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	)

ENFORCEMENT COUNSEL'S RESPONSE IN OPPOSITION TO RESPONDENTS' OBJECTION, MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, REQUEST FOR CLARIFICATION OF THE ORDERS TAKING JUDICIAL NOTICE

Respondents argue that the Tribunal is not permitted to exercise its power to take official notice of facts once the hearing record has closed (even though Respondents themselves have asked the Tribunal to do so as to numerous asserted facts); that the Tribunal has taken such notice without appropriate "prior notice" to the parties; that the Tribunal may not take such notice in the absence of a party's request; and, in the alternative, that Respondents are entitled to have the Tribunal explain why it has taken such notice. In each case, Respondents' arguments are unsupported, and directly contradict the applicable authorities. Their motion should be denied in its entirety.

Background

On July 14, 2014 the Tribunal ordered that the hearing record in this proceeding be closed. On August 8, 2014 the parties submitted their initial post-trial briefs. On September 23, 2014 the Tribunal issued an order taking official notice of the public official records of the Securities and Exchange Commission (S.E.C.) with respect to PHH Corporation, Document 188, and on September 25, 2014 the Tribunal issued a similar order taking official notice of the S.E.C. records relating to Genworth Financial, Inc., Radian Group Inc., The PMI Group, Inc., and Arch Capital Group Ltd, Document 189. On Sept. 29, 2014 Respondents filed the present objection, motion, and supporting brief with respect to the two September Orders. Documents 190-91.

Argument

A. Official notice may be taken at any stage of the proceeding, including after the hearing record has closed

Contrary to Respondents' assertion, nothing in the Bureau's Rules of Adjudication bars the Tribunal from taking official notice of material facts at any point during the proceeding, including after the hearing record has closed. Most importantly, Rule 303(c), which explicitly empowers the Tribunal to take official notice, contains no temporal limitation. 12 C.F.R. § 1081.303(c). But Rule 303(c) also provides that official notice can be taken of "a material fact not appearing in the evidence in the record," *id.*, implying that such notice is permissible, and may even be particularly appropriate, *after* the hearing record has closed. Other Rules confirm the correctness of this reading. Under Rule 303(a)(4), evidence "that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this part." 12 C.F.R. §

1081.303(a)(4). Under the Federal Rules of Evidence, judicial notice may be taken "*at any stage* of the proceeding." Fed. R. Evid. 201(d) (emphasis added).[1]

Rule 304(c), cited by Respondents, is not to the contrary. That Rule lays out the procedure for "Closing of the hearing record." 12 C.F.R. § 1081.304(c) (heading). But officially-noticed facts are not part of the hearing record[2] – by their nature, they are "extra-record facts," as Rule 303(c) also implies.[3] *See, e.g., Gjiknuri v. Mukasey*, 259 Fed. Appx. 338, 340-41 (1st Cir. Jan. 15, 2008) (noting that an administrative tribunal may take "official notice of extra-record facts") (citing *Gebremichael v. INS*, 10 F.3d 28, 39 (1st Cir. 1993)); *Gebremichael*, 10 F.3d at 39 ("all of the extra-record facts considered by the [administrative tribunal] were the proper subject of official notice"); *accord, e.g., Yero v. Holder*, 355 Fed. Appx. 555, 1 (2d Cir. Dec. 10, 2009). This is so precisely because such facts are, as Rule 303(c) provides – in language strikingly similar to that used in the Federal Rules of Evidence – "either generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." 12 C.F.R. § 1081.303(c).[4] By making such facts available to the factfinder, "[j]udicial notice forms an important part of what has been called the trial

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[1] This Rule also belies any imputation that the taking of judicial or official notice after closing of the trial or hearing record is inherently unfair or denies due process.

[2] The Bureau's Rules of Adjudication distinguish between the hearing record and the full record before the hearing officer, and the former is subsumed within the latter. *Compare, e.g.,* Rule 304 (heading) ("Record of the hearing") *with* Rule 306 (heading) ("Record in proceedings before the hearing officer….").

[3] *See* 12 C.F.R. § 1081.303(c) (referring to official notice of "a material fact not appearing in the evidence in the record," *i.e.*, the definition of an extra-record fact).

[4] *See* Fed. R. Evid. 201(b) ("**Kinds of Facts That May Be Judicially Noticed.** …. A fact that is not subject to reasonable dispute because it … is generally known … or … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned") (emphasis in original).

information system,"[5] since "[courts] cannot construct every case from scratch, like Descartes creating a world base[d] on the postulate *Cogito, ergo sum*."[6] Because officially-noticed facts do not implicate or form part of "the hearing record," the fact that the hearing record is closed does not preclude the taking of such notice, and official notice after the hearing record has closed cannot in and of itself prejudice a party.

Thus, as might be expected, both administrative adjudicative bodies and courts routinely take official or judicial notice of facts after the trial or hearing record in a matter has been closed. There is no controversy about their power to do so. At the Securities and Exchange Commission, for instance, the full Commission has taken official notice of facts in opinions reviewing the decision of an administrative law judge. *E.g.,* Op. of the Comm'n, *In re Lawton*, 205 S.E.C. Docket 673, 2012 WL 6208750, at *2 & n.3, n.6 (S.E.C. Dec. 13, 2012); Op. of the Comm'n, *In re Toth*, 93 S.E.C. Docket 1799, 2008 WL 2597566, at *2 & n.3 (S.E.C. Jul. 1, 2008); Op. of the Comm'n, *In re Citizens Capital Corp.*, 104 S.E.C. Docket 18, 2012 WL 2499350, at *7 & n. 41, *9 (S.E.C. Jun. 29, 2012). Other administrative bodies have similarly taken such notice after the record of a hearing had closed. *E.g.*, *In re Entergy Nuclear Operations, Inc.*, 2013 WL 9591753, at * 87 & n. 984, (N.R.C. Nov. 27, 2013); Order on Initial Decision, *Coakley v. Bangor Hydro-Electric Co.*, 147 FERC P 61234, 2014 WL 2799918, at * 1, *3 (F.E.R.C. Jun. 19, 2014); *Gunderson Rail Services, LLC & Sheet Metal Workers Int'l Ass'n, Local 359, AFL-CIO*, 2014 WL 2943555, at *n. 38 (N.L.R.B. Div. of Judges Jun. 30, 2014); *see also Richlin Sec. Service Co. v. Chertoff,* 553 U.S. 571, 574-75 (2008) (noting that administrative body considering successful claimant's application for reimbursement

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[5] Wright & Graham, Fed. Practice & Procedure § 5102.1 (quotation omitted).
[6] *Id.* (quoting Advisory Committee's Note, Fed. R. Evid. 201).

took official notice of facts after "extensive litigation"); *So. Calif. Edison v. F.E.R.C.*, 717 F.3d 177, 187 (D.C. Cir. 2013) (noting that "[t]he Commission took official notice [of certain facts] after the record had closed"). And in keeping with their explicit power to do so under Federal Rule of Evidence 201, many district courts have taken judicial notice following the closing of the trial record. *E.g.*, *Weekes-Walker v. Macon County Greyhound Park, Inc.*, -- F. Supp. 2d --, 2014 WL 3513130 at *1, *2 & n.1 (M.D. Ala. Jul. 16, 2014); *C & L Intern. Trading Inc. v. American Tibetan Health Institute, Inc.*, -- F.Supp.2d --, 2014 WL 2883945, at*1, *3 (S.D.N.Y. Jun. 25, 2014). Even courts of appeals regularly take judicial notice of facts, presumably without tranching on the rights of litigants. *See, e.g., Sierra Club v. E.P.A*, 762 F.3d 971, 975 & n.1 (9th Cir. 2014) ("We take judicial notice…."); *Michigan v. U.S. Army Corps of Engineers*, 758 F.3d 892, 899 (7th Cir. 2014) (same); *In re Semcrude, L.P.*, 728 F.3d 314, 326 & n.11 (3rd Cir. 2013) (same); *see id.* ("In accord with the usual view, judicial notice may be taken *at any stage of the proceedings, whether in the trial court or on appeal.*") (emphasis added) (quoting Fed. R. Evid. 201, Advisory Committee's Note).

Perhaps these exceedingly well-established practices are what Respondents had in mind when, several weeks after the hearing record closed in this proceeding,[7] they asked the Tribunal for the first time to take notice of facts elucidated in six numbered paragraphs spanning two pages under the heading "Facts Subject to Judicial Notice." Document 178, Addendum A to Respondent's Post-Hearing Brief (Aug. 8, 2014), ¶¶ 31-36.[8] If so, they appear with the present Motion to have reversed course and concluded

[7] *See* Document 171 (Jul. 14, 2014).
[8] These facts included not only court documents but also the contents of several web pages.

that their own August 8 request that facts be noticed by the Tribunal was untimely, and that to grant the relief they sought in that request would be "prejudicial," Br. at 4, since that is the indispensable upshot of their argument here. But as the above authorities show, they were right the first time. Nothing precludes the Tribunal from taking official notice at any point in the proceeding, including after the hearing record has closed – and no one is prejudiced by its power to do so.[9]

B. The Tribunal's Orders taking official notice are themselves sufficient "notice"

Respondents next argue that they are prejudiced by the Tribunal's failure to give them "prior notice" that it would take official notice. Respondents point to no provision of the Rules of Adjudication requiring the Tribunal to give "prior notice" of the taking of official notice. Rule 303(c), the provision that empowers the Tribunal to take official notice, contains no such requirement. Respondents rely on the part of Rule 304(b) stating that "[c]orrections shall not be ordered by the hearing officer except upon notice and opportunity for the hearing of objections." But Rule 304(b) applies only to "Corrections of the official transcript…." 12 C.F.R. § 1081.304(b).[10] Nor do Respondents explain how they have been prejudiced.

Rather than requiring prior notice, Rule 303(c) merely entitles the parties, in the event that "official notice . . . is taken," to "an opportunity to disprove such noticed fact"

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[9] While Respondents' initial position regarding *when* judicial notice may be taken was correct, the merits of Respondents' own request for judicial notice are not at issue here. Therefore, for purposes of responding to the present motion, Enforcement takes no position on whether the Tribunal should grant Respondents' request.

[10] This is clear both from the reference to "Corrections of the official transcript" in the opening sentence of Rule 304(b) and the fact that the sentence immediately following the one on which Respondents rely requires that "[s]uch corrections … be made by the official reporter by furnishing substitute type pages, under the usual certificate of the reporter, for insertion in the official record."

upon request. 12 C.F.R. § 1081.303(c). That opportunity necessarily comes after "official notice . . . is taken." Respondents' motion, at best, constitutes a request for such an opportunity.[11]

In any case, the Tribunal's orders themselves provide sufficient notice, so there can be no prejudice. The D.C. Circuit has indicated that such notice can come in the administrative opinion and order disposing of the case. *West Virginia Public Servs. Comm'n v. D.O.E.*, 681 F.2d 847, 864 & n. 89 (D.C. Cir. 1982) (an opportunity to "show the contrary" of an officially noticed fact under § 556(e) of the Administrative Procedure Act "could have come only after the order was issued … since official notice was first taken in the opinion…."). Here, of course, notice in advance of such an order has been given in the form of the September 23 and 25 Orders, issued prior to service of the Tribunal's recommended decision.

Moreover, because the Tribunal has not yet indicated what use, if any, it will ultimately make of the facts officially noticed, Respondent's "request for clarification" is both unripe and unnecessary, and should be denied.

C. The Tribunal may take official notice on its own motion

Respondents then argue that the Tribunal lacks the power to take official notice in the absence of a party's request that it do so. Under the Federal Rules of Evidence, however, a "court … may take judicial notice on its own," as well as on request of a party.

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[11] Respondents do not suggest that any of the noticed facts is incorrect. It is therefore unclear that Respondents have made the request for an opportunity to disprove any of those facts. To the extent Respondents' motion seeks an opportunity to argue the inferences to be drawn from noticed facts, it is untimely and unsupported by any Rule. *See* Br. at 4 (official notice "runs the risk of the Tribunal misinterpreting the materials and/or prevents Respondents from identifying any subsequent material change in circumstances….").

Fed. R. Evid. 201(c). Moreover, an administrative body's "ability to take official notice of a fact does not turn on whether any of the parties has filed a formal motion." Op. of the Comm'n and Final Order, *In Re Telebrands Corp.*, 140 F.T.C. 278, 2005 WL 6241018, at *30 & n.59 (Sept. 19, 2005) (citing *Dobrota v. INS*, 195 F.3d 970, 973 (7th Cir. 1999)). Rather, it may take such notice *sua sponte*, as the Tribunal has done here. *See* Final Enforcement Decisions, *In re Cavallari*, 80 Fed.Res.Bull. 1046, 1994 WL 616173, at *4 (F.R.B. Nov. 1994) (Tribunal taking official notice with no reference to any request from a party to do so). Thus, for instance, the FTC's "adjudicative rules specifically anticipate the possibility that in rendering a decision on the merits the Commission sua sponte will take official notice of a material fact." *In Re Telebrands Corp.*, 2005 WL 6241018, at *30 & n.59 (citing 16 CFR § 3.43) (similar to Rule 303(c)).

Nothing in the Rules of Adjudication precludes official notice *sua sponte*, and in fact the Rules appear to contemplate it. In empowering the Hearing Officer to take official notice where appropriate, Rule 303(c) refers to circumstances where "[o]fficial notice is requested *or* is taken of a material fact…." 12 C.F.R. § 1081.303(c) (emphasis added). The disjunctive "or" contemplates instances where official notice may be taken but has *not* been requested by a party. Any other reading renders the phrase "or is taken" surplusage. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (quotations omitted).

Again, the rule Respondents argue for is nowhere to be found in judicial or administrative practice, nor could it be – it cramps that practice needlessly.

D. The SEC filings are within the definition of facts subject to official notice

Respondents' Motion makes no attempt to "disprove"[12] the facts noticed by the Tribunal – indeed, as to PHH Corporation's SEC filings, it endorses them as reliable. Br. at 4. But even if Respondents were to make such an argument, it would fail. Many courts have found it appropriate, in applying language identical to that of Rule 303(c), to "take judicial notice of properly-authenticated public disclosure documents filed with the SEC." *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000) (collecting cases). Similarly, although the SEC itself has a rule specifying that official notice may be taken of "any matter in the public official records of the Commission,"[13] other administrative agencies as well – lacking such a rule – have taken official notice of the SEC's filed records. *See, e.g.,* Decision and Order, *In re Chicago Bridge & Iron Co.*, 139 F.T.C. 553, 2005 WL 6300817 at *10 & n.82 (F.T.C. August 30, 2005) ("Although this 10-K filing was not part of the record, we take official notice of it…."); Mem. Op. and Order, *In re App. Of WWOR-TV, Inc.*, 6 FCC Rcd. 193, 1990 WL 602978, at *2 & n.7 (F.C.C. Dec. 26, 1990) ("We take official notice of the material filed with the [SEC]….").

Conclusion

The Rules of Adjudication, as well as customary administrative and court practice, support the Tribunal's taking of official notice in the September Orders, and Respondents are not – and could not be – prejudiced by the manner or timing of that notice. Although under Rule 303(c) litigants before this Tribunal are entitled "upon timely request" to be "afforded an opportunity to disprove …[officially] noticed fact[s],"

[12] 12 C.F.R. § 1081.303(c).
[13] 17 C.F.R. § 201.323.

Respondents' request in the alternative for "clarification" is unripe. Respondents' motion should be denied in its entirety.

DATED: October 15, 2014

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 15th day of October 2014, I caused a copy of the foregoing "Enforcement Counsel's Response in Opposition to Respondents' Objection, Motion for Reconsideration, or, in the Alternative, Request for Clarification of the Orders Taking Judicial Notice" to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service on behalf of Respondents:

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