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.

RESPONDENTS' MOTION IN LIMINE TO STRIKE THE BUREAU'S CLAIMS FOR REMEDIES OTHER THAN INJUNCTIVE RELIEF FOR CONDUCT PRIOR TO JULY 21, 2011

Pursuant to 12 C.F.R. §§ 1081.104(10) and 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 striking the Bureau's claims for relief other than injunctive relief, and for an order to show cause why injunctive relief should be available since it is undisputed that the alleged practices in question have not occurred for some time and would be functionally impossible to resume. In support of this Motion, Respondents state as follows:

At the Motions Hearing on March 5, 2014, the Bureau conceded that it cannot and would not seek relief beyond that which the U.S. Department of Housing and Urban Development ("HUD") could have obtained for conduct prior to July 21, 2011, which was the date HUD's RESPA enforcement authority transferred to the Bureau. Motions Hearing Transcript ("Tr.") at 38, Mar. 5, 2014 ("[T]o the extent that the [CFPA] creates additional remedies . . . that HUD did

not possess, we agree that those can only apply to conduct that occurred after the effective date of the statute.").

Under RESPA Section 8, HUD could only obtain "injunctive relief" and only by filing suit in court. 12 U.S.C. § 2607(d)(4). Although the Bureau asserted that "injunctive relief" is not, in fact, limited to injunctive relief (Tr. at 92), the Bureau does not dispute that it cannot obtain relief under the Consumer Financial Protection Act ("CFPA") as to conduct that occurred prior to July 21, 2011. Moreover, the Bureau's contention that it can bootstrap substantial financial penalties into its claim for "injunctive relief" is misconceived.

By way of background, the Supreme Court has held that (subject to certain qualifications) a federal court, once seized of equity jurisdiction to grant injunctive relief, can also grant certain additional equitable relief, such as a claim for equitable accounting or for disgorgement of profits. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99 (1946) (holding that "a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court *once its equity jurisdiction has been invoked,*" and noting that the statute explicitly gave courts the authority to enter "a permanent or temporary injunction, restraining order, *or other order*") (emphasis added). This general rule, however, does not apply to statutes like RESPA for which Congress has provided detailed and varied enforcement provisions for the various provisions. *See Porter*, 328 U.S. at 398 (holding that a court cannot exercise broad equitable powers where "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity"); *Edison v. Dep't of the Army*, 672 F.2d 840, 846 (11th Cir. 1982) ("Where a statute provides for certain types of relief, but not others, it is not proper to imply a broad right to injunctive

relief.”).[1] Because RESPA gave HUD only the right to seek injunctive relief, and because Congress was very precise in the relief permitted to various persons under each provision of RESPA, other equitable remedies would not have been available to HUD under *Porter* and therefore are concededly not available here. *Cf. Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2041 (2012) (noting that RESPA § 8 is enforceable through “actions for injunctive relief brought by federal and state regulators,” with no reference to any ancillary equitable relief). Therefore, Respondents are entitled to an order striking the Bureau’s claims for relief other than injunctive relief for any conduct before July 21, 2011.

Finally,—as the Honorable Cameron Elliot appeared to reference at the Motions Hearing (Tr. at 59 (“[W]hen I read the notice of charges, although there is an injunction requested in your prayer for relief, it seems like it’s all very backward looking. There’s really nothing in the notice of charges . . . that suggest that these violations are still occurring.”))—there can be no valid claim for injunctive relief here since the conduct in question is not alleged to be ongoing, there is no possibility that it would resume in light of the termination/commutation of all of

[1] One court has held, citing *Porter*, that disgorgement of profits is available under RESPA § 8. *See Jackson v. Property I.D. Corp.*, No. 07-CV-3372, Order Re: Defendants’ Motions to Dismiss, Dkt. 52 (C.D. Cal. Mar. 24, 2008). *Jackson*, an unpublished opinion not available on LexisNexis that does not appear to have been cited by any other court, was wrongly decided, and was never appealed because the case was settled after a motion to certify an interlocutory appeal was denied. In any case, *Jackson* is wholly distinguishable. In *Jackson*, the court specifically found that the defendant’s voluntary cessation of the allegedly unlawful activity did not preclude injunctive relief. Here, by contrast, the Florida Consent Orders foreclose any possibility of the resumption of the captive arrangements that are alleged to violate RESPA. Moreover, unlike a federal court, which has “inherent” equitable powers once its equitable jurisdiction is invoked, HUD had no such authority and the CFPB accordingly did not inherit any such authority from HUD. *See Ramos v. D.C. Dep’t of Consumer & Regulatory Affairs*, 601 A.2d 1069, 1073 (D.C. 1992) (“[A]dministrative law tribunals . . . within agencies of the executive branch—by definition and design do not have the inherent ‘equitable authority’ that courts in the judicial branch have derived from common law traditions and powers.”); *see also Feistman v. C.I.R.*, 587 F.2d 941, 943 (9th Cir. 1978) (“When the Tax Court was an administrative agency, it was without the ancillary equitable powers ordinarily exercised by a true court.”)

Atrium/Atrium Re's captive mortgage reinsurance agreements, and the Florida Consent Orders prohibit the private mortgage insurers from participating in any new captive reinsurance arrangement for a period of ten years.[2] Accordingly, Respondents respectfully request entry of an order to show cause why the Bureau's claim for injunction should not be stricken as well. Pursuant to Rule 205(b)(2), a proposed order is submitted herewith.

Dated: March 19, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

By: /s/ David M. Souders

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[2] The Bureau appears to agree, stating that "by seeking injunctive relief it really is a reference to the matter in which we obtained an injunction, for example, with respect to the mortgage insurers." Tr. at 59.

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.

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CERTIFICATION OF SERVICE

I hereby certify that on the 19th day of March, 2014, I caused a copy of the foregoing Respondents' Motion in Limine to Strike the Bureau's Claims For Remedies Other Than Injunctive Relief to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

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