

UNITED STATES OF AMERICA  
Before the  
CONSUMER FINANCIAL PROTECTION BUREAU  
March 7, 2014

ADMINISTRATIVE PROCEEDING  
File No. 2014-CFPB-0002

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In the Matter of	:	
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PHH CORPORATION,	:	ORDER DENYING
PHH MORTGAGE CORPORATION,	:	RESPONDENTS' MOTION
PHH HOME LOANS LLC,	:	TO COMPEL
ATRIUM INSURANCE CORPORATION, and	:	
ATRIUM REINSURANCE CORPORATION	:	

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On January 29, 2014, the Consumer Financial Protection Bureau (Bureau or CFPB) filed a Notice of Charges Seeking Disgorgement, Other Equitable Relief, and Civil Money Penalty (Notice) in this proceeding. The hearing is currently scheduled to commence on March 24, 2014, in Philadelphia, PA.

**Background**

Pending before me is Respondents' Motion and Memorandum to Compel the CFPB to Comply With Its Disclosure Obligations Under Rule 206 (Motion), filed on February 18, 2014, with two attachments thereto and a Proposed Order (Proposed Order). The Office of Enforcement (Enforcement) timely filed an Opposition to Respondents' Motion (Opposition) together with two attachments: the Rules of Practice for Adjudication Proceedings, 77 Fed. Reg. 39058 (June 29, 2012) (Rules), and a copy of John Thomas Capital Management. Group LLC, Investment Advisers Act of 1940 Release No. 3733, 2013 WL 6384275 (Dec. 6, 2013). Respondents timely filed a Reply (Reply) with one attachment, a letter from Enforcement to Respondents dated March 4, 2014 (Letter). In Response to the Reply, Enforcement submitted a letter dated March 6, 2014, directly to this Office, and in response to that letter, Respondents submitted their own letter, dated March 7, 2014, directly to this Office (collectively, Unfiled Letters).

On February 5, 2014, five days after the Notice issued, Enforcement delivered a hard drive to Respondents containing a partial production of the investigative file, pursuant to Rule 206. Motion at 2; Reply at 1 n.1; see 12 U.S.C. § 1081.206. I held a scheduling conference on February 14, 2014, at which time, at Respondents' request and over Enforcement's objection, I ordered the hearing to commence within sixty days of service of the Notice. Scheduling Conference Transcript (Transcript) at 17, 21. Enforcement objected on the ground that a hearing start date within sixty days was not practicable because there was no protective order governing treatment of confidential materials from third parties in the investigative file, and Enforcement therefore was not able to produce such materials to Respondents. Id. at 15-16.

On February 20, 2014, I denied without prejudice the parties' Joint Stipulated Motion for a Protective Order. On February 28, 2014, I entered a Protective Order Governing Discovery Material, to which the parties and various third parties had stipulated. On March 4, 2014, the next business day (U.S. government offices in Washington, D.C., were closed on March 3, 2014), Enforcement produced an electronic version of the remainder of the producible portion of the investigative file to Respondents, except for certain electronic communications and witness interview notes. Letter.

### Discussion

Respondents, relying heavily on the commentary to Rule 206 for support, argue that Enforcement violated Rule 206 by dumping on Respondents every document it received, including those received from Respondents, rather than identifying and providing only the documents that Enforcement materially relied upon in deciding to file this action. Motion at 3-4, 6. Respondents quote from certain passages of the commentary to the Rules stating that Rule 206 was intended to provide respondents with "access to the material facts underlying enforcement counsel's decision to recommend" the Notice. *Id.* (quoting 77 Fed. Reg. at 39073-74). Respondents also argue that due process requires Enforcement to limit their disclosures under Rule 206 just to those documents it relied upon in deciding to bring this proceeding. *Id.* at 5-6.

Accordingly, the Motion requests an order "compelling [Enforcement] to comply with its disclosure obligations under Rule 206." Motion at 1. Specifically, Respondents request an order directing Enforcement to "re-disclose to Respondents only those documents that contain the material facts underlying enforcement counsel's decision to recommend the commencement of this enforcement proceeding." Proposed Order.

The Motion contains a qualification: it "relates only to the documents produced by the CFPB and identified as having been previously produced by Respondents." Motion at 1 n.1. If documents not previously produced by Respondents are also not screened and selected for their materiality, however, "Respondents will be filing a subsequent motion in connection with those future productions." *Id.* The Reply, however, asserts that Enforcement's March 4, 2014, production (containing documents not previously produced by Respondents) was late, and requests two new forms of relief: dismissal of the Notice, and alternatively an extension to Respondents' deadlines for filing their exhibit and witness lists. Reply at 4.

Rule 206 requires Enforcement to "make available for inspection and copying by any respondent 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 institution of proceedings." 12 C.F.R. § 1081.206(a)(1). It sets forth five specific categories of documents that "shall" be produced, and six specific categories of documents that "may" be withheld. *Id.* at § 1081.206(a), (b). The enumerated documents must be made available for inspection and copying at the Bureau's offices "no later than seven days after service" of the Notice, with copying costs borne by Respondents. *Id.* at § 1081.206(d)-(f). Enforcement has the discretion to make electronic copies of documents available. *Id.* at § 1081.206(f). If a document required to be made available is not, "no rehearing or redecision of a proceeding already heard or decided shall

be required unless the respondent establishes that the failure to make the document available was not harmless error.” Id. at § 1081.206(h).

The relief requested in the Motion is authorized neither by Rule 206 nor by the commentary to the Rules. Nothing in Rule 206 requires Enforcement to identify what it believes is material, and then point that out to Respondents. Respondents point to no authority supporting their contention that the commentary to Rule 206 is legally binding. The language in the commentary, in context, is best understood as an explanation for why Rule 206 specified certain documents for disclosure and certain documents for withholding. That is, in implementing the Rules the Bureau made the general determination that, for example, civil investigative demands and documents turned over pursuant to them were material and should be produced, but that documents obtained from other governmental entities which are “not relevant to the resolution of the proceeding” are not material and may be withheld. 12 C.F.R. § 1081.206(a)(1)(i), (a)(2)(i), (b)(1)(iii). In effect, when Enforcement complies with Rule 206, it necessarily produces “those documents that contain the material facts underlying enforcement counsel’s decision to recommend the commencement of this enforcement proceeding.” Proposed Order.

As for their due process argument, Respondents make a perfectly valid point. In a case such as this, the Notice is required to set a hearing date “not earlier than 30 days nor later than 60 days after the date of service of [the Notice], unless an earlier or a later date is set by the Bureau, at the request of any party so served.” 12 U.S.C. § 5563(b)(1)(B). That is, Respondents possess a waivable statutory right to a hearing no later than sixty days after service of the Notice, and they should not be unduly prejudiced for exercising that right. See Transcript at 20-21 (quoting 12 U.S.C. § 5563(b)(1)(B)).

However, I am not persuaded that they have been unduly prejudiced. This is not a district court proceeding subject to the Federal Rules of Civil Procedure, and the cases Respondents rely on are accordingly inapposite. Motion at 5. Although John Thomas is not precisely on point, it interprets very similar administrative rules under very similar circumstances, and concludes that an “open file” production, even a very large one, satisfies those administrative rules. John Thomas, 2013 WL 6384275, at \*6.

The Reply, as noted, raises two new forms of relief requiring their own briefing, and Enforcement was not properly on notice from the Motion that such briefing was required. I thus do not address those forms of relief. Also, the Unfiled Letters, which are best construed as responses to previous filings, should have been filed in accordance with Rule 111. 12 C.F.R. § 1081.111. Although I appreciate the parties’ efforts to bring matters to my attention quickly, the Office of Administrative Adjudication and its electronic filing system have been very efficient and I have been receiving papers promptly after their official filing time. I will direct the Unfiled Letters to be formally filed, but I have not considered them in deciding the Motion.

**Order**

It is HEREBY ORDERED that Respondents' Motion and Memorandum to Compel the CFPB to Comply With Its Disclosure Obligations Under Rule 206 is DENIED.

It is FURTHER ORDERED that the above-referenced letters from Enforcement to this Office, dated March 6, 2014, and from Respondents to this Office, dated March 7, 2014, shall be FILED and made a part of the record.



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Cameron Elliot  
Administrative Law Judge  
Securities and Exchange Commission