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 REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AS TO LIABILITY**

I. INTRODUCTION

PHH's Opposition is inflated with bluster, but bereft of factual support. Faced with copious evidence demonstrating that PHH, through Atrium, accepted payments from mortgage insurance companies (MIs) in exchange for referrals of business, PHH cites not a single affidavit, document, or piece of live testimony that could conceivably rebut this conclusion.

There is no genuine dispute of material fact on the core issues in this case:

- PHH made purchasing purported reinsurance from Atrium a *quid pro quo* condition of receiving mortgage insurance referrals from PHH.
  - PHH, through Atrium, accepted things of value in the form of purported reinsurance premiums and the opportunity to profit from its purported reinsurance business from certain MIs.
  - PHH referred business to those same MIs who engaged in its captive reinsurance arrangements using the dialer and the preferred provider list.
  - MIs offered and participated in PHH's captive reinsurance arrangements pursuant to an agreement and understanding that mortgage insurance business would be referred to them only if they did so.

- PHH accepted a percentage of borrower MI premiums without providing any settlement service in return.
  - Atrium received as much as 40% of the MI premiums paid by borrowers.
  - Atrium's "reinsurance" was not a settlement service.

- This conduct violated Sections 8(a) and 8(b) of RESPA, and it persisted continuously from 1995-2013.

PHH fails to refute any of these facts. It cites neither evidence nor law to the contrary for an obvious reason: there is none. The only question left for this Tribunal to decide is one of law: whether Section 8(c)(2) of RESPA has any application at all once violations of Sections 8(a) and 8(b) are established. The statute itself answers this question – it does not.

PHH's primary argument, it appears, is that Enforcement Counsel should never have filed a summary disposition motion, even though such a motion is provided for in the Bureau's Rules, was ordered by the Tribunal with PHH's consent, and would certainly be permitted in a federal court action. While PHH now complains of "prejudice" due to the fact that this motion was filed after

one week of hearing testimony and before PHH has presented the direct testimony of its witnesses, PHH could have filed affidavits to present any testimony that it believed was necessary to counter Enforcement Counsel's evidence.[1] Moreover, PHH has had the added benefit of opportunities to cross-examine Enforcement Counsel's witnesses and to review a complete list of Enforcement Counsel's witnesses and exhibits, neither of which would normally be afforded prior to summary disposition motions, as well as more than a month to review Enforcement Counsel's investigative file. After demanding an expedited hearing and receiving all of these accommodations, PHH now pleads for the Tribunal to wait. But PHH cannot stall this proceeding without coming forward with evidence that creates a genuine issue of material fact. It has not done so.

Enforcement Counsel respectfully request that this Tribunal bring this matter to an efficient resolution, and grant summary disposition as to liability to Enforcement Counsel.

II. ARGUMENT

A. Enforcement Counsel's Motion is Consistent with the Tribunal's Order

In addition to its meritless claims of "prejudice" addressed above, PHH asserts that Enforcement Counsel "ignores this Tribunal's clear directive regarding the viability of such a motion" because the hearing officer noted that the "diametrically opposed" expert reports "raise[d] a genuine issue of material fact." Respondents' Opposition to Enforcement Counsel's Motion for Summary Disposition as to Liability (PHH Opp.) at 3-4; *see* 3/24/2014 Tr. at 34:16-20. But the Hearing Officer's comment was limited to the issue of the value of the "reinsurance" purportedly provided by Atrium, assuming that question need be addressed, and did not pertain to every issue in this proceeding. Furthermore, it was not a "directive" or a holding of the Tribunal, but merely an

[1] Many of the witnesses that PHH has identified remain current PHH employees and their statements would thus be readily accessible to PHH. PHH executive Sam Rosenthal, who PHH previously identified as one of only two central witnesses in the preceding investigation, testified for three days, including through examination by PHH's own counsel.

observation based on the limited information available at the time about Enforcement Counsel's case. The Tribunal noted then that "Enforcement's theory of the case is that the product or the service offered by Atrium was a sham." 3/28/2014 Tr. at 962:24 – 963:1. That is certainly one of Enforcement Counsel's allegations. But this case can be decided on even more straightforward grounds because RESPA Section 8(c)(2) does not apply to payments made pursuant to referral agreements. That threshold legal issue is particularly appropriate for a ruling at this stage because it does not require expert testimony and does not require the Tribunal to determine whether Atrium's purported reinsurance services were a sham or otherwise incommensurate with the price paid.

PHH also contends that this proceeding is wasteful because Enforcement Counsel's case was "supposedly premised on complex expert testimony" but in fact "could have been decided by the filing of a cursory dispositive motion at the start of this proceeding." PHH Opp. at 1-2. First, Enforcement Counsel has never maintained that its case is premised on complex expert testimony. That testimony was made necessary by PHH's defense, premised on its flawed reading of Section 8(c)(2), that RESPA permits referral payments when the referrals are purchased along with a service of any value. Second, Enforcement Counsel had every intention to file a dispositive motion before the hearing, *see* 2/14/2014 Tr. at 29:20-25, 3/24/2014 Tr. at 33:17-20, but was prevented from doing so by PHH's insistence on holding the hearing within 60 days of the filing of the Notice of Charges (NOC), 2/14/2014 Tr. at 5:9-13, 30:1-7.[2] Any waste of resources is the result of PHH's actions, and it does not warrant the waste of still more resources with an unnecessary hearing on issues that can be resolved now. The Tribunal should decide Enforcement Counsel's motion for

[2] To the extent PHH suggests that Enforcement Counsel could have filed such a motion along with the NOC "at the start of this proceeding," PHH Opp. at 2, PHH is mistaken. The Bureau's rules do not permit such an early filing. 12 C.F.R. § 1081.212(d)(1) (providing for summary disposition motion practice only after Rule 206 disclosures have been made). Rule 206 disclosures could not be made in this proceeding before the resolution of confidentiality issues with a number of third parties, a process which took approximately a month.

summary disposition in order to "narrow the issues." *See* 3/24/2014 Tr. at 37:14-25.

B. Enforcement Counsel Is Entitled To Summary Disposition As To Liability

1. PHH Fails to Raise a Genuine Issue as to Whether the Payments It Accepted Under its Captive Arrangements Were Referral Payments and Unearned Fees

"Summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Azur v. Chase Bank, USA, N.A.*, 601 F.3d 212, 216 (3d Cir. 2010) (internal quotation marks and citations omitted). "Once the moving party points to evidence demonstrating no issue of material fact exists, the non-moving party has the duty to set forth specific facts showing that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor." *Azur*, 601 F.3d at 216 (internal quotation marks and citations omitted). The Bureau's Rules require that the opposing party "file a statement setting forth those material facts" it contends are genuinely disputed, which "must be supported by evidence" such as "admissions, in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the [opposing] party contends support his or her position." 12 C.F.R. § 1081.212(d)(2). "[T]he party opposing summary judgment 'may not rest upon . . . mere allegations.'" *Bayete v. Ricci*, 489 Fed. App'x 540, 542 (3d Cir. 2012) (quoting *Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001)). *See also* Fed. R. Civ. P. 56(c)(1)(A)-(B) (for each fact set forth by the moving party, the non-moving party must either cite specific evidence – such as affidavits, depositions, or documents – to support its assertion that the fact is genuinely disputed, or show that materials cited by the moving party do not establish the absence of a genuine dispute).

Enforcement Counsel's initial brief on this motion (EC Br.) and its Statement of Undisputed Facts (SOUF) (Dkt. Entry No. 102) presented documents and testimony to make the required showing that there is no genuine issue of material fact with respect to Enforcement Counsel's Section 8(a) and 8(b) claims, and that PHH's Section 8(c)(2) defense had no bearing here. The

SOUF places far beyond reasonable dispute the issue of whether PHH accepted payments from the MIs in exchange for an agreement to refer business to those MIs and whether those payments were illegal splits of settlement charges, and whether this conduct persisted continuously from 1995 until 2013. Among other undisputed issues, the SOUF demonstrates that PHH required captive arrangements as a precondition of referring any significant amount of business to MIs, and that, pursuant to those arrangements, it accepted payments from the MIs to whom it referred business through 2013. *See* EC Br. at 10-19. The SOUF also establishes that the payments PHH accepted from MIs constituted a "portion, split, or percentage" of the premiums paid by borrowers to the MIs. EC Br. at 19-20. PHH has not come forward with any evidence showing there is a genuine dispute that it accepted referral payments from the MIs through its captive arrangements. Indeed, its affirmative defense based on RESPA 8(c)(2) presupposes that PHH accepted things of value in exchange for providing referrals, but it insists that this fell within a perceived "safe harbor." PHH does not point the fact-finder to any testimony, affidavits, or contemporaneous documents indicating that the premiums ceded by the MIs to Atrium were *bona fide* payments for reinsurance with no tie to referrals. Rather, PHH rests on "mere allegations"[3] – that is, PHH's say-so – that the facts are in dispute or, in some instances, citations to inapposite evidence that do not remotely relate to the contention at hand.

In responding to the SOUF, PHH cites precious few facts of its own, mainly engaging in arguments jousting at straw-men and distracting debate over irrelevant alleged facts.[4] Such argument, of course, cannot conjure a fact dispute, and only a small portion of PHH's SOUF Response even nominally attempts to challenge Enforcement's facts and supporting evidence. When the

[3] *Bayete v. Ricci*, 489 Fed. App'x 540, 542 (3d Cir. 2012).
[4] *See* Respondents' Resp. to Enf. Counsel's Statement of Purported Undisputed Facts in Supp. of Their Mot. for Summ. Disp. (PHH SOUF Resp.).

underbrush of argument is cleared away, what is most striking is what is missing. PHH has marked over a thousand exhibits in this matter, but it *cites only two*, both of them guidance issued by bank regulators in the 1990s to institutions who are not involved in this matter. Instead, PHH raises lengthy (and unpersuasive or simply irrelevant) objections to the evidence cited by Enforcement. PHH's fact statement thus barely attempts, and utterly fails, to raise a single triable fact issue.

Enforcement's SOUF contains 55 numbered paragraphs. All 55 of PHH's responses fall into one (or in one case, two) of the following five categories, as shown in Table 1, below. In categories 1, 2, and 3, PHH either does not dispute the facts asserted by Enforcement, or does not adduce any evidence in an attempt to do so. Thus, the facts in those 30 ½ paragraphs should be deemed established without further inquiry. Further, as discussed below, the evidence cited by PHH in the 25 paragraphs in categories 4 and 5 also, in each instance, fails to raise any triable fact issue. Thus, all of the facts in the SOUF should be deemed established.

Table 1

Description	Paragraphs
1. PHH does not dispute the facts asserted in the paragraph.	2, 5, 9, 11, 13, 18, 23, 26 [1st sentence], 33, 41, 42, 48, 50
2. PHH says only that "the documents speak for themselves," and does not dispute the facts asserted.	49, 52
3. PHH says that it disputes the facts asserted, but cites no evidence to contradict Enforcement's evidence on the factual point(s) in question.	1, 4, 14, 15, 19, 20, 22, 24, 25, 27, 28, 29, 30, 34, 54, 55
4. PHH disputes the facts asserted, and cites only the evidence cited by Enforcement, or some of it, but the evidence does not contradict any of the facts asserted by Enforcement.	3, 17, 21, 26 [2nd sentence], 31, 32, 40, 43, 44, 45
5. PHH says that it disputes the facts asserted, and cites other evidence (often only self-serving testimony), but the evidence does not contradict any of the facts asserted by Enforcement.	6, 7, 8, 10, 12, 16, 35, 36, 37, 38, 39, 46, 47, 51, 53

a. PHH's Arguments Are Irrelevant to, And Do Not Contradict, Enforcement Counsel's Statement of Undisputed Facts

PHH continually declares that it disputes a particular statement of fact, but instead proceeds to argue against unrelated facts not at issue in the SOUF paragraph in question or against inferences that it says Enforcement Counsel seeks to draw from the fact, while failing to raise any genuine dispute as to the fact itself. A number of statements in the SOUF and the corresponding paragraphs from PHH's SOUF Response are summarized below:

- SOUF ¶ 6: Mortgage insurance is paid for by borrowers but the MI is typically selected by the lender.
    - SOUF Resp. ¶ 6: Discusses various factors supposedly affecting PHH's selection of MIs, MI rates for credit union borrowers as compared to those for other borrowers, PHH's relationship with RMIC, MGIC's efforts to comply with RESPA, MGIC's use of Milliman's services, PHH's selection of MGIC in 3,869 instances mostly post-dating the use of captive reinsurance.
- SOUF ¶ 7: Prior to the financial crisis, mortgage insurance was profitable and lenders sought to participate in MI profits.
    - SOUF Resp. ¶ 7: Asserts that MI rates are filed with state regulators, Enforcement Counsel has no jurisdiction to regulate insurance rates, and that a Milliman webpage refers to banks and OCC guidance.
- SOUF ¶ 10: Atrium's captive arrangement with UGI in 1995 was the first in the industry, and was retroactive to 1993.
    - SOUF Resp. ¶ 10: Discusses whether UGI entered into a new arrangement with Atrium as a result of 2006 RFP, UGI's intentions in responding to the 2006 RFP, the existence of factors in a lender-MI relationship, the existence of regulatory monitoring of captive reinsurers, and whether "the captives are undercapitalized."
- SOUF ¶ 12: UGI and Genworth paid Atrium a percentage of borrowers' premiums, purportedly in exchange for reinsurance coverage.
    - SOUF Resp. ¶ 12: Argues that Bureau settlements allowed MIs to continue ceding premiums, that the settlements should have dictated the MIs' accounting, and that reinsurance was "real."
- SOUF ¶ 14: Atrium had no employees and a small unoccupied office space.
    - SOUF Resp. ¶ 14: Discusses New York insurance law.
- SOUF ¶ 17: Atrium was the only captive reinsurer until 1995, when Amerin began ceding premiums to another captive, and in the late 1990s MIs competed with one another by offering increasingly generous deals to lenders, including "deep cede" arrangements.

- SOUF Resp. ¶ 17: Discusses UGI's efforts to comply with the law, questions the validity of a Bear Stearns analysis (as opposed to the numbers cited in the SOUF).

- SOUF ¶ 18: By 2000 UGI was ceding forty percent of premiums to Atrium.

  - SOUF Resp. ¶ 18: Argues that an injunction in a private suit precludes Enforcement Counsel's claims.

- SOUF ¶ 19: In 1998, the MIs' trade association (MICA) expressed alarm to state regulators about captive arrangements and requested limitations, including limiting ceded premiums to twenty-five percent.

  - SOUF Resp. ¶ 19: Mischaracterizes Enforcement Counsel's position on the applicability of RESPA to certain captive arrangements and notes that a regulator never *adopted* the limitations that the SOUF asserts were merely *sought* by the MIs.

- SOUF ¶ 20: MICA also warned that deep cede arrangements would be financially detrimental, and as they became more favorable to lenders they might be nothing more than revenue sharing arrangements with no transfer of risk.

  - SOUF Resp. ¶ 20: Questions whether the MIs actually presented the warnings cited in the SOUF and states that Mr. Culver did not attend the presentation.

- SOUF ¶ 26: From 2001 to November 2008, UGI and Genworth were the only MIs on PHH's dialer.

  - SOUF Resp. ¶ 26: Discusses PHH's reason for using Genworth rather than a different MI at a time when Genworth had a captive arrangement with PHH.

- SOUF ¶ 27: During this eight year period, the overwhelming majority of PHH loans with private mortgage insurance, and all loans on which PHH completely controlled the allocation of MI business, were steered by PHH to UGI and Genworth, while four other MIs lacking captive arrangements with PHH received virtually no PHH business.

  - SOUF Resp. ¶ 27: Hypothesizes (without citing any evidence) about whether PHH would use an MI not on its dialer – and therefore, lacking a captive arrangement – if no other MI was available, and asserts that there was no explicit agreement to require a captive arrangement.

- SOUF ¶ 28: From 2006 to 2011, Triad received no referrals from PHH and PMI received only one referral from PHH.

  - SOUF Resp. ¶ 28: Speculates as to why Triad and PMI did not receive referrals (but not denying that fact).

- SOUF ¶ 29: From 2001 until 2008, MGIC insured only eight PHH loans. For several of these years, beginning in 2003, MGIC publicly declared that it would not enter into deep cede captive arrangements.

- SOUF Resp. ¶ 29: Asserts that there was no explicit agreement to require a captive arrangement, discusses MGIC's views of deep cede arrangements, states that PHH "at some point," i.e., after Freddie Mac cut the use of deep cede arrangements in late 2008, "ended up" using MGIC.

- SOUF ¶ 36: In 2006 PHH issued a RFP to provoke MIs to compete over the terms of captive arrangements. The RFP requested "creative structuring" of captive reinsurance and that the MIs address a number of captive features. Sam Rosenthal referred to it as an "RFP for our Captive Mortgage Insurance business." The RFP indicated that PHH considered doubling the volume it would refer to MIs.

  - SOUF Resp. ¶ 36: States that the RFP addressed other topics in addition to captive reinsurance and that the RFP did not result in new captive arrangement.

- SOUF ¶ 37: The MIs responded to the RFP with captive reinsurance proposals including a variety of highly favorable features.

  - SOUF Resp. ¶ 37: States that the MI responses to the RFP were "very detailed," and the RFP did not result in any new captive arrangement.

- SOUF ¶ 38: PHH pushed the MIs to make their captive reinsurance proposals even more favorable to PHH than they already were.

  - SOUF Resp. ¶ 38: States, conclusorily, that PHH and the MIs were "sophisticated business entities" engaged in "arms length [sic] negotiations," and citing only to their own witness's self-serving testimony that PHH "wanted" to adhere to the law and sought advisory opinions.

- SOUF ¶ 40: PHH used its ability to steer borrower referrals to MIs as leverage to extract more favorable deep cede arrangements.

  - SOUF Resp. ¶ 40: States that PHH had two MIs other than RMIC "already in place," and PHH did not have explicit "mandated requirements" for doing business.

- SOUF ¶ 45: PHH expanded its referrals to additional MIs with whom it lacked a captive arrangement only after it virtually stopped placing captive reinsurance on new mortgages.

  - SOUF Resp. ¶ 45: Asserts that Mr. Culver does not know why MGIC began getting PHH business after "captives were no longer important," but not disputing that this was the case.

- SOUF ¶ 47: From June until at least October 2008 PHH and MGIC negotiated terms for a captive arrangements, and MGIC was added to the dialer in late November 2008.

  - SOUF Resp. ¶ 47: States that PHH did not enter into a captive arrangement with MGIC, and mischaracterizes Enforcement Counsel's position as to the *per se* legality of quota share captive arrangements.

- SOUF ¶ 51: Sets forth the sums accepted by Atrium under each of its captive arrangements, which Atrium received continuously until the end of its captive arrangements in 2013.
    - SOUF Resp. ¶ 51: Sets forth termination dates and total ceding amounts for all PHH captive arrangements.
- SOUF ¶ 55: From December 2006 to February 2007, PHH and UGI executives frequently discussed the possibility of a payment to Atrium out of the UGI trust of as much as $52 million. In March 2007 a "dividend" payment of $52,563,805 was made to Atrium out of the UGI trust, which required both parties to execute an amendment to their captive agreement. UGI received nothing under the terms of the amendment.
    - SOUF Resp. ¶ 55: Asserts that the dividends withdrawn by Atrium were authorized by the captive reinsurance agreements (which included amendments).

Comparing the corresponding paragraphs in the two documents demonstrates that much of PHH's response fails to address the factual statements in the SOUF. As a result, vast portions of PHH's SOUF Response are irrelevant to Enforcement Counsel's motion.

b. PHH's Conclusory Assertions Do Not Create a Genuine Dispute

Repeatedly, PHH claims that testimony or document excerpts are taken "out of context" or used "selective[ly,]" but then fails to explain how the supplied "context" would result in a contrary meaning, *e.g.*, *id.* ¶¶ 7, 21 (**ECX 0503**), makes an unpersuasive argument for such a meaning, *e.g.*, *id.* ¶¶ 21 (**ECX 0733**), 40, or does not even bother to provide or characterize the supposedly missing "context," much less its significance, *e.g.*, *id.* ¶¶ 19, 21 (**ECX 0153**), 26 (**ECX 0495**) (claiming that Enforcement "extract a snippet of a phrase and ignore the remainder of the document because the other information undercuts their position," but failing to discuss "the remainder of the document" or why this creates a fact issue). This is mere mechanical contradiction-by-allegation, and it cannot raise a genuine fact issue.

Great expanses of text are consumed arguing that Enforcement's facts and evidence are irrelevant or unpersuasive in establishing its claims. In addressing paragraph 6, for instance, PHH employs two and half pages claiming to refute a single sentence – "Although private mortgage insurance premiums are paid by borrowers, the lender, not the borrower, typically selects the

mortgage insurance provider" – which Enforcement Counsel supported with four examples of competent evidence. *Compare* SOUF ¶ 6 *with* PHH SOUF Resp. ¶ 6. Yet PHH nowhere says that the evidence cited by Enforcement fails to support this fact, and it cites no contrary evidence, even though such evidence, if it existed, would be within PHH's grasp.[5]

PHH argues that certain documents are "hearsay," PHH SOUF Resp. ¶¶ 30, 40, 55, and that this is somehow "improper," *id.* ¶ 30, even though hearsay may be admitted in this proceeding, *see* Rule 303(b)(3), and cannot be excluded solely *because* it is hearsay, Rule 303(b)(4). Setting aside what may ultimately be "admissible," contrary to PHH's suggestion, evidence supporting *this Motion* may include "investigatory depositions, transcripts," other out-of-court statements, and "any other evidentiary materials that the moving party contends support his or her position." Rule 212(d)(2). Similarly, PHH attacks a document as "completely unauthenticated," without explaining what such "authentication" would establish, while failing in an entire page to offer any evidence to contradict the one-sentence fact asserted by Enforcement. PHH SOUF Resp. ¶ 20; *see also id.* ¶ 17 (objecting to "the use of such materials for the truth of the matter asserted ….").

PHH objects to the use of the words "referral" or "referred" as conclusory, *id.* ¶¶ 7, 28, 36, 40, 43, 44, 45, but admits that PHH "selected" MIs to provide mortgage insurance, *id.* ¶ 28, and in any event never offers any evidence to counter the abundant evidence proffered by Enforcement of such "selections," *e.g.,* SOUF ¶¶ 21 (citing **ECX 0622**, **0733**), 24-27, 35, or the conclusion that they

[5] PHH also asserts that it had reasons other than the existence of a captive arrangement for selecting an MI, including "whether the MI offered to insure the loan program." PHH SOUF Resp. ¶ 6. This assertion is irrelevant to the corresponding paragraph in the SOUF. PHH also cites no evidence to support it. Most importantly, it is immaterial to Enforcement Counsel's claims. The material fact, which PHH does not even purport to dispute, is that captive reinsurance was an essential factor in the selection of MIs. Indeed, it is undisputed that it was a but-for condition of selecting an MI, as reflected by the fact that until November 2008, PHH virtually never referred a borrower to an MI that did not have a captive arrangement with PHH. *See* EC Br. at 14-15 (citing SOUF ¶¶ 26-33); *id.* at 15 (citing SOUF ¶¶ 31-35).

constituted "action[s] which had the effect of affirmatively influencing the *selection* by any person of a provider of a settlement service…." 24 CFR § 3500.14(f)(1) (defining "referral") (emphasis added). Again, whether the word "referred," "selected," "allocated," or some other synonym is used, PHH cannot meet its burden to create a genuine dispute simply by caviling about word choice.

c. PHH Fails to Overcome, or Even Respond to, the Evidence Showing That the Material Facts Are Not Genuinely Disputed

Close examination of the little PHH does say about the material facts in its SOUF Response shows that it cannot create a genuine dispute in this matter. One need only look at the documents and testimony themselves to see that PHH has no true rebuttal.

PHH seeks to rebut one key paragraph with evidence that does not, in fact, refute it, and which Enforcement itself later cites. *Compare id.* ¶ 35 ("PHH added to the dialer MIs with which PHH had no captive reinsurance arrangement.") (citing **ECX 0654**) *with* SOUF ¶ 45 ("PHH expanded its referrals to additional MIs with whom it lacked a captive arrangement only after it virtually stopped placing captive reinsurance on new mortgages.") (same).

In several instances PHH asserts that the evidence cited by Enforcement does not support the stated facts, but in each case, PHH is simply wrong. For example, in paragraph 10, PHH disputes the assertion that "PHH's captive reinsurance arrangement with United Guaranty was the first one in the mortgage industry," complaining that two of the cited exhibits do not support it, but failing to mention Enforcement's quotation from a third: "Together with PHH Mortgage, AIG United Guaranty created *the first captive reinsurer for the mortgage industry -- PHH's Atrium*" (emphasis added). PHH SOUF Resp. ¶ 10 (quoting **ECX 0733)**. Similarly, in paragraph 17, PHH claims that the asserted facts are "pure supposition," e.g., that "Atrium was the only captive reinsurer in the industry until about 1995 when a new market entrant, Amerin Guaranty, began ceding premiums…," when in fact, based on the cited evidence and facts previously adduced, those facts are inescapable. *Compare* SOUF ¶ 8 (Atrium established 1994 in New York) *with* SOUF ¶ 17 (quoting

ECX 0586, at CFPB-PHH-00352309, that a New York-based reinsurer was the first and "only captive MI insurer until about 1995 when a new MI market entrant, Amerin Guaranty, began ceding premiums …."). This is just one more example of the myriad ways in which PHH attempts to run from basic, objective facts that it knows to be true.

PHH also attempts to contradict certain indisputable inferences drawn from the evidence by acknowledging only a limited subset of the evidence supporting the inference. For example, rather than make a reasoned argument in its opposition brief, PHH claims it disputes the inference it thinks Enforcement Counsel seeks to draw from paragraph 25 of the SOUF, specifically, the implication that Genworth was added to PHH's dialer as a result of its creation of a captive arrangement. SOUF Resp. ¶ 25. That inference is not in paragraph 25 of the SOUF. Rather, it is drawn from a number of facts contained in the SOUF for the reasons explained at length in the accompanying brief. *See* EC Br. at 14-19. The inference is not only appropriate, but inescapable. RESPA and Regulation X recognize that referral agreements like the one between PHH and Genworth will often be proved with evidence of "a practice, pattern or course of conduct" that is not "written or verbalized," or through evidence of the repeated receipt of a thing of value "that is connected in any way with the volume or value of the business referred." 12 C.F.R. § 1024.14(e). The SOUF is replete with both of these kinds of evidence, of which paragraph 25 is only a small part, and which PHH does nothing to address or even acknowledge.[6]

[6] PHH floats a new argument, in its SOUF Response rather than its brief, that its MI referrals on correspondent loans are not covered by Section 8 because secondary market transactions are not covered by Section 8. *See* SOUF Resp. ¶ 34. While certain secondary market transactions are excluded from Section 8 coverage, s*ee* 12 C.F.R. § 1024.5(b)(7), that provision only exempts the secondary market transaction from being treated as a "referral" and the purchase price from being treated as a referral fee. *See*, *e.g.*, *Moreno v. Summit Mortg. Corp.*, 364 F.3d 574 (5th Cir. 2004) (borrower alleged that purchaser paid illegal referral fee to originator). If the secondary market purchaser refers the borrower to a particular MI, that referral is unrelated to the section 1024.5(b)(7) exemption. Furthermore, PHH has not established that these referrals qualify as "secondary market"

PHH also suggests that one document, **ECX 0622**, cannot be used to support a statement of fact, "because the document makes no mention of Respondents," PHH SOUF Resp. ¶ 21, omitting to mention that the proposition for which it is cited does not refer to Respondents either, *see* SOUF ¶ 21 ("In agreeing to cede premiums as part of captive arrangements, Genworth sought to remain competitive with other MIs and to improve, retain, or regain market share position."). PHH's other objections to the two sentences asserted in paragraph 21 of the SOUF (some discussed above) are irrelevant to whether the facts asserted are disputed.

Critically, PHH fails to dispute the years-long pattern and practice evidence of quid pro quo agreements between itself and the MIs. In the face of a dozen pieces of evidence cited by Enforcement to support the statement that "PHH nonetheless continued to use its existing captive arrangements to dictate its mortgage insurance referrals through 2008 and into 2009," PHH mischaracterizes two, ignores the other ten, and cites nothing else to support its position. PHH SOUF Resp. ¶ 43. PHH similarly fails to refute subsequent paragraphs from the SOUF collecting pattern-and-practice and financial evidence. *See, e.g., id.* ¶¶ 44 (complaining of the terms "referral" and "maximally steered," disputing the interpretation of clear-cut evidence corroborated by their own witness's admission, and citing no other evidence), 45 (complaining of term "referral," and citing only witness testimony that does not contradict Enforcement's asserted fact), 46 (ignoring the evidence in multiple earlier paragraphs cited by Enforcement, and citing only its own witness' self-serving 2014 testimony about his "recollection" of events in 2007)[7], 47 (disputing fact based on what PHH says the fact "insinuates," ignoring four of the six citations to evidence by Enforcement, and

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transactions.[7] PHH notes, correctly, that ECX 0053 does not contain the cited information, but this is simply the result of a scrivener's error – the cited document exists, and was quoted accurately by Enforcement, but its correct exhibit number is **ECX 0086**. *See* SOUF ¶¶ 46, 47.

[7] PHH notes, correctly, that ECX 0053 does not contain the cited information, but this is simply the result of a scrivener's error – the cited document exists, and was quoted accurately by Enforcement, but its correct exhibit number is **ECX 0086**. *See* SOUF ¶¶ 46, 47.

misinterpreting the other two), 54 ("object[ing]" to RFP evidence as "not material" while not stating that the asserted fact is untrue or citing any evidence), 55 ("object[ing]" to the "characterization" of Atrium dividend payments, and to the use of "hearsay" as "improper," and failing to address or even mention fourteen other pieces of competent evidence, or cite any other evidence, in rebuttal).

In sum, PHH's response to the SOUF fails to cast any doubt on Enforcement Counsel's showing. The Tribunal should determine that each of the facts therein is established and hold now based on the evidence presented by Enforcement Counsel, that from 1995 through 2013, PHH accepted payments from MIs in exchange for an agreement to refer business to those MIs.

2. The Section 8(b) Exclusion for "Services Actually Performed" Applies Only to Settlement Services

Although it describes Enforcement Counsel's interpretation of Section 8(b) as "tortured," PHH does not point to any flaw in that interpretation or explain how Section 8(b) could be interpreted differently. PHH does not proffer any possible alternate view of the scope of the Section 8(b) exclusion for "services actually performed." Nor does PHH contend that Atrium provided a settlement service to the MIs. PHH merely points out that mortgage insurance is a settlement service. PHH Opp. at 10; *see also* EC Br. at 22 (noting PHH's assertion in another litigation that reinsurance is not a settlement service). PHH's assertion that Atrium purported to acquire some portion of the MIs' insurance obligations is off the mark for two reasons. First, it is factually incorrect. The MIs had obligations to lenders to pay insurance claims in the event of loss on individual loans. Atrium's purported obligations were to MIs, not lenders, and involved the payment of claims in the event the MIs' insurance claims reached a certain level. Atrium did not take on the MIs' obligations, but rather purported to incur new obligations to the MIs themselves. Second, even if Atrium had acquired the MIs' obligation, that transaction would not constitute a settlement service. Rather, it would be a separate transaction removed from the provision of the underlying settlement service, just like a secondary market loan transfer, which also does not constitute a

settlement service. *See Moreno v. Summit Mortg. Corp.*, 364 F.3d 574 (5th Cir. 2004) (purchase of loan from mortgage loan from originator was not covered by Section 8, even where agreement to purchase predated the origination); *Chandler v. Northwest Bank Minnesota, N.A.*, 137 F.3d 1053 (8th Cir. 1998) (same). Nothing in PHH's brief suggests that Atrium provided a settlement service. PHH has therefore conceded that Section 8(b)'s coverage exclusion applies only to settlement services, and that Atrium provided no such service.

PHH is correct insofar as it claims that Section 8(c)(2) could theoretically protect a payment for a service other than a settlement service that would otherwise violate Section 8(b). PHH Opp. at 10; *see also* EC Br. at 21. However, as Enforcement Counsel has explained in its initial brief, EC Br. at 22-25, and in this brief, *infra* section II.D, Section 8(c)(2) does not apply where the challenged payment(s) has been shown to have been made in exchange for referrals. PHH cannot avail itself of Section 8(c)(2) in this matter in light of the extensive uncontroverted evidence establishing that MIs purchased PHH's captive reinsurance for the purpose of receiving referrals from PHH.

3. **Section 8(c)(2) Does Not Apply To Referral Payments**

Enforcement Counsel has shown there is no genuine issue of fact as to any element of its Section 8(a) and 8(b) claims. The evidence proffered in connection with Enforcement Counsel's motion establishes that PHH accepted purported reinsurance premium payments from MIs pursuant to agreements that PHH would refer real estate settlement business to those MIs, and that PHH accepted a "portion, split, or percentage" of the MIs' premiums from borrowers. PHH has raised no genuine issue as to these facts. At most, PHH has raised a question as to whether PHH's selections of MIs were motivated solely by the payment of "reinsurance" premiums by MIs, or whether a captive arrangement was one of several preconditions to making referrals to an MI. But that question is immaterial to a Section 8(a) claim, because both scenarios would violate the law. PHH provides no reasoning or authority suggesting otherwise. A "referral" occurs whenever an

action "has the effect of affirmatively influencing the selection by any person of a provider of a settlement service." 12 C.F.R. § 1024.14(f). PHH's repeated selection of MIs clearly constitutes referrals. Just because PHH may have also had a high opinion of the MIs to which it referred business does not make it any less a referral. And it is equally clear from the evidence that the MIs purchased PHH's purported reinsurance pursuant to an agreement or understanding that the MIs would receive referrals of business from PHH. EC Br. at 14-19. Any additional reasons that PHH may have had for making referrals to MIs are irrelevant. The Tribunal should therefore hold that Enforcement Counsel has established that PHH violated Section 8(a) and 8(b).

PHH only argues that RESPA Section 8(c)(2) and section 1024.14(g)(1) of Regulation X authorize it to sell referrals along with its purported reinsurance. As PHH notes, Section 8(c) protects several categories of payments. 12 U.S.C. § 2607(c)(1)-(5) (permitting (1) payments for legal services, title insurance services, and loan origination services; (2) payment of a bona fide salary or compensation or other payment for goods or facilities actually furnished or services actually performed; (3) payments under cooperative brokerage and referral arrangements or agreements between real estate agents and brokers; (4) "affiliated business arrangements," under certain conditions; and (5) payments authorized by Bureau regulation) . Similarly, Regulation X enumerates seven categories of permitted payments. 12 C.F.R. § 1024.14(g)(1)(i)-(vii) (allowing many of the payments listed in RESPA Section 8(c)(2), as well as permitting promotional and educational activities that are not conditioned on the referral of business and an employer's payment to its own employees for referral activities). PHH makes much of the language elsewhere in section 1024.14 stating that "[a]ny referral of a settlement service is not a compensable service, except as set forth in section 1024.14(g)(1)." 12 C.F.R. § 1024.14(b). The reference to section 1024.14(g)(1) in section 1024.14(b) is simply a recognition that section 1024.14(g)(1) in fact does explicitly permit certain kinds of referral payments – none of which are at issue in this proceeding – and that those payments

do not violate the ban on payments for referrals, which are generally "not a compensable service." *See* 1024.14(g)(1)(v) (permitting "a payment pursuant to cooperative brokerage and referral arrangements"), (g)(1)(vii) (permitting "[a]n employer's payment to its own employees for any referral activities"). In other words, section 1024.14(b) bans payments for "[a]ny referral for a settlement service" other than "cooperative brokerage and referral agreements" and employer payments to employees who engage in "referral activities."

PHH suggests that because section 1024.14(g)(1) permits these two types of referral payments (which are not at issue here), all the other paragraphs in section 1024.14(g)(1) must be read to also permit referral payments. That is wrong. Unlike paragraphs 1024.14(g)(1)(v) and (vii), the other paragraphs, including paragraph (g)(1)(iv) – which is a verbatim restatement of RESPA Section 8(c)(2) – do not permit referrals. The general principle that "[a]ny referral of a settlement service is not a compensable service" applies to payments under these other paragraphs. 12 C.F.R. § 1024.14(b). To hold otherwise would be allow a person to sell a referral of real estate settlement business along with, and as a condition of, the buyer's purchase of, (i) legal services, (ii) title services, (iii) loan origination, processing or funding services, (iv) any goods, facilities or services, or (vi) promotional or educational services (even though the purchase of these services must "not [be] conditioned on the referral of business"). 12 C.F.R. § 1024.14(i)-(iv), (vi). Once again, PHH's interpretation of Section 8(c)(2) (and now Regulation X) would destroy the prohibitions of Section 8. The statute and the regulation do not support such a radical reading. Enforcement Counsel's reading, on the other hand, is consistent with the prohibitions of Section 8, Congressional intent, and the Bureau's position in the *Edwards* litigation. *See* Brief of *Amicus Curiae* Consumer Financial Protection Bureau in Support of Neither Party at 11-18, *Edwards v. First American Corp.*, No. 13-55542 (9th Cir. Oct. 30, 2013) (Dkt. Entry No. 16) (interpreting the scope of Section 8(c)(2)).

The authority that PHH cites supports Enforcement Counsel's position. As PHH notes, a

district court has pointed out that "RESPA does not prohibit a real estate broker from referring business to a [home warranty company]." *Kiefaber v. HMS Nat'l, Inc.*, 284 F.R.D. 370, 372 (E.D. Va. 2012). That is a correct, and mundane, statement of the law. RESPA Section 8(a) prohibits *payments* for referrals. *See id.* ("RESPA prohibits a broker from receiving a fee for that referral"). PHH faces the charges filed in this matter, not because it made referrals to MIs, but because PHH accepted payments from MIs in exchange for those referrals. Those payments are illegal under Section 8(a) and are not protected by Section 8(c)(2), regardless of whether they also involved the provision of real reinsurance services alongside the referrals (which further evidence would demonstrate, they did not). The HUD Letter by Mr. Retsinas also reflects Section 8(a)'s prohibition on payments for referrals. As PHH acknowledges, the HUD Letter requires "the payments to the reinsurer (1) [to be] for reinsurance services actually furnished or for services performed." [8] PHH Opp. at 8 (internal quotation marks omitted). Because PHH accepted the payments pursuant to an agreement to refer business to the MIs, those payments were not "solely 'payments for goods or facilities actually furnished or for services actually performed.'" *See* **ECX 0193**, Attachment A (HUD Letter) at CFPB-PHH-00112651. PHH's argument that Section 8(c)(2) applies to referral payments, as long as some service is rendered alongside the referral, is based on an erroneous interpretation of RESPA that would negate Section 8 entirely and is unsupported by any authority. The Tribunal should hold that Section 8(c)(2) does not apply to Enforcement Counsel's Section 8 claim[s].[9]

CONCLUSION

[8] PHH also notes that the HUD Letter requires the payments to be "bona fide compensation." PHH Opp. at 8. In addition, the HUD Letter imposed other limitations with which PHH also failed to comply. It is enough for the purpose of this motion to note that the HUD Letter does not permit a lender to condition referrals on an MI's purchase of captive "reinsurance" from the lender's affiliate.

[9] PHH also contends that Enforcement Counsel bears the burden of proof under Section 8(c)(2). We disagree. But that issue need not be resolved on the instant motion because Enforcement Counsel's asserts that Section 8(c)(2) does not apply when the challenged payment was accepted, at least in part, in exchange for making a referral. *See* EC Br. at 22-25; *id.* at 24 n.10.

For the reasons cited above and in its initial brief, Enforcement Counsel respectfully requests that the Tribunal grant its motion for summary disposition of its claims as to liability.

DATED: May 12, 2014

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 12th day of May 2014, I caused a copy of the foregoing "Enforcement Counsel's Reply In Support of Its Motion for Summary Disposition As to Liability" 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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