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.	)	**FILED UNDER SEAL**

RESPONDENTS' OPPOSITION TO ENFORCEMENT COUNSEL'S MOTION FOR SUMMARY DISPOSITION AS TO LIABILITY

INTRODUCTION

Enforcement Counsel's motion for summary disposition is nothing short of astounding. Despite this Tribunal's directive that such a motion would not be successful given the genuine issue of material fact raised by the "diametrically opposed" expert testimony, Enforcement Counsel nonetheless file such a motion. In fact, the conflicting expert opinions represent but one of the many disputed material facts which preclude a grant of summary disposition in Enforcement Counsel's favor.

Enforcement Counsel also advocate an interpretation of RESPA Section 8 that is plainly wrong. Enforcement Counsel selectively quote from RESPA and Regulation X to assert that *any* payment made in connection with the referral of a settlement service is a violation of Section 8 and that the Section 8(c) safe harbor has no application. If that is the case, then Enforcement Counsel are wasting precious government resources (and taxpayer dollars) in pursuing an administrative enforcement action supposedly premised on complex expert testimony for

something that could have been decided by the filing of a cursory dispositive motion at the start of this proceeding.

Contrary to Enforcement Counsel's misreading of the statute, RESPA absolutely contemplates that there will be referrals in connection with the provision of real estate settlement services. Indeed, RESPA and Regulation X set forth ***seven*** categories of payments that are explicitly permitted under the Section 8(c) safe harbor in connection with a referral. Further, it is Enforcement Counsel's burden, not Respondents', to prove that Section 8(c)(2) does not apply, *i.e.*, that no services were performed in connection with the reinsurance agreements at issue. Of course, attempting to prove that no services were performed in this case brings Enforcement Counsel back full circle to the expert testimony that they now apparently claim is unnecessary.

Accordingly, Enforcement Counsel's motion for summary disposition should be rejected as both inappropriate and wholly unfounded as a matter of law.

LEGAL STANDARD

Summary disposition is appropriate only where: "(1) There is no genuine issue as to any material fact; and (2) The moving party is entitled to a decision in its favor as a matter of law." 12 C.F.R. § 1081.212(c).[1] "[F]acts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion" may be used to support or oppose a motion for summary disposition. *Id.* §§ 1081.212(c), (d)(2). In considering a motion for summary disposition, the

[1] The procedures and standards for motions for summary disposition under Rule 212 of the CFPB's Rules of Practice are modeled after standards set forth in the SEC rules for such motions. 77 Fed. Reg. 39058, 39078. Further, Rule 250 of the SEC Rules of Practice, which provides for summary disposition, was modeled on Fed. R. Civ. P. 56(c). *Kornman v. SEC*, 592 F.3d 173, 182 (D.C. Cir. 2010). As such, Respondents read Rule 212 as setting forth a standard for summary disposition that mirrors the standard for summary judgment under Fed. R. Civ. P. 56(c).

court considers all evidence in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also Porter v. Shah*, 606 F.3d 809, 813 (D.C. Cir. 2010) ("In assessing whether a genuine issue exists, we view the evidence in the light most favorable to the nonmoving party.") (citations and quotations omitted). Further, the burden of showing "the absence of a genuine issue concerning any material fact" lies with the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (quotation omitted). Summary disposition, however, "should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." *Assoc. Press v. United States*, 326 U.S. 1, 6 (1945).

ARGUMENT

I. ENFORCEMENT COUNSEL'S MOTION FOR SUMMARY DISPOSITION IS INAPPROPRIATE GIVEN THE STAGE OF THE PROCEEDING AND THE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE

Enforcement Counsel's motion for summary disposition is prejudicial to Respondents. Enforcement Counsel have now had the benefit of putting on their case-in-chief for one week and relying on evidence obtained therein to support their motion. Respondents, by contrast, have only had the opportunity to cross-examine witnesses; they have not yet been able to present any of the evidence in support of their case-in-chief. At the hearing, in response to Respondents' counsel's request for clarification as to whether dispositive motions would follow Enforcement Counsel's case-in-chief, *see* Mar. 24, 2014 Hearing Tr. at 34:16-20, the Tribunal explained:

> I don't see Enforcement making a successful motion for summary disposition. For one reason, I don't need to look outside anything except the expert reports. Okay? The experts are, for the most part, diametrically opposed, and that by itself, is sufficient to raise a genuine issue of material fact. So this case is not going to get resolved completely in Enforcement's favor, at least by way of summary disposition.

Id. at 34:23-25; 35:1-7.

Thus, Enforcement Counsel's attempt to move for summary disposition based on testimony elicited so far, *i.e.*, mid-hearing, is prejudicial to Respondents and ignores this Tribunal's clear directive regarding the viability of such a motion.

Second, even setting aside the impropriety of the motion, there are genuine issues of material fact in dispute that preclude a grant of summary disposition. Indeed, the Tribunal need look no further than Enforcement Counsel's first argument in support of their RESPA Section 8(a) claim to conclude that summary disposition should be denied. Enforcement counsel blithely contend that "[t]here is no genuine dispute of material fact in this case that . . . 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." Mot. at 10. As set forth in RESPA's implementing regulation, Regulation X, there are seven categories of payments that "Section 8 of RESPA permits[,]" in connection with a referral of business, including "payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed[.]" 12 C.F.R. § 1024.14(g)(1)(iv). Enforcement Counsel's repeated use of the word "purported" is both inexplicable and fatal to their attempt to obtain summary disposition. Whether the services provided by Atrium were – or were not – reinsurance is a material fact that is the subject of a genuine dispute between the parties as demonstrated by the "diametrically opposed" expert witness opinions. Thus, this disputed material fact alone precludes a grant of summary disposition to Enforcement Counsel.

In addition, as detailed more fully in Respondents' Response to Enforcement Counsel's Statement of Undisputed Facts ("SOUF"), filed contemporaneously herewith, many of the other so-called "undisputed material facts" identified by Enforcement Counsel are, in reality, highly

disputed issues which have yet to be fully explored through hearing testimony presented by one or both parties. For example, Enforcement Counsel inappropriately use the term "referral" throughout their SOUF, suggesting that they have already established this element of a RESPA Section 8 claim. *See, e.g.*, SOUF ¶¶ 7, 22, 24, 28, 30, 43-45. Whether any alleged referral took place is still a highly disputed fact, and one that Enforcement Counsel have yet to prove. Moreover, in many instances, Enforcement Counsel rely on out-of-context and/or selective excerpts of testimony and statements cobbled together to create supposed undisputed material facts.

Accordingly, given the fact that Enforcement Counsel have had the benefit of presenting a portion of their case-in-chief – and relying on supposed facts derived therefrom – and the undeniable existence of disputed material facts, the motion for summary disposition is inappropriate and should not be granted.

II. ENFORCEMENT COUNSEL'S STRAINED INTERPRETATION OF RESPA SECTION 8 FINDS NO SUPPORT IN THE LAW

A. The RESPA Section 8(c) Safe Harbor Qualifies RESPA Sections 8(a) and 8(b)

RESPA Sections 8(a) and 8(b) provide as follows:

> (a) Business referrals
>
> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) Splitting charges
>
> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. §§ 2607(a) and (b).

Importantly, the above prohibitions are subject to Section 8(c), RESPA's safe harbor provision, which explicitly permits *seven* different categories of payments including:

> (c) Fees, salaries, compensation, or other payments
>
> Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed[.]

12 U.S.C. § 2607(c)(2); *see also* 12 C.F.R. § 1024.14(g)(1)(iv); *Cedeno v. IndyMac Bancorp, Inc.*, No. 06-Civ-6438, 2008 U.S. Dist. LEXIS 65337, at *13 (S.D.N.Y. Aug. 25, 2008) (stating that RESPA Section 8 "specifically does not prohibit payments for services actually rendered"). As explained by the Fourth Circuit, "Congress 'directed § 8 against a particular kind of abuse that it believed interfered with the operation of free markets – the splitting and kicking back of fees to parties **who did nothing** in return for the portions they received.'" *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 268 (4th Cir. 2002) (quoting *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985)) (emphasis added).

B. Enforcement Counsel, Not Respondents, Have the Burden of Proving that Section 8(c) Does Not Apply

The motion for summary disposition constitutes yet another improper attempt by Enforcement Counsel to characterize Section 8(c) as an "affirmative defense" so as to avoid their burden of proof on this issue. Mot. at 22, 23. As the Bureau's regulations make clear, however, "Enforcement Counsel shall have the burden of proof of the ultimate issue(s) of the Bureau's claims at the hearing." 12 C.F.R. §1081.303. Moreover, courts that have addressed this issue have concluded that the party alleging a violation of Section 8(a) or 8(b) must demonstrate that Section 8(c) is not applicable. *See, e.g., Capell v. Pulte Mortg. L.L.C.*, No. 07-1901, 2007 U.S. Dist. LEXIS 82570, at *18 (E.D. Pa. Nov. 7, 2007) ("All claims under RESPA § 8 are subject to § 8(c)'s exemptions. 12 U.S.C. § 2607(c). Thus, a plaintiff asserting a RESPA § 8 claim must

establish that the transaction is not exempt under RESP[A] § 8(c)."); *Rambam v. Long & Foster Real Estate, Inc.*, No. 11-5528, 2012 U.S. Dist LEXIS 184839, at *2-3 n.1 (E.D. Pa. June 22, 2012) ("We also held [at the hearing on the motion to dismiss] that, as an element of his RESPA claim, Plaintiff must plead and prove that the fee-splitting transaction about which he complains is not an exempt fee-splitting transaction under § 8(c) . . . . ") (internal citations omitted).

Therefore, contrary to Enforcement Counsel's repeated assertion, it is not Respondents that bear the burden of proving that Section 8(c) applies. Enforcement Counsel have the burden of proving that no "goods or facilities" were "actually furnished" and no "services" were "actually performed" under Section 8(c)(2).

C. RESPA Section 8(c) Does Not Prohibit All Payments Made in Connection with Referrals And Its Application is Not Optional

In contravention of the plain language of RESPA and Regulation X, Enforcement Counsel take the position that any payment made in connection with the referral of a settlement service is a violation of RESPA:

> Section 8(c)(2) does not permit referral agreements; it only authorizes certain types of payments, and only when those payments are for "services actually performed," not for referrals of real estate settlement services. Since "[a]ny referral of a settlement service is not a compensable service," RESPA is violated wherever any payment is made for a referral in whole or in part.

Mot. at 24 (citing 12 C.F.R. § 1024.14(b)).

In fact, Enforcement Counsel fail to note a critical deletion in the above-quoted language of Regulation X, a complete version of which reads as follows: "Any 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) (emphasis added). Section 1024.14(g), entitled "Fees, salaries, compensation, or other payments," in turn, sets forth the seven categories of payments that "**Section 8 of RESPA permits**[,]" including "payment to any person of a bona fide salary or compensation or other

payment for goods or facilities actually furnished or for services actually performed[.]" 12 C.F.R. § 1024.14(g)(1)(iv) (emphasis added). In other words, contrary to Enforcement Counsel's representation, RESPA absolutely contemplates that there will be referrals that accompany the provision of real estate settlement services. While payments for referrals are prohibited under RESPA, payments for services provided in connection with a referral are not. *See, e.g., Kiefaber v. HMS Nat'l, Inc.*, 284 F.R.D. 370, 372 (E.D. Va. 2012) ("RESPA does not prohibit a real estate broker from referring business to a [home warranty company]. Rather, RESPA prohibits a broker from receiving a fee for that referral. However, if the fee is for a 'compensable service,' then the fee is exempt from liability under § 2607(c)."") (citations omitted).

Further, as it specifically relates to the captive reinsurance arrangements at issue here, in 1997, HUD, the agency previously responsible for RESPA enforcement, issued guidance in the form of an informal letter. *See* Letter from Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner, to Sandor Samuels, General Counsel of Countrywide Funding Corporation (Aug. 6, 1997) ("HUD Letter") (copy attached to ECX 193 at Attachment A, CFPB-PHH-112651). HUD acknowledged in its guidance that a captive reinsurance arrangement will result in the lender "ha[ving] a financial interest in having the primary insurer in the captive reinsurance program selected to provide the mortgage insurance." HUD Letter at 1 (CFPB-PHH-112651). Yet, HUD specifically allowed lenders to enter into such arrangements as long as the payments to the reinsurer "(1) are for reinsurance services 'actually furnished or for services performed' and (2) are bona fide compensation that does not exceed the value of such services." HUD Letter at 3. Simply stated, HUD recognized the potential incentive to use the primary MI with which there was a reinsurance arrangement. Critically, HUD placed no limitation on a

lender's use of one or more MIs under such circumstances. Indeed, if HUD had wanted to prohibit captive arrangements pursuant to its authority under RESPA, it had the opportunity to do so in 1997, but it did not.

In a final attempt to distance themselves from the clear application of the Section 8(c) safe harbor to the facts here, Enforcement Counsel make the startling claim that "[o]nce the elements of a Section 8 kickback claim are proven, Section 8(c)(2) does not apply because it does not protect the payments made under referral agreements, even if accompanied by some purchase of services actually performed." Mot. at 25. As explained above, this is an incorrect statement of the law. Tellingly, the only so-called "support" for this outlandish proposition is a citation to an amicus curiae brief filed *by the Bureau* in connection with another matter in the Ninth Circuit. The Section 8(c) safe harbor is an integral part of a Section 8 analysis and its application is not optional. Stated otherwise, nothing is "proven" until it is determined that none of the Section 8(c) exceptions apply. *See Capell*, 2007 U.S. Dist. LEXIS 82570, at *18 ("[A] plaintiff asserting a RESPA § 8 claim must establish that the transaction is not exempt under RESP[A] § 8(c).").

D. Enforcement Counsel's Tortured Section 8(b) Interpretation is Unavailing in Light of the Services Provided by Atrium

In support of their alleged Section 8(b) claim, Enforcement Counsel assert that the reinsurance provided by Atrium does not constitute a "settlement service" as that term is defined under RESPA and Regulation X. Based on that premise, Enforcement Counsel contend that the Section 8(b) exclusion that allows for receipt of a "portion, split, or percentage of any charge" "for services actually performed," actually means "for **settlement** services actually performed" and, consequently, Respondents cannot avail themselves of the Section 8(b) exclusion.

First, as Enforcement Counsel acknowledge, mortgage insurance constitutes a settlement service under RESPA. In providing reinsurance to the MIs, Atrium assumed a portion of the MIs' obligation on the underlying mortgage insurance in exchange for a portion of the premiums. Stated otherwise, Atrium agreed to take on part of the MIs' obligation in connection with a settlement service. Thus, Enforcement Counsel's attempt to characterize the services performed by Atrium as falling outside the scope of the Section 8(b) exclusion is illogical.

Second, even accepting Enforcement Counsel's tortured reading of Section 8(b) as correct, it nonetheless is irrelevant given the fact that the safe harbor of Section 8(c) applies equally to Sections 8(a) and 8(b), a point even Enforcement Counsel concedes. Mot. at 21 ("Payments for any other kind of service . . . are protected, if at all, by the provisions of Section 8(c)(2)[.] . . ."). Accordingly, even if the reinsurance furnished by Atrium falls outside the Section 8(b) exclusion, it still would constitute a "service actually performed" under Section 8(c)(2).

CONCLUSION

For all the foregoing reasons, Enforcement Counsel's motion for summary disposition on liability is without merit. Not only is the motion inappropriate and prejudicial to Respondents, it also relies on a gross misreading of RESPA Section 8. More egregious, however, is the fact that Enforcement Counsel declare 22 pages of purported "facts" to be "undisputed" when, in fact, virtually all of them are disputed by Respondents, and then insist that Respondents be found liable for violating RESPA. Therefore, the motion for summary disposition should be denied.

Dated: May 2, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 2nd day of May, 2014, I caused a copy of the foregoing Respondents' Opposition to Enforcement Counsel's Motion for Summary Disposition as to Liability and Response to Enforcement Counsel's Statement of Purported Undisputed Facts in Support of Their Motion for Summary Disposition to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

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