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' OPPOSITION TO ENFORCEMENT COUNSEL'S MOTION TO DISQUALIFY SCHNADER HARRISON SEGAL & LEWIS LLP

INTRODUCTION

Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, "Respondents"), oppose Enforcement Counsel's motion to disqualify Schnader Harrison Segal & Lewis LLP (the "Schnader firm") from representing any person in connection with this proceeding. The motion is not only inappropriate, but also reveals Enforcement Counsel's unabashed attempt to intimidate Respondents, witnesses, and counsel to this proceeding. Although the motion is only directed at the Schnader firm, the motion is intended to prejudice Respondents in connection with their defense of this matter.

Specifically, as Respondents argued to the Tribunal when this matter was first raised on March 28, 2014, it was improper for the Bureau to tarnish the credibility of a witness in advance of his testimony. Further, the insinuation by Enforcement Counsel that either Respondents or the Schnader firm acted improperly in exchanging documents and witness statements in preparation of Respondents' defense in this action is outrageous. To be clear, Respondents believe that the

Notice of Charges are entirely without merit, and they intend to vigorously defend against those allegations and will not be intimidated by Enforcement Counsel's threats of disqualification.

ARGUMENT

I. ENFORCEMENT COUNSEL'S ATTACKS ON A WITNESS IN ADVANCE OF HIS TESTIMONY IS INAPPROPRIATE

When Enforcement Counsel raised the issue of recusal of the Schnader firm at the hearing on March 28, 2014, Respondents immediately objected. *See* March 28, 2014 Hearing Transcript ("Hearing Tr.") at 712-14. The reason for Respondents' objection was two-fold: First, because the witness, Steve Young, had not actually testified, the issue was not ripe for resolution. Indeed, regardless of what Enforcement Counsel believe Mr. Young may, or may not, say on the stand, the fact of the matter is that until such time as Mr. Young takes the oath and responds to specific questions, the issue of whether his testimony bears out any type of "conflict" has not yet occurred. *See, e.g. Williams v. United Dairy Farmers*, 188 F.R.D. 266, 274 (S.D. Ohio 1999) ("It is axiomatic that a statement may not be used pursuant to Rule 613(b) [Fed. R. Evid.] unless it is in fact inconsistent with the witness's statements made at trial."). Thus, Enforcement Counsel's motion is premature and based on sheer conjecture.

Second, the entire premise of Enforcement Counsel's motion is that Mr. Young changed his story. Thus, before Mr. Young has even taken the stand, Enforcement Counsel has labeled him a "liar" before this Tribunal. Enforcement Counsel's effort to discredit a witness before he is even given a chance to testify is unprecedented. *See, e.g. Williams*, 188 F.R.D. at 274 ("Proof of a prior inconsistent statement may be elicited by extrinsic evidence only if the witness on cross-examination denies having made the statement."); *see* also Rule 613(b), Fed. R. Evid. (extrinsic evidence of a prior inconsistent statement not admissible unless the witness is afforded an opportunity to explain or deny the statement). Even more disconcerting is the fact that

Enforcement Counsel's tarring of Mr. Young's credibility rests on, *inter alia*, the credibility of Enforcement Counsel who purportedly transcribed Mr. Young's statements and subsequently proffered their own declarations into the record. Thus, Enforcement Counsel has now placed *themselves* into this controversy by prematurely bringing the matter to the Tribunal for resolution in advance of the witness's testimony. If, instead, Enforcement Counsel simply sought to impeach Mr. Young with his prior statements as he was testifying, Mr. Young would have a full and fair opportunity to explain himself. However, that is not what Enforcement Counsel is seeking to accomplish; rather, Enforcement Counsel is seeking to have Mr. Young's *counsel* disqualified from representing not only him, but from the entire proceeding. Such affirmative and preemptive relief can only be justified based on a finding that the Schnader firm acted improperly, which requires, among other things, the determination of whether, in fact, the witness originally stated what Enforcement Counsel transcribed.

II. ENFORCEMENT COUNSEL'S INSINUATION OF IMPROPER CONDUCT ON THE PART OF RESPONDENTS OR THE SCHNADER FIRM IS INAPPROPRIATE

Respondents' second objection to the disqualification motion is Enforcement Counsel's insinuation that Respondents and the Schnader firm acted improperly in exchanging documents and witness statements in advance of the hearing. As the Tribunal is aware, the Bureau produced to Respondents more than one million pages of documents which it declared to be its "complete investigative file" in this matter. The parties to this administrative action, as well as the private mortgage insurers ("MIs") and other parties which provided documents to the Bureau as part of an investigation that lasted more than six years, entered into a protective order for the purpose of maintaining the confidentiality of certain materials. The Schnader firm represents Radian Guaranty Inc. ("Radian"), one of the MIs with which Atrium had a reinsurance arrangement.

The Schnader firm, on behalf of its client, is a signatory to the Protective Order dated February 28, 2014. Mr. Young's purported prior statement to Enforcement Counsel on or about March 7, 2014 (the "Interview Report"), is among the documents Respondents received from Enforcement Counsel, and Respondents identified that statement as an exhibit to be used in this proceeding. *See* Respondents' Exhibit 1060.

In connection with the preparation of its defense, counsel for Respondents provided the Interview Report to the Schnader firm as Radian's counsel. Enforcement Counsel now appears to take exception to Respondents' conduct. Specifically, in footnote 5 of their motion, Enforcement Counsel state:

> Though it is not directly at issue in this motion, Enforcement Counsel does not believe that Respondents' decision to provide the Bureau's own Confidential investigative materials to third parties is in keeping with the letter or the spirit of the Protective Order. Nowhere does the protective order provide for Respondents to unilaterally transmit Enforcement's Confidential investigative materials to third parties for the purported purpose of their own review for potentially "Highly Confidential" information. It is also unclear, at best, that this was Schnader's true purpose in seeking the Interview Reports, as they ultimately were used by Schnader for a different purpose altogether – that is, witness preparation.

Mot. at 5, n.5.

Contrary to Enforcement Counsel's assertion, Respondents' use of materials provided by the Bureau as part of its "investigative file" is "directly at issue" in this motion because Enforcement Counsel is accusing Respondents' counsel of violating the "letter" or "spirit" of the Protective Order. Such an assertion is completely false and entirely without factual basis. More to the point, such an accusation is designed to intimidate Respondents' counsel into not taking all reasonable and appropriate steps to mount a vigorous defense in this action. While Enforcement Counsel believes Respondents' counsel violated the Protective Order in sharing the witness statement of a former employee with Radian's counsel, Respondents' counsel would be remiss in

their responsibilities to their clients if they did not investigate the statements purportedly made by Mr. Young to Enforcement Counsel – more specifically, statements that imply certain "beliefs" held by the former CEO of Radian.

Indeed, Enforcement Counsel's insinuation that Respondents' counsel could not use some, any, or all of the materials provided by the Bureau in any manner necessary (and consistent with the terms of the Protective Order) is ludicrous. Under Enforcement Counsel's apparent view, Respondents' defense would be limited to consulting with its own employees. Of course, there is no legal basis for such an assertion, and Enforcement Counsel cites to no such authority. Rather, Enforcement Counsel simply casts aspersions of "misconduct" on the part of Respondents' counsel, which is unacceptable.

CONCLUSION

Enforcement Counsel's motion to disqualify the Schnader firm is completely without merit and inappropriate. In addition to tainting Mr. Young's credibility prior to his opportunity to take the stand and testify under oath, the motion was designed to intimidate Respondents' counsel and any other attorney who seeks to mount a defense on behalf of their clients against the Bureau. Indeed, Enforcement Counsel's assertions of "additional severe conflicts of interest" and citations to criminal provisions regarding "false statements," "obstruction of proceedings," and "witness tampering," *see* Motion at 9, n.7, demonstrate the extent to which Enforcement Counsel has blown this issue out of proportion in an attempt to bully anyone who stands in their way. Respondents' counsel vehemently object to these tactics and request that the Motion be denied in its entirety.

Dated: April 30, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

By: /s/ David M. Souders

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CERTIFICATION OF SERVICE

I hereby certify that on the 30th day of April, 2014, I caused a copy of the foregoing Respondents' Memorandum in Opposition to Enforcement Counsel's Motion to Disqualify Schnader Harrison Segal & Lewis LLP be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

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