UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of:	)
PHH CORPORATION, **PHH MORTGAGE CORPORATION,** **PHH HOME LOANS LLC,** **ATRIUM INSURANCE CORPORATION,** **and ATRIUM REINSURANCE CORPORATION**	)

ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE INTO THE RECORD

Filed under Seal

Introduction

PHH seeks to re-open the record some ten months after exhibits were due, six months after the hearing record closed, six weeks after the recommended decision issued, and simultaneous with its appeal, arguing that due process should allow the inclusion of new evidence because the Notice of Charges (NoC) supposedly did not provide adequate notice of all of the litigated issues and PHH did not predict the precise reasoning of the ALJ's recommended decision. To allow an exception to the rules for PHH here would be an injustice and compromise the efficiency and fairness of the Bureau's investigations and administrative process. First, due process does not require the NoC to plead counter-arguments to PHH's affirmative defenses. Second, PHH artificially demarks a line between the argument that Atrium's reinsurance had no value, and the argument that it had too little value,[1] and urges that they required separate notice and different evidence to prove or rebut. But due process does not require such exacting pleading, and even if it did, Enforcement provided plenty of notice of both arguments – which are simply different ways of expressing the same view that Atrium's pricing was excessive.

PHH's motion must also be denied because it makes no attempt to explain how admission of the additional documents is necessary to remedy any harm arising from the due process violations it has alleged. In fact, there is no connection between the allegedly insufficient notice and PHH's failure to submit those documents before the ALJ. PHH's motion is an attempt to circumvent the deadlines in this proceeding.

[1] PHH's argument appears to hang on the wafer-thin reed of brief, off-the-cuff remarks by the ALJ from the bench. *See* PHH App. Br. at 16-17. That the ALJ happened to refer to "overbilling" as an "alternative theory," **Tr. 962-63** (Mar. 28, 2014), rather than as one expression of the same theory that PHH's reinsurance was overpriced, does not in fact render it a different theory for purposes of the notice and due process inquiry, and, as shown below, it is not.

Finally, PHH seeks to introduce documents it should have submitted ten months ago—and in one case, a document it wrongly withheld from production in response to a Civil Investigative Demand. To allow PHH to introduce evidence at this stage is not protecting due process; it is encouraging delay, deceit, and inefficiency.

Background

On January 29, 2014, Enforcement filed the NOC alleging that PHH violated RESPA Section 8. The NoC contains, among others, the following numbered paragraphs:

> **64.** In practice, the captive arrangements entered into by Respondents effectively prevented any real transfer of risk from the MIs. As a result, **Respondents, through Atrium, received payments, in the form of ceded premiums, that were worth far more than, and were not reasonably related to, the value of any services purportedly provided by Atrium.**
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> **96.** The premiums ceded by the MIs to PHH through Atrium: (a) were not for services actually furnished or performed, or (b) **grossly exceeded the value of any such services**.
>
> NoC (emphases added).

In its Answer, PHH pled as an affirmative defense that Enforcement's claims were barred by Section 8(c). Answer ¶ 12. To support that defense, PHH has argued that the price charged by Atrium was commensurate with its value. *See, e.g.*, Dkt. 178, at 2 ("Respondents offered proof that the premiums received were commensurate with the risk it assumed….").

On May 22, 2014, the ALJ issued an Order (May Order, Dkt. 152) ruling that Section 8(c)(2) was an affirmative defense on which PHH bore the burden of proof. May Order, at 3-4.

Argument

I. There was no due process violation because Enforcement was not required to disclose its responses to PHH's Section 8(c)(2) affirmative defense in its Notice of Charges

Whether the price charged by Atrium was commensurate with the value, if any, of Atrium's purported reinsurance is a factual issue that went to PHH's Section 8(c)(2) affirmative defense. Therefore, that issue was necessary to resolve PHH's "claims" – not Enforcement's. When

Enforcement filed the NoC, it was not required to anticipate that PHH would raise a Section 8(c)(2) affirmative defense or include in the NoC any responses to such a defense. Moreover, because PHH bore the burden of establishing the factual basis of that defense at the hearing, including its claim that Atrium charged a reasonable price, Enforcement was entitled to prove its responses to those claims at the hearing, including showing that the price was excessive. There is no merit to PHH's argument that its due process rights were violated based on its characterization of the NoC.[2]

II. Even if Enforcement's claims were at issue, there was no due process violation because PHH was fully notified of Enforcement's argument that Atrium charged an excessive price

Even if the reasonableness of Atrium's pricing were an issue necessary to resolve Enforcement's claims, rather than PHH's affirmative defense, the NoC provided sufficient notice of Enforcement's argument that Atrium's pricing was excessive. For purposes of due process, "[i]t is sufficient if the [petitioner] 'understood the issue' and 'was afforded full opportunity' to justify its conduct during the course of the litigation." *Flying Food Grp., Inc. v. N.L.R.B.*, 471 F.3d 178, 183 (D.C. Cir. 2006) (quoting *NLRB v. Mackay Radio & Tel. Co.,* 304 U.S. 333, 350 (1938)); *accord Katz v. S.E.C.*, 647 F.3d 1156, 1161-62 (D.C. Cir. 2011). This is because "[t]he primary function of notice is to afford respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation of events that refutes the charge of unlawful behavior." *Pergament United Sales, Inc. v. N.L.R.B.*, 920 F.2d 130, 135 (2d Cir. 1990) (citations omitted). Given the passages from the NoC cited above, PHH cannot plausibly argue that it "did not underst[and] the issue" or was not "afforded full opportunity to justify its conduct." *Flying Food Grp, Inc.*, 471 F.3d at 183

[2] To be sure, until the ALJ correctly ruled that Section 8(c)(2) was an affirmative defense on which PHH bore the burden, Enforcement faced the possibility that the ALJ might hold that it, rather than PHH, bore the burden of proof on Section 8(c)(2). This accounts for Enforcement's pleading up to that time, including the cited paragraphs in the NoC. But those paragraphs were certainly not required in the NoC.

(quotations omitted); *accord Katz*, 647 F.3d at 1161-62.[3]

But even had these passages been absent from NoC, there is no requirement that "notice" must be provided in the document initiating the administrative proceeding. This is clearly shown in a case PHH cites, but in language it omits: "So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency *even though the formal pleadings did not squarely raise the issue*." *Nat'l Realty & Const. Co. v. O.S.H.R.C.*, 489 F.2d 1257, 1264 (D.C. Cir. 1973) (emphasis added; citations omitted). Thus, although the NoC did "squarely raise the issue[s]" in question, this was not even necessary.

None of the other cases PHH cites announce a different standard. Some are distinguishable from this case in that they found an administrative order defective because it was based on distinct theories or facts of which – unlike here – respondents were not, in fact, given notice.[4] And some others fail even to find a violation.[5] For instance, in *Rapp v. O.T.S.*, 52 F.3d 1510 (10th Cir. 1995) the

[3] In assessing the adequacy of the NOC generally on the Motion to Dismiss, the ALJ noted that "[t]he Notice has fifteen pages of often very specific factual allegations, which are considerably more than mere '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,' or 'naked assertion[s]' lacking 'further factual enhancement.'" March Order at 7 (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009), citing *Bell Atlantic Com. v. Twombly,* 550 U.S. 544, 570 (2007)). The ALJ therefore held that "the Notice satisfies *Iqbal*, *Twombly*, and its progeny, even assuming that they apply…." *Id.* But while the NoC met the pleading standards applicable to a federal civil complaint, it did not have to. The D.C. Circuit has "long held" that "[p]leadings in administrative proceedings are not judged by the standards applied to an indictment at common law." *Flying Food Grp.*, 471 F.3d at 183 (quotations and citations omitted); *see id.* ("[E]ven if there had been some ambiguity in the complaint, that would not have been grounds for dismissal.").

[4] For instance, the court in *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968), cited by PHH regarding "chang[ing] theories in midstream," *id.*, Mot. Br. at 4, vacated on due process grounds an FTC order that was based not simply on a different theory but "on a *contrary* theory" to the one followed by the hearing examiner, *Rodale Press, Inc.*, 407 F.2d at 1256 (emphasis added), something PHH has not asserted, and that plainly did not occur here.

[5] Although the court in *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971) upheld petitioner's due process argument, the Sixth Circuit held much more recently that where "[t]he specificity and detail of the [initiating document], as clarified by the pre-hearing brief, provided [petitioner] with notice with the nature of the [agency's] case," "[t]he case … bears no resemblance to the procedural

10th Circuit held no due process violation had occurred in the administrative adjudication under review, noting that "[n]otice is sufficient as long as the party to an administrative proceeding is *reasonably apprised* of the issues in controversy and is not misled. *Wyo. v. Alexander*, 971 F.2d 531, 542 (10th Cir. 1992)." *Id.* at 1520 (emphasis added; other citation omitted). The court also explained that "to establish a due process violation, petitioners must demonstrate that they have sustained prejudice as a result of the allegedly insufficient notice," but held that petitioners failed to do so. *Id.*

And in *Golden Grain Macaroni Co. v. FTC,* the Ninth Circuit found no due process violation, except as to the smallest part of the challenged transaction. 472 F.2d 882, 886, 887 (9th Cir. 1972). The court held that "there is no due-process violation, if the party proceeded against 'understood the issue' and 'was afforded full opportunity' to justify its conduct," *id.* at 885-86 (quoting *Mackay Radio*, 304 U.S. at 350; other citations omitted), and stressed notice and substance, not formalities:

> [T]he initial complaint, while hardly a model of clarity, put Golden Grain *on notice that the specific practices as well as the alleged over-all scheme* … were being challenged. Moreover, an examination of the proceedings subsequent to the complaint demonstrates that *while there was some confusion as to the nature of the charge, all facts relevant to the alleged unlawful acts were fully litigated. Actual litigation* is often referred to in support of a holding that a party was not prejudiced by initially inadequate pleadings.
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> *Id.* at 886 (emphases added; citations omitted).

The *Golden Grain* court also noted that (in contrast to this case) there was "an obvious difference between" the two separate provisions of two entirely different statutes that were at issue there – one charged and one not charged – and this was the basis of appellants' due process claim. *Id.* at 886. But in finding no violation, the court found it sufficient that "the facts at issue under the two standards …were identical," and "the 'basic policies' of these two prohibitions are the same." *Id.*

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violations in *Bendix*," and "the agency adjudication was procedurally adequate." *Volkman v. U.S. Drug Enf. Admin.*, 567 F.3d 215, 221 (6th Cir. 2009).

Here, only one statutory provision, RESPA Section 8(c)(2), is at issue. Though the relevant evidence can be complex, it is aimed at answering a straightforward question: how much was Atrium's reinsurance worth relative to its cost? Beginning with the NoC and continuing through "actual litigation," PHH was repeatedly notified of Enforcement's argument that Atrium charged an excessive price in relation to the value of its purported reinsurance, including the "specific practices" and the "overall scheme" that Enforcement argued resulted in that disparity. For example:

- In a brief filed on February 20, 2014, Enforcement wrote that "[w]hile RESPA may not impose a 'price control' on fees charged to borrowers, it undoubtedly 'controls' the price of referrals. The only allowable kickback fee is $0." EC Opp. to 1st MTD, Dkt. 41, at 16.

- Enforcement's pre-hearing brief discussed these issues, referred to "Respondents' pricing for 'reinsurance,'" Dkt. 74, at 3, and "the price of its reinsurance," *id.* at 4, and quoted the HUD Letter for the view that ceding must be "*bona fide* compensation that does not exceed the value of such [reinsurance] services," *id.* at 14.

- And – contrary to PHH's assertion[6] – the argument section of Enforcement's post-hearing brief contained a twelve-page section entitled "The compensation the MIs paid to Atrium was grossly excessive." Dkt. 177, at 136-148. *See also* EC Post-Hearing Response Br, Dkt. 184, at 99-102 (discussing Enforcement expert's "opinions regarding pricing" and "pricing analysis").

Moreover, the expert report submitted on March 3, 2014 by Enforcement's expert Mark Crawshaw contained an entire section devoted to "ANALYSIS OF ATRIUM'S COMPENSATION," which provided an analysis of why the premiums charged by Atrium were excessive, along with another section that identified flaws in the analysis of Atrium's pricing performed by PHH's actuary, Milliman. **Crawshaw Rpt.**, Dkt. 55, at 59-61, 72-76. While Crawshaw believed that Atrium's reinsurance had no value, his pricing analyses nonetheless demonstrated that Atrium's premiums would be excessive *even if one assumed for the sake of argument that Atrium's reinsurance had value.*[7] That

[6] *See* Mot. Br. at 2 ("neither EC nor the ALJ found that the premiums ceded by the MIs 'grossly exceeded the value of such services' as alleged in the Notice of Charges.")
[7] **Crawshaw Rpt.**, Dkt. 55, at 59-61 (opining that Atrium's pricing resulted in a 40% expected profit margin that greatly exceeded the approximately 10% expected profit margin that would be expected

conclusion is totally consistent with Enforcement's argument that Atrium's reinsurance was overpriced because it had no value. If the price would be excessive even if Atrium's reinsurance had some value, then the same price is even more excessive if the reinsurance had no value. There is no conflict between these two propositions. Moreover, regardless of how Enforcement described its excessive-pricing argument, the evidence required of PHH to show that Atrium's pricing was not excessive would be the same. Either way, PHH would have to quantify the value of Atrium's reinsurance, and show that its price was commensurate with that value.

Throughout this proceeding, PHH showed it understood that the value of Atrium's reinsurance was at issue, including if that value were more than zero (i.e., Atrium assumed some significant amount of risk from the arrangements). Indeed, PHH repeatedly sought to bar Enforcement from arguing that Atrium's price was excessive if Atrium provided value, indicating its belief that Enforcement was making that argument. For instance, in a motion to dismiss filed just two days after the NoC was filed, PHH argued that the NoC "seeks to have it both ways – the payment for the reinsurance was either an 'overcharge' for the services rendered; or was a payment for which no services were performed" and "[u]nder either theory, however, the Notice is subject to dismissal." *See* PHH 1st Mot. to Dis. Br., Dkt. 18, at 26.[8] PHH also argued that "the CFPB is barred from alleging a RESPA violation based on the allegation that the *premium was 'excessive' for the risk that was assumed*." *Id.* at 28 (emphasis added).[9]

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had Atrium provided some value); *id.* at 74 ("The purpose of this analysis is simply to use the expected profit margin of a true-risk bearing entity such as Genworth as a baseline of comparison to show that Atrium's profit margin would be highly unreasonable and excessive *even if Atrium were also a true-risk bearing entity that assumed a similar amount of risk as Genworth* (it did not, for the many reasons I have discussed).") (emphasis in original).

[8] PHH's argument regarding pricing, however, confused prices to consumers with prices to MIs. *Id.* at 25-29.

[9] Likewise, in its prehearing brief, PHH argued that under "RESPA's Section 8(c)(2) safe harbor provision … once a service has been provided, *the cost of the service cannot be scrutinized*." Dkt. 67 (Mar.

Given the statements in the NoC and the sustained focus on these issues throughout the proceeding, it is ludicrous to assert – as PHH must show to prevail on its due process claim – that PHH was not "reasonably apprised of the issues in controversy," *Rapp*, 52 F.3d at 1520, that it did not "underst[and] the issue," or that it was not "afforded full opportunity to justify its conduct," *Golden Grain*, 472 F.2d at 885. And there is simply no merit to PHH's argument that "the ALJ alone pursued the theory" that Atrium's premiums exceeded the value of its reinsurance services. Mot. Br. at 2 n.1. There was no due process violation.

III. The ALJ's citation to documents not referenced at the hearing or in the post-hearing briefs was appropriate and does not constitute a due process violation

Citing no authority, PHH objects to the RD's citation to certain exhibits that were not sponsored by a witness at the hearing or not raised in Enforcement's Post-Hearing Brief. The ALJ's use of these exhibits is entirely permissible under the Administrative Procedure Act (APA) and the Bureau's Rules of Practice for Adjudication Proceedings (Rules).

The provision of the APA cited by PHH makes clear that an ALJ can rely on: (1) documentary evidence, as opposed to oral testimony; and (2) parts of the record other than those cited by a party. It states that "[a] party is entitled to present his case or defense by oral *or* documentary evidence," and also provides that an order may not be "issued except on consideration of the whole record *or* those parts thereof cited by a party …." 5 U.S.C. § 556(d) (emphases added).

The Rules mirror APA Section 556(d). Rule 303(a)(3) provides that hearsay is admissible in this proceeding.[10] 12 C.F.R. § 1081.303(a)(3). This is consistent with rules in other types of

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19, 2014), at 9 (emphasis added). This misreading of Section 8(c)(2) has been rejected by the ALJ, March Order, Dkt. 67 (Mar. 13, 2014), at 6-8, May Order, Dkt. 152, at 3, but it shows clearly that PHH understood Enforcement was arguing that the cost of Atrium's purported reinsurance was subject to scrutiny in this proceeding even PHH could establish that a service of some value was provided.

[10] To the extent PHH's concern relates to authenticity of the exhibits, 66 of the 75 documents listed in Exhibit A are PHH's own documents, *compare* Mot. Br. at Ex. A *with* Dkt. 162 (joint exhibit list),

administrative proceedings. *See*, *e.g.*, *Gray v. U.S. Dep't of Agric.*, 39 F.3d 670, 675-76 (6th Cir. 1994) (citing 5 U.S.C. § 556(d) to hold that hearsay is admissible in USDA administrative proceeding).[11] And Rule 400(c) provides: "A recommended decision *shall be based on a consideration of the whole record* relevant to the issues decided." 12 CFR § 1081.400(c) (emphasis added). Thus, the Rules *required* the ALJ to consider the entire record, and there is no dispute that the exhibits at issue are part of the record. PHH never objected to the inclusion of these exhibits in the record, and it does not contend even now that the exhibits are not "relevant to the issues decided."

PHH has waived any right to object to the inclusion of the exhibits at issue in the record. The ALJ properly considered the entire record, and his reliance on those exhibits – in addition to abundant other evidence cited in the RD – was appropriate under the Rules and the APA[12] and did not constitute any due process violation.

IV. PHH has not shown how admission of the additional documents is necessary to remedy any harm from the due process violations it has alleged

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and are therefore presumptively authentic, and the burden of proof is on PHH to prove otherwise, 12 C.F.R. § 1081.303(d)(4).

[11] In *Malave v. Holder*, the Seventh Circuit explained that "[h]earsay is regularly used in administrative litigation" and noted that "[i]n *Richardson v. Perales,* 402 U.S. 389 (1971), the Justices roundly rejected the argument that the due process clause creates for administrative adjudication the same constitutional requirement of live testimony that the confrontation clause establishes for criminal trials" and that the *Richardson* court "added that hearsay could supply substantial evidence for an administrative decision." 610 F.3d 483, 487 (7th Cir. 2010) (other citations omitted).

[12] Nor is there anything unusual about the ALJ's citation to documents not cited by Enforcement. Courts routinely exercise their discretion to review the record on their own, rely on parts of the record not cited by a party, and perform analysis of the record not presented by a party. *See*, *e.g.*, *Ward v. City of Birmingham*, No. 2:12-CV-00257-WMA, 2013 WL 541429, at *4 (N.D. Ala. Feb. 8, 2013) ("Only after searching the record on its own did this court find evidence of Ward's targeted references to FMLA retaliation."); *Harris v. C.I.R.*, 745 F.2d 378, 379 (6th Cir. 1984) ("The new figure arrived at by the Tax Court Judge appears to be based on his own study of the evidence."); *Svenson v. William Wrigley, Jr. Co.*, No. 95 C 4198, 1996 WL 705250, at *7 (N.D. Ill. Nov. 27, 1996) (noting that a party "fail[ed] to cite any evidence in the record to the contrary and the court can find no such evidence on its own examination of the record"); *Crespin v. Hawes*, No. EDCV 07-1348-AGMLG, 2008 WL 624938, at *8 (C.D. Cal. Mar. 5, 2008) *aff'd*, 368 F. App'x 776 (9th Cir. 2010) (noting that a party "fail[ed] to identify anything in the record that supports this allegation in any way, and the Court was unable to find such evidence on its own review").

PHH contends that it must be allowed to submit new documents into the record to remedy the due process violations it claims the ALJ committed. Setting aside the lack of merit in its due process claims, PHH's request must be rejected because it makes no attempt to explain *why* admission of those documents is necessary to mitigate any harm caused by the alleged due process violations. *See Rapp*, 52 F.3d at 1520 ("to establish a due process violation, petitioners must demonstrate that they have sustained prejudice as a result of the allegedly insufficient notice….").

As discussed, PHH's primary due process claim is that the ALJ pursued a theory of overpricing that was somehow different from the "noticed" theory. But even if they were two distinct theories (they are not), PHH does not contend that the documents are relevant to one and not the other, or that PHH otherwise failed to submit the documents before the ALJ as a result of that alleged distinction.[13] There is, in fact, no connection between the allegedly insufficient notice and PHH's failure to submit the documents before the ALJ. For example, PHH's asserted justification for admission of the CMG License Agreement is that it disproves the ALJ's finding that PHH referred MI business to CMG in exchange for premiums ceded to Atrium. Mot. Br. at 7-8. But PHH does not assert that the document rebuts any of the ALJ's conclusions regarding the price of Atrium's reinsurance in relation to its value.[14]

The false due process violations manufactured by PHH are simply a transparent attempt to circumvent the deadlines in this proceeding. The deadline for submitting hearing exhibits was Mar.

[13] Nor does PHH attempt to explain how those documents are necessary to rebut any finding in the RD that was based on the documents listed in its Exhibit A or any of the officially noticed facts alluded to on page 3 of PHH's brief.

[14] PHH contends that the Genworth documents are necessary to respond to the ALJ's finding that the Genworth 2008-B book year had no reinsurance value because PHH's withdrawal of a $5 million dividend violated an essential condition of risk transfer (as determined by its actuary, Milliman). Mot. Br. at 8; RD at 67. This is an admission that the alleged due process violation had no bearing on that finding, because it is consistent with what PHH contends is Enforcement theory of the case: that Atrium's reinsurance had no (as opposed to insufficient) value.

10, 2014, Dkt. 37, and the hearing record closed on July 14, 2014, Dkt. 171. There is no justification for PHH's failure to timely submit these documents before the ALJ.

This is especially the case because the issues that PHH contends justify their admission now (which, again, have nothing to do with the alleged due process violations) were very clearly and specifically raised in this proceeding long before the RD was issued. PHH knew that the CMG License Agreement was at issue as early as May 2014. May 22 Order at 17 (discussion of internal PHH email (ECX 0747) referring to the CMG License Agreement). The ALJ explained his belief that a contractual provision referenced in the email was from the CMG License Agreement and reflected an agreement to refer settlement service business to CMG in consideration of premiums ceded to Atrium. *Id.* Nonetheless, he declined to grant summary disposition in Enforcement's favor on the issue because, among other reasons, "it does not appear that the License Agreement is in evidence" and "it may be that CMG viewed the License Agreement as an agreement to license its name or intellectual property in return for referrals." *Id.* If PHH believed it was necessary to admit the CMG License Agreement to disabuse the ALJ of a mistaken understanding based on the internal PHH email, it should have moved to supplement the record shortly after the May Order was issued.

As for the Genworth documents, PHH contends they are necessary to respond to the ALJ's finding that PHH's withdrawal of a $5 million dividend from the Genworth trust account nullified Milliman's determination that the Genworth 2008-B book year passed risk transfer, and violated the terms of Atrium's agreement with Genworth. Mot. Br. at 8. PHH asserts that supplementation of the record is appropriate because "the ability to withdraw funds from the trust was the result of an issue never explored by EC, nor was it the subject of any testimony as it was mentioned only once by a witness during the hearing." *Id.* This is not true. Enforcement has provided repeated notice to PHH of its argument that Atrium's withdrawal of dividends from the trust accounts reduced risk

transfer.[15] And relying on testimony elicited at the hearing, in its Post-Hearing Brief Enforcement made the argument that Atrium's withdrawal of dividends from the Genworth trust account negated an essential condition of Milliman's conclusion that the Genworth 2008-B book year passed risk transfer. Enforcement's Post-Hearing Brief (EC Br., Dkt. 177) at 181. The impact of dividends on risk transfer has been a major theme throughout this proceeding, and Enforcement's specific argument based on the $5 million dividend has been known to PHH for months.[16]

V. PHH's submission of the CMG License Agreement and its failure to disclose an associated Asset Purchase Agreement raise serious concerns

PHH's proffer of the CMG License Agreement raises two troubling issues. First, PHH appears to have produced this document to Enforcement for the first time on the day it filed its appeal brief, yet the document is plainly responsive to at least one document request in the Civil Investigative Demand (CID) served by Enforcement on PHH on May 22, 2012.[17] PHH has made no attempt to excuse its noncompliance with the CID, or even to explain why this document has suddenly materialized, two and a half years late. PHH also did not respond to an emailed request from Enforcement on January 8, 2015, to supply the Bates number of the document if it had been produced. *See* 1/8/15 email, attached hereto as **Exhibit A**.[18] This is unethical, violates Bureau rules, and causes inefficiencies.

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[15] *See* NoC ¶¶ 61-62 (discussing risk-reducing impact of dividends, including a specific reference to the $5 million dividend); *id.* ¶ 26 (discussing MI concerns regarding impact of dividends on "availability of funds to pay claims"); Dkt. 42, ¶ 11 ("the captive arrangements … prevented any real transfer of risk …. At the first sign that significant claims might jeopardize its capital contributions, PHH could eliminate the risk … by withdrawing dividends").

[16] While Enforcement made the argument that the $5 million dividend violated one of Milliman's conditions of risk transfer, it did not note that the dividend also violated a term of the Fifth Amendment to the Genworth reinsurance agreement. The Bureau should reject PHH's attempt to excuse its tardiness based on this "distinction." The provision of the Fifth Amendment simply reflected Milliman's requirement that no dividends be withdrawn.

[17] *See* CID (Attached hereto as **Exhibit B**), *e.g.*, at 12 (Requests for Documents, ¶ 10).

[18] *See also* EC Br., Dkt. 177, at 29 n.8.

Even more seriously, PHH's belated disclosure of the CMG License Agreement, and its argument that the ALJ misinterpreted that agreement based on his reading of ECX 0747, an internal PHH email, appear to be a calculated attempt to mislead the Bureau. But for the fact that Enforcement, through its diligence, found another email produced by PHH (which is not a hearing exhibit) indicating that the ALJ correctly concluded that PHH and CMG entered into an explicit contractual referral agreement in violation of RESPA, and that he was mistaken only as to the name of the contract, PHH might have worked a serious injustice by withholding responsive documents and mischaracterizing those it decided to release.

In ECX 0747, a senior PHH executive wrote that the following contractual provision was contained in an "acquisition agreement" to which PHH is a party:

> During the term of the License Agreement, Purchaser agrees to (i) designate CMGMI as a preferred mortgage insurance provider in its correspondent channel, and (ii) use its commercially reasonable efforts to obtain primary mortgage insurance from CMGMI for loans closed by or for the benefit of credit unions doing business with Purchaser.

RD at 20 (quoting **ECX 0747**). The ALJ believed this provision was contained in the License Agreement. RD at 20-21, 74. Based on the provision, and other references in the email tying the referral of MI business to CMG's continued participation in its captive arrangement,[19] he concluded that the License Agreement was a written "agreement to refer real estate settlement business in consideration of premiums ceded to Atrium." RD at 74.

PHH seeks to admit the License Agreement referenced in the above email to show that "it contains nothing to support" the ALJ's conclusion. Mot. Br. at 8. But the clear implication of that assertion is that because the License Agreement does not contain the provision quoted in ECX

[19] The PHH executive also alluded to "getting the captive economics … nailed down," stated that a failure to renew the License Agreement would also result in termination of "new business into the captive" and opined that CMG would "be willing to re-negotiate the captive terms, since they could be losing the $280k licensing fee and all of the captive business…." *Id.* (emphasis in original).

0747, *no such written agreement existed*, so there exists "nothing to support" the ALJ's conclusion. PHH's representation is misleading because it omits material facts.

After PHH filed its motion, Enforcement located another document produced by PHH that indicates that the "acquisition agreement" referenced in ECX 0747 is an "Asset Purchase Agreement" that is different from the "License Agreement." PHH-00016305 (attached hereto as **Exhibit C**), at 1. This email shows that the quoted contractual provision on which the ALJ relied is contained in that Asset Purchase Agreement. But PHH did not produce to Enforcement the Asset Purchase Agreement between itself and CMG.

In this email, the same executive who authored ECX 0747 wrote to the then-CEO of PHH Corporation that "the obligation to direct MI to the captive runs concurrently with the License Agreement" and "[t]he operative terms are in the Asset Purchase Agreement and are set forth below." *Id.* He then quoted the same provision quoted in ECX 0747. The version quoted in this email, however, includes additional language explicitly tying PHH's agreement to refer to CMG's continued ceding of premiums to Atrium. It provides that CMG's agreement to "enter into a captive reinsurance arrangement" is a "condition" of PHH's agreement to refer MI business to CMG.[20] *Id.*

If Enforcement's understanding of the facts is correct,[21] PHH's decision to selectively disclose the License Agreement while concealing the Asset Purchase Agreement and failing to note

[20] PHH attempts to blame the ALJ for "draw[ing] erroneous conclusions" based on ECX 0747. Mot. Br. at 7. But the ALJ relied on ECX 0747 only because PHH failed to produce both agreements, so PHH's misconduct is the cause of any mistaken understanding regarding the location of the provision. More importantly, PHH makes no attempt to explain the senior executive's statements reflected in ECX 0747. Regardless of whether those statements were based on the License Agreement, another document, or an undocumented understanding between PHH and CMG, they are ample evidence of an agreement to refer real estate settlement business to CMG in consideration of premiums ceded to Atrium.

[21] Prior to filing this response, Enforcement sent an email to counsel for PHH seeking confirmation that its understanding was correct, and stating that if PHH's counsel did not respond, Enforcement

that it contains the provision at issue raises serious ethical concerns. The Asset Purchase Agreement is also responsive to the CID and, if in PHH's possession, should have been produced.[22] PHH's failure to produce a document that explicitly contains a referral agreement in violation of RESPA is itself highly problematic. But more importantly, PHH now seeks to capitalize on its failure to produce the documents by strategically using only one of them, while continuing to conceal the other, to misrepresent the nature of the relationship between PHH and CMG.[23]

Additionally, if Enforcement's understanding of the facts is correct, then PHH's counsel, by signing this filing, may have violated Rule 108(b). It is unclear how PHH's counsel could have believed "after a reasonable inquiry" that implicitly representing that the ALJ was wrong to conclude that a written referral agreement between PHH and CMG existed was "well-grounded in fact" and not for "an improper purpose." 12 C.F.R. § 1081.108(b).

Conclusion

PHH's characterization of the ALJ's actions as "inquisitorial" has no basis in fact, and PHH's request to re-open the record may be seen for what it is: an improper and unjustified attempt to re-hear a case it was unable to win on the merits. Enforcement therefore respectfully requests that the motion be denied in its entirety.

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would assume that its understanding was correct. *See* 1/20/15 email, attached hereto as **Exhibit D**. PHH's counsel did not respond.

[22] Enforcement has been unable to locate the Asset Purchase Agreement among the documents produced by PHH. The Asset Purchase Agreement, like the License Agreement, is responsive to RFD 10 and should have been produced. For all of the reasons stated above, Enforcement believes the present motion should be denied. If, however, the motion is granted as to the unproduced License Agreement, Enforcement respectfully requests that PHH be required to produce the Asset Purchase Agreement and that the Asset Purchase Agreement and PHH-00016305 also be admitted.

[23] This is not the first time PHH has misrepresented facts to the Bureau in this matter. PHH also understated the profitability of its captive arrangements by several orders of magnitude in its NORA response in 2013. RD at 36; *see* EC Br. at 221-23.

DATED: January 26, 2015

Respectfully submitted,

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Enforcement Counsel

Certificate of Service

I hereby certify that on this 26th day of January 2015, I caused a copy of the foregoing "Enforcement's Opposition to Respondent's Motion for Leave to Submit Additional Evidence into the Record" to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service on behalf of Respondents:

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