

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of:)
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)
PHH CORPORATION,)
PHH MORTGAGE CORPORATION,)
PHH HOME LOANS LLC,)
ATRIUM INSURANCE CORPORATION,)
and ATRIUM REINSURANCE)
CORPORATION)

ENFORCEMENT COUNSEL’S SUR-SURREPLY MEMORANDUM IN
SUPPORT OF ITS MOTION TO AMEND THE PROTECTIVE ORDER AND TO
UNSEAL “CONFIDENTIAL” MATERIAL

Enforcement Counsel previously argued in support of our Motion to Amend the Protective Order that 12 CFR § 1081.119 compels this Tribunal to modify the Protective Order so that the transcript, orders, memoranda, and documents filed with the Office of Administrative Adjudication (OAA) could be unsealed unless they contained certain categories of sensitive information.¹ Enforcement Counsel raised this motion after the close of the hearings when the relatively small universe of affected materials was largely defined. No party’s opposition to Enforcement Counsel’s motion has yet raised any claim that the Proposed Order would cause any actual harm by publicly releasing the

¹ For the sake of clarity, Enforcement Counsel notes their understanding that the courtesy copies of exhibits the parties provided to chambers are not “filed” with the OAA and would thus remain unaffected by the instant Motion to Amend the Protective Order.

parties' filings. In this Sur-surreply, we address the Mortgage Insurers' arguments that federal and state document disclosure laws prevent our proposed modification; but as applied, these arguments are merely theoretical. The actual briefings, reports, and associated documents filed with the OAA and used in the hearing do not raise the concerns identified by the MIs.

I. MIs' FOIA Exemption 4 Arguments are Overstated

In their surreply, the MIs characterize Enforcement Counsel's positions regarding FOIA Exemption 4 overly broadly. But the MIs are generally correct that Enforcement Counsel are amenable to protective order provisions that comply with 12 CFR Part 1070 and the Freedom of Information Act, 5 USC § 552 . In particular, the CFPB "may disclose confidential investigative information...in an administrative or court proceeding to which the CFPB is a party." 12 CFR § 1070.45(a)(4). Thus, the Motion proffers a revision to Paragraph 8 of the Protective Order that meets those criteria; and we urge the Hearing Officer to adopt it.

II. The MIs' MN Law Argument is a Red Herring

The MIs' argument in their Sur-Reply that Minnesota law, Minn. Stat. 60A.031, categorically prevents modification of Paragraph 8 is theoretical and should not drive a decision on the instant motion. First, it is unclear as to whether the information the MIs provided to the Minnesota DOC was for an examination, an investigation, or both. While the subpoenas the Minnesota DOC issued to some witnesses reference Minn. Stat.

60A.031, they were issued by the investigation division.² Other correspondence discussing the MIs' document submission to Minnesota DOC reference Minn. Stat. 45.027.³ Since the issue of which Minnesota statute applies remains cloudy, and this determination drives the inter-agency information exchange limitations, we urge the Tribunal to avoid a determination based on this line of argument. Rather, we think the Tribunal can amend Paragraph 8 without concern about potentially running afoul of Minnesota statutes for two other reasons.

Principally, the documents that the MIs provided to Minnesota were also provided by the MIs to the Department of Housing and Urban Development (HUD) Office of Inspector General,⁴ which transferred the documents to the Bureau pursuant to the Dodd-Frank Act. 12 U.S.C. 5581(b)(7)(A-B). The MIs' arguments about the applicability of Minnesota state law do not apply to materials they provided to HUD, the Bureau's predecessor agency in RESPA enforcement. This reasoning should apply to all materials transferred from HUD and used by both Enforcement Counsel and Respondents in their filings.

An additional and alternative basis for granting Enforcement Counsel's requested relief is that the six documents from the Enforcement Counsel filings, which we

² *In re PHH Corporation, et. al.*, File No. 2014-CFPB-0002, *Surreply Brief of Radian Guaranty Inc., et. al., to Enforcement Counsel's Motion to Amend the Protective Order Governing Discovery Material*, Exhibits A-C (Jul. 16, 2014).

³ Exhibit A (CFPB-PHH-00349813).

⁴ *In re PHH Corporation, et. al.*, File No. 2014-CFPB-0002, *Joint Opp'n of Radian Guaranty Inc., et. al., to Enforcement Counsel's Motion to Amend the Protective Order Governing Discovery Material*, at 2 (Jun. 23, 2014).

identified as having MN DOC-production bates labels,⁵ can be either sealed as “highly confidential,” where appropriate, or disclosed on the OAA website for reasons having nothing to do with Minnesota law:

- ECX 0035. This MGIC document was already personally reviewed and redacted by the Hearing Officer in this proceeding;
- ECX 0586. This document appears to be Highly Confidential and thus should remain sealed;
- ECX 124. Minnesota received this document from a non-supervised entity, therefore Minn. Stat. 60A.031 does not apply; Enforcement Counsel also received an identical version of this document from PHH (labeled PHH Munoz 014959);
- ECX 0583. This document is a publicly-available letter drafted by the New York State Department of Insurance, a non-substantive fax cover sheet, and a publicly-available letter between state insurance commissioners;
- ECX 0580. Enforcement Counsel reasonably believes this document was produced to HUD because we received it in hard-copy directly from HUD. This moots the concerns raised by the potential applicability of Minn. Stat. 60A.031.
- ECX 0544. Enforcement Counsel also received another version of this document from HUD (bates label HUD-008442). This moots the concerns raised by the potential applicability of Minn. Stat. 60A.031.

CONCLUSION

Enforcement Counsel take very seriously their obligations to preserve and protect the information we receive in our investigations. We proceeded carefully in this matter to strike the balance between these obligations and Rule 119’s presumption in favor of public disclosure. We would not now be seeking a modification to Paragraph 8 of the Protective Order if we thought it would cause competitive harm or the release of

⁵ PHH’s exhibit list does not provide bates labels, thus Enforcement Counsel cannot speak to which, if any, of PHH’s exhibits the MIs may initially have provided to the Minnesota DOC.

sensitive personal information. And no party has claimed that it will. Accordingly, Enforcement Counsel respectfully urge the modification of Paragraph 8 to more closely comport with 12 CFR 1081.119.

DATED: July 21, 2014

Respectfully submitted,

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Enforcement Counsel

Certificate of Service

I hereby certify that on this 21st day of July, 2014, I caused a copy of the foregoing "Enforcement Counsel's Sur-Surreply Memorandum in Support of its Motion To Amend The Protective Order And To Unseal 'Confidential' Material" to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service:

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Exhibit A



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June 10, 2010

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VIA EMAIL AND U.S. MAIL

Paul Hanson, Chief Examiner
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Minnesota Department of Commerce
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Re: *In the Matter of the Examination of General Electric Mortgage Insurance Company; Mortgage Guaranty Insurance Corporation; PMI Mortgage Insurance Company; Republic Mortgage Insurance Company; Triad Guaranty Insurance Corporation and United Guaranty Residential Insurance Company*

Dear Paul and Cam:

Pursuant to Minnesota Statutes sections 45.027 and 60A.031, the Minnesota Department of Commerce's ("Department") February 18, 2010, Examination Requests to United Guaranty Residential Insurance Company ("United Guaranty"), our various discussions, and your May 24, 2010 correspondence, United Guaranty supplements its earlier responses, subject to and without waiving any of the General and/or Specific Objections previously provided to you, as follows:

Document Request Nos. 1-6: Attached please find an index of the documents Bate numbered UG064197 – UG065028. The index specifies, by document, to which request it is responsive. As indicated by the index, many of the documents included in this range are not responsive to a particular request, but were provided as part of the larger working files kept in the ordinary course of business, which contained the responsive materials provided.

As you know, the documents and this index are being produced in response to the Department's Examination Requests and pursuant to Minnesota Statutes sections 45.027 and 60A.031 (2010). Accordingly, United Guaranty requests that these documents and the index be kept confidential. Furthermore, United Guaranty's production should not be construed as a waiver of any objection, applicable privilege, or the treatment of the information and documentation provided herewith as confidential.

Please let me know if you have any questions or concerns.

Thank you.

Very truly yours,

WINTHROP & WEINSTINE, P.A.



David M. Aafedt

cc: Julien Kubesh
Margaret DuB. Avery
Theresa M. Cameron
Michelle R. Lauseng