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	)	ORDER DENYING MOTION FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE INTO THE RECORD

On January 9, 2015, Respondents PHH Corp., PHH Mortgage Corp., PHH Home Loans LLC, Atrium Insurance Corp., and Atrium Reinsurance Corp. (hereinafter PHH) filed a Motion for Leave to Submit Additional Evidence into the Record in this adjudicative proceeding. The matter at issue is an enforcement action brought by the Consumer Financial Protection Bureau, alleging that PHH (through Atrium) accepted reinsurance premiums in violation of Sections 8(a) and 8(b) of the Real Estate Settlement Procedures Act (RESPA). PHH asks to have two documents included in the record. I have considered PHH's arguments in the Memorandum supporting its motion, the Opposition filed by CFPB Enforcement Counsel (Enforcement), and PHH's Reply. The motion is denied, for two reasons. First, PHH has failed to comply with the rules governing motions in this proceeding. Second, PHH has not provided good cause for reopening the record at this time, after the trial phase of this proceeding had already concluded and a Recommended Decision had been rendered.

I.

PHH seeks an open-ended opportunity to reopen the record in order to submit two additional items. At the threshold, however, the motion must be denied because PHH has failed to comply with the rather standard rules that govern all motions in these proceedings. Rule 205(b)(2) of the Bureau's Rules of Practice for Adjudicative Proceedings states: "All written motions must ... be accompanied by a proposed order." Rule 205(f) also says that all motions "shall be accompanied by a signed statement representing that counsel for the moving party has conferred or made a good faith effort to confer with opposing counsel in a good faith effort to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement." Yet PHH's motion was accompanied neither by a proposed order nor by a signed statement of conferral. These omissions justify rejection of the motion, and counsel are cautioned to review and comply with the Bureau's Rules when submitting motions. Nonetheless, because counsel has not had the benefit of any prior precedent on these issues, I will proceed to address the merits of the motion also.

II.

PHH supports its request to reopen the record with Exhibit A to its Memorandum, in which it presents a list of 75 exhibits that were admitted into evidence, but that were not mentioned either during the hearing or in Enforcement's post-hearing briefs. PHH Mem. at 2. PHH contends that the ALJ relied on these exhibits in reaching various findings and conclusions that constitute the bases for his Recommended Decision. *Id.* Of course, that would not be error, as the ALJ is entitled to rest his determination on any and all evidence that is acknowledged to be contained in the record. But PHH also complains that the ALJ pursued an "alternative theory of liability," different from the one alleged in the Notice of Charges: that PHH violated RESPA because the price for Atrium's reinsurance was not commensurate with its value. *Id.* at n.1. PHH seems to contend that the 75 exhibits listed in its Exhibit A relate to this "alternative theory," and that by relying on them the ALJ violated its due process rights, the Administrative Procedure Act, and the Bureau's rules. Enforcement counters that PHH was reasonably apprised that the value of Atrium's reinsurance was at issue based on language in the Notice of Charges and various documents that Enforcement filed during the proceeding. Enf. Opp. at 3-8. Enforcement also contends that it was irrelevant whether the value of PHH's reinsurance was challenged in the Notice of Charges, because the value of the reinsurance became an issue as a result of an affirmative defense that PHH itself asserted. *Id.* at 2.

PHH further contends that it cannot challenge the ALJ's findings and conclusions in this appeal without an opportunity to submit additional evidence into the record. PHH Mem. at 3. The first of the two documents that it identifies is the License Agreement that PHH entered into with CMG, which is Exhibit B to its Memorandum. This document was not in the record, but PHH notes that the ALJ concluded that it contained PHH's agreement to refer business to CMG. *Id.* at 7-8 (quoting Recommended Decision at 74). PHH argues that this finding was erroneous, and it seeks to supplement the record with a copy of the License Agreement to support its argument. *Id.* In response, Enforcement notes that PHH was aware that the content of the License Agreement was at issue during the hearing and could have submitted the document at that time. Enf. Opp. at 11. It also argues that PHH should have provided the License Agreement to the Bureau in response to the Bureau's May 2012 civil investigative demand, but did not do so. *Id.* at 12. Finally, Enforcement contends that, although the License Agreement does not explicitly mention any agreement to refer business to CMG, another document, the Asset Purchase Agreement that PHH entered into with CMG, apparently contains such an agreement and thus would establish the same point of fact. *Id.* at 13-15. Enforcement also provides a document that refers to the Asset Purchase Agreement.

The second document, Exhibit C, is a series of emails and a letter relating to a $5 million dividend that PHH received from the Genworth trust account. The ALJ concluded that, as a result of the dividend payment, the Genworth 2008-B book did not transfer risk. PHH Mem. at 8. PHH claims the documents show that Genworth acquiesced in the payment, and that the payment was not inconsistent with the amended version of PHH's agreement with Genworth. *Id.* at 8-9. Enforcement responds that PHH was on notice of Enforcement's position that the $5 million dividend PHH withdrew from the Genworth trust account affected the risk that was

transferred as a result of the reinsurance, and PHH could have submitted the documents during the hearing but did not do so. Enf. Opp. at 11-12.

III.

Before addressing the merits, it is necessary to determine the standard for granting a motion to supplement the record where that motion is submitted after an appeal has been filed pursuant to Rule 402, 12 CFR 1081.402. Bureau Rule 400 provides that an ALJ may reopen the record "for good cause shown." 12 CFR 1081.400. But there is no rule specifically providing for reopening the record after the filing of a notice of appeal, which typically would divest the ALJ of jurisdiction to act on the motion. Nevertheless, since the ALJ may reopen the record, and since I may exercise all the powers that I could have exercised if I had made the recommended decision myself, 12 CFR 1081.405(a), I have the authority, if appropriate, to supplement the record at this time. Thus, the core issue is simply whether PHH can show "good cause" to supplement the record in these circumstances.

Although the Bureau has no precedent yet that addresses motions to supplement the record that are submitted after the filing of an appeal, we can look to other federal agencies that conduct adjudicative proceedings for how they treat such motions. The Commodity Futures Trading Commission and the Securities and Exchange Commission both allow the record to be supplemented if the party shows both that the evidence is material and that there were reasonable grounds for failing to submit it earlier. 17 CFR 12.405 (CFTC); 17 CFR 201.452 (SEC). The National Labor Relations Board allows a party to a matter that has been appealed to the Board to move to reopen the record "because of extraordinary circumstances." Such a motion:

> shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

29 CFR 102.48(d)(1).

The Federal Trade Commission, whose rules are similar to the Bureau's own rules, has established a standard that it applies to assess whether a party has made a showing of good cause to reopen the record. The FTC's standard is based on the following four criteria:

> (1) whether the moving party can demonstrate due diligence (that is, whether there is a bona fide explanation for the failure to introduce the evidence at trial); (2) the extent to which the proffered evidence is probative; (3) whether the proffered evidence is cumulative; and (4) whether reopening the record would prejudice the non-moving party.

In the Matter of Brake Guard Products, Inc., 125 F.T.C. 138, 248 n.38 (1998).

The standards applied by the agencies mentioned above are quite similar. All require some meaningful justification as to why the items were not included in the record previously. And all require a persuasive explanation of why the items are material to informing the ultimate result of the proceeding. For purposes of the Bureau's proceedings, I will adopt these same two essential factors and require a party that moves to supplement the record on appeal to establish both factors in order to prevail on the motion.

The FTC's "due diligence" criterion provides appropriate guidance on the first factor, and requires a bona fide explanation for the moving party's failure to introduce the specified items in the hearing before the ALJ. This can more readily be done where the items were unavailable to it earlier; where the items could have been introduced but it chose not to present them before the ALJ, a strong and compelling justification must be adduced for the failure to introduce the items into the record at the proper time. This is important because to withhold the evidence in the hearing before the ALJ and then to submit it later could obviously prejudice both the presentation of the other party's case and the ALJ's ability to determine the appropriate outcome of the proceeding on the record as established during the hearing. So the timely submission of evidence is crucial to preserving the orderliness of the Bureau's adjudicative proceedings.

As to the second factor, the significance of the items to be added to the record, it can be addressed by combining the second and third criteria used by the FTC. Accordingly, I will assess whether the items to be added are probative of the outcome and not otherwise cumulative of evidence already in the record. Only where both criteria are met is the extra evidence actually likely to be material to the ultimate determination of the issues raised in the hearing and appeal.

A party seeking to supplement the record must address both criteria. If it fails to make a satisfactory showing with respect to either, its motion will be denied.

IV.

Although PHH captions its motion as a request for "Leave to Submit Additional Evidence into the Record," the first part is akin to a request for rehearing to respond to certain findings and conclusions that it contends it did not have a chance to address before the ALJ. On this point, I agree with Enforcement that the value of Atrium's reinsurance was put directly at issue based on language in the Notice of Charges, the record compiled during the proceeding, and an affirmative defense that PHH itself asserted. Moreover, the issue of whether PHH was, in fact, denied due process is an issue that PHH should challenge in its appeal brief, not in a motion to supplement the record. Indeed, PHH does devote two pages of its appeal brief to this issue, and its entire brief is 30 pages long, the full length permitted by the Bureau's rules. PHH may not use a motion to supplement the record as a means of presenting additional argumentation that exceeds the Bureau's rule on the length of briefs. Accordingly, I will deny PHH's request for rehearing, and in evaluating the issues that are raised in PHH's appeal, I will not consider any of the arguments that are discussed in this motion.

PHH next requests that I supplement the record with its Exhibit B, which is a copy of the License Agreement that it entered into with CMG, disputing the ALJ's statement (Recommended

Decision at 74) that it encompasses a written agreement on the part of PHH to refer mortgage insurance business to CMG in exchange for reinsurance premiums that CMG will pay to Atrium. PHH, which did not produce this document in discovery, does not provide an adequate explanation for its failure to submit the License Agreement into the record previously. Early in the hearing, PHH Mortgage's vice president, Samuel Rosenthal, testified that he recognized Enforcement exhibit ECX 0747. He explained that the exhibit consists of a series of emails that circulated internally at PHH. The first page of that exhibit contains an email in which the sender states that the "acquisition agreement" with CMG "required" that "[d]uring the term of the License Agreement [PHH] agrees to ... use its commercially reasonable efforts to obtain primary mortgage insurance from [CMG] for loans closed by or for the benefit of credit unions doing business with [PHH]." It was not unreasonable for the ALJ to infer from this email that PHH agreed to refer certain mortgage insurance business to CMG, regardless of what contrary inferences PHH might prefer to draw now after the fact. The bottom line here is that this exchange provided PHH with ample notice that, if it wanted to present and discuss documents bearing on ECX 0747, it should have done so during the hearing before the ALJ.

Further, it is far from clear that the License Agreement is even probative on the issue of whether there was an agreement between PHH and CMG to refer mortgage insurance business to CMG in exchange for reinsurance premiums. The crucial part of the ALJ's holding is that there was an agreement between PHH and CMG pursuant to which PHH would refer mortgage insurance business to CMG. The ECX 0747 email states that "the acquisition agreement required" PHH, "[d]uring the term of the License Agreement," to refer mortgage insurance business to CMG. The ALJ does not explain why he would have assumed that, just because referrals had to be made "during the term of the License Agreement," this meant that PHH's obligation to refer business to CMG was memorialized in the License Agreement. Indeed, the more reasonable reading of the ECX 0747 email is that there was an agreement to refer business, and this agreement was contained not in the License Agreement but in a different document, "the acquisition agreement." Thus, I reach a different interpretation as to the meaning of ECX 0747, and the License Agreement is not probative as to that interpretation. Accordingly, on this point PHH fails both parts of the test governing its motion to supplement the record.

Finally, PHH also seeks to supplement the record with its Exhibit C, a letter and various emails concerning its withdrawal of $5 million from its Genworth trust account, which it claims did not violate its agreement with Genworth. PHH claims that its "ability to withdraw funds from the trust was the result of an issue never explored by [Enforcement], nor was it the subject of any testimony as it was only mentioned once during the hearing." PHH Mem. at 8.

I find it clear that PHH was aware from the outset that a central issue in the case was whether Atrium's reinsurance transferred risk. This was evident from the Notice of Charges, and it pervaded the issues examined in the hearing. Although PHH contends that it was surprised when the ALJ held that the prices it charged for reinsurance were too high, Mot. at 2 n.1, the documents in Exhibit C do not relate to the price Atrium charged; they relate instead to whether there was *any* risk transfer. PHH cannot plausibly claim to have been surprised on *this* issue, and thus it has failed to provide sufficient justification for not introducing these documents in the hearing before the ALJ.

Moreover, PHH has also failed to demonstrate that its Exhibit C is probative. According to PHH, these items show that PHH's dividend withdrawal from the Genworth trust account was consistent with the trust agreement. Whether or not that was so, the relevant holding for purposes of this proceeding was whether payment of the dividend "nullified risk transfer," as the ALJ concluded. Recommended Decision at 67. The ALJ based this conclusion on ECX 0194, an analysis of the Genworth 2008-B book year performed by Milliman, Inc., a consulting firm specializing in actuarial services, as well as the testimony of Milliman principal Michael Schmitz, all of which explained that the dividend withdrawal was inconsistent with that analysis. *See* ECX 0194 at 7; Transcript at 1842, 1991. Whether Genworth approved the dividend transfer or not was irrelevant to this risk-transfer analysis, meaning that the evidence is not probative of the outcome of this matter. PHH therefore does not satisfy either of the factors required to supplement the record at this stage of the proceeding.

V.

For the reasons set forth above, I DENY in its entirety Respondents' Motion for Leave to Submit Additional Evidence into the Record.

SO ORDERED.

Richard Cordray
Director
Consumer Financial Protection Bureau

February 13, 2015