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.	)

REPLY MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO COMPEL THE CFPB TO COMPLY WITH RULE 206

It has now been more than 35 days since the Bureau filed its Notice of Charges in this action, and the Bureau has yet to comply with its disclosure obligations under Rule 206. Further, this matter is now less than three weeks from a hearing; yet, the Bureau admits that it remains deficient in its obligation. Specifically, Attachment A hereto is the cover letter that accompanied the Bureau's data dump of 260 GB of information (that is being provided to Respondents for the first time), along with two CDs: the first containing three "investigational hearing" transcripts (with exhibits), and the second CD labeled as "publicly available" documents. Separate and apart from the fact that Rule 206(d) requires production "**no later than seven days after service of the notice of charges**," or in this case by February 7, 2014, the Bureau still is not in compliance.[1] Specifically, the Bureau states that additional materials of indeterminate size are

[1] In fact, the Bureau's first production, which occurred on February 5, 2014, was simply to return to Respondents all the documents they produced to the Bureau (with many of Respondents' original Bates labels missing).

forthcoming, which the Bureau describes as "additional electronic communications and witness interview notes." *See* Attachment A.

The Bureau's non-compliance with Rule 206 cannot be excused. The Bureau's calculated decision not to produce "publicly available" documents for more than a month is inexplicable. Further, the Bureau's attempt to rely on the availability of a protective order is not a valid excuse. The Bureau investigated Respondents for more than two years prior to filing its Notice of Charges. Since filing those charges, however, the Bureau has prejudiced Respondents, making a mockery out of the disclosure provisions of Rule 206.

Further, the Bureau's decision to dump every conceivable document it collected in the course of its two-year investigation, along with every document HUD collected in the four-plus years it conducted its investigation, does not comply with Rule 206. As the Bureau explained, when it published its Rules governing adjudications:

- "Section 1081.206 is intended to give respondents access to the *material facts* underlying enforcement counsel's decision to recommend the commencement of enforcement proceedings."
- "Rather than provide the respondent with access to all of the documents that in any way relate to it or its business -- including many completely unrelated to the proceeding -- *enforcement counsel will turn over those documents that enforcement counsel obtained or considered in its decision to proceed in the particular action.*"

In response, the Bureau now claims that everything in the commentary to its Rules was superfluous and without meaning. Or, to quote the Bureau, the language in the Commentary to the Bureau's rules is simply an "**oblique string of references to due process, fairness and efficiency in Part 1081's commentary"** which **"is not compelling."** Opp'n at 6. In other words, the Commentary is not compelling because the Bureau considers the disclosure provisions of Rule 206 to be of no moment.

In an attempt to justify its recalcitrance, the Bureau directs this tribunal to the SEC's decision in *In re John Thomas Capital Management Group*, 2013 WL 6384275 and declares victory because "the Bureau's production is less than half of the size" of the production in that case. Opp'n. at 5. The Bureau is mistaken for at least two reasons.

First, as Respondents pointed out, when the Bureau established its rules, it informed the public that "the Bureau endeavored to create an adjudicatory process that provides for the expeditious resolution of claims while ensuring that parties who appear before the Bureau receive a fair hearing." 77 Fed. Reg. 39058, at 39058 (June 29, 2012). Further, in crafting its rules, the Bureau reviewed both the SEC's and the FTC's adjudicatory rules and stated:

> In drafting the Final Rule, the Bureau considered and attempted to **improve upon** these and other agencies' efforts to streamline their processes while protecting parties' rights to fair and impartial proceedings.

Id. (emphasis added). Thus, the Bureau's sole reliance on SEC decisions, when the Bureau specifically sought to "improve upon" those procedures is telling. Once again, the Bureau's actions stand in stark contrast to its words.

Second, the Bureau is missing the point of Respondents' motion. Unlike *John Thomas Capital Management Group*, where the Respondents were seeking the identification of exculpatory material, Respondents here are seeking the identification and disclosure of "the documents that informed [the Bureau's] decision to recommend the institution of proceedings . . . ." 77 Fed. Reg. at 39074. In other words, out of the more than 1 million pages of documents that the Bureau dumped on Respondents less than a week before witness lists and exhibits lists are due, "**due process, fairness and efficiency"** – the basis for the Bureau's enactment of Rule 206 – require that the Bureau identify those documents that led to its decision to file the Notice of Charges.

Third, the Bureau's purported "remedy" of postponing the hearing in this matter until August 4, 2014– as it proposed at the Scheduling Conference and which has already been rejected by this tribunal– requires Respondents to give up their rights to a "fair and expeditious" adjudication of the Notice of Charges as stated in Rule 101 by agreeing to delay a hearing in this matter for several months. The Bureau's proposed remedy is unacceptable, and the Bureau cites no authority for the proposition that its inability to comply with its own rules of procedure should be remedied by Respondents forfeiting their rights. The Bureau has been investigating this matter for more than two years. Its refusal to provide Respondents with the materials that purportedly support the Notice of Charges as required by Rule 206 justifies dismissal of the Charges.

In the alternative, if this tribunal is unwilling to dismiss the Charges, then to remedy the issue created by the Bureau's delay it should compel the Bureau to make a proper Rule 206 production. Further, given the fact that Respondents still do not have all of the information even under the Bureau's perception of its Rule 206 obligations, Respondents should be provided with more time to file their exhibit and witness lists. Specifically, after the Bureau identifies its witnesses and exhibits – which are due on Monday March 10, 2014 – and thereby provides the information upon which it intends to rely to support the Notice of Charges, Respondents should be given seven days additional days in which to file their exhibit and witness lists. That way, Enforcement Counsel will have identified its witnesses and exhibits – which are due on Monday March 10, 2014 – and thereby provided the information upon which they intend to rely to support the Notice of Charges, and the prejudice to Respondents will be lessened because they will then have at least seven days following the last production to identify witnesses and exhibits for their case-in-chief.

CONCLUSION

To be clear, the Bureau is in violation of Rule 206. Enforcement Counsel's characterization of the Bureau's statements regarding its efforts to fashion an "improved" adjudicatory process is troubling. In spite of the repeated references to the public that such a process would be "fair" and respectful of the "due process" rights of Respondents, Enforcement Counsel's callous disregard of their obligations is startling. Further, Enforcement Counsel's repeated offers to "fix" its failures by Respondents' giving up their right to an expedited resolution of the baseless charges leveled against them are similarly inappropriate. The remedy for Enforcement's Counsel's failure is the dismissal of charges. That is the only remedy that will protect Respondents' rights. If this tribunal is unwilling to dismiss the charges, then the only equitable remedy is to allow Respondents the opportunity to have at least seven days following the last production to identify witnesses and exhibits for their case-in-chief.

Dated: March 6, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

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CERTIFICATION OF SERVICE

I hereby certify that on the 6th day of March, 2014, I caused a copy of the foregoing Reply to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

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