

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

EASTERN DIVISION

_____)	
CONSUMER FINANCIAL)	
PROTECTION BUREAU,)	
)	
<i>Plaintiff,</i>)	
)	Civil Action No. 3:16-cv-00144
v.)	
)	
INTERCEPT CORPORATION, et al.,)	
)	
<i>Defendants.</i>)	
_____)	

RESPONSE TO DEFENDANTS’ NOTICE OF SUPPLEMENTAL AUTHORITY

The D.C. Circuit’s split decision (2-1) in *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Oct. 11, 2016), was wrongly decided and, in any event, does not control the outcome of defendants’ motion to dismiss in this case. The Bureau stands ready to provide this Court with full briefing on the issue should the Court determine that it would be of assistance in resolving the present motion.

In considering a separation-of-powers challenge to the Bureau’s structure, the *PHH* panel announced a new constitutional rule that agencies must be structured as multimember commissions if their heads are removable only “for cause” rather than at the will of the president. This principle has no basis in the text of the Constitution or in Supreme Court case law. Instead, the panel based its decision on (a) the lack of sufficient historical precedent for the Bureau’s structure, and (b) a policy judgment that multimember commissions are superior to single agency heads. The panel did not—and could not—conclude that the Bureau’s structure either

aggrandizes the legislative branch or diminishes the president’s ability to direct the operations of the executive branch, beyond what the Supreme Court approved in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) (approving “for cause” removal protections for FTC heads). Slip op. at 55–59. The panel decision was wrongly decided and is not likely to withstand further review.

Nor would the *PHH* decision control the outcome of this motion in any event. This Court is, of course, not bound by the decisions of an appellate court outside of the Eighth Circuit. And because the mandate has not yet issued from the D.C. Circuit (and will not issue until the Bureau has had an opportunity to petition for rehearing en banc or a writ of certiorari, see Fed. R. App. P. 41), the decision is not yet final and should not be given even persuasive weight at this point. See, e.g., *Carver v. Lehman*, 558 F.3d 869, 878–79 (9th Cir. 2009) (“Until the mandate has issued, opinions can be, and regularly are, amended or withdrawn, by the merits panel...”). Finally, with respect to the *PHH* court’s rulings on the Real Estate Settlement Procedures Act and the applicable statute of limitations under that Act, those holdings are entirely irrelevant to this case, where the Bureau has brought claims under a different statute and the parties agree on the applicable statute of limitations provision.

Dated: October 14, 2016

Respectfully submitted,

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