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 OPPOSITION TO RESPONDENTS' MOTION TO COMPEL**

Enforcement Counsel submits its brief in opposition to Respondents' Motion to Compel, and in support thereof states:

I. SUMMARY

Respondents seek an order from this court requiring Enforcement Counsel to identify, in addition to the records cited in the Notice of Charges and prior to the date determined in the Scheduling Order for the exchange of exhibits, "those documents that contain material information that led to the decision to bring this enforcement proceeding." *Resp. Mot. to Compel* at 5, filed Feb. 18. 2014 (Dkt. 35). Their motion ignores a plain reading of the Rule of Practice governing disclosures of Enforcement's investigative file as well as analogous Securities and Exchange Commission precedent, which inform that Enforcement meets its production obligations by producing its entire non-privileged investigative file. Respondents' motion should be denied.

II. BACKGROUND

Enforcement Counsel filed a detailed Notice of Charges in this matter on January 29, 2014. Pursuant to Rule 206(d), 12 C.F.R. § 1081.206(d), within seven days of filing the Notice of Charges, on February 5, 2014, Enforcement Counsel commenced its document disclosures by delivering to Respondents an electronic load file comprising approximately 21,000 documents (26 GB), including all documents of which Enforcement Counsel was then aware that had previously been produced by Respondents to the Office of Enforcement in the course of the investigation that led to this proceeding. Enforcement Counsel added Bates label numbering specific to this proceeding to these records. In addition, it produced to PHH, for its convenience only and upon its request, an index that associated the proceeding bates labels with the bates labels that PHH originally applied to the records.[1] On March 4, 2014, two business days after entry of a protective order under Rule 119, 12 C.F.R. § 1081.119,[2] Enforcement Counsel produced to Respondents a hard disk drive of third party documents comprising approximately 260 GB. The documents were provided in the electronically searchable form in which they are kept by the Office of Enforcement and included all necessary document metadata suitable for loading into a Concordance or similar database. Enforcement Counsel also produced on March 4, 2014 compact disks of relevant publicly available records and witness transcripts.

III. ARGUMENT

The plain language of Rule 206 compels Enforcement Counsel to provide its entire investigative file, not just selected portions, stating: "the Office of Enforcement shall make available for inspection and copying by any respondent documents obtained by the Office of Enforcement

[1] Enforcement Counsel initially produced document MD5 hashtag metadata that could have been used for the same purpose.

[2] Production of this material on Monday, March 03, 2014 was impeded due to a snowstorm in the Washington, DC metro area and resultant government "closure."

prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings." 12 C.F.R. § 1081.206(a)(1). Rule 206 does not state anywhere that these documents must be marked, selected, or specifically identified.

Nevertheless, PHH relies on a disconnected string of quotes from Part 1081's staff commentary to urge that Enforcement Counsel must identify only those documents that it relied upon in deciding to bring this administrative proceeding. Resp. Br. at 6. But reliance on staff commentary is not necessary because the Rule's language is clear. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear."). Moreover, read in context, the cited references in the commentary plainly refer to the fact that "material" documents will be disclosed as part of the overall disclosure obligation – not to any additional obligation to limit disclosure to such documents, or to identify them within the overall production.

Furthermore, SEC decisions interpreting the model for this plain language,[3] Rule of Practice 230(a)(1), also support the plain reading of Rule 206. SEC decisions consistently hold or take for granted that it is Enforcement Counsel's obligation to make available to Respondents its "entire investigative file," subject to certain enumerated withholding exceptions. *In re Bridge et al.*, Rel. Nos. 9068, 60736 (S.E.C. Sept. 29, 2009) (holding the Enforcement Division "complied with the requirements of Rule 230" where, among other things, "[t]he Division represents that it made available its entire non-privileged investigative file to Respondents …."); *In re Becker*, Ad. Proc. 3-11367 (S.E.C. May 12, 2004) ("…Rule [230]… requires the Division to provide [respondent] with an opportunity for inspection and copying of the investigative file."); *In re Butler*, Ad. Proc. 3-13986,

[3] Commentary to Rules of Practice for Adjudication Proceedings, 12 CFR 1081.206, 77 Fed. Reg. No. 126 at 39070 (June 29, 2012) (Rule 206 is "[m]odeled primarily after the SEC Rules, 17 CFR 201.230").

at *2 (S.E.C. Jan. 19, 2011) ("Respondent was advised of his right to inspect and copy the Division's investigative file, pursuant to Rule 230 of the Commission's Rules of Practice."); Order, *In re Park Financial Group, Inc.*, Ad. Proc. 3-12614 (S.E.C. Aug. 30, 2007) ("The Division's Response states, that after the OIP was filed, it made its entire non- privileged investigative file available to [Respondent] for inspection and copying as required by Rule 230. The file consisted of 'more than 20 boxes and 50,000 papers consisting of documents obtained from third parties, correspondence, litigation pleadings, testimony and deposition exhibits, and 28 transcripts of sworn investigative and deposition testimony.' In addition, the Division represents that … [respondent] *has all the Division's evidence in his possession*.") (emphasis added); *In re Hall et al.*, Ad. Proc. 3-12208 (S.E.C. Apr. 17, 2006), at *1 ("The documents that the Division of Enforcement [ ] are *required to make available* to Respondents pursuant to 17 C.F.R. § 201.230 (Investigative File) comprise approximately 700 boxes of documents and multiple transcripts.").

In an analogous SEC matter, *John Thomas Capital Mgmt. Grp. LLC*, 2013 WL 6384275, at *4-5, the respondents contended that the Division of Enforcement violated its disclosure obligations under Rule 230(b)(2)by producing its entire investigative file and not specifically identifying material exculpatory or impeaching evidence within the production.[4] The Commission held that the Division met its obligations under the Rule when it provided respondents with an electronically searchable Concordance database of 700 GB of files that were kept in the "same way the files are kept by the

[4] Respondents in *John Thomas* also argued that the production deprived them of the benefit of the *Brady* doctrine, which was effectively "incorporated" in administrative proceedings by Rule 230(b)(2). *John Thomas Capital Mgmt. Grp. LLC*, 2013 WL 6384275, at *5. This argument is inapposite as applied to the Bureau's Rule 119, as the Commentary to the Final Rule explicitly provides that the Bureau's proceedings are civil and *Bra*dy does not apply, "The Bureau declines to adopt the SEC Rules' explicit reference to *Brady v. Maryland*, 373 U.S. 83 (1963) in this context. Proceedings under this part are civil in nature, not criminal, and the requirements of *Brady* are therefore inapplicable." 77 Fed. Reg. 39071 (June 29, 2012) (Tab 1).

Division." *Id.* Likewise, Bureau Enforcement Counsel are also providing to Respondents records from its electronically searchable database that are kept the same way Enforcement Counsel keep them, except the Bureau's production is less than half of the size noted in *John Thomas Capital.*[5] *Id.*

Moreover, *John Thomas* also supports the proposition that a full investigative file disclosure does not affect Respondent's due process rights, holding that even if the administrative hearing were a criminal proceeding, the "open file" production would satisfy criminal proceeding disclosure obligations. *John Thomas Capital Mgmt. Grp. LLC*, 2013 WL 6384275, at *5 (quoting *Strickler v. Greene*, 527 U.S. 263, 283 n.23 (1999) ("an 'open file' policy…could well 'increase the efficiency and the fairness of the criminal process.'")

Finally, the *Sassano* SEC case cited by Respondents is inapposite.[6] In *Sassano*, respondents sought a broader, not narrower, set of documents than the Enforcement Division disclosed, namely documents gathered under a different investigation number. *Sassano*, Ad. Proc. 3-12554 (S.E.C. Nov. 30, 2007). This request was granted in part by the law judge, and interlocutory review was denied by the Commission.

CONCLUSION

Rule 206, 12 C.F.R. § 1081.206(a)(1), plainly requires Enforcement Counsel to produce to Respondents its entire non-privileged investigative file and Respondents can point to no language in Rule 206 requiring identification of certain documents. Moreover, Respondents' oblique string of references to due process, fairness, and efficiency in Part 1081's staff commentary is not compelling

[5] To the extent that Respondents suggest they are prejudiced by the volume of Enforcement Counsel's disclosures (or of its anticipated further disclosure), "the argument that the size of the investigative file renders complete review of it prior to the hearing 'not feasible,' such that relief is justified, was recently rejected by the[S.E.C.]." *In re Harding Advisory LLC*, Ad. Proc. 3-15574, Rel. No. 1195[5] (S.E.C. Jan. 24, 2014) (citing *John Thomas Capital Mgmt. Grp. LLC*, Advisers Act Rel. No. 3733, 2013 WL 6384275, at *5 (Dec. 6, 2013)).

[6] *Michael Sassano*, Exchange Act Release No. 56874, 2007 WL 4699012, at *3 (Nov. 30, 2007).

in the face of analogous authority clearly holding that an "open file" disclosure meets even the strict criminal standards for document disclosures. Accordingly, Respondents' motion should be denied.

Dated: March 4, 2014

Respectfully submitted,

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Enforcement Counsel

Certificate of Service

I hereby certify that on this 4th day of March 2014, I caused a copy of the foregoing "Enforcement Counsel's Opposition to Respondent's Motion to Compel" 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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