

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.)

MEMORANDUM IN SUPPORT OF PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC, ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE CORPORATION’S MOTION REQUESTING A LIST OF DOCUMENTS WITHHELD BY ENFORCEMENT COUNSEL

Pursuant to 12 C.F.R. § 1081.206(c), respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively “Respondents”), request that this tribunal order Enforcement Counsel to produce a list of withheld documents. In support of that request, Respondents state as follows:

Rule 206(c) contemplates that Enforcement Counsel “shall inform the other parties of the fact that” documents under 206(b)(1)(iii) have been withheld. Despite this compulsory requirement, and undersigned counsel’s request for such information, Enforcement Counsel has not provided that information to Respondents.

To obviate the need to file a formal motion for other withheld materials, undersigned counsel requested that Enforcement Counsel produce a list of other documents withheld from production. In response to that request, Enforcement Counsel stated that they would “comply.” See Letter from Sarah J. Auchterlonie to David Souders, Feb. 24, 2014, at 5, attached hereto as Exhibit A. However, to date, no such list or privilege log has been produced. Thus,

Respondents are forced to request that this tribunal enter the attached proposed order, requiring Enforcement Counsel to provide a list of withheld documents to Respondents.

Such a list is essential to Respondents' ability to determine whether Enforcement Counsel has complied with the initial disclosure requirements of Rule 206. This inquiry is particularly important when viewed in light of the fact that this investigation has been ongoing for years, starting with the Department of Housing and Urban Development's investigation, it involves multiple entities, and most critically, Enforcement Counsel has, on the whole, failed to timely comply with Rule 206. As this tribunal is well aware, Enforcement Counsel took well beyond seven days to comply with Rule 206. In fact, it was not until early March that Enforcement Counsel produced the majority of its "investigative file." *See* Letter from Sarah J. Auchterlonie to David Souders, Mar. 4, 2014, attached hereto as Exhibit B. Even then, that production was admittedly incomplete. *Id.* ("With this production, Enforcement Counsel is producing to PHH its entire investigative file related to the matter *In Re PHH Corporation et al.*—subject to specified withholding exceptions, and with the following exception. We are presently preparing a production of our electronic communications between Enforcement Counsel and Mortgage Insurers, fact witnesses (or their attorneys), as well as interview notes, regarding this investigation[.]"). The production was also incomplete for reasons not raised by Enforcement Counsel—a fact which had to be brought to Enforcement Counsel's attention repeatedly before such issues were resolved. Indeed, Enforcement Counsel was still trying to complete their production as late as March 13, 2014.¹ Given the timing and magnitude of Enforcement Counsel's production, which consists of well over one million pages, it is possible that

¹ This fact is in stark contrast with an important representation Enforcement Counsel made to the Court during the first day of the hearing. During argument concerning the motions in limine, Enforcement Counsel represented to the tribunal that Enforcement Counsel produced its entire investigative file, and that as of March 24th, Respondents had that file for "20 days and counting." Hearing Tr., Day One (Mar. 24, 2014), at 14:18-20.

Enforcement Counsel's required production of materials is still incomplete. As discussed at the hearing, Respondents are still examining the various productions to make such a determination (and to determine if their exhibit and/or witnesses lists need to be revised further). To facilitate that endeavor, Respondents need the list of withheld documents. *See, e.g.*, Ex. A (Responses to request nos. (1), (4), (5), (6), (7), (8) and (9) state that the requested information will be produced if it has not already been produced or is "**not privileged**"). (emphasis added).

Obtaining a list of withheld documents is also necessary to ascertain whether Enforcement Counsel has properly withheld any materials crucial to Respondents' defense. *See, e.g., Animal Legal Def. Fund, Inc. v. Dep't of the Air Force*, 44 F. Supp. 2d 295, 303 (D.D.C. 1999) ("[A] privilege log . . . is essential if this Court is to perform effectively its review of the agency's proffered exemptions. Without a better record, judgment cannot be granted."); *see also Horace Mann Ins. Co. v. Nationwide Mut. Ins. Co.*, 240 F.R.D. 44, 47 (D. Conn. 2007) ("The purpose of preparing the privilege log is to assist the court and the parties in performing the careful analysis that a privilege or immunities evaluation demands."); *Ala. Educ. Ass'n v. Bentley*, No. CV-11-S-761-NE, 2013 U.S. Dist. LEXIS 8188, at *15 (N.D. Ala. Jan. 22, 2013) (stating that the purpose of producing a privilege log is to "*provide a party whose discovery is constrained by a claim of privilege . . . with information sufficient to evaluate such a claim and to resist if it seems unjustified*") (internal quotations omitted).

Respondents are entitled to all of the documents enumerated under Rule 206. To assess whether Enforcement Counsel has complied with Rule 206, Respondents respectfully request that this tribunal require Enforcement Counsel to produce a list of withheld documents.

Dated: April 2, 2014

Respectfully submitted,

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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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