UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU
May 16, 2014

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of	:	
	:	ORDER **UNDER SEAL**
PHH CORPORATION,	:	ON MOTION TO DISQUALIFY
PHH MORTGAGE CORPORATION,	:	
PHH HOME LOANS LLC,	:	
ATRIUM INSURANCE CORPORATION, and	:	
ATRIUM REINSURANCE CORPORATION	:	

On January 29, 2014, the Consumer Financial Protection Bureau (Bureau) filed a Notice of Charges Seeking Disgorgement, Other Equitable Relief, and Civil Money Penalty in this proceeding. The hearing commenced on March 24, 2014, in Philadelphia, PA, and was not yet complete when it adjourned on March 28, 2014. The hearing will recommence in Philadelphia, PA on May 28, 2014. See PHH Corporation, 2014-CFPB-002, Document 126 (May 6, 2014). Pending before me is the Office of Enforcement's (Enforcement) Motion to Disqualify Schnader Harrison Segal & Lewis LLP (Motion).

Procedural Background

The Motion was submitted for filing under seal on April 15, 2014, and a redacted version was filed on April 21, 2014. PHH Corporation, 2014-CFPB-002, Documents 95 (Apr. 15, 2014) (under seal). On April 15, 2014, Enforcement also submitted for filing under seal the Declaration of Kimberly J. Ravener, the Declaration of Navid Vazire (Vazire Declaration), and the Declaration of Donald R. Gordon (Gordon Declaration) with ten exhibits attached thereto (Exhibit A–J). PHH Corporation, 2014-CFPB-002, Documents 95-B, 95-C, 96 (all under seal). Enforcement did not file redacted versions of the declarations or exhibits. See PHH Corporation, 2014-CFPB-002, Document 109 (Apr. 22, 2014).

On April 30, 2014, Respondents filed an Opposition to Enforcement's Motion (Resp. Opposition) and Schnader Harrison Segal & Lewis LLP (Schnader) filed a Response to Enforcement's Motion (Schnader Opposition). PHH Corporation, 2014-CFPB-002, Documents 114, 115 (both under seal). Attached to the Schnader Opposition is the Declaration of David Smith (Smith Declaration) and the Declaration of Stephen A. Fogdall (Fogdall Declaration). PHH Corporation, 2014-CFPB-002, Documents 115-A, 115-B (both under seal). On May 9, 2014, Schnader requested that the Schnader Opposition, the Fogdall Declaration, and the Smith Declaration be maintained under seal and provided a redacted version of the Schnader Opposition. Schnader did not submit redacted versions of the Smith Declaration or the Fogdall Declaration.

That same day, I granted Schnader's request and ordered that the Schnader Opposition and the Smith and Fogdall Declarations be filed under seal. PHH Corporation, 2014-CFPB-002, Document 131 (May 9, 2014).

On May 6, 2014, Enforcement submitted for filing under seal its Reply in Support of its Motion (Reply), and a redacted version of the Reply was submitted May 13, 2014. PHH Corporation, 2014-CFPB-002, Documents 127 (May 6, 2014) (under seal). The same day, Enforcement submitted for filing under seal a Reply Declaration of Donald R. Gordon (Gordon Reply Declaration), with two exhibits attached thereto. PHH Corporation, 2014-CFPB-002, Documents 128, 128-A, 128-B (all under seal). Redacted versions of the Gordon Reply Declaration and the attached exhibits were not submitted.

On May 9, 2014, Schnader submitted for filing under seal a Motion for Leave to file a Sur Reply in Further Opposition to Enforcement's Motion (Motion for Sur Reply) and attached a copy of the Sur Reply in Further Opposition to Enforcement's Motion (Sur Reply). PHH Corporation, 2014-CFPB-002, Documents 130, 130-A (both under seal). Schnader's Motion for Sur Reply is granted and the arguments presented have been fully considered.[1]

Factual Background

Schnader represents three non-parties in this adjudicative proceeding – intervenor Radian Guaranty, Inc. (Radian) and Enforcement witnesses Steven Young (Young) and Frank Filipps (Filipps), who are former Radian employees. Smith Declaration; Fogdall Declaration at 1, 3; Gordon Declaration at 2.

Enforcement interviewed Young on March 7, 2014, which was prior to Schnader's representation of him. Motion at 3; Gordon Declaration, Exhibit D. Enforcement Investigator Theresa Ridder (Ridder) participated in the interview by telephone and drafted an interview memorandum (March 7 Interview Memorandum) summarizing the discussions between Enforcement and Young. Motion at 3 n.4; Gordon Declaration, Exhibit D. The March 7 Interview Memorandum notes that Protective Order [redacted] Gordon Declaration, Exhibit D at 3. At some point on or before between March 14, 2014, Schnader became Young's counsel, and Schnader and Enforcement arranged a witness preparation session with Young for March 27, 2014. Fogdall Declaration at 3.

On March 19, 2014, Enforcement interviewed Filipps, represented by Schnader. Motion at 3; Fogdall Declaration at 4; Gordon Declaration, Exhibit G. Ridder participated in the March 19, 2014, interview by telephone and drafted an interview memorandum (March 19 Interview Memorandum) summarizing the discussions between Enforcement and Filipps. Motion at 3 n.4; Gordon Declaration, Exhibit G. The March 19 Interview Memorandum states that Protective Order [redacted] Gordon Declaration, Exhibit G at 3.

[1] Granting Schnader's Motion for Sur Reply does not prejudice Enforcement because I have found largely in Enforcement's favor, and to the extent I have not, the Sur Reply had no influence on the outcome.

The March 7 Interview Memorandum states, Protective Order
Gordon Declaration, Exhibit D at 3). Protective Order
Gordon Declaration, Exhibit G at 3.

Stephen A. Fogdall (Fogdall) and David Smith (Smith), attorneys with Schnader, do not dispute any part of Ridder's memorialization of Filipps' interview in the March 19 Interview Memorandum. See Fogdall Declaration at 4; Smith Declaration. Fogdall, however, represents that, at the time of Filipps' interview, Schnader had not seen the March 7 Interview Memorandum and Fogdall was not aware that Young had given a statement about Filipps' views regarding captive reinsurance. Fogdall Declaration at 4.

At some point between March 20 and March 25, 2014, Respondents' counsel gave Fogdall a copy of the March 7 Interview Memorandum. Fogdall Declaration at 5-6. Fogdall gave the March 7 Interview Memorandum to Young on March 25, 2014. Fogdall Declaration at 6.

On March 27, 2014, Young participated in discussions with Enforcement to prepare for hearing testimony. Vazire Declaration; Fogdall Declaration at 7-8. Enforcement asserts that, Protective Order

Vazire Declaration at 2. Enforcement also claims that: Protective Order

Id.

Schnader acknowledges that Protective Order Fogdall Declaration at 7-8. Schnader contends that Protective Order Id. at 8. Schnader does not recall Young stating that Protective Order , and instead recalls Young "stat[ing] Protective Order Id. at 9.

Fogdall's recollection of Young's statements on March 27, 2014, differs from Vazire's recollection. Fogdall recalls that Young was asked Protective Order Id. at 8. Fogdall recalls that Vazire asked Young Protective Order Id. at 8; see Vazire Declaration at 2. Fogdall also recalls that Young's response to this question was, Protective Order rather than Protective Order Id. at 8-9.

Discussion

I agree with Enforcement that Schnader's responsibilities to these three non-parties gives rise to actual or potential conflicts of interest materially limiting Schnader's ability to represent any one of them. See Motion at 7.

Rule 109 of the Bureau's Rules of Practice for Adjudication Proceedings (Rules) governs conflicts of interest. 12 C.F.R. § 1081.109. Rule 109(a) states:

> 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 the counsel's own interests.

12 C.F.R. § 1081.109(a). Rule 109(a) further states that I "may take corrective measures . . . 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(b) requires that counsel representing "two or more parties to an adjudication proceeding or also represent[ing] a non-party on a matter relevant to an issue in the proceeding" must provide the following written certification:

> (1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

> (2) That each such party and/or non-party waives any right it might otherwise have to assert any known conflict of interest or to assert any conflicts of interest during the course of the proceeding.

12 C.F.R. § 1081.109(b).

The Administrative Procedure Act provides that a person summoned to appear before a federal agency is entitled to the assistance of counsel. 5 U.S.C. § 555(b). It is well settled that, at least with respect to criminal proceedings, there is a presumption in favor of a person's chosen counsel; however, a person's right to counsel of his choice is not absolute. See Wheat v. United States, 486 U.S. 153, 154 (1988) (recognizing presumption in favor of counsel of choice, but stating that such presumption may be overcome); United States v. Jones, 381 F.3d 114, 119 (2d Cir. 2004) (same). The presumption in favor of a person's chosen counsel also applies to administrative proceedings. See SEC v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976) ("The guarantee, phrased by the legislature in unequivocal terms, has been construed to imply the concomitant right to the lawyer of one's choice.").

Courts must balance the presumption in favor of a person's chosen counsel with its obligation to preserve the integrity of the tribunal and to conduct fair proceedings. See Jones, 381 F.3d at 119; Clarke T. Blizzard, Investment Advisers Act of 1940 Release No. 2032, 2002 SEC LEXIS 3406, 55 S.E.C. 650, 653 n.8 (Apr. 24, 2002). The existence of an actual conflict of interest or a potentially serious conflict of interest is sufficient to overcome the presumption in favor of a person's choice of counsel. Jones, 381 F.3d at 119-20. Courts have found some actual or potential conflicts of interest unwaivable. E.g., Jones, 381 F.3d at 120.

Csapo sets forth the standard that must be met before an attorney may be disqualified in an administrative proceeding. 533 F.2d. at 11. There must be "concrete evidence" that the attorney's "presence would obstruct and impede" the proceeding. Csapo, 533 F.2d at 11. Schnader contends that under this standard, the Motion should be denied because there is "no concrete evidence to support disqualification of Schnader." Motion for Sur Reply at 2 ; see also Sur Reply.

I disagree. The issue of attorney disqualification cannot be taken lightly, but I am very troubled by this turn of events. Based on the evidence presented, a reasonable factfinder could conclude that: (1) Young made statements on March 7, before being represented by Schnader; (2) Filipps made statements on March 19, while represented by Schnader, that were inconsistent with Young's statements; (3) Schnader learned of Young's statements before March 27; (4) Protective Order [redacted]

If a reasonable factfinder were to accept Enforcement's version of events, it could be concluded that Schnader's responsibilities to Filipps caused Protecti to engage in conduct for which he (or possibly Schnader) could be sanctioned. See Pennsylvania Rule of Professional Conduct 1.7 ("A concurrent conflict of interest exists if . . . 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."). Schnader therefore has, at minimum, an incentive to protect its own interests at the expense of its clients' interests. This

constitutes an unwaivable conflict. See U.S. v. Schwarz, 283 F.3d 76, 95-96 (2d Cir. 2002). As the Fulton court noted, "no rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation." 5 F.3d at 614.

The evidence here is much stronger than in Csapo, where the D.C. Circuit Court of Appeals upheld a district court's determination that a litigant must be accompanied by attorneys of his choice during questioning. In Csapo, the plaintiff Securities and Exchange Commission (SEC) sought disqualification only on the basis that the objective of its investigative questioning might be frustrated if the witness' counsel continued to represent multiple other witnesses in the investigation. 533 F.2d at 11. The D.C. Circuit held that the agency failed to sustain its burden, stating that the "mere fact that a witness' counsel also represents others who have been or are later to be questioned, is no basis whatsoever for concluding that presence of such counsel would obstruct the investigation." Id. at 11-12. Protective Order [redacted]

Indeed, the evidence here is at least as concrete as in Blizzard, where the SEC reversed an administrative law judge's denial of a motion to disqualify. 55 S.E.C. at 651-52. In Blizzard, an attorney represented a respondent and multiple witnesses, at least one of whom was set to testify for the SEC's Division of Enforcement (Division), and had obtained conflict waivers from each client. Id. at 651. The Division "anticipate[d] possible conflicts" between the respondent and the other witnesses' testimony, and "expect[ed]" that the respondent and one of the other witnesses would directly blame each other. Id. The SEC, without addressing the Csapo standard and without ordering an evidentiary hearing, held that the attorney could not represent the respondent "while simultaneously representing any witness who may be called against" him. Id. at 655. In so holding, the SEC noted that if another witness' testimony at the hearing "is consistent with [respondent's] case, then it will apparently be inconsistent with statements, albeit unsworn, made to the Division in its prehearing interviews" with the other witnesses. Id. at 655 n.15. Protective Order [redacted]

Corrective Action

Rule 109(a) states that I "may take corrective measures . . . 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. Given the severity of the situation, any corrective measure less than disqualification would not suffice.

I have considered conducting an evidentiary hearing, as urged by Schnader and possibly by Respondents. See Sur Reply at 3-4; Opposition at 3. Although Csapo holds that an evidentiary hearing is an appropriate way of resolving the factual disputes presented, neither Schnader nor any other party has identified a case where such an evidentiary hearing was actually held. See Csapo, 533 F.2d at 12. More importantly, an evidentiary hearing is unnecessary, because the test for disqualification is not whether Schnader actually counseled Young to change his testimony, or

violated any disciplinary rules, but whether there is concrete evidence that Schnader's representation of any participant would obstruct and impede the proceeding. There is no need for an evidentiary hearing to find such concrete evidence. Additionally, this case must be resolved by late November 2014, and holding an evidentiary hearing would unduly delay the proceedings. See 12 C.F.R. § 1081.400(a).

[redacted] Enforcement initially noted that Radian remains a defendant in multiple cases under the Real Estate Settlement Procedure Act (RESPA) relating to its participation in captive reinsurance arrangements. Motion at 1-2, 7-8. In response, Schnader explained that [redacted] Smith Declaration at 2. Moreover, Radian settled its RESPA case against the Bureau in 2013, and the settlement is public knowledge. See PHH Corporation, 2014-CFPB-002, Document 67 (Order Denying Motion to Dismiss the Notice of Charges) at 13-15 The Reply does not squarely address Schnader's representations regarding the RESPA cases. See generally Reply.

To be sure, it seems likely that Young and Filipps are only represented by Schnader because Radian asked Schnader to represent them, and that Radian's director and officer insurance policy covers such representation. But this is speculation. There is no actual evidence, and certainly no concrete evidence, regarding how Schnader came to represent Young and Filipps, what motivated Young and Filipps to agree to the representation, or Radian's involvement, if any. I am unimpressed by Enforcement's allegations regarding improper client solicitation, and unpersuaded by Enforcement's argument that Schnader should be disqualified from representing Radian.[2] See Motion at 10.

The most appropriate relief under the circumstances is disqualification of Schnader from representing Young or Filipps, but not Radian, for the duration of this proceeding. I am mindful that Young and Filipps should be given an opportunity to retain new counsel, but in view of the fact that the hearing does not recommence until May 28, 2014, there should be sufficient time for them to do so. If not, then I will entertain requests for appropriate relief.

[2] Respondents' arguments in opposition to the Motion are that disqualification requires factfinding, a contention I reject supra, and that the Motion "was designed to intimidate Respondents' counsel." Resp. Opposition at 2-3, 5. The Motion is meritorious, and was plainly not intended as intimidation. More particularly, I am not troubled that Respondents turned over Young's March 7 Interview Memorandum to Schnader. I agree that disclosure to Schnader by Enforcement would have been expected under the Protective Order, because Young's witness statements are presumably subject to production pursuant to Rule 207, and Radian must be given an opportunity at some point to review the statements for confidentiality. See 12 C.F.R. § 1081.207(a) (requiring production of Jencks material); Schnader Opposition at 14-15 (discussing Rule 207).

Conclusion

Accordingly, Enforcement's Motion is GRANTED IN PART. Schnader Harrison Segal & Lewis LLP is DISQUALIFIED from appearing in this proceeding as a representative of Steven Young or Frank Filipps.

Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission