

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU
May 15, 2014

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of	:	
	:	ORDER GRANTING IN PART
PHH CORPORATION,	:	REQUEST FOR ISSUANCE OF
PHH MORTGAGE CORPORATION,	:	SUBPOENA REQUIRING
PHH HOME LOANS LLC,	:	PRODUCTION OF DOCUMENTS
ATRIUM INSURANCE CORPORATION, and	:	
ATRIUM REINSURANCE CORPORATION	:	

On January 29, 2014, the Consumer Financial Protection Bureau (Bureau) filed a Notice of Charges Seeking Disgorgement, Other Equitable Relief, and Civil Money Penalty in this proceeding. The hearing commenced on March 24, 2014, in Philadelphia, PA, was not yet complete when it adjourned on March 28, 2014, and is scheduled to recommence on May 28, 2014.

On May 1, 2014, the Office of Enforcement (Enforcement) filed a Request for Issuance of Subpoena Requiring Production of Documents (Subpoena Request), seeking all communications between Respondents and any mortgage insurance company (MI) regarding, in summary, this proceeding, the investigation underlying this proceeding, and five cases in the Southern District of Florida, which the Bureau brought against MIs (MI Cases). PHH Corporation, 2014-CFPB-002, Document 116. On May 5, 2014, I held a telephonic prehearing conference where Respondents stated that they intended to file an objection to the Subpoena Request, and in which I stated, in substance, that I would resolve the Subpoena Request by way of motions practice, without setting a specific briefing schedule. On May 6, 2014, Respondents filed an Objection to the Subpoena Request (Objection). PHH Corporation, 2014-CFPB-002, Document 125. On May 12, 2014, Enforcement filed a Response to the Objection (Response). PHH Corporation, 2014-CFPB-002, Document 134. On May 14, 2014, Respondents filed a Response to the Response (Surreply). PHH Corporation, 2014-CFPB-002, Document 139.

Rule 208 of the Bureau's Rules of Practice for Adjudication Proceedings (Rules) governs subpoena requests. 12 C.F.R. § 1081.208. A party may request a subpoena for production of documentary or other tangible evidence. 12 C.F.R. § 1081.208(a). The plain language of Rule 208 permits Enforcement to request subpoenas directed to Respondents; there is nothing in Rule 208 suggesting that only Respondents may request subpoenas, or that Enforcement may only seek them against non-parties, nor is there any reason to look outside the Rule's plain language. See 12 C.F.R. § 1081.208(a). I may quash or modify a subpoena upon a motion by the person to whom the subpoena is directed. See 12 C.F.R. § 1081.208(h)(1). A motion to quash or modify is due prior to the time specified for compliance, and in any event within ten days of service of the

subpoena, any opposition to the motion to quash or modify is due five days thereafter, and no reply briefs are permitted unless I request them. 12 C.F.R. § 1081.208(h)(1).

Based on Rule 208(h)(1), the Objection and Response were timely and proper, but the Surreply was not authorized. Admittedly, I did say in my General Prehearing Order that I would set a briefing schedule, which would normally require an opposition to a motion to quash within three days rather than five. See PHH Corporation, 2014-CFPB-002, Document 58 at 1. However, at the May 5, 2014, prehearing conference, I set no briefing schedule and stated that I would allow motions practice. In the absence of any other specific guidance, Rule 208(h)(1) applies, and that Rule clearly allows the Response and clearly bars the Surreply. I have nonetheless considered it because I have ruled almost entirely in Enforcement's favor.

Enforcement asserts that the requested documents are relevant to Respondents' argument that no injunctive relief is appropriate. Subpoena Request at 2-3. Specifically, Enforcement contends that the requested documents "are necessary to test the veracity of Respondents' . . . willingness, if any, to entertain the possibility of entering into a captive arrangement in the future." Id. Respondents did not address this issue in their Objection, and their Surreply only avers, in essence, that injunctive relief is unavailable as a matter of law. See Objection; Surreply at 5. However, a court's power to grant an injunction "survives discontinuance of the illegal conduct," and I am not prepared to rule out injunctive relief at this point. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). Accordingly, Respondents' contention that injunctive relief is unavailable is a valid basis for Enforcement to seek the requested documents, and the Subpoena Request is not merely "designed for harassment purposes." Surreply at 3. I need not address whether Respondents' judicial estoppel argument justifies the Subpoena Request, because their injunctive relief argument is independently sufficient.

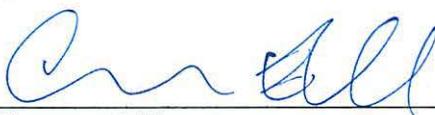
Respondents object that the Subpoena Request is excessive in scope and unduly burdensome. Objection at 4. First, they argue that the Subpoena Request encompasses "even the most general communications" about this proceeding, including communications about the Protective Order. Objection at 5. However, Enforcement offers an example of an email between counsel for Respondents and counsel for Radian Guaranty, Inc., with a subject line suggesting it is about designation of confidentiality under the Protective Order, but with a body containing a discussion of other topics. Response, Exhibit A. This email suggests that "even the most general communications" may contain potentially admissible evidence.

Second, Respondents argue that the Subpoena Request encompasses Atrium's communications with any MI. Objection at 5. But communications regarding possible future captive arrangements are most likely to be those between Respondents and the MIs who were not parties to the MI Cases. In no sense is the Subpoena Request or Respondents' injunctive relief argument relevant to just one MI. See id.

Third, Respondents argue that requesting communications between counsel is "particularly inappropriate." Objection at 5. They cite no authority for this proposition, and I see no privilege issues or other inappropriateness.

Lastly, Respondents argue that the Subpoena Request is not limited “to a time period that is relevant” to Respondents’ estoppel defense; they make no separate argument about temporal limits relevant to their argument about injunctive relief. Objection at 5; see Surreply at 5. The lack of temporal limitation potentially renders the Subpoena Request very broad, because the Subpoena Request could be construed as covering communications predating 2011, if “the CFPB’s investigation” is read as including that part of the investigation conducted by the Department of Housing and Urban Development. See Subpoena Request, Attachment A. In view of this potential ambiguity, I will explicitly limit coverage of the subpoena to communications dated no earlier than July 21, 2011. In view of the present motions practice, I will also change the return date and location.

It is, therefore, hereby ORDERED that Enforcement’s Subpoena Request is GRANTED IN PART, and Respondents need not produce responsive documents dated earlier than July 21, 2011.



Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission