

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' MOTION IN LIMINE TO STRIKE CLAIMS PREDICATED ON
CEDING PAYMENTS ALLOWED BY THE BUREAU IN APRIL AND MAY 2013**

Pursuant to 12 C.F.R. §§ 1081.104(10) and 1081.205, Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, "Respondents"), move for an Order striking the Bureau's claims to the extent they are predicated on private mortgage insurance premium ceding payments received by Atrium Reinsurance Corp. ("Atrium Re") on or after April 5, 2013, the date the Florida Consent Order was signed, permitting United Guaranty Corp. ("UGI") to continue making those very ceding payments.

The UGI Consent Order provides that "[n]othing in this Order shall be construed, however, as preventing the ceding of premiums on policies originated as of, and subject to Arrangements already in existence as of, the date of entry of this Order." *CFPB v. United Guar. Corp.*, No. 13-cv-21189, ECF No. 5, at 5 (S.D. Fla., docketed April 8, 2013).¹ That the ceding payments were permitted by the Bureau in the Consent Order was amply set forth in UGI's

¹ The Administrative Law Judge has already taken judicial notice of this document. *See* Motions Hearing Transcript, Mar. 5, 2014 ("Tr.") at 32-34.

Memorandum in Opposition to Respondents' Motion to Intervene in the Florida case ("UGI Mem."): ²

- "Moreover, because this Court already approved the Consent Order, including the provision in it that expressly authorizes PHH's conduct in question" UGI Mem. at 2;
- "[B]ecause this Court has already approved the Consent Order, which contains an express approval of PHH's receipt of ceded payments from United Guaranty" *Id.* at 11.
- "United Guaranty negotiated a settlement that "*explicitly permitted* the continuation of the payments under the reinsurance contracts between UGI and Atrium." *Id.* at 12.
- "United Guaranty adequately represented [PHH's] interests by including a provision that declared the ceded payments from United Guaranty to be lawful." *Id.*

As a result, and in reliance on the Bureau's acquiescence, UGI gave—and Atrium Re received— private mortgage insurance premium ceding payments for approximately two months, under agreements previously in place.

The Bureau explains that this provision of the Order was to serve as a "pragmatic carve-out" for "very limited conduct," which was within the Bureau's "discretion." Tr. at 54-55. ³ Indeed, the Bureau concedes that "[t]here is no argument or contention the Bureau has sought to prevent the ceding of premiums on the contracts; that was *allowed* to happen for a period of less

² The UGI Memorandum (*CFPB v. United Guar. Corp.*, No. 13-cv-21189 (S.D. Fla., filed Feb. 14, 2014) (ECF No. 18)), of which official notice has already been taken, is attached hereto as Exhibit A for the convenience of the Administrative Law Judge and the Parties.

³ Enforcement Counsel has represented that the provisions of the Florida Consent Orders permitting the continuation of ceding payments from the private mortgage insurers to the captive reinsurers were merely "carving out this highly limited conduct for agreements that were in run-off *for a matter of weeks.*" Tr. at 56 (emphasis added). As Respondents have explained, the compliance reports of the settling mortgage insurers demonstrate that there were more than 160 arrangements in place as of the date of the entry of the Florida Consent Orders; that there were ceding payments subsequent to the entry of those Orders; and that the ceding payments to reinsurers other than Atrium continued throughout 2013 and appear to be expected to continue in 2014 as well. *See* Respondents' Notice of Clarification served March 13, 2014.

than two months.” Transcript of Hearing on Motion to Intervene at 22, *CFPB v. United Guaranty Corp.*, No. 13-cv-21189 (S.D. Fla. Mar. 10, 2014) (ECF No. 30) (emphasis added).⁴

The Bureau permitted the continuation of ceding payments from UGI to Atrium Re following the UGI Consent Order. The Bureau’s contention that this carve-out should have no preclusive effect in this matter is without merit—the issue is not merely that the *Consent Order* permits the payments, but also that *the Bureau itself*, in Enforcement Counsel’s words “*allowed*” the continued ceding payments. The Bureau allowed UGI to “give” the ceding payments, which necessarily means that Atrium Re was allowed to “accept” them, because giving and receiving are two sides of the same RESPA coin. *See* 12 U.S.C. § 2607(a) (“*No person shall give and no person shall accept any fee, kickback, or thing of value . . .*”) (emphasis added); 12 U.S.C. § 2607(b) (“*No person shall give and no person shall accept any portion, split, or percentage of any charge . . .*”) (emphasis added); *Freeman v. Quicken Loans, Inc.*, 566 U.S. ___, 132, S. Ct. 2034, 2041 (2012) (because a consumer’s payment of an alleged overcharge for a settlement service was legal, the receipt of that charge by the service provider *could not be illegal under RESPA*). It would be inequitable, to say the least, to permit the Bureau now to bring claims for the receipt of the very ceding payments that it *permitted UGI to make*, namely the ceding payments from UGI to Atrium Re in April and May 2013. *See, e.g.*, 12 U.S.C. § 2617(b) (no liability for acts relying in good faith on Bureau’s interpretation).

This attempt to play both sides is also precluded by judicial estoppel, which prohibits a party from “deriv[ing] an unfair advantage” by taking inconsistent positions in different proceedings. *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001).

⁴ Since the Administrative Law Judge has determined to take judicial notice of the proceedings in the UGI case in Florida, a copy of the Transcript of the March 10, 2014, Hearing on the Motion to Intervene, not yet available on Pacer, is submitted herewith as Exhibit B, and Respondents request that the Administrative Law Judge take official notice of it as well.

The representation that the Bureau made to the U.S. District Court for the Southern District of Florida was that entering the proposed Consent Orders would not put the court's imprimatur on the continuation of unlawful conduct (in this case, allowing the continuation of the ceding payments from UGI). While this representation was implicit, it was also logically necessary, because the Bureau asked the court to enter the Consent Order, and it is well-settled that a court cannot enter an order permitting illegal activity to continue. *See Stoval v. City of Cocoa, Fla.*, 117 F.3d 1238, 1240 (11th Cir. 1997) ("District courts should approve consent decrees so long as they are not unconstitutional, unlawful, unreasonable, or contrary to public policy."); *Howard v. McLucas*, 871 F.2d 1000, 1008 (11th Cir. 1989) (district court must "ensure that [consent order does] not violate federal law"); *United States v. City of Miami, Fla.*, 664 F.2d 435, 440-41 (5th Cir. 1981) (en banc) (a court must ensure that a consent order "does not put the court's sanction on and power behind a decree that violates . . . [a] statute"); *see also Williams v. Vukovich*, 720 F.2d 909, 925 (6th Cir. 1983) (vacating consent decree as "illegal" where it "contain[ed] impermissible waivers of future" statutory violations); *Robertson v. N.B.A.*, 556 F.2d 682, 686 (2d Cir. 1977) ("*[A] settlement that authorizes the continuation of clearly illegal conduct cannot be approved*, but a court in approving a settlement should not in effect try the case by deciding unsettled legal questions.") (emphasis added).

Accordingly, Respondents respectfully seek an Order precluding the Bureau from bringing claims predicated on private mortgage insurance premium ceding payments received on or after April 5, 2013. Pursuant to Rule 205(b)(2), a proposed order is submitted herewith.

Dated: March 19, 2014

Respectfully submitted,

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RULE 205 CERTIFICATION

Pursuant to Rule 205(f), counsel for Respondents certifies that they have conferred with counsel for the Enforcement Division in a good faith effort to resolve the issues raised by this Motion and have been unable to resolve the matter by agreement.

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CERTIFICATION OF SERVICE

I hereby certify that on the 19th day of March, 2014, I caused a copy of the foregoing Respondents’ Motion in Limine be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

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