

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.)

ORAL ARGUMENT REQUESTED

MOTION AND MEMORANDUM OF PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC, ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE CORPORATION TO COMPEL THE CFPB TO COMPLY WITH ITS DISCLOSURE OBLIGATIONS UNDER RULE 206

Pursuant to 12 C.F.R. § 1081.205, respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, “Respondents”), move for an Order compelling the CFPB to comply with its disclosure obligations under Rule 206 of the Bureau’s Rules.¹ In support of this Motion, Respondents state as follows:

BACKGROUND

Since at least 2008, the CFPB, and its predecessor, the U.S. Department of Housing and Urban Development (“HUD”), have been conducting an investigation “to determine whether

¹ This Motion relates only to the documents produced by the CFPB and identified as having been previously produced by Respondents since that is all that the CFPB produced to date pursuant to Rule 206. The CFPB has represented to Respondents that the total number of documents it intends to produce is approximately 100,000. Respondents anticipate that many of these additional documents were collected by the U.S. Department of Housing and Urban Development (“HUD”), which has been investigating the issue of private mortgage reinsurance since at least 2008. If, as explained below, it is the intention of the Bureau to simply produce documents, regardless of their materiality to this administrative proceeding, then Respondents will be filing a subsequent motion in connection with those future productions.

premium ceding practices by PHH involving captive reinsurers and private mortgage insurance carriers comply with Section 8 of RESPA.” *See* Decision and Order of Director Cordray on PHH’s Motion to Modify or Set Aside Civil Investigative Demand, dated September 20, 2012, at 5 (Attachment A, hereto).

As it relates to documents demanded from Respondents, the Enforcement Division served, and the CFPB ordered compliance with, a broad-ranging Civil Investigative Demand (“CID”) dated May 22, 2012. When Respondents sought to narrow the scope of the CID, Director Cordray overruled every one of Respondents’ objections, finding, *inter alia*, that the Bureau needed broad requests because of the “substantial information gap between the Bureau and [Respondents].” *Id.* at 3. As a result of its insistence on compliance with such overly broad demands, the Bureau has collected in excess of 21,000 separate documents from Respondents. Now, the CFPB has initiated an administrative action against Respondents. Pursuant to Rule 206, the Bureau is required to produce to Respondents “documents obtained by the Office of Enforcement prior to the institution of proceedings, from persons not employed by the Bureau, *in connection with the investigation leading to the initiation of proceedings.*” 12 C.F.R. § 1081.206 (emphasis added). The production must “commence” “no later than seven days after service of the notice of charges.” *Id.* § 1081.206(a)(1) & (d). On February 5, the CFPB delivered a hard drive to Respondents that contained all of the documents that were produced by Respondents in response to the overly broad CID.²

² The hard drive consists of materials produced by PHH only and contains 145,259 “pages” of documents. Many of those pages, however, are simply place holders which, when the native file is opened, link to numerous other documents sometimes totaling thousands of pages. Respondents estimate that the 26 GB of data the CFPB sent back totals many hundreds of thousands of pages of documents.

ARGUMENT

I. THE BUREAU'S PRODUCTION VIOLATES RULE 206

The Bureau's decision to "dump" every document produced by Respondents back on them as purported "compliance" with Rule 206, in fact, violates the Rule. In its commentary accompanying the Final Rules of Practice for Adjudicative Proceedings (the "Final Rules"), the CFPB stated: "Section 1081.206 is intended to give respondents access to the *material facts* underlying enforcement counsel's decision to recommend the commencement of enforcement proceedings." 77 Fed. Reg. 39058, 39073 (June 29, 2012) (emphasis added), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-06-29/pdf/2012-14061.pdf>. *See also id.* at 39059 ("The goal in adopting the SEC's approach is to ensure that respondents have prompt access to the non-privileged documents *underlying enforcement counsel's decision to commence enforcement proceedings*, while eliminating much of the expense and delay often associated with pre-trial discovery in civil matters."); *id.* at 39073 ("Through the affirmative disclosure process, the Office of Enforcement will turn over the documents that informed its decision to recommend the institution of proceedings"); *id.* at 39074 ("Rather than provide the respondent with access to all of the documents that in any way relate to it or its business -- including many completely unrelated to the proceeding -- *enforcement counsel will turn over those documents that enforcement counsel obtained or considered in its decision to proceed in the particular action.*") (emphasis added). *Cf. In Re Michael Sassano, et al.*, 2007 SEC LEXIS 2779, at *3 (Nov. 30, 2007) (Although it denied interlocutory review, the Commission noted the SEC Enforcement Division's position that "only documents gathered in the file leading to the [Division's] specific recommendation [to institute proceedings] need be made available" pursuant to the SEC's disclosure rule, 17 C.F.R. § 201.230.).

One need only examine the first of the 21,000 documents on the hard drive to understand what the CFPB has done. Specifically, the first email produced, Bates-labeled CFPB-PHH-00000001-2 is an August 10, 2007 email from Mark Johnson to a number of individuals titled “Pro Forma with revised warehouse” and two spreadsheets are attached. A copy of the email with certain pricing data redacted is Attachment B hereto. This email has nothing to do with private mortgage insurance or reinsurance; accordingly, the August 10, 2007 email from Mr. Johnson is certainly not “material” to “enforcement counsel’s decision to recommend the commencement of enforcement proceedings.”

The CFPB’s position that compliance with Rule 206 is achieved by handing back copies of every document it collected in response to its overly broad demands from Respondents is nonsensical and renders that portion of Rule 206 a meaningless exercise. Respondents already have copies of what they provided. Thus, the only legitimate reading of Rule 206 is to require, as stated in the Bureau’s commentary when it issued the Rule, the production of documents that are *material* to its investigation; otherwise, what possible need would there be to give Respondents back a copy of their own documents? To hold otherwise would simply allow the Bureau to bury Respondents with the documents produced in response to its overly broad CID and would contravene the administrative adjudication process which the CFPB describes as providing for only limited discovery. As such, the Bureau’s statement that “the affirmative disclosure process will promote a fair and efficient resolution of administrative proceedings without placing the respondents at an unfair disadvantage,” 77 Fed. Reg. at 39073, is patently false.

II. THE BUREAU'S TACTICS CONSTITUTE "TRIAL BY AMBUSH"

The CFPB's decision not to identify those documents that contain material information that led to the decision to bring this enforcement proceeding constitutes the classic "trial by ambush." *See, e.g., Johnson v. Volvo Parts N. Am.*, 2011 U.S. Dist. LEXIS 102682, at *3-4 (S.D. Ohio Sept. 9, 2011) ("The purpose of discovery is, after all, to enable each party to prepare adequately for trial and to eliminate the prospect of 'trial by ambush.'"). The cases are legion in the civil discovery context that Fed. R. Civ. P. 34(b)(2)(E) "prohibits 'simply dumping large quantities of unrequested materials onto the discovering party along with the items actually sought.'" *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 410 (S.D.N.Y. 2009) (citing 8A Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, *Federal Practice & Procedure*, § 2213 (2008)); *see also In re: Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 351, 363 (N.D. Ill. 2005) (producing party is "not at liberty under federal discovery rules to dump massive amounts of documents . . . on their adversaries and demand that they try to find what they are looking for"). As the court in *United States v. O'Keefe* explained, "[Rule 34] was amended in 1980 to prevent the juvenile practice whereby the producing party purposely rearranged the documents prior to production in order to prevent the requesting party's efficient use of them." 537 F. Supp. 2d 14, 19 (D.D.C. 2008).

In issuing its Final Rules, the Bureau made clear that the hearing officer's powers "are intended to further the Bureau's goals of an expeditious, fair, and impartial hearing process." 77 Fed. Reg. at 39061. Indeed, the Bureau stated that the disclosure requirements of Rule 206 "help[] ensure that respondents have a complete understanding of the factual basis for the Bureau's action and can more accurately and efficiently determine the nature of their defenses or whether they wish to seek settlement." *Id.* at 39070. Accordingly, due process mandates that the

Bureau identify only those documents that it relied upon in deciding to bring this administrative proceeding. Stated otherwise, requiring Respondents to guess which documents the Bureau relied upon to bring the action, when such information is already in the hands of the Bureau, is not “expeditious” or “fair.” Having represented to the public through its Final Rules that respondents would be entitled to understand the factual basis underlying an enforcement action, the CFPB cannot backtrack and undo those public representations through its conduct.

CONCLUSION

The CFPB’s commentary to the Final Rules contains numerous statements regarding the “fairness” of those Rules. *See, e.g.*, 77 Fed. Reg. at 39058 (“In drafting the final rule, the Bureau endeavored to create an adjudicatory process that provides for the expeditious resolution of claims while ensuring that parties who appear before the Bureau receive a fair hearing.”). While the Rules provide for fairness in theory, in practice that is not the case where, as here, the Bureau has simply “dumped” Respondents’ documents back on them and has deliberately refused to identify the documents that it materially relied upon in deciding to file this enforcement action. The Bureau spent two years demanding more and more documents from Respondents. By now producing every document back to Respondents, the CFPB is either shirking its obligations under Rule 206, or it is designating every one of the 21,000 documents as “material” to its case. If, in fact, the CFPB is designating all 21,000 documents as material, then Respondents will have no choice but to designate every document produced by the CFPB as an exhibit in this action.

Dated: February 17, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

By: /s/ David M. Souders

Mitchel H. Kider, Esq.
David M. Souders, Esq.
Sandra B. Vipond, Esq.
Rosanne L. Rust, Esq.
1300 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 628-2000

Attorneys for Respondents
PHH Corporation, PHH Mortgage Corporation, PHH Home
Loans, LLC, Atrium Insurance Corporation, and Atrium
Reinsurance Corporation

RULE 205 CERTIFICATION

Pursuant to Rule 205(f), counsel for Respondents certifies that they have conferred with counsel for the Enforcement Division in a good faith effort to resolve the issues raised by this Motion and have been unable to resolve the matter by agreement.

By: /s/ David M. Souders

David M. Souders, Esq.
Weiner Brodsky Kider PC
1300 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 628-2000

Attorney for Respondents
PHH Corporation, PHH Mortgage Corporation, PHH Home
Loans, LLC, Atrium Insurance Corporation, and Atrium
Reinsurance Corporation

CERTIFICATION OF SERVICE

I hereby certify that on the 17th day of February, 2014, I caused a copy of the foregoing Motion and Memorandum of PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation to Compel the CFPB to Comply with Its Disclosure Obligations Under Rule 206, and proposed Order, to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties who have consented to electronic service:

Sarah Auchterlonie
Sarah.Auchterlonie@cfpb.gov

Donald Gordon
Donald.Gordon@cfpb.gov

Kim Ravener
Kim.Ravener@cfpb.gov

Navid Vazire
Navid.Vazire@cfpb.gov

Thomas Kim
Thomas.Kim@cfpb.gov

Kimberly Barnes
Kimberly.Barnes@cfpb.gov

Fatima Mahmud
Fatima.Mahmud@cfpb.gov

/s/ Rosanne L. Rust
Rosanne L. Rust