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' RENEWED OBJECTION TO THE ORDERS TAKING OFFICIAL NOTICE

The Tribunal has exercised its power to take official notice of a small number of unremarkable facts. Respondents' latest challenge to this clearly enumerated power in the form of a "renewed objection" is simply a motion for reconsideration that restates their previous, rejected arguments. It raises no new issues and points to no clear error or injustice flowing from the Tribunal's order, and should not be considered. Alternatively, Respondents' filing contends for a rule of law not supported by the Adjudication Rule they cite in support of it, and that, even if it did control, would not entitle Respondents to relief. Respondents' request should be denied.

Background

On September 23 and September 25, 2014, the Tribunal issued orders taking official notice of certain filings with the Securities and Exchange Commission (S.E.C. filings) relating to Respondent PHH Corporation and several third parties, respectively. Documents 188-89. On September 29, 2014, Respondents filed an "Objection, Motion for Reconsideration or, in the Alternative, Request for Clarification of the Orders Taking Judicial Notice" (Sept. 29 Motion). Documents 190-91. Enforcement filed a brief in opposition (Enf. Opp. Br.) on October 15, 2014, Document 192, and Respondents filed a reply brief (Reply) on October 20, 2014, Document 194. The Tribunal ruled on October 22, 2014 in an "Order Taking Judicial Notice and Granting in Part Respondents' Objection to Judicial Notice" (Oct. 22 Order). Document 196. The Tribunal rejected, *inter alia*, Respondents' argument that the record may not be supplemented "once the [hearing] record is closed," Oct. 22 Order at 1, and Respondents' argument that official notice may not be taken in the absence of a party's request for such notice, *Id*. at 2. The Tribunal also elucidated a brief list of ten facts taken from the S.E.C. filings of which it was taking notice, together with certain facts previously cited by Respondents in their post-hearing briefing, and ordered that "any party seeking to disprove any officially noticed fact shall file an objection thereto no later than October 31, 2014." *Id*. at 3.

On October 31, 2014, Respondents filed a "Renewed Objection to the Orders Taking Official Notice as Clarified by the Order Dated October 22, 2014" (Resp. Br.). In that document, Respondents did not attempt to disprove any of the facts officially noticed by the Tribunal. Respondents did not suggest that any of those facts were untrue. Respondents instead argued, among other things, that the Tribunal's ruling that it may take official notice even though Enforcement did not "request" that it do so

"misses the point," Resp. Br. at 2; that, in spite of the Tribunal's contrary holding, "there is no basis to permit the proffer of new 'evidence'" in the form of officially noticed facts after the hearing has closed, *id*. at 3-4;[1] and that the Tribunal's identification of material facts was "insufficient" and did not "satisfy due process" because it did not supply "context," *id.* at 5. Respondents said they "do not understand how or why [a] purported fact is relevant," *id.* at 6, that a noticed fact did "not give Respondents sufficient notice of what use the Tribunal intends to make of it," *id.*, and that they were entitled to "understand the point" of official notice before notice could be taken, *id*. at 7.

Argument

A. Respondents' "renewed objection" should not be entertained by the Tribunal because it is a motion for reconsideration that points to no change in law or evidence and no clear error or injustice

Respondents' filing is not an "objection:" they have made no effort to disprove any of the officially noticed facts. It should be construed instead as what it is, a motion for reconsideration – and the Tribunal should decline to entertain it.

Once again, Respondents have filed papers styled as "renewed" that simply seek to re-litigate settled matters. *See* Respondent's Renewed Motion to Dismiss, or in the Alternative, to Narrow the Notice of Charges (Apr. 18, 2014), Document 101; Order on Dispositive Motions (May 22, 2014), Document 152 (May 22 Order), at 2 ("[Respondents'] Dismiss Motion also seeks to revisit certain issues I have already resolved, and to that extent it is properly construed as a motion for reconsideration."). A "motion for reconsideration is not an opportunity for the moving party 'to argue those issues already considered when a party does not like the way the original motion was

[1] *See also id*. at 4 ("Respondents again respectfully disagree.").

resolved.'" *Lichtenberg v. Besicorp Group Inc.*, 28 Fed. Appx. 73, 75 (2d Cir. Jan. 25, 2002) (quoting *In re Houbigant, Inc.*, 914 F. Supp. 997, 1001 (S.D.N.Y.1996)). In the absence of a specific rule governing a motion for reconsideration, this Tribunal has elected "to follow the standard applicable in federal court," May 22 Order at 1, under which a movant must establish "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court issued the prior order; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice," *id*. at 2 (citing *In re Linerboard Antitrust Litig.*, 361 F. App'x 392, 396 (3d Cir. 2010)). As this high standard suggests, motions for reconsideration "are generally disfavored," *Lincoln Gen'l. Ins. Co. v. Kingsway Amer. Agency, Inc.*, 2013 WL 458449, at *1 (M.D. Pa. Feb. 6, 2013) (citation omitted), and "are granted sparingly...," *Romero v. Allstate Ins. Co.*, 1 F.Supp.3d 319, 420 (E.D. Pa. 2014).

Respondent's papers establish no change and no error. Acknowledging that the Tribunal has rejected their prior arguments,[2] Respondents nevertheless re-urge those arguments, misconstrue the authorities, and cite scant case law, none of it new. There is no clear error, no manifest injustice, and no basis for reconsideration. Respondents' motion should not be entertained by the Tribunal.

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[2] *See, e.g.*, Resp. Br. at 3 ("nowhere in its analysis does the Tribunal explain how the administrative adjudication process can comport with due process...."), at 4 ("the Tribunal accuses Respondents of 'mischaracterize[ing]' Rule 304 .... Respondents respectfully disagree."), at *id*. ("The Tribunal's stated basis for rejecting Respondents' arguments....").

B. Respondents have been afforded due process

Respondents argue that "mere identification" of material facts "without any context" violates due process. They cite no case, statute, treatise, or other authority on official notice for this proposition. They cite only Rule 303(c), but do not say why.

In fact, just as Rule 303(c) provides, Respondents were given notice of the particular facts of which the Tribunal sought to take official notice, and provided an opportunity to furnish evidence to the contrary or to call into doubt the accuracy of the noticed facts. They failed to do so.[3] As a result, nothing bars the Tribunal from taking official notice of the stated facts.

The Administrative Procedure Act (A.P.A.) similarly dictates that "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to *show the contrary*." 5 U.S.C.A. § 556(e) (emphasis added). Contrary to Respondent's assertions, where official notice has been taken, the plain language of these authorities do not guarantee a litigant an opportunity to offer further argument in support of their case, or a right to discern the tribunal's intent in noticing a fact. They refer only to the opportunity for a party to "disprove" or "show the contrary [of]" the noticed fact. Rule 303(c) and the A.P.A. do not, for instance, specify that a party is entitled to know the "context" of a noticed fact, Resp. Br. at 5, to "understand how or why [the] purported fact is 'material' or 'relevant,'" *id*. at 6, to receive "notice of what use the Tribunal

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[3] Indeed, it is not clear that Respondents have any interest in whether the noticed facts are true or not, since they do not appear to have reviewed the SEC filings by other entities at issue here. *See* Resp. Br. at 9 ("While *it is possible* that the SEC filings of these various entities contain these statements....") (emphasis added).

intends to make" of a noticed fact, *id.*, or otherwise to "understand the point" of notice in a given instance, *id.* at 7.

For the second time, Respondents seize upon Enforcement's citation to *West Virginia Public Services Commission v. DOE* and quote from it at length.[4] But the quoted language stands only for the proposition – contained in Rule 303(c) and, in fact, explicitly noted by Enforcement in the same brief[5] – that a party is entitled to an opportunity to disprove an officially noticed fact. That opportunity has been given to Respondents; they have spurned it. They are entitled to no more.

Moreover, even assuming, *arguendo*, that a party were entitled to know the "context" or challenge the materiality of an officially noticed fact, any such context will be fully supplied in the Tribunal's Recommended Decision. *See* 12 C.F.R. § 1081.400(c). That decision does not become the Bureau's decision until and unless it is subsequently adopted as such by the Director, *see* 12 U.S.C. § 5563(b)(3) and 12 C.F.R. § 1081.400, and before it can be, it is first subject to a *de novo* right of appeal,[6] *see* 12 C.F.R. § 1081.402. The availability of that intervening right of appeal under Rule 402 permits Respondents (or any party) an opportunity fully to challenge any such "context," and thus would allay any possible, notional due process concern, if it were presented here. *See Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (citations/quotations omitted); *id.* at 334 ("Due process is flexible and calls

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[4] 681 F.2d 847, 864, n. 89 (D.C. Cir. 1982); *see* Resp. Br. at 3, Reply at 5.
[5] *See* Enf. Opp. Br. at 6-7.
[6] *See Vineland Fireworks Co., Inc. v. B.A.T.F.E.*, 544 F.3d 509, 514 (3d Cir. 2008) (under the A.P.A. "Congress permits [an] agency to limit its review using its regulation-promulgating powers, but if it chooses not to do so, it exercises de novo review over the ALJ's decision.") (citing 5 U.S.C. § 557(b)).

for such procedural protections as the particular situation demands.") (citations/quotations omitted). Thus, even assuming due process had not yet been satisfied (which under Rule 303(c) it has), any request for relief is unripe.

Conclusion

Respondents are not entitled endlessly to rehash arguments the Tribunal has already rejected. They have been given what Rule 303(c) entitles them to, and even if they had not, they will receive it once the Recommended Decision issues. There is no basis for relief.

DATED: November 6, 2014

Respectfully submitted,

Cara Petersen
Acting Deputy Enforcement Director for Litigation

Sarah J. Auchterlonie
Assistant Deputy Enforcement Director for Litigation

/s/ Donald R. Gordon
Donald R. Gordon
Kimberly J. Ravener
Navid Vazire
Thomas Kim
Enforcement Attorneys
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Telephone: (202) 435-7357
Facsimile: (202) 435-7722
e-mail: donald.gordon@cfpb.gov

Enforcement Counsel

Certificate of Service

I hereby certify that on this 6th day of November 2014, I caused a copy of the foregoing "Enforcement Counsel's Response in Opposition to Respondents' Renewed Objection to 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:

Mitch Kider
kider@thewbkfirm.com

David Souders
souders@thewbkfirm.com

Sandra Vipond
vipond@thewbkfirm.com

Roseanne Rust
rust@thewbkfirm.com

Michael Trabon
trabon@thewbkfirm.com

Leslie Sowers
sowers@thewbkfirm.com

/s/ Donald R. Gordon
Donald R. Gordon