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	)
	)

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

The MI Companies[1] respectfully submit this surreply in further opposition to Enforcement Counsel's motion to amend the Protective Order, as authorized by the Tribunal's July 11, 2014 Order. This surreply is limited to the following two points:

First, Enforcement Counsel concede that, at a minimum, the Protective Order should protect information within the Freedom of Information Act (FOIA) exemption for "confidential commercial or financial information," often called "FOIA Exemption 4." *See* 5 U.S.C. § 552(b)(4). Yet they wrongly argue that the "Orders in this matter and Enforcement Counsel's filings" should be excluded from this protection. Reply at 4.

---

[1] Radian Guaranty Inc., United Guaranty Residential Insurance Company, Mortgage Guaranty Insurance Corporation, Genworth Mortgage Insurance Corporation, and Republic Mortgage Insurance Company

Second, the Bureau's own regulations contemplate confidentiality protection "[w]here public disclosure is prohibited by law." 12 C.F.R. § 1081.119(c)(4). As the MI Companies showed in their original opposition brief, public disclosure of materials the MI Companies produced to the Minnesota Department of Commerce (DOC) is prohibited by Minn. Stat. § 60A.031. In their reply, Enforcement Counsel make three arguments, described below, to attempt to escape this conclusion. All of them fail.

I. Enforcement Counsel Concede that the Protective Order Should Cover Material Subject to FOIA Exemption 4.

Enforcement Counsel admit in their reply that material subject to FOIA Exemption 4 should not be made public in this proceeding. *See* Reply at 5 (acknowledging that "[m]aterial exempted under 5 U.S.C. § 552(b)(4)" should be protected).[2] The Protective Order was specifically negotiated to include this protection, and, in light of Enforcement Counsel's concession, there is no basis to eliminate it.

While acknowledging that the Protective Order should include materials protected under FOIA Exemption 4, Enforcement Counsel nevertheless broadly assert that this exemption does not apply to "the Orders in this matter and Enforcement Counsel's filings, including its expert reports" because these "involve analysis prepared by the government." Reply at 4 (citing *Philadelphia Newspapers, Inc. v. Dep't of Health and Human Servs.,* 69 F. Supp. 2d 63, 67 (D.D.C. 1999)). This is wrong. When a government agency has prepared a memorandum, analysis or other document, any information subject to Exemption 4 "that is either repeated

---

[2] Enforcement Counsel also do not dispute that the *Critical Mass* test, which applies to information "of a kind that would customarily not be released to the public by the person from whom it was obtained," covers much of the information at issue. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n,* 975 F.2d 871, 879 (D.C. Cir. 1992).

verbatim or [in] slightly modified" form in the document must be redacted, as should content from which such information could be "extrapolated." *Southern Alliance for Clean Energy v. Dep't of Energy,* 853 F. Supp. 2d 60, 68 (D.D.C. 2012). The parties and the MI Companies have followed that practice since the Protective Order was entered, and Enforcement Counsel offer nothing to justify suddenly taking a different approach now.

II. The Protective Order Should Protect All Information for Which Public Disclosure is Prohibited by Law.

As already noted, the Bureau's regulations require confidentiality protection "[w]here public disclosure is prohibited by law." 12 C.F.R. § 1081.119(c)(4).[3] The MI Companies explained in their opposition brief that materials they produced to DOC are protected from disclosure by Minn. Stat. § 60A.031.[4] Enforcement Counsel make three erroneous arguments in reply: First, Enforcement Counsel mistakenly assert that the MI Companies produced documents to DOC pursuant to Minn. Stat. § 45.027, not Minn. Stat. § 60A.031, and that under Minn. Stat. § 45.027, "the DOC can provide investigatory information to other law enforcement agencies without restriction on the recipient." Reply at 5-6. Second, Enforcement Counsel wrongly say that they can "disclose records in this administrative hearing even if" Minn. Stat. § 60A.031 applies. Reply at 6. Third, Enforcement Counsel assert that the Bureau's Agreement to Confidentiality with DOC (Reply Exhibit D) permits them to disclose any materials the MI Companies produced to DOC. *Id.* This too is wrong.

---

[3] On its face, this provision is not limited to prohibitions under federal law. *Cf. Pacheco v. Fed. Bureau of Investigation,* 470 F. Supp. 1091, 1104 n.17 (D.P.R. 1979) (recognizing, in the FOIA context, that a state statute can prohibit disclosure).

[4] The Trade Secrets Act, 18 U.S.C. § 1905, also prohibits disclosure of much of the material at issue, as discussed in the MI Companies' original opposition brief.

First, each of DOC's requests to the MI Companies relating to captive mortgage reinsurance arrangements relied on Minn. Stat. § 60A.031. *See, e.g.,* Exhibit A (DOC request directed to Radian Guaranty Inc., citing only Minn. Stat. § 60A.031); Exhibit B (DOC request directed to Mortgage Guaranty Insurance Corporation, citing only Minn. Stat. § 60A.031); Exhibit C (DOC request directed to Republic Mortgage Insurance Company, citing only Minn. Stat. § 60A.031).[5] Everything the MI Companies produced to DOC was produced in response to such requests. Moreover, even if Minn. Stat. § 45.027 were somehow also relevant, that statute expressly does not permit DOC to disclose "information classified as confidential under . . . [§] 60A.031." Minn. Stat. § 45.027 subd. 7. Because all of the material produced to DOC by the MI Companies was "classified as confidential under . . . [§] 60A.031," Minn. Stat. § 45.027 by its terms does not permit disclosure of these materials in this proceeding.

Second, contrary to Enforcement Counsel's assertions, Minn. Stat. § 60A.031, the statute that *does* apply here, does not permit disclosure of these materials either. Enforcement Counsel rely on language in that section stating that DOC may "use as evidence a final or preliminary examination report, examiner or company work papers or other documents" in a "legal or administrative action" to argue that public disclosure of such materials by Enforcement Counsel would be "consistent with" that section. Reply at 6; Minn. Stat. § 60A.031 subd. 3(e). The language on which Enforcement Counsel rely on its face permits the *use*, not the disclosure, of examination materials in a DOC administrative proceeding. The statute governing administrative proceedings in Minnesota specifically calls for "closed hearing[s]," "necessary

---

[5] All of the MI Companies received multiple similar requests over a period of several years. These are representative. Additional examples can be provided if that would be helpful to the Tribunal.

protective orders," and the "seal[ing] [of] all or part of the hearing record" to protect "information which is not public." Minn. Stat. § 14.60 subd. 2. So, DOC's authority to *use* examination materials in an administrative proceeding is not authority to publicly disclose such information, and Enforcement Counsel's proposal to publicly disclose such information here therefore is *not* "consistent with" Minn. Stat. § 60A.031, or any other Minnesota statute.

Third, the Bureau's confidentiality agreement with DOC likewise does not permit the public disclosure of the examination materials the MI Companies produced to DOC. That agreement expressly acknowledges that the Bureau "will not disclose to the public any examination report, the workpapers or matters related thereto consistent with Minnesota Statutes §§ 60A.03 and 60A.031." Reply Exhibit D. Enforcement Counsel assert that the agreement does not "prevent CFPB from using and/or disclosing information and documents identified, analyzed or generated . . . to the extent that the CFPB must disclose or may use such information as required or permitted by law or the CFPB regulations [12 C.F.R. §§ 1070.40-47] . . . , or ordered by a court in a civil, criminal, or administrative proceeding." That language does not authorize disclosure of these examination materials.

Enforcement Counsel have not been "ordered by a court in a civil, criminal, or administrative proceeding" to publicly disclose the materials the MI Companies produced to DOC. Nor do the Bureau's regulations at 12 C.F.R. §§ 1070.40-47 "require or permit" such disclosure. To the contrary, those regulations call for a protective order for "trade secret[s] or privileged or confidential commercial or financial information, as claimed by designation by the

submitter of such material, or confidential supervisory information." 12 C.F.R. § 1070.45(a)(4).[6] Nor is there any other "law" that "require[s] or permit[s]" Enforcement Counsel to disclose this material.

Thus, all of Enforcement Counsel's arguments that they are free to publicly disclose the materials the MI Companies produced to DOC are meritless.

CONCLUSION

In sum, Enforcement Counsel's arguments for modifying the Protective Order all fail and their motion should be denied. If the Tribunal nevertheless determines that the Protective Order should be modified, the modification should be limited to the revised version of the first sentence of Paragraph 8 proposed by the MI Companies: "Any submission filed or lodged in this Administrative Proceeding, and any portion of the record or transcript of a hearing before the Hearing Officer in this Administrative Proceeding, that contains, refers to, or reflects the use of any Sensitive Personal Information, Highly-Confidential Information, or any information that is exempted under 5 U.S.C. § 552(b)(4) or is otherwise prohibited from public disclosure by law shall be maintained under seal, and shall not be posted on the Bureau's website or otherwise made publicly available unless required by law."

In addition, 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.

[6] As defined in the Bureau's regulations, "confidential supervisory information" includes information provided to state agencies in the exercise of their supervisory authority, just as the MI Companies provided materials to DOC pursuant Minn. Stat. § 60A.031.

Respectfully submitted,

/s/ David Smith
David Smith
Stephen A. Fogdall
Schnader Harrison Segal & Lewis LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103
Telephone: 215-751-2581
Facsimile: 215-751-2205
dsmith@schnader.com
sfogdall@schnader.com
Counsel for Radian Guaranty Inc.

/s/ Jane M. Byrne
Jane M. Byrne
William A. Burck
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue
New York, NY 10010
Telephone: 212-849-7000
Facsimile: 212-849-7100
JaneByrne@QuinnEmanuel.com
WilliamBurck@QuinnEmanuel.com
Counsel for United Guaranty Residential Insurance Company

/s/ Reid L. Ashinoff
Reid L. Ashinoff
Ben Delfin
Melanie McCammon
Dentons US LLP
1221 Avenue of the Americas, 26th Floor
New York, NY 10020
Telephone: 212-768-6700
Facsimile: 212-768-6800
reid.ashinoff@dentons.com
benito.delfin@dentons.com
melanie.mccammon@dentons.com
Counsel for
Genworth Mortgage Insurance Corporation

/s/ William L. Kirkman
William L. Kirkman
Bourland & Kirkman, LLP
201 Main Street, Suite 1400
Fort Worth, Texas 76102
Telephone: 817-336-2800, ext. 122
Facsimile: 817-877-1863
billk@bourlandkirkman.com
Counsel for
Republic Mortgage Insurance Co.

/s/ Jay N. Varon
Jay N. Varon
Jennifer Keas
Foley & Lardner LLP
3000 K Street, N.W.
Washington, DC 20007
Telephone: 202-672-5380
Facsimile: 202-672-5399
jvaron@foley.com
jkeas@foley.com
Counsel for
Mortgage Guaranty Insurance Corporation

Dated: July 16, 2014

CERTIFICATE OF SERVICE

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

Mitchel H. Kider
kider@thewbkfirm.com

David M. Souders
souders@thewbkfirm.com

Sandra B. Vipond
vipond@thewbkfirm.com

Roseanne Rust
rust@thewbkfirm.com

Michael S. Trabon
trabon@thewbkfirm.com

Lucy Morris
Lucy.Morris@cfpb.gov

Sarah Auchterlonie
Sarah.Auchterlonie@cfpb.gov

Donald Gordon
Donald.Gordon@cfpb.gov

Kim Ravener
Kim.Ravener@cfpb.gov

Navid Vazire
Navid.Vazire@cfpb.gov

William L. Kirkman
billk@bourlandkirkman.com

Reid L. Ashinoff
reid.ashinoff@dentons.com

Melanie McCammon
melanie.mccammon@dentons.com

Ben Delfin
ben.delfin@dentons.com

Jay N. Varon
jvaron@foley.com

Jennifer M. Keas
jkeas@foley.com

Jane Byrne
janebyrne@quinnemanuel.com

William Burck
williamburck@quinnemanuel.com

Scott Lerner
scottlerner@quinnemanuel.com

/s/ Stephen A. Fogdall
Stephen A. Fogdall

Dated: July 16, 2014