

**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 Filippis 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. Counsel for plaintiffs in the remaining three cases have offered to dismiss all claims against Radian without any monetary or injunctive relief.¹ Declaration of David Smith (“Smith Decl.”) ¶ 3.

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

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 Nor was anyone at Schnader aware that Mr. Young had discussed with Enforcement Counsel his recollection of how others at Radian felt about captive reinsurance during the time he was employed at Radian. *Id.*

Enforcement Counsel did not ask Mr. Filipps during his March 19 interview whether he had ever stated an opinion of captive reinsurance in the presence of Mr. Young. *Id.* ¶ 17. Mr. Filipps was not asked whether he had ever said that he "hated captives." *Id.* ¶ 18.

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

³ At the beginning of the telephone call, Mr. Smith informed the participants for the Bureau that Mr. Timothy Hunter, Radian's General Counsel, would also be joining the call, but was running late. Mr. Hunter had attended telephonic interviews of two Radian employees, Mr. Michael Dziuba and Ms. Lora Wasson, by Enforcement Counsel in January 2014. Neither Mr. Fogdall nor Mr. Smith had any reason to believe that there would be any objection to Mr. Hunter's attendance at Mr. Filipps's interview, which presumably would relate to events that occurred during his employment with Radian. In any event, no one objected to the prospect of Mr. Hunter joining the call. Fogdall Decl. ¶ 15.

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. Filippis. Rather, Ms. Ravener said that she felt the interests of Mr. Young, Mr. Filippis 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. Filippis 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 Filippis 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

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. In a brief exchange during the hour-plus long preparation session, Mr. Vazire asked Mr. Young what Mr. Filipp’s opinion of captive reinsurance had been. Mr. Young responded that he had read Enforcement Counsel’s summary of his interview and wanted to clarify the statement that Frank Filipp “hated captives.” Mr. Young then attempted to explain that what he actually told Enforcement Counsel — or at least intended to tell Enforcement Counsel — during the March 7 interview, is that it was his *impression* that Mr. Filipp had hated captives rather than that Mr. Filipp had stated those words in Mr. Young’s presence. Mr. Young did not “recant” or deny a belief that Mr. Filipp had hated captives. *Id.* ¶ 36.

Mr. Vazire asked Mr. Young what gave him the impression that Mr. Filipp hated captives. Mr. Young responded that he could not recall a specific incident or conversation, but that Mr. Filipp was “demanding” of the Radian sales force. *Id.* ¶ 38. Mr. Vazire then asked Mr. Young why Mr. Filipp having been demanding would cause Mr. Young to have the impression that Mr. Filipp hated captives. Mr. Young answered, “I was just going from point A to point C, but it makes sense to me.” *Id.* ¶ 39. Mr. Vazire did not ask a further follow-up question.

ARGUMENT

The disqualification motion should be denied because Schnader’s representations of each of Radian, Mr. Young and Mr. Filipp 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. Filippis in his March 19 interview.
3. There is no significant risk that the testimony of Mr. Young or Mr. Filippis 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. As Mr. Young explained to Enforcement Counsel in his March 7 interview, he has not worked for Radian — or even in the industry — since he was let go as part of a

reduction in sales force in 2007. Since 2008, Mr. Young has owned and operated his own landscaping company, and has had no occasion to refresh or even maintain his recollection of his work at Radian.⁶ There is no indication in Enforcement Counsel's summary of the March 7 interview of Mr. Young that Enforcement Counsel did anything to help Mr. Young refresh his memory of distant events in another career — virtually another lifetime for Mr. Young. There is no basis to infer impropriety if Mr. Young's memory were to become refreshed by continuing exposure to distant events after his first interview with Enforcement Counsel.

Enforcement Counsel contend that during the March 27 preparation session, Mr. Young “changed” (1) his statement that senior Radian executives did not like captive reinsurance, and (2) his statement that Mr. Filippis “hated captives.” Mot. at 9. Enforcement Counsel's summary of the March 7 interview of Mr. Young is four single-spaced pages, only four and one-half lines of which are implicated by Enforcement Counsel's argument that Mr. Young has changed his statement. Those four and one-half lines are as follows:

Young remembers that senior executives at Radian did not like captive reinsurance. And that the reaction at Radian, concerning capping the premium cede, would have been positive. Radian believed that CEOs at mortgage insurance companies would like to see captive reinsurance go away because they “didn't want to give

⁶ Enforcement Counsel's summary (respondents' Exhibit 1060) highlights some of the gaps in Mr. Young's memory; Mr. Young told them he was in sales and that all of the mortgage insurers “pitched” the availability of captive reinsurance arrangements along with their entire “suite of products” as a “part of the ‘typical sales process.’” However, persons with expertise in structuring captive reinsurance participated in the presentation, and Mr. Young *did* “not remember the specific structure.” With respect to PHH, Mr. Young called on the PHH account over his whole career.” Mr. Young pitched captive reinsurance to PHH, but the discussions “never got anywhere.” Mr. Young believed that the reason he failed to attract business for PHH was that PHH had strong relationships with other mortgage insurers, with whom PHH was very satisfied. Mr. Young *did not remember* whether Radian ever had a captive reinsurance agreement with PHH.

up revenue” to lenders. Radian’s CEO at the time, Frank Filippis, “hated captives.”

First, Enforcement Counsel argue that those four and one-half lines should be construed to mean that Mr. Young heard senior executives at Radian say that they did not like captive reinsurance and Mr. Filippis say that he “hated captives.” Mr. Young contends — and Enforcement Counsel’s punctuation supports — that Mr. Young was not quoting senior executives when he said they did not like captive reinsurance or Mr. Filippis when he said that Mr. Filippis “hated captives.” Those were Mr. Young’s words and there is no indication that Mr. Young was quoting senior executives or Mr. Filippis when he said them.

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.

Mr. Young has not denied that it was his impression that Radian’s senior executives did not like captive reinsurance. Nor has he said that he would not so testify. Similarly, Mr. Young has not denied that it was his impression that Mr. Filippis “hated captives.” Nor has he said that he would not so testify. 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. On March 7 he told of his impressions that Radian senior executives did not like captives, and that Mr. Filipps "hated captives." 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.

The only statement that Mr. Young made regarding Mr. Filipps in his March 7 interview was his impression that Mr. Filipps, as he put it, "hated captives." Mr. Young was not asked what that impression was based on, or if Mr. Filipps had ever said those words in his presence. Similarly, Mr. Filipps was not asked during his interview if he "hated captives," or if he had ever expressed that opinion in the presence of Mr. Young or anyone else. *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").

Enforcement Counsel erroneously contend that Mr. Young's statement that Mr. Filipps "hated captives" is in "tension" with Mr. Filipps's statements that (1) he viewed captive reinsurance as an arm's length business arrangement, and (2) he could not recall what his opinion had been regarding the more specific issue of pulling back on "deep cede" captive arrangements. Mot. at 8.

First, there is nothing incongruous about a CEO regarding a transaction as arm's length, while nevertheless evidencing, through non-verbal behavior or otherwise, an attitude that

someone else later recalls as “hating” the arrangement. A CEO does not necessarily like every arm’s length business arrangement his company may enter into.

Second, there is no tension between Mr. Young’s statement that Mr. Filipps’s “hated captives” and Mr. Filipps’s statement that he could not recall having an opinion on the specific issue of pulling back on so-called deep cede arrangements. Mr. Filipps left Radian in 2005. He did not even recall the term “deep cede,” and had to ask that it be defined. Mr. Filipps said that he had a vague recollection of MGIC’s announcement that it would no longer participate in such arrangements, but could not recall if Radian had entered into any such arrangements. So it is hardly surprising that he did not recall what, if any, opinion he might have had about pulling back on them. Enforcement Counsel is also wrong in their argument that there is an inconsistency in Mr. Filipps’s own statements that he viewed captives generally as arm’s length arrangements and his inability to recall his opinion on pulling back on deep cede arrangements. Again, recalling a view on a general issue (whether captives were arm’s length arrangements), but failing to recall a more specific view on a narrower issue (pulling back on deep cede arrangements) is not uncommon, and certainly not inconsistent.

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. Plaintiffs’ counsel in the three remaining lawsuits have offered to dismiss Radian from these lawsuits without monetary or injunctive relief. The precise terms of the dismissal are being negotiated. *Id.* 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

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. Filippis 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. Filippis 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. Filippis. 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)

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,

/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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Dated: April 30, 2014