

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 DISQUALIFY
PHH HOME LOANS LLC,) SCHNADER HARRISON SEGAL &
ATRIUM INSURANCE CORPORATION,) LEWIS LLP
and ATRIUM REINSURANCE)
CORPORATION)

)

Enforcement Counsel files this motion to disqualify Schnader Harrison Segal & Lewis LLP (Schnader) from representing any person in connection with this proceeding.

FACTUAL BACKGROUND

Schnader has represented Radian Guaranty Inc. (Radian) in connection with Enforcement Counsel's investigations of captive reinsurance practices since January 2012. On April 4, 2013, Enforcement Counsel filed a complaint alleging that Radian had violated Section 8 of the Real Estate Settlement Procedures Act (RESPA), along with a proposed consent order, in the United States district court for the Southern District of Florida. *See C.F.P.B. v. Radian Guaranty, Inc.*, No. 13 Civ. 21188 (JAL) (S.D. Fla. filed Apr. 4, 2013) (Dkt. Entry Nos. 1, 4). On April 9, 2013, the Court entered the consent order. *See id.* (Dkt. Entry No. 5). As of April 1, 2014, Radian remains a

defendant in at least three lawsuits involving claims that Radian's participation in captive mortgage reinsurance arrangements violated RESPA.¹

Enforcement Counsel filed its Notice of Charges in this proceeding on January 29, 2014. *See In re PHH Corp., et al.*, No. 2014-CFPB-0002 (C.F.P.B. filed Jan. 29, 2014). Attorneys from Schnader filed Notices of Appearance on behalf of Radian in this matter on February 14, 2014. *See id.* (Dkt. Entry for Feb. 14, 2014). On February 26, 2014, Enforcement Counsel contacted Steve Young, a former Radian employee, and requested to interview him about his time at Radian. *See* Feb. 26, 2014, email from N. Vazire to S. Young, attached hereto as Ex. A to the Declaration of Donald R. Gordon.² That same day, Mr. Young agreed to a voluntary interview, initially scheduled for February 27, 2014, and Enforcement Counsel provided Mr. Young with a form entitled "Notice to Persons Supplying Information Form" (Notice). *See* Feb. 26, 2014, email from N. Vazire to S. Young (second), Gordon Decl. Ex. B. The Notice sets forth the provisions of 18 U.S.C. § 1001 (False Statements) and 18 U.S.C. § 1621 (Perjury) and advises the person supplying information of their Fifth Amendment right against self-incrimination and their right to counsel.³ *See* Notice to Persons Supplying Information Form, Gordon Decl. Ex. C.

The telephonic interview ultimately occurred on March 7, 2014. *See* Interview Report Re: Steve Young, March 7, 2014, Gordon Decl. Ex. D. Mr. Young was not represented by counsel, and

¹ These suits include: *White, et al. v. PNC Financial Services Group, Inc., et al.*, No. 2:11 Civ. 7928 (LS) (E.D. Pa. filed Dec. 31, 2011); *Manners, et al. v. Fifth Third Bank, et al.*, No. 2:12 Civ. 442 (MRH) (W.D. Pa. filed Apr. 6, 2012) (stayed); *Menichino, et al. v. Citibank, N.A., et al.*, 2:12 Civ. 58 (MRH) (W.D. Pa. filed Jan. 13, 2012) (stayed). In two other putative class actions, the claims against Radian were dismissed without prejudice. It is not clear from the docket whether claims against Radian will be reasserted. *See Hill, et al. v. Flagstar Bank, FSB, et al.*, No. 2:12 Civ. 2770 (BMS) (E.D. Pa. Aug. 22, 2013) (Dkt. Entry No. 85); *Cunningham, et al. v. M&T Bank Corp., et al.*, No. 12 Civ. 1238 (CCC), slip op. (M.D. Pa. Jan. 31, 2014) (Dkt. Entry No. 167).

² Documents referenced herein are attached to the Declaration of Donald R. Gordon and are cited as "Gordon Decl. Ex. ____."

³ The Notice contains other information as well.

confirmed that he had read and understood the Notice. *Id.* Among other things, Mr. Young stated that (1)

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On March 7, 2014, an Enforcement Investigator contacted Frank Filippis, now a former employee of Radian, and requested a voluntary interview with him as well. *See* March 7, 2014, email from T. Ridder to F. Filippis, Gordon Decl. Ex. E. On March 14, 2014, Stephen Fogdall, an attorney at Schnader, informed Enforcement Counsel that he represented Mr. Filippis, and that after reviewing Enforcement Counsel's witness list filed with the Office of Administrative Adjudication, he had also contacted Steve Young and now represented him as well. *See* Declaration of Kimberly J. Ravener (Ravener Decl.) at ¶¶ 2-4. On March 17, 2014, Enforcement counsel provided the Notice to Mr. Fogdall for Mr. Filippis's review. *See* March 17, 2014, email from K. Ravener to S. Fogdall, Gordon Decl. Ex. F. On March 19, 2014, Enforcement Counsel interviewed Mr. Filippis by telephone.⁴ *See* Interview Report Re: Frank Filippis, Gordon Decl. Ex. G. Mr. Fogdall and David Smith, both with Schnader, were on the call. *Id.* at 1. In addition, Timothy Hunter, Radian's General Counsel, joined the call during the interview. *Id.* Mr. Filippis confirmed that he had read and understood the Notice. *Id.*

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⁴ As with the interview of Mr. Young on March 7, 2014, Enforcement Investigator Theresa Ridder was present on the call.

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On March 20, 2014, Enforcement Counsel contacted Mr. Fogdall regarding his representations in this matter. *See* Ravener Decl. at ¶¶ 5-6. Mr. Fogdall confirmed that he was engaged in three separate representations – that of Radian, Mr. Filippis in his individual capacity, and Mr. Young in his individual capacity. *Id.* at ¶ 7. Enforcement Counsel informed Mr. Fogdall that it believed he and Schnader may have a conflict of interest in their multiple representations of Radian, Mr. Fillips and Mr. Young, and advised him to file the certification required under Rule 109(b) of the Consumer Financial Protection Bureau's (CFPB) Rules of Practice for Adjudication Proceedings. *Id.* at ¶ 8. The next day, Mr. Fogdall's colleague, David Smith, wrote to Enforcement Counsel stating that "there is no basis to assert . . . that the interests of Messrs. Young and Filippis are not 'aligned' with those of our client Radian." March 21, 2014, Letter from D. Smith to K. Ravener at 1, Gordon Decl. Ex. H. Mr. Smith further asserted that Schnader's representations are not "materially limited" because all three clients were released by the consent order and Enforcement Counsel had indicated that its interest in Messrs. Young and Filippis was strictly as witnesses or sources of information, and as a result "there can be no basis for any supposed conflict." *Id.* Nonetheless, Mr. Smith claimed to have "fully discussed the possibility of conflicts of interest" with each of his clients. *Id.* He did not affirm that any of the clients had waived any potential conflicts, and asserted that the certification-of-waiver provision of Rule 109(b)(2) "has no application here," but offered to seek waivers in the future. *Id.* Mr. Smith also disclosed for the first time that Schnader had obtained Enforcement Counsel's Interview Reports summarizing interviews with current and former Radian employees, all of which had been designated "Confidential" pursuant to the protective order entered on February

28, 2014, unilaterally from Respondents' counsel.⁵ *Id.* at 2. Mr. Smith's letter did not state whether those reports were further disclosed to Radian, Mr. Filippis, Mr. Young, or anyone else. On March 24, 2014, Enforcement Counsel reiterated its expectation that Schnader would file the certification required by Rule 109(b). *See* March 24, 2014, email from K. Ravener to D. Smith and S. Fogdall, Gordon Decl. Ex. I.

On March 27, 2014, anticipating that Mr. Young would testify at the hearing in this proceeding the next day, Enforcement Counsel spoke by telephone with Mr. Young about his time at Radian. *See* Declaration of Navid Vazire (Vazire Decl.) at ¶¶ 2, 5. Mr. Young's attorney, Mr. Fogdall, was also on the call. *Id.* at ¶ 3.

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At 1:12 am on March 28, 2014, Schnader filed a certification pursuant to Rule 109(b) relating to its representation of Radian, Mr. Young and Mr. Filippis. March 28, 2014, email from S. Fogdall to

⁵ Though it is not directly at issue in this motion, Enforcement Counsel does not believe that Respondents' decision to provide the Bureau's own Confidential investigative materials to third parties is in keeping with the letter or the spirit of the Protective Order. Nowhere does the protective order provide for Respondents to unilaterally transmit Enforcement's Confidential investigative materials to third parties for the purported purpose of their own review for potentially "Highly Confidential" information. It is also unclear, at best, that this was Schnader's true purpose in seeking the Interview Reports, as they ultimately were used by Schnader for a different purpose altogether – that is, witness preparation.

Enforcement Counsel, Gordon Decl. Ex. J. Both Mr. Young and Mr. Filippo remain on the witness list for Enforcement Counsel in this matter.

ARGUMENT

Rule 109 is entitled “Conflict of interest.” Subsection 109(a) provides that “No person shall appear as counsel for another person in an adjudication proceeding if it reasonably appears that such representation may be materially limited by that counsel’s responsibilities to a third person or by the counsel’s own interests.” 12. C.F.R. § 109(a). The Rule authorizes the hearing officer to “take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.” *Id.*

Rule 109 “is modeled after the Uniform Rules, 12 C.F.R. 19.8, which were based upon the Model Code of Conduct for attorneys and the District of Columbia Ethics Rule,” Rules of Practice for Adjudication Proceedings, 77 Fed. Reg. 39058, 39063 (June 29, 2012), and therefore reflect a broad concern with addressing the participation of conflicted attorneys in Bureau proceedings. As in the federal courts, Rule 109 requires this tribunal to honor and ensure compliance with “the ethical rules announced by the national profession in light of the public interest and the litigants’ rights,” including “the ethical canons contained in the ABA Model Code.” *In re American Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992); *see also id.* at 611 (“To a very large extent, unless a conflict is addressed by courts upon a motion for disqualification, it may not be addressed at all. More to the point, it is our business—our responsibility”).

Even in a criminal prosecution, a person’s right to the counsel of his choice, through the waiver of any right to assert a conflict of interest, is not absolute. Federal courts must balance the right of parties to choose their own counsel against their obligation to preserve the integrity of their processes, including the appearance of fairness, and the government’s interest in a just outcome. *See,*

e.g., *United States v. Jones*, 381 F.3d 114, 119 (2d Cir. 2004). For example, the Second Circuit has held that the presumption in favor of a person's chosen counsel is "overcome by a showing of an actual conflict or a potentially serious conflict." *Id.* An actual conflict arises "when the attorney's representation of the defendant is impaired by loyalty owed to a prior client." *Id.* A potential conflict exists where "the interests of the defendant *could* place the attorney under inconsistent duties in the future." *Id.* (emphasis in original). Even where only a potential conflict exists, a court may refuse to accept a waiver "if the attorney's conflict jeopardizes the integrity of the judicial proceedings" or the conflict "may ripen into an actual conflict as the trial progresses." *Id.* at 120.

Schnader's responsibilities to Radian, Mr. Filippis and Mr. Young have given rise to actual or potential conflicts of interest that materially limit Schnader's ability to represent any one of these clients. As noted above, Radian continues to defend against a number of RESPA claims relating to its participation in captive reinsurance arrangements. Thus, while the CFPB has released certain RESPA claims against Radian, the company has a continuing interest in restricting the public disclosure of its conduct with respect to captive reinsurance arrangements. Statements by Radian's former employees relating to that conduct may affect Radian's liability in those actions. In particular,

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Schnader's loyalty to Radian impairs its representation of Mr. Young in connection with any statements or testimony about Radian's views and use of captive reinsurance. At a minimum, the interests of Radian and Mr. Young *could* place Schnader under inconsistent duties in the future. *See Jones*, 381 F.3d at 119.

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minute that Schnader obtained knowledge of these conflicting statements – which are plain on the face of the Interview Reports Schnader received from Respondents prior to March 21, 2014 – Schnader faced a conflict of interest and had an obligation to recuse themselves from one or more of these representations.⁶ They refused to do so. Days later, Mr. Young sought to revise his prior statements.

The Hearing Officer will weigh the credibility of each witness's testimony in this proceeding by, among other things, comparing the witness's testimony with the statements of other witnesses, and with any earlier statements made by the same witness. The prior statements made by Mr. Young and Mr. Filipp to Enforcement Counsel were knowingly made subject to the false statements provisions of 18 U.S.C. § 1001 and any testimony they give in this proceeding will be subject to the perjury provisions of 18 U.S.C. § 1621. There is a substantial risk that Schnader's loyalty to Radian impairs its ability to advise Mr. Young and Mr. Filipp as to any future statements or testimony that would be detrimental to Radian's defense in the private RESPA actions. Likewise, Schnader's loyalty to Mr. Filipp impairs its ability to advise Mr. Young as to any future statements or testimony that would be inconsistent with Mr. Filipp's earlier statements. Schnader's loyalty to Mr. Young could also impair its ability to advise Mr. Filipp as to any future statements or testimony that would be

⁶ See, e.g., Pennsylvania Rule of Professional Conduct 1.7 ("A concurrent conflict of interest exists if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

inconsistent with Mr. Young's earlier statements. The impairment is particularly acute with respect to Mr. Young, who has made a number of statements to Enforcement Counsel that could be prejudicial to Radian and whose testimony on these subjects Enforcement Counsel intends to elicit at the hearing. At minimum, the situation presents a potential conflict that easily could ripen into an actual conflict as the hearing progresses. *See Jones*, 381 F.3d at 120.⁷

Furthermore, Schnader's various representations in connection with this proceeding raise significant questions about its divided loyalties and public perception regarding the fairness and integrity of the proceeding. After Schnader assumed his representation, Mr. Young made statements to Enforcement Counsel in the presence of Schnader (March 27) that are inconsistent with previous statements he made to Enforcement Counsel when he was not represented by Schnader (March 7). The fact that the only changes to date in Mr. Young's statements relate to the views of Mr. Filipps and Radian senior management raises, at a minimum, the specter of impropriety by Schnader in conducting these three simultaneous, conflicting representations. Such a risk is precisely the reason that tribunals do, and should, address the participation of conflicted attorneys in their proceedings, including by disqualifying them from further participation.

⁷ Schnader's continued representations of Radian, Filippis and Young could potentially lead to a number of additional severe conflicts of interest. Mr. Young's March 27 statements are subject to the false statements provisions of 18 U.S.C. § 1001 and the obstruction of proceedings provisions of 18 U.S.C. § 1505. To the extent that Radian or Mr. Filippis (or anyone else) influenced or obstructed or endeavored to influence or obstruct Mr. Young's participation in the March 27, 2014, meeting with Enforcement Counsel, they may also be subject to the obstruction of proceedings provisions of 18 U.S.C. § 1505. Furthermore, to the extent that Radian or Mr. Filippis (or anyone else) attempted to influence Mr. Young's testimony, which was expected to occur the following day, they may be subject to the witness tampering provisions of 18 U.S.C. § 1512(b). Under such circumstances, Schnader's representation of clients who could be perceived to have obstructed the proceeding or tampered with a witness by influencing or attempting to influence his statements or testimony would involve a number of severe conflicts. Any advice Schnader might give to any one client regarding their possible liability for such actions would likely have grave consequences for at least one other client.

In this case, particularly with respect to Schnader's representation of Mr. Young, there is little reason to believe that there is much of a countervailing interest on Mr. Young's behalf to maintain Schnader's representation of him. While Mr. Young may desire representation paid for by Radian (if that is the case), there is no reason believe that he has a specific interest in being represented by the exact same attorneys as Radian and Mr. Filips.

Further, courts have disqualified attorneys who contacted the defendant's former employees for potential representation on the basis that the contact violated the state's anti-solicitation rules, particularly where the attempted representation was for the purpose of obstructing the plaintiff's ability to conduct discovery through informal private interviews. *See, e.g., Rivera v. Lutheran Medical Center*, 866 N.Y.S.2d 520, 525-26, aff'd, 73 A.D.3d 891, 899 N.Y.S.2d 859 (2d Dept 2010) (disqualifying defense attorneys from representing defendant's former employees on the basis that their contact with those former employees violated New York's anti-solicitation rules, and noting that the solicitation was improper because it was made "to gain a tactical advantage in this litigation," undermined the "importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses," and "clearly affects the public view of the judicial system and the integrity of the court."). It is further unclear whether Schnader's communications to reach out to Mr. Young and solicit their representation of him once they learned he would be a witness complied with the relevant ethical rules. *See, e.g., Pennsylvania Rule of Professional Conduct 7.3* ("A lawyer shall not solicit in-person or by intermediary professional employment from a person with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain").

Lastly, there is substantial reason to question Schnader's representation to this tribunal that its three clients have "waived" any potential conflicts in this matter. Any such waiver would be based on Schnader's own disclosure and framing of the relevant potential for conflicts of interest to

each of their clients. Schnader's letter to Enforcement Counsel demonstrates that Schnader failed to recognize the scope of the serious risks inherent in these three representations, maintaining instead that "there can be no basis for any supposed conflict." March 21, 2014, Letter from D. Smith to K. Ravener at 1, Gordon Decl. Ex. H. Schnader's statements in this letter are reason enough to question whether they could possibly have fulfilled their duties to each of their clients in presenting the true nature of the actual or potential conflicts present here, let alone obtained any legitimate waiver of those conflicts. It is clear that as of March 21, 2014, when the letter was sent, Schnader had failed to do so.

For the foregoing reasons, Enforcement Counsel respectfully requests that the Hearing Officer enter an order disqualifying Schnader from representing any person in connection with the instant proceeding. At a minimum, Enforcement Counsel requests disqualification of Schnader from representing any person other than Radian in connection with this proceeding.

DATED: April 15, 2014

Respectfully submitted,

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/s/ Donald Gordon
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Enforcement Counsel

Rule 205 Certification

Pursuant to Rule 205(f), Enforcement Counsel certifies that it has conferred with Schnader Harrison Segal & Lewis LLP in a good faith effort to resolve the issues raised by this Motion and has been unable to resolve the matter by agreement.

DATED: April 15, 2014

/s/Donald Gordon

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Certificate of Service

I hereby certify that on this 15^h day of April 2014, I caused a copy of the foregoing “Enforcement Counsel’s Motion to Disqualify Schnader Harrison Segal & Lewis LLP” to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons:

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