Rule 116, there is no indication that subsection (e) applies to expert depositions. Had the Bureau intended to apply to expert depositions *both* the deposition procedures of Rule 209(g) *and* the fee provisions of Rules 209(e) or 116, it would have said so. Stated otherwise, if the Bureau had intended for expert witnesses to be compensated at the fact witness rate, or for parties to be responsible for their own expert's fees — which would conflict with the intent and language of the Federal Rules — it would have specifically said so.

Rule 116 calls for payment to witnesses subpoenaed for depositions by stating that the Bureau should pay deponents 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.” This Rule clearly does not apply to the deposition of expert witnesses, however. Instead, Rule 116 applies to fact witnesses who are unavailable to testify at a hearing. *See* Rule 209(e). Thus, Enforcement Counsel’s reliance on Rule 116 to assert that their obligation to Mr. Burke is limited to the standard fact witness fee for attendance and mileage is unfounded.¹

Even if Rule 116 applies, Enforcement Counsel are responsible for paying Mr. Burke’s standard expert fee, as in the district court. Federal Rule of Civil Procedure 26(a)(4)(E) specifically provides that “[u]nless manifest injustice would result, the court must require that the party seeking discovery . . . (i) pay the expert a reasonable fee for time spent in responding to discovery,” including depositions. In fact, several courts relying on Rule 26(a)(4)(E) have concluded that the deposing party must pay for reasonable time spent by an expert *preparing for* his or her deposition. *See, e.g., Schmidt v. Solis*, 272 F.R.D. 1, 3 (D.D.C. 2010); *Sea Carriers Corp. v. Empire Programs, Inc.*, No. 04-cv-7395, 2007 U.S. Dist. LEXIS 68269, at * 4 (S.D.N.Y. Sept. 12, 2007); *Am. Steel Prods. Corp. v. Penn Cent. Corp.*, 110 F.R.D. 151, 153 (S.D.N.Y. 1986).

The rate sought by Mr. Burke is his traditional hourly rate, is the rate paid to him by Respondents, and is reasonable under Fed. R. Civ. P. 26(a)(4)(E). *See, e.g., Snook v. Cnty. of Oakland*, No. 07-14270, 2009 U.S. Dist. LEXIS 27304, at *9 (E.D. Mich. Mar. 31, 2009) (“[A]n expert’s regular hourly rate for professional services is presumptively a reasonable hourly rate

¹ Enforcement Counsel’s claim that, because expert depositions were set forth in the Tribunal’s February 18, 2014 Scheduling Order, “subpoena fees” were not necessary for the first round expert depositions, but are now necessary for the current expert deposition misrepresents the Tribunal’s Order and is without merit.

for deposition.”); *Mathis v. NYNEX*, 165 F.R.D. 23, 25 (E.D.N.Y. 1996) (In determining whether a requested expert fee is “reasonable” courts generally consider, *inter alia*, “(1) the fee actually being charged to the party who obtained the expert; and (2) fees traditionally charged by the expert on related matters.”).

The Federal Rule for payment of expert fees is specifically designed to prevent discovery abuses by means of unnecessary depositions. Unlike fact witnesses, expert witnesses have already submitted testimony in the form of expert reports, and are unlikely to cover new ground in a deposition. *Schmidt*, 272 F.R.D. at 2 (“One of the reasons for requiring experts to submit reports under Fed. R. Civ. P. 26(a)(2)(B) is to eliminate the need to take a useless deposition in which the expert simply repeats what he had said in his report.”) (quoting Fed. R. Civ. P. 26, Notes to 1993 Amendments). In the Commentary to Rule 209, the Bureau has similarly stated its distaste for the financial burdens associated with pre hearing depositions. *See* 77 Fed. Reg. 39058, 39076 (“[T]he Bureau continues to believe that the marginal benefits of prehearing depositions are not justified by their likely cost in time, expense, collateral disputes and scheduling complexities.”).

If Respondents are obligated to pay for the deposition of their own expert witness, Enforcement Counsel will have no incentive to spend less than the full eight hours permitted by Rule 210. Respondents will certainly have to pay for more than eight hours of work, with consideration for deposition preparation time, travel time, and breaks during the deposition itself. Respondents’ prior experiences with Enforcement Counsel confirm that Enforcement Counsel will take full advantage of this deposition to burden Respondents with excessive discovery

costs.² Further, this burden will be for naught, as Enforcement Counsel is not likely to discuss issues not already discussed in detail in Mr. Burke's rebuttal report, which contains a complete statement of his rebuttal opinions and the basis and reasons therefore.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Tribunal order Enforcement Counsel to pay Mr. Burke's standard expert witness fee of \$600 per hour for the duration of the deposition as required by Fed. R. Civ. P. 26(a)(4)(E), or, in the alternative, for the Tribunal to deny Enforcement Counsel's request for issuance of a subpoena for the deposition of Mr. Burke.

Dated: May 9, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

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² Enforcement Counsel spent a little under 10 hours deposing Respondents' expert witness Michael Cascio.

CERTIFICATION OF SERVICE

I hereby certify that on the 9th day of May, 2014, I caused a copy of the foregoing Objection to Enforcement Counsel’s Request for Issuance of a Subpoena for the deposition of rebuttal expert Vincent Burke, to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties who have consented to electronic service:

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