

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' MEMORANDUM IN SUPPORT OF MOTION
FOR FEES OF EXPERT WITNESS VINCENT BURKE INCURRED IN
RESPONDING TO DISCOVERY REQUESTED BY ENFORCEMENT COUNSEL**

Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (“Respondents”), seek reimbursement of fees incurred in connection with the deposition of Respondents’ rebuttal expert witness, Vincent R. Burke, by the Office of Enforcement (“Enforcement Counsel”).

Specifically, Respondents seek \$4,050.00 from the Consumer Financial Protection Bureau (“Bureau”) to cover fees charged by Mr. Burke for his appearance and testimony at a deposition held by Enforcement Counsel on May 20, 2014. Enforcement Counsel have refused to pay Mr. Burke’s fee, and take the hard-line position that Respondents should bear the cost of this discovery. The Bureau’s Rules of Practice for Adjudication Proceedings (“Rules”) do not explicitly resolve this issue. Rule 116, however, incorporates the standard witness fee rules applied in United States district courts, which obligate the Bureau to pay Mr. Burke a “reasonable” fee for attending the expert deposition. *See* 12 C.F.R. § 1081.116; Fed. R. Civ. P. 26(b)(4)(E). In light of Mr. Burke’s qualifications and relevant experience, and the various

factors considered in *Mathis v. NYNEX*, 165 F.R.D. 23, 24-25 (E.D.N.Y. 1996), his standard hourly fee is reasonable. Therefore, Respondents respectfully request that the Tribunal issue an order requiring the Bureau to reimburse Respondents for fees incurred in connection with Mr. Burke's deposition.

FACTS

On April 21, 2014, Respondents filed Mr. Burke's rebuttal expert report. On Enforcement Counsel's request, Respondents agreed to make Mr. Burke available for deposition on the condition that the Bureau pay Mr. Burke's standard hourly rate during the deposition. Enforcement Counsel refused Respondents' offer and on May 7, 2014, sought issuance of a subpoena from the Tribunal ("Subpoena Request"). On May 16, 2014, the Tribunal denied Enforcement Counsel's Subpoena Request, and directed the parties to cooperate in arranging for Mr. Burke's deposition. Order Denying Request for Subpoena For Deposition of Vincent Burke ("Order"), Document 144, at 2. The Tribunal noted that, in any event, it could not determine the reasonableness of Mr. Burke's fee without having afforded Enforcement Counsel the "opportunity to show that it is not [reasonable]," under Fed. R. Civ. P. 26(b)(4)(E). *Id.*

In an attempt to cooperate with Enforcement Counsel, Respondents made Mr. Burke available for deposition, despite not having resolved the fee dispute. The deposition was held on May 20, 2014, beginning at 10:00 a.m. and concluding at 4:43 p.m. On May 30, 2014, Mr. Burke was called to testify as an expert witness in support of Respondents' case-in-chief and was cross-examined by Enforcement Counsel. On July 11, 2014, Respondents sought from Enforcement Counsel reimbursement of fees paid by Respondents to Mr. Burke for attending the deposition. *See* Letter from Respondents to Enforcement Counsel, July 11, 2014 (Exhibit A). Mr. Burke charges \$600 per hour – his standard rate for litigation support arrangements – and

spent approximately 6.75 hours at the deposition, totaling \$4,050.00 in fees. Respondents do not seek remuneration for costs associated with the time Mr. Burke spent preparing for the deposition.¹ On July 21, 2014, Enforcement Counsel responded, refusing to pay for any portion of Mr. Burke's fees incurred during the deposition. *See* Email from Enforcement Counsel to Respondents, July 21, 2014 (Exhibit B).

ARGUMENT

I. The Bureau Must Tender Mr. Burke a Reasonable Fee for Attending the Deposition

The Bureau's Rules of Practice do not explicitly identify which party is responsible for the payment of fees incurred in connection with expert depositions. Rule 116, however, incorporates the witness fee payment standards of United States district courts:

The Bureau shall pay to witnesses subpoenaed for testimony or depositions on behalf of the Office of Enforcement 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, but the Bureau need not tender such fees in advance.

12 C.F.R. § 1081.116. United States district courts have long held the requesting party responsible for those reasonable expert fees accrued in responding to discovery requests. Specifically, Fed. R. Civ. P. 26(b)(4)(E) provides that “[u]nless manifest injustice would result, the court must require that the party seeking discovery . . . pay the expert a reasonable fee for time spent in responding to discovery. . . .” The Tribunal recently noted that Rule 116 may incorporate Fed. R. Civ. P. 26(b)(4)(E), which would require Enforcement Counsel to pay Mr.

¹ Respondents have agreed to cover this cost, despite the fact that 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).

Burke a reasonable fee for attending the deposition.² Order, Document 144, at 2. Respondents agree with this interpretation. The Bureau's Rules have deviated from the Federal Rules in certain specific instances, but have not done so here. Instead, Rule 116 appears to specifically adopt the witness fee payment standards of United States district courts. Moreover, the Rules of Practice are otherwise silent as to the payment of experts subject to deposition. Thus, Enforcement Counsel should be required to comply with Fed. R. Civ. P. 26(b)(4)(E), and should pay Mr. Burke a reasonable fee for his time spent in responding to their discovery.

Rule 26(b)(4)(E) aims to prevent discovery abuses among the parties – such as unnecessary or lengthy depositions – and is equally necessary in the context of an administrative adjudication before the Bureau. Unlike fact witnesses, expert witnesses submit testimony in the form of expert reports and are unlikely to cover novel issues in a deposition. *See, e.g., 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). Further, parties will almost always have the opportunity to cross-examine expert witnesses during trial.³ Additionally, Rule 26(b)(4)(E) is designed to “ensure that a party seeking discovery in the form of a deposition . . . does not obtain for free what the other party

² Under similar circumstances, the Nuclear Regulatory Commission incorporated Fed. R. Civ. P. 26(b)(4)(E) into its rules of practice. *See In the Matter of Duke Cogema Stone & Webster*, No. 070-03098, 2003 NRC Lexis 152, at *3 (Aug. 28, N.R.C. 2003) (“The Board finds that the 10 C.F.R. § 2.740a(h) reference to ‘the same fees as are paid for like services in the district courts’ necessarily incorporates the provision for expert witness fees contained in Rule 26(b)(4)(C) [now, 26(b)(4)(E)] of the Federal Rules of Civil Procedure.”)

³ Notably, Rule 26(b)(4)(E) requires payment to those experts responding to discovery under Rule 26(b)(4)(A), which only allows for the deposition of “an expert whose opinions may be presented at trial.” Thus, subsection (b)(4)(E) is tailored to shift the cost of expert depositions only where the party requesting discovery will also be afforded the chance to cross-examine the expert at trial.

has paid for.” *Se-Kure Controls, Inc. v. Vanguard Prods. Group*, 873 F. Supp. 2d 939, 959 (N.D. Ill. 2012). In drafting the Rules of Practice for Adjudication Proceedings, the Bureau similarly stated its distaste for the unnecessary financial burdens associated with prehearing depositions. *See, e.g.*, 77 Fed. Reg. 39058, 39076 (June 29, 2010) (“[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.”).

Enforcement Counsel should not be entitled to take discovery from Respondents’ expert without bearing responsibility for the costs associated therewith. Similarly, Enforcement Counsel should not be entitled to unilaterally drive up Respondents’ discovery costs. Were Enforcement Counsel to bear no responsibility for the cost of expert discovery, there would be no incentive for Enforcement Counsel to limit the scope of, and time spent in, a deposition.

If the Tribunal is inclined to find that Rule 116 does not apply, or that the Rule does not incorporate the witness fee payment standards of United States district courts, Fed. R. Civ. P. 26(b)(4)(E) should still apply. Ruling alternatively would open the door to discovery abuses and significantly limit future respondents’ ability to afford their expert of choice. The Bureau’s refusal to compensate Mr. Burke for his attendance and testimony at a deposition held on their request is unreasonable, and is neither supported by the Bureau’s Rules, nor the Federal Rules of Civil Procedure.

II. Mr. Burke’s Fee is Reasonable under Fed. R. Civ. P. 26

Respondents submit that Mr. Burke’s standard hourly fee is reasonable under Fed. R. Civ. P. 26(b)(4)(E). As noted by the Tribunal, courts in certain jurisdictions have ruled that an expert’s “regular hourly rate for professional services is presumptively a reasonable hourly rate for deposition.” *Snook v. City of Oakland*, No. 07-14270, 2009 U.S. Dist. LEXIS 27304, at *9

(E.D. Mich. Mar. 31, 2009); *see also* Order, Document No. 144, at 2. In addition, courts consider the following factors in determining the “reasonableness” of an expert deposition fee: (1) the witness’ area of expertise; (2) the education and training that is required to provide the expert insight that is sought; (3) the prevailing rates for other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the costs of living in the particular geographic area; (6) the fee actually being charged to the party who retained the expert; (7) the fees traditionally charged by the expert on related matters; and (8) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26. *Mathis*, 165 F.R.D. at 24-25; *see also Snook*, 2009 U.S. Dist. LEXIS 27304 at *9-10.

Mr. Burke’s hourly rate of \$600 should be presumed reasonable, as it reflects his standard hourly rate and the rate at which Respondents have agreed to compensate him in this matter. Mr. Burke’s fee is also reasonable with consideration of the factors enumerated in *Mathis*. First, Mr. Burke has more than three decades of experience as an accountant, with significant expertise in the accounting of mortgage reinsurance – a niche practice area that is also fundamental to this case. *See* curriculum vitae of Vincent Burke (Exhibit C). Second, Mr. Burke is well credentialed, having completed a master’s degree in business administration with a focus in finance, and having obtained licenses as a Certified Public Accountant in California, Pennsylvania and New York. Mr. Burke has also obtained the following designations: Chartered Property Casualty Underwriter; Chartered Life Underwriter; and Fellow of the Life Management Institute. Third, in preparing for and attending the deposition, Mr. Burke was obligated to provide specific responses relating to various contractual agreements and regulatory and accounting standards dating back more than a decade. Mr. Burke’s responses were specific and potentially dispositive of issues relating to the Enforcement Counsel’s claims and

Respondents' defenses, and such responses were utilized by Enforcement Counsel during the hearing. Fourth, as mentioned, the rate charged to the Bureau represents Mr. Burke's standard hourly rate for performing litigation support services, as well as the rate at which Respondents have agreed to compensate him in this matter. *See* Transcript, Deposition of Vincent Burke, at 109-110. Fifth, Mr. Burke's fee is comparable to those fees charged by other professionals in the field and at his organization, Weizermazars, LLP, an internationally respected accounting and consulting firm. *See id.* With consideration of these factors, and those enumerated in *Mathis*, Mr. Burke's standard fee is reasonable.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Tribunal issue an order requiring the Bureau to reimburse Respondents \$4,050.00, for the cost of Mr. Burke's attendance and testimony at the deposition held by Enforcement Counsel on May 20, 2014, as required by Rule 116 and Fed. R. Civ. P. 26(a)(4)(E).

Dated: July 29, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

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CERTIFICATION OF SERVICE

I hereby certify that on the 29th day of July, 2014, I caused a copy of the foregoing Memorandum in Support of Motion for Fees Incurred by Expert Witness Vincent Burke in Responding to Discovery Requested by Enforcement Counsel, 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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