UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

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In the matter of:	)
	)
PHH CORPORATION,	)
PHH MORTGAGE CORPORATION,	)
PHH HOME LOANS, LLC,	)
ATRIUM INSURANCE CORPORATION,	)
and ATRIUM REINSURANCE	)
CORPORATION	)
	)

JOINT OPPOSITION OF RADIAN GUARANTY INC., UNITED GUARANTY RESIDENTIAL INSURANCE COMPANY, MORTGAGE GUARANTY INSURANCE CORPORATION, GENWORTH MORTGAGE INSURANCE CORPORATION, AND REPUBLIC MORTGAGE INSURANCE COMPANY TO ENFORCEMENT COUNSEL'S MOTION TO AMEND THE PROTECTIVE ORDER

Radian Guaranty Inc., United Guaranty Residential Insurance Company, Mortgage Guaranty Insurance Corporation, Genworth Mortgage Insurance Corporation, and Republic Mortgage Insurance Company (collectively, the "MI Companies") oppose Enforcement Counsel's motion to amend the Protective Order entered by the Tribunal on February 28, 2014 (the "Protective Order"). Far from requesting a "small fix" that supposedly would "bring the Order into compliance with Rule 119," Mem. at 5, Enforcement Counsel in fact seek to renege on a binding agreement that was approved by the Tribunal and entered as an Order in this proceeding and on which the MI Companies have relied in producing (or consenting to the production of) thousands of documents containing confidential information. Indeed, Enforcement Counsel's proposed modification to the Protective Order would not "compl[y] with

Rule 119" at all, but would instead eliminate the protections that the Bureau's own regulations require for the MI Companies' confidential information.

Enforcement Counsel cannot unilaterally withdraw from the agreement underlying the Protective Order. The MI Companies worked closely with the parties to this action to carefully negotiate and draft the Protective Order to ensure that their confidential information would receive the protections mandated by law. Enforcement Counsel's assertion that confidentiality should now be limited to "sensitive personal information" and "highly confidential information" lacks support in the Bureau's regulations or any other applicable law. There is no basis to permit Enforcement Counsel to rewrite the Protective Order at this late date and dramatically restrict the confidentiality protections to which the MI Companies are entitled.

BACKGROUND

The MI Companies produced tens of thousands of pages of confidential information to the Minnesota Department of Commerce ("DOC") and the Office of the Inspector General of the U.S. Department of Housing and Urban Development ("HUD OIG") during the conduct of an investigation by these agencies of alleged violations of the Real Estate Settlement Procedures Act ("RESPA") involving captive mortgage reinsurance arrangements.[1] In July 2011, the Bureau assumed primary enforcement responsibility under RESPA pursuant to the Dodd-Frank Act and it likewise began to investigate these arrangements. Although HUD OIG terminated its investigation at that point, DOC's investigation has yet to be resolved. It appears that the Bureau has received copies of the entirety of DOC's and HUD OIG's investigative files relating to

[1] Each of the MI Companies received requests for documents from DOC and HUD OIG relating to this investigation beginning in May 2008, and periodically thereafter until December 2011. Some MI Companies also received earlier requests for documents from DOC as part of the same investigation.

captive mortgage reinsurance, including all of the confidential information produced by the MI Companies.

In January 2012, each of the MI Companies received an informal request for information regarding captive mortgage reinsurance from the Bureau, to which they voluntarily responded. In July 2012, each of the MI Companies received a civil investigative demand (CID) from the Bureau, which also related to captive mortgage reinsurance. In the ensuing months, the MI Companies negotiated with the Bureau regarding the scope of the CIDs as well as a potential resolution of the Bureau's investigation. During the course of these discussions, the Bureau periodically agreed to extend the time in which the MI Companies could file petitions to modify or set aside the CIDs pursuant to Section 1052(f) of the Dodd-Frank Act, 12 U.S.C. § 5562(f), and 12 C.F.R. § 1080.6(e). In December 2012, the Bureau refused to agree to further extensions of time and each of the MI Companies accordingly filed a petition to modify or set aside the CID served on it. Although the filing of these petitions stays the time for compliance with the CIDs,[2] the MI Companies have each since then voluntarily produced thousands of pages of information to the Bureau, and made witnesses available for interviews, while the petitions remain pending.

On January 29, 2014, Enforcement Counsel wrote to each of the MI Companies to inform them that confidential information they had produced to DOC, HUD OIG or the Bureau might be disclosed to respondents or to the public during this proceeding. That letter also advised the MI Companies that they could move to intervene in this matter to seek a protective order to prevent this information from being publicly disclosed.

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[2] *See* Dodd-Frank Act § 1052(f)(2), 12 U.S.C. § 5562(f)(2); 12 C.F.R. § 1080.6(f).

On February 20, 2014, the Tribunal permitted the MI Companies to intervene in order to "reach agreement on a stipulated protective order" with Enforcement Counsel and respondents.[3] The parties negotiated for several days and submitted a jointly drafted Protective Order, which the Tribunal entered on February 28, 2014. Contrary to Enforcement Counsel's suggestion, they did not hastily agree in that process to some unprecedented level of protection for the MI Companies' confidential information. To the contrary, the definition of "Confidential Information" in the Protective Order was specifically negotiated and drafted to track the definitions in the Bureau's own regulations virtually word for word. *See* 12 C.F.R. § 1070.2.[4] Indeed, as set forth below, the Protective Order does no more than ensure that the materials submitted by the MI Companies to DOC, HUD OIG and the Bureau will receive the confidentiality protections to which those materials are entitled under law.

ARGUMENT

Enforcement Counsel's motion to modify the Protective Order should be denied for three reasons.

First, Enforcement Counsel do not, and cannot, demonstrate good cause to justify the modification to the Protective Order they belatedly propose. Nor can they unilaterally "withdraw" their consent to the Protective Order after it was carefully negotiated, drafted, and entered by the Tribunal, and after the parties have relied on it in consenting to the use and redaction of confidential information in this proceeding.

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[3] Order Granting Motion to Intervene (Document 40), entered February 20, 2014 at 2.

[4] Clause (ii) of the definition of "Confidential Information" in the Protective Order tracks the definition of "[c]*ivil investigative demand material*" in 12 C.F.R. § 1070.2(e), while clause (iii) of the definition tracks the second clause of the definition of "[c]*onfidential investigative information*" in 12 C.F.R. § 1070.2(h). *See* Protective Order ¶ 1h(ii) & (iii).

Second, far from being "indiscriminate," Mem. at 5, the Protective Order merely implements protections imposed by law. Indeed, public disclosure of the MI Companies' confidential information is *prohibited* by law, and the Protective Order must remain in place for this reason alone. 12 C.F.R. § 1081.119(c)(4) (providing that a protective order "*shall* be granted" where disclosure is "prohibited by law").

Third, Enforcement Counsel's purported "small fix" that supposedly would "bring the [Protective] Order into compliance with Rule 119," Mem. at 5, does nothing of the sort. Enforcement Counsel propose that confidential treatment under the Protective Order be limited to "Sensitive Personal Information or Highly-Confidential Information" as presently defined in the Protective Order. Mem. at 9. That change, which cannot fairly be characterized as "small," has no legal basis and would eliminate the protections to which the MI Companies are entitled.

I. Enforcement Counsel Fail to Demonstrate Good Cause to Modify the Protective Order Entered by This Tribunal.

"A protective order may be modified only where the party seeking modification shows good cause for the modification." *In re R.J. Reynolds Tobacco Co.,* 127 F.T.C. 765, 1999 FTC LEXIS 64, *19 (May 26, 1999). While the Protective Order here does not "*prevent* any Party, Third Party, or other person from *seeking* its modification," Protective Order ¶ 18 (emphasis added), nothing in the Protective Order alters this good cause standard. Indeed, "[w]here a protective order is agreed to by the parties before its presentation to the court, there is a *higher* burden on the movant to justify the modification of the order." *Id.* at *20 n.9 (quoting *AT&T v. Grady,* 594 F.2d 594, 597 (7th Cir. 1978)) (emphasis added).

The Federal Trade Commission's decision in *In re R.J. Reynolds Tobacco Co.* is instructive. In that case, a protective order was entered during discovery pursuant to a joint motion, which defined and restricted the use and disclosure of precisely defined "confidential

material." *Id.* at *2-*3. Subsequently, after receiving certain material designated "confidential," defense counsel sought modification of the protective order to allow it to retain certain confidential materials, which was disallowed under the protective order. *Id.* at *8. Holding that (i) the remedy defendant sought (to retain the confidential materials) was foreseeable at the time defense counsel agreed to the protective order and (ii) defendant had shown no prejudice justifying modification, the Commission denied the motion. *Id.* at *20-*21.

Here, Enforcement Counsel make no effort whatsoever to demonstrate good cause to modify the Protective Order. They cite no changed circumstance that requires the MI Companies' confidential information to suddenly be made public. Nor do they argue that the confidentiality of this information has in any way impeded their efforts to present their claims in this proceeding. Instead, Enforcement Counsel assert that they can unilaterally extinguish the Protective Order on a whim, without showing good cause, simply by "withdrawing" their consent to it. They are wrong.

First, Enforcement Counsel do not have the authority to "withdraw" their consent. A stipulation agreed to by government lawyers and accepted by a tribunal is binding on the government no less than on other parties. *See, e.g., Farrell v. Commissioner of Internal Revenue,* 136 F.3d 889, 894 (2d Cir. 1998) ("The Commissioner and the taxpayers are equally bound by stipulations validly entered into . . . ."); *United States v. West,* 2011 U.S. Dist. LEXIS 37877, *5 (E.D. Mich. Apr. 7, 2011) (rejecting effort by government lawyers to withdraw from a stipulation they said they entered into "hastily"); *Idaho Aids Found., Inc. v. Idaho Hous. & Fin. Ass'n*, 2008 U.S. Dist. LEXIS 16178, *8 n.1 (D. Idaho Feb. 29, 2008) ("Stipulations entered into by government agencies are binding and will be enforced by the Court.").

Second, Enforcement Counsel ignore the prejudice the MI Companies would suffer if the Protective Order could be obviated by one party in this way. Enforcement Counsel concede in their memorandum that without any protective order in place, "the *great majority* of materials in [their] investigative file, namely *the portion that contained materials produced by the* [*MI Companies*]," could *not* be disclosed to the respondents in this case or, for that matter, to the public. Mem. at 3 (emphasis added). Yet, now that the material has been produced, they say that there will be "no injury or surprise" if the Protective Order is lifted. Mem. at 9. The unfairness of that position is palpable. On Enforcement Counsel's view, they can negotiate a Protective Order that apparently suited their purposes at one stage of the case; then, after producing a vast quantity of documents and data to the respondents that *they admit could not have been produced before the Protective Order was entered*, they claim that they can unilaterally terminate the Protective Order and rob much of this material of its protection.

Not only would that outcome be fundamentally unfair, it simply makes no sense. If, as Enforcement Counsel admit, the materials produced by the MI Companies could not be disclosed in the absence of a protective order, then the logical consequence of Enforcement Counsel's "withdrawal" of their agreement to the Protective Order would be to return all affected parties to the *pre*-protective order state, in which the "materials produced by the [MI Companies]" could not be made public or shared with respondents at all. Mem. at 3. Thus, if anything, by repudiating the Protective Order, Enforcement Counsel have actually *precluded* the disclosure of confidential information previously produced under its protection.

In sum, nothing justifies rewriting the Protective Order. Enforcement Counsel cannot "withdraw" their consent and deprive all involved of the protections to which Enforcement

Counsel readily agreed when it suited them. The motion to modify the Protective Order should be denied.

II. Enforcement Counsel's Proposed Disclosure of the MI Companies' Confidential Information Would Violate Federal and State Law.

Enforcement Counsel wrongly argue that the Protective Order is somehow "indiscriminate" because it "seals all investigative information — regardless of its content." Mem. at 5-6. But that is exactly what federal and state law mandate.

The Bureau's regulations make clear that "no employee . . . of the CFPB, or any other person in possession of confidential information, shall disclose such confidential information by any means," unless specifically "required by law" or the Bureau's regulations. 12 C.F.R. § 1070.41(a). Here, far from being "required by law," disclosure is *prohibited* by law.

The MI Companies' confidential information consists of materials produced to DOC, HUD OIG or directly to the Bureau. All of the materials produced to DOC were produced pursuant to Minnesota Statutes § 60A.031, which specifically provides that such materials "*must* be given confidential treatment" and "may not be made public" by any person. Minn. Stat. § 60A.031 subd. 4(f) (emphasis added). Moreover, any other agency receiving these materials from DOC, such as the Bureau, "must agree in writing prior to receiving the information to provide it the same confidential treatment as required by this section." *Id.*

As to materials the MI Companies produced to HUD OIG, or to the Bureau directly, all such materials constitute, at a minimum, confidential commercial or financial information that, ultimately, was produced voluntarily. Such information is entitled to protection under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), and the Trade Secrets Act, 18 U.S.C. § 1905, if it is "of a kind that would customarily not be released to the public by the person from

whom it was obtained." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n,* 975 F.2d 871, 879 (D.C. Cir. 1992). That is precisely the situation here.

A. By Statute and Agreement, the Bureau Must Maintain The Confidentiality of All Materials the MI Companies Produced to DOC.

Much of the Confidential Information covered by the Protective Order is information produced to DOC in response to various document requests. Each of these document requests was issued pursuant to Minnesota Statutes § 60A.031. That section provides that "[*a*]*ll* working papers, recorded information, documents and copies thereof produced by, obtained by, or disclosed to the [Minnesota insurance] commissioner or any other person in the course of an examination made under this subdivision . . . *must* be given confidential treatment and are not subject to subpoena and *may not be made public by the commissioner or any other person* . . . ." Minn. Stat. § 60A.031 subd. 4(f) (emphasis added). While this section permits DOC to share materials produced to it with an "agency of the federal government," any such agency must agree to "hold [the materials] confidential and in a manner consistent with this subdivision." Minn. Stat. § 60A.031 subd. 4(e)(2); *see also* Minn. Stat. § 60A.031 subd. 4(f) (person receiving materials must give the materials "the same confidential treatment as required by this section, unless the prior written consent of the company to which it pertains has been obtained").

These provisions dictate that *all* of the material the MI Companies produced to DOC, which DOC in turn gave to the Bureau, "must be given confidential treatment" and "may not be made public by . . . any . . . person." Minn. Stat. § 60A.031 subd. 4(f). Because the Bureau and DOC presumably complied with this statute when DOC shared the MI Companies' materials with the Bureau, the Bureau must have agreed to give "the same confidential treatment" DOC was obligated to provide. *Id.* If the Bureau *failed* to make this required agreement, that is no reason to lift the confidentiality protection to which the MI Companies' materials are entitled.

Thus, public disclosure of the materials the MI Companies produced to DOC is "prohibited by law," and the Protective Order was properly entered. 12 C.F.R. § 1081.119(c)(4). The Protective Order is not "indiscriminate," and Enforcement Counsel's request to modify it should be denied.

B. All Materials Produced by the MI Companies to HUD OIG and the Bureau are Protected From Disclosure as Confidential Commercial or Financial Information.

All of the materials produced by the MI Companies to HUD OIG, or directly to the Bureau, are likewise entitled to confidential treatment because these materials constitute confidential commercial or financial information that was *voluntarily* produced to these agencies. Such information is exempt from disclosure under FOIA, and prohibited from public disclosure by the Trade Secrets Act, where, as here, it is "of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass,* 975 F.2d at 879; *see also McDonnell Douglas Corp. v. NASA,* 180 F.3d 303, 305 (D.C. Cir. 1999) (prohibition on disclosure under the Trade Secrets Act encompasses confidential commercial or financial information under FOIA).

This is fully consistent with the Bureau's own regulations. The definition of "[*c*]*onfidential information*" in the Bureau's regulations includes information exempt from disclosure under FOIA. 12 C.F.R. § 1070.2(f). The Bureau's regulations further permit a third party to seek a protective order to prevent the disclosure in any enforcement proceeding of any "confidential investigatory material that contains any trade secret or privileged or confidential commercial or financial information, as claimed by designation by the submitter of such material." 12 C.F.R. § 1070.45(a)(4).

In accordance with these principles, the Protective Order incorporates confidentiality protection for "Confidential Commercial and Financial Information," which it defines, following

Critical Mass, as "commercial or financial information of a kind that would customarily not be released to the public by the person from whom it was obtained." Protective Order ¶¶ 1h(iv) & 1j. That language applies to the materials the MI Companies produced to HUD OIG and the Bureau, all of which were produced voluntary — the predicate for protection under the *Critical Mass* test.

1. The Materials the MI Companies Produced to HUD OIG Were Produced Voluntarily.

The materials the MI Companies produced to HUD OIG were produced voluntarily because HUD OIG never had authority to conduct its investigation in the first place. When "determining that [a] submission [of information to an agency] was not mandatory," *i.e.*, was voluntary for purposes of FOIA's exemption for confidential commercial or financial information, the "*actual* legal authority" of the agency "governs judicial assessments of the character of submissions." *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.,* 244 F.3d 144, 149 (D.C. Cir. 2001) (emphasis added). Thus, "if an agency had no authority to enforce an information request, submissions are not mandatory," *id.*, and the *Critical Mass* test therefore applies — that is, such information is protected from public disclosure if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.

HUD OIG had no authority to enforce its document requests because an agency Inspector General "lacks statutory authority to conduct, as part of a long-term, continuing plan, regulatory compliance investigations or audits." *Burlington Northern R.R. v. Office of Inspector General, R.R. Ret. Bd.,* 983 F.2d 631, 642 (5th Cir. 1993). Where "a regulatory statute makes a federal agency responsible for ensuring compliance with its provisions," as HUD was responsible for ensuring compliance with RESPA before the enactment of the Dodd-Frank Act, "the Inspector General for that agency will lack the authority to make investigations or conduct audits which

are designed to carry out that function directly." *Id.* That was precisely the situation with HUD OIG's investigation of captive reinsurance. This was not an investigation into fraud, abuse, waste or ineffectiveness within HUD, the normal province of an Inspector General. Rather, it was a regulatory investigation of the MI Companies under RESPA of exactly the sort that HUD itself would have performed. By purporting to assume that regulatory function, HUD OIG exceeded its authority.

Despite HUD OIG's lack of authority, the MI Companies voluntarily cooperated with the investigation. It follows that all of the materials that the MI Companies produced to HUD OIG, and which HUD OIG in turn shared with the Bureau, are properly subject to confidential treatment. *Auto Safety,* 244 F.3d at 149. Enforcement Counsel do not dispute that all of this information is "of a kind that would customarily not be released to the public by the person from whom it was obtained," *Critical Mass*, 975 F.2d at 879, and is therefore protected from public disclosure.

2. The Materials the MI Companies Produced to the Bureau Directly Were Produced Voluntarily.

The materials the MI Companies produced directly to the Bureau were likewise voluntarily produced. Once the MI Companies had filed timely petitions to modify or set aside their respective CIDs, they agreed informally with the Bureau that they would nevertheless produce documents pursuant to the CIDs. Because compliance with a CID is stayed during the pendency of a petition to modify or set it aside, these productions to the Bureau were entirely voluntary. *See* Dodd-Frank Act § 1052(f)(2), 12 U.S.C. § 5562(f)(2); 12 C.F.R. § 1080.6(f). Thus, the *Critical Mass* test applies to these materials as well. Because, as with the materials produced to HUD OIG, all of the materials the MI Companies produced to the Bureau constituted commercial or financial information "of a kind that would customarily not be

released to the public by the person from whom it was obtained," *Critical Mass*, 975 F.2d at 879, the Protective Order appropriately treats these materials as confidential.

In short, the Protective Order provides no greater protection for the MI Companies' confidential information than applies under FOIA, the Trade Secrets Act and the Bureau's regulations. Enforcement Counsel's motion to modify the Protective Order should be denied.

III. Enforcement Counsel's Purported "Small Fix" Would Eviscerate the Confidentiality Protections to Which the MI Companies are Entitled.

As set forth above, the Protective Order does not need "fixing" and Enforcement Counsel have no basis to seek to modify it. In any event, Enforcement Counsel's proposed "small fix" is no such thing. Mem. at 5. Enforcement Counsel assert that confidential treatment under the Protective Order should now be limited to "Sensitive Personal Information" and "Highly-Confidential Information." Mem. at 9. That would dramatically limit the confidentiality protection to which the MI Companies are entitled. The Protective Order defines "Highly-Confidential Information" as "Competitively Sensitive Information," which in turn is defined as "business or propriety information that is not publicly known and that, if released to an entity's competitors, would confer on those competitors a competitive advantage." Protective Order ¶¶ 1a & 1i. Although much of the information the MI Companies produced to DOC, HUD OIG and the Bureau is of this sort, *all* of this information is entitled to confidential treatment without any requirement that the MI Companies make such a showing of competitive harm. Enforcement Counsel's suggested limitation is really a disguised effort to subject the MI Companies to a burden the governing law does not impose.

Nevertheless, should the Tribunal be inclined to grant Enforcement Counsel's requested limitation, the Tribunal should also grant the MI Companies two weeks to reevaluate their prior designations under this "competitive harm" standard (or such other confidentiality standard as

the Tribunal determines to impose). Contrary to Enforcement Counsel's suggestion, the MI Companies' previous designations of "Confidential Information" under the Protective Order do not exclude the possibility that such "Confidential Information" is *also* "Highly-Confidential Information." *See* Protective Order ¶ 1h(i) (defining "Confidential Information" to include "Competitively Sensitive Information"). In making their confidentiality designations to date, the MI Companies have not primarily focused on issues of competitive harm because, as explained above, the law does not require that limitation for this information. However, such harm doubtless would occur if much of this confidential information were disclosed. The MI Companies are entitled to a reasonable opportunity to make such a determination should the Tribunal grant Enforcement Counsel's request to rewrite the Protective Order.

CONCLUSION

For the forgoing reasons, the MI Companies respectfully urge the Tribunal to deny Enforcement Counsel's motion to modify the Protective Order. Should the Tribunal nevertheless determine to modify the Protective Order, the MI Companies ask that they be given two weeks from the date of the Tribunal's decision to reevaluate designations of confidentiality under any new standard of confidentiality the Tribunal imposes.

Respectfully submitted,

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Dated: June 23, 2014

CERTIFICATE OF SERVICE

I, Stephen A. Fogdall, hereby certify that I have on this date served a copy of the foregoing Joint Opposition to Enforcement Counsel's Motion to Amend the Protective Order on the following by electronic mail:

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