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.	)

REPLY MEMORANDUM IN SUPPORT OF OBJECTION, MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, REQUEST FOR CLARIFICATION OF THE ORDERS TAKING JUDICIAL NOTICE

INTRODUCTION

In their opening memorandum, Respondents demonstrated why it is improper and contrary to the Bureau's Rules of Practice for Adjudication Proceedings ("Rules") for the Tribunal to take judicial notice of any document or evidence after the Record has been closed and the case submitted for a recommended decision. Indeed, the Bureau's rule on taking judicial notice could not be clearer: "If official notice is requested or is taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to disprove such noticed fact." 12 C.F.R. § 1081.303(c). Enforcement Counsel, rather than attempt to protect the administrative process or seek to ensure that Respondents are afforded the "fairness to all parties" touted by the Bureau in its Rules,[1] proffer reasons why it is excusable in this instance. One needs only to read page 7 of their memorandum to recognize the absurdity of Enforcement Counsel's position. Therein, Enforcement Counsel argue that there is no "prejudice" to Respondents because "the Tribunal's orders themselves provide sufficient notice;" yet, in the next breath they argue that this matter is not ripe "because the Tribunal has not yet indicated what use, if any, it will ultimately make of the facts officially noticed." It is axiomatic that if, as Enforcement Counsel declare, the Orders provide "sufficient notice," then the parties would know to what "use" such facts would be "put." But therein lies the rub, as Enforcement Counsel readily admit, since the Tribunal has only identified the materials from which it purportedly will take "material facts;" neither Respondents, nor Enforcement Counsel, have any idea what those "facts" might be.

[1] *See, e.g.*, 77 Fed. Reg. 39058, 39060-61 (June 29, 2012) (The Bureau's policy is "to avoid delays in any stage of an adjudication proceeding while still ensuring fairness to all parties.").

ARGUMENT

I. THE SPECIFIC RULE TRUMPS THE GENERAL AND SIMPLY IDENTIFYING DOCUMENTS IS INSUFFICIENT

There is a specific rule governing the taking of judicial notice. Rule 303(c) governs the taking of "official notice" of "any material fact that is not subject to reasonable dispute." Enforcement Counsel do not dispute the applicability of this specific rule to the Tribunal's actions; indeed, the Tribunal cited Rule 303(c) in its two Orders. Rather, Enforcement Counsel now assert that other rules, for example, Federal Rule of Evidence 201(b), permit the Tribunal to proceed in this fashion. Enforcement Counsel's argument is that to hold otherwise "cramps that practice needlessly." Opp. Mem. at 8. Enforcement Counsel's cavalier disregard of the Bureau's rules, and Respondents' due process rights, is alarming.

First, the Bureau wrote the Rules, which are binding on the parties as well as the Tribunal. The Bureau established a rule that provides for parties to have notice of the "material fact" sought to be established through "sources whose accuracy cannot reasonably be questioned" and the "opportunity to disprove such noticed fact." Rule 303(c). There is no dispute that such procedural steps – indeed, safeguards – have not occurred here. Rather, the Tribunal has simply issued an Order indicating that it intends to take "judicial notice" of six years of PHH Corporation's Forms 10-K and 10-K/A, and one year of the SEC's "public official records" as to Genworth Financial, Inc., Radian Group Inc., The PMI Group, Inc., and Arch Capital Group Ltd. (collectively, the "MIs"), including Genworth's Form 10-K for the year ended December 31, 2012. Nowhere in their opposition brief does Enforcement Counsel explain how Rule 303(c)'s requirements have been satisfied through the identification of voluminous documents. That is because they are not.

Second, Enforcement Counsel's attempt to graft the Federal Rules of Evidence into the Bureau's rule in an effort to gut the protections of Rule 303(c) is misplaced and legally deficient. It is hornbook law that rules of specific applicability trump general rules. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("'[I]t is a commonplace of statutory construction that the specific governs the general.'" (citation omitted)). That same principle holds true here – Enforcement Counsel cannot use a general reference to the admissibility of evidence and the Federal Rules of Evidence to undercut, indeed, eviscerate, a specific rule providing for the taking of "official notice."[2]

II. THE TRIBUNAL CANNOT EXCEED THE BUREAU'S RULES

Enforcement Counsel argue that there is nothing in the Rules that "precludes official notice *sua sponte*, and in fact the Rules ***appear*** to contemplate it." Opp. Mem. at 8 (emphasis added). To reach such a conclusion, one must simply ignore the second sentence of the Rule. But the Rule is not written in the disjunctive, and Enforcement Counsel's position is simply wrong. The fact that Enforcement Counsel must characterize their position as "appear[ing]" to be within the Rules should give the Tribunal further pause. More to the point, the Tribunal is bound by the terms of Rule 303(c) and, to date, that Rule has not been adhered to.

Enforcement Counsel's request that Rule 303(c) be disregarded stands in stark contrast to their prior positions in this matter. When Respondents sought to compel the production of only relevant materials, as opposed to Enforcement Counsel's document dump of all materials in their possession, Enforcement Counsel demanded strict adherence with the Bureau's Rules. *See, e.g.*, Enforcement Counsel's Opposition to Respondents' Motion to Compel (Dkt. No. 56), at 1

[2] Enforcement Counsel's argument that the use of "or" in the first sentence of Rule 303(c) misses the point. Opp. Mem. at 8. Regardless of whether official notice is taken at the urging of the Bureau or by the Tribunal on its own, compliance with the second sentence of Rule 303(c) is mandatory, and such compliance has not occurred in connection with the Tribunal's two Orders.

(Respondents' motion "ignores a plain reading of the Rule of Practice . . . ."). When Enforcement Counsel moved to disqualify Radian's counsel, they repeatedly cited to the Bureau's Rules of Adjudication. *See, e.g.*, Hearing Tr. 711 (Mr. Vazire citing Rule 107(b) as a basis for disqualification of Radian's counsel); *id.* at 2239-40 (Ms. Ravener citing the Bureau's rules in support of Enforcement Counsel's position that the disqualification of Radian's counsel could not be expunged from the record.). Indeed, Enforcement Counsel repeatedly cited to the Bureau's Rules when it was in their interest to do so. *See, e.g.*, Hearing Tr. 52-53 (Ms. Ravener citing Rule 208 for the proposition that Respondents should have sought a subpoena for documents); *id.* at 984 (Mr. Gordon citing the Bureau's "disclosure rules," *i.e.*, Rule 206, to limit the scope of discovery against the Bureau).

The Tribunal lacks any inherent authority to simply take judicial notice of "material facts" without adherence to the Rules of Adjudication. The cases cited by Enforcement Counsel do not require a different result. Indeed, Enforcement Counsel's reliance on *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993), is particularly startling since the First Circuit held in that case that "depriving petitioner of an opportunity to respond to this newly noticed fact prior to its adverse decision . . . ***abused our presumption of good faith and ran afoul of petitioner's procedural rights.***" *Id.* at 39 (emphasis added) (footnote omitted). That is exactly what Enforcement Counsel is asking for here – that Respondents be denied the opportunity to respond to the Tribunal's actions. The harm is exacerbated by the fact that Respondents have not even been told what fact(s) are being noticed.

While there are administrative cases where judicial notice was taken, such cases are neither probative nor relevant where no objection was made to the notice. For example, in *Gjiknuri v. Mukasey*, 259 F. App'x 338 (1st Cir. 2008), Enforcement Counsel left off the

discussion just prior to their quoted material wherein the court stated that "[b]ecause the Gjiknuris had the opportunity to be heard, they received all the process they are due." Once again, Enforcement Counsel's own cases support Respondents' position here.[3]

Enforcement Counsel's citation to *West Virginia Public Services Commission v. D.O.E.*, 681 F.2d 847 (D.C. Cir. 1982), is disingenuous. According to Enforcement Counsel, the case supports a finding of no prejudice here. Opp. Mem. at 7. Not so. In fact, the court held exactly the opposite:

> ***It is a meaningless gesture to afford such a hearing if the agency does not consider itself confined to the evidence adduced therein***. If the circumstances require that the agency take official notice of material facts, it must afford an opportunity for the parties to present information "which might bear upon the propriety of noticing the fact, or upon the truth of the matter to be noticed." C. McCormick, Law of Evidence § 333, at 771 (2d ed. 1972). In fact, the APA requires that when an agency decision rests on official notice, a party be given "on timely request, … an opportunity to show the contrary." 5 U.S.C. § 556(e) (1976). No such opportunity, which could have come only after the order was issued, since official notice was first taken in the opinion, was afforded in this case.

681 F.2d at 864, n.89 (emphasis added).

Finally, Enforcement Counsel's attempt to justify the Orders based on Respondents' post-hearing brief is silly and beside the point. While it is true that Respondents noted certain "material facts" of which the Tribunal could take judicial notice, unlike the situation here, the

[3] Similarly, in *Yero v. Holder*, 355 F. App'x 555 (2d Cir. 2009), while the court rejected petitioner's objection to the taking of judicial notice, at issue in that case was the official notice of an updated report, and the earlier version was already in the record; the updated report was "merely a 'see also' cite;" and the report was not the "sole basis" for denying the relief. *Id.* at 556 & n.2. In addition to those obvious factual distinctions, Enforcement Counsel also "missed" the discussion that followed the selective material they quoted wherein the court noted other decisions that "strongly encourage[d] [BIA] . . . to adopt procedures to alert the parties of any agency intent to take judicial notice of extra-record facts and to afford them an opportunity to he heard." *Id.* (citing *Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008)).

"material facts" were identified, and, also unlike here, Enforcement Counsel were afforded a full and fair opportunity to comment or even attempt to dispute those material facts.

CONCLUSION

Enforcement Counsel's support of the Tribunal's Orders is curious. As explained above, the Bureau drafted a specific rule on the issue of judicial notice that provided for both notice and the opportunity to dispute. Simply citing to documents is not "notice," as Enforcement Counsel concede in arguing that the matter is not yet "ripe," and the opportunity to dispute any noticed fact has now passed (even assuming Respondents knew the reason for the Tribunal's actions). Yet, Enforcement Counsel simply ignore such due process protections – as well as the plain language of Rule 303(c) itself – having convinced themselves that the Tribunal's actions will inure to their benefit. But the result cannot justify the means. The Bureau's Rules provide that Enforcement Counsel "shall have the burden of proof of the ultimate issue(s) of the Bureau's claims at the hearing." § 1081.303(a). Enforcement Counsel did not put the identified SEC filings into the record in this case, nor did they ask the Tribunal to take judicial notice of any of these materials, other than one reference to a single SEC filing by Genworth Financial, Inc. Thus, such materials have already been deemed to be irrelevant to Enforcement Counsel's case and unnecessary for purposes of carrying their "burden of proof of the ultimate issue(s)" in this proceeding. Rule 303(a). Permitting the Record in this matter to be supplemented in this manner renders the hearing a "meaningless gesture" and is contrary to both Rule 303(c) and the Administrative Procedure Act, both of which require notice and the opportunity to be heard. For all of these reasons, the Tribunal should vacate its prior Orders regarding its intention to take judicial notice.

Dated: October 20, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 20th day of October, 2014, I caused a copy of the foregoing Reply Memorandum in Support of Respondents' Objection, Motion for Reconsideration or, in the Alternative, Request for Clarification of the Orders issued by the Tribunal on September 23 and 25, 2014, 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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