UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

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In the Matter of:	)
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	)
PHH CORPORATION,	)
PHH MORTGAGE CORPORATION,	)
PHH HOME LOANS LLC,	)
ATRIUM INSURANCE CORPORATION,	)
and ATRIUM REINSURANCE	)
CORPORATION	)
	)
	)

ENFORCEMENT COUNSEL'S RESPONSE TO RESPONDENTS' OBJECTION TO REQUEST FOR ISSUANCE OF SUBPOENA FOR DEPOSITION OF VINCENT BURKE

Enforcement Counsel submits this response to Respondents' Objection to Enforcement Counsel's Request for Issuance of Subpoena for the Deposition of Vincent Burke, Respondent's rebuttal expert witness**.**

Rule 116 of the Bureau's Rules of Practice for Adjudication Proceedings could not be clearer that, "[T]he Bureau shall pay to witnesses subpoenaed for testimony or deposition on behalf of the Office of Enforcement the same fees for attendant and mileage as are paid in the United States district courts…" 12 C.F.R. § 1081.116. This is the same cost-shifting provision in 28 U.S.C. § 1821. And like 28 U.S.C. § 1821, it applies equally to fact and expert witnesses.[1] *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) ("We think that it is clear that in §§ 1920 and 1821, Congress comprehensively addressed the taxation of fees for litigants' witnesses…a federal court may tax expert witness fees in excess of the $30–per-day limit set out in § 1821(b) only when the witness is court-appointed."). For decades, federal courts have applied the rule articulated by the Supreme Court in *Crawford Fitting* to limit recovery of expert witness fees, including for time spent at a deposition, to the attendance and mileage fees under 28 U.S.C. § 1821. For example, in *Illinois v. Sangamo Construction Co.*, the district court awarded the prevailing party $2,041.36 of expert witness fees for attendance at a deposition, but the Seventh Circuit held: "Because of our decision that expert witness fees in excess of the statutory amount in 28 U.S.C. § 1821 are not recoverable costs, we reverse the district court's award of $2,041.36 for expert witness fees paid in conjunction with depositions taken in this case." 657 F.2d 855, 867 (7th Cir. 1981). More recently, in *Duhn Oil Tool, Inc. v. Cameron International Corp.*, the defendant paid $1,350 to its expert witness for his deposition. Upon prevailing, the defendant sought recovery of that amount, but the court held that the defendant was "not entitled to the requested $1,350 in fees paid to [the expert], but only $40 in

[1] Respondents argue Rule 116 applies only to fact witnesses. Rule 116 does not indicate that it is limited to fact witnesses; it refers generally to "witnesses subpoenaed for testimony," not "*fact* witnesses subpoenaed for testimony."

costs" pursuant to 28 U.S.C. § 1821. No. 1:05–CV–01411–MLH–GSA, 2012 WL 4210104, at *4 (E.D. Cal. Sept. 19, 2012).

Respondent's urged interpretation, that the Rules of Practice are "silent" on the issue of payment for expert witness depositions, and thus that the Tribunal must apply what Respondents contend is the practice in federal courts, would have the unfortunate effect of importing the same confusion between Fed. R. Civ. P. 26(b)(4)(E) and 28 U.S.C. § 1821 that exists now in federal courts. Fed. R. Civ. P. 26(b)(4)(A) provides that "the court must require that the party seeking discovery … pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D)."[2] Respondents correctly point out that many federal courts have, based on Fed. R. Civ. P. 26(a)(4)(A), required the deposing party to pay the expert's hourly fee for time spent in the deposition (if the fee is deemed "reasonable). PHH Br. at 4-5. But in many other cases, such as *Dunn Oil Tool* and *Sangamo Construction* discussed above, federal courts have not imposed such a requirement; rather, the party who retained the expert absorbed the cost of the deposition, and was permitted to recover the attendance and mileage fee pursuant to 28 U.S.C. § 1821 after prevailing in the lawsuit. Some courts have expressly discussed the tension between Fed. R. Civ. P. 26(b)(4)(E) and 28 U.S.C. § 1821. *See*, *e.g.*, *Halasa v. ITT Educ. Servs.*, 690 F.3d 844, 849-852 (7th Cir. 2012) (discussing conflict between two rules and noting "district courts have taken different approaches to the way in which § 1821 applies to motions for costs under Rule 26(b)(4)(E) when those particular items are also addressed in § 1821").[3]

Here, there is no such tension because the Rules of Practice contains no rule similar to Fed. R. Civ. P. 26(b)(4)(E). Rule 116, however, references the cost-shifting provision in 28 U.S.C. § 1821,

[2] Respondents refer to Fed. R. Civ. P. 26(a)(4)(E), which does not exist. It appears that Respondents intend to refer to Fed. R. Civ. P. 26(b)(4)(E).

[3] In contrast to the other cases cited herein, the *Halasa* court held: "Although we consider it a close call, we conclude that the flexible authorization for a reasonable fee contained in Rule 26 supersedes the specific schedule outlined in § 1821(b)." *Id.* at 852.

which clearly provides for a $40 attendance fee plus mileage. Respondents have presented no good reason to introduce unnecessary complications.

Finally, if the Tribunal accepts Respondents' argument that the Rules of Practice are silent on the issue of payment of expert fees, it should apply the "American Rule" to that issue. Under the "American Rule," the parties "must bear their own costs absent a specific statutory provision shifting them." *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 876 (8th Cir. 1994); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) ("[W]e are mindful that Congress legislates against the strong background of the American Rule."). The Supreme Court has explained that "the American Rule applies not only to attorney's fees but also other costs of litigation, including expert witness fees …." *Kansas v. Colorado*, 556 U.S. 98, 102-03 (2009) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975)). Thus, if there is no provision in the Rules of Practice that provides for shifting of expert deposition costs from the party that retained the expert to the other party, as Respondents appear to argue, then PHH should be required to bear the costs of its own expert to attend his deposition (just as each party bore the cost of its expert to attend his depositions after initial reports were filed).

For the reasons discussed in its written request for the subpoena and herein, Enforcement Counsel requests that the Tribunal grant the subpoena and rule that Enforcement Counsel's payment to Mr. Burke shall be the fees for attendance and mileage provided in Rule 116 or, in the alternative, that Respondents shall be responsible for all of his fees for attending the deposition.[4]

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[4] Respondents state that Enforcement Counsel's deposition of Michael Cascio took "a little under 10 hours." PHH Br. at 6 n.2. Exclusive of breaks, the deposition was under eight hours.

DATED: May 14, 2014

Respectfully submitted,

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Enforcement Counsel

Certificate of Service

I hereby certify that on this 14th day of May 2014, I caused a copy of the foregoing "Enforcement Counsel's Response to Respondents' Objection to Enforcement Counsel's Request for Issuance of Subpoena for the Deposition of Vincent Burke" to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service on behalf of Respondents:

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