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	)

REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR FEES OF EXPERT WITNESS VINCENT BURKE

I. The Bureau Must Pay Burke a Reasonable Fee

Enforcement Counsel contend that Rule 116 of the Bureau's Rules of Practice for Adjudication Proceedings ("Rules of Practice") does not apply because Respondents' rebuttal expert, Vincent Burke ("Burke"), was "not subpoenaed for testimony or deposition." Instead, Enforcement Counsel suggest that, because Burke's deposition was taken as the result of an agreement between the parties, Rule 116 is "irrelevant." Further, Enforcement Counsel assert that because the Rules are "silent" on the issue of which party is responsible for fees in connection with an expert deposition taken *without issuance of a subpoena*, Respondents must bear the cost of the deposition. But Enforcement Counsel's reliance on this narrow distinction is futile, as the Tribunal's issuance of a subpoena would not have meaningfully changed the circumstances of the deposition. Enforcement Counsel requested the issuance of a subpoena. Though their request was denied, the Tribunal expressly ruled that the "deposition must take place," and that Enforcement Counsel are "entitled to depose Burke." Order Denying Without

Prejudice Request for Subpoena for Deposition of Vincent Burke ("Order"), Document 144, at 2. Thus, the Tribunal obviated the requirement for a formal subpoena and Burke was required to attend the deposition. Enforcement Counsel's narrow reading of the Bureau's Rules of Practice would, curiously, serve to financially burden those respondents willing to cooperate with the Bureau by making expert witnesses available for deposition without issuance of a formal subpoena from the Tribunal.

Enforcement Counsel further claim that there is no "credible" argument that Rule 116 incorporates Fed. R. Civ. P. 26(b)(4)(E) ("Rule 26"), and that 28 U.S.C. § 1821 ("§ 1821") should apply instead. In doing so, Enforcement Counsel claim that Rule 116 "clearly" references § 1821, which they allege controls the compensation of expert witnesses in federal district court. In support of this argument, Enforcement Counsel rely on *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). The Court in *Crawford Fitting*, however, addressed the question of whether federal courts may require a losing party to pay the compensation of the prevailing party's expert witnesses, which is not the issue currently before the Tribunal. *Id.* at 438.

As an aside, Enforcement Counsel also note that "some courts" have discussed the "tension" between the seemingly incompatible requirements of Rule 26 and § 1821, and cite to *Halasa v. ITT Educ. Servs.*, 690 F.3d 844, 851 (7th Cir. 2012) for that proposition. Enforcement Counsel, however, fail to mention that in *Halasa*, the Seventh Circuit Court of Appeals specifically ruled that "Rule 26 supersedes the specific schedule outlined in § 1821(b)." *Halasa*, 690 F.3d at 851. Other circuit courts of appeal have ruled similarly. *See, e.g., Haarhuis v. Kunnan Enter., Ltd.*, 177 F.3d 1007, 1015 (D.C. Cir. 1999) ("28 U.S.C. § 1821(b) does in fact limit witness fees to $ 40 per day. However, the fee here was awarded under Rule 26(b)(4)(C), which applies where, as here, an expert witness spends time responding to the opposing party's

discovery request."). Rather than address this conflict, Enforcement Counsel summarily conclude that the "tension" between Rule 26 and § 1821 is irrelevant under the Bureau's Rules of Practice because Rule 116 so clearly and exclusively incorporates § 1821. To support this theory, Enforcement Counsel rely only on purported similarities between the language of the two provisions. Notably, this argument gives little credence to the Tribunal's recent Order, which specifically provided that Rule 116 may, in fact, incorporate *both* Rule 26 and § 1821. Order at 2 ("Although it does not explicitly say so, Rule 116 may also incorporate FRCP 26(b)(4)(E), which requires a reasonable fee for experts, and 28 U.S.C. § 1821, which sets a fixed fee for any witness."). If, as suggested by the Tribunal, Rule 116 incorporates both Rule 26 *and* § 1821 (which it does), then this so-called "tension" between the two provisions *does* exist, and Rule 26 would apply. *See Halasa*, 690 F.3d at 851.

Lastly, Enforcement Counsel contend that the Tribunal should apply the "American Rule," under which the parties must bear their own costs. Enforcement Counsel cite *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 876 (8th Cir. 1994) and *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) for that proposition, despite the fact that each of those cases involve the shifting of *attorney's fees*. Enforcement Counsel's reliance on *Kansas v. Colorado*, 556 U.S. 98, 102-03 (2009) is similarly misplaced, as the Court there merely interpreted the application of 28 U.S.C. § 1821(b) and the American Rule in the context of the post-trial shifting of expert witness fees onto a losing party. Enforcement Counsel have neglected the distinction between Rule 26 – which requires a requesting party to pay those reasonable fees incurred by an expert witness in responding to the requesting party's discovery requests – and the American Rule – which prohibits the post-trial recovery of expert witness fees by a prevailing party. This

distinction renders Enforcement Counsel's argument irrelevant to the issue presently before the Tribunal.

II. Enforcement Counsel Fail to Rebut that Burke's Hourly Rate was Reasonable

In determining the "reasonableness" of expert fees, courts consider several objective factors relating to the individual expert's fee, such as the witness's area of expertise, the complexity of the questions at issue, the prevailing rates for comparable experts, the rates actually charged to the retaining party, and the fees traditionally charged by the expert. *See, e.g.*, *Mathis v. NYNEX*, 165 F.R.D. 23, 24-25 (E.D.N.Y. 1996). Rather than objecting to the reasonableness of Burke's fees on such grounds, Enforcement Counsel, instead, exploit this fee dispute as an opportunity to discredit and impeach Burke on the basis of his testimony at the deposition and hearing, and, inexplicably, to question the relevance of his opinions to this case. These are inappropriate and improper bases on which to rebut the reasonableness of Burke's fees.

As an initial matter, the Tribunal has ruled – over Enforcement Counsel's objection – that Burke is qualified to testify as an expert witness and that his testimony is relevant to the disposition of various issues in dispute. Hearing Tr. 1713-14. As such, Burke is sufficiently qualified to testify as an expert witness in this case, and his report and testimony are sufficiently relevant to the issues in dispute. Although his qualification and testimony are no longer in dispute, if Burke's opinions were wholly unrelated to this case, what compelled Enforcement Counsel to depose him for several hours prior to the hearing? Similarly, why did Enforcement Counsel address Burke's testimony and opinions on more than a dozen separate occasions in their post-hearing brief? These facts alone demonstrate the impropriety of Enforcement Counsel's objection to Burke's fees on such grounds.

Moreover, Enforcement Counsel will be hard-pressed to identify a venue in which expert compensation is determined by the alleged "quality" of the expert's testimony. A so-called "qualitative" approach is not the standard set in *Mathis*, nor has it been applied, to Respondents' knowledge, by any court. Notably, Enforcement Counsel's approach, besides being improper, conflicts with the American Rule, which they contend applies. Experts are not compensated on the basis of the quality of their performance, or on the outcome of the proceedings.

CONCLUSION

Enforcement Counsel's attempt to avoid the cost of the discovery they demanded is inappropriate. Indeed, Enforcement Counsel could not locate a single other example where an agency imposed such costs in the manner they suggest. That is so because federal courts and agencies recognize the fundamental fairness underlying Rule 26(b)(4)(E). To hold otherwise would permit Enforcement Counsel to force unnecessary costs on respondents – costs incurred at the whim of Enforcement Counsel. Further, Enforcement Counsel's attempt to conflate the recovery of expert witness costs as a prevailing party, as opposed to costs incurred to accommodate Enforcement Counsel's demand for discovery from Respondents' expert, demonstrates a fundamental misunderstanding of the issue now before the Tribunal. To reiterate, Respondents are not seeking recovery of all of Mr. Burke's fees, only those incurred to comply with Enforcement Counsel's demand for a deposition prior to the completion of the hearing. Finally, Enforcement Counsel's ad hominem attacks on Mr. Burke are unprofessional. Taking statements out of context on points unrelated to the issues about which Mr. Burke was called to testify reflects poorly on Enforcement Counsel and such arguments should be disregarded by the Tribunal.

Dated: August 15, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 15th day of August, 2014, I caused a copy of the foregoing Reply in support of Respondents' Motion for Fees of 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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