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**

REPLY MEMORANDUM IN SUPPORT OF RESPONDENTS' RENEWED MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO NARROW THE NOTICE OF CHARGES

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INTRODUCTION

The Bureau's Opposition to Respondents' Renewed Motion to Dismiss or to Narrow the Notice of Charges is long on hyperbole and short on substance. The Bureau accuses Respondents of "camouflaging" their prior motion to dismiss, "taking a second bite at the apple" (despite the Tribunal's explicit request for dispositive motions to "pare down" the case), and re-filing dispositive motions that were denied without prejudice.

Far from successfully opposing Respondents' Motion, the Bureau's Opposition goes a long way towards narrowing the issues in this case. Most significantly, the Bureau admits:

> To be clear, Enforcement Counsel takes no position as to whether PHH's purported captive reinsurance is "insurance" for purpose of any state's law. We merely contend that, whatever its status under state law, PHH's purported captive reinsurance is not a compensable service within the meaning of Section 8 of RESPA, and that even if it is such a "service," PHH accepted excessive compensation in order to mask kickbacks and referral payments.

Opp'n at 39 n.33.

Given the Bureau's "no position" stance on the insurance issue, *i.e.*, its decision not to oppose the issue, the Tribunal should now conclude that the following facts are "established" pursuant to Rule 213: (1) the reinsurance provided by Atrium and Atrium Re constituted "insurance" under state law; and (2) HUD deemed captive reinsurance arrangements permissible under RESPA as provided in its 1997 letter, and HUD's position has never been rescinded by HUD or the Bureau. *See* ECX 594.[1] Accordingly, even if the Tribunal rejects all of Respondents' arguments in favor of dismissing and/or narrowing claims – which clearly it

[1] Permitting the Bureau to announce a new rule prohibiting reinsurance by lender-captive reinsurers for the purpose of "impos[ing] potentially massive liability on [Respondents] for conduct that occurred well before that interpretation was announced . . . would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [it] prohibits or requires.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (citation omitted).

should not – all that would remain even under the Bureau's formulation is whether "PHH accepted excessive compensation in order to mask kickbacks and referral payments." While Respondents disagree with the Bureau's assertion that the premiums received by Atrium should be evaluated as to whether they were "excessive," given the fact that a service, *i.e.*, reinsurance, was provided, in no event should any continued hearing go beyond determining the applicability of the Section 8(c)(2) safe harbor.

Although the Bureau again manufactures arguments out of whole cloth and states legal conclusions for which it can offer no case law support, one point has been established: The Bureau finally acknowledges that it cannot go back any further than July 21, 2008. While the Bureau characterizes its concession as "at least as far back," the simple fact is that if it wants to go back further, it should provide some authority; tellingly, it does not. Second, while relegating the Fifth Circuit's decision in *Snow v. First Am. Title Ins. Co.*, 332 F.3d 356, 357 (5th Cir. 2003), to a footnote and proclaiming that the Fifth Circuit got it wrong, the Bureau fails to cite a single case in support of its position that the statute of limitations for a RESPA claim does not start on the closing date or that the pmi payments constitute a "continuing violation" of the underlying alleged RESPA violation. Finally, the Bureau incorrectly relies on judicial principles that are more aptly suited for district courts rather than administrative adjudications, incorrectly asserts that the motions in limine were denied with prejudice, incorrectly mischaracterizes Respondents' arguments, and takes inherently inconsistent positions within a single brief.

ARGUMENT

I. THE TRIBUNAL'S MARCH 13 ORDER

One would think that, as a new agency and in connection with its first full adjudicative hearing, the Bureau would have an interest in getting it right. It does not. Rather, in response to

Respondents' motion the Bureau raises a host of defenses including allegations that the motion is barred by the "law of the case" and/or that it constitutes an improper "motion for reconsideration." Such arguments are inappropriate in the context of an adjudicative hearing. *See, e.g., U.S. Postal Serv. ANET & WNET Contracts*, 6 Wage & Hour Cas. 2d (BNA) 521, at *24, 2000 DOL Admin. Rev. Bd. LEXIS 84 (Dep't of Labor 2000) (rescinding a statement in a previous order that was subsequently determined to be incorrect, noting that "adjudicative bodies may revisit their own earlier legal conclusions in a pending case to correct errors without running afoul of the 'law of the case' principle"). That is so because this Tribunal's purpose is to prepare a "recommendation" that will go to the Director who will then issue a final agency decision that is subject to review before a court of appeals.[2]

Respondents take issue with the Bureau's characterization of Respondents' motion as one for reconsideration. Regardless, this Tribunal may – and in fact should – correct any incorrect or erroneous statements of law on its own accord. *See, e.g., Dun & Bradstreet Corp. Found. v. U.S. Postal Serv*., 946 F.2d 189,193-94 (2d Cir. 1991) (an agency "may, on its own initiative, reconsider its interim or even its final decisions," and noting "the general public [policy] interest in obtaining the correct result in administrative cases"). Respondents have preserved their arguments and, if necessary, are willing to incur the cost and expense of the appellate process.

Further, Respondents disagree with the Bureau's claim that the following matters were established by the Tribunal's March 13 Order:

<u>Bureau Statement No. 1</u>. Section 8(a) of RESPA "has no separate exception for 'services actually performed.'" 3/13 Order at 8.

[2] The Bureau's "win at all cost" attitude, even to the extent that this Tribunal makes an error of law or fact, is startling. Respondents' arguments for dismissal or for a narrowing of the NOC – both as to scope and parties – are sound and the Bureau's opposition, while "full of sound and fury," in fact, "signify[] nothing." William Shakespeare, Macbeth, Act 5, Sc. 5.

<u>Response</u>: The Bureau does not, because it cannot, cite any legal support for this proposition, and to the extent this Tribunal made such a holding, it is clearly erroneous. Section 8(c), qualifies Sections 8(a) and 8(b), and provides, in pertinent part, that "***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) (emphasis added). The last time Respondents checked, "nothing" meant "nothing."

<u>Bureau Statement No. 2</u>. "RESPA Section 8(c)(2) establishes a safe harbor for salary, compensation, or other payment for services actually performed, but only if such payment is bona fide." 3/13 Order at 8.

<u>Response</u>: In resolving a question of statutory interpretation, "our starting point must be the language of the statute." *Albernaz v. United States*, 450 U.S. 333, 336 (1981). The relevant statutory provision states, in pertinent part: "Nothing in [Section 8] 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[.]" As explained by Respondents in their opening memorandum, connecting "bona fide" directly to "payment for goods of facilities actually furnished or for services actually performed" deletes the word "other" which Congress put into the statute.

<u>Bureau Statement No. 3</u>. "The Bureau therefore does possess jurisdiction to administratively adjudicate this proceeding, even as to claims arising prior to July 21, 2011, at least to the extent it seeks injunctive relief." 3/13 Order at 13.

<u>Response</u>: The NOC does not support a request for injunctive relief; this Tribunal does not possess the inherent equitable authority of an Article III court; and the Bureau cites no authority for the proposition that this Tribunal can award such remedies in the absence of statutory authority, especially retroactively.

<u>Bureau Statement No. 4</u>. PHH's motion to "strik[e] any relief other than injunctive [relief]" was denied for lack of "any merit . . . at all." 3/24 Hearing Tr. at 32:3-25.

<u>Response</u>: This is a mischaracterization of the Tribunal's statement regarding the motion to strike any relief other than injunctive relief. *See* Hearing Tr. at 32:15-25 (ALJ stating that "[t]hat's not the argument you made in your motion in limine, though."); *id* at 36-37 ("maybe I find that no claims can be heard that accrued prior to the transfer date").

<u>Bureau Statement No. 5</u>. "To the extent Enforcement seeks the same relief as was formerly available to HUD, Dodd Frank's expansion of the available adjudicatory forum to include the present forum affects only jurisdiction. It does not impair rights Respondents possessed when

they acted, increase their liability for past conduct, or impose new duties with respect to transactions already completed." 3/13 Order at 12.

Response: As explained herein, the Bureau not only repudiates HUD's prior guidance on lender-affiliated captive reinsurers, it seeks to impose new liability on prior conduct in complete disregard of the presumption against retroactivity.

Bureau Statement No. 6. Section 16 of RESPA applies only to "actions" filed in "courts" and has no application to this administrative proceeding. 3/13 Order at 8-9.

Response: The Bureau simply ignores Respondents' arguments regarding *BP America Production Co. v. Burton*, 549 U.S. 84 (2006), *see* Respondents' Mem. at 22-25, and declares its authority to proceed untethered by RESPA's explicit statute of limitations.

Bureau Statement No. 7. The McCarran-Ferguson Act does not bar this proceeding. 3/24 Hearing Tr. at 23:4-14.

Response: Curiously, the Bureau tramples all over the state insurance regulatory structures but then disingenuously declares in a footnote that it "takes no position" regarding whether Atrium's insurance is valid under state law. Since the Bureau is not questioning the validity of the insurance provided by Respondents, this fact should be established.

In short, these purported "established" facts are more of the same declarations by the Bureau based on what it alone deems to be the law, regardless of the decisions issued by Article III courts. The Bureau's demand that the Tribunal now find these "facts" is, to quote the Bureau's rhetoric, "particularly brazen." Turning to the specific issues and NOC allegations, the Bureau's Opposition simply misses the points made by Respondents.

A. Atrium's Purported Lack of Separate Underwriting

As Respondents previously pointed out, the assertion in the NOC that "Atrium conducted no underwriting to price any reinsurance risks that it purportedly assumed," is of no moment because, among other things, Atrium relied on the underwriting conducted by the lenders who originated the loans and those lenders – specifically, PHH Mortgage and PHH Home Loans – utilized the underwriting guidelines of the MIs with which Atrium had captive reinsurance

arrangements. Such arrangements were approved by state regulators as well as by the OCC as far back as 1996. Further, as this Tribunal is now aware, Atrium obtained opinions from Milliman regarding risk transfer that included an opinion that the premium received was commensurate with the risk assumed.

The Bureau's response is telling. Citing no authority, the Bureau declares that Atrium was "required" to conduct reinsurance underwriting on each specific loan. Opp'n at 7. Indeed, the Bureau's attorneys' declaration that the reliance on the lenders' underwriting "is not equivalent to conducting underwriting of the purported reinsurance[,]" *id.* at 8 n.5, demonstrates both the lack of evidence the Bureau has in this regard as well as the shrill nature of its opposition. Further, as to the OCC, the Bureau makes clear its disdain for the purported "generic" letters which it can only disparage but not distinguish. *See id.* at 8 n.4. The Bureau's response makes plain that it believes it is the new "national insurance regulator" with the right and authority to make new insurance requirements governing past conduct. At bottom, the Bureau seeks a declaration from this Tribunal that the purported lack of loan-level underwriting by Atrium means that Atrium was not a reinsurer, despite the fact that:

- Both Atrium and Atrium Re are licensed to conduct the business of insurance in their respective jurisdictions;
- Both Atrium and Atrium Re have been subjected to routine audits by the Insurance Departments of New York and Vermont, respectively;
- The reinsurance arrangements were fully disclosed to each state regulator; and
- The accountants for Atrium, Atrium Re, and the respective MIs, all had access to the underlying agreements, the risk transfer opinions provided by Milliman, as well as the audit reports of state regulators. The accountants, who are responsible for the financial statements of each company, accounted for the arrangements as reinsurance.

The Bureau has no use for any other regulator, either federal or state, and it believes that such regulators have been remiss in their responsibilities since at least 1997, and perhaps earlier. That is why, for example, the Bureau consistently alleges a "cover-up" by Respondents. *See, e.g.*, Opp'n at 10. Such hyperbole is inappropriate given that the Bureau can point to nothing that was withheld from any regulator or auditor. Such a position is also inappropriate where, as here, the Bureau "stepped into the shoes of HUD;" HUD approved of captive reinsurance arrangements; and the Bureau's authority over insurance is strictly curbed by Dodd Frank.

B. Control of the Trust Accounts

As Respondents pointed out, the Bureau claims that the trust accounts were "controlled" by PHH and that this purported fact means that the reinsurance was a "sham." Once again, the Bureau cites no authority for its position. Further, the trust accounts were in full compliance with applicable state law, a fact that the Bureau cannot dispute. If it could, it would have cited the applicable state insurance statute or regulation; it did not. Instead of any authority in support of its position, the Bureau cites to snippets in the UGI Trust Agreement regarding the reinvestment of assets, voting rights, and distributions upon termination, and then concludes that the "timing" of withdrawals "does not mean that UGI controlled the assets in the Trust Account." Opp'n at 10. The Bureau's arguments on this point are without substance. The various trust accounts were compliant with state law and sufficient to support the underlying reinsurance arrangements. The fact that the Bureau can point to no violation of any legal requirement regarding the structure of the trust agreements eviscerates any assertion of misconduct.

C. Atrium's Purported Liability Limitation

Despite the fact that Atrium paid every claim presented, the Bureau spends seven pages attempting to demonstrate that Atrium's liability under the reinsurance agreements was "capped"

at the amount in the trust accounts. Opp'n at 10-16. The Bureau's arguments miss the point. Milliman's risk transfer opinions assumed that liability was "capped" at the amount in the trust, which even the Bureau's expert conceded results in a more conservative analysis of risk transfer. *See* Crawshaw Testimony, Hearing Tr. at 830:7-17. The Bureau's unadorned speculation that the parties "agreed" separately to modify the plain language of the underlying agreements, or that "the MIs were unwilling to assert any right to reach Atrium's assets outside the Trust Accounts, reflecting PHH's ability to use its power to refer business to avoid risk transfer[,]" Opp'n at 12-13, are without factual support and reflect the extent to which the Bureau is willing to manufacture arguments in support of its NOC. Unfortunately for the Bureau, it cannot support such assertions with actual evidence.

II. THE BUREAU HAS NO JURISDICTION OVER CONDUCT THAT OCCURRED BEFORE JULY 21, 2011

As Respondents explained, there is no jurisdiction for the Bureau's Office of Administrative Adjudication to adjudicate alleged violations of RESPA occurring before July 21, 2011, because Title X of Dodd Frank was not yet effective and is not retroactive. Since it has been established that by July 21, 2011, all of the reinsurance agreements were in run-off, Respondents are entitled to dismissal of the Bureau's claim for injunctive relief. The Bureau again runs back to its "improper motion to reconsider" argument in an effort to avoid the merits of Respondents' argument.[3] The Tribunal should disregard this misdirection because the fact of the matter is that there is no basis for injunctive relief. Nowhere in the NOC does the Bureau

[3] The Bureau's insistence that the Tribunal should rest on its prior reliance on *Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225 (D. Mass. 2011), in support of its decision to find that Dodd Frank is retroactive is demonstrative of the fact that Enforcement Counsel's only concern is in prevailing at the administrative level hoping that Respondents will not seek judicial review since *Pezza* is now clearly the minority view on the issue of the retroactivity of Dodd Frank, *see* Respondents' Mem. at 28-29, and *Pezza* only dealt with the issue of pre-dispute arbitration, not the substantive issue of relief available to the Bureau in an adjudicative proceeding.

allege that the conduct is either ongoing, or that it is even "reasonably likely" to occur in the future. The Bureau's efforts to overcome this obvious pleading deficiency are quite spectacular as the Bureau now posits that since "PHH today remains a very large mortgage lender that controls the referral of substantial amounts of private mortgage insurance business" with a "strong profit motive," it remains "well situated in the industry to repeat this or similar violative conduct" because it "could form captive arrangements at any time if not enjoined[.]" Opp'n at 24. The Bureau's argument speaks volumes. First, such allegations regarding the possible "resumption" of captive reinsurance activities appear nowhere in the NOC, so the Bureau is attempting to amend its pleading through its memorandum, something it cannot do. After all, the NOC is supposed to give a respondent "notice" of the charges and is ***required*** to contain "[a] statement of the matters of fact and law showing that the Bureau is entitled to relief." 12 C.F.R. § 1081.200(b)(2). Second, the Bureau's argument applies to any mortgage lender with a "profit motive"; accordingly, the Bureau believes that all such lenders must be "enjoined." Third, while citing boilerplate law regarding cessation of alleged illegal conduct, the Bureau makes no attempt to justify the necessity of an injunction where, as here, the agreements were in run-off well over a year before the Bureau came into existence and more than ***four*** years before the filing of the NOC.[4]

The Bureau's arguments that Dodd Frank granted this Tribunal authority to grant equitable relief, Opp'n at 25, also misses the point. That Dodd Frank granted such authority is not challenged by Respondents; the issue is the Bureau's authority ***prior*** to the passage of the

[4] The Bureau's attempt to show timeliness based on the commutation dates of the UGI and Genworth agreements is misplaced. When the agreements were placed in run-off, no more loans were being placed into reinsurance books. For Genworth, the last book year was 2008, and for UGI the last book year was 2009. The fact that Atrium or Atrium Re continued to receive ceding premiums for these and prior book years prior to commutation is of no moment.

statute, which the Bureau does not respond to. As Respondents explained, administrative tribunals are not Article III courts, they are statutorily created; accordingly, administrative tribunals do not have "inherent equitable authority."[5] Indeed, the two cases cited for this proposition, *Ramos v. D.C. Dep't of Consumer & Regulatory Affairs*, 601 A.2d 1069, 1073 (D.C. 1992) and *Feistman v. C.I.R.*, 587 F.2d 941, 943 (9th Cir. 1978), go unaddressed by the Bureau in its Opposition. That is so because it is beyond dispute that an administrative agency lacks the inherent equitable authority of an Article III court.

In support of its position, the Bureau cites 1) cases interpreting the authority of an Article III court to grant equitable relief under its inherent authority, a point not raised or challenged by Respondents;[6] 2) the FTC Act, but none of the cases discuss the availability of the purported "broad authority to fashion appropriate remedies for violations of the Act" prior to the passage of that act; and 3) cases in federal court under the Securities Act, which rely on the Article III court's inherent equitable authority.[7] Indeed, all of its case law relies either on statutory grants of authority or the inherent powers of Article III courts; nowhere does the Bureau explain how or

[5] Typically, Article I courts have been found to lack general equitable powers. *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988) (finding Federal Court of Claims to lack equitable powers of a district court); *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987) (Tax Court lacks general equitable powers); *cf. Comm'r v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 420–21 (1943) (Board of Tax Appeals, an executive branch administrative predecessor of the Tax Court, lacks equity jurisdiction).

[6] Indeed, the one unreported, outlier case, *Jackson v. Prop. I.D. Corp.*, CV-07-3372-GHK (CWx) (C.D. Cal. Mar. 24, 2008) the Bureau cites to, which granted the equitable remedy of disgorgement of profits under RESPA, relies on the district court's *own* inherent equitable authority as an Article III tribunal to award such relief. *Id.* at 3-5.

[7] The Bureau relies on: *SEC v. Sekhri*, No. 98-CV-2320 (RPP), 2002 U.S. Dist. LEXIS 13289, at * 47 (S.D.N.Y. July 22, 2002) ("the district court possesses the equitable power to grant disgorgement") (quotation omitted); *SEC v. Manor Nursing Ctrs., Inc.,* 458 F.2d 1082, 1103 (2d Cir. 1972) (same); *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (same). In each of these cases, the courts could only grant equitable relief by means of drawing on their own inherent equitable authority as Article III courts.

why it is entitled to apply its authority to seek equitable relief retroactively.

The Bureau specifically elected to file an administrative action, viewing it as a more favorable forum for its arguments such as the alleged absence of any statute of limitations. Having made that decision, however, the Bureau cannot now argue for the application of Dodd Frank's equitable remedies to conduct before July 21, 2011, without running afoul of the well-established "presumption against retroactive legislation" which is "deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). In other words, if HUD had tried to obtain the disgorgement of profits in an administrative proceeding before July 21, 2011, (assuming it could even bring an administrative action, which it could not), it would not have been able to obtain disgorgement of any profits.[8]

III. THE BUREAU'S ATTEMPT TO REGULATE INSURANCE

In a remarkable concession, the Bureau now states that "Enforcement Counsel takes no position as to whether PHH's purported captive reinsurance is "insurance" for the purpose of any state's law." Opp'n at 39 n.33. Taken at their word then, this Tribunal should find that the reinsurance provided by Atrium is real insurance under state law and disregard all of the Bureau's assertions of "purported" reinsurance and dismiss the NOC because Respondents provided a service or facility. Further, this Tribunal should now find as an undisputed fact that Atrium's and Atrium Re's reinsurance is insurance under state law. Then the Bureau can stop playing both sides of the fence – damning the reinsurance as a "sham" while at the same time professing not to undermine valid state insurance law.

[8] Comparisons of proceedings before this Tribunal to SEC administrative proceedings are not germane, as the SEC Act explicitly empowers the Commission to, in some instances, administratively award the disgorgement of profits. *See*, e.g., 15 U.S.C. §§ 77h-1(e), 78u-2(e), -3(e).

Further, while claiming not to undermine state insurance regulation, the Bureau's opposition makes clear its dissatisfaction with state insurance regulators and its belief that it is responsible for the regulation of insurance.[9] Similarly, the Bureau's disregard of the McCarran-Ferguson Act is typical of the Bureau's response – it fails to answer Respondents' argument. While hoping to hide beneath the decision in *Patton v. Triad Guar. Ins.*, 277 F.3d 1294, 1299 (11th Cir. 2002), the fact remains that the Bureau is going far beyond any RESPA issue here. Indeed, the Bureau chides Respondents for attempting to infer that reinsurance is a settlement service, Opp'n at 41 n.37, yet the Bureau attempts to pigeonhole reinsurance under the ambit of other settlement services when it suits its fancy. *Id.* at 37-38. The Tribunal should not be misled by the Bureau's sleight of hand arguments. The lynchpin of its case is its expert, Dr. Crawshaw, who has declared that Milliman's analysis was wrong. This is in spite of the fact that Dr. Crawshaw could not identify any standard violated by Milliman, nor did Dr. Crawshaw dispute the fact that Respondents were entitled to rely on Milliman's work. And what is the Bureau seeking in this case? A declaration that the reinsurance arrangements were a sham, and that such agreements did not constitute "real insurance." That has nothing to do with RESPA, but rather has everything to do with usurping the authority of state insurance regulators.

IV. <u>STATUTE OF LIMITATIONS AND ALLEGED CONTINUING VIOLATION</u>

Confident that the Tribunal will accept the Bureau's legally unsupported allegations of an unlimited statute of limitations and its summary dismissal of *Snow* and its progeny, the Bureau simply relegates the Fifth Circuit's universally followed decision to a footnote wherein it declares the case "incorrectly decided" and attempts to force Respondents to prove the Bureau's limits of authority, claiming it is an affirmative defense. *See* Opp'n at 32-36 & n.31. While the

[9] At the same time, however, the Bureau seeks to rely on the authority of the New York Insurance Department in support of its position that its authority to regulate insurance is not "retroactive." Opp'n at 34-35.

Bureau refuses to engage substantively on these issues, at least in providing some response, the Bureau finally admits that a statute of limitations cannot "revive an otherwise time-barred claim." Opp'n at 33.

Now that there is a concession by the Bureau that it cannot reach conduct prior to July 21, 2008, the question becomes what does that mean? As Respondents pointed out, under the *Snow* decision, and the more than 100 cases that followed that case, the alleged RESPA violation occurs at or around closing. The Bureau cannot cite a single case that has questioned the *Snow* analysis and adopted a different starting point for the statute of limitations. The Bureau attempts to distinguish *Snow* by arguing that it "is not a continuing violation case." Opp'n at 35 n.31. That is a nonsensical statement. In *Snow* the plaintiff argued that the violation "continued" after closing until some future point when the settlement agent received his additional commission, a position flatly rejected by the Fifth Circuit. Accordingly, the Bureau's statement is only correct to the extent that the Fifth Circuit ***rejected*** the plaintiff's attempt to allege a "continuing violation." Nor does the Bureau make any attempt to distinguish, or even mention, the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007), which held that a continued effect of the initial violation "cannot breathe life into prior, uncharged [illegal conduct]." The alleged referral here occurred prior to closing and so did the borrower's commitment to pay for pmi. The fact that the borrower continues to pay a particular MI for pmi after closing is, like in *Ledbetter*, simply a continued effect of the alleged illegal referral.

Similarly, buried in a footnote is the Bureau's response to *Mullinax v. Radian Guaranty*, 199 F. Supp. 2d 311, 325 (M.D.N.C. 2002), another allegedly incorrectly decided case, which the Bureau now claims "has no application to a government enforcement proceeding." Opp'n at 35 n.32. Again, the Bureau cites no authority for this curious proposition, that statutes have two

meanings, one for private parties and one for the Bureau. Such a notion, that there exists multiple interpretations of RESPA based on the party enforcing it was most recently rejected in *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 727 (6th Cir. 2013), wherein the Sixth Circuit refused to read RESPA differently based on whether the statute was being enforced criminally or civilly. Likewise, the Bureau's assertion that RESPA should be expanded because of its enforcement authority was recently rejected in *Freeman v. Quicken Loans, Inc.*, 566 U.S.___, 132 S. Ct. 2034, 2040 (2012) (rejecting expansion of RESPA based on "[v]ague notions of statutory purpose").

Further, in the effort to distinguish *Mullinax* and *Snow* the Bureau now claims, for the first time, that the "Section 8(a) violator [] elects when the violation occurs, . . . by choosing to accept (or give) an illegal kickback at a particular time." Opp'n at 35 n.32.[10] Another fanciful distinction without substance. It is the borrower who elects the manner in which he or she pays for pmi. That was the point of the court's decision in *Mullinax*, and the Bureau's attempt to distinguish that case, or *Snow*, or the pmi reinsurance decision cited by Respondents, *Menichino v. Citibank, N.A.*, No. 12-0058, 2013 U.S. Dist. LEXIS 101102, at *42-43 (W.D. Pa. July 19, 2013), on such a flimsy analysis should be rejected.

V. DISMISSAL OF ATRIUM AND ATRIUM RE IS WARRANTED

The Bureau tries to avoid Respondents' argument for dismissal of Atrium and Atrium Re by mischaracterizing it as an untimely motion to dismiss for lack of personal jurisdiction.[11]

[10] The Bureau's concession that it is the "giving" of the ceding commission that is the Section 8(a) violation is remarkable for the reasons stated in Section VI below.

[11] The Bureau cites to one case in support of this proposition; however, *Silva v. Dep't of Homeland Sec.*, 2009 M.S.P.B. 189, ¶ 6 & ¶ 6 n.2 (2009), is inapplicable to this proceeding. First, *Silva* involved an entirely different statute and corresponding regulations. Second, *Silva* does not stand for the proposition that a claim may be dismissed for lack of personal jurisdiction

Respondents' argument is, in fact, one of subject matter jurisdiction, *i.e.*, "[j]urisdiction over the nature of the case and the type of relief sought." *Black's Law Dictionary* 710 (8th ed. 2005).[12] Moreover, unlike personal jurisdiction, subject matter jurisdiction is not an affirmative defense, nor one that can be waived by any party. *Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 346 (3d Cir. 2003) ("[S]ubject matter jurisdiction is not a waiveable defense. Indeed, it is well-settled that a party can never waive lack of subject matter jurisdiction."). Further, because subject matter jurisdiction may be raised at any time, Respondents have properly raised the issue, and the Tribunal cannot exercise subject matter jurisdiction over Atrium or Atrium Re under the CFPA. *Id.* at 347 ("It is of no moment . . . that the defense of lack of subject matter jurisdiction was raised by [defendant] for the first time in its reply brief on appeal.").

Additionally, the Bureau cannot avoid this result by raising – for the first time in its Opposition – a veil piercing theory of liability. Opp'n at 40-41. The Bureau did not plead this theory of liability in the NOC, nor can it now seek to remedy that omission through its Opposition. *See* 12 C.F.R. § 1081.200(b)(2) ("The notice of charges must set forth: . . . (2) A statement of the matters of fact and law showing that the Bureau is entitled to relief[.]"). Even if such a theory was properly pled, which it is not, the Bureau failed to meet its heavy burden in demonstrating the applicability of this theory. As explained by Respondents, N.Y. Ins. Law § 1507 specifically permits an insurer to share common management and personnel "with one or

because an entity failed to fall within the scope of a federal statute. *Silva*, in fact, expressly declines to address the issue in terms of personal jurisdiction. *Id.* ¶ 6 n.2.

[12] *See also Ziegler v. Anesthesia Assocs. of Lancaster, Ltd.*, No. 00-4803, 2002 U.S. Dist. LEXIS 4031, at *2 (E.D. Pa. Mar. 12, 2002) (stating that whether an entity falls within the federal statute's definition of "employer" is a question of subject matter jurisdiction) (citations omitted); *Shepherdson v. Local Union No. 401*, 823 F. Supp. 1245, 1249 (E.D. Pa. 1993) (stating that the determination of whether an entity meets "the statutory definition" for a covered defendant is a matter of subject matter jurisdiction).

more other persons." Furthermore, "[v]irtually all corporations are formed for the purpose of limiting liability," *NLRB v. Fullerton Transfer & Storage, Ltd.*, 910 F.2d 331, 338 (6th Cir. 1990), and "[t]here is nothing inherently suspect in a parent and subsidiary having overlapping officers and directors. . . . Moreover, disregard of corporate formalities, in and of itself, is not sufficient to justify piercing the corporate veil." *ITT Corp. v. Borgwarner, Inc.*, No. 1:05-CV-674, 2009 U.S. Dist. LEXIS 62792, at *23-24 (W.D. Mich. July 22, 2009) (citations omitted).

The Bureau also cannot try to "elicit[] at trial" facts demonstrating that "Atrium is a service provider, a covered person, and a related person under the CFPA." Opp'n at 41. The Bureau is required to plead such facts in the NOC, *see* 12 C.F.R. § 1081.200(b)(2), and it failed to do so.[13]

The remainder of the Bureau's argument that Atrium is somehow a "service provider" under the CFPA also rings hollow. Throughout this proceeding, the Bureau has repeatedly claimed that Atrium failed to provide *any actual* services to PHH. Yet, the Bureau now states that Atrium somehow "provided a 'material service' to the PHH mortgage origination entities 'in connection with [PHH's] offering or provision' of mortgage loans to borrowers." Opp'n at 41. Atrium purportedly rendered such material services by "'processing transactions,'" including receiving ceded premiums, transferring dividends and disbursing commutation payments. *Id.* Yet, none of these listed acts is a "material service." The statute provides two examples of a "material service:" (1) participation in "designing, operating or maintaining" the consumer product or service, or (2) "process[ing] transactions relating to the consumer financial product or

[13] To the extent such facts exist, those facts should have come to light during the Bureau's overly broad investigation that spanned several years. In other words, such facts would have been readily available to the Bureau long before it filed this case. Consequently, the Bureau should not be allowed to overcome the glaring deficiencies in the NOC by making specious claims about what *might* possibly occur at trial. Trials are not fishing expeditions, and to allow otherwise would constitute a fundamental miscarriage of justice.

service." 12 U.S.C. § 5481(26)(A)(i), (ii). It is undisputed that Atrium, as a reinsurer, engaged in neither activity.

The Bureau's assertion that Atrium was also a service provider because PHH could have "directly" performed Atrium's duties is nonsensical. PHH could not have executed the same functions as Atrium, a reinsurer, and likewise, Atrium could not have performed the same actions PHH did, such as originating residential mortgage loans. Nor is Atrium a covered person because it is an "affiliate" of the "PHH mortgage origination entities." Opp'n at 42. Section 5481(6)(B) of the CFPA states that a "covered person" means "(B) any affiliate of a person described in subparagraph (A) ***if*** such an affiliate acts as a ***service provider*** to such person." 12 U.S.C. § 5481(6)(B) (emphasis added). For the reasons previously stated, Atrium is not a "service provider" as defined in the CFPA.[14]

Finally, there is no merit to the Bureau's argument that Atrium was a "joint venture partner" of the "PHH mortgage origination entities." Opp'n at 43. It is undisputed that Atrium is a separate corporation, which is only a wholly-owned subsidiary of PHH Corporation—not a joint venture partner. *See* Mar. 13 Order at 17, ¶ 1.[15]

[14] The Bureau's argument is not saved by looking outside the plain language of Section 5481 of the CFPA. Indeed, the Bureau's reference to several banking provisions of the CFPA are inapplicable. PHH is not a bank, nor is Atrium a "bank service company" that performs "check and deposit sorting and posting, computation and posting of interest and other credits and charges, preparation and mailing of checks, statements, notices, and similar items, or any other clerical, bookkeeping, accounting, statistical, or similar functions performed for a depository institution." 12 U.S.C. § 1863.

[15] *See, e.g., Fried v. Kelly*, No. 06 Civ. 1528, 2007 U.S. Dist. LEXIS 45818, at *16 (S.D.N.Y. June 26, 2007) (enumerating the elements a plaintiff must prove to show the existence of a joint venture, and explaining that the "absence of single element is fatal to the establishment of" a joint venture).

VI. **JUDICIAL ESTOPPEL**

The more the Bureau attempts to explain its position on this issue, the more obvious the inappropriateness of its conduct becomes.[16] Simply stated, the Bureau obtained a Consent Order with five MIs that permitted them to continue to cede premiums to lender-affiliated captive reinsurers, including Atrium Re, and allowed those same MIs to continue to account for the reinsurance agreements, including the one with Atrium Re, as reinsurance on their financial statements. In other words, the Bureau explicitly allowed the MIs to continue with their existing arrangements indefinitely into the future while at the same time alleging here that those same agreements violate a criminal statute. The Bureau's continued defense of its actions demonstrates that it has no idea what it has done – it has immunized the MIs from criminal prosecution in exchange for the payment of money. In its Opposition, the Bureau now states:

- It is the "giving" of the kickback payment that is the violation; thus, it is the Bureau's position that every ceding payment is a violation of RESPA Section 8. Opp'n at 36 n.32;
- At the time it entered into the Consent Orders, Enforcement Counsel was "'fully aware of the continued ceding payments [by the settling MIs to lender-captive reinsurers] under existing agreements;'" Opp'n at 46 n.48 (citing with approval the statement in Respondents' memorandum of law);
- "In every kickback situation, there is somebody paying and somebody receiving. *It takes two to tango.* Today we're dealing with those paying the kickbacks. But we have more work to do on this matter." Kent Marcus, the Bureau's Director of Enforcement;[17] and
- The Bureau's NOC is based upon the acceptance of ceding payments from, among others, UGI, including payments accepted ***after*** entry of the Consent Order.

[16] The Bureau misleadingly states that Respondents' judicial estoppel argument was "rejected" by the District Court in Florida. Opp'n at 1. Not true, as that court specifically stated that "that argument can be made in the administrative proceeding." Florida Hearing Tr. at 35.

[17] Quoted in, among other sources, Joe Adler's "Lenders Likely Next Target in CFPB Reinsurance Kickback Probe," 178(65) AMERICAN BANKER (April 5, 2013), *available on LexisNexis*.

The following facts are beyond dispute:

- The Consent Orders explicitly permitted the MIs to continue to cede premiums to entities such as Atrium Re, and many other captive reinsurers; and
- RESPA is both a civil and criminal statute. *See, e.g., Freeman,* 132 S. Ct. at 2041; *Carter,* 736 F.3d at 727; *United States v. Graham Mortg. Corp*., 740 F.2d 414, 423 (6th Cir. 1984).

Since it is not legally possible to deem only one half of the RESPA transaction to be a violation of Section 8, *see, e.g., Freeman*, 132 S. Ct. at 2041 (because a consumer's payment of an alleged overcharge for a settlement service was legal, the receipt of that charge by the service provider could not be illegal under RESPA), it is now time for the Bureau to admit that it is permitting the settling MIs to continue to violate Section 8 of RESPA, a criminal statute. The only way to avoid that conclusion is to interpret the Consent Orders as stating that the reinsurance agreements comply with RESPA.[18]

None of the cases cited by the Bureau deals with the situation here, specifically, an agency of the federal government allowing an entity – indeed, five separate entities – to continue to violate a criminal statute in exchange for paying a few million dollars. In not one of the cases cited by the Bureau did the government continue to prosecute the alleged illegal conduct against others while it specifically permitted the alleged criminal conduct to continue by the settling parties. The Bureau's grant of immunity to the MIs against future criminal prosecution under the guise of a Consent Order for the same conduct alleged against Respondents here is unprecedented and without any legal basis. Respondents are not aware of any authority held by the Bureau to excuse conduct it deems to violate a criminal statute based on the payment of

[18] The Bureau repeatedly attempts to turn Respondents' judicial estoppel argument into an admission by Respondents that the conduct is "illegal." Not so. In fact, the only way to reconcile what the Bureau has done, *i.e.*, permitting the MIs to continue to cede premiums in exchange for reinsurance services, is to find that the conduct does not violate Section 8.

money.[19] Indeed, only the Attorney General can grant immunity from criminal prosecution, and then only in exchange for the testimony of a witness.[20]

CONCLUSION

The Bureau has no jurisdiction for conduct prior to July 21, 2011. Even if the Tribunal disagrees with Respondents, the Bureau concedes that in no event can it go back any further than July 21, 2008. The Bureau also admits that to accept its "continuing violation" theory based on ceding payments, this Tribunal must go it alone since there is no legal authority to support such a position. Further, the NOC contains no allegations that can support the issuance of an injunction. The Bureau now admits that it will not dispute that Atrium's and Atrium Re's reinsurance constitutes insurance under state law, so a service was provided. Finally, by obtaining Consent Orders permitting entities such as Atrium Re to continue to receive ceding commissions in exchange for the provision of reinsurance services and/or facilities, the Bureau is now estopped from proceeding with the NOC.

[19] The Bureau's continued reliance on *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977), to justify its conduct is unavailing and misses the point. The private parties to that settlement did not agree to allow conduct one of them deemed to be illegal to continue. It is simply impossible for the Bureau to prevail on its claim that the ceding payments made by UGI to Atrium Re after the entry of the consent order to be in violation of RESPA while at the same time stating that it was legal for UGI to make the payment.

[20] *See* 12 C.F.R. § 1080.12 ("The Director has the nondelegable authority to request approval from the Attorney General of the United States for the issuance of an order requiring a witness to testify or provide other information and granting immunity under 18 U.S.C. § 6004.").

Dated: May 12, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 12th of May, 2014, I caused a copy of the foregoing Reply Memorandum in Support of Respondents' Renewed Motion to Dismiss the Notice of Charges, or, in the Alternative, to Narrow the Notice of Charges, to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

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