UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of:	)	
PHH CORPORATION,	)	**ENFORCEMENT COUNSEL'S**
PHH MORTGAGE CORPORATION,	)	**MOTION TO STRIKE**
PHH HOME LOANS LLC,	)	**RESPONDENTS' PURPORTED**
ATRIUM INSURANCE CORPORATION,	)	**MOTIONS *IN LIMINE***
and ATRIUM REINSURANCE CORPORATION	)	

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Enforcement Counsel for the Consumer Financial Protection Bureau (Bureau) files this motion to strike the four purported motions "in limine" filed by Respondents on March 19, 2014.

INTRODUCTION

Seven weeks after Enforcement Counsel filed its Notice of Charges and just days before the hearing commences, Respondents filed four motions "in limine" (Motions) seeking to dismiss or strike claims asserted by Enforcement Counsel in this administrative proceeding.[1] Although Respondents inserted the phrase "in limine" in their titles – a transparent attempt to justify filing those motions on the eve of the hearing – they are plainly not motions in limine because they do not even claim to deal with evidentiary issues. *See Luce v. U.S.*, 469 U.S. 38 (1984) (stating that a motion in limine "in a broad sense" refers to any motion "to exclude anticipated prejudicial evidence before the evidence is actually offered"). Rather, they are all dispositive motions because they explicitly seek dismissal of Enforcement Counsel's claims based on substantive grounds.

Enforcement Counsel requests that the Hearing Office strike Respondents' Motions. First, motions in limine should not be used to seek resolution of substantive issues, such as dismissal of claims, and "motions in limine" that are dispositive motions in disguise are routinely rejected without consideration of the merits of the substantive arguments. Second, Respondents waived any right to file a second round of dispositive motions because they failed to mention at the Scheduling Conference that they intended to do so, as required by the Bureau's Rules of Practice for Adjudication Proceedings (Rules of Practice). Third, even if Respondents' waiver is overlooked, the

[1] These motions are: (1) Respondents' Motion in Limine to Preclude the Bureau From Using These Proceedings to Regulate the Business of Insurance or Collaterally Attack the Actions of State Insurance Regulators (Motion No. 1); (2) Respondents' Motion in Limine to Strike the Bureau's Claims for Remedies Other Than Injunctive Relief for Conduct Prior to July 21, 2011 (Motion No. 2); (3) Respondents' Motion in Limine to Dismiss Respondents Atrium Insurance Corporation and Atrium Reinsurance Corporation for Lack of Statutory Authority (Motion No. 3); and (4) Respondents' Motion In Limine to Strike Claims Predicated on Ceding Payments Allowed by the Bureau in April and May 2013 (Motion No. 4).

Motions are still untimely and improper because Respondents could have filed their Motions well before the start of the hearing; instead, they waited to file them at a time when they will serve no purpose other than to harass Enforcement Counsel as it finalizes its preparation for the hearing.[2]

ARGUMENT

I. Respondents' Motions Should be Stricken Because They Improperly Seek Dismissal of Substantive Claims and Do Not Request an Evidentiary Ruling.

A motion in limine should not be used as a vehicle to seek dismissal of substantive claims or defenses. When parties file dispositive motions under the guise of a motion in limine, courts routinely reject them as improper. For example, in *Royal Indemnity Company v. Liberty Mutual Fire Insurance Company*, the court explained that a motion in limine is a motion "to restrict or eliminate *evidence*." No. 07-80172-CIV, 2008 WL 2323900 at *1 (S.D. Fla. June 5, 2008) (emphasis added). Thus, motions in limine are "inappropriate for resolving substantive issues" and not a proper "mechanism by which [courts] address or narrow the issues to be tried" or a "means of testing issues of law." *Id.* The court rejected the motion in limine at issue on the basis that the motion sought "a ruling from the Court . . . as a matter of law" and granting the motion "would be essentially entering a partial motion for summary judgment via a motion in limine." *Id.*

This principle is applied in courts across the country. *See*, *e.g.*, 75 Am. Jur. 2d Trial § 44 (2014) ("The use of motions in limine to summarily dismiss a portion of a claim has been condemned, and the trial courts are cautioned not to allow motions in limine to be used as unwritten and unnoticed motions for summary judgment or motions to dismiss."); *Tuttle v. Tyco Elecs. Installation Servs., Inc.*, No. 2:06-cv-581, 2008 WL 343178 (S.D. Ohio Feb. 7, 2008) (holding that motions in limine "are inappropriate vehicles to seek a final determination with respect to a

[2] As discussed in Section IV below, if the Hearing Officer declines to strike the Motions, because they are dispositive motions, Enforcement Counsel should be afforded the full 20 days required under Rule 212(f) to file an opposition brief containing its substantive responses to Respondents' arguments. 12 C.F.R. § 1081.212(f).

substantive cause of action") (internal quotation marks and citation omitted); *Provident Life & Acc. Ins. Co. v. Adie*, No. 95–40183, 176 F.R.D. 246 (E.D. Mich. Sept. 29, 1997) (holding that a motion in limine was not appropriate vehicle to resolve substantive factual issues because motions in limine "involve matters which ought to be excluded from the jury's consideration due to some possibility of prejudice or as a result of previous rulings by the court); *Hana Fin., Inc. v. Hana Ban*k, 735 F.3d 1158, 1162 n.4 (9th Cir. 2013) ("A motion in limine is not the proper vehicle for seeking a dispositive ruling on a claim, particularly after the deadline for filing such motions has passed.").

Respondents' Motions do not request exclusion of evidence because it will tend to prejudice the finder of fact. Rather, they explicitly seek to dismiss substantive claims.[3] Consistent with the authority discussed above, Respondents' Motions should be stricken because they are facially improper motions in limine.[4]

II. Respondents' Motions Should be Stricken Because They Waived Any Right to File Multiple Rounds of Dispositive Motions.

Rule 203(a) of the Rules of Practice provides: "As early as practicable before the scheduling conference described in paragraph (b) of this section, counsel for the parties shall meet to … discuss and agree, if possible, on the matters set forth in paragraph (b) of this section." 12 C.F.R. § 1081.203(a). Paragraph (b) of Rule 203 in turn requires the following: "At the scheduling

[3] Having elected for strategic purposes to file their requests as motions in limine, Respondents' Motions should be held to the requirements for granting a motion in limine. *See*, *e.g.*, 75 AM. JUR. 2d Trial § 52 (2014) (a motion in limine "should be granted only when the trial court finds that the material or evidence in question will be inadmissible at trial under the rules of evidence, and that the mere offer, reference, or statements made during the trial concerning the material or evidence will tend to prejudice the jury"). Respondents should not be allowed to avoid the requirements for granting a motion in limine while obtaining advantages from using the "in limine" label – such as the ability to file motions in limine shortly before the hearing, a shorter deadline for Enforcement Counsel's response compared to the response period for dispositive motions, *compare* 12 C.F.R. § 1081.204(d) *with* 12 C.F.R. § 1081.212(f), and a shorter deadline for the decision, compare 12 C.F.R. § 1081.204(g) with § 1081.204(h). Respondents' Motions do not deal with evidentiary issues at all.

[4] To the extent the Hearing Officer treats the Motions "in limine" as dispositive motions, they should be stricken for the reasons discussed in Sections II and III below.

conference, counsel for the parties shall be prepared to address … *Whether or not the parties intend to move for summary disposition of any or all issues*." 12 C.F.R. § 1081.203(b)(emphasis added). Rule 203 further requires the parties to be prepared to discuss at the scheduling conference "Such other matters as may aid in the orderly disposition of the proceeding." 12 C.F.R. § 1081.203(b)(9).

When counsel for the parties met and conferred before the Scheduling Conference, Respondents had already filed their first dispositive motion (January 31 Dispositive Motion). *See* 1/31/2014 Motion to Dismiss or, in the Alternative, for Summary Judgment. Respondents did not mention during that meeting that they might file multiple additional dispositive motions.

During the February 14, 2014 Scheduling Conference, as required by Rule 203(b), the Hearing Officer asked the parties about dispositive motions, and the parties discussed the schedule for briefing and oral argument on Respondents' January 31 Dispositive Motion and whether Enforcement Counsel would file any dispositive motions. *See* 2/14/14 Hearing Tr. at 28-32 (attached hereto as Exhibit A). At no time did Respondents mention that they might file additional dispositive motions, much less that they would do so days before the hearing. Instead of apprising the Hearing Officer and Enforcement Counsel of this information, Respondents simply insisted on a hearing date in March, which the Hearing Officer granted. *Id.* at 5.

On February 18, 2014, the Hearing Officer entered a Scheduling Order that accommodated Respondents' request that the hearing commence in March. *See* 2/18/14 Order. The Scheduling Order does not contemplate additional dispositive motions. As the Hearing Officer observed at the Scheduling Conference, a March hearing date would make any further dispositive motions, even one filed as early as February 14 (the date of the Scheduling Conference), impracticable.[5]

[5] The Hearing Officer noted that even if Enforcement Counsel filed its dispositive motion on the same day as the scheduling conference, such a motion would not be practical because briefing would be completed right before the start of the hearing. *See* 2/14/14 Hearing Tr. at 30 (attached hereto as Exhibit A).

Under Rule 203(a), Respondents were obligated to tell Enforcement Counsel and the Hearing Officer "[w]hether or not [they] intend[ed] to move for summary disposition of any or all issues." 12 C.F.R. § 1081.203(a). The plain language of that requirement encompasses "any or all" summary disposition motions yet to be filed.[6] The potential filing of additional dispositive motions (whether a motion to dismiss or a summary disposition motion) was also clearly critical to crafting a schedule that would "aid in the orderly disposition of the proceeding," 12 C.F.R. § 1081.203(b)(9), particularly when filed days before the hearing. Thus, to the extent the Hearing Officer regards the Motions as dispositive motions, because Respondents failed to disclose this information at the parties' meet and confer before the Scheduling Conference or at the Scheduling Conference itself, as required by Rule 203, the Hearing Officer should hold that Respondents waived any right to file additional dispositive motions. Respondents cannot circumvent the Rules and the schedule for this proceeding (which it insisted on) simply by adding the "in limine" label to the title of their Motions.

Nor can Respondents contend that the legal arguments raised in their Motions were not known or knowable before the Scheduling Conference. There is no reason that Respondents could not have included those legal arguments in their January 31 Dispositive Motion.[7] But even if

[6] To the extent the Hearing Officer regards the Motions as dispositive motions rather than motions in limine, they can all be treated as summary disposition motions (rather than motions to dismiss) because they rely on matters outside of the pleadings. *See*, *e.g.*, Motion No. 1 at 2 (alleging that state regulators made "determinations … approving the reinsurance arrangements at issue," that those determinations show that Atrium offered "real" reinsurance, and that "Vermont has a comprehensive insurance and reinsurance regulatory regime"); Motion No. 2 at 3-4 (alleging that "there is no possibility that [conduct in question] would resume" and relying on Florida Consent Orders); Motion No. 3 at 3 (alleging that "Moving Respondents do not participate in 'designing, operating or maintaining' the loans made by the Lender Respondents, nor do they 'process transactions' relating to the loans"); Motion No. 4 (relying on Florida Consent Orders and documents attached to Motion No. 4).

[7] In an attempt to justify filing additional dispositive motions not contemplated in the Scheduling Order, Respondents pepper their Motions with statements made at various oral arguments or hearing. The fact that Respondents believe such statements are consistent with, or provide additional support for, their legal arguments does not mean that those legal arguments themselves were not known or knowable long before. In any event, with respect to at least Motions Nos. 1-3,

Respondents had not yet developed those arguments by that time, or they simply forgot to include them, Respondents – not Enforcement Counsel – should bear the consequences of that failure because the parties were required under Rule 203 to be "prepared to address" their intentions with regard to dispositive motions at the Scheduling Conference. If there was any uncertainty on Respondents' part as to whether or not they had thoroughly uncovered all potential dispositive legal arguments, they were free to request a schedule that allowed more time, rather than insisting on a March hearing date.

III. Respondents Should Not Be Permitted to File Dispositive Motions on the Eve of the Hearing.

Even if the Hearing Officer were to overlook Respondents' waiver, the Motions should still be denied as untimely and improper because, as discussed above, there is no legitimate justification for Respondents' decision to file them three business days before the hearing. As discussed above, the legal arguments raised for the first time in the Motions were known or knowable when this proceeding was initiated on January 29, 2014, so Respondents could have included those arguments in their January 31 Dispositive Motion.[8] At a minimum, Respondents should have requested leave

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Respondents cannot even move to reconsider based on those statements because they did not make the arguments initially in their January 31 Dispositive Motion. In Motion No. 4 (judicial estoppel), Respondents reiterate the same legal arguments made in their January 31 Motion, which the Hearing Officer rejected; Respondents merely assert that subsequent statements provide further support for those same arguments. That does not justify a second "bite at the apple."

[8] Courts generally disfavor multiple successive dispositive motions, particularly when the arguments raised in the second motion could have been included in the initial motion and/or when the second motion is filed without leave. For example, in *Mulholland v. U.S.*, 25 Cl. Ct. 748, 759 (Cl. Ct. 1992), the court was "very concerned as to why the defendant failed to develop all dispositive issues upon the filing of its initial motion …." The court noted the "fragmentary nature of defendant's 'partial' motions for summary judgment" and concluded: "What is most troubling, against this background, is the fact that the second motion was *filed without leave of court*. Obviously, such actions on the part of the defendant are not consonant with the spirit of the summary judgment rules, nor do they further the interests of judicial economy." *Id.* (emphasis added). *See also Klatch-Maynard v. Sugarloaf Tp.*, No. 3:06–cv–0845, 2011 WL 3476814 at *2 (M.D. Pa. 2011) ("The time for dispositive motions has passed, and Defendants have not sought leave of court to file a dispositive motion *nunc pro tunc*. Accordingly, the Court must deny Defendants' motion in limine on this issue."). Permitting

shortly after the Scheduling Conference to file an additional dispositive motion and extend the hearing date as necessary to accommodate the briefing schedule, rather than waiting until March 19 to drop them on Enforcement Counsel with less than a day's notice.

Respondents' conduct is strikingly similar to that of the plaintiffs in *Dunkin' Donuts, Inc. v. Romanias*, No. Civ.A.00–1886, 2002 WL 32955492 at *2 (W.D. Pa. May 29, 2002). In that case, the court found that the plaintiffs' motion in limine was actually a "substantive challenge belong[ing] either in a Motion to Dismiss or a Motion for Summary Judgment" and held that the dispositive motion was "untimely" because it was filed "on the eve of trial." The court noted that the plaintiffs had known that a dispositive motion "would likely delay trial," but they "declined to file any such motions" because they were "[e]ager to proceed to trial." *Id.* The court concluded: "They should not now be permitted, days before trial, to circumvent the timelines and deadlines associated with dispositive motions. The Motion is DENIED." *Id.*

Numerous other courts have refused to consider dispositive motions filed on the eve of trial under the name of a "motion in limine," particularly when the dispositive motion could have been filed well before trial. *See*, *e.g.*, *Provident Life,* 176 F.R.D. at 249-51 (holding that purported motion in limine was actually a dispositive motion and thus it was improper for the defendant to "have filed a motion in limine on the eve of trial" when he had notice of the grounds for his motion "from the early stages of this lawsuit" and therefore should have filed a dispositive motion earlier); *Tuttle v. Tyco Elecs. Installation Services, Inc.*, No. 2:06-cv-581, 2008 WL 343178 (S.D. Ohio Feb. 7, 2008) (rejecting "Defendants' request to exclude evidence of emotional damages" because "it is more a motion for judgment on the pleadings or for summary judgment on the issue of emotional damages than it is a motion in limine" and the "time for filing such dispositive motions has long closed and Defendants

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Respondents' additional dispositive motions without leave would also allow them to circumvent the 35-page limit on opening briefs for dispositive motions. 12 C.F.R. § 1081.212(e).

cannot evade this Court's deadlines simply by captioning its dispositive motion in a creative manner."); *Avaya Inc. v. Telecom Labs, Inc.*, Civ. No. 06–2490, 2014 WL 97335, at *4 n. 19 (D.N.J. Jan. 7, 2014) (denying "several motions in limine seeking to limit or preclude several of [plaintiff's] claims" because "such substantive motions were made for the first time on the eve of trial").

Respondents' decision to file additional dispositive motions on the Wednesday before the hearing raises serious questions. As Respondents explained in their January 31 Dispositive Motion, summary judgment is "designed to secure the just, speedy and inexpensive determination of every action." January 31 Dispositive Motion at 19, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotation marks omitted). But Respondents' Motions will not avoid the expense of the hearing. Even if it were appropriate for Respondents to have filed four dispositive motions right before the hearing (it is not), a decision would likely not be rendered until after the hearing has concluded (or perhaps near the end of the hearing), due to the time required by the Rules of Practice for full briefing, oral argument (at the request of either party), and a decision. 12 C.F.R. § 1081.212(f)-(h). These Motions were filed at a time when they will serve no purpose other than to harass Enforcement Counsel as it makes its final preparations for the hearing. *See*, *e.g.*, *Merrill v. Chicago & Illinois Midland Ry.*, 751 F. Supp. 770, 772 (C.D. Ill. 1990) (where defendant filed motion to dismiss claims for lack of jurisdiction on the eve of trial, court noted that "the timing, nature and circumstances of the motion indicated that Defendant was not sincere, but intended the motion only to harass …").

IV. If the Hearing Officer Declines to Strike Respondents' Motions, Enforcement Counsel Should be Given 20 Days to Respond.

Because Respondents' Motions are dispositive motions, if the Hearing Officer declines to strike them, Enforcement Counsel should be afforded the full 20 days required under Rule 212(f) to file opposition briefs containing its substantive responses to the arguments in Respondents' Motions. 12 C.F.R. § 1081.212(f).

DATED: March 20, 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 20, 2014

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Certificate of Service

I hereby certify that on this 20th day of March 2014, I caused a copy of the foregoing "Enforcement Counsel's Motion to Strike Respondents' Purported Motions *in Limine*" 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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