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**

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

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INTRODUCTION

On the first day of the hearing in this matter, Judge Elliot requested that the parties file additional dispositive motions. Specifically, Judge Elliot stated:

> But I am really bothered, and I'm not blaming anybody here, but I'm bothered by the fact that this case is really big by my standards. Almost 2,000 exhibits and dozens of witnesses, and I really just don't see any way that I can resolve this case within 300 days, based on my experience at the SEC. I'm going to have to ask for an extension and, I think one way of perhaps increasing the chances that I can get an extension or increasing the chances that I won't need one is that we're going to have to have another round of dispositive briefs, dispositive motions. . . . Here is what I am thinking, okay, I need to do something to pair this case down. And I'll tell you right now, 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.

Transcript of March 24, 2014 hearing ("March 24 Tr."), at 33-35.

In this action, the Consumer Financial Protection Bureau (the "Bureau" or "CFPB") accuses Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, "Respondents") of violating Section 8 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607, in connection with Atrium's receipt of mortgage reinsurance premiums pursuant to reinsurance agreements with four private mortgage insurers (the "MIs"). According to the Bureau, the payments to Atrium[1] were illegal under RESPA Sections 8(a) and 8(b) which prohibit kickbacks and unearned fee splits in connection with the provision of real estate settlement services.

[1] Unless otherwise specified, all references to "Atrium" mean both Atrium Insurance Corporation and Atrium Reinsurance Corporation ("Atrium Re"). As Respondents have explained, Atrium Re assumed the two remaining reinsurance agreements with Genworth Mortgage Insurance Company and AIG United Guaranty Mortgage Insurance Company after they were in run-off.

While Respondents agree that this case must be narrowed, the Tribunal's request for renewed motions to dismiss following the first week of the hearing places Respondents at a disadvantage. The first week of trial consisted entirely of the Bureau's case-in-chief. Thus, Respondents have not yet had the opportunity to present evidence in support of their case. However, now that the Bureau has presented what is obviously the core of its case – that is, the testimony of its expert witness, Dr. Mark Crawshaw – there are certain issues that are now ripe for determination. Accordingly, Respondents' renewed motion encompasses those issues upon which they believe they are entitled to judgment as a matter of law, in addition to identifying the issues upon which there will be no genuine dispute. Respondents' renewed motion also raises specific objections to those portions of the March 13, 2014 Order denying their prior Motion to Dismiss the Notice of Charges or, in the Alternative, for Summary Disposition ("March 13 Order"), which Respondents believe are clearly erroneous and contrary to law.[2]

LEGAL STANDARD FOR A MOTION TO DISMISS[3]

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should be granted if the complaint does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). As the Supreme Court explained in *Twombly*, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" 550 U.S. at 555 (internal quotation marks and citation omitted). "Nor does a

[2] Given Judge Elliot's comments at the opening of the hearing on March 24, Respondents believe it necessary to raise their objections to the March 13 Order so as to avoid any assertion – albeit mistaken – by the Bureau that Respondents have somehow "waived" any such objections.

[3] As Judge Elliot noted in his March 13 Order, the Bureau's commentary does not explain to what degree Rule 212(b) is based on Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. 67, at 5. However, Respondents continue to believe that it would be nonsensical for the Bureau to rely on any standard other than the well-developed case law interpreting Fed. R. Civ. P. 12.

complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). "Threadbare recitals" of nothing more than the elements of a claim "supported by mere conclusory statements," are not enough to state a claim under Rule 12(b)(6). *Id.* (citing *Twombly*, 550 U.S. at 555).

In the wake of *Twombly* and *Iqbal*, the Third Circuit has articulated a two-step analysis for assessing motions to dismiss for failure to state a claim:

> First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to show such an entitlement with its facts.

Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009) (internal quotation marks and citations omitted). *See also Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011) (noting that after *Twombly* and *Iqbal* "conclusory or bare-bones allegations will no longer survive a motion to dismiss") (quoting *Fowler*, 578 F.3d at 210).

ARGUMENT

Respondents are entitled to either complete dismissal of the Notice of Charges ("NOC") or, in the alternative, for a narrowing of the NOC – both as to scope and parties – for the following reasons: 1) there is no jurisdiction for this administrative proceeding; 2) the three-year statute of limitations in RESPA limits the Bureau's claims; 3) the bar against retroactivity limits the Bureau to pursuing conduct occurring after July 21, 2008; 4) this entire action is barred because the Bureau cannot regulate insurance; 5) Atrium and Atrium Re must be dismissed because they are not "covered persons" within the meaning of Section 1053(b) of the Consumer

Financial Protection Act; and 6) judicial estoppel applies because the Bureau convinced four federal judges to approve the very payments it now, inexplicably, claims are illegal.

I. RESPONDENTS' DISAGREEMENT WITH CERTAIN "FACTUAL FINDINGS" AND LEGAL CONCLUSIONS CONTAINED IN THE MARCH 13 ORDER[4]

The Bureau has now presented the core of its case – specifically, the testimony of Mr. Rosenthal, PHH's Vice President for Secondary Marketing, Curt Culver, MGIC's Chairman of the Board, and the direct and cross-examination of the Bureau's expert witness, Dr. Crawshaw.[5] Thus, while for purposes of a motion to dismiss the Tribunal must assume the truth of all factual assertions in the NOC, Respondents believe that the documents and testimony adduced to date demonstrate that the NOC contains several factual misstatements. Moreover, it is Respondents' position that certain legal conclusions contained in the March 13 Order should be withdrawn or corrected.

a. The Assertion that Atrium "Conducted No Underwriting to Price Any Reinsurance Risks It Purportedly Assumed" Is Disingenuous

The NOC attempts to make much of the fact that "Atrium conducted no underwriting to price any reinsurance risks that it purportedly assumed." NOC, ¶ 22. Yet, the evidence demonstrates that the structure of the reinsurance arrangements were such that, in fact, Atrium could rely upon the underwriting conducted by others – specifically, PHH Mortgage and PHH Home Loans – both of which utilized the underwriting guidelines of the MIs with which Atrium had captive reinsurance arrangements. Such reliance is not, as suggested by the Bureau, novel or

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[4] To be clear, Respondents also take issue with the March 13 Order regarding the denial of Respondents' arguments on statute of limitations and judicial estoppel. Because Respondents are renewing their motion to dismiss, those disagreements are set forth below in the respective sections which discuss such issues.

[5] When the hearing was adjourned, Enforcement Counsel was conducting its re-direct examination of Dr. Crawshaw, which will resume when the hearing recommences on May 19, 2014.

extraordinary. Indeed, such arrangements were specifically approved by the Office of the Comptroller of the Currency ("OCC") as far back as 1996 when it issued Interpretative Letter #743. In that guidance, the OCC noted that because the reinsurer would only be reinsuring mortgage loans underwritten to the bank's underwriting standards, "the bank's own credit standards and credit underwriting experience will provide a valuable safeguard against excessive risk." Interpretative Letter #743, at 3 (Resp. Ex. 821); *see also id.* at 7-8 (same); OCC Corporate Decision #99-26, at 7 (September 1999) (Resp. Ex. 808) ("The Bank's own credit standards and credit underwriting experience will also be used to manage reinsurance risk since the Subsidiary will only accept home mortgage loan credit risks consistent with the Bank's underwriting standards.").

Further, as explained more fully below, the issue of appropriate underwriting of risk is within the purview of the state insurance regulators who have responsibility for supervising the operations of insurance companies operating within their respective jurisdictions. Thus, the record clearly demonstrates that the Bureau's argument regarding the purported lack of separate "underwriting" by Atrium is disingenuous.

b. The Assertion that the "Captive Trust Accounts [Were] Controlled By PHH" Is Contrary to the Plain Language of the Various Agreements

According to the Bureau, interpretation of the terms of the reinsurance agreements is a question of law for the Tribunal, not the expert witnesses. *See* Bureau's Omnibus Motion *In Limine* to Exclude Evidence Pursuant to 12 C.F.R. § 1081.303(b), filed March 24, 2014, at 2 ("the construction of a contract is a matter of law for the court"). Because the four agreements are now in the record, it would be appropriate for this Tribunal to rule on the issue of whether the captive trust accounts were, as the Bureau contends, "controlled" by PHH.

Redacted

There are similar provisions in the trust agreements for [redacted] Radian and CMG. That is so because under the governing law – New York Insurance Law – the beneficiary (*i.e.*, the MI) is required to have the absolute right to withdraw funds from the trust account established for its benefit.

The Bureau's assertion that "PHH" controlled the trust accounts is belied by the plain language of the underlying trust agreements, and this Tribunal should now find, as a matter of law, that the Bureau's assertion has no merit. Further, the Bureau's attempt to make an issue of the "control" of the trust accounts simply highlights the inappropriateness of the Bureau's intermeddling in the realm of insurance law – an area left almost exclusively to the control of state insurance regulators.

c. The Assertion that "An MI Had No Recourse to Recover Claims Beyond the Amount of the Trust Funds" Is Contrary to the Plain Language of the Various Agreements

Given the Bureau's position that the issue of contract interpretation is for the Tribunal to decide, the Bureau's attempt to demonstrate through testimony and documents that Atrium's liability under the reinsurance agreements was "capped" at the amount in the trust accounts is inappropriate Redacted

Because the interpretation of the provisions of the reinsurance agreements is, in the Bureau's own words, "a matter of law for the court," this Tribunal should resolve this issue now so that the parties are in a better position to present their cases when the hearing resumes in May.

d. The Legal Conclusion that the Safe Harbor Provision of RESPA Does Not Apply to Section 8(a) Is Clearly Erroneous

In the March 13 Order, this Tribunal stated that "Section 8(a) has no separate exception for 'services actually performed.'" March 13 Order at 8. Respondents respectfully disagree. RESPA's "safe harbor" provision, Section 8(c), qualifies Sections 8(a) and 8(b), and provides:

> (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 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

[6] Section 9 of the CMG Agreement does contain a provision that would permit Atrium to terminate the agreement by failing to make a required trust deposit and, thereafter, Atrium's liability would be limited to returning all of the trust assets to CMG. *See* CMG Agreement §§ 9.03, 9.06 (Resp. Ex. 37). While this type of provision was required by the Vermont insurance regulator, and Respondents do not believe that the inclusion of such a provision negated the risk transfer analysis, the CMG provision differs from the provisions of the other three agreements entered into by Atrium.

Cir. 1985) (emphasis added); *see also Arthur v. Ticor Title Ins. Co.*, 569 F.3d 154, 160 n.2 (4th Cir. 2009) ("At no point have plaintiffs explained why [defendant's] commissions to its agents should be regarded as referral fees in the circumstance in which the agents have indisputably performed settlement services. Because Section 8(c) makes clear that [defendant] has not violated any of the provisions of Section 8 in this circumstance, plaintiffs' Section 8(a) claim fails [in addition to their Section 8(b) claim]."); *Cedeno*, 2008 U.S. Dist. LEXIS 65337, at *13 (dismissing RESPA Section 8(a) case "[b]ecause the safe harbor provision of RESPA permits payment to a person for services actually performed").

Another issue regarding Section 8(c) is the Bureau's assertion in its prehearing brief that the safe harbor provision of RESPA is an "affirmative defense." *See* Bureau's Prehearing Brief at 13-16. The Bureau's assertion is wrong as a matter of law and should be corrected before the hearing resumes so that the Bureau understands it obligations with regard to its case-in-chief. The Bureau has the burden of proof on all issues, including the burden of proving that no "goods or facilities" were "actually furnished" and no "services" were "actually performed," under Section 8(c)(2). *See* 12 C.F.R. §1081.303 ("Enforcement Counsel shall have the burden of proof of the ultimate issue(s) of the Bureau's claims at the hearing."). Courts that have addressed the 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) . . . . Because Plaintiff has not pled that the alleged fee-splits between Long & Foster and its broker-associates do not fall within the § 8(c) exemptions, the Complaint fails to state a RESPA claim upon which relief may be granted.") (internal citations omitted).

e. The Legal Conclusion that "Bona Fide" Applies to "Services Actually Performed" Is Clearly Erroneous

Respondents also request that the Tribunal reconsider its conclusion that the term "bona fide" in RESPA Section 8(c)(2) modifies "other payment for goods or facilities actually furnished or for services actually performed." March 13 Order, at 8. The language of RESPA Section 8(c)(2) is unambiguous:

> 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[.]

12 U.S.C. § 2607(c)(2). In drafting this section, Congress clearly delineated between "bona fide salary or compensation," on the one hand, and "other payment," on the other hand. The term "bona fide" modifies "salary or compensation" only; it does not modify "other payment." Indeed, the word "other" would be rendered superfluous if the word "bona fide" was read in conjunction therewith, *i.e.*, "bona fide other payment." *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (citation and internal quotations omitted). Thus, the Tribunal's conclusion that the term "bona fide" modifies "other payment for goods or facilities

actually furnished or for services actually performed" is contrary to the plain language of the statute.[7]

To be clear, while Respondents maintain that the portion of premiums ceded to Atrium for reinsurance were certainly "bona fide," for purposes of interpreting Section 8(c)(2), that term cannot be read to apply to the payment for services actually performed. Further, such a distinction makes sense because RESPA is not a price control statute, as the Supreme Court recently confirmed in *Freeman v. Quicken Loans, Inc.*, 566 U.S.___, 132 S. Ct. 2034, 2040 (2012). Accordingly, by not using the term "bona fide" in connection with payments for goods or facilities or for services actually performed, Congress made clear its intention that RESPA not be used by HUD – and now the CFPB – to engage in price regulation by proscribing the collection of unreasonably high fees.

Accordingly, Respondents respectfully request that this Tribunal reconsider its prior conclusion that the ceding payments to Atrium must be "bona fide" since such a requirement is contrary to the plain language of RESPA.

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[7] To the extent the March 13 Order suggests that the ceding payments to Atrium be considered "compensation," such that the term "bona fide" is applicable to the analysis of the ceding payment, Respondents respectfully disagree. *See* March 13 Order, at 8. As used in the phrase "bona fide salary or compensation," the term "compensation" relates to "salary." Limiting "compensation" to payments to employees similar in nature to "salary" is supported by the maxim *ejusdem generis*, the statutory canon that 'where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores v. Adams*, 532 U.S. 105, 114-15 (2001) (citing 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991)). Further, the statutory construction principle *noscitur a sociis* also counsels that a word is given more precise content by the neighboring words with which it is associated. *See Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."). Accordingly, as used in the phrase "bona fide salary or compensation," the term compensation relates to a payment similar to "salary" or, in other words, compensation to an employee.

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

Respondents are entitled to dismissal of the NOC for any alleged violations occurring before July 21, 2011, because the statute under which the Bureau is proceeding, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), known as the Consumer Financial Protection Act ("CFPA"), was not yet effective and is not retroactive. Thus, not only does the Bureau lack jurisdiction to pursue pre-July 21, 2011 claims, but no law provides jurisdiction to the Office of Administrative Adjudication to hear such claims. Further, Respondents are entitled to dismissal of the Bureau's claim for injunctive relief since all of the reinsurance agreements were in run-off before July 21, 2011.

a. The Bureau Is Not Entitled to Seek Injunctive Relief Where It Cannot Demonstrate a Likelihood of Future Conduct

The Bureau's administrative process can only be utilized to enjoin conduct, get restitution, impose civil money penalties, obtain recovery of costs and seek disgorgement – the panoply of remedies in the CFPA, for conduct occurring after July 21, 2011. Prior to the passage of Dodd-Frank, HUD could not enforce RESPA through an administrative proceeding such as this one. Indeed, neither RESPA, nor its implementing regulation, Regulation X, contains any provision authorizing an agency to bring an administrative action for alleged violations of Section 8. After the designated transfer date, the Bureau stands in HUD's shoes under RESPA. *See* Transcript of February 14, 2014, Telephonic Scheduling Conference ("Feb. 14 Tr."), at 10-11 (Mr. Gordon: "We're in a slightly unusual posture in this investigation because . . . we stand in the shoes of HUD which prior to the Dodd-Frank transfer date, as we call it, which is July 21st, 2011, HUD had exclusive Federal responsibility for enforcing RESPA and now we do following the transfer date."); *see also* CFPA § 1061(b)(7) (12 U.S.C. § 5581(b)(7)).[8] Moreover, the Bureau concedes that it cannot seek relief beyond that which HUD could have obtained for conduct before July 21, 2011. Transcript of March 5, 2014 Motions Hearing ("Mar. 5 Tr.") at 38 ("[T]o the extent that the [CFPA] creates additional remedies . . . that HUD did not possess, we agree that those can only apply to conduct that occurred after the effective date of the statute."). Under RESPA Section 8, HUD could only obtain "injunctive relief" and only by filing suit in court. 12 U.S.C. § 2607(d)(4).[9]

With respect to seeking injunctive relief, however, the Bureau is simply too late. That is so because as of July 21, 2011, there was nothing to enjoin. Specifically, this Tribunal has already taken as established that all four of the reinsurance agreements were in run-off before January 1, 2010, or more than a year prior to the creation of the Bureau. Thus, reinsurance was not being provided on any new loans. Indeed, the Tribunal touched on the issue of the viability of injunctive relief at the March 5 Motions Hearing since the conduct in question is not alleged

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[8] Section 1061(b)(7) of the CFPA provides, in pertinent part:

> The Bureau shall have all powers and duties that were vested in the Secretary of the Department of Housing and Urban Development relating to the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. § 2601 et seq.), the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (12 U.S.C. § 5101 et seq.), and the Interstate Land Sales Full Disclosure Act (15 U.S.C. § 1701 et seq.), on the day before the designated transfer date.

[9] Although the Bureau asserts that "injunctive relief" is not, in fact, limited to obtaining an order enjoining future conduct (Mar. 5 Tr. at 92), the Bureau does not dispute that it cannot obtain other additional relief under the CFPA as to conduct that occurred before July 21, 2011. Moreover, the Bureau's contention that it can bootstrap substantial financial penalties into its claim for "injunctive relief" is misconceived.

to be ongoing.[10] *See* Mar. 5 Tr. at 59 ("[W]hen I read the notice of charges, although there is an injunction requested in your prayer for relief, it seems like it's all very backward looking. There's really nothing in the notice of charges . . . that suggest that these violations are still occurring.").[11]

The Supreme Court has explained that "[t]he purpose of an injunction is to prevent *future* violations." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (citation omitted, emphasis added); *see also SEC v. Tourre*, No. 10 Civ. 3229, 2014 U.S. Dist. LEXIS 32817, at *48-49 (S.D.N.Y. Mar. 12, 2014) (an injunction "is appropriate where there is a likelihood that, unless enjoined, the violations will continue") (internal quotes and citation omitted). The Bureau requests in its NOC that this Tribunal grant "[a] permanent injunction to prevent and restrain *future* violations of Section 8 of RESPA." NOC ¶ 104(A) (emphasis added). The Bureau's failure, however, to allege that there is any possibility that Respondents *will* violate Section 8 of RESPA in the future renders their request for injunctive relief insufficient under Supreme Court

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[10] The Bureau appears to agree, stating that "by seeking injunctive relief it really is a reference to the matter in which we obtained an injunction, for example, with respect to the mortgage insurers." Mar. 5 Tr. at 59.

[11] Further, the testimony the Bureau elicited from Mr. Rosenthal demonstrates that, in fact, while the Respondents had explored the possibility of entering into new reinsurance arrangements back in 2006-2007, those efforts were abandoned after a few months. *See* Mar. 24 Tr. at 182; Mar. 26 Tr. at 575-76. And now that the majority of the remaining MIs have entered into consent orders with the Bureau that restrict their ability to enter into such arrangements in the future, the Bureau's ability to demonstrate the necessity for an injunction is even more difficult, if not impossible. While the Tribunal inquired about the possibility of restarting a reinsurance relationship with a company such as CMG Mortgage Insurance Company ("CMG"), which is not subject to a consent order with the Bureau, Respondents note that there is not even a specter of that occurrence transpiring here for several reasons. Most obviously, no rational mortgage company and/or lender would enter into such an agreement given the Bureau's outspoken detestation of such arrangements, and its aggressive prosecution of them. Furthermore, the case law requires that the Bureau plead something more than a speculative possibility that *some future* violation *might* occur, and the Bureau has failed to do that.

precedent: "[T]he moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *W.T. Grant Co.*, 345 U.S. at 633 (affirming dismissal where defendant voluntarily terminated offending conduct after government filed suit).

As the Supreme Court has stated, "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 166 (2010) (reversing and remanding lower court's grant of broad injunctive relief). In this case, the fact that the complained-of agreements have been terminated, coupled with the inability to find MIs to act as counterparties for any future reinsurance agreements, weighs heavily against the imposition of such a drastic remedy.[12] In addition, the over-breadth of the Bureau's request only further supports the conclusion that an injunction is inappropriate. "[A]n injunction must be narrowly tailored . . . to remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law." *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (internal quotations and citations omitted). Rather than tailor its request for this extraordinary relief, the Bureau has effectively called for an order that Respondents "obey-the-law." Such an injunction is improper in any proceeding. *See SEC v. Sky Way Global, LLC*, 710 F. Supp. 2d 1274, 1282 (M.D. Fla. 2010) (finding such an "obey-the-law" injunction unenforceable and ineffective; gathering cases); *see also Tourre*, 2014 U.S. Dist.

[12] Such considerations also apply where administrative agencies issue cease and desist orders. *See, e.g.*, *Country Tweeds, Inc. v. FTC*, 326 F.2d 144, 149 (2d Cir. 1964) ("We think it advisable again to note that petitioners in this case have ceased to engage in the advertising practice which prompted the order, and voluntarily did so well before the Commission filed its complaint. [Cessation] of the offending activity, with the likelihood that the petitioner will not again resume it or a related activity, has been one factor which courts have considered in limiting broad Commission orders.").

LEXIS 32817, at *49-50 ("the Court is skeptical of the utility of this kind of 'obey-the-law' injunction – after all, everyone is required to obey the law, and the law comes with its own penalties, and merely reciting statutory provisions gives an individual little guidance on how to conform his conduct to the terms of the injunction") (internal quotes and case citation omitted); *Miglionico v. Birmingham News Co.*, 378 So. 2d 677, 681 (Ala. 1979) (finding that such injunctions are "repugnant to the American spirit and should not lightly be either administratively sought or judicially granted") (citation omitted).

As of July 21, 2011, Respondents had commuted two of the four agreements, and the other two agreements were in run-off. There was simply nothing left to enjoin. Thus, this Tribunal has no authority to hear the Bureau's RESPA claim.

b. **This Tribunal Does Not Possess Inherent Equitable Authority**

Even if this Tribunal accepts the Bureau's argument that injunctive relief was available to it as of July 21, 2011, the Bureau has an additional problem – its relief is limited to simply an order enjoining future conduct. That is so because any other equitable relief is only available in a court of law. By way of background, the Supreme Court has held that, subject to certain qualifications, a federal court, once seized of equity jurisdiction to grant injunctive relief, can also grant certain additional equitable relief, such as a claim for equitable accounting or for disgorgement of profits. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99 (1946) (holding that "a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court *once its equity jurisdiction has been invoked*," and noting that the statute explicitly gave courts the authority to enter "a permanent or temporary injunction, restraining order, *or other order*") (emphasis added). This general rule, however, does not apply to statutes like RESPA for which Congress has provided detailed and varied enforcement provisions for the various sections. *See Porter*, 328 U.S. at 398 (holding that a court cannot exercise broad equitable powers where "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity"); *Edison v. Dep't of the Army*, 672 F.2d 840, 846 (11th Cir. 1982) ("Where a statute provides for certain types of relief, but not others, it is not proper to imply a broad right to injunctive relief.").[13] Because RESPA gave HUD only the right to seek injunctive relief in court, and because Congress was very precise in the relief permitted to various persons under each provision of RESPA, other equitable remedies would not have been available to HUD under *Porter* and, therefore, concededly are not available here. *Cf. Freeman*, 132 S. Ct. at 2041 (noting that RESPA Section 8 is enforceable through "actions for injunctive relief brought by federal and state regulators," with no reference to any ancillary equitable relief).

Regardless, however, of whether this Tribunal believes that injunctive relief includes other equitable remedies, the fact of the matter is that unlike a federal court which has "inherent"

[13] One court has held, citing *Porter*, that disgorgement of profits is available under RESPA Section 8. *See Jackson v. Prop. I.D. Corp.*, No. 07-CV-3372, Order Re: Defendants' Motions to Dismiss, Dkt. 52 (C.D. Cal. Mar. 24, 2008). *Jackson*, an unpublished opinion on a motion to dismiss not available on LexisNexis that does not appear to have been cited by any other court, was wrongly decided, and never appealed because the case was settled after a motion to certify an interlocutory appeal was denied. In any case, *Jackson* is wholly distinguishable. In *Jackson*, the court specifically found that, assuming the truth of the allegations in the Complaint and viewed in a light most favorable to the plaintiff, that the allegations that defendants' conduct would continue unless enjoined – *if proven* – would support injunctive relief. Slip Op. at 2. The court made clear that "on a motion to dismiss we cannot simply accept Defendants' assurances that the allegedly wrongful conduct will not continue." *Id.* Here, by contrast, this Tribunal has established certain facts regarding the status of Atrium's reinsurance agreements. Indeed, there is no dispute here that Atrium had commuted two of its reinsurance agreements by returning all premiums, earnings, and capital contributions, and the other two reinsurance agreements were in run-off more than 18 months before the Bureau came into existence. There is simply no evidence that Respondents had any intention of entering into any new reinsurance arrangements as of July 21, 2011, nor has the Bureau pled any such intention on the part of Respondents. Furthermore, the Bureau's entry of consent orders with five of the largest MIs forecloses any possibility of the resumption of the captive arrangements that are alleged to violate RESPA.

equitable powers once its equitable jurisdiction is invoked, administrative tribunals have no such inherent authority, nor did the Bureau inherit any such authority from HUD. *See Ramos v. D.C. Dep't of Consumer & Regulatory Affairs*, 601 A.2d 1069, 1073 (D.C. 1992) ("[A]dministrative law tribunals . . . within agencies of the executive branch—by definition and design do not have the inherent 'equitable authority' that courts in the judicial branch have derived from common law traditions and powers."); *see also Feistman v. C.I.R.*, 587 F.2d 941, 943 (9th Cir. 1978) ("When the Tax Court was an administrative agency, it was without the ancillary equitable powers ordinarily exercised by a true court.").

Because the law did not authorize the relief the Bureau is seeking until July 21, 2011, and since the statute under which the Bureau purports to be proceeding, the CFPA, is not retroactive, the Tribunal should conclude that the Bureau has no jurisdiction to bring, and the Office of Administrative Adjudication has no jurisdiction to hear, an enforcement action for any alleged violations that occurred before July 21, 2011. Consequently, Respondents are entitled to dismissal of the NOC to the extent it concerns conduct allegedly occurring before July 21, 2011, namely all of the Bureau's claims in this matter. Further, even if the Tribunal concludes that the Bureau was authorized to seek injunctive relief for conduct that occurred before its creation, the fact of the matter is that the cessation of reinsurance activities eviscerates any such claim.

III. RESPA'S THREE-YEAR STATUTE OF LIMITATIONS APPLIES SO THE BUREAU MAY ONLY REACH CONDUCT OCCURRING AFTER JANUARY 25, 2009

All of the Bureau's claims involving loans closed before January 25, 2009, are time-barred because of the three-year statute of limitations governing RESPA actions. Redacted

Redacted A statute of limitations "is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time." *Guarantee Trust Co. v. United States*, 304 U.S. 126, 136 (1938).

With respect to the running of the statute of limitations, the first issue to resolve is when the running of the period commences. At times, the Bureau has suggested that the period begins with each ceding payment. The Bureau is wrong for at least three reasons.

a. The Statute of Limitations Starts to Run When the Loan Closes

First, as with all questions of statutory construction, review begins with the language of the statute itself. *Albernaz v. United States*, 450 U.S. 333, 336 (1981) (In resolving a question of statutory interpretation, "our starting point must be the language of the statute[]"); *Perrin v. United States*, 444 U.S. 37, 42-43 (1979). Section 16 of RESPA, titled "Jurisdiction of Courts" states that "[a]ny action" by the Bureau "may be brought within 3 years *from the date of the occurrence* of the violation." 12 U.S.C. § 2614 (emphasis added). The language used by Congress can only apply to a discrete event, one that occurs on a single identifiable date, as opposed to any assertion of a "continuing violation" that runs for years and occurs on some unidentifiable date. *See Snow v. First Am. Title Ins. Co.*, 332 F.3d 356, 357 (5th Cir. 2003) ("Had Congress wanted the various steps in a single transaction to trigger the statute of limitations multiple times, it would have spoken of multiple 'violations.'").

Courts have uniformly accepted the loan closing date as the date of the "occurrence of the violation." As the *Snow* court explained, using the closing date "create[s] a simple and workable rule for the application of § 2614 by interpreting the phrase 'the date of the occurrence of the violation' as the date of the closing, which is a definite and indisputable date known to potential plaintiffs and defendants." 332 F.3d at 361. *See also In re Cmty. Bank of N. Va.*, 622 F.3d 275, 281 (3d Cir. 2010) (citing *Snow*, 332 F.3d at 359-61); *Taggart v. Wells Fargo Home Mortg., Inc.*, No 10-cv-00843, 2010 U.S. Dist. LEXIS 102747, at *9 (E.D. Pa. Sept. 27, 2010); *Morilus v. Countrywide Home Loans, Inc.*, 651 F. Supp. 2d 292, 306 (E.D. Pa. 2008).

Second, as the court in *Mullinax v. Radian Guaranty*, 199 F. Supp. 2d 311, 325 (M.D.N.C. 2002), explained, an interpretation that would allow borrowers to initiate their suit within one year from the date of any single primary mortgage premium payment "would create disparate results among borrowers, who apparently can elect either to pay for their insurance in one lump sum or through multiple payments. . . . This would mean that a borrower who elected to make monthly payments would have a floating statute of limitations period based upon the date of his last payment. . . . If Congress had intended the statute of limitations to float in this way, it could have so provided in explicit language."[14] *See also Snow*, 332 F.3d at 360

[14] Underlying the *Mullinax* court's decision was the fact that *any* borrower could elect to pay for mortgage insurance in a single lump sum payment—not whether a large percentage of borrowers did. *See Mullinax*, 199 F. Supp. 2d at 325. The mere fact that a borrower could do so was enough. *See id.* While borrowers may elect how they pay for their mortgage insurance, RESPA does not allow borrowers to elect what statute of limitations applies to their claims. *See id.* Indeed, the plain language of the statute provides for no such disparity.

As Mr. Rosenthal testified during the first week of the Hearing, borrowers have:

> [S]everal different possibilities, mortgage insurance products that [they] can choose. One mortgage insurance product a borrower can choose is borrower paid MI where that occurs on a monthly basis. Another product a borrower could choose would be the single premium MI where the borrower would write a check on day 1 or include in their loan amount on day 1 all future MI premiums in one upfront singular payment. So as opposed to paying it monthly with the loan until the loan reach[es] 78 LTV and the certain other objectives have been achieved, you just pay one time upfront, and that's it, you have mortgage insurance, and that's the only payment the borrower makes.

Mar. 26 Tr. at 577:20-578:10.

("Plaintiffs' interpretation also would let the statute of limitations regenerate itself like a phoenix from the ashes.").

Third, the Bureau cannot utilize the ceding payments as a "continuing violation" running for years after the loan closing date. The continued payment of a portion of the pmi premium by the MI provider to the reinsurer is, as the Supreme Court explained in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), simply a continued effect of the initial violation which "cannot breathe life into prior, uncharged [illegal conduct]." *Id.* at 628; *see also Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008) ("Put differently, a continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.") (internal quotation marks and citations omitted). Further, every court that has considered the assertion that continuation of payments after the alleged violation constitutes a "continuing violation" has rejected it, including two cases specifically in the context of pmi reinsurance claims. *Menichino v. Citibank, N.A.*, No. 12-0058, 2013 U.S. Dist. LEXIS 101102, at *42-43(W.D. Pa. July 19, 2013); *Mullinax*, 199 F. Supp. 2d at 325.

b. The Bureau Is Subject to RESPA's Three-Year Statute of Limitations Which Runs from the Loan Closing Date

The Bureau is bound by the three-year statute of limitations in RESPA. Indeed, the plain language of Section 1054 of the CFPA, 12 U.S.C. § 5564(g)(2)(C) ("Transferred Authority"), provides that "[i]n any action arising solely under laws for which authorities were transferred under subtitles F and H [which includes RESPA], the Bureau may commence, defend, or intervene in the action *in accordance with the requirements of that provision of law*, as applicable." (emphasis added)). Accordingly, the Bureau's attempt to bring an action against

Respondents for conduct involving reinsurance agreements between Atrium and CMG, Radian or Genworth is in complete disregard of RESPA's controlling statutory provision.[15]

The Fifth Circuit's decision in *Snow* is well-reasoned and the lack of any contrary authority is a testament to its persuasiveness.[16] The *Snow* Court carefully considered the issue and rejected an interpretation proffered by the plaintiffs that "would generate confusion and uncertainty about the timeliness of many RESPA claims." The Fifth Circuit explained that a rule allowing the limitations period to "beg[i]n to run anew" based on a payment to defendants after closing "would encourage tardy plaintiffs to sue and hope that discovery turns up a recent payment that restarts the limitations period." 332 F.3d at 358-61. Further, the *Snow* Court's admonition to plaintiffs remains true for the Bureau: "Plaintiffs, by contrast, cannot point to a

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[15] The Bureau's attempt to hold Respondents liable for conduct back to 1997 – or more than 15 years before the tolling date of January 25, 2012, and long before the CFPB even existed – on the apparent theory that there is no applicable statute of limitations for a Bureau-initiated administrative action – is specious and patently unreasonable. Indeed, the Bureau faces an insurmountable hurdle in seeking to go back further than 2003. A number of MIs were defendants in previous private litigation in the Southern District of Georgia alleging that the reinsurance agreements, including the agreement between UGI and Atrium, violated RESPA. *See, e.g., Pedraza v. United Guaranty Corp., et al.*, No. CV199-239 (S.D. Ga.). That litigation was resolved through the entry of an Injunction which, *inter alia*, established terms under which the MIs could continue with existing reinsurance arrangements. That injunction was in place from June 25, 2001, through December 31, 2003, which encompasses a period of time that Atrium had a reinsurance agreement with UGI. Pursuant to its terms, as long as UGI (as well as the other MIs that were part of this litigation and subject to identical injunctions), acted in conformity with the terms of the injunction, the acts of UGI were "deemed to be in compliance with RESPA." There is no evidence that HUD, or any other person or entity, has alleged that UGI did not adhere to the terms of the Injunction. Accordingly, the Bureau is precluded from arguing that UGI, and thus, Atrium, failed to comply with RESPA at any time prior to December 31, 2003.

[16] Notably, the *Snow* decision has been cited by more than 100 federal and state courts. And although *Snow* concerns a private action, its discussion of the RESPA limitations period applies to the government with equal force. Indeed, RESPA uses the exact same language, *i.e.*, "the date of occurrence of the violation," to define the limitations period for actions brought by both private plaintiffs and government agencies.

case that holds or even assumes that the limitations period can restart when the defendant pays an allegedly illegal kickback or fee." 332 F.3d at 361.

c. *BP America* Does Not Save the Bureau's Claims

The Bureau's reliance on *BP America Production Co. v. Burton*, 549 U.S. 84 (2006), for the proposition that administrative actions have no statute of limitations, is misplaced.[17] In *BP America*, at issue was the application of the general six-year statute of limitations period to the enforcement of a Department of Interior administrative payment order. In rejecting the argument that the general statute of limitations would apply, the Supreme Court explained that by its plain language, "§ 2415(a) applies when the Government commences any 'action for money damages' by filing a 'complaint' to enforce a contract, and the statute runs from the point when 'the right of action accrues.'" 549 U.S. at 91. The Court then noted that the "key terms in this provision -- 'action' and 'complaint' -- are ordinarily used in connection with judicial, not administrative, proceedings." *Id.*

The Court's holding that an administrative payment order does not fall within the statute of limitations for an "action for money damages" is of no help to the Bureau here. First, unlike *BP America*, the Bureau's action is brought under RESPA, which has a specific statute of limitations period for "any action" brought by "the Bureau, the Secretary, the Attorney General of any State, or the insurance commissioner of any State" under Section 8 of RESPA. Thus, unlike *BP America*, here there is a specific statute of limitations in RESPA governing government "actions." As Respondents have pointed out, even under *BP America*, courts will first look to the statutory provision at issue for the relevant statute of limitations before reaching

[17] As an initial matter, the issue of whether the Bureau is subject to any statute of limitations affects only the period from July 21, 2008, to January 25, 2009. That is so because, as explained in Section IV below, there is no legal support for the proposition that the Bureau can revive RESPA claims where the statute of limitations expired before the Bureau's creation.

the conclusion that there is no such limitations period. *See Alden Mgmt. Servs. v. Chao*, 532 F.3d 578, 582 (7th Cir. 2008) ("Unless a federal statute directly sets a time limit, there is no period of limitations for administrative enforcement actions."). Here, RESPA has a specific statute of limitations period and there is no indication that Congress sought to extend that period through the creation of the Bureau.

The Court further explained that prior to the enactment of § 2415(a), there was no statute of limitations regarding contract actions brought by the government. *BP America*, 549 U.S. at 100-01. Thus, the Court found that this "rule" remains the "law, and the text of § 2415(a) betrays no intent to change this rule as it applies to administrative proceedings." *Id*. at 101. Quite the opposite is true here; the "law" was that any government action under Section 8 of RESPA was required to be "brought" within three years. When Congress amended RESPA to insert the "Bureau" into the statute of limitations provision (through CFPA § 1098(9)), it did not indicate in any way that it was also changing the "law" to permit the Bureau to ignore the existing statute of limitations. Instead, Congress chose to make a single change to the statute of limitations, which was unrelated to extending the time period within which the government could initiate an action. Congress clearly did not intend for the Bureau to receive any sort of special treatment regarding when it must file an action. Rather, Congress's silence on this point necessitates a finding that the three-year statute of limitations for government actions is still the law and applies to the Bureau, regardless of whether it brings an action administratively or in court. *See, e.g. Maharaj v. Stubbs & Perdue, P.A.*, 681 F.3d 558, 572 (4th Cir. 2012) (in reviewing the 2005 amendments to the Bankruptcy Code, the court rejected the interpretation that represented a departure from prior practice in light of, *inter alia*, the lack of any clear statement in either the text of the amendment or the legislative history and noting that "[t]his Congressional silence is telling").

Nor does the underlying policy reason of the *BP America* decision support the Bureau here. While it is generally true that "statutes of limitations are construed narrowly against the government," 549 U.S. at 95, the "sovereign" is certainly capable of "subject[ing] itself to a statute of limitations." *Id.* at 96. In limiting "any action" to enforce Section 8 of RESPA to "3 years from the date of occurrence of the violation" Congress made clear its intention that the government, including the Bureau, is subject to a three-year statute of limitations period in connection with the bringing of "any action" under Section 8 of RESPA.

The Bureau cannot find solace in the Court's statement that "the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous," *id.* at 96, because RESPA is a criminal statute; accordingly, the rule of lenity applies. *See United States v. Graham Mortg. Corp.*, 740 F.2d 414, 423 (6th Cir. 1984) (holding that the rule of lenity mandated reversal of RESPA convictions because the statute was "ambiguous" on the issue of whether making a mortgage loan was a settlement service); *see also Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729-36 (6th Cir. 2013) (Sutton, J., concurring) (explaining in detail the application of the rule of lenity to RESPA Section 8); *cf. Freeman*, 132 S. Ct. at 2044 (rejecting expansion of RESPA based on "[v]ague notions of statutory purpose").

The Bureau's attempt to empower itself with the authority to bring actions unbounded by any statute of limitations is unsupportable. While this issue is only of limited scope here because there is nothing in *BP America* that could support the assertion that the passage of Dodd-Frank can "revive" a claim where the statute of limitations had already run, which is discussed more fully below in Section IV, there is simply no basis to find that the Bureau is not bound by the three-year statute of limitations set forth in RESPA. 12 U.S.C. § 2614.

IV. IN NO EVENT CAN THE BUREAU SEEK RELIEF FOR CONDUCT PRIOR TO JULY 21, 2008

At the March 5, 2014 motions hearing, Enforcement Counsel stated that in its view, "as long as any part of the conduct occurred after July 21st, 2008, it would be encompassed here because HUD could have brought that claim before we existed, [and] we could have brought it the day after." Mar. 5 Tr. at 47. Here, the Bureau seeks to impose penalties that would not have been available at the time of the conduct, when the Bureau's predecessor could only obtain an injunction in a court of competent jurisdiction and could not have obtained any recovery in a proceeding such as this. In addition to an injunction, the Bureau is seeking additional forms of relief not previously available to HUD – restitution, civil money penalties, recovery of costs and disgorgement. While it is the Bureau's position that its administrative actions under RESPA are not subject to a statute of limitations, any attempt by the Bureau to seek <u>any</u> relief for conduct before July 21, 2008, is absolutely barred by the "robust presumption against statutory retroactivity." *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 172 (4th Cir. 2010).

The following facts are not in dispute:

- HUD, the agency responsible for enforcement of RESPA before the creation of the Bureau, did not have an administrative process for pursuing RESPA claims;
- Because HUD's enforcement of RESPA was limited to judicial actions, it was bound by the three-year statute of limitations set forth at 12 U.S.C. § 2614;
- HUD had been investigating pmi reinsurance since at least 2008; and
- With respect to RESPA, the Bureau "stands in the shoes" of HUD.

Accordingly, as of July 21, 2011, the date on which the Bureau assumed responsibility for RESPA enforcement, the statute of limitations on an action by HUD had expired for all actions prior to July 21, 2008, and there is no legal basis for the Bureau to claim the authority to revive those time-barred claims.

The "presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). The Supreme Court has made clear that a statute that would "revive" an action that had been foreclosed or otherwise "extend[] a statute of limitations after the pre-existing period of limitations" "impermissibly revives a moribund cause of action." *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 950 (1997) (citation omitted). While it is true that a statute does not have retroactive effect "merely because it is applied in a case arising from conduct antedating the statute's enactment," *Landgraf*, 511 U.S. at 269, a statute does operate retroactively when it "attaches new legal consequences to events completed before its enactment." *Id*. at 270. Such new legal consequences include, for example, "impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed." *Id*. at 280. *See also Hughes Aircraft Co.*, 520 U.S. at 951 (Court refused retroactive application to the 1986 amendment to the False Claims Act); *Vartelas v. Holder*, 132 S. Ct. 1479, 1491 (2012) (when evaluating retroactivity, the "essential inquiry" is "whether the new provision attaches new legal consequences to events completed before its enactment") (quoting *Landgraf*, 511 U.S. at 269-70).[18]

The Supreme Court has set out the steps of the analysis that must be conducted "when an objection is made to applying a particular statute said to . . . impose some burden on the basis of an act or event preceding the statute's enactment." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30,

[18] In *Marrie v. SEC*, 374 F.3d 1196, 1207 (D.C. Cir. 2004), the D.C. Circuit reversed the Commission's Order which imposed new legal consequences and new legal duties on the actions of accountants by eliminating the good faith defense and requiring that materiality be proved by showing that a false or misleading financial statement had been filed. 374 F.3d at 1207.

37 (2006). In the March 13 Order, this Tribunal stated that "Dodd-Frank lacks an express retroactivity provision, and 'normal rules of [statutory] construction' do not reveal Congress's intent regarding retroactivity." March 13 Order at 12 (internal quotation marks and citations omitted). Where Congress has not expressly stated that a statute is retroactive, and where "applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of 'affecting . . . liabilities'" for "conduct arising before [its] enactment," the statute must be construed "as inapplicable to the event or act in question." *Fernandez-Vargas v. Gonzales*, 548 U.S. at 37-38 (alteration in original) (citation omitted).

In *Landgraf*, a case about the retroactive application of a damages provision, the Supreme Court observed that, in no case "in which Congress had not clearly spoke, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment." 511 U.S. at 284.

In *FDIC v. Belli*, 981 F.2d 838 (5th Cir. 1993), the Fifth Circuit considered whether the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), which modified the statute of limitations on a contractual claim held by the FDIC, applied to an action by the FDIC against an individual who provided several personal guarantees. The *Belli* Court rejected the FDIC's argument that FIRREA applies retroactively because to do so would have revived claims where the statute of limitations had run. "In the absence of evidence of a contrary legislative purpose, 'subsequent extensions of a statutory limitation period will not revive a claim previously barred.'" 981 F.2d at 842-43 (citing *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990)).[19] *See also Chenault v. U.S. Postal Serv.*, 37 F.3d

[19] In *Bellwood*, the Seventh Circuit stated; "It is true that there is a presumption that new laws are to be applied to pending cases, *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), but the presumption is reversed when it is proposed to use a newly enacted statute of limitations to

535, 539 (9th Cir. 1994) ("[A] newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would alter the substantive rights of a party and increase a party's liability.") (internal quotation marks omitted).

The Tribunal's 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 misplaced. As an initial matter, *Pezza* dealt with the applicability of the Dodd-Frank ban on pre-dispute arbitration of whistleblower claims under Sarbanes-Oxley to conduct before the statute's enactment. While one other court has reached the same result as *Pezza*,[20] the majority of courts dealing with this particular issue have expressly rejected the conclusion of the *Pezza* court. *See, e.g., Jones v. Southpeak Interactive Corp.*, No. 3:12-443, 2013 U.S. Dist. LEXIS 37999, at *26 (E.D. Va. Mar. 19, 2013) ("Because Dodd-Frank serves to increase the liability imposed on the losing party, and because the statute lacks evidence of clear congressional intent to do so retroactively, the Court concludes that Dodd–Frank cannot be applied retroactively in a situation such as this."); *Weller v. HSBC Mortg. Servs., Inc.*, No. 13-cv-185, 2013 U.S. Dist. LEXIS 130544, at *13-14 (D. Colo. Sept. 11, 2013) ("In my opinion, *Pezza* and *Wong* too blithely disregard the presumption against retroactivity and the need for 'predictability and stability' attendant on preserving established contractual expectations. *See Landgraf*, 511 U.S. at 271. Indeed, these decisions disregard the very essence of the substantive/jurisdictional distinction as described by the Supreme Court itself: that 'jurisdictional statutes speak to the power of the court rather than to the rights or

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revive a previously barred claim." 895 F.2d at 1527. *See generally Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 840-58 (1990) (Scalia, J., concurring) (tracing the historical development of the presumption).

[20] The district court in *Wong v. CKX, Inc.*, 890 F. Supp. 2d 411, 423 (S.D.N.Y. 2012), agreed with *Pezza*.

obligations of the parties.' *Id*. at 274 (citation and internal quotation marks omitted)."); *Holmes v. Air Liquide USA LLC*, No. 11 Civ. 2580 (LRH), 2012 U.S. Dist. LEXIS 10678, *18 (S.D. Tex. Jan. 30, 2012) ("Ultimately, the Court cannot agree with the holding in *Pezza* that the portions of Dodd-Frank at issue affect only procedural rights. Instead, as the court held in *Henderson*, [*v. Masco Framing Corp.* No. 11-cv-0088, 2011 U.S. Dist. LEXIS 80494, at *3 (D. Nev. July 22, 2011)] this Court finds that the rights of contracting parties are substantive, and that a statute affecting those rights undoubtedly impairs rights that existed at the time the parties acted."); *Taylor v. Fannie Mae*, 839 F. Supp. 2d 259, 262-63 (D.D.C. 2012) (rejecting *Pezza* because a retroactive application would impair the parties' rights possessed when they acted).

Recently, the court in *Khazin v. TD Ameritrade Holding Corp*., No. 13-4149, 2014 U.S. Dist. LEXIS 31142, at *22 (D.N.J. Mar. 11, 2014), rejected *Pezza's* reasoning in favor of the decisions in *Henderson*, *Taylor*, and *Heller*. Specifically, the *Khazin* court found that the arbitration prohibition of the Dodd-Frank Act not only "affects the jurisdictional location of where the claims are brought, it also affects the parties' rights and obligations agreed upon in the arbitration agreement. Therefore, this Court finds that the Dodd-Frank Act does not operate retroactively to bar the parties' arbitration agreement." *Id.* at *22.

Because retroactive application of Dodd-Frank increases the liability imposed on Respondents, and because the statute lacks evidence of clear congressional intent to apply it retroactively, this Tribunal should reconsider its decision allowing the Bureau to administratively adjudicate RESPA claims arising prior to July 21, 2011. In the alternative, the Tribunal should find that the Bureau is barred from pursuing any claims based on conduct where the RESPA three-year statute of limitations had run; that is, for claims arising from conduct that occurred before July 21, 2008.

V. THE BUREAU IS PRECLUDED FROM USING THESE PROCEEDINGS TO REGULATE THE BUSINESS OF INSURANCE OR COLLATERALLY ATTACK THE ACTIONS OF STATE INSURANCE REGULATORS

The NOC makes clear that the Bureau believes that the reinsurance arrangements entered into by Atrium, and subsequently assumed by Atrium Re, do not constitute "real insurance." *See* NOC ¶¶ 60-70. In pursuit of its theory, the Bureau relies heavily on the report of its expert witness, Dr. Crawshaw,

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The Bureau's blatant attempt to displace the role of state insurance regulators is inappropriate. Under the McCarran-Ferguson Act, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b) ("McCarran-Ferguson"). A state law is "impair[ed]" under McCarran-Ferguson if application of a federal law would "frustrate any declared state policy or interfere with a State's administrative regime." *Humana, Inc. v. Forsyth*, 525 U.S. 299, 309-10 (1999).

Atrium Re is licensed and regulated by the Insurance Division of the Vermont Department of Financial Regulation. Vermont has a comprehensive insurance and reinsurance regulatory regime, including extensive regulation of captive insurers. *See, e.g.*, 8 V.S.A. § 6001, *et seq.* (setting forth detailed regulation of captive insurance companies); 8 V.S.A. § 6002 (restricting captive insurers to insuring the risks of affiliated companies);[21] 8 V.S.A. § 6004 (governing unimpaired paid-in capital and surplus of captive insurance companies); 8 V.S.A. § 6005 (dividends approved by the regulator); 8 V.S.A. § 6008 (requiring examinations of captive insurance companies); 8 V.S.A. § 6011 (permitting captive insurance companies to provide reinsurance); 8 V.S.A. § 6015 (giving Commissioner the authority to issue regulations governing captive insurance companies); 21-020-005 Vt. Code R. §§ 1 through 15 (regulations governing captive insurance companies); 21-020-036 Vt. Code R. §§ 1 through 8 (regulations governing trust accounts, including withdrawals).[22]

Atrium is licensed and regulated by the Insurance Division of the New York Department of Financial Services. New York also has a comprehensive insurance and reinsurance regulatory regime. *See, e.g.*, N.Y. Ins. Law §§ 309 through 312 (providing for examination of insurance companies); N.Y. Ins. Law § 1114 (governing reinsurance); N.Y. Ins. Law § 1507 (permitting an insurer to share common management and personnel "with one or more other persons"); 11 N.Y. Comp. Codes R. & Regs. tit. 11, § 126.1, *et seq.* (regulating reinsurance trust agreements); 11 N.Y. Comp. Codes R. & Regs. tit. 11, § 128.0, *et seq.* (procedures for commutation of reinsurance agreements where insurer is impaired or insolvent).

Both states' regulators regularly supervised and examined their respective licensee, Atrium or Atrium Re, pursuant to a complex state regulatory scheme covering insurance, an issue essentially and exclusively reserved for state regulation under McCarran-Ferguson.

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[21] Thus, for example, the Bureau cannot argue that Atrium Re's reinsurance of only risks from loans made by PHH Mortgage or PHH Home Loans somehow evidences a RESPA violation without upending the Vermont statute and regulatory regime in violation of McCarran-Ferguson.

[22] McCarran-Ferguson precludes, for example, the Bureau from arguing that purportedly impermissible withdrawals from trust accounts somehow evidence a RESPA violation.

Moreover, the MIs were also supervised and regulated by their respective state insurance regulators. As such, the Bureau's attempt to second-guess the state insurance regulators and appoint itself as the arbiter of whether reinsurance was "real reinsurance" is irredeemably inconsistent with McCarran-Ferguson. *See Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 564 (7th Cir. 1999) (McCarran-Ferguson prevented federal courts from applying federal law to question actuarial practices: "Even if the formal criteria are the same under federal and state law, displacing their administration into federal court—requiring a federal court to decide whether an insurance policy is consistent with state law—obviously would interfere with the administration of the state law.").

The reliance by the Bureau and this Tribunal on *Patton v. Triad Guar. Ins.*, 277 F.3d 1294, 1299 (11th Cir. 2002), is misplaced. Under *Patton*, the Bureau asserts that because *primary* mortgage insurance is a real estate settlement service, RESPA directly regulates insurance in that context, therefore the Bureau's attempt to regulate reinsurance is not subject to McCarran-Ferguson's bar against the federal regulation of insurance. While Respondents believe that *Patton* was wrongly decided, even if its reasoning were accepted, it cannot support the present action by the Bureau. Respondents do not dispute the general statement by the *Patton* Court that "the McCarran-Ferguson bar does not apply where Congress explicitly reveals its intent to regulate the business of insurance." *Id.* at 1298. However, in that case, the court went on to find that Congress's inclusion of "underwriting" as a settlement service -- which the court construed to refer to "mortgage insurance" -- meant that "RESPA is a Congressional Act that 'specifically relates' to mortgage insurance." *Id.* Respondents are not aware of any other court that has construed the term "underwriting" as it relates to the settlement service in connection with the origination of a loan to be "mortgage insurance." Indeed, such an assertion is nonsensical where the lender "underwrites" the loan. Under *Patton*, the lender's underwriting department would fall within the purview of the state insurance department, a position not taken by any state insurance regulator.

The issue here, unlike *Patton* where the question concerned the charge for primary mortgage insurance, is the Bureau's attempt to define what is, and is not, insurance. The Bureau's challenge is based on the specific characteristics of insurance and whether, for example, there was sufficient capital in the trust accounts, whether the segregation of trust accounts was proper, the ability of a reinsurer to rely on the underwriting of its affiliates, the appropriateness of using shared services and employees, as well as a host of other factors which the Bureau now contends were indicia of "sham" insurance structures. Given the Bureau's attempt to completely "occupy" the field of insurance, there seems little reason to have state departments of insurance.

Curiously, the Bureau acknowledges the authority of state insurance regulators and their role in regulating the very same captive insurers it now seeks to regulate through this enforcement action. Specifically, the Bureau has introduced into evidence, and seeks to rely upon, the fact that the MIs allegedly "expressed alarm to state insurance regulators in 1998, asking for limits on captive and other 'risk-sharing' arrangements between MIs and lenders." NOC ¶ 25. According to the Bureau, the "the MIs argued[] such arrangements 'present a threat to the overall strength and claims-paying ability of the private mortgage insurance industry.'" *Id. See also id.* ¶¶ 26-27. Further, the Bureau introduced exhibits discussing the purported involvement of the Arizona Department of Insurance in the issue of captive reinsurance. *See* ECX 35. Thus, the Bureau concedes that state insurance regulators regulate the very issue it is seeking to affect through this enforcement action.

Finally, in addition to the fact that McCarran-Ferguson precludes the Bureau's evidentiary theories under RESPA, the CFPA itself—which gave the Bureau the authority to enforce RESPA—precludes this type of collateral attack that would "affect[] the authority" of the state insurance regulators. 12 U.S.C. § 5552(d)(3) ("No provision of this title shall be construed as altering, limiting, or affecting the authority of a State insurance commission or State insurance regulator under State law to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or regulator.").

Accordingly, the Bureau is precluded from using RESPA to attempt to regulate the business of insurance or collaterally attack the actions of the Vermont and New York insurance regulators who approved of the reinsurance arrangements at issue.

VI. <u>**ATRIUM AND ATRIUM RE MUST BE DISMISSED**</u>

Respondents Atrium and Atrium Re must be dismissed from this action because they are neither Covered Persons nor Service Providers to Covered Persons, and accordingly are not subject to proceedings under Section 1053(b) of the CFPA.

At the scheduling conference in this proceeding, the Bureau made a formal representation to the Tribunal that this matter is brought under Section 1053(b) of the CFPA:

> HONORABLE ELLIOT: . . . Can I get a representation, I'll ask Mr. Gordon about this, can I get a representation that this case is brought under 1053B? I see that it refers to 1053, but I don't see 1053B anywhere. Mr. Gordon?
>
> MR. GORDON: Yes, Your Honor, 1053B is correct.

Feb. 14 Tr. at 17-18. Section 1053(b) of the CFPA, entitled "Special Rules for Cease-and-Desist Proceedings," is expressly limited to "covered person[s] or service provider[s]." 12 U.S.C. §§ 5563(b)(1)(A), (b)(2). "Covered Person" is defined as "(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person." 12 U.S.C. §

5481(6). Atrium and Atrium Re do not "engage[] in offering or providing a consumer financial product or service."[23] They are, however, affiliates of Respondents PHH Mortgage and PHH Home Loans (the "Lender Respondents"), which are covered persons, and PHH Corporation, which may be deemed the controlling shareholder of one or both of the Lender Respondents. Accordingly, Atrium and Atrium Re could only be subject to proceedings under Section 1053(b) if they were also "Service Providers" to the Lender Respondents. They are not.

"Service Provider" is defined as:

> any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that—(i) participates in designing, operating, or maintaining the consumer financial product or service; or (ii) processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes).

12 U.S.C. § 5481(26)(A). "Service Provider" does *not* include:

> a person solely by virtue of such person offering or providing to a covered person—(i) a support service of a type provided to businesses generally or a similar ministerial service; or (ii) time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media.

12 U.S.C. § 5481(26)(B). In addition, a "Related Person" is "deemed to mean" a Covered Person, and is defined as:

> (i) any director, officer, or employee charged with managerial responsibility for, or controlling shareholder of, or agent for, such covered person;

[23] "Consumer Financial Product or Service" is defined as "any financial product or service that is described in one or more categories under—(A) paragraph (15) *[defining Financial Product or Service]* and is offered or provided for use by consumers primarily for personal, family, or household purposes; or (B) clause (i) *[extending credit and servicing loans]*, (iii) *[providing most real estate settlement services, other than the business of insurance, or performing appraisals]*, (ix) *[provision or use of credit reports]*, or (x) *[debt collection]* of paragraph (15)(A), and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (A)." 12 U.S.C. § 5481(5) (with brief summaries of cross-referenced provisions added in bracketed italics).

> (ii) any shareholder, consultant, joint venture partner, or other person, as determined by the Bureau (by rule or on a case-by-case basis) who materially participates in the conduct of the affairs of such covered person; and
>
> (iii) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any—(I) violation of any provision of law or regulation; or (II) breach of a fiduciary duty.

12 U.S.C. § 5481(25)(C).

The NOC does not include any allegation that either Atrium or Atrium Re are Covered Persons, Service Providers to PHH Mortgage or PHH Home Loans (or to any other Covered Person), or Related Persons. Yet, it is the Bureau's burden to establish facts that would support proceeding under Section 1053(b).

Neither Atrium nor Atrium Re provide any "material service" to either of the Lender Respondents "in connection with the offering or provision by such covered person of a consumer financial product or service." The term "material service" is explained in the statute with reference to two examples: participation in "designing, operating or maintaining" the consumer product or service, or "process[ing] transactions relating to the consumer financial product or service." 12 U.S.C. § 5481(26)(A)(i), (ii). Here, there is no allegation that Atrium or Atrium Re have engaged in either and, in fact, these two entities do not participate in "designing, operating or maintaining" the loans made by the Lender Respondents, nor do they "process transactions" relating to the loans. Moreover, they cannot be considered Service Providers to the MIs, because private mortgage reinsurance is not a "Financial Product or Service." *See* 12 U.S.C. § 5481(15)(C)(i) (excluding the business of insurance). Accordingly, Atrium and Atrium Re are not Covered Persons or Service Providers.

Therefore, since CFPA Section 1053(b) only applies to Covered Persons and Service Providers; neither Atrium nor Atrium Re are Covered Persons or Service Providers under the CFPA; and the Bureau has admitted that this proceeding is brought pursuant to Section 1053(b), the inescapable conclusion is that the Bureau cannot proceed against these two entities in this forum. Accordingly, the charges against Atrium and Atrium Re should be stricken, and they should be dismissed from this proceeding.

VII. THE FAILURE TO HOLD THAT THE CFPB'S CLAIMS ARE BARRED BY JUDICIAL ESTOPPEL NECESSITATES A FINDING THAT THE BUREAU'S SETTLEMENTS WITH THE MIS ARE A "SHAM"

In spite of the Bureau's efforts to sweep the issue under the rug, the fact remains that if it is the Bureau's position that the reinsurance arrangement between UGI and Atrium was a "sham," then permitting UGI to continue to make payments to Atrium and permitting UGI to account for this arrangement as reinsurance on its financial statements demonstrates that the Florida Consent Order is a "sham." While the Bureau, and presumably UGI, would seek to explain their present positions by pointing to the language in the Consent Order that there was no finding on the merits and that UGI did not admit liability for a RESPA violation, those provisions change nothing because the Bureau is seeking to demonstrate that payments made **after** the entry of the Consent Order are illegal.

The Bureau should not be permitted to argue that the payments by UGI, which the Bureau expressly allowed to continue, are in fact illegal when received by Respondents. Indeed, UGI made clear in its briefing on Respondents' motion to intervene in the Florida case that the Consent Order permitted UGI to pay, and Atrium to receive, ceding payments after the entry of the Consent Order. As UGI explained, the ceding payments were permitted by the Bureau:

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

- "United Guaranty adequately represented [PHH's] interests by including a provision that declared the ceded payments from United Guaranty to be lawful." *Id.*

CFPB v. United Guaranty Corp., No. 13-cv-21189 (S.D. Fla. Feb. 14, 2014), UGI's Memorandum in Opposition to Respondents' Motion to Intervene in the Florida case ("UGI Mem."), ECF No. 18. As a result, and in reliance on the Bureau's acquiescence, UGI gave—and Atrium received— private mortgage insurance premium ceding payments for approximately two months, under agreements previously in place.

At the March 5, 2014 hearing on Respondents' motion to dismiss, the Bureau sought to explain that allowing payments on existing agreements to continue was to serve as a "pragmatic carve-out" for "very limited conduct," which was within the Bureau's "discretion." Mar. 5 Tr. at 54-55.[24] Indeed, the Bureau conceded that "[t]here is no argument or contention the Bureau has sought to prevent the ceding of premiums on the contracts; that was *allowed* to happen for a period of less than two months." Transcript of March 10, 2014 Hearing on Motion to Intervene at 22, *CFPB v. United Guaranty Corp.*, No. 13-cv-21189 (S.D. Fla.) (ECF No. 30) (emphasis added).[25]

The Bureau's contention that this so-called "carve-out" should have no preclusive effect in this matter is without merit. The issue is not merely that the Consent Order permits the

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[24] As Respondents have explained, the compliance reports submitted by the settling MIs demonstrate that there were more than 160 arrangements in place as of the date of the entry of the Florida Consent Orders; that there were ceding payments totaling millions of dollars to reinsurers other than Atrium subsequent to the entry of those Orders; and that the ceding payments continued throughout 2013 and appear to be expected to continue in 2014 as well. *See* Respondents' Notice of Clarification served March 13, 2014.

[25] Since the Tribunal is taking judicial notice of the proceedings in the Florida UGI case, a copy of the Transcript of the March 10, 2014, Hearing on the Motion to Intervene, not yet available on Pacer, is submitted herewith as Exhibit A, and Respondents request that the Tribunal take official notice of the transcript as well. Respondents also note for the record that they have appealed the District Court's denial of their motion to intervene on the ground of timeliness.

payments, but also that *the Bureau itself*, in Enforcement Counsel's words *"allowed"* the continued ceding payments. Discovery in this action now demonstrates that the Bureau and the MIs were fully aware of the issue of continued ceding payments under existing agreements such as the one between UGI and Atrium, yet the Bureau had no intention of letting that stand in the way of getting a settlement. Protective Order [redacted] But the Bureau still demanded the inclusion of language "requiring the MIs to comply with Section 8 and RESPA." *See* Exhibit C, hereto (Email from Lucy Morris to Erika Lee Brown dated February 20, 2013, CFPB-PHH 1354731 at 1354732).[26]

[26] If the MIs did not settle with the Bureau, they were faced with a costly investigation which included complying with the Bureau's overly broad CID. In the case of MGIC for example, the scope of the CFPB's CID was so broad that MGIC found it necessary to file a petition to modify or set aside the CID. A copy of the petition is available on the CFPB's website at: http://files.consumerfinance.gov/f/201311_cfpb_mgic-investment_petition.pdf. In support of its petition, MGIC submitted a declaration of Dan D. Stilwell, Vice President-Chief Compliance Officer, Assistant General Counsel and Assistant Secretary at MGIC. In his declaration, Mr. Stilwell estimated that just the production of emails and electronic records responsive to the CID alone would cost MGIC in excess of $5.25 million. Stilwell Declaration ¶ 7, available at: http://files.consumerfinance.gov/f/201311_cfpb_mgic-investment_declaration.pdf. MGIC ultimately settled with the CFPB and as part of the settlement, MGIC agreed to pay a civil

Judicial estoppel "seeks to prevent a litigant from asserting a position inconsistent with one that [he or she] has previously asserted in the same or a previous proceeding." *Macfarlan v. Ivy Hill SNF, LLC*, 675 F.3d 266, 272 (3d Cir. 2012) (alteration in original) (quoting *Ryan Ops. G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996)). "The doctrine exists 'to protect the integrity of the judicial process and to prohibit parties from deliberately changing positions according to the exigencies of the moment." *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)). In addition to court proceedings, judicial estoppel applies in administrative proceedings as well. *See W.T. v. Gulf Concrete, L.L.C./Bayou Concrete Co., Inc.*, 40 Ben. Rev. Bd. Serv. (MB) 864 (2006) (applying judicial estoppel in federal administrative proceeding to preclude party from taking position inconsistent to the position he had taken previously before a bankruptcy court); *see also Trs. In Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346 (Fed. Cir. 2010) (applying judicial estoppel to preclude an argument that was inconsistent with an argument made in prior administrative proceeding); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996) (noting that "the truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law").

As the Third Circuit has explained:

> Judicial estoppel may be imposed only if: (1) the party to be estopped is asserting a position that is irreconcilably inconsistent with one he or she asserted in a prior proceeding; (2) the party changed his or her position in bad faith, i.e., in a culpable manner threatening to the court's authority or integrity; and (3) the use of judicial estoppel is tailored to address the affront to the court's authority or integrity.

Montrose Med. Grp. v. Bulgar, 243 F.3d 773, 777-78 (3d Cir. 2001). In this case, all three factors are satisfied.

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money penalty in the amount of $2.65 million, or for only 50% of the estimated cost of compliance with the CID.

First, there can be no doubt that the Bureau's positions are "inconsistent." In asking four federal judges to approve and enter the Florida Consent Orders, which permit "the ceding of premiums on policies originated as of, and subject to Arrangements already in existence as of, the date of entry of th[e] Order" the Bureau necessarily—and consistently—took the position that payments of reinsurance premiums to mortgage lenders' captive reinsurers were legal, and established that the MIs could continue making such payments without violating RESPA. *See*, *e.g.*, UGI Order at 5. The Florida Consent Orders both explicitly permit such payments under existing agreements to continue, and release the MIs from liability for those payments under the existing agreements. *See*, *e.g.*, UGI Order at 12.

Second, the Bureau's sudden and unexplained reversal evidences bad faith. Courts find bad faith where a party has "behaved in a manner that is somehow culpable," and has done so "vis-a-vis the court." *Montrose Med.*, 243 F.3d at 781. Such culpable behavior is found where, for example, "intentional self-contradiction is being used as a means of obtaining unfair advantage," *Scarano v. Cent. R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) (quoted by *Ryan Ops.*, 81 F.3d at 362), or a litigant "'play[s] fast and loose' with the court[.]" *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996), *explained on other grounds by Motley v. N.J. State Police*, 196 F.3d 160, 163 (3d Cir. 1999). Here, the Bureau—represented, incidentally, by the same enforcement attorneys—has taken the contradictory positions that the *same ceding payment* violates RESPA when it is *received* by Atrium from an MI, but does not violate RESPA when it is *paid* by an MI to a captive reinsurance company such as Atrium. That is impossible, because giving and receiving are two sides of the same RESPA coin. If a payment is prohibited, RESPA criminalizes both "giving" and "accepting" it. 12 U.S.C. § 2607(a) ("No person shall give and no person shall accept any fee, kickback, or thing of value . . . ."); § 2607(b) ("No person shall give and no person shall accept any portion, split, or percentage of any charge . . . .").

Third, it is an affront to both judicial and administrative integrity to permit the Bureau to obtain an order that permits illegal conduct to continue; however, that is exactly what has happened if the Bureau is to be believed. It is well-settled that a court cannot enter an order permitting illegal activity to continue. *See, e.g.*, *Stoval v. City of Cocoa, Fla.*, 117 F.3d 1238, 1240 (11th Cir. 1997) ("District courts should approve consent decrees so long as they are not unconstitutional, unlawful, unreasonable, or contrary to public policy."); *Howard v. McLucas*, 871 F.2d 1000, 1008 (11th Cir. 1989) (district court must "ensure that [consent order does] not violate federal law"); *United States v. City of Miami, Fla.*, 664 F.2d 435, 440-41 (5th Cir. 1981) (en banc) (a court must ensure that a consent order "does not put the court's sanction on and power behind a decree that violates . . . [a] statute"); *Williams v. Vukovich*, 720 F.2d 909, 925 (6th Cir. 1983) (vacating consent decree as "illegal" where it "contain[ed] impermissible waivers of future" statutory violations); *Robertson v. N.B.A.*, 556 F.2d 682, 686 (2d Cir. 1977) ("*[A] settlement that authorizes the continuation of clearly illegal conduct cannot be approved*, but a court in approving a settlement should not in effect try the case by deciding unsettled legal questions.") (emphasis added).

This Tribunal previously denied Respondents' judicial estoppel argument on the ground that because no defendant had been found liable in a RESPA case involving pmi reinsurance, the Bureau was entitled to settle with the MIs while continuing to prosecute the counterparty lenders.[27] The Tribunal's upholding of the Bureau's inconsistent conduct on the basis of a

[27] At the hearing in this matter, the following colloquy took place:

purported "unsettled" area of RESPA law requires reconsideration. First, there is certainly no dispute that RESPA has been enforced criminally. Indeed, Respondents brought to the Tribunal's attention the fact that there were four criminal convictions under RESPA involving clerks at the Cook County Recorder of Deeds. *See United States v. Gannon*, 684 F.2d 433 (7th Cir. 1981) (en banc). Attached hereto as Exhibit D is a Department of Justice Press Release, dated June 16, 2008, wherein the government announced that a mortgage broker had pled guilty to three counts of paying kickbacks in violation of RESPA.

Second, as exemplified by *Freeman*, the Supreme Court did not need an adjudicated RESPA case to analyze the plain language of the statute and reject the government's interpretation, as argued in its amicus brief. *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* and to hold otherwise "would make lawbreakers of consumers—the very class for whose benefit § 2607(b) was enacted, *see* § 2601").

> JUDGE ELLIOT: I read the transcript [from the Florida proceeding] and, at one point, I think it was Mr. Kim who commented that something -- I don't remember the exact words, but something to the effect of, there has never been a case under RESPA where a defendant has been found liable in a litigated case. There have been several cases. There have been cases that have been dismissed or otherwise, found in favor of the defendant. There are cases still pending; such as Munoz, but no one has ever been found liable under RESPA as a result of a litigated case. And let me ask Mr. Kim very quickly. Am I mischaracterizing your argument?
>
> MR. KIM: That's, in essence, correct.

Mar. 24 Tr. at 27-28. The next day, Mr. Kim clarified this statement, explaining that he meant that "no specific captive arrangement had ever been held to be illegal under RESPA, let alone the specific ones that are at issue here. It wasn't that RESPA had never been enforced." Mar. 25 Tr. at 220. As explained herein, this explanation is of no consequence.

Finally, try as it might, the Bureau has not been able to provide any legal support for what has occurred here – the Bureau has released UGI from liability for continuing to make payments to Atrium, the Bureau has obtained an Order from a District Court that these payments are permissible and that UGI is in compliance with RESPA while making these payments; yet, at the same time, the Bureau believes it can prosecute a RESPA claim against Respondents for the very same payments. There is no supporting case law for the Bureau's action because it is legally unsupportable.

The Bureau cannot have it both ways, and having obtained millions of dollars by convincing federal judges to approve Consent Orders that permit the MIs to continue ceding payments, it cannot now assert that those same payments are illegal in an attempt to recover millions more from Respondents. Because the Bureau is judicially estopped from asserting that the ceding payments violate RESPA, Respondents are entitled to dismissal of any claims based on the receipt of ceding payments or, in the alternative, at a minimum for conduct occurring after the entry of the Florida Consent Orders.

CONCLUSION

The Bureau's Notice in this matter is subject to dismissal. The Bureau's attempt to penalize conduct that occurred before it came into existence faces insurmountable hurdles. As of July 21, 2011, the date the Bureau came into existence, all four of the reinsurance agreements originally entered into by Atrium were in run-off, and two had already been commuted with the return of all premiums, capital contributions and earnings. The remaining two reinsurance agreements were commuted before this action was filed. Further, the Bureau has not pled any facts in support of an assertion that, as of July 21, 2011, Respondents had any intention of entering into any new reinsurance arrangements in the future. For that reason, there is no basis for the award of injunctive relief. Any attempt by the Bureau to attach other liability to Respondents' conduct before the enactment of the CFPA and the creation of the Bureau runs afoul of the strict prohibition against retroactive application of increased penalties for past conduct. Nor can the Bureau salvage its claims by asserting that it is not bound by RESPA's three-year statute of limitations. There is no legal support for the proposition that Dodd-Frank was intended to "revive" claims where the statute of limitations had run. Nor can the Bureau use its authority to displace state insurance regulators and, in any event, neither Atrium nor Atrium Re belongs in this administrative proceeding.

Dated: April 18, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

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CERTIFICATION OF SERVICE

I hereby certify that on the 18th day of April, 2014, I caused a copy of the foregoing Renewed Motion to Dismiss the Notice of Charges, and the accompanying Brief, to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties who have consented to electronic service:

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