UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU
August 21, 2014

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of	:	
	:	ORDER GRANTING MOTION
PHH CORPORATION,	:	FOR FEES OF EXPERT WITNESS
PHH MORTGAGE CORPORATION,	:	
PHH HOME LOANS LLC,	:	
ATRIUM INSURANCE CORPORATION, and	:	
ATRIUM REINSURANCE CORPORATION	:	

Introduction

On January 29, 2014, the Consumer Financial Protection Bureau (Bureau) filed the Notice of Charges Seeking Disgorgement, Other Equitable Relief, and Civil Money Penalty that commenced this proceeding, and the hearing took place over nine days in Philadelphia, PA, between March 24 and June 4, 2014. On July 29, 2014, PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (Respondents) filed a Motion for Fees of Expert Witness Vincent Burke Incurred in Responding to Discovery Requested by Enforcement Counsel (Motion; Document 175) and a Memorandum in support of the Motion (Document 175-A). On August 12, 2014, the Office of Enforcement (Enforcement) filed an Opposition to the Motion (Opposition; Document 179). On August 15, 2014, Respondents filed a Reply in Support of the Motion (Reply; Document 180).

Background

On May 16, 2014, I denied Enforcement's Request for Issuance of Subpoena for Deposition of Vincent Burke, explaining that Respondents had no basis on which to condition Mr. Burke's deposition on Enforcement's agreement to pay Mr. Burke's hourly rate, and commenting that I expected the parties to continue to be professional, civil, and cooperative with one another. Document 144. Mr. Burke's deposition took place on May 20, 2014, and Respondents ask that the Bureau cover the $4,050 that Mr. Burke charged Respondents to participate in the deposition. Document 175-A at 1, 3. Respondents argue that Rule 116 of the Bureau's Rules of Practice for Adjudication Proceedings incorporates Federal Rule of Civil Procedure (FRCP) 26(b)(4)(E), and that Mr. Burke's standard hourly fee of $600 is reasonable and should be presumed reasonable consistent with *Snook v. County of Oakland*, 07-cv-14270, 2009 WL 928753, at *3 (E.D. Mich. Mar. 31, 2009). *Id.* at 1-2, 5-7. Respondents point out that Mr. Burke: has expertise in accounting of mortgage reinsurance, which they describe as a niche practice area fundamental to this case; has over three decades of accounting experience; and charges fees comparable to fees

charged by other professionals in his field and at his organization, the international accounting and consulting firm WeiserMazars, LLP. *Id.* at 6-7.

In response, Enforcement contends that Rule 116 does not require any payment to Mr. Burke because he did not testify at the deposition pursuant to a subpoena and Rule 116 does not address which party must pay for expert depositions. Opposition at 1-2. Enforcement further argues that Rule 116 does not incorporate FRCP 26(b)(4)(E), but instead clearly references only 28 U.S.C. § 1821, which sets forth attendance and mileage fees for both fact and experts witnesses in federal court, and that Mr. Burke's hourly rate is unreasonable because his work in this case was "perfunctory" and "irrelevant," and Respondents did not rely on Burke's expert report or testimony in their post-hearing brief.[1] *Id.* at 2-8 & n.5; *see* 28 U.S.C. § 1821(b), (c)(2).

In their Reply, Respondents point out that Enforcement addresses Burke's opinions in its post-hearing brief, and dispute that Rule 116 clearly references only § 1821. Reply at 2, 4. They further emphasize that, because I ruled that Mr. Burke's "deposition must take place," I obviated the requirement for a formal subpoena under Rule 116. *Id.* at 1-2; *see* Document 144 at 2.

Analysis

Rule 116 states that the Bureau shall pay witnesses subpoenaed for deposition the same fees "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." 12 C.F.R. § 1081.116. I agree with Respondents that it is irrelevant that no subpoena was issued to compel Mr. Burke's deposition testimony. I declined to issue the requested subpoena because I saw no merit to any effort to hamper Mr. Burke's deposition, but I clearly could have issued it had the circumstances warranted it. Further, because Rule 116, and the Bureau's Rules generally, do not explicitly exclude expert witnesses from the term "witnesses," I conclude that Rule 116 applies to expert witnesses such as Mr. Burke. Likewise, Rule 116 is applicable to recovery of costs associated with Mr. Burke's deposition testimony.

There is no indication in the Rules as to the meaning of Rule 116's "as are paid in the United States district courts in proceedings in which the United States is a party" (district court clause). While a number of agencies have a procedural rule identical to Rule 116 – the Federal Deposit Insurance Corporation, the Federal Reserve, and the Office of the Comptroller of the Currency to name a few – these other agencies' rules provide no help as to interpretation of the district court clause, and I could not find any agency opinion addressing the interpretation of the district court clause. *See* 12 C.F.R. §§ 109.14, 263.14, 390.43. However, I previously determined that Rule 116 incorporates FRCP 45(b)(1) as to fees associated with attendance pursuant to a subpoena.[2] Document 144 at 2. The question that remains is whether Rule 116 also incorporates

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[1] Enforcement at length describes Mr. Burke's alleged misunderstanding of the basic facts of this case. Opposition at 6-7.

[2] FRCP 45(b)(1) reads:

> Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the

FRCP 26(b)(4)(E) and/or § 1821. *See id.* FRCP 26(b)(4)(E) provides that "[u]nless manifest injustice would result," a party must pay an expert a reasonable fee for depositions, and § 1821 provides for a $40 per day witness attendance fee and reimbursement of a witness' travel expenses. 28 U.S.C. § 1821(b), (c)(1); Fed. R. Civ. P. 26(b)(4)(E).

Given that Rule 116 explicitly refers to district court procedure, it is reasonable to look toward both FRCP 26(b)(4)(E) and § 1821 – both of which would apply in district court proceedings where the United States is a party – for guidance on what should be paid to reimburse an expert's costs. Respondents believe FRCP 26(b)(4)(E) alone would apply, relying in part on *Halasa v. ITT Educ. Servs., Inc.*, 690 F.3d 844 (7th Cir. 2012). *See* Reply at 2-3. In *Halasa*, which involved a losing party's objection to awarded witness fees, the Seventh Circuit Court of Appeals squarely held that the costs provision of FRCP 26(b)(4)(E) trumps that of § 1821. 690 F.3d at 850, 852. Respondents also cite to *Haarhuis v. Kunnan Enter., Ltd.*, 177 F.3d 1007, 1015-16 (D.C. Cir. 1999), where the D.C. Circuit Court of Appeals determined that the district court did not err in awarding expert fees under FRCP 26(b)(4)(E), rather than less substantial fees under § 1821(b), because FRCP 26(b)(4)(E) applies to an expert witness' time spent responding to a discovery request.[3] *See* Reply at 2-3.

Enforcement insists that § 1821 applies notwithstanding FRCP 26(b)(4)(E), relying on *Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 867 (7th Cir. 1981), in which the Seventh Circuit reversed the district court's award of expert witness fees paid in conjunction with depositions, on the basis that "expert witness fees in excess of the statutory amount in 28 U.S.C. § 1821 are not recoverable costs." *See* Opp. at 4. Notably, *Sangamo* did not address the impact of FRCP 26, as the Seventh Circuit was tasked only with addressing the interrelation between the Clayton's Act attorney's fee provision, § 1821, FRCP 54(d), and 28 U.S.C. § 1920. 657 F.2d at 864. *Halasa* is better precedent than *Sangamo*, because it is more closely on point.

Enforcement also cites to a number of Supreme Court cases, none of which provides insight on the relationship between FRCP 26(b)(4)(E) and § 1821. *See* Opp. at 2-3 (citing *Kansas v. Colorado*, 556 U.S. 98 (2009); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987)). Enforcement looks to *Kansas v. Colorado* and *Fogerty* for support for the accurate proposition that it is the default rule in the United States for parties to bear their own costs associated with litigation under the "American Rule."[4] Opp. at 2 (citing *Kansas v. Colorado*, 556 U.S. at 102-03; *Fogerty*, 510 U.S. at 533). The Court also held in *Kansas v. Colorado* that expert witness fees under § 1821(b) are available in cases under the

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> subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

[3] The opinion actually refers to FRCP 26(b)(4)(C), but the court's quoted language is presently codified at subsection (E). *See* 117 F.3d at 1015-16.

[4] Enforcement also quotes from *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 876 (8th Cir. 1994), in support of application of the American Rule.

Court's original jurisdiction, but without addressing the impact of FRCP 26. 556 U.S. at 103. The Court in *Fogerty* decided an issue, not at all relevant here, related to the Copyright Act. 510 U.S. at 534. The Court in *Crawford Fitting* held that when a prevailing party seeks reimbursement of expert witness fees, a federal court is bound by the limit of § 1821(b), absent contract or explicit statutory authority to the contrary, but, as in *Kansas*, it did not address the impact of FRCP 26. 482 U.S. at 439, 445.

Because two U.S. Courts of Appeals have quite clearly indicated that the costs provision of FRCP 26(b)(4)(E) prevails over that of § 1821, and because there is no Supreme Court or other Appeals Court decision directly on point, I conclude that FRCP 26(b)(4)(E) is applicable to the costs associated with Mr. Burke's deposition.

Where FRCP 26(b)(4)(E) applies, some federal courts deem the expert's regularly hourly rate presumptively reasonable, while most, it seems, consider a number of factors in assessing reasonableness, including (1) the expert's area of expertise; (2) the education and training required to provide the expert insight that is sought; (3) the prevailing rates for other comparable respected available experts; (4) the nature, quality, and complexity of the discovery responses provided; (5) the cost of living in the particular geographic area; and (6) fees traditionally charged by the expert in unrelated matters. *Compare Burgess v. Fischer*, 283 F.R.D. 372, 373 (S.D. Ohio 2012); *Snook*, 2009 WL 928753, at *3, *with Ndubizu v. Drexel Univ.*, 07-cv-3068, 2011 WL 6046816, at *2 (E.D. Pa. Nov. 16, 2011), *report and recommendation adopted* 2011 WL 6058009 (E.D. Pa. Dec. 6, 2011); *Barnes v. District of Columbia*, 274 F.R.D. 314, 316 (D.D.C. 2011); *Cartrette v. T & J Transp., Inc.*, 10-cv-277, 2011 WL 899523, *1 (M.D. Fla. Mar. 15, 2011); *Young v. Global 3, Inc.*, No. 03-cv-2255, 2005 WL 1423594, at *1 (D. Colo. May 26, 2005); *Mathis v. NYNEX*, 165 F.R.D. 23, 24-25 (E.D.N.Y. 1996).

Having analyzed these factors, I conclude that Mr. Burke's regular hourly rate is reasonable. *See Burgess*, 283 F.R.D. at 373 ("It is in the Court's discretion to determine the reasonableness of an expert's fee."); 12 C.F.R. § 1081.104 (authority of hearing officer). Mr. Burke is a widely consulted accountant and works in a technical field requiring special training and experience, and that his extensive credentials were relevant to his opinions in this case. While the testimony of the actuarial experts in this case likely is more relevant to the issues than Mr. Burke's opinions, his opinions are not irrelevant, as demonstrated by Enforcement's citations to Burke's opinion in its post-hearing brief. Also, Mr. Burke lives and works near Philadelphia, which I assume not to be inexpensive, he charged his typical hourly rate in connection with his expert testimony in this case, and certified public accountants have charged fees over $500 per hour in similarly complex litigation. *See Nordock Inc. v. Sys. Inc.*, 927 F. Supp. 2d 577, 584 (E.D. Wis. 2013) (CPA had a $475 hourly rate in a patent case); *SEC v. Berry*, 07-cv-04431, 2011 WL 2149088, at *1, *3 (N.D. Cal. June 1, 2011) (CPAs in securities case respectively had hourly rates of $575, $600, $750, and $1,600, with only the $1,600 rate being reduced by the court).

Because the forthcoming Recommended Decision is just that – a recommended decision – immediate payment will not be ordered. In the event monetary relief is imposed in a final decision and order, I recommend offset of Mr. Burke's fee against such monetary relief.

Order

It is ORDERED that Respondents' Motion for Fees of Expert Witness Vincent Burke Incurred in Responding to Discovery Requested by Enforcement Counsel is GRANTED, and the Consumer Financial Protection Bureau shall pay Respondents $4,050.00 to reimburse fees charged by Vincent Burke for his appearance and testimony at his May 20, 2014, deposition.

Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission