UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB- 0002

In the Matter of:	**ENFORCEMENT COUNSEL'S STATEMENT OF DISPUTED FACTS IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY DISPOSITION**
PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS LLC, ATRIUM INSURANCE CORPORATION, and ATRIUM REINSURANCE CORPORATION	

Pursuant to 12 C.F.R. § 1081.212(d)(2), in support of its opposition to Respondents' Motion for Summary Disposition (Respondents' Motion), the Consumer Financial Protection Bureau (Bureau or CFPB) hereby submits the following statement of facts as to which the Bureau contends a genuine dispute exists for purposes of adjudicating the motion by Respondents, PHH Corporation and its affiliates (together, PHH).[1] This statement is organized into two sections. In Section I, the Bureau submits disputed facts that it contends support a denial of PHH's request for summary disposition on the basis of its claim that Atrium purportedly provided actual services under Section 8(c)(2) of the Real Estate Settlement Procedures Act (RESPA). In Section II, the Bureau responds

[1] The facts in this Statement of Disputed Facts are included solely for purposes of supporting the Bureau's opposition to Respondents' Motion for Summary Disposition. These facts are "disputed" for purposes of Respondents' Motion insofar as Respondents have contested them. But the inclusion of any fact in this statement is without waiver of or prejudice to the Bureau's right to contend that any issue or fact is undisputed in support of the Bureau's claims.

to Respondents' Statement of Undisputed Facts in Support of their Motion for Summary Disposition (Respondent's Statement) by identifying facts alleged therein that the Bureau disputes.

The statement below does not include citations to evidence obtained from a third party that may be subject to a claim of confidentiality and which the Bureau has not yet disclosed to Respondents pursuant to 12 C.F.R. § 1081.119. The Bureau reserves the right to supplement this statement based on such evidence after disclosure to Respondents.

I. Material Disputed Facts Supporting Denial of Respondents' Motion.

1. In 1998, a consortium of the country's major mortgage insurance companies ("MIs"), through their trade association, privately expressed alarm to state insurance regulators regarding captive mortgage reinsurance arrangements. Asking for limits on captive arrangements between MIs and lenders, the MIs argued: "[I]f not properly controlled," such arrangements "present a threat to the overall strength and claims-paying ability of the private mortgage insurance industry." The MIs identified "Risk Factors Associated With Captive Reinsurance," observing that segregation of premiums collected from each MI into a separate trust account accessible only in the event of exceedingly unlikely loss levels runs "counter to the basi[c] insurance principle that an insurer's liability should be supported by all of its assets." The MIs warned that permitting MIs "to reinsure more than 25% of their business in captive reinsurance structures" would be "financially detrimental to the mortgage finance industry." The MIs also stated that when lenders issue captive reinsurance, "a true arms-length independent judgment of risk [is] more difficult to obtain." *See* Presentation to Arizona Department of Insurance, "Captive Reinsurance and Other Risk Sharing Arrangements," Jan. 22, 1998 (MGIC-CFPB00190633 at MGIC-CFPB00190646-649), attached hereto as Ex. A to the Declaration of Donald R. Gordon.[2]

[2] Documents referenced herein are attached to the Declaration of Donald R. Gordon and are cited as "Gordon Decl. Ex. ___."

2. The MIs in 1998 therefore pushed for "more stringent" risk-to-capital requirements for captives than the MIs themselves were subject to. They also sought regulatory assurance that captive reinsurance premiums would not be "greater than the cost of comparable coverage with an unrelated insurer," that "dividends and other payments by the captive … be restricted to ensure the availability of funds to pay claims," and that ceding to captives would "not exceed 25% of premium…." The MIs sought these changes to offset the increased risk to the mortgage insurance system posed by captive reinsurance. *See* Presentation to Arizona Department of Insurance, "Captive Reinsurance and Other Risk Sharing Arrangements," Jan. 22, 1998 (MGIC-CFPB00190633 at MGIC-CFPB00190650), Gordon Decl. Ex. A.

3. Respondents Atrium Insurance Corporation and Atrium Reinsurance Corporation (together, Atrium), Respondent PHH's Corporation's captive, had no employees that were not also employees of PHH. In the class action *Munoz v. PHH Corp.*, Mark Danahy, the President and CEO of PHH Mortgage and the President of Atrium, testified: "Q. Does Atrium have any employees? A. It does not." *See* M. Danahy Dep. Tr. (Oct. 22, 2009) at 24:17-18, Gordon Decl. Ex. B; *see also id.* at 17:15-24 (describing Mr. Danahy's positions).

4. Atrium conducted no underwriting to price any reinsurance risks that it purportedly assumed. *See* S. Rosenthal Investigational Hearing Tr. (Aug. 13, 2013) at 40:16-24, Gordon Decl. Ex. C ("Rosenthal IH Tr.").

5. Atrium entered into purported reinsurance arrangements with MIs that enabled Atrium to receive 40% of the insurance premiums that consumers paid to the MIs. *See* Rosenthal IH Tr. at 132:11-23, Gordon Decl. Ex. C.

6. Over the lifespan of its captive arrangements with MIs United Guaranty, Genworth, Radian and CMG, Atrium collected at least $493 million in purported reinsurance premiums from those MIs:

a. Atrium collected at least $349.6 million in purported reinsurance premiums from United Guaranty. *See* Atrium Reinsurance Corporation GAAP Unaudited Financial Statements, Sept. 30, 2012 (CFPB-PHH-00098492) at 6, Gordon Decl. Ex. D.

b. Atrium collected at least $137.2 million in purported reinsurance premiums from Genworth. *See* Atrium Reinsurance Corporation GAAP Unaudited Financial Statements, Mar. 31, 2012 (CFPB-PHH-00098431) at 6, Gordon Decl. Ex. E.

c. Atrium collected at least $3,534,924.32 in purported reinsurance premiums from Radian. *See* MI Remittance Summary (CFPB-PHH-00094507), Gordon Decl. Ex. F.

d. Atrium collected at least $2,726,736.47 in purported reinsurance premiums from CMG. *Id.*

7. The premiums ceded to Atrium by MIs were initially held in captive trust accounts. There was one trust account for each MI. *See* Rosenthal IH Tr. at 42:12-18, 116:23-117:9, Gordon Decl. Ex. C.

8. Each captive trust account established by PHH held two sources of funds: PHH's capital contributions and the premiums ceded by the MI. *See* Rosenthal IH Tr. at 42:21-43:2, Gordon Decl. Ex. C.

9. Atrium's liability to the MIs under its captive arrangements was limited to the funds in the applicable captive trust. Mr. Rosenthal testified that Atrium had no exposure beyond "all the capital that in, in that trust" because "the most it could lose was the money, all the premiums and all the capital it initially put in the trust . . . ." *See* Rosenthal IH Tr. at 42:12-43:19, Gordon Decl. Ex. C. Thus, if all of the funds in a trust were exhausted by claims, the MI would not be able to reach any other Atrium assets outside of the trust or any assets of PHH.

10. In its eighteen years of existence as a captive between 1995 and 2013, Atrium never paid claims or made any other payments to MIs that exceeded the then-available funds in the applicable captive trust.[3] *See* United Guaranty cession statement (CFPB-PHH-00113991), Gordon Decl. Ex. G; Genworth cession statement (CFPB-PHH-00025672 and CFPB-PHH-00025673), Gordon Decl. Exs. H and I; Radian cession statement, Gordon Decl. Ex. J; Exhibit A to the Declaration of Michael Bogansky, Gordon Decl. Ex. K.[4]

11. In practice, the captive arrangements entered into by Respondents effectively prevented any real transfer of risk from the MIs – that is, any real risk that Atrium would have to pay significantly more in claims to a MI than it had received in premiums from that MI. At the first sign that significant claims might jeopardize its capital contributions, PHH could eliminate the risk of losing its capital by withdrawing dividends so that the only funds remaining in the trust were the premiums paid by the MI, along with any income from the investment of those premiums. For example, 2009 was the first year in which Genworth received any payments from its trust – less than $1 million that year, out of more than $100 million in total premiums that Genworth had ceded to the trust since 2001. *See* Genworth cession statement (CFPB-PHH-00025672 and CFPB-PHH-00025673), Gordon Decl. Exs. H and I.[5] In 2010, paid losses to Genworth increased to over $10

[3] "Cession statements" are quarterly accounting statement prepared by each MI for the loans covered by its captive arrangement with Atrium. *See* Rosenthal IH Tr. at 59:8-60:15, Gordon Decl. Ex. C. Printouts of relevant pages of the cession statements for United Guaranty, Genworth, and Radian are attached as Exhibits G through J to the Declaration of Donald R. Gordon.

[4] The Declaration of Michael Bogansky (Attachment 1 to Exhibit G to Respondents' Motion) was originally included as part of PHH's initial submission to the Bureau pursuant to the Bureau's Notice and Opportunity to Respond ("NORA") process. In that version, Mr. Bogansky attached as Exhibit A to his declaration what he describes as "a chart I prepared showing, for each reinsurance agreement, the capital contributions that we made and the dividends that were earned by Atrium, as well as the distributions made when each of the reinsurance agreements was commuted." Bogansky Decl. ¶ 14. It appears that the referenced chart was omitted from the version of his declaration attached to Respondents' Motion.

[5] The Genworth cession statement is contained in two files titled "1Q12-Atrium-Summary" and "trust-Atrium" produced by Respondents. *See* Gordon Decl. Exs. H and I. Paid losses to

million, and Atrium took a $5 million dividend from the trust. *Id.* The removal of those funds reduced Respondents' net capital contribution in the trust to just $500,000. *Id.* In 2011, paid losses to Genworth grew to over $12 million, and Atrium withdrew another $8.9 million from the trust, eliminating Respondents' entire capital contribution from the trust. *Id.* Thus, Respondents removed their capital contributions from the Genworth trust just as significant losses were mounting.

12. Even when the agreement between Atrium and an MI partner did not permit the removal of funds from the trust in the amount Respondents' desired, Respondents could and did use its leverage over the MI to extract one-sided amendments to the agreement, allowing Atrium to completely eliminate its capital contributions from the trust for that MI:

a. In a 2006 internal memorandum, PHH stated its intention to "[u]se leverage to renegotiate Captives with MI's." *See* PHH "Captive Strategy" memorandum (CFPB-PHH-00132147), Gordon Decl. Ex. L. PHH's Sam Rosenthal, who drafted the memorandum, testified that his reference to "leverage" in this memorandum meant: "[W]e'll send you the mortgage insurance and you give us as good a deal as possible." *See* Rosenthal IH Tr. at 70:2-80:12, Gordon Decl. Ex. C.

b. In March 2007, Atrium took a $52 million dividend from the trust account established for United Guaranty. *See* United Guaranty cession statement (CFPB-PHH-00113991), Gordon Decl. Ex. G.[6] The $52 million dividend was not

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Genworth appear in row 16 of the "Settlement" worksheet of the "1Q12-Atrium-Summary" file (Gordon Decl. Ex. H). Ceded premiums and dividend withdrawals from the Genworth trust appear in the "trust" worksheet of the "trust-Atrium" file (Gordon Decl. Ex. I).

[6] The cession statement for United Guaranty is a spreadsheet produced by PHH titled "0912 Sep Settlement." *See* Gordon Decl. Ex. G. The $52 million dividend appears in the "Trust Deposits" worksheet, in cell L120 of the "Excess Funds" column.

permitted under the then-existing reinsurance agreement between United Guaranty and Atrium because the withdrawal of that amount would have caused the funds in the trust to fall below the minimum capital required under the agreement. That amount was withdrawn only after United Guaranty agreed to an amendment to the reinsurance agreement to allow the dividend without receiving anything in return, other than the prospect of future referrals from PHH. *See* email, Rosenthal (PHH) to Walker (UGI), Jan. 8, 2007 (CFPB-PHH-00033419), Gordon Decl. Ex. M; "Amendment # 7 to Reinsurance Agreement By and Between United Guaranty Residential Insurance Co. and Atrium Insurance Co.," Feb. 1, 2007 (CFPB-PHH-00050515-17), Gordon Decl. Ex. N.

c. Although United Guaranty was among the MIs who, in 1998, jointly pressed state regulators for more stringent minimum capital requirements and restrictions on dividends by the captive to ensure the availability of funds to pay claims, on the eve of the financial crisis, in 2007, United Guaranty allowed Respondents to remove more than $52 million in funds from the trust that Respondents previously had no right to withdraw. *See* BestWeek Insurance News and Analysis, "Mortgage Insurers, Regulators Unite to Urge Curbs on New Bank Ventures," Jan. 12, 1998, Gordon Decl. Ex. A, at MGIC-CFPB00190653 (listing United Guaranty as a member of MI trade association urging state regulators to impose limits on captives); *see also* documents referenced in ¶ 12(b). PHH was able to obtain such a highly one-sided amendment from United Guaranty because it had significant leverage resulting from its ability to steer primary mortgage insurance business to, or potentially away from, MIs.

d. In February 2007, the month before Respondents took the $52 million dividend, its total capital contributions to the United Guaranty trust from its inception were approximately $46.8 million and it had previously withdrawn more than $44 million in dividends. *See* Exhibit A to M. Bogansky Declaration, Gordon Decl. Ex. K; United Guaranty cession statement, Gordon Decl. Ex. G.[7] Thus, the $52 million that Respondents removed from the trust in March 2007 eclipsed the less than $3 million in Respondents' capital contributions remaining at that time. As a result, from then on the United Guaranty trust contained no funds contributed by Respondents and the only money at risk in the trust was from ceded premium payments and investment income. *Id.*[8] Thus, during the financial crisis, when funds were actually needed to pay claims to cover catastrophic losses, United Guaranty could merely obtain a return of what remained of its paid premiums in the trust and no more.

13. PHH used its leverage to obtain other favorable amendments from the MIs that limited its risk. In the spring of 2006, PHH became concerned about increasing defaults on subprime loans, and decided that it wished to exclude such loans from the captive arrangements. Doing so would allow PHH to continue to originate subprime loans and require borrowers to obtain mortgage insurance coverage on those loans, while reducing its highly limited risk of "reinsurance" exposure even further. United Guaranty and Genworth were receiving the vast majority of PHH's referrals at the time. Both companies gave up access to Atrium's "reinsurance" coverage on

[7] The United Guaranty cession statement ("Capital Deposit" column, cells F11-F118) shows that Respondent contributed approximately $46.8 million in total capital through February 2007. *See* Gordon Decl. Ex. G.

[8] The United Guaranty cession statement ("Capital Deposit" column) shows no capital contributions after June 2005, so Respondents never made up the deficit after it withdrew the $52 million dividend.

subprime loans and received nothing in exchange. PHH was able to obtain these free, highly favorable modifications of its captive arrangements because it had the leverage to steer business to, or potentially away from, the MIs. *See* email and attachments, Rosenthal (PHH) to Danahy (PHH), Jul. 5, 2006 (CFPB-PHH-00124507-22), Gordon Decl. Ex. O; Rosenthal IH Tr. 28:21-29:5, Gordon Decl. Ex. C.

14. In discussions with mortgage insurer PMI, PHH urged PMI to craft for PHH's consideration captive arrangements that would help eliminate PHH's risk by narrowing the layer of losses to which Atrium was exposed, reducing capital requirements, and increasing premiums. In a 2006 email, a PHH executive urged PMI to "Think high cede, late attachment, short corridor, low capital, fast dividend!"[9] *See* email, Rosenthal (PHH) to Beagles (PMI), Oct. 27, 2006 (CFPB-PHH-00033468), Gordon Decl. Ex. P.

15. As a result of these types of risk-limiting mechanisms, Atrium did not pay a single dime in losses for over 12 years, from its inception, in 1995, through the end of 2007. *See* Annual Statement of the Atrium Insurance Corporation, for the Year Ended Dec. 31, 2008 (CFPB-PHH-00096341, at *00096350), Gordon Decl. Ex. Q.

16. Even after the Great Recession brought a catastrophic downturn in the mortgage industry, Atrium's reinsurance trusts still held over $189 million in assets. *See* Atrium Reinsurance Corporation GAAP Unaudited Financial Statements, Sept. 30, 2012 (CFPB-PHH-00098492 – 00098501), Gordon Decl. Ex. D; Atrium Reinsurance Corporation GAAP Unaudited Financial Statements, Mar. 31, 2012 (CFPB-PHH-00098431 – 00098441), Gordon Decl. Ex. E. PHH had

[9] The term "attachment point" is described in paragraph 4 of Respondents' Statement. As explained in that paragraph, a high attachment point would require a greater level of losses before Atrium had to pay any claims. Paragraph 4 also states that Atrium was responsible for claims "only up to a certain percentage of losses," which it describes as the "detachment point" or "exit point." A "risk corridor" or "risk band" refers to the level of losses between the "attachment point" and the "detachment point" at which Atrium was required to pay claims.

earned an approximately 20% annualized internal rate of return from captive reinsurance. *See* Exhibit A to M. Bogansky Declaration, Gordon Decl. Ex. K; PHH Corporation's Supplemental NORA Submission, Sept. 23. 2013, at *7, Gordon Decl. Ex. R.

II. Allegations in Respondents' Statement Disputed by the Bureau.

1. The Bureau disputes that "Atrium's business is to provide reinsurance on private mortgage insurance ('pmi') issued in connection with loans originated by respondents …" *See supra* Section I ¶¶ 1-16 and evidence cited therein.

2. The Bureau disputes that the referenced "reinsurance agreements" between Atrium and MIs were agreements to provide actual reinsurance services. *See supra* Section I ¶¶ 1-16 and evidence cited therein.

3. The Bureau disputes that the referenced "reinsurance agreements" between Atrium and MIs were agreements to provide actual reinsurance services. *See supra* Section I ¶¶ 1-16 and evidence cited therein.

4. The Bureau disputes that the referenced "reinsurance agreements" between Atrium and MIs were agreements to provide actual reinsurance services or that Atrium "agreed to provide reinsurance" to MIs pursuant to those arrangements. *See supra* Section I ¶¶ 1-16 and evidence cited therein. The Bureau further disputes that PHH's capital contributions were made "[i]n connection with the establishment and maintenance of" actual reinsurance services to the MIs. *See supra* Section I ¶¶ 1-16 and evidence cited therein.

6. The facts alleged in paragraph 6 of Respondents' Statement are not material to any claim or defense because the New York Insurance Department's (NYID) did not assess Respondents' captive arrangements for RESPA compliance. *See* letter, Buchmiller (NYID) to Laurenzano (Stroock & Stroock & Lavan LLP), Jan. 25, 2010 (CFPB-PHH-00113025), Gordon Decl. Ex. S. Thus, the NYID's non-disapproval of reinsurance assumptions agreements between

Atrium and Atrium Re does not tend to establish that Respondents' captive arrangements complied with RESPA.

7. The Bureau disputes that an opinion prepared by Milliman for a "specific book year" can serve as a valid basis of a conclusion that a "reinsurance agreement" as a whole has "a reasonable probability of loss to the reinsurer and the net ceded premium is reasonable related to the ceded risk." Atrium's reinsurance arrangements covered multiple books years. *See* Respondents' Statement of Undisputed Facts ¶¶ 3, 18. Moreover, as the court found in *Munoz v. PHH Corp.*, 2013 WL 2146925 (E.D. Cal. May 15, 2013), "the structure of Atrium's reinsurance arrangement does not lend itself to a book year approach" because "[i]t is undisputed that all book years within a given reinsurance agreement are pooled into one trust account and cross-collateralized with all other book years" and "[t]hus, cross-collateralization of all book years reduces the overall risk associated with continuing a reinsurance arrangement with a given insurer."

To the extent Respondents' reference to Milliman as a "third-party actuarial firm" is intended to suggest that Milliman's opinions were independent, the Bureau further disputes the facts alleged in paragraph 7 of Respondents' Statement. Milliman had a strong financial incentive to provide opinions approving purported reinsurance arrangements as reflecting adequate risk transfer and reasonably priced in relation to the risk assumed by the purported reinsurer. Because issuing such approvals was a significant part of Milliman's business, Milliman stood to gain directly by the proliferation of captive reinsurance arrangements throughout the industry, which was facilitated by its approvals. Milliman issued hundreds of such opinions to numerous lenders and mortgage insurers. *See* Milliman's Supplemented Response to Interrogatory No. 2 of the Bureau's June 18, 2012 Civil Investigative Demand (listing 462 final opinions issued by Milliman on captive reinsurance arrangements), Gordon Decl. Ex. T. Reflecting its interest in the growth of captive arrangements, Milliman has marketed the benefits of captive reinsurance to lenders. For example,

its website states that lenders "have been seeking ways to share in [MI] profits" and that "[i]f actual losses develop to the expected level," a captive arrangement "from the lender's perspective, is financially equivalent to receiving a commission or profit sharing equal to a percentage of premium . . ." *See* Milliman website, Using a Bank Captive Subsidiary To Reinsure Mortgage Insurance, *available at* https://www.captive.com/service/milliman/article3_mortgage.shtml (visited February 11, 2014), Gordon Decl. Ex. U.

The Bureau further disputes that the referenced "reinsurance agreements" between Atrium and MIs were agreements to provide actual reinsurance services. *See supra* Section I ¶¶ 1-16 and evidence cited therein.

8. The Bureau disputes that the referenced "reinsurance agreements" between Atrium and Radian and CMG, respectively, were agreements to provide actual reinsurance services. *See supra* Section I ¶¶ 1-16 and evidence cited therein.

9. The Bureau disputes that the referenced "reinsurance agreement" between Atrium and Radian was an agreement to provide actual reinsurance services. *See supra* Section I ¶¶ 1-16 and evidence cited therein.

10. The Bureau is unaware of any Milliman report reflecting the assertion in the second sentence of paragraph 10 of Respondents' Statement, and is thus unable to confirm or dispute the allegation in that sentence. The only source cited by Respondents to support that assertion is a statement in Mr. Bogansky's declaration, but Mr. Bogansky did not cite any Milliman report or other document to support his statement.

11. The Bureau disputes that the referenced "reinsurance agreement" between Atrium and CMG was an agreement to provide actual reinsurance services or that the commutation of that agreement was "by mutual agreement and pursuant to the terms of their agreement." The agreement was terminated because Respondents refused to adequately fund the trust despite CMG's

requests. On August 13, 2009, Alan Bahr of CMG wrote to Sam Rosenthal of PHH: "While we understand the economics behind PHH's choice not to fund the Atrium trust deficiency and concur that commutation of the captive is the resulting next step, I must express CMG MI's deep disappointment in the decision. We had anticipated a resolution that would support the integrity of the structure in place." *See* email, Bahr (CMG) to Rosenthal (PHH), Aug. 13, 2009 (CFPB-PHH-00065203), Gordon Decl. Ex. V.

12. The Bureau disputes that the referenced "reinsurance agreement" between Atrium and Genworth was an agreement to provide actual reinsurance services. *See supra* Section I ¶¶ 1-16 and evidence cited therein.

13. The Bureau disputes the facts alleged in paragraph 13 of Respondents' Statement to the extent Respondents assert that Atrium "paid" a net amount to Genworth as a result of the termination of their agreement. Genworth obtained only a return of a portion of the premiums it had previously paid to Atrium. Over the life of the captive arrangement between Atrium and Genworth, Atrium collected at least $137.2 million in total ceded premiums from Genworth. *See* Atrium Reinsurance Corporation GAAP Unaudited Financial Statements, Mar. 31, 2012 (CFPB-PHH-00098431) at 6, Gordon Decl. Ex. E. Thus, the transfer of funds from the trust to Genworth as a result of the termination was simply a return of a portion of those premiums, not a net payment from Atrium.

14. The Bureau disputes that the referenced "reinsurance agreement" between Atrium and UGI was an agreement to provide actual reinsurance services.

15. The Bureau disputes the facts alleged in paragraph 15 of Respondents' Statement to the extent Respondents assert that Atrium "paid" a net amount to United Guaranty as a result of the termination of their agreement. United Guaranty obtained only a return of a portion of the premiums it had previously paid to Atrium. Over the life of the captive arrangement between

Atrium and United Guaranty, Atrium collected at least $349.6 million in total ceded premiums from United Guaranty. *See* Atrium Reinsurance Corporation GAAP Unaudited Financial Statements, Sept. 30, 2012 (CFPB-PHH-00098492) at 6, Gordon Decl. Ex. D. Thus, the transfer of funds from the trust to United Guaranty as a result of the termination was simply a return of a portion of those premiums, not a net payment from Atrium.

16. The Bureau disputes that Atrium always met its contractual funding obligations with respect to the trusts that were created in connection with its purported reinsurance arrangements. For example, on August 13, 2009, Alan Bahr of CMG wrote to Sam Rosenthal of PHH: "While we understand the economics behind PHH's choice not to fund the Atrium trust deficiency and concur that commutation of the captive is the resulting next step, I must express CMG MI's deep disappointment in the decision. We had anticipated a resolution that would support the integrity of the structure in place." *See* email, Bahr (CMG) to Rosenthal (PHH), Aug. 13, 2009 (CFPB-PHH-00065203), Gordon Decl. Ex. V.

17. The Bureau disputes the facts alleged in paragraph 17 of Respondents' Statement to the extent Respondents assert that Atrium "paid" a net amount of $156,307,798 to the MIs overall or that Atrium "paid" a net amount to United Guaranty or Genworth, specifically.

a. Over the lifespan of its captive arrangements, Atrium collected over $493 million in purported reinsurance premiums from MIs. *See supra* Section I ¶ 6. Thus, across all of its captive arrangements, the $156 million of alleged "payments" to the MIs were just a return of less than one-third of the total premiums previously collected from those MIs.

b. In total, Genworth and United Guaranty paid at least $137.2 million and $349.6 million in ceded premiums to Atrium, respectively. *See* Atrium Reinsurance Corporation GAAP Unaudited Financial Statements, Sept. 30, 2012 (CFPB-

PHH-00098492) at 6, Gordon Decl. Ex. D; Atrium Reinsurance Corporation GAAP Unaudited Financial Statements, Mar. 31, 2012 (CFPB-PHH-00098431) at 6, Gordon Decl. Ex. E. Thus, the $127,731,812 and $28,571,236 amounts that Respondents refer to as "claims paid" by Atrium to United Guaranty and Genworth were just a return of a portion of premiums previously collected from those MIs.

18. As support for the assertions in paragraph 18 of Respondents' Statement, Respondents cite only Mr. Bogansky's declaration, but Mr. Bogansky did not cite any document to support those assertions or explain how he calculated the figures in the table contained in paragraph 18. Bogansky Decl. ¶ 13. As a result, the Bureau is unable to confirm or dispute the allegations in that sentence or the figures in the table. The Bureau, however, contends that limiting an analysis of claims paid to a select few book years that were most exposed to the impact of the financial crisis does not provide an accurate or fair assessment of the overall arrangement, which included additional book years for which no claims were paid. *See* Annual Statement of the Atrium Insurance Corporation, for the Year Ended Dec. 31, 2008 (CFPB-PHH-00096341, at *00096350), Gordon Decl. Ex. Q.

19. The facts alleged in paragraph 19 of Respondents' Statement are not material to any claim or defense because the NYID did not assess Respondents' captive arrangements for RESPA compliance as part of its audit. Compliance with the "substantive provisions of New York Insurance Law" does not equate to compliance with RESPA. *See* 2008 Report on Examination, *available at* http://www.dfs.ny.gov/insurance/exam_rpt/10362f07.pdf. Thus, the NYID's audit cannot establish that Respondents' captive arrangements complied with RESPA.

20. The Bureau disputes the facts alleged in paragraph 20 of Respondents' Statement to the extent Respondents intend it to mean that all of the mortgage insurance structures utilized by the

four MIs with which the Bureau settled had precisely the "same structure that is the subject of the Notice in this Action." The Consent Orders entered in those cases covered captive arrangements between those MIs and lenders other than PHH, and those arrangements varied in structure. For example, some arrangements were "quota share" arrangements, while others were "excess-of-loss" arrangements. *See*, *e.g.*, Milliman website, Using a Bank Captive Subsidiary To Reinsure Mortgage Insurance, *available at* https://www.captive.com/service/milliman/article3_mortgage.shtml (visited February 11, 2014), Gordon Decl. Ex. W ("Typically, an aggregate excess approach is used, where the captive is responsible for losses within a certain tier.") For "excess-of-loss" structures, terms such as the level of premiums ceded, the entry and exit points for reinsurer liability, and the characteristics of the reinsured loans can vary according to the terms of the contract. *See*, *e.g.*, *id.* ("The captive is then responsible for certain losses as defined by the contract."); *id.* ("The captive assumes a portion of the premium via a reinsurance contract with the primary mortgage insurer (common captive premium levels are 15% to 20% of the total premium).").

21. The Bureau disputes the last sentence of paragraph 21 to the extent Respondents intend it to mean that the Consent Orders reflected the Bureau's position or the Court's conclusion that premiums ceded by MIs to captive reinsurers such as Atrium were permitted by RESPA. The Consent Orders do not reflect any conclusions made by the Courts that entered them. The Consent Orders state:

> The parties, by and through their respective counsel, have agreed to entry of this Proposed Final Consent Judgment and Order ("Order") by this Court, without trial or adjudication of any issue of fact or law, to settle and resolve all matters of dispute arising from the conduct alleged in the Complaint. *See*, *e.g.*, UGI Consent Order at 1-2, Gordon Decl. Ex. W.
>
> -and-
>
> The parties intend that this Order a) not be an adjudication of any fact or legal conclusion, and b) not have any preclusive effect in any other action or proceeding. *See id.* at 2 (¶ 4).

As to the Bureau's positions, the Consent Orders reflected the parties' agreement that the "Complaint states a claim upon which relief may be granted under Section 8 of RESPA" and that the "relief provided in this Order is appropriate and available pursuant to" the CFPA and RESPA. *See id.* at 2-3 (¶¶ 2, 5). Because the Complaint alleges that UGI ceded premiums to Captive Reinsurers in violation of RESPA, these provisions establish that the Bureau did not concede that those payments were legal under RESPA or that Bureau could not file an action or proceeding against other entities stating a similar claim for relief.

With respect to the Bureau's claims based on UGI's past conduct, the Consent Order required UGI to pay $4.5 million in civil money penalties "by reason of the alleged violations of law or regulations as set forth in the Complaint" and taking into account "the history of previous conduct by United Guaranty." *See id.* at 6. Thus, the Consent Orders reflect the Bureau's view that premiums previously ceded by UGI were made in violation of RESPA.

In the "Prohibited Conduct" section, the Consent Order "permanently restrained and enjoined" UGI from participating in any Captive Mortgage Reinsurance Arrangement for ten years "unless otherwise expressly provided herein." *See id.* at 4 (¶ A). The Consent Order specifically prohibited UGI from entering into any New Arrangements, revising existing Arrangements, and obtaining reinsurance from any Captive Reinsurer for any new loans originated after the Order was entered. *See id.* at 4-5 (¶¶ A.1-A.3).

The Consent Order further prohibited UGI from "[g]iving any thing of value to any person pursuant to an agreement that mortgage insurance business shall be referred by such person to United Guaranty, in violation of Section 8 of RESPA . . . ." *See id.* at 5 (¶ B). Thus, the Consent Order expressly reflects the Bureau's view that payments from UGI to lenders in exchange for referrals are made "in violation of Section 8 of RESPA."

22. The facts in paragraph 22 of Respondents' Statement are undisputed, and were pled by Enforcement Counsel, *see* Notice of Charges, ¶¶ 52, 55.

23. The facts alleged in paragraph 23 of Respondents' Statement are not material to any claim or defense.

24. The facts alleged in paragraph 24 of Respondents' Statement are not material to any claim or defense.

25. The facts alleged in paragraph 25 of Respondents' Statement are not material to any claim or defense. Nevertheless, on October 24, 2013, Old Republic International Corporation (Old Republic) announced that it planned to recapitalize its RMIC Companies, Inc. (RMICC), mortgage insurance subsidiary, by seeking new funds in the capital markets, together with up to $50 million to be contributed by Old Republic itself, and that it would "use substantially all of these [funds] to recapitalize its three mortgage insurance carriers." *See* "Old Republic Announces A Plan Of Recapitalization By Its RMICC Mortgage Guaranty Subsidiary," *available at* http://ir.oldrepublic.com/phoenix.zhtml?c=80148&p=irol-newsArticle&ID=1867909&highlight= (visited February 10, 2014). Old Republic and RMICC stated that they intended thereby to resolve "successfully the North Carolina regulatory supervision, including full settlement of accumulated deferred claim payments held in reserve…" and to enable "Fannie Mae, Freddie Mac and other insured lenders to collect 100% of the deferred claim payments together with an agreed-upon interest charge." *Id.*

26. The facts alleged in paragraph 26 of Respondents' Statement are not material to any claim or defense.

DATED: February 20, 2014

Respectfully submitted,

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Enforcement Counsel

Certificate of Service

I hereby certify that on this 20th day of February 2014, I caused a copy of the foregoing "Enforcement Counsel's Statement of Disputed Facts in Opposition to Respondents' Motion for Summary Disposition" to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service on behalf of Respondents:

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