

UNITED STATES OF AMERICA  
Before the  
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING  
File No. 2014-CFPB-0002

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In the Matter of: )  
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PHH CORPORATION, ) ENFORCEMENT COUNSEL'S  
PHH MORTGAGE CORPORATION, ) MOTION *IN LIMINE* TO  
PHH HOME LOANS LLC, ) EXCLUDE TESTIMONY OF  
ATRIUM INSURANCE CORPORATION,) PERSONS NOT NAMED ON  
and ATRIUM REINSURANCE ) RESPONDENTS' AMENDED  
CORPORATION ) WITNESS LIST  
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**Table of Authorities**

**Cases**

*Gonzalez v. State*, 777 So.2d 1068 (Fla. Dist. Ct. App. 2001) .....4

*In re Otero County Hospital Association, Inc.*,  
Bankruptcy No. 11–11–13686 JL, 2014 WL 184984 (D.N.M. Jan. 15, 2014) .....5

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**Statutes & Regulations**

12 C.F.R. § 1081.215 .....1, 3

Enforcement Counsel files this motion *in limine* to preclude any person not specifically identified by name on Respondents' Amended Witness List from testifying at the hearing in this proceeding.

Rule 215(a)(2) of the Consumer Financial Protection Bureau's (CFPB) Rules of Practice for Adjudication Proceedings provides that each party must, within the time set by the hearing officer, serve on the other party: "A *final list* of witnesses to be called to testify at the hearing, *including the name* and address of *each witness* and a short summary of the expected testimony of each witness." 12 C.F.R. § 1081.215(a)(2) (emphases added). Rule 215(c) provides: "No witness may testify ... at the hearing if such witness ... is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown." 12 C.F.R. § 1081.215(c).

At the Scheduling Conference held on February 14, 2014, Respondents insisted that the hearing commence within 60 days of the filing of the Notice of Charges. *See* 2/14/14 Hearing Tr. at 5:9-13 (attached hereto as Exhibit A). As a result of Respondents' request, the Hearing Officer ruled that the hearing would commence on March 24, 2014, and set a March 10 deadline for the parties to exchange witness lists. *Id.* at 7:18-9:20, 23:25-24:9. On February 18, 2014, the Hearing Officer issued an Order formally requiring the parties to "exchange and file witness lists" by March 10, 2014. *See* 2/18/14 Order.

On March 10, 2014, both parties filed and served their witness lists. In addition to naming 22 specific individuals, Respondents' Witness List (attached hereto as Exhibit B) reserved the following additional 13 general categories of witnesses:

- Corporate Representative from AIG United Guaranty Mortgage Insurance Company ("UGI") 230 N. Elm Street, Greensboro, North Carolina 27401, to testify concerning pmi reinsurance agreements, negotiations and discussions regarding Atrium's reinsurance and trust agreements, cession statements, commutation/termination of reinsurance agreements, and dealings with state and federal regulators.

- Corporate Representative from Genworth Mortgage Insurance Company, 6601 Six Forks Road, Raleigh, North Carolina 27615, to testify concerning pmi reinsurance agreements, negotiations and discussions regarding Atrium's reinsurance and trust agreements, cession statements, commutation/termination of reinsurance agreements, and dealings with state and federal regulators.
- Corporate Representative from Radian Group, Inc., 1601 Market Street Philadelphia, Pennsylvania 19103, to testify concerning pmi reinsurance agreements, negotiations and discussions regarding Atrium's reinsurance and trust agreements, cession statements, commutation/termination of reinsurance agreements, and dealings with state and federal regulators.
- Corporate Representative from CMG Mortgage Insurance Company, 3003 Oak Road Walnut Creek, California 94597, to testify concerning pmi reinsurance agreements, negotiations and discussions regarding Atrium's reinsurance and trust agreements, cession statements, commutation/termination of reinsurance agreements, and dealings with state and federal regulators.
- Corporate Representative from Mortgage Guaranty Insurance Corporation, 250 E Kilbourn Ave, Milwaukee, Wisconsin 53202, to testify concerning pmi reinsurance and trust agreements, the commutation/termination of such agreements, dealings and negotiations with lenders and reinsurance providers, including Respondents, and communications with state and federal regulators.
- Corporate Representative from Old Republic International Corporation, 307 N. Michigan Ave., Chicago, Illinois 60601, to testify concerning pmi reinsurance and trust agreements, the commutation/termination of such agreements, dealings and negotiations with lenders and reinsurance providers, including Respondents, and communications with state and federal regulators.
- Corporate Representative from Triad Guaranty, Inc., 101 South Stratford Road Winston-Salem, North Carolina 27104, to testify concerning pmi reinsurance and trust agreements, the commutation/termination of such agreements, dealings and negotiations with lenders and reinsurance providers, including Respondents, and communications with state and federal regulators.
- Corporate Representative from PMI Group, Inc., PMI Plaza 3003 Oak Road Walnut Creek, California 94597, to testify concerning pmi reinsurance and trust agreements, the commutation/termination of such agreements, dealings and negotiations with lenders and reinsurance providers, including Respondents, and communications with state and federal regulators.
- Corporate Representative from Essent Guaranty, Inc., 101 S. Stratford Rd, Winston-Salem, North Carolina 27104, to testify concerning pmi reinsurance and trust agreements, the commutation/termination of such agreements, dealings and negotiations with lenders and reinsurance providers, including Respondents, and communications with state and federal regulators.

- Representative from the Office of the Comptroller of the Currency (“OCC”) to testify regarding the approval of captive reinsurance subsidiaries for National Banks.
- Representative from the OCC, as successor to the Office of Thrift Supervision (“OTS”), to testify regarding the approval of captive reinsurance subsidiaries for entities under the supervision of the OTS.
- Representative from the Federal National Mortgage Association (“FNMA” or “Fannie Mae”), 3900 Wisconsin Ave., NW, Washington, DC 20016, to testify regarding the requirements for pmi, claims made by FNMA under pmi policies, and the approval process for pmi providers.
- Representative from the Federal Home Loan Mortgage Corporation (“FHLMC” or “Freddie Mac”), 8200 Jones Branch Dr., McLean, VA 22102, to testify regarding the requirements for pmi, the decision in 2008 to limit pmi providers to a maximum cede of 25%, claims made by FHLMC under pmi policies, and the approval process for pmi providers.

On March 14, 2014, Respondents’ filed an Amended Witness List that includes these same general categories. *See* Exhibit C.<sup>1</sup>

Respondents’ reservation of the right to call unnamed individuals falling within these 13 general categories does not comply with the requirement of Rule 215(a)(2) that the witness list shall be “final” and must include “the name ... of each witness.” 12 C.F.R. § 1081.215(a)(2). As required by Rule 215(c), the Hearing Officer should preclude Respondents from calling any witness to testify at the hearing who was not explicitly identified by name in their final witness list, as amended on March 14, 2014. Specifically, Enforcement Counsel requests that the Hearing Officer strike each of the aforementioned categories from Respondents’ Amended Witness List.

Respondents’ failure to specifically identify their additional witnesses by name by the deadline in the Order is, without more, sufficient under Rule 215(c) to grant Enforcement Counsel’s motion. However, to the extent the Hearing Officer nonetheless considers whether Enforcement Counsel is prejudiced by that failure, allowing Respondents to present testimony at the hearing from

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<sup>1</sup> Respondents’ Amended Witness List included two additional witnesses interviewed by the Bureau on March 7 and 10, 2014, respectively. Respondents received transcripts of those interviews on March 11, 2014. Enforcement Counsel does not object to the addition of those two witnesses.

unnamed witnesses would severely impair Enforcement Counsel's ability to adequately prepare for the hearing. The 13 general categories in Respondents' Witness List amount to a catch-all list encompassing virtually anyone – from any entity that Respondents consider to be conceivably relevant to the issues in this proceeding – who might have information that Respondents believe supports their defense. Those categories include almost all of the major mortgage insurance companies (including but not limited to the four that had captive arrangements with Atrium) and several large governmental agencies. The “short summary of the expected testimony of each witness” provided for each entity is so overly broad, general and vague that Enforcement Counsel cannot adequately prepare an examination of those yet-to-be identified witnesses even as to the topics identified. For example, “disclosing” that various individuals from various mortgage insurance companies might testify about anything relating to “pmi reinsurance” or “dealings and negotiations with lenders and reinsurance providers” is effectively no disclosure at all. And without knowing their identities, Enforcement Counsel cannot interview any of these individuals, nor can it effectively search for documents targeted to either the particular individual or the overly broad topics. Moreover, even though Respondents will present most or all of their witnesses in the later part of the hearing, Enforcement Counsel was entitled to disclosure of all of Respondents' specific witnesses by name by the deadline, sufficiently in advance of the hearing, so that it would have time to account for those witnesses and their intended topics of testimony in preparing its overall case strategy that it will implement starting on the first day of the hearing.

The purpose of pretrial disclosures is to prevent trial by ambush. *See, e.g., Gonzalez v. State*, 777 So.2d 1068, 1069 (Fla. Dist. Ct. App. 2001) (“Pre-trial disclosure of witnesses eliminates ‘surprise and prevents trial by ambush.’) (internal citation omitted). That purpose is not served by a witness list that includes broad categories of potential witnesses on the eve of the hearing. For example, in *Van Beek v. Robinson*, No. 11–10514, 2013 WL 409225 at \*1 (E.D. Mich. Feb. 1, 2013),

the plaintiff included on its “may call” witness list a category for “Other Persons Who Have Been Searched By [the Defendants] Whose Identities Are Not Yet Known.” The court granted the defendants’ motion to exclude testimony from individuals falling within that category because “listing this broad category of persons fails to put Defendants and the Court on reasonable notice of how many witnesses Plaintiff may in fact call, *fails to provide the identities of those witnesses, leaves Defendants without knowledge of the substance of their proposed testimony*, and could ultimately result in additional ‘trials within a trial.’” *Id.* at \*5 (emphasis added). The Court concluded that the plaintiff provided no authority that would allow her to maintain “hypothetical witnesses” on the “eve of trial” and struck those unnamed individuals from the witness list. *Id.*

Similarly, in *In re Otero County Hospital Association, Inc.*, Bankruptcy No. 11–11–13686 JL, 2014 WL 184984, at \*10 & n. 19 (D.N.M. Jan. 15, 2014), the court held that it would “not regard *designation of a corporate representative, without naming an individual*, as an adequate disclosure of trial witnesses in the pretrial order” and that “[i]t would be inappropriate for a party to add an individual to its fact witness list in the pretrial order issued by this Court based on Rule 30(b)(6) discovery in the State Court Litigation after expiration of the fact witness disclosure deadline before this Court.” (emphasis added).

The hearing will commence in less than one week. There is no good cause to allow Respondents a unilateral extension to add new witnesses at some later date. As an initial matter, Respondents have not even filed a motion requesting such an extension, much less established any legitimate justification for granting one.<sup>2</sup> Respondents cannot show good cause for their failure to identify, by the deadline set in the Order, the specific individuals from these 13 companies or government agencies they will call to testify at the hearing. No one forced Respondents to insist on a

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<sup>2</sup> Any such motion should have been filed before the March 10, 2014 deadline. Because Enforcement Counsel has already disclosed its Witness List, granting an extension now would provide Respondents with an unfair tactical advantage. *See infra* p. 6.

hearing date that would require expedited deadlines for pretrial submissions such as the witness lists. If Respondents needed additional time to develop their defense and to identify and select their final witnesses for the hearing, they were free to request a schedule that would have allowed for such time. Respondents cannot have it both ways by requesting a schedule that required Enforcement Counsel to finalize and serve its witness list by March 10, 2014, while simultaneously reserving for themselves additional time to ascertain and disclose their own witnesses.

Finally, giving Respondents an extension to identify additional witnesses will provide them with a significant unfair tactical advantage. Enforcement Counsel filed its Witness List by the deadline, including a “summary of the expected testimony of each witness” as required by Rule 215. Respondents would gain a strategic advantage if they are allowed to tack on new witnesses to their list after having already received and reviewed Enforcement Counsel prehearing disclosures, or even after Enforcement Counsel has presented its witnesses at the hearing.

For the foregoing reasons, pursuant to the requirements of Rule 215(c), Enforcement Counsel respectfully requests that the Hearing Officer enter an order excluding any person not specifically identified by name on Respondents’ Amended Witness List from testifying at the hearing.



DATED: March 19, 2014

Respectfully submitted,

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*Enforcement Counsel*

**Rule 205 Certification**

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

DATED: March 19, 2014

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**Certificate of Service**

I hereby certify that on this 19<sup>th</sup> day of March 2014, I caused a copy of the foregoing “Enforcement Counsel’s Motion *in Limine* to Exclude Testimony From Persons Not Named in Respondents’ Witness List” 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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