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	)	**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE THE EXPERT REBUTTAL REPORT OF DR. MARK CRAWSHAW**

Filed Under Seal

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Enforcement Counsel files this opposition to PHH's motion to strike the rebuttal report of Dr. Mark Crawshaw. Crawshaw's rebuttal report (Dkt. No. 108) directly counters the opinions expressed in the initial report of PHH's expert, Michael Cascio, and it should be admitted in its entirety.

I. PRELIMINARY STATEMENT

Before this proceeding commenced, PHH asserted that it was "extremely unlikely" that any expert could be located who would conclude that Atrium did not assume significant risk under its captive arrangements, given the impending claim payments resulting from the financial crisis.[1] Such an expert materialized in Dr. Mark Crawshaw, whose initial and rebuttal reports submitted in this proceeding pierce through the complexities of those arrangements and reveal that they were, at their core, mechanisms designed to transfer profits, not risk, from mortgage insurers (MIs) to Atrium. The instant motion is PHH's third attempt to hide Crawshaw's opinions from the light of day. At the hearing in March, PHH moved (unsuccessfully) to exclude Crawshaw's initial report, even after the Tribunal stated that its usual practice is to admit expert reports into the record. Hearing Tr. at 715:8-716:11; 943:9-946:18. More recently, PHH invoked the Protective Order to block any portion of his rebuttal report from public disclosure by asserting that "the entire expert rebuttal report, including all of the attachments and exhibits thereto, must remain under seal," even though much of it discusses public information and little to nothing in the remainder would provide competitors an advantage if disclosed.[2] Now, in this latest gambit, PHH seeks to expunge that report from the record entirely.

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[1] This assertion was made to the plaintiffs in the private class action lawsuit, *Efrain Munoz, et al. v. PHH Mortgage Corp., et al.* *See* Letter from Souders to Moffa and Ziegler, March 3, 2009, p. 2 (attached hereto as Ex. A).

[2] *See* Email from Rust to Kim, April 28, 2014 (attached hereto as Ex. B); Protective Order Governing Discovery Material ¶ 1 (definition of "Competitive Sensitive Information"). PHH's position is also contrary to the stated "goal of transparency" in the Bureau's administrative proceedings. *See* Rules of Practice for Adjudication Proceedings, 77 Fed. Reg. 39,058, 39,067 (June

PHH's motion is overbroad while its characterization of its expert's initial report is overly narrow. First, there was no legitimate basis for PHH to move to strike the entire 151-page report based on objections limited to less than 50 pages of it.[3] There is no dispute that the remaining 100-plus pages rebut Cascio's opinions.[4]

Second, PHH's objections to the approximately 50 pages it identifies as "new" (PHH Br. at 10) do not hold water when one looks more closely at Cascio's opinions. For example, from PHH's Motion to Strike, one might be led to believe that Cascio did not opine at all about Milliman and state insurance regulation, and that Crawshaw's discussion of those topics was thus unprompted by any of Cascio's opinions. But in fact, as discussed below, Cascio explicitly vouches for Milliman's methodology, and he concludes that because Atrium and the MIs were subject to state regulation, their captive arrangements must have resulted in risk transfer. Crawshaw's rebuttal report is a point-by-point response to Cascio's opinions about Milliman, state insurance regulation and a host of other topics. There is no basis to exclude it because Crawshaw's opinions directly contradict or rebut evidence on the same subject matter provided by Cascio.

II. ARGUMENT

A. Legal Standard

Administrative Adjudication Rule 210 provides: "A rebuttal report shall be limited to rebuttal of matters set forth in the expert report for which it is offered in rebuttal." 12 C.F.R. § 1081.210. Federal courts applying a similar rule in the Federal Rules of Civil Procedure – which

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29, 2012) (discussing Rule 119). The Protective Order does not impose any time limit on Enforcement Counsel's ability to challenge spurious designations of confidentiality. Thus, we will address the merits of PHH's "Confidentiality" designation at a later time.

[3] This includes 12 pages devoted to Crawshaw's rebuttal of Cascio opinions relating to Milliman (pages 62-73), 28 pages devoted to Crawshaw's rebuttal of Cascio's opinions relating to state insurance regulation (pages 82 to 109), and no more than ten total pages of text discussing or referring to Radian or CMG. (Dkt. No. 108)

[4] A summary of each section of Crawshaw's rebuttal report, including the opinions of Cascio which he rebuts, is provided in the Executive Summary. Additional detail regarding the specific opinions that Crawshaw has rebutted is provided at the beginning of each section.

requires that rebuttal reports be offered "solely to contradict or rebut evidence on the same subject matter identified by another party," Fed. R. Civ. P. 26(a)(2)(D)(ii) – have consistently interpreted the phrase "same subject matter identified by another party" broadly.[5] Rebuttal testimony is proper so long as it serves to "explain, repel, counteract, or disprove the evidence of the adverse party."[6] Rebuttal reports "may cite new evidence and data so long as the new evidence and data is offered to directly contradict or rebut the opposing party's expert."[7]

B. Crawshaw's Rebuttal Opinions Regarding Milliman are Proper Because They Counter Cascio's Opinions on the Same Subject

Because the Cascio Report devotes five paragraphs to Milliman's analysis, Cascio Rpt. ¶¶ 10-12, 18-19 (Ex. D) and explicitly vouches for the correctness of Milliman's methodology and conclusions, Milliman was a proper subject of rebuttal testimony for Crawshaw. In his report, Cascio asserts that Milliman's methodology for analyzing risk transfer under the Atrium arrangements was flawless, with one exception – the statement that Atrium's liability was limited to the trust accounts. *Id.* ¶¶ 11, 18.[8] He agrees with Milliman's methodology of analyzing risk transfer by focusing on a single book year, even though the arrangements covered multiple book years. Cascio Dep. Tr. at 259:2-19, 260:16-23, 280:13-281:2 (Ex. C). He relies on Milliman's projections to support his own conclusion that there was risk transfer under Atrium's captive arrangements. Cascio Rpt. ¶ 19 (Ex. D). And he ultimately concludes, based on his review of Milliman's reports, that

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[5] *See, e.g.*, *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09–cv–230, 2013 WL 211303, at *5 (D. Vt. Jan. 18, 2013) ("[D]istrict courts have been reluctant to narrowly construe the phrase 'same subject matter' beyond its plain language.") (internal quotations omitted); *TC Sys. Inc. v. Town of Colonie*, 213 F. Supp. 2d 171, 180 (N.D.N.Y. 2002) (the phrase "same subject matter" must not be narrowly construed to restrict a rebuttal expert to the same methodology used by the opposing expert; rather, the rebuttal expert can offer an "independent, fresh opinion" on the subject).

[6] *U.S. v. Mallis*, 467 F.2d 567, 569 (3d Cir. 1972).

[7] *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit*, 290 F.R.D. 11, 16 (D. Mass. 2013).

[8] Although Mr. Cascio's report refers to "flaws" in Milliman's analysis, *id.* ¶ 18, he identified only one such purported flaw. At his deposition, he confirmed that he saw no other flaws in Milliman's methodology, analysis or conclusions. Cascio Dep. Tr. at 280:13-281:2 (Ex. C).

"Milliman properly applied FASB 113 in reaching its conclusion of a reasonable probability of loss to the reinsurer." *Id.* ¶ 18.[9]

Crawshaw's rebuttal opinions regarding Milliman directly contradict Cascio's opinions. Whereas Cascio asserts that Milliman's methodology for analyzing risk transfer under the Atrium arrangements was flawless (with one purported exception), Crawshaw believes Milliman's methodology was full of flaws. To show this, Crawshaw cited a publicly-available Milliman report[10] reflecting an analysis Milliman performed for UGI in 2012 (which was unrelated to the Atrium arrangements), in which Milliman estimated the amount of UGI's capital that would be required to support losses. Crawshaw Rebuttal Rpt. at 64 (Dkt. No. 108). In this report, Milliman expressly recognized the limitations of a single-book year analysis it performed, and therefore it also performed an analysis that covered fifteen book years in light of those limitations. *Id.* Crawshaw's discussion of this analysis is squarely within the bounds of proper rebuttal because it contradicts Cascio's opinion that Milliman's analysis of the Atrium arrangements, which focused only on one book year, accurately measured risk transfer.[11]

There is no rule barring an expert from relying on a document if it also can be used to rebut a witness other than the opposing expert.[12] It should not be surprising that a document can be used

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[9] Beyond the many statements in his report that *explicitly* reference Milliman, at his deposition, Mr. Cascio revealed that he relied on Milliman for many other opinions, including his conclusions regarding risk transfer, even though he did not disclose that in his report. *See*, *e.g.*, Cascio Dep. Tr. at 178:3-180:20 (Ex. C) (with regard to opinions on the probability of Atrium incurring "a full limit loss" in paragraph 4.D of his report, he testified: "I'm relying on Milliman here."); *id.* at 154:2-6 (with regard to opinion in paragraph 4.D that MIs preferred a higher attachment point to avoid dollar swapping, he testified: ""I was able to look at the loss experience by layer according to the Milliman report.").

[10] PHH incorrectly refers to this Milliman report as an "article." It is a report submitted by UGI to various governmental agencies.

[11] This 2012 analysis for UGI also highlights other serious flaws in the analysis Milliman performed for Atrium's captive arrangements, which are explained in detail in Crawshaw's rebuttal report. Crawshaw Rebuttal Rpt. at 63-73 (Dkt. No. 108).

[12] Had the same 2012 analysis been prepared by another company, it would still have been proper for Crawshaw to rely on it to show that Milliman's methodology for analyzing Atrium's

to rebut both Cascio and Milliman, given that Cascio agrees with Milliman's methodology. Thus, PHH cannot seek to exclude Crawshaw's report because Milliman's 2012 analysis could be used to cross examine Milliman representatives. PHH Br. at 4.

C. Crawshaw's Rebuttal Opinions Regarding State Insurance Regulation are Proper Because They Counter Cascio's Opinions on the Same Subject

Crawshaw properly offers opinions about the import of state insurance regulations because those opinions directly counter Cascio's opinions, within his area of expertise, and because PHH questioned Crawshaw about his state insurance regulation experience and opinions during Crawshaw's cross-examination. Principally, it was first Cascio who speculates about the conduct of state regulators by claiming that they exercised "significant control" and "oversight" over Atrium's captive arrangements. Cascio Rpt. ¶ 6 (Ex. D).[13] When asked at his deposition what that has to do with risk transfer, Cascio responded that he believes a state regulator would not "allow a reinsurance agreement that did not pass risk transfer." Cascio Dep. Tr. at 210:3-10 (Ex. C). Thus, Cascio's opinion is that state regulators wielded their "significant control" and "oversight" specifically over Atrium's arrangements to assess them for risk transfer. Cascio also states in his report that he saw "no evidence that any dividends were not permitted by" any state regulator – that is, the absence of any objection or finding of violation somehow confirms that Atrium's arrangements were genuine risk-transfer mechanisms. Cascio Rpt. ¶ 29.D (Ex. D). He concludes that meeting the minimum capital requirements "stipulated by state law in year one" is, by itself, sufficient to satisfy risk transfer

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arrangements did not comport with typical industry practice. The fact that the report was prepared by Milliman itself only increases its force in countering Mr. Cascio's opinion about the correctness of that methodology.

[13] In his report, Mr. Cascio wrote that a provision of Atrium's agreements "reflects the significant control exercised by both the ceding company and the reinsurer, as well as oversight that is exercised by the North Carolina Commissioner of Insurance with respect to the UGI agreement." Cascio Rpt. at 6 (Ex. D). At his deposition, he clarified that meant that the provision reflects the "significant control exercised *over* both the ceding company and the reinsurer" by Commissioner of Insurance of North Carolina. Cascio Dep. Tr. at 209:16-210:10 (Ex. C) (emphasis added).

requirements. *Id.* ¶ 13 (Ex. D). In sum, Cascio believes that the mere fact that Atrium's captive arrangements were regulated by state insurance departments and not found to be in violation of any state insurance requirement means they must have resulted in significant risk transfer. Crawshaw disagrees. The sections of Crawshaw's rebuttal report that PHH seeks to exclude are thus properly admitted because they serve to "explain, repel, counteract, or disprove the evidence of the adverse party."[14]

Of the two experts who have opined on state insurance regulation, it is Crawshaw, not Cascio, who appears to have more expertise. It is unclear what, if any, experience Cascio has working with or on behalf of state insurance regulators, but he has never served as one. Yet PHH considers him qualified to speak authoritatively on the conduct of state regulators, and it expresses no dismay at his speculative assertion that state regulators used their "significant control" and "oversight" specifically over the Atrium arrangements to ensure that they resulted in significant risk transfer. In contrast, Crawshaw has vast experience working with state insurance regulators, including evaluating reinsurance arrangements on behalf of state insurance regulators, and performing financial examinations of captive reinsurance companies on behalf of state insurance regulators. Hearing Tr. 593:8-594:17, 595:8-21, 685:16-23, 838:14-18. Throughout his career, Crawshaw has personally performed substantial work for the state insurance departments of Texas, Oklahoma, Ohio, New Mexico, Hawaii, California, Florida, Maryland, North Carolina, Tennessee, and Georgia. His work for many of these clients has spanned many years, including the state insurance departments of Texas (1992 to present), Oklahoma (1989 to present), Ohio (2000 to 2013), and New Mexico (2009 to present). The state insurance regulators who hired Crawshaw relied heavily on his judgment, expertise, and understanding of their regulatory authority. The Administrative Adjudication Rules do not have an analog to Fed. R. Evid. 702, but Enforcement

[14] *U.S. v. Mallis*, 467 F.2d 569.

Counsel submits that Crawshaw's over 20 years of experience working for state insurance regulators (along with his expertise in evaluating risk transfer) would even meet those rigorous requirements to provide opinions about the relevance, if any, of state insurance regulation to the question of risk transfer under Atrium's arrangements.

While PHH complains that Crawshaw has "interpreted" various supporting documents, there is nothing improper about an expert explaining his opinions by referring to, and describing the relevance of, documents that clearly bear on the issue at hand, in an effort to assist the trier of fact in understanding complex concepts.[15] Those opinions are appropriate because they counter Cascio's conclusions about the significance of state insurance regulation to establishing risk transfer under Atrium's arrangements.

Finally, PHH's claim of "shock" that Crawshaw would provide opinions about the relevance of state insurance regulation to risk transfer cannot be genuine, given that PHH's counsel asked well over one hundred questions to elicit his opinions on that very topic during his cross examination of Crawshaw. Hearing Tr. at 834:25-853:17, 869:11-892:23. PHH's cross-examination makes clear that it believes it is appropriate for Crawshaw to opine about how, if at all, state insurance regulation is relevant to risk transfer, and that he is qualified to do so. Indeed, at the start of a long line of questions on these issues, PHH established that Crawshaw was in fact so qualified. PHH's counsel asked: "You, in your years of experience, have worked with entities that are regulated by insureds that are regulated by state insurance departments; is that correct?" Hearing Tr. at 838:14-

[15] It is particularly bizarre for PHH to complain about the documents that Dr. Crawshaw discusses in this section of his report because many of them are either documents Mr. Cascio relied on or are discussed in the documents he relied on, including: (1) a paper from the Casualty Actuarial Society (CAS) explaining the difficulty that regulators face in "ferreting out the motives and intent of the producers of financial statements"; (2) the NAIC's Reinsurance Attestation Supplement, which is referenced in the preceding CAS document; and (3) the 1999 Circular Letter from the New York Department of Insurance. These documents appear on a list of "Documents Primarily Relied on" by Mr. Cascio. *See* Cascio Rpt. Att. B, Doc. Nos. 9, 18 (Ex. D). Mr. Cascio, however, did not specifically cite these three documents in his report, much less explain how they support any of his opinions.

18. Having laid that foundation, PHH's counsel asked Crawshaw myriad questions on topics that it now contends are totally inappropriate for him to testify about.

For example, PHH's counsel asked Crawshaw:

- Whether the New York Insurance Department (NYID) would have "looked at" and "reviewed" Atrium's captive agreements, *id.* at 870:21-25, 873:11-16, and the meaning of various information included by the NYID in its examination reports, *id.* at 875:11-892:23.
- To speculate as to whether the apparent absence of any objection by the NYID to the novation agreement in which Atrium Reinsurance Corporation assumed the obligations of Atrium Insurance Corporation means that the NYID affirmatively approved that agreement. *Id.* at 838:8-13.
- What type of termination clause Vermont regulators "typically" require of mortgage reinsurance captives. *Id.* at 844:7-9.
- Whether he believes that a "State can set a minimum capital requirement." *Id.* at 880:17-19.
- To assess whether New York has "extensive regulation of insurers" and how New York "stack[s] up in terms of its regulation of insurers among other state regulators." *Id.* at 839:13-21.

PHH also finds it objectionable that Crawshaw would dare to provide any general commentary about Vermont's regulatory regime, including his opinion as to why most captives are domiciled in Vermont. But on cross, PHH's counsel elicited extensive testimony on his views about Vermont's overall regime, including asking him whether he believes Vermont has "promoted its captive reinsurance opportunities" and "taken captive regulation very seriously," and whether Vermont has "extensive regulation of insurers." *Id.* at 839:22-24, 840:22-25, 915:3-15.

If PHH believes it is inappropriate for Crawshaw to testify about issues relating to state insurance regulation, as it now contends, then its attempt to elicit testimony from him on those issues is inconsistent with the instant motion to strike. It would be an inequitable result to find that Crawshaw's opinions about state insurance regulation are admissible and relevant only when PHH can control and limit the scope of that testimony. Excluding pages 82-109 of Crawshaw's report is

not supported by the law, the Administrative Adjudication Rules, or the goal of eliciting expert testimony to understand the evidence or to determine a fact in issue.[16]

D. Crawshaw Properly Relied on the Radian and CMG Arrangements to Counter Cascio's Opinions Regarding Risk Transfer Under the UGI and Genworth Arrangements

In forming his expert opinions about Atrium's captive arrangements with UGI and Genworth, Cascio neglected contradictory evidence provided by highly similar arrangements with Radian and CMG; thus Crawshaw's rebuttal properly fills that gap to aid the fact finder. PHH's brief correctly notes that Cascio did not analyze those arrangements in his initial report, instead limiting his analysis to the UGI and Genworth arrangements, PHH Br. at 8-10. But Cascio's failure to consider all of Atrium's arrangements when forming his opinions should not stymie a full understanding of the issues.

Crawshaw's discussion of the outcomes of the Radian and CMG arrangements is directly responsive to Cascio's opinions regarding risk transfer under the UGI and Genworth arrangements. As explained in the paragraph from Crawshaw's report quoted in the third bullet point on page 9 of PHH's brief, the meager returns to Radian and CMG under their arrangements, which were merely comparable to the interest they could have obtained from a savings account, approximate a "base-case scenario" for the MI under *all* of the Atrium captive arrangements, because the Radian and CMG arrangements "commenced relatively close to the financial crisis" and therefore did not have a

[16] PHH incorrectly contends that Crawshaw is attempting to displace the judgment of state insurance regulators. PHH Br. at 5. To the contrary, as Crawshaw explains, state regulators do not typically analyze specific arrangements for risk transfer. Thus, his conclusion that Atrium's arrangements did not transfer significant risk to Atrium does not displace the judgment of any state regulator. Moreover, PHH cannot contend that Crawshaw should be precluded from testifying about the extent of state regulation with regard to risk transfer given its questions on cross asking him his view regarding the "extensiveness" of state regulations, Hearing Tr. at 839:19-840:15, which are clearly intended to elicit testimony to support its argument that "extensive" state regulation establishes risk transfer, *id.* at 72:1-74:7.

very long time to accumulate premiums in the trust accounts. PHH Br. at 9. This is a classic rebuttal opinion.

It is well-established that an expert may draw conclusions about a particular transaction by analyzing closely comparable transactions, and that a party or its expert may rebut assertions of an opposing party or expert about a particular transaction by citing contrary evidence from such similar transactions. *See*, *e.g.*, *In re DeCoro USA, Ltd.*, No. 09–10846C–11G, 2014 WL 1089795, at *11 (M.D.N.C. Mar. 18, 2014) (holding that IRS's expert should have, but failed to, select comparables that "exhibit similar functional and risk qualities to those of the Debtor and the transactions at issue"); *U.S. v. Walls*, 577 F.2d 690, 696-97 (9th Cir. 1978) (allowing "[e]vidence of other loan transactions in which appellant had defaulted" to be "submitted by the government to rebut appellant's claim that he borrowed from Mrs. Bjerke in good faith."); *U.S. v. Certain Real Property Located at 21090 Boulder Circle*, 9 F.3d 110 (6th Cir. 1993) ("The district court acted within its discretion in admitting the evidence of a prior similar transaction to rebut Betty's contention that she was an innocent party to this structuring scheme."); *Hale v. Firestone Tire & Rubber Co.*, 820 F.2d 928, 934 (8th Cir. 1987)(holding that district court properly admitted "evidence of other accidents" not considered by the opposing party's expert to "disprove his theories" and "impeach his testimony.").

With respect to analyzing risk transfer under the UGI and Genworth arrangements, the Radian and CMG arrangements are the *most* similar arrangements – among other reasons, they share a common party (Atrium) and in the case of Radian, an identical 4/10/40 structure.[17] The fact that Atrium is a common party is significant in light of Crawshaw's opinion that the conduct of the parties to an arrangement is relevant to risk transfer. Indeed, for its judicial estoppel defense, PHH

[17] Because Radian, UGI and Genworth shared an identical 14% detachment point, the bar chart in Radian's 2003 presentation (referenced in the second bullet on page 9 of PHH's brief) showing that most of the catastrophe layer was above the 14% detachment point flatly disproves Mr. Cascio's claim that Atrium provided catastrophe coverage to UGI and Genworth by limiting its liability to claims below that detachment point.

argues that a vastly larger and more diverse universe of arrangements – "at least 160 other captive arrangements" involving UGI, Radian, Genworth or MGIC, most of which do not involve Atrium – were "virtually identical in structure as the Atrium agreements." PHH Prehearing Br. at 13, 14 n. 6 (Dkt. No. 78). While PHH's claim that 160 other captive arrangements are "virtually identical" to Atrium's arrangements may have been hyperbole to support its judicial estoppel defense, it certainly cannot argue that the Radian and CMG arrangements are completely different from, and entirely irrelevant to, the UGI and Genworth arrangements.

PHH's position is also indefensible because *its* expert, in *his* rebuttal report, repeatedly relies on the outcomes of the *Radian and CMG arrangements* to attempt to rebut Crawshaw's opinions (expressed in Crawshaw's initial report) that the *UGI or Genworth arrangements* did not result in significant risk transfer. For example, responding to an opinion "on page 37 of [Crawshaw's] report" regarding the UGI arrangement, Cascio claims that the Radian and CMG arrangements provide contrary "anecdotal proof." Cascio Rebuttal Rpt. at 7-8 (Ex. E). Likewise, Cascio attempts to rebut Crawshaw's opinions regarding Atrium's ability to avoid losses under the UGI and Genworth arrangements by claiming that those opinions do "not mesh with the reality of two contracts suffering net economic losses, i.e., CMG & Radian." *Id.* at 9. He points to the "nearly $1 million in losses" that Atrium "suffered" as a result of the CMG and Radian arrangements as proof that Atrium could not have avoided significant losses under the UGI and Genworth arrangements. *Id.*[18]

Again, an inequity would occur if PHH's expert can rely on the losses incurred by Atrium under the Radian and CMG arrangements to prove his own points about the UGI and Genworth

[18] As yet another example, Mr. Cascio acknowledges that Crawshaw's opinion regarding the extremely low likelihood of claims in the early years of an arrangement is one Crawshaw believes applies to "all of Atrium's arrangements," *id.* at 10, but Mr. Cascio attempts to rebut that opinion by focusing on the outcomes of the CMG and Radian arrangements, *id.* at 10-11.

arrangements, but Crawshaw's analysis cannot use those very losses to support his points about the UGI and Genworth arrangements.

E. PHH is Not Prejudiced by the Admission of Crawshaw's Rebuttal Report

Striking Crawshaw's report would be an extraordinary remedy when ordinary discovery and trial procedures can cure any of PHH's perceived claims of prejudice. If PHH desires to elicit testimony from Crawshaw about his rebuttal report, PHH can "re-open" its cross examination.[19] PHH can also depose Crawshaw; indeed, Enforcement Counsel has already offered to make him available. *See* emails between Souders and Kim (Ex. F). Exclusion of expert testimony is a drastic and extreme remedy, to be avoided when claims of prejudice can be addressed by less severe measures, such as an additional deposition.[20]

Even if Enforcement Counsel was "in possession of all of Dr. Crawshaw's opinions when his initial report was filed," and its experts supposedly filed short rebuttal reports on the basis of Dr. Crawshaw's initial report, rebuttal opinions should not be excluded simply because they could have been included in an initial report. In *Crowley v. Chait*, for example, the court explained that the "Third Circuit's rule does not automatically exclude anything an expert could have included in his or her original report" because "[s]uch a rule would lead to the inclusion of vast amounts of arguably irrelevant material in an expert's report on the off chance that failing to include any information in anticipation of a particular criticism would forever bar the expert from later introducing the relevant

[19] *See Allen*, 2013 WL 211303 at *6 (any concerns about the scope of a rebuttal report could be addressed through cross-examination).

[20] *See*, *e.g.*, *Plew v. Limited Brands, Inc.*, No. 08 Civ. 3741 (LTS), 2012 WL 379933, at *2 (S.D.N.Y. Feb. 6, 2012) ("Exclusion of expert testimony is a drastic remedy and is inappropriate where the movant could easily have cured the prejudice by seeking more discovery.") (internal quotations / citations omitted); *Freeland v. Amigo*, 103 F.3d 1271, 1280 (6th Cir. 1997) (reversing district court's failure to consider less severe measures before imposing "the drastic sanction of exclusion of plaintiff's expert witness testimony"); *Allen*, 2013 WL 211303 at *6 ("[P]rejudice from the introduction of a rebuttal report is commonly addressed by allowing the other party an opportunity to depose the expert."); *Lab Crafters v. Flow Safe, Inc.*, No. 03 Civ. 4025 (SJF) (ETB), 2007 WL 7034303 (E.D.N.Y. Oct. 26, 2007) ("Courts to address this issue have stated that any prejudice to the opposing party can be alleviated by allowing them to depose the expert prior to trial.").

material." 322 F. Supp. 2d 530, 551 (D.N.J. 2004). Likewise, in *U.S. v. Luschen*, the Eighth Circuit explained the following general principle regarding rebuttal testimony: "[T]he fact that testimony would have been more proper for the case-in-chief does not preclude the testimony if it is proper both in the case-in-chief and in rebuttal." 614 F.2d 1164, 1170 (8th Cir. 1980). Thus, in determining whether rebuttal opinions are proper, it does not matter whether those opinions could have been included in an initial report; the test is whether those opinions counter the other expert's opinions. Moreover, to hold otherwise would be inequitable, because PHH was in possession of most or all of Mr. Cascio's rebuttal opinions when his initial report was filed. (Dkt. No. 106).[21]

III. CONCLUSION

PHH protests that Crawshaw's rebuttal opinions do not respond to anything in Cascio's report; but Crawshaw's report is a near point-by-point rebuttal. PHH asserts that Crawshaw is unqualified to opine about state insurance regulation; but PHH *voir dire'd* Crawshaw on the topic at the hearing and it thereafter elicited extensive testimony on that subject. PHH proclaims its "shock" that someone who has never served as a state insurance regulator could comment intelligibly about state insurance regulations; but its own expert has never served as a state regulator and offers several opinions on that subject. PHH claims that the CMG and Radian arrangements have nothing to do with the UGI and Genworth arrangements; but it argues as a basis for estoppel that 160 other arrangements are virtually identical to Atrium's arrangements; and Cascio repeatedly relies on the CMG and Radian arrangements in his rebuttal report as a basis to opine about risk transfer under

[21] Throughout its brief, PHH argues that Crawshaw's rebuttal report should be excluded because he cites documents that were available to him when he submitted his initial report. Those arguments are meritless in light of the case law discussed above and contrary to basic logic. The only question is whether the documents support Crawshaw's opinions that contradict or rebut Cascio's opinions on the same subject. As explained below, they clearly do. Moreover, PHH's position cannot be squared with the rebuttal report of Cascio – virtually the *entirety* of that report, including substantial new analyses and several documents not referenced in Cascio's initial report, was available to him at the time he submitted his initial report. (Ex. D) The same is true of the rebuttal report prepared by Vincent Burke on behalf of PHH. (Dkt. No. 105)

the UGI and Genworth arrangements. PHH argues that Crawshaw's rebuttal report should be excluded because information therein was available at the time he prepared his initial report; but both most or all of the information in PHH's rebuttal reports were available to PHH at the time PHH filed Cascio's initial report.

In light of the above, the Tribunal should deny PHH's frivolous request to exclude Crawshaw's rebuttal report.

DATED: May 13, 2014

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Certificate of Service

I hereby certify that on this 13th day of May 2014, I caused a copy of the foregoing "Enforcement Counsel's Opposition to Respondents' Motion to Strike the Expert Rebuttal Report of Dr. Mark Crawshaw" 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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