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	**ENFORCEMENT COUNSEL'S OMNIBUS MOTION *IN LIMINE* TO EXCLUDE EVIDENCE PURSUANT TO 12 CFR § 1081.303(b)**

MOTION

Enforcement Counsel file this omnibus motion *in limine* to object to Respondents' listed exhibits and testimony that do not meet the Rules of Practices' standards for admissibility under 12 CFR § 1081.303(b).

Opinion Testimony about the Meaning of Contractual Provisions

Enforcement Counsel object to the admission of any evidence or testimony relating to or supporting statements in the Michael J. Cascio expert report about his legal interpretation of contract provisions or how an arbitration panel would rule on them, for example: "Based on my years of experience, I believe that if this issue were to be put before an arbitration panel, the panel would award…" Cascio Expert Report, pp. 8-9, ¶ 11 (Dkt. 52, filed under seal March 3, 2014).[1] Mr.

[1] The quoted statement is by means of example; Mr. Cascio's report provides several interpretations of contract provisions at ¶¶ 21, 22, and 23.

Cascio is neither a lawyer, arbitrator, nor a judge;[2] and even if he were, he is not entitled to displace this court's interpretation of contractual legal provisions. Expert testimony is to assist the trier of fact to understand the evidence or to determine a fact in issue.[3] Fed.R.Evid. 702. In contrast, the construction of a contract is a matter of law for the court. *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (finding that district court abused its discretion by allowing expert to testify about the scope of insurer's duty to defend under the insurance policy); *Southern Pine Helicopters, Inc. v. Phoenix Aviction Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003) (finding that expert opinion as to whether insured helicopter was being operated in violation of Federal Aviation Administration (FAA) regulations, within meaning of policy exclusion, was inadmissible, in action to recover on policy).

Mr. Cascio's testimony about his construction of legal terms may be excluded under the Rules of Practice because it is irrelevant. 12 CFR § 1081.303(b)(1-2). "[T]he construction of unambiguous contract terms is strictly a judicial function; the opinions of percipient or expert witnesses regarding the meaning(s) of contractual provisions are irrelevant and hence inadmissible." *Sheet Metal Workers, Int'l Ass'n, Local Union No. 24 v. Architectural Metal Works, Inc.*, 259 F.3d 418, 424 n. 4 (6th Cir. 2001).

Federal courts in jury trials exclude expert testimony about the law because "it is axiomatic that the judge is the sole arbiter of the law and its applicability." *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988). But even where, as here, confusing the jury is not a consideration, such testimony is a waste of time under 12 CFR § 1081.303(b)(3). "It would be a waste of time if witnesses or counsel should duplicate the judge's statement of the law…." *Specht,* 853 F.2d at 807, *citing* Stoebuck, *Opinions*

[2] *Id.* at 22; Cascio Tr. 69:18-25 (March 12, 2014).

[3] In contrast to Mr. Cascio's statements, Enforcement Counsel's expert witness Mark Crawshaw has cited certain provisions of the relevant agreements and, based in part on his understanding of those provisions, issued opinions about the captive arrangements at issue. Unlike Mr. Cascio, Dr. Crawshaw has not issued any opinions or conclusions about the legal interpretation of those contractual provisions.

on Ultimate Facts: Status, Trends, and a Note of Caution, 41 Den.L.Cent.J. 226, 237 (1964). Moreover, if those sections of the report and accompanying testimony are admitted, Enforcement Counsel would need to proffer its own time-consuming witness to rebut the interpretation of the contracts.

We also note that other administrative tribunals have excluded witness testimony about the law. *In re George Craig Stayner, CPA*, SEC Admin. Proc.No. 3-8330, 1994 WL 545884, *1 (court ordered that court will receive objections at trial from the Enforcement Division if attorney-witness testifies as to matters of law.); *In the Matter of Scotts-Sierra Crop Prot. Co. Respondent, FIFRA*, Admin. Proc. 09-0864-C-95-0, 1998 WL 99975 (E.P.A. Jan. 15, 1998) ("witnesses should not be presented to testify on matters of law."); *United States v. Hamdan*, 2004 WL 3088406 (D.O.T.C.A.B. Oct. 8, 2004) ("offering attorneys as 'expert witnesses' to testify on ultimate issues of law before the Commission runs afoul of the standards for expert witnesses recognized by both U.S. and International courts"). Accordingly, Enforcement Counsel respectfully request issuance of the attached order in *limine* excluding testimony.

General Objections

Finally, Enforcement Counsel also generally object to the admission of evidence that does not meet the admissibility standards of 12 CFR § 1081.303(b) but for which we do not presently know its proposed use and factual predicate. This objection comports with the General Pretrial Order of March 5, 2014, which provides that "any prehearing objection not resolved at the outset will be handled in the 'traditional' way, that is, its proponent should lay a foundation and then, if an exhibit, offer it in evidence. The objecting party may then renew its objection." Pretrial Order ¶ 4. This motion *in limine* is thus initially lodging Enforcement Counsel's objections to inadmissible

evidence,[4] which we will renew with specificity as Respondents introduce particular exhibits and testimony during the hearing and their use becomes clear.

DATED: March 21, 2014

Respectfully submitted,

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Enforcement Counsel

[4] Enforcement Counsel's specific objections include: that the proffered evidence is not relevant, material, reliable, or is unduly repetitive. 12 CFR § 1081.303(b)(1). In addition, Enforcement Counsel objects to evidence that is relevant, but its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues; that is misleading, or which if introduced would cause undue delay, waste of time, or needless presentation of cumulative evidence. § 1081.303(b)(2). Finally, Enforcement Counsel objects to hearsay evidence that is not relevant, material, or does not bear satisfactory indicia of reliability so that its use is fair. § 1081.303(b)(3).

Rule 205 Certification

Pursuant to Rule 205(f), Enforcement Counsel certifies that it has conferred with counsel for the Respondents in a good faith effort to resolve the issues raised by this Motion and has been unable to resolve the matter by agreement.

DATED: March 21, 2014

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Certificate of Service

I hereby certify that on this 21st day of March 2014, I caused a copy of the foregoing "Enforcement Counsel's Omnibus Motion *in Limine* to to Exclude Evidence Pursuant to 12 CFR § 1081.303(b)" 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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