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	)
	)

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

Enforcement Counsel's motion to disqualify Schnader Harrison Segal & Lewis LLP ("Schnader") from representing its clients Radian Guaranty Inc. ("Radian"), Steve Young and Frank Filipps is based on their mistaken understanding of the facts and misapplication of the legal standards. The motion should be denied.

BACKGROUND

Schnader has represented Radian and various of its present and former employees in (among other matters) litigation and regulatory proceedings for at least the past 14 years. Schnader represented Radian when the Consumer Financial Protection Bureau (the "Bureau") assumed responsibility for the U.S. Department of Housing and Urban Development's longstanding investigation of captive reinsurance practices in the mortgage insurance industry and negotiated the consent judgment cited by Enforcement Counsel at page 1 of their motion. Schnader also has represented Radian and various of its present and former employees in civil litigation, including eleven class action lawsuits commenced between December 9, 2011, and

January 4, 2013, in which captive reinsurance arrangements were alleged to violate the anti-kickback provisions of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607. All claims against Radian have been dismissed in eight of the eleven cases.

Schnader entered its appearance in this proceeding as counsel for Radian on February 14, 2014. Declaration of Stephen A. Fogdall ("Fogdall Decl.") ¶ 5. On that same date, Radian and other mortgage insurance companies filed a motion to intervene to seek a protective order pursuant to 12 C.F.R. § 1081.119(a). *Id.* The Hearing Officer granted that motion on February 20, 2014 and entered a Protective Order on February 28, 2014. *Id.* ¶¶ 6 and 7.

On March 14, 2014, Stephen Fogdall of Schnader telephoned Kimberly Ravener, one of the Enforcement Counsel, to inform her that Schnader represents former Radian employees Steve Young and Frank Filipps, both of whom were identified on Enforcement Counsel's witness list.[2] Fogdall Decl. ¶ 9. Mr. Fogdall did not tell Ms. Ravener that he had solicited Mr. Young (or Mr. Filipps) to be represented by Schnader. *Id.* ¶ 10. Nor did Mr. Fogdall tell Ms. Ravener that Schnader did not previously have a professional relationship with Mr. Young (or Mr. Filipps). Contrary to Ms. Ravener's unwarranted inference, no one at Schnader solicited Mr. Young (or Mr. Filipps). *Id.* ¶ 11.

During this March 14 conversation, Ms. Ravener stated that Enforcement Counsel was unlikely to call Mr. Filipps as a witness. *Id.* ¶ 12. However, she stated that they would likely

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1 As Radian has not reinsured coverage on new loans under captive reinsurance arrangements since December 2009, Fogdall Decl. ¶ 2, the likelihood of any future private litigation involving captive reinsurance has to be very small.

2 The witness list was available on the Bureau's website. Fogdall Decl. ¶ 8.

call Mr. Young, and she asked that Mr. Young make himself available to Enforcement Counsel a second time to help them prepare to present his testimony. *Id.*

On March 19, Mr. Filipps made himself available for a voluntary interview with Ms. Ravener, Navid Vazire and other individuals employed by the Bureau. *Id.* ¶ 14. Mr. Fogdall and David Smith of Schnader attended Mr. Filipps' interview as his counsel.[3] At the time of this March 19 interview, no one representing Radian had seen Enforcement Counsel's summary of their March 7, 2014 interview of Steve Young (Respondents' Exhibit 1060). *Id.* ¶ 16.[4]

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On March 20, 2014, Mr. Fogdall received a telephone call from Ms. Ravener and Donald Gordon, another of the Enforcement Counsel. *Id.* ¶ 19. Neither Ms. Ravener nor Mr. Gordon

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4 Enforcement Counsel have not provided a verbatim transcript of their interview with Mr. Young. Nor have they provided copies of whatever notes they took during the interview. Accordingly, we do not have the questions asked or the answers given during the interview.

asserted that Schnader had a concurrent conflict of interest regarding its representation of Radian, Mr. Young and Mr. Filipps. Rather, Ms. Ravener said that she felt the interests of Mr. Young, Mr. Filipps and Radian may not be "aligned," and that Schnader should file a certification pursuant to 12 C.F.R. § 1081.109(b). When Mr. Fogdall asked Ms. Ravener to explain why she thought that the interests of Mr. Young, Mr. Filipps and Radian may not be "aligned," she declined to elaborate. *Id.* ¶ 20. Ms. Ravener did not assert the argument that Enforcement Counsel is now making, that the recollections of Messrs. Young and Filipps are somehow inconsistent or that such inconsistency (if it existed) would create a concurrent conflict. *Id.*

Later in the day on March 20, 2014, Mr. Fogdall reviewed respondents' March 14, 2014 amended exhibit list. *Id.* ¶ 22. Respondents' Exhibit 1060 was identified as "Young, CFPB Interview (Radian), March 7, 2014.pdf," Respondents' Exhibit 841 was identified as "CFPB Interview Notes Dziuba IR (Radian)," and Respondents' Exhibit 844 was identified as "CFPB Interview Notes Wasson IR (Radian)." *Id.* Mr. Fogdall spoke by telephone with David Souders, one of the lawyers for respondents. He confirmed that those exhibits were Enforcement Counsel's summaries of the voluntary interviews with Mr. Young and other Radian witnesses, and agreed to provide them to Mr. Fogdall. *Id.* ¶ 25.[5]

On March 25, 2014, Mr. Fogdall gave Mr. Young a copy of Enforcement Counsel's summary of his March 7 interview (Respondents' Exhibit 1060) to help him get ready for the

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[5] Enforcement Counsel suggest that there was some impropriety in Schnader "unilaterally" obtaining Enforcement Counsel's summaries of the interviews of Mr. Young and the other Radian witnesses from respondents' counsel because they were "the Bureau's own Confidential Investigative materials" under the Protective Order. Mot. at 5 n.5. This is incorrect as set forth in Part V of the Argument, below.

agreed preparation session. *Id.* ¶ 27. Mr. Fogdall told Mr. Vazire that he had given Mr. Young a copy of the summary while discussing the scheduling of Mr. Young's preparation session. *Id.* ¶ 28. Mr. Vazire made no objection. *Id.*

Enforcement Counsel's preparation session with Mr. Young was conducted on March 27, 2014. Mr. Fogdall was present as Mr. Young's counsel. Mr. Vazire participated for the Bureau. *Id.* ¶ 32.

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ARGUMENT

The disqualification motion should be denied because Schnader's representations of each of Radian, Mr. Young and Mr. Filipps are not materially limited by its representation of all three within the meaning of Rule 109 of the Bureau's Rules of Practice for Adjudication Proceedings.

12 C.F.R. § 1081.109(a) ("[n]o person shall appear as counsel for another person in an adjudication proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests.").

Contrary to Enforcement Counsel's arguments:

1. Mr. Young has not attempted to "change" any of the statements he made during his March 7 interview.

2. There is no "significant tension" between statements by Mr. Young in his March 7 interview and statements by Mr. Filipps in his March 19 interview.

3. There is no significant risk that the testimony of Mr. Young or Mr. Filipps will affect Radian's potential liability in the few remaining private lawsuits over captive reinsurance arrangements.

4. Schnader did not improperly "solicit" its representation of Mr. Young.

5. There was no impropriety in Schnader's obtaining the Enforcement Counsel's summaries of interviews with Mr. Young and other Radian witnesses, and in providing the summary of Mr. Young's interview to him.

I. Mr. Young Has not Changed Any Statement he Made During his March 7 Interview.

There is no basis in fact for Enforcement Counsel's suggestion that there is a "specter of impropriety by Schnader" because (according to them) "Mr. Young made statements to Enforcement Counsel in the presence of Schnader (March 27) that are inconsistent with previous statements he made to Enforcement Counsel when he was not represented by Schnader (March 7)." Mot. at 9. Moreover, even if there were an inconsistency, that would not be a basis to disqualify counsel.

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Second, in the absence of a verbatim transcript or its substantial equivalent, there is no competent evidence to support Enforcement Counsel's argument. There is no indication in the interview summary of the precise questions that were asked or of the precise answers that were given. Nor is there any indication whether Enforcement Counsel asked follow-up questions to probe whatever answers were given.

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Rather, Mr. Young has addressed possible ambiguity in Enforcement Counsel's summary so that neither he nor they will be embarrassed by a miscommunication when he testifies. Fogdall Decl. ¶¶ 36-40. Indeed, he would have made the same clarifications on March 7 if appropriate follow-up questions had been asked, but they were not. *See, e.g., In re Warren,* 2013 Bankr. LEXIS 5045, *29-*30 (Bankr. D.S.C. Nov. 26, 2013) (no inconsistency between deposition and trial testimony where counsel "did not ask follow-up questions at the deposition").

In sum, there is no inconsistency between Mr. Young's statements in his March 7 interview and his statements in his March 27 preparation session.

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He did not retract or contradict those statements on March 27.

II. Statements of Mr. Young and Mr. Filipps are not in "Tension."

Enforcement Counsel's argument that Schnader has a conflict of interest because statements by Mr. Young in his March 7 interview with Enforcement Counsel allegedly are "in significant tension" with statements made by Mr. Filipps in his March 19 interview (Mot. at 8) simply is incorrect.

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See Iacangelo v. Georgetown Univ., 710 F. Supp. 2d 83, 90-91 (D.D.C. 2010) (no inconsistency, and no conflict of interest, where one represented party "inferred" the other's view, and "never claimed" the other had "used [a] specific term").

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In any event, Enforcement Counsel do not explain how the supposed "tension" between statements of Mr. Young and Mr. Filipps could materially limit Schnader's representation of either of them in this proceeding. Representation of multiple witnesses in a civil case creates a conflict only where the lawyer would be *presenting* inconsistent testimony of two clients, or cross-examining one to bolster the other. *See Iacangelo,* 710 F. Supp. 2d at 87; Pa Rule of Prof. Responsibility 1.7, Explanatory Comment (a conflict may arise "where a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client"). But it is Enforcement Counsel, not Schnader, who would be presenting these witnesses, and it is

respondents, not Schnader, who would be cross-examining them.[7] Schnader has no input or control over the direct or cross examination of either of these witnesses, so any "tension" in their testimony cannot "materially limit" Schnader's representation of them in this case. Enforcement Counsel cite no case supporting disqualification of a lawyer in this situation, and Schnader is aware of none. Enforcement Counsel's request to disqualify Schnader should be denied.[8]

III. The Pending Private RESPA Lawsuits do not Materially Limit Schnader's Representation of any Person in this Proceeding.

Enforcement Counsel erroneously maintain that Schnader has a conflict because Mr. Young or Mr. Filipps could testify in this proceeding in a way that might be thought to be adverse to Radian in class action lawsuits asserting that captive mortgage reinsurance violates RESPA. Radian has been dismissed from all but three of the eleven cases in which Radian was sued. See Smith Decl. ¶ 3.

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There is not a material risk of future litigation, as the last time Radian ceded premiums on any new loan to a captive reinsurer was more than 4 years ago (the statute of limitations for private civil suits is one year). Fogdall Decl. ¶ 2.[9]

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7 Moreover, Enforcement Counsel has admitted that they are unlikely to call Mr. Filipps as a witness. Fogdall Decl. ¶ 12.

8 Enforcement Counsel conclusorily assert that Schnader's ability to "advise" Mr. Young and Mr. Filipps regarding their testimony is somehow "impaired." Mot. at 8. Nothing has impaired Schnader from advising its clients to tell the truth in this proceeding as they remember it. Nor would advising a client that he is permitted to clarify a potentially misleading statement in someone else's summary of his voluntary interview be "impaired" advice. *Cf. Gardner v. Galetka,* 568 F.3d 862, 892 (10th Cir. 2009) ("Showing a witness how his phrasing could be misinterpreted and then instructing that witness to 'tell how it happened' is not witness tampering, but being a good lawyer.").

9 In addition, if an alleged future risk of liability created a conflict here, then that putative conflict would exist no more and no less for the other mortgage insurance companies

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Moreover, what Enforcement Counsel are asserting as a basis for disqualification is not a conflict in *this* case, but an imagined future conflict in one of the private cases. Enforcement Counsel hypothesize a scenario in which the plaintiffs in one of the private cases seek to have admitted there a statement made by Mr. Young or Mr. Filipps in this proceeding, and at *that* point, Enforcement Counsel seem to suggest, Schnader would be required to attack the credibility of that statement, and therefore should not be permitted to represent either Mr. Young or Mr. Filipps here. Putting aside the obvious hearsay issues implicit in Enforcement Counsel's hypothetical, that mere potentiality simply does not create a disqualifying conflict for Schnader in this case. Again, Schnader has no ability (or desire) to cross-examine either Mr. Young or Mr. Filipps. Enforcement Counsel cite no case suggesting that such a speculative conflict potentially arising in the future in a separate case can provide a basis for disqualification in this case, or that they even have standing to raise that theoretical future conflict in this case.[10]

For this reason as well, Enforcement Counsel's request to disqualify Schnader should be denied.

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whose former employees have been or may be called by Enforcement Counsel in this case. Yet, to our knowledge, Enforcement Counsel have made no assertion that the attorneys for the other mortgage insurance companies have any conflict of interest.

10 Contrary to Enforcement Counsel's suggestion, *United States v. Jones,* 381 F.3d 114 (2d Cir. 2004), does not support disqualification of Schnader. In *Jones,* the disqualified lawyer apparently sought to assist client "A" to evade prosecution for a continuing criminal enterprise by illegally providing client "A" with copies of disclosures made to client "B," highlighted by the disqualified lawyer to show what conduct should be altered in the future. The disqualified lawyer thus had a self-interest to avoid prosecution for his own criminal misconduct, which the court held was a "per se unwaivable conflict," as well as the potential that he would be called as a witness against his client. See *Jones,* 381 F.3d at 118. Those facts bear no resemblance to the circumstances here, and Enforcement Counsel do not argue otherwise. *See* Part V *infra* on the propriety of showing Mr. Young Enforcement Counsel's summary of his own interview.

IV. Schnader did not Solicit Mr. Young as a Client.

Enforcement Counsel contends that Schnader should be disqualified because it allegedly "solicited" its representation of Mr. Young. This argument appears to be based on an inference that Ms. Ravener drew from a conversation with Mr. Fogdall on March 14. Mr. Fogdall did not state, then or at any time, that he personally had initiated contact with Mr. Young regarding Schnader's representation of him. Fogdall Decl. ¶ 10. In fact, no one at Schnader initiated contact with Mr. Young. *Id.* ¶ 11. Nor did Mr. Fogdall or anyone else at Schnader tell Ms. Ravener that Schnader had no prior professional relationship with Mr. Young.

Pennsylvania Rule of Professional Conduct 7.3 does not prohibit an employer from providing legal representation to its former employees in connection with events that occurred during their employment. That Rule prohibits a lawyer from soliciting "professional employment from a person with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain …." Pa. R. Prof. Conduct 7.3(a). Radian plainly had a "prior professional relationship" with Mr. Young, and its purpose in providing legal representation to him was not the pecuniary gain of any lawyer. To the contrary, Radian was attempting "to protect the interest of the former employees whose conduct" in some part may conceivably "form[] the basis for [the] claims in this case." *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n,* 2010 U.S. Dist. LEXIS 38279, *3 (W.D. Okla. Apr. 19, 2010) (rejecting solicitation argument).

The case cited by Enforcement Counsel, *Rivera v. Lutheran Med. Cntr.,* 866 N.Y.S.2d 520 (2d Dep't 2010), is inapplicable. In that case, the court found that the law firm had contacted nonparty witnesses "to gain a tactical advantage in this litigation by insulating them from any informal contact with plaintiff's counsel." *Id.* at 526. Unlike the law firm in *Rivera,* Schnader did not initiate contact with Mr. Young. Moreover, there is no basis to assert that Mr.

Young has been "insulated" from contact. Mr. Young has voluntarily made himself available to Enforcement Counsel not once but twice, the second time so that Enforcement Counsel could prepare to present his testimony. Enforcement Counsel's "solicitation" argument does not establish a basis to disqualify Schnader.

V. There Was No Impropriety in Obtaining the Summary of Mr. Young's Interview and Allowing him to Review It.

Lastly, Enforcement Counsel are mistaken in their suggestion that there was some impropriety in Schnader obtaining Enforcement Counsel's summaries of the interviews of Mr. Young and other Radian witnesses from respondents, and in providing Mr. Young with a copy of the summary of his own interview to help him prepare to testify.[11]

First, under the Protective Order, confidential information received by the Bureau from Radian's employees or former employees relating to their employment with Radian is *Radian's* confidential information, which Radian was entitled to review prior to disclosure. *See* Protective Order ¶¶ 4a, 4b. The Protective Order does not prevent Radian from disclosing its own information to a witness who will be examined and cross-examined about that information. Indeed, it would be fundamentally unfair, perhaps even malpractice, to expose Mr. Young to cross-examination on a document he had not seen.

Second, to the extent Enforcement Counsel appear to be treating the summary of Mr. Young's interview as his "statement" (a position that is implicit in their production of the summary to counsel for respondents), Enforcement Counsel should have allowed Mr. Young to review it and make corrections before giving it to counsel for respondents. Rule 207(a)

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[11] Schnader did not provide any other potential witness with a copy of the summary of Mr. Young's interview, and did not provide Mr. Young with a copy of the summary of any other potential witness's interview. Fogdall Decl. ¶¶ 30-31.

contemplates that Enforcement Counsel will disclose witness statements to respondents — and indeed "to any party" — if they "would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500." 12 C.F.R. § 1081.207(a).

Enforcement Counsel did not give Mr. Young the opportunity to sign or otherwise adopt or approve their summary, yet the summary was produced to respondents as if it was Mr. Young's statement.[12] *Cf.* 18 U.S.C. § 3500(e)(1).

For these reasons, there was no impropriety in obtaining copies of the summaries and allowing Mr. Young to review them while preparing to testify.

CONCLUSION

For all these reasons, the Hearing Officer should deny Enforcement Counsel's motion to disqualify Schnader from representing any person in this case.

Respectfully submitted,

Dated: April 30, 2014

/s/ David Smith

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[12] Review of the summaries by the witnesses is appropriate for the further reason that they do contain some (presumably inadvertent) errors. For example, the notes of Mr. Dziuba's and Ms. Wasson's interviews state that Enforcement Counsel provided them with a "Notice to Persons Supplying Information," and that they were asked at the beginning of the interview whether they had read and understood the notice. That did not occur in either interview. *See* Fogdall Decl. ¶ 26.

CERTIFICATE OF SERVICE

I, Stephen A. Fogdall, hereby certify that I have on this date served a copy of the foregoing Response to Enforcement Counsel's Motion to Disqualify Schnader Harrison Segal & Lewis LLP on the following by electronic mail:

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