

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

Eastern Division

<hr/>		:	
Consumer Financial Protection Bureau,		:	
		:	
		:	
	Plaintiff,	:	CIVIL ACTION
		:	
v.		:	No. 16-144
		:	
Intercept Corporation d/b/a Intercept EFT,		:	
Bryan Smith, and Craig Dresser,		:	
		:	
	Defendants.	:	
<hr/>		:	

DEFENDANTS’ NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants Intercept Corporation and Messrs. Smith and Dresser hereby file this Notice of Supplemental Authority in support of their Motion to Dismiss to bring to the Court’s attention yesterday’s ruling by the United States Court of Appeals for the District of Columbia Circuit in *PHH Corp. v. CFPB*, a copy of which is attached as Exhibit A. This matter involved a challenge by the company to an administrative order issued by Director Cordray concluding that PHH had violated the Real Estate Settlement Procedures Act (“RESPA”). The Court of Appeals found in favor of PHH in every possible respect and, critically for the purposes of the present litigation, ruled that the structure of the Bureau violates Article II of the U.S. Constitution by lodging “massive, unchecked power” in the Director. Ex. A at 24-25, 27.¹

¹ To remedy the constitutional defect, the *PHH* court elected to sever the “for cause” removal provision insulating Director Cordray from Presidential control rather than striking down the agency. Ex. A at 69. The Intercept Defendants have sought and continue to seek the broader remedy. It bears noting, however, that the *PHH* court did not address what effect its choice of remedy would have on pending enforcement actions. *Id.* at 69 n. 19.

In so holding, the Court of Appeals rejected every argument set forth by the CFPB in this case in support of the Bureau's constitutionality, concluding that (i) no historical precedent exists for a single-director independent agency exercising substantial executive authority, *id.* at 27 (the CFPB is a "historical anomaly"); (ii) the case law relied on by the CFPB does not support its position that the Bureau is constitutionally structured, *id.* at 20-22, 33; and (iii) Congress' failure to provide for a multi-member commission to moderate the exercise of the Bureau's powers represents a constitutional defect, *see id.* at 46 (noting that the multi-member structure, unlike the single-director model, "will tend to lead to [agency] decisions that are not as extreme, idiosyncratic, or otherwise off the rails.").

The *PHH* court ultimately concluded that the Bureau's structural defects render Director Cordray "the single most powerful official in the entire U.S. government, other than the President" in terms of the unilateral authority granted him (and even "more powerful" in the arena of consumer finance), and that such unchecked authority risks "arbitrary decisionmaking and abuse of power." *Id.* at 27, 44. The Court of Appeals' concerns are of a piece with those highlighted by Defendants in their litigation before this Court. *See* Defs.' Mot. to Dismiss at 10-12 (describing the CFPB's position that it may unilaterally toll the running of the CFPA's statute of limitations indefinitely); Defs.' Reply at 10-12 (describing the CFPB's unprecedented effort to expand its authority under the CFPA to "business-to-business" companies); Complaint ¶¶ 32-42, *Intercept Corp. v. CFPB*, No. 16-118 (D.N.D. May 19, 2016) (alleging threats made by CFPB attorneys to the effect that Intercept could face billions of dollars in penalties, and that Director Cordray had prejudged the company's liability and personally dictated certain monetary and injunctive relief). Notably, the *PHH* court rejected an analogous attempt by the agency to extend its statutory authority under RESPA, *see* Ex. A at 73-89 (after describing the statutory question as "not a close

call,” rejecting the CFPB’s “aggressive interpretation” as inconsistent with RESPA and industry expectations, and finally concluding that the Bureau’s “deeply unsettling” effort to retroactively apply its incorrect interpretation violated PHH’s right to due process), and decisively rejected the Bureau’s position that it was unconstrained by any statute of limitations provision. *Id.* at 99-100 (describing the CFPB’s position as “absurd”).

Dated: October 12, 2016

Respectfully submitted,

/s/ Michael T. Andrews

Michael T. Andrews (ND #05516)

David J. Hauff (ND #04145)

Anderson, Bottrell, Sanden & Thompson

4132 30th Ave SW, Suite 100

PO Box 10247

Fargo, ND 58106-0247

(701) 235-3300

mandrews@andersonbottrell.com

dhauff@andersonbottrell.com

Jay A. Dubow

Richard J. Zack (admitted *Pro Hac Vice*)

Pepper Hamilton LLP

3000 Two Logan Square

Eighteenth and Arch Streets

Philadelphia, PA 19103-2799

(215) 981-4000

zackj@pepperlaw.com

dubowj@pepperlaw.com

Attorneys for Defendants