

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' REPLY IN SUPPORT OF THEIR MOTION REQUESTING
A LIST OF WITHHELD DOCUMENTS FROM ENFORCEMENT COUNSEL**

On April 16, 2014, Enforcement Counsel filed their Opposition to Respondents' Motion Requesting a List of Withheld Documents. In their Opposition, Enforcement Counsel states that requiring them to produce such a list is now moot because they have provided this Tribunal with generalized categories of documents withheld from production. Such a position is unfounded.

As an initial matter, Respondents address Enforcement Counsel's comments regarding Rule 206(c)'s requirement that they affirmatively inform Respondents whether they have withheld documents "obtained from a domestic or foreign governmental entity . . . either [because they] are not relevant to the resolution of the proceeding or [they were] provided on the condition that the information not to be disclosed[.]" 12 C.F.R. § 206(b)(1)(iii). Enforcement Counsel admits that they had a mandatory requirement to share such information, Opp'n at 2, yet they failed to do so until they filed their Opposition, which was nearly two and a half months too late. Although not incumbent on Respondents to do so, Respondents point out that they previously asked for these disclosures to avoid the need and expense of filing a motion. However, Enforcement Counsel refused to cooperate with Respondents' request.

Throughout this proceeding, Respondents have repeatedly requested that Enforcement Counsel provide all of the materials required to be disclosed under Rule 206, in addition to a list of documents withheld under Rule 206(c).¹ Because such requests have not been fully met, Respondents were forced to file their Motion. Only in response to the Motion have Respondents started to receive certain, albeit incomplete, information necessary to properly defend themselves.

For example, for the first time in the Opposition, Enforcement Counsel provided general categories of documents they withheld. Prior to the Motion, Enforcement Counsel was unwilling to share this information. Although the categories provided by Enforcement Counsel are at least a starting point for discussion, they are still insufficient for Respondents to determine whether such materials were properly withheld under Rule 206(c).

According to Enforcement Counsel, the first category of documents withheld were “materials obtained from third parties that relate exclusively to other investigations” or “records

¹ As explained in Respondents’ Motion, and admitted in the Opposition, Enforcement Counsel took the majority of March to produce their initial disclosures to Respondents (although the parties are still disputing whether such full disclosures have been made). In fact, Enforcement Counsel failed to produce the majority of the documents falling within the ambit of Rule 206 until shortly before the Hearing began on March 24, 2014, and then, Enforcement Counsel only attempted to do so after Respondents repeatedly requested full compliance with Rule 206. Pursuant to Rule 206, Enforcement Counsel is “to give respondents access to the **material facts** underlying enforcement counsel’s decision to recommend the commencement of enforcement proceedings.” 77 Fed. Reg. 39058, 39073 (June 29, 2012) (emphasis added), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-06-29/pdf/2012-14061.pdf>. The purpose behind such a requirement is simple: to “promote a **fair and efficient** resolution of administrative proceedings **without placing the respondent at an unfair disadvantage.**” *Id.* at 39073 (emphasis added). To accomplish that goal, the Rules set forth an “approach [that] will provide respondents **automatic access** to the factual information gathered . . . leading to the institution of the proceedings. . . . [to] help ensure that respondents have a complete understanding of the basis for the Bureau’s action, and can assess their defenses accordingly.” *Id.* at 39072 (emphasis added). Rule 201 also requires a respondent to file an answer to the notice of charges within 14 days of service, and respondents are entitled a hearing within 30 to 60 days after service of the notice. Given this “compressed timeline for litigating,” respondents are to be given access to the initial disclosures within seven days of the service of the notice of charges. *Id.* at 39068.

related to investigations of other subjects[.]” Opp’n at 3-4. Such a general description makes it impossible for Respondents to know whether “other investigations” or “investigations of other subjects” refers to content connected with captive reinsurance. If such “other investigations” or “other subjects” do relate to captive reinsurance, that information is relevant to Respondents’ case and should be produced under Rule 206(a). Enforcement Counsel relies on general facts related to the overall captive reinsurance market for several decades to support their claims against Respondents, including, but not limited to, the behavior of participants in that market and their overall business relationships and dealings.

Enforcement Counsel also withheld documents that are purportedly subject to privilege or work product protections. *See* 12 C.F.R. § 206(b)(1)(i) and (b)(1)(ii). However, based on their cursory description of the withholdings, Respondents cannot determine if such materials are properly cloaked in privilege. Thus, more details are necessary to determine whether such documents need to be produced, or whether they have been properly withheld. *See, e.g., 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).

Enforcement Counsel’s attempt to rely on cursory descriptions of withheld materials stands in stark contrast to the demands it made previously on Respondents. Specifically, when it issued the Civil Investigative Demand (“CID”), Enforcement Counsel demanded that Respondents produce a privilege log that included the:

1. type, specific subject matter, and date of the withheld item;
2. names, addresses, positions and organizations of all authors and recipients of the item;

3. specific grounds for claiming that the item is privileged; and
4. interrogatory or request to which the privileged document is responsive.

See CID, dated May 22, 2012 (excerpts attached as Exhibit A, hereto). There is no question that Enforcement Counsel’s cursory description of the materials it admits to withholding would not satisfy the Bureau’s “standard” that it imposed on Respondents and other parties receiving a CID.² This Tribunal should not permit Enforcement Counsel to act in such a hypocritical manner.

CONCLUSION

Because the information supplied in the Opposition is not sufficient to demonstrate Enforcement Counsel’s invocation of the exceptions articulated in Rule 206(b), Respondents respectfully request that this Tribunal order Enforcement Counsel to produce a list of withheld documents so that Respondents can determine whether they have all materials they are entitled to in order to defend themselves against the allegations made by the Bureau.

Dated: April 22, 2014

Respectfully submitted,

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² Notably, Respondents did produce very lengthy, detailed privilege logs in response to the CID—at great expense.

Attorneys for Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation

CERTIFICATION OF SERVICE

I hereby certify that on the 22nd day of April, 2014, I caused a copy of the foregoing Reply 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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