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 AMEND THE PROTECTIVE ORDER AND UNSEAL "CONFIDENTIAL" MATERIAL

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 Amend the Protective Order and Unseal "Confidential" Material. Enforcement Counsel's attempt to eliminate the "Confidential" designation in the stipulated protective order comes too late and would impose a substantial burden on Respondents and the third-party mortgage insurers (the "MIs").

Rule 119 of the Bureau's Rules of Practice for Adjudication Proceedings clearly provides that "[a] motion for a protective order shall be granted[] [i]f all parties, including third parties to the extent their information is at issue, stipulate to the entry of a protective order[.]" 12 C.F.R. § 1081.119(c)(3). That is exactly what occurred here. After much back and forth negotiation, the parties, along with the MIs, reached an agreement regarding the "Confidential" and "Highly Confidential" designations that would govern the documents produced in this matter. On February 19, 2014, the parties filed a joint stipulated motion and proposed protective order

reflecting the agreed-upon confidentiality designations and, on February 28, 2014, the Tribunal entered the Protective Order Governing Discovery Material ("Order").

Now, nearly four months after the fact, and at the conclusion of the hearing in this matter, Enforcement Counsel seek to "withdraw" their agreement to the Order and eliminate the "Confidential" designation altogether. In support of this drastic and untimely request, Enforcement Counsel contend that the Order "fails to serve Rule 119's stated purpose of promoting transparency in the adjudicative process . . . ." Mot. at 5. Enforcement Counsel further complain that the Order "seals all investigative information – regardless of its content." *Id.* at 6. Finally, and tellingly, Enforcement Counsel worry that allowing the Order to stand as written "enshrines in only the second administrative adjudication in the Bureau's history a practice that directly conflicts with Rule 119 . . . ." *Id.* at 7. The Bureau's arguments are unavailing.

First, while Enforcement Counsel contend that there needs to be "one small fix to Paragraph 8" to "bring the Order into compliance with Rule 119," Mot. at 5, in fact, the Order in its current form unquestionably complies with Rule 119. Stated otherwise, it cannot be the case that Enforcement Counsel's change of heart means that the Order somehow fails to comply with Rule 119 when the Rule directly allows parties to stipulate to the parameters that will govern confidential materials and does not restrict the parties in any way. Enforcement Counsel's attempt to find support for their position in the commentary to Rule 119 is nothing short of ironic given their prior rejection of the same commentary, albeit to Rule 206, when they opposed Respondents' motion to compel. *See* Opp'n to Resp'ts' Mot. to Compel, Dkt. No. 56, at 5-6 (stating that "Respondents' oblique string of references to due process, fairness, and efficiency in Part 1081's staff commentary is not compelling"). Enforcement Counsel should not be permitted

to rely on the commentary only when it suits their purposes. Further, this Tribunal has apparently concluded that the commentary is not legally binding. *See* Order Denying Resp'ts' Mot. to Compel, Dkt. No. 60, at 3 ("Respondents point to no authority supporting their contention that the commentary to Rule 206 is legally binding."). With or without the commentary, however, the plain language of Rule 119 explicitly allows for stipulated protective orders, and Enforcement Counsel should not be heard to argue otherwise.

Second, the "one small fix" proposed by Enforcement Counsel isn't so "small." Eliminating the designation of "Confidential" would mean that only those documents designated as "Highly Confidential" would be entitled to protection under the Order. Not only does such a proposal run afoul of the Bureau's own rules, it would also impose a significant (and unnecessary) burden on Respondents and the MIs. As Enforcement Counsel is well aware, the bulk of Respondents' document production was made during the course of the Bureau's confidential investigation which commenced in 2012 with the Bureau's service of a Civil Investigative Demand ("CID") on Respondents. *See* 12 C.F.R. § 1080.14 ("Confidential treatment of demand material and non-public nature of investigations").[1] Unquestionably the documents produced by Respondents in response to the CID constituted "confidential investigative information," and Respondents' practice of marking the documents as "Confidential" was wholly appropriate and in accordance with the Bureau's own rules.[2]

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[1] *See also* 12 C.F.R. § 1080.14(a) (explaining that documents received by the Bureau during the course of an investigation "are subject to the requirements and procedures relating to the disclosure of records and information set forth in part 1070 of this title" which, in turn, is entitled "Disclosure of Records and Information").

[2] *See* 12 C.F.R. § 1070.2(h) ("Confidential investigative information means: (1) Civil investigative demand material; and (2) Any documentary material prepared by, on behalf of, received by, or for the use by the CFPB or any other Federal or State agency in the conduct of an

Therefore, Enforcement Counsel's contention that the more recently entered Order "seals all investigative information – regardless of its content," Mot. at 6, is not exactly correct. It was the Bureau's rules in the first instance that caused the documents produced by Respondents to become "confidential investigative information" entitled to protection from disclosure.

Enforcement Counsel's assertion that Respondents "can hardly claim" that disclosure of "mere Confidential material could cause them harm," because "if it were harmful to disclose, it would be [designated] 'Highly Confidential,'" Mot. at 9, is nothing short of astounding. As Enforcement Counsel well know, by the time the Order was entered in February 2014, Respondents believed their earlier-produced documents were protected from disclosure due to their prior "Confidential" designation and, as a result, did not go back through those documents to determine whether they should also be labeled "Highly Confidential." Further, Enforcement Counsel's self-serving statement that "we telegraphed that we might seek to make public mere 'Confidential' materials," Mot. at 9, is hardly accurate and provides no justification for their late-filed motion. Enforcement Counsel first alluded to the possibility of their change of position in a telephone conversation on April 28, 2014. Surprised by this possibility, Respondents' counsel followed up with an email that pointedly asked whether the Bureau was changing its position. *See* Exhibit A hereto. Enforcement Counsel failed to give Respondents' counsel even the professional courtesy of a response.[3] In other words, Enforcement Counsel would not admit what they were seeking to do until *after* the hearing in this matter concluded.

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investigation of or enforcement action against a person, and any information derived from such documents.").

[3] Likewise, Enforcement Counsel's statement to the MIs' counsel to "[p]lease be certain to distinguish in your designations between Confidential and Highly Confidential materials, should such a distinction apply," Mot., Ex. B, hardly constitutes "telegraphing" Enforcement Counsel's intention to eliminate entirely the "Confidential" designation.

If Enforcement Counsel's motion is granted, Respondents, as well as the MIs, will be forced to re-review, at a minimum, all of the documents submitted in support of, or opposition to, the numerous motions filed, as well as all of the documents admitted into evidence at the hearing of this matter to determine whether a "Highly Confidential" designation is appropriate. Such a burden cannot be justified given the stage of these proceedings and the fact that the Order as entered already complies with Rule 119. And certainly such a burden cannot be justified simply because Enforcement Counsel is concerned about their reputation and the possible precedent established by "only the second administrative adjudication in the Bureau's history."

For all the foregoing reasons, Enforcement Counsel's attempt to withdraw their consent to the Order at this late date should not be accepted. The burden that would be imposed on Respondents and the MIs is too significant to justify re-writing the Order. Given Respondents' ongoing production of documents over a two-year period in the context of a confidential government investigation, the designation of "Confidential" – as provided by the Bureau's own rules – has to mean something and cannot be changed at the Bureau's whim after an enforcement action has been commenced and a hearing has been held.

In the alternative, should the Tribunal be inclined to grant Enforcement Counsel's motion, a more reasonable compromise would be to allow the "Confidential" designation to remain on all documents filed with the OAA or entered into evidence as exhibits at the hearing, but to unseal the hearing transcript to allow the testimony to become part of the public record, except for those portions of the transcript any party or MI designates as "Highly Confidential." The Tribunal could also place on the public record any Order on the merits entered in the proceeding, again with any necessary redactions for "Highly Confidential" material. In that way,

Enforcement Counsel's purported need for transparency in the administrative process is met while Respondents' need for protection is preserved.

Dated: June 23, 2014

Respectfully submitted,
WEINER BRODSKY KIDER PC

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CERTIFICATION OF SERVICE

I hereby certify that on the 23rd day of June, 2014, I caused a copy of the foregoing Respondents' Opposition to Enforcement Counsel's Motion to Amend the Protective Order and to Unseal "Confidential" Material be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

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