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' RESPONSE TO ENFORCEMENT COUNSEL'S 15-PAGE "RESPONSE" TO RESPONDENTS' OBJECTION TO ENFORCEMENT COUNSEL'S REQUEST FOR ISSUANCE OF A SUBPOENA REQUIRING PRODUCTION OF ALL COMMUNICATIONS BETWEEN RESPONDENTS AND THE MI COMPANIES

Enforcement Counsel's 15-page "Response" is not in accordance with the Rules, is replete with irrelevant arguments, and demonstrates the degree to which the Bureau is willing to retaliate against Respondents because they have sought to defend themselves in this action.

1. Enforcement Counsel's Response is not in accordance with the General Prehearing Order dated March 5, 2014. Under the terms of that Order, Respondents had three business days in which to file their objections to the subpoena. Respondents complied with that requirement, having filed their objections on May 5, 2014. Thereafter, the procedure was to set a briefing schedule for a motion to quash. That has not happened. Further, even if Respondents' objections were deemed to be a motion to quash, Enforcement Counsel's response was due

within three business days, or by May 8, 2014. Enforcement Counsel filed their Response four days later, on May 12, 2014, without seeking leave of the Tribunal.[1]

2. Enforcement Counsel's defense of their request for a subpoena is remarkable, both in its length of pages and lack of substance. For example, Respondents objected to the use of a subpoena to obtain documents during the hearing and from a party. Enforcement Counsel's response is to cite to the provisions in the Bureau's Rules that permit a ***party*** to ***request*** a subpoena. *See* Response at 5-7 (citing Rule 208(a), and explaining that the Rule provides that a subpoena "is a discovery tool ***available to*** any 'party'" (emphasis added); citing Rule 203 and explaining that "Enforcement Counsel may ***request*** a subpoena" (emphasis added); citing the section-by-section analysis of Rule 203 and explaining that the parties are "required" to meet and confer "to discuss . . . whether *either party intends to issue documentary evidence subpoenas.*"). Enforcement Counsel's authoritative discussion on the "availability" of subpoenas simply misses the point. Nowhere do Enforcement Counsel explain how or why they should be permitted to gather evidence to support the Notice of Charges they issued almost four months ago. Nor do Enforcement Counsel respond to the argument that the Bureau's administrative process was supposed to be "faster and more efficient" thereby "saving both the Bureau and respondents the resources typically expended in the civil discovery process." *See* 77 Fed. Reg. 39058, 39070.

3. Enforcement Counsel's reliance on the Commentary to the Rules is the epitome of hypocrisy. *See* Response at 5, 6. This Tribunal should recall that when Respondents sought to

[1] Enforcement Counsel also claim that they requested the subpoena "almost one month before the hearing is scheduled to resume." Response at 7. Actually, Enforcement Counsel requested the subpoena on May 1, and, at the time the request was made, the hearing was scheduled to recommence on May 19. In any event, the hearing is now two weeks away, and Enforcement Counsel now claim they need Respondents and Respondents' counsel to search for materials that are completely irrelevant to any issue in this administrative action. Respondents and their counsel should not be forced to waste valuable time and resources on immaterial inquiries, especially as they are diligently preparing for the hearing.

utilize the Commentary in support of their motion to compel, Enforcement Counsel characterized the argument as "not compelling," *see* Enforcement Counsel's Opposition to Respondents' Motion to Compel at 5, and the Tribunal accepted the argument in holding that the "commentary" to Rule 206 was not legally binding. *See* Order Denying Respondents' Motion to Compel, dated March 7, 2014, at 3. According to Enforcement Counsel, the Commentary is only relevant when it supports the Bureau's position.

4. Enforcement Counsel's argument in support of their request for a subpoena makes no sense. According to Enforcement Counsel:

> Thus, rather than serving a broader request that would include internal PHH documents, Enforcement Counsel has sought only communications between Respondents and MIs about topics identified in the request, a much smaller set of documents that almost certainly ***excludes*** highly relevant documents.

Response at 3 (emphasis added). The hearing in this matter has already commenced and is set to resume in two weeks. The request that Respondents' counsel take time away from preparing for the hearing in order to search for documents, which Enforcement Counsel admit do not even include the subset of "highly relevant documents," makes no sense and is designed simply to harass Respondents and their counsel.

5. That the request for a subpoena was designed for harassment purposes is made plain by the arguments in the Response. For example, Enforcement Counsel again complain, as they did in opposition to Respondents' renewed motion to dismiss, that they have been "repeatedly burdened" with "irrelevant arguments." Response at 10. How the purported "burden" of briefing is relevant to the request for a subpoena is not explained other than to demonstrate that Enforcement Counsel are retaliating against Respondents for mounting a vigorous defense to the Notice of Charges.

6. Enforcement Counsel's repeated attempt to assert that Respondents are relying on "equitable estoppel" fails for numerous reasons. First, Enforcement Counsel state that equitable estoppel is not available against the government. Response at 9. If that is the case, then why is Enforcement Counsel even worried about this issue? Second, Enforcement Counsel's repeated attempt to characterize Respondents' assertion of "judicial estoppel," which does not require proof of reliance, as a claim for "collateral estoppel" cannot be justified. Indeed, the Motion in Limine cited on page 9 of their Response demonstrates the extent to which Enforcement Counsel will take statements out of context. In that motion, Respondents stated as follows:

> As a result, and in reliance on the Bureau's acquiescence, UGI gave—and Atrium Re received— private mortgage insurance premium ceding payments for approximately two months, under agreements previously in place.

Respondents' Motion in Limine to Strike Claims Predicated on Ceding Payments Allowed by the Bureau in April and May 2013 (Docket No. 76), at 2. There is nothing to dispute about that statement: the Bureau has admitted that it was aware of the existing reinsurance agreements with lender-captives, that the continuation of existing agreements was specifically requested by the MIs as part of the negotiation of the Consent Orders, and that the Consent Orders specifically permitted UGI to continue to cede payments. In other words, the Bureau has already admitted all of the facts upon which Respondents' judicial estoppel argument rests; accordingly, there is no basis to request additional discovery. Further, Enforcement Counsel cite no authority to support the argument that the assertion of judicial estoppel requires the demonstration of reliance, or that Respondents would illogically add such an additional element to the defense.

7. The subpoena requests information that is wholly unrelated to the Notice of Charges – specifically, information in the possession of Respondents "regarding:"[2]

- This Administrative Proceeding;
- The CFPB's investigation of Respondents; and
- Any discussion between the MIs and Respondents regarding "discussions with the CFPB," or "settlement terms" in connection with the five Consent Orders.

Subpoena, Attachment A. In support of these demands, Enforcement Counsel state that such information is necessary because, among other things, the Bureau needs to be able to demonstrate that "injunctive relief" is necessary. Response at 2. As Respondents have pointed out, and as the Tribunal has already noted:

> [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.

March 5, 2014 Motions Hearing, Tr. at 59. Curiously absent from the Response is any citation to the Notice of Charges to support any of the requests for information. That is so because the Bureau fails to allege a continuation of the underlying conduct, and it should not now be able to remedy that deficiency. Enforcement Counsel had well over a year to engage in fact finding to determine whether they believed they could file a Notice of Charges. Moreover, the Notice of Charges they filed were required to include: "(2) A statement of the matters of fact and law showing that the Bureau is entitled to relief." 12 C.F.R. §1081.200(b)(4). Accordingly, there is no basis for the Enforcement Counsel to now demand information in an attempt to manufacture a record of potential future conduct.

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[2] Enforcement Counsel suggest that their subpoena is more narrowly tailored because it uses the term "regarding" instead of "relating to." Response at 4. Such an assertion is nonsensical, as the term "regarding" is synonymous with "relating to."

Enforcement Counsel's untimely response is inappropriate, misses the point, and constitutes an effort to harass Respondents and their counsel while they are preparing for the resumption of the hearing. Enforcement Counsel cannot justify the requested subpoena either under the Bureau's rules or based on the Notice of Charges under which it is proceeding. The Tribunal should adhere to its General Hearing Order and reject Enforcement Counsel's Response and deny the Bureau's request for belated discovery in its entirety.

Dated: May 13, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

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CERTIFICATION OF SERVICE

I hereby certify that on the 13th day of May, 2014, I caused a copy of the foregoing Response to Enforcement Counsel's 15-Page Response to Respondents' Objection to Enforcement Counsel's Request for Issuance of a Subpoena to Respondents, to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties who have consented to electronic service:

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