

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:

INTEGRITY ADVANCE, LLC and
JAMES R. CARNES

Respondents

ORDER GRANTING IN PART
AND DENYING IN PART
MOTION TO QUASH
SUBPOENA

Hon. Parlen L. McKenna

On July 15, 2016, counsel for non-party Edward Foster filed a Motion to Quash the subpoena the Bureau served on him. Mr. Foster argues that requiring him to appear as a witness at the hearing would be unreasonable, oppressive, and unduly burdensome, *see* 12 C.F.R. § 1081.208(h)(2), and would violate fair notice and due process requirements. Mr. Foster states he was served with the subpoena only five calendar days—three business days—prior to commencement of the hearing; that he resides and works in Kansas City, Missouri, which is outside the 100-mile radius specified in Fed. R. Civ. P. 45, thus this subpoena would be quashed in federal court; that he has prior business and personal obligations during the dates set for the hearing which cannot be reasonably cancelled or rearranged on such short notice; and, that the Bureau may use the transcript of his June 24, 2014 investigational deposition even if his motion to quash is granted.

The Bureau filed a response, stating that after I granted partial summary disposition on July 1, 2016, Bureau counsel had made diligent attempts to reach Mr. Foster. Mr. Foster did not respond to repeated telephone calls and Respondents' counsel indicated she did not represent Mr. Foster. After learning that Gerald Sachs represented Mr. Foster, Bureau counsel attempted to serve the subpoena through Mr. Sachs and was ultimately successful in doing so on July 14, 2016.¹

Mr. Foster was served with the subpoena five calendar days—or three business days—prior to the commencement of the hearing. The CFPB's Rules of Practice do not contain a specific time frame for serving a subpoena prior to a hearing. However, when a party notices a deposition under 12 C.F.R. § 1081.209, that party must give the deponent no fewer than 14 days notice unless the hearing officer orders otherwise. 12 C.F.R. § 1081.209(a)(4). A subpoena recipient may file a motion to quash “prior to the time specified therein for compliance, but in no event more than ten days after the date of service of such subpoena.” 12 C.F.R. § 1081.208(h)(1).

Although the Federal Rules of Evidence do not govern this proceeding, federal law may be used as guidance where the Rules of Practice and binding case law are silent. Mr. Foster argues that courts considering motions to quash under Fed. R. Evid. 45 have generally held that fourteen days is a reasonable time frame. See, e.g., *Brown v. Hendler*, No. 09 CIV. 4486 RLE, 2011 WL 321139, at *2 (S.D.N.Y. Jan. 31, 2011); *Donahoo v. Ohio Dep't of Youth Servs.*, 211 F.R.D. 303, 306 (N.D. Ohio 2002). Federal courts have also found compliance times of eight and seven days not to be reasonable. See, e.g., *Auto-Owners Ins. Co. v. Se. Floating Docks, Inc.*, 231 F.R.D. 426, 428 (M.D. Fla. 2005) *Memorial Hospice, Inc. v. Norris*, No. 2:08-CV-084-B-A, 2008 WL 4844758, at * 1

¹ Based on the parties' pleadings of this issue, I caution against employing gamesmanship type tactics.

(N.D.Miss. Nov. 5, 2008); *United States v. Woods*, 931 F.Supp. 433, 442 n. 3 (E.D.Va.1996). He urges me to apply an analogous standard here.

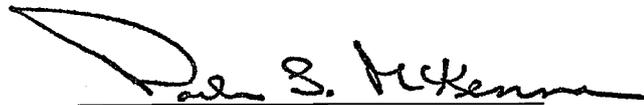
Unlike the Federal Rules, CFPB's Rules of Practice do not set out specific conditions under which a hearing officer must quash a subpoena. Under Fed. R. Evid. 45(d)(3)(A), a court must quash if the subpoena fails to allow a reasonable time to comply; requires a person to travel further than the geographical area set in Rule 45(c)(1); requires disclosure of privileged or other protected matters unless an exception or waiver applies; or subjects a person to undue burden. Conversely, under 12 C.F.R. § 1081.208(h)(2), a hearing officer shall quash, modify, or order return of the subpoena only on specified conditions "[i]f compliance . . . would be unreasonable, oppressive, or unduly burdensome." I also note that under the CFPB Rules of Practice, the hearing officer can "permit a witness to appear at a hearing via video conference or telephone for good cause shown." 12 C.F.R. § 1081.303(g)(5). This is less restrictive than the Federal Rules of Evidence, which permit telephonic testimony only "for good cause in compelling circumstances and with appropriate safeguards." Fed. R. Evid. 43(a).

Mr. Foster's arguments regarding fair notice and due process are hereby accepted as to Mr. Foster's physical attendance at the hearing. Therefore, I will not require him to travel to Washington, D.C. However, because the CFPB Rules of Practice specifically provide for a witness to testify by video conference or telephone, I find Enforcement Counsel has shown good cause for taking this testimony under certain limited circumstances.

Importantly, if Enforcement Counsel believes this witness' live testimony is critically important, I would entertain travelling to Kansas City, Missouri at a later

(mutually agreeable) date to hear Mr. Foster's testimony live. The preferences of the parties will be discussed at the opening of the hearing. Accordingly, Mr. Foster's Motion to Quash is GRANTED to the extent he will not be required to travel to testify live at the hearing; in all other respects the Motion to Quash is DENIED.

IT IS SO ORDERED.



Hon. Parlen L. McKenna
Administrative Law Judge
United States Coast Guard

Done and dated on this 18th day of July, 2016 at
Alameda, California.

CERTIFICATE OF SERVICE

I hereby certify that I have served the *Order Granting In Part And Denying In Part Motion To Quash Subpoena* (2015-CFPB-0029) upon the following Parties and Entities in this proceeding as indicated in the manner described below:

Via Fax and email: D05-PF-ALJBALT-ALJDocket

United States Coast Guard
40 South Gay Street, Suite 412
Baltimore, Maryland 21202-4022
Bus: (410) 962-5100
Fax: (410) 962-1746

**Via Electronic Mail to CFPB Counsel(s) and
CFPB electronic filings@cfpb.gov:**

Alusheyi J. Wheeler, Esq.
1700 G Street, NW
Washington, DC 20552
Bus: (202) 435-7786
Fax: (202) 435-7722
Email: alusheyi.wheeler@cfpb.gov

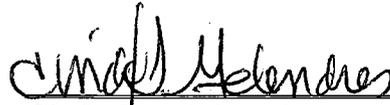
Deborah Morris, Esq., Email: deborah.morris@cfpb.gov
Craig A. Cowie, Esq., Email: craig.cowie@cfpb.gov
Wendy J. Weinberg, Esq., Email: wendy.weinberg@cfpb.gov
Vivian Chum, Esq., Email: vivian.chum@cfpb.gov

Via Electronic Mail to Respondents' Counsel as follows:

Allyson B. Baker, Esq.
Venable LLP
575 7th Street, NW
Washington, C.D., 20004
Bus: (202) 344-4708
Email: abbaker@venable.com

Hillary S. Profita, Esq., Email: hspofita@venable.com
Peter S. Frechette, Esq., Email: psfrechette@venable.com
JP Boyd, Esq., Email: jpboyd@venable.com

Done and dated this 18th day in July, 2016
Alameda, California


Cindy June Melendres
Paralegal Specialist to the
Hon. Parlen L. McKenna