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 OPPOSITION TO ENFORCEMENT COUNSEL'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF PERSONS NOT IDENTIFIED BY NAME ON RESPONDENTS' AMENDED WITNESS LIST

Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, "Respondents"), oppose Enforcement Counsel's Motion in Limine to exclude the testimony of certain corporate representatives (the "Motion"), whom Respondents were forced to list by company—rather than by name, because of the Bureau's failure to abide by its discovery and pre-hearing obligations.

The Tribunal's ruling on this Motion will greatly impact the hearing, which, after all, is not about exclusion, but about the truth. And ascertaining the truth requires allowing the fact finder to hear the evidence and find the facts. As set forth below, the Bureau has been dilatory is producing documents to Respondents, including continuously amending its Exhibit List as late as March 20th, just two business days prior to the hearing. Respondents have cooperated with the Bureau during this process, and it is Respondents' intention to review the Bureau's voluminous exhibits and identify the challenged witnesses by name as promptly as possible. If instead of

seeking the truth, however, this hearing is to be a trial of exclusion, then all of the Bureau's untimely-disclosed and untimely-produced exhibits, as well as the Bureau's witnesses whose documents were not timely produced, must be excluded as well.

Indeed, it is ironic that the Bureau intimates that *Respondents* seek to conduct "trial by ambush." Motion at 4. For it is the Bureau that has repeatedly failed to disclose documents and information timely or accurately, which has substantially interfered with Respondents' ability to prepare their defense. For example:

- Most egregiously, the Bureau *failed to name or describe nearly 99% (763 of 771) of its exhibits*, which it designated only by Bates range.
- The Bureau *failed to produce more than 30 exhibits* that it designated. Respondents asked for the missing exhibits on March 12th, but the Bureau did not produce the missing exhibits until March 19th.
- The Bureau failed to even *list* multiple documents on its Exhibit List, despite apparently intending to use these documents. Two were simply missing from the Exhibit List (ECX Nos. 653-654). In several other instances, multiple documents were given the same exhibit number and produced as if they were different versions of the same exhibit, but only one of each was designated on the Exhibit List. In at least one case, an exhibit simply bore the wrong number. Again, Respondents brought this to the Bureau's attention on March 12th, but the Bureau failed to resolve the problem until March 19th.
- Multiple documents were produced late, including Interview Reports of Steve Young and David Tubolino, produced on March 11th; 180-day reports of compliance by the private mortgage insurers with the Florida Consent Orders, produced on March 14th,

only after repeated requests; and Interview Reports of Curt Culver (interviewed Feb. 13, 2014) and Lawrence Pierzchalski (interviewed Jan. 31, 2014), produced, after multiple inquiries, on March 20th, just two business days before the hearing.

- The burden on Respondents to determine whether they have received all of the Bureau's exhibits has only been exacerbated by the fact that the exhibits are not numbered sequentially—there are unused exhibit numbers throughout the range used by the Bureau.

In light of all these failures—including, in particular, the Bureau's failure to produce all documents obtained from the private mortgage insurance companies on February 28, 2014, when the Protective Order was entered—Respondents had no choice but to preserve their right to call witnesses who could testify concerning the documents Respondents had not yet received. In so doing, Respondents have specified the companies from which they would seek testimony and the general areas of testimony that they would provide. Undoubtedly, Respondents would have been entitled to simply wait until additional documents were produced, and then to move to amend their witness list to add anyone appearing in the newly-disclosed documents.

Enforcement Counsel anticipate this weakness in their Motion, and their argument in response is startling—Enforcement Counsel would lay the blame for their own conduct at Respondents' feet, for having had the temerity to ask the Bureau to follow the law and provide a hearing within 60 days. *See* Motion at 1 ("Respondents insisted that the hearing commence within 60 days of the filing of the Notice of Charges."); *id*. at 5-6 ("No one forced Respondents to insist on a hearing date that would require expedited deadlines for pretrial submissions such as the witness lists."); *cf. United States v. Groves*, 571 F.2d 450, 453 (9th Cir. 1978) (appearance of retaliation for asserting right to speedy trial required reversal of criminal conviction). Yet it was

not Respondents' demand of a timely hearing that caused the Bureau's document dump, missing exhibits, and repeated failure to produce promised documents. This investigation has been going on for more than 2 years at the Bureau, and at HUD before that. The Bureau decided when to file the Notice of Charges, knowing the timetable on which it would have to produce documents to Respondents. And when the Bureau delayed producing documents from the private mortgage insurers, it should have had those documents ready to produce upon entry of the Protective Order. Instead, the Bureau continues to produce documents, which it has had for some time, mere days before the hearing.

Finally, Respondents dispute Enforcement Counsel's interpretation of the Scheduling Order. Although the Scheduling Order requires that witnesses' names be listed, it seems unlikely that this was intended to preclude the listing of corporate representatives where the Bureau's own discovery violations are the reason that the individual representatives' names were not known *ten days before* the Bureau's most recent document production. *See Garrett v. Trans Union, L.L.C.*, No. 2:04-CV-00582, 2006 U.S. Dist. LEXIS 73395, at *19 (S.D. Ohio Sept. 29, 2006) (refusing to strike summary judgment declaration of corporate representative since "there is no prejudice to Plaintiff whether the witness is listed as a 'Citifinancial representative' or 'Citifinancial representative Joe Barbone'"); *cf. Purnell v. Arrow Fin. Svcs., LLC*, No. 05-cv-73384, 2007 U.S. Dist. LEXIS 38523 (E.D. Mich. May 29, 2007) (treating corporate representative who was not named on plaintiff's witness list, but rather was listed as "a representative of Defendant who 'may have knowledge of Plaintiff's claims and may attest to the policies and procedures used in collection accounts,'" as witness individually designated by plaintiff, rather than a party, for purpose of taxing costs). Indeed, Enforcement Counsel's failure to raise this perceived issue with Respondents' witness list until nine days after the witness list was provided—waiting until

it would be too late for Respondents to attempt to address the Bureau's concerns—speaks volumes.

In light of the Bureau's failure to comply with its discovery obligations, even if this Tribunal were to read the Scheduling Order's requirement of the "name" of each witness to include naming the individual corporate representatives, it would be appropriate to permit Respondents to replace the challenged disclosures with named individuals within 14 days of the Bureau's certification that it has completed its document production (which still has not occurred). Respondents would also agree not to call any of these witnesses during the first week of the hearing, obviating any perceived unfairness to Enforcement Counsel.[1]

Respondents will not be goaded or prodded into waiving a timely hearing on the meritless accusations the Bureau has brought against them. But neither will Respondents waive the right to present their case by calling witnesses, the identities of whom appear from documents not timely produced by the Bureau. Enforcement Counsel should not be rewarded for failing to comply with their discovery obligations, and in any case would not be surprised by the testimony of representatives of entities the Bureau has been investigating for years. Accordingly, Respondents respectfully request that the Motion be denied, or in the alternative, that Respondents be given 14 days from the date the Bureau completes its document production, to identify the previously-designated witnesses in question more particularly.

* * *

[1] Respondents have offered a compromise of this Motion to Enforcement Counsel, along similar lines, but have not heard back.

Dated: March 21, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

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CERTIFICATION OF SERVICE

I hereby certify that on the 21st day of March, 2014, I caused a copy of the foregoing Respondents' Memorandum in Opposition to Enforcement Counsel's Motion in Limine be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

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