UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU
March 13, 2014

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	: : : : : : :	ORDER DENYING MOTION TO DISMISS THE NOTICE OF CHARGES OR, IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION

On January 29, 2014, the Consumer Financial Protection Bureau (Bureau) filed a Notice of Charges Seeking Disgorgement, Other Equitable Relief, and Civil Money Penalty (Notice) in this proceeding. The hearing is scheduled to commence on March 24, 2014, in Philadelphia, PA.

On January 31, 2014, Respondents filed a Motion to Dismiss the Notice of Charges or, in the Alternative, for Summary Disposition, which included a brief (Motion), a Statement of Undisputed Facts (SOUF), and eight exhibits (Motion Exs. A-H). The Office of Enforcement (Enforcement) timely filed an Opposition (Oppo.), which included a Statement of Disputed Facts (SODF) and a Declaration of Donald R. Gordon, to which were attached twenty-five exhibits (Oppo. Exs. A-Y), and Respondents timely filed a Reply (Reply), to which was attached one exhibit (Reply Ex. 1), and a Response to the SODF (Response). I held oral argument on the Motion on March 5, 2014.

I. BACKGROUND

The Notice, the facts of which are taken as true in considering dismissal, pursuant to 12 C.F.R. § 1081.212(b), alleges as follows. Respondents are a family of companies with two general lines of business: PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans LLC (collectively PHH) offer and provide residential mortgages and mortgage loan products, and Atrium Insurance Corporation and its successor, Atrium Reinsurance Corporation (collectively Atrium), offer or provide "purported" reinsurance to mortgage insurance companies. Notice at 2. Atrium is wholly-owned by PHH Corporation. Notice at 2. PHH is a lender subject to the requirements of, and is a "person" under, Section 8 of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2602. Id. at 2. The home loans originated by PHH are federally related mortgage loans as defined in 12 U.S.C. § 2602(1) and 12 C.F.R. § 1024.2(b). Id. at 3. Mortgage insurance constitutes "business incident to or a part of a real estate settlement service" within the meaning of Section 8 of RESPA. Id. at 3 (citing 12 C.F.R. § 1024.2(b)).

A. Captive Reinsurance

Mortgage insurance is ordinarily required when a prospective borrower seeks a residential mortgage loan in excess of eighty percent of the value of the home. Notice at 3. Private mortgage insurance policies cover losses incurred by mortgage lenders in case of borrower default, and in such a case, the mortgage insurer pays to the lender a specified percentage of loss faced by the lender. Id. Although premiums are paid by borrowers, the lender typically selects the mortgage insurance provider; borrowers usually neither select, nor are given a meaningful opportunity to select, a mortgage insurance provider. Id.

Prior to the 2008 financial crisis, mortgage insurance was profitable enough that private mortgage insurance companies (MIs) highly valued referrals by lenders, and lenders sought to participate in the MIs' high profits. Notice at 3. To this end, PHH Corporation established Atrium in 1994 as a wholly-owned reinsurer, to provide purported reinsurance to MIs, which in turn provided mortgage insurance for loans originated by PHH. Id. at 4. In a typical reinsurance arrangement, a reinsurer agrees to assume a certain percentage of the primary insurer's risk, in return for the primary insurer "ceding" a portion of the premiums it receives to the reinsurer. Id. at 10.

Atrium entered into mortgage reinsurance arrangements, so-called "captive arrangements," with United Guaranty Corporation (UGC) in 1995, and General Electric Mortgage Insurance Corporation (later, Genworth Mortgage Insurance Corporation) (Genworth) in 2000. Notice at 4. Under each captive arrangement, PHH referred borrowers of loans it originated almost exclusively to UGC and Genworth; in exchange, UGC and Genworth paid Atrium a percentage of the borrowers' premiums (ceded premiums), purportedly in exchange for reinsurance coverage by Atrium. Id. The ceded premiums were paid by the MIs, and accepted by Respondents, after each mortgage loan transaction closed, pursuant to the captive arrangements. Id. Atrium never issued policies for loans originated by any lender other than PHH. Id. Atrium did not have any employees that were not also employees of PHH, and conducted no underwriting to price any reinsurance risks it purportedly assumed. Id.

B. Events Prior to 2008

During the late 1990s, MIs competed with one another to offer increasingly generous deals to lenders, including PHH, in what are known as "deep cede" captive reinsurance arrangements. Notice at 4-5. For example, by 1998, UGC was ceding forty percent of premiums it received to Atrium, and by 2000, Genworth agreed to cede forty percent of its premiums to Atrium, as well. Id. at 4. Nonetheless, the trade association for MIs privately expressed alarm to state insurance regulators in 1998, and requested limits on captive arrangements, including a limit on ceded premiums of twenty-five percent. Id. at 5. The MIs warned that deep cede arrangements would be financially detrimental to the mortgage finance industry, and that as deep cede arrangements became more favorable to lenders, they might ultimately amount to nothing more than revenue sharing arrangements, with no transferred risk. Id. at 5-6.

Until at least 2009, PHH manipulated its allocation of MI business to maximize reinsurance payments, and pressured MIs to purchase reinsurance from Atrium, with the understanding that the MIs would then receive borrower referrals from PHH. Notice at 7. From at least 1995 to 2001, UGC served as virtually the sole mortgage insurance provider to PHH. Id. UGC had the only captive arrangement with PHH until late 2000. Id. PHH controlled referrals of borrowers to MIs on its retail mortgage loans using an automated "dialer" system. Id. at 6. Genworth was added to the dialer in August 2001, ten months after it entered into a captive arrangement with PHH. Id. at 7.

From 2001 to November 2008, UGC and Genworth were the only two MIs on PHH's dialer. Notice at 7. The majority of PHH loans during this period, and all the PHH loans in which PHH controlled the allocation of MI business, were steered to UGC and Genworth, and four other MIs lacking captive arrangements with PHH received virtually no PHH business. Id. For example, Triad never received a referral from PHH, PMI received only one referral, and RMIC insured only two mortgages originated by PHH in 2008, notwithstanding its explicit appeal for referrals. Id. at 9-10. Another MI, Radian Guaranty Inc. (Radian), established a captive arrangement with PHH in 2004, and was able to obtain a small portion of PHH's business. Id. at 7; see Motion Ex. C. For PHH mortgage loans originated by correspondent lenders, PHH maintained a list of preferred mortgage insurance providers, and if a correspondent lender referred a borrower to an MI not on the preferred MI list, PHH charged an additional seventy-five basis points on the loan. Notice at 6.

In 2006, PHH issued a Request for Proposal (RFP) to allow MIs to compete for PHH business, which was intended to provoke MIs to compete over the terms of captive arrangements. Notice at 8. PHH personnel worked to extract the highest reinsurance payments possible, by holding out the promise of more referrals for favored MIs. Id. PHH used its ability to steer business to MIs as leverage to extract more favorable deep cede arrangements. Id.

C. The 2008 Crisis

The housing market and the mortgage insurance industry were collapsing by 2008. Notice at 9. Freddie Mac prohibited the use of deep cede captive arrangements in February 2008, but PHH nonetheless continued to use its existing captive arrangements to dictate its mortgage insurance referrals through 2008. Id. As late as May 2009, PHH executives directed that MI referrals should be maximally steered toward UGC because of PHH's profitable captive arrangement with UGC, and that PHH should avoid sending business to MIs without captive arrangements. Id.

PHH expanded its referrals to additional MIs with whom it lacked a captive arrangement only after it virtually stopped placing captive reinsurance on new mortgages. Notice at 10. At around the same time, UGC, Genworth, and other MIs tightened their standards, raising the prospect that some PHH-originated loans could not be insured unless other MIs were added to the dialer. Id. Mortgage Guaranty Insurance Corporation (MGIC) was added to the dialer in late November 2008, and Republic Mortgage Insurance Company (RMIC) was added in June 2009; by contrast, MGIC and RMIC together received no more than half a percent of all MI business originated by PHH in 2006 and 2007. Id. at 10; see Motion Exs. B, E. Although PHH planned to establish captive arrangements with MGIC and RMIC in exchange for referrals, the deals never came to fruition because of market conditions. Notice at 10.

D. Atrium's Captive Arrangements

Respondents' captive arrangements were structured as "excess-of-loss" deals, under which Atrium assumed liability for a specified "risk band" of losses on loans originated in a specified calendar year, or "book year." Notice at 11. Under such an arrangement, Atrium was only liable for reinsurance claims when the total amount of losses in a book year reached an "attachment" point, and its liability only continued until losses reached a ceiling, or "detachment" point. Id. Thus, Atrium's liability began, if ever, when the MI's losses reached the attachment point and ended when the MI's losses reached the detachment point. Id. All losses below and above the risk band were solely covered by the MI. Id.

Atrium's arrangements were structured generally as "4/10/40" deals. Notice at 11. Under such a deal, the MI paid all insurance claims until losses reached four percent of total insured risk for a given book year, Atrium was responsible for losses on the next ten percent of insured risk (i.e., for losses between the four percent attachment point and the fourteen percent detachment point), and any additional loss was the sole responsibility of the MI. Id. In return, the MI ceded, and Atrium received, forty percent of the insurance premiums. Id. From 1995 through 2008, MIs believed that there was a very low probability that losses in a book year would exceed four percent of insured risk. Id. at 13.

The ceded premiums were initially held in captive trust accounts controlled by PHH. Notice at 11. Each captive trust account held only two sources of funds, the ceded premiums and PHH's capital contributions. Id. at 11. That is, unlike a traditional insurer, which typically pools premiums from multiple insureds or puts great amounts of its own capital at risk, PHH segregated each MI's ceded premiums into a separate trust for each MI. Id. at 11-12. This reduced the likelihood that there would be sufficient funds available to pay claims, because an MI had no recourse to recover claims beyond the amount of the trust funds. Id. at 12. As a result, each MI had little chance of ever recovering more in reinsurance claims than it had paid in premiums, defeating the central purpose of insurance. Id.

Atrium's arrangements allowed PHH to eliminate the risk of losing its capital contributions by withdrawing dividends, so that the only funds remaining in each trust account were the MI's premiums and any investment income from those premiums. Notice at 12. In 2007, Atrium took a $52 million dividend from UGC's trust account, which exceeded Respondents' total capital contribution at that time. Id. As a result, the only trust money at risk thereafter was from ceded premiums and investment income, and when funds were needed to pay claims to cover catastrophic losses during the 2008 financial crisis, UGC could merely obtain a return of its ceded premiums, plus investment income, and no more. Id. Respondents also removed their capital contributions from Genworth's trust account as losses mounted. Id. Genworth received its first payments from the trust in 2009, when it received less than $1 million, out of more than $100 million in total ceded premiums since 2001. Id. In 2010, when Genworth received over $10 million in paid losses, Atrium took a $5 million dividend, which reduced Respondents' net capital contribution to just $500,000. Id. In 2011, when Genworth received over $12 million in paid losses, Atrium took an $8.9 million dividend, which eliminated Respondents' net capital contribution from the trust account. Id. at 12-13.

In the spring of 2006, PHH became concerned about increasing defaults on subprime loans, and decided to exclude such loans from the captive arrangements. Notice at 13. Accordingly, PHH used its control over referrals to obtain modifications to the UGC and Genworth captive arrangements so as to exclude subprime loans from reinsurance coverage; UGC and Genworth received nothing in return. Id. at 13-14. Doing so still allowed PHH to originate subprime loans, and to require mortgage insurance on them, but it reduced its reinsurance exposure. Id. at 13.

Between 1995 and 2013, Atrium never paid claims or made any other payments to MIs that exceeded the then-available funds in the corresponding captive trust account. Notice at 13. Upon expiration of the captive arrangements, PHH was expected to retain all remaining funds and receive a substantial windfall. Id. Through Atrium, Respondents received payments, in the form of ceded premiums, that were worth far more than, and were not reasonably related to, the value of the services provided. Id. The MIs could have ensured nearly the same result as the captive arrangements simply by self-insuring, that is, setting aside the same premiums in trust for themselves. Id.

E. Payments to PHH

Over the captive arrangements' lifespan, Atrium collected over $493 million in purported reinsurance premiums. Notice at 14. Atrium did not pay on any losses between 1995 and 2007. Id. Even after the 2008 financial crisis, Atrium's captive trust accounts held over $189 million, and PHH had earned an approximately twenty percent annualized internal rate of return from captive reinsurance. Id.

Atrium paid dividends to PHH of $17 million in May 2005, $52 million in March 2007 from the UGC trust, $16.5 million in June 2007, $19.25 million in August 2009, and $12 million in February 2010. Notice at 14-15. The March 2007 dividend was not permitted under the then-existing captive arrangement, because the withdrawal would have caused the funds in the trust account to fall below the required minimum capital. Id. at 15. PHH withdrew $52 million only after UGC agreed to an amendment to the captive arrangement. Id. UGC received no consideration under the amendment. Id.

Effective April 1, 2012, Atrium and Genworth agreed to end their captive arrangement, resulting in payment of more than $24 million to PHH. Notice at 15. Effective May 31, 2013, Atrium and UGC agreed to end their captive arrangement, resulting in payment of more than $69 million to PHH. Id.

II. DISCUSSION

A. Motion to Dismiss

The Bureau's Rule of Practice for Adjudication Proceedings (Rule) 212 permits a respondent to file a motion to dismiss. 12 C.F.R. § 1081.212(b). A motion to dismiss may be granted if, "even assuming the truth of the facts alleged in the notice of charges, [a respondent] is entitled to dismissal as a matter of law." Id. It is not clear from the Bureau's commentary to its Final Rule to what degree Rule 212(b) is based on Federal Rule of Civil Procedure (FRCP)

12(b)(6). 77 Fed. Reg. 39058, 39058-60, 39077-78 (June 29, 2012). However, although the standard for dismissal described in Rule 212(b) is not precisely the same as that described in FRCP 12(b)(6), of the various grounds for dismissal under FRCP 12, FRCP 12(b)(6) is plainly the provision most closely analogous to Rule 212(b). See generally Fed. R. Civ. P. 12(b)-(c), (e)-(f); see Zinermon v. Burch, 494 U.S. 113, 118 (1990) (in considering FRCP 12(b)(6) motion, all factual allegations of the complaint are taken as true). Accordingly, I find that rules and case law pertinent to FRCP 12(b)(6) are generally pertinent to Rule 212(b).

Respondents move to dismiss the Notice on the ground that it does not properly plead a claim under Section 8 of RESPA, that most of this action is barred by the statute of limitations, and that the entire action is barred by judicial estoppel. Motion at 25-32.

1. RESPA Section 8

RESPA Section 8(a), 12 U.S.C. § 2607(a), states:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

RESPA Section 8(b), 12 U.S.C. § 2607(b), states:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

RESPA Section 8(c), 12 U.S.C. § 2607(c), in pertinent part, states:

> 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.

Respondents argue, as to RESPA Section 8(b), that "the CFPB's allegation that the ceding payment[s] by the [MIs] to Atrium 'grossly exceeded or exceeds the value of any such service' in violation of Section 8(b) should be dismissed as completely without legal or factual support." Motion at 27. They argue similarly as to RESPA Section 8(a), because "the § 8(b) exception for payment of goods, facilities, and services is essentially the same as the § 8(c)(2) safe harbor," and the 8(b)/8(c)(2) exception therefore applies to Section 8(a). Reply at 10. Respondents cite to numerous cases holding that, to violate Section 8(b), one must "provid[e] no services at all." Freeman v. Quicken Loans, Inc., 566 U.S. –, 132 S. Ct. 2034, 2040 (2012); Motion at 24-29.

The Notice alleges that the premiums ceded to Atrium "were not for services actually furnished or performed." Notice at 17. Enforcement argues that it is not alleging that excessive fees or overages constitute the violation. Oppo. at 15. Instead, as to Section 8(b), Enforcement argues that "PHH accepted a split of mortgage insurance premiums other than for settlement services performed," that is, PHH provided no "actual service." Id. at 15-17.

In support of this allegation, the Notice asserts the following, among many other things. Atrium never issued policies for loans originated by any lender other than PHH, had no employees that were not also employees of PHH, and conducted no underwriting to price any reinsurance risks it purportedly assumed. Notice at 4. The majority of PHH loans between 2001 and 2008, and all the PHH loans in which PHH controlled the allocation of MI business, were steered to UGC and Genworth, and four other MIs lacking captive arrangements with PHH received virtually no PHH business. Id. at 7. After issuance of the RFP, PHH personnel worked to extract the highest reinsurance payments possible by holding out the promise of more referrals for favored MIs; the Notice provides specific examples. Id. at 8. PHH continued to use its existing captive arrangements to dictate its mortgage insurance referrals, and as late as May 2009, PHH executives directed that MI referrals should be maximally steered toward UGC because of its profitable captive arrangement, and that PHH should avoid sending business to MIs without captive arrangements; the Notice provides specific examples. Id. at 9. Two specific MIs never entered into captive arrangements and were essentially shut out of PHH's dialer. Id. PHH only expanded its dialer after MIs started tightening their standards for mortgages, i.e., refusing to do business with PHH on certain loans. Id. at 10. Over the captive arrangements' lifespan, Atrium collected over $493 million in purported reinsurance premiums. Id. at 14. Atrium did not pay on any losses between 1995 and 2007. Id. Even after the 2008 financial crisis, Atrium's captive trust accounts held over $189 million, and PHH had earned an approximately twenty percent annualized internal rate of return from captive reinsurance. Id. In return, Atrium's arrangements allowed PHH to eliminate the risk of losing its capital contributions by withdrawing dividends, so that the only funds remaining in each trust account were the MI's premiums and any investment income from those premiums. Id. at 12. Beginning in 2001, Genworth ceded over $100 million in premiums to its trust account. Id. Although Genworth received payments totaling approximately $23 million from its trust in 2009, 2010, and 2011, Atrium withdrew $13.9 million from the trust during that time, which eliminated Respondents' entire capital contribution. Id. at 12-13. PHH withdrew $52 million in March 2007 from the UGC trust account only after UGC agreed to an amendment to the captive arrangement, for which UGC received no consideration. Id. at 15.

Respondents contend that such allegations are insufficient under Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007), and their progeny. Motion at 17-18, 27. Even assuming that Iqbal and Twombly apply in this administrative proceeding,[1] I disagree. The 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." Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570. The allegations regarding Genworth alone are sufficient to state a claim: of the $100 million in ceded premiums paid over a ten year period, Genworth got back about $23 million in payments, but none of Respondents'

[1] The parties dispute whether the pleading standard established by Iqbal and Twombly applies to a motion to dismiss under Rule 212. Motion at 17-18; Oppo. at 7. I find that the Notice satisfies Iqbal, Twombly, and its progeny, even assuming that they apply, and therefore need not resolve this issue.

capital contribution was paid out, or even placed at risk, because Respondents withdrew it all as Genworth's losses mounted. If true, such assertions support a conclusion that Respondents never truly provided reinsurance at all. These allegations are much more detailed than the allegations found sufficient in Tubbs v. North American Title Agency, Inc., 389 F. App'x 104, 105-06 (3d Cir. 2010), where the plaintiffs merely averred that "Title Agency performed no services to earn the $150.00 fee it charged Plaintiffs." They demonstrate that, factually, Enforcement has "a plausible claim for relief" under Section 8(b). Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009).

Section 8(c)(2) of RESPA establishes a "safe harbor" for the payment of a "bona fide salary or compensation or other payment . . . for services actually performed." 12 U.S.C. § 2607(c)(2). Respondents argue that the term "bona fide" modifies only "salary." Reply at 10 n.13. I disagree. First, case law suggests otherwise. See Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 728 (6th Cir. 2013) (RESPA "uses 'bona fide' in the salary-or-compensation exception" (emphasis added)). Second, if only a salary need be bona fide, the safe harbor could be established in virtually every case simply by non-salary compensation. Accordingly, I find that RESPA Section 8(c)(2) establishes a safe harbor for salary, compensation, or other payment for services actually performed, but only if such payment is bona fide.

So construed, and for the same reason the Notice states a claim under Section 8(b), the Notice sufficiently alleges that the ceded premiums in suit were not bona fide within the meaning of Section 8(c)(2). Section 8(a) has no separate exception for "services actually performed." See 12 U.S.C. § 2607(a). Accordingly, dismissal of the Notice on the ground that it "fails as a matter of law" is unwarranted. Motion at 25.

2. Statute of Limitations

Respondents argue that this proceeding is subject to a three-year statute of limitations, that the limitations period begins to run on the date a particular loan closed, that the parties entered into a tolling agreement on January 25, 2012, and, therefore, that all "claims involving loans closed prior to January 25, 2009, are time-barred." Motion at 29-31; see Oppo. at 6 n.6 (parties entered into tolling agreement on January 25, 2012). A statute of limitations defense may be raised by way of motion to dismiss if the claim is "indisputably time-barred." Small v. Chao, 398 F.3d 894, 898 (7th Cir. 2005); see also Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 & n.1 (3d Cir. 1994). I find that the statute of limitations for which Respondents argue is generally inapplicable.

The RESPA statute of limitations establishes a three-year limitations period for "actions brought by the Bureau." 12 U.S.C. § 2614. For two reasons, I find that this statute refers to court actions, not administrative adjudications. First, BP America Production Co. v. Burton, 549 U.S. 84, 89, 91 (2006), holds that, in the context of a general statute of limitations for government contract actions, the term "action" is "ordinarily used in connection with judicial, not administrative, proceedings," and that the general statute of limitations therefore does not limit a Department of the Interior administrative proceeding. Respondents do not squarely grapple with this authority, and I find that it applies here. Reply at 8; see Guaranty Trust Co. of N.Y. v. United States, 304 U.S. 126, 132 (1938) (the government is not subject to any limitations period unless Congress explicitly provides otherwise); Alden Mgmt. Svcs., Inc. 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.").

Second, the statute's plain language, particularly in the context of other pertinent statutes, indicates it applies only to court actions. 12 U.S.C. § 2614 is entitled "Jurisdiction of Courts," and states that an "action" under Section 8 of RESPA may be "brought in the United States district court," with no mention of any administrative forum. Id. By contrast, 12 U.S.C. § 5565, entitled "Relief Available," plainly applies to both court actions and administrative proceedings, with no explicit limitations period. Also, the language of 12 U.S.C. § 5563(a), which is entitled "Hearings and Adjudication Proceedings" and which refers to "hearings and adjudication proceedings," with no explicit limitations period, contrasts with that of 12 U.S.C. § 5564(f), (g), which is entitled "Litigation Authority" and which refers to "civil action[s]" brought in a "United States district court or in any court of competent jurisdiction of a state," with a three-year limitations period. Thus, 12 U.S.C. § 2614 is generally not applicable to this proceeding.[2]

3. Judicial Estoppel

Respondents argue that "[b]ecause the [Bureau] is judicially estopped from asserting that the ceding payments violate RESPA, PHH is entitled to dismissal, or in the alternative summary disposition on all counts." Motion at 25. In support of this argument, Respondents attach to their Motion five consent orders issued in litigation between the Bureau and five MIs, namely, Genworth, MGIC, Radian, UGC, and RMIC. Id. at 13 (citing Motion Exs. A-E). Respondents' Answer listed judicial estoppel as their third affirmative defense; no supporting documents were attached to the Answer in support of this affirmative defense. Answer at 12.

If, on a motion under FRCP 12(b)(6), "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment." Fed. R. Civ. P. 12(d). Respondents' argument that judicial estoppel warrants dismissal cannot be resolved without considering matters outside the pleadings, and I have accordingly treated the motion to dismiss, to the extent it claims judicial estoppel, as one for summary disposition.[3]

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[2] The inapplicability of 12 U.S.C. § 2614 renders moot the issues of when that statute of limitations begins to run, and whether the continuing violations doctrine applies. The issue of whether 12 U.S.C. § 2614 applies to this proceeding to the extent that it would have applied to HUD – in other words, whether Dodd-Frank effected a "resurrection of previously time-barred claims" – appears to have been raised by Respondents for the first time in their Reply. Reply at 3-4, 7-8. Respondents' terse assertion in the Motion that the Bureau "stands in HUD's shoes under RESPA after the designated transfer date," although suggestive, is insufficient to have put Enforcement on notice regarding this issue, and it is not properly before me. Motion at 20.

[3] Because Respondents alternatively seek summary disposition on the basis of judicial estoppel, and Enforcement was clearly on notice of that fact, there is no need to give the parties an additional opportunity to present material pertinent to that issue, as FRCP 12(d) would normally require. See Hilfirty v. Shipman, 91 F.3d 573, 578-79 (3d Cir. 1996); Motion at 25. Also, again by analogy to the FRCPs, my denial of summary disposition based on judicial estoppel, infra, necessarily requires

B. Motion for Summary Disposition

Rule 212 permits a respondent to file a motion for summary disposition. 12 C.F.R. § 1081.212(c). A motion for summary disposition may be granted if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted show that: (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to a decision in its favor as a matter of law. Id. This standard is virtually identical to the standard for summary judgment in civil actions. See Fed. R. Civ. P. 56(a). The necessary evidentiary support is also very similar. Compare 12 C.F.R § 1081.212(c) with Fed. R. Civ. P. 56(c)(1)(A) (a genuine dispute, or lack thereof, may be supported by "depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials"). The Bureau's commentary to its Final Rule states that Rule 212(c) adopts standards "similar to those set forth in the Uniform Rules, the SEC Rules, and the FTC Rules for such motions." 77 Fed. Reg. at 39078. Both the Securities and Exchange Commission's Rules of Practice and the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, as they pertain to summary disposition or summary decision, respectively, are modeled on the summary judgment standard of FRCP 56. Kornman v. SEC, 592 F.3d 173, 182 (D.C. Cir. 2010); Trans Union Corp. v. FTC, 81 F.3d 228, 230 (D.C. Cir. 1996).

Accordingly, I find that case law pertinent to summary judgment is pertinent to summary disposition in this proceeding. In considering a motion for summary disposition, all evidence must be viewed in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). All justifiable inferences must be drawn in favor of the nonmoving party, including questions of credibility and of the weight to be accorded to particular evidence. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1991). Once the moving party has carried its initial burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). That is, a party opposing summary disposition must present specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson, 477 U.S. at 247-48. A dispute is genuine if the evidence presents a sufficient disagreement to submit the matter to a reasonable factfinder. See id. at 251-52; Kautz v. Met-Pro Corp., 412 F.3d 463, 467 (3d Cir. 2005).

Respondents present three arguments for summary disposition. First, they argue that the pertinent jurisdictional statute was not in effect prior to July 21, 2011, and is not retroactive, and thus that I lack jurisdiction to adjudicate any alleged violations predating July 21, 2011. Motion at 20-21. Second, they argue that judicial estoppel bars this proceeding. Id. at 21-25. Third, they argue that the undisputed facts show that the reinsurance agreements were legitimate, and thus that no RESPA violation occurred even under Enforcement's theory of the case. Id. at 31-32.

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a denial of dismissal based on judicial estoppel. See Briscoe v. Klaus, 538 F.3d 252, 263 (3d Cir. 2008).

1. <u>Jurisdiction</u>

Prior to July 21, 2011, the Department of Housing and Urban Development (HUD) possessed authority to bring an enforcement action involving RESPA. 12 U.S.C. § 2607(d)(4) (1996). Enforcement concedes, though, that HUD lacked statutory authority to enforce RESPA via administrative adjudication. Motion at 20; Oppo. at 8. The Bureau assumed HUD's RESPA enforcement authority on July 21, 2011, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). 12 U.S.C. § 5581(b)(7); Designated Transfer Date, 75 Fed. Reg. 57252 (Sept. 20, 2010). As noted, the Bureau's authority extends to both civil litigation and administrative adjudication, and its administrative authority extends to both legal and equitable relief. 12 U.S.C. §§ 5563-5565.

Respondents argue that "no law provides jurisdiction to the Office of Administrative Adjudication" over this proceeding, to the extent the Notice asserts claims regarding pre-July 21, 2011, conduct. Motion at 20. This is particularly significant, Respondents argue, because Atrium and the MIs had agreed prior to July 21, 2011, not to reinsure any new loans. Motion at 20; Motion Ex. G at 3, 7-8. Enforcement argues in opposition that Dodd-Frank merely effected a forum change, at least as to injunctive relief, and that such a change can be applied retroactively. Oppo. at 10 & n.13. Insofar as the Notice seeks injunctive relief, that is, the same relief as was available to HUD, Enforcement is correct.

The presumption against statutory retroactivity is founded on "[e]lementary considerations of fairness dictat[ing] that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." <u>Landgraf v. USI Film Prods.</u>, 511 U.S. 244, 265 (1994); <u>see also</u> <u>Lieberman v. Cambridge Partners, LLC</u>, 432 F.3d 482 (3d Cir. 2005). Under <u>Landgraf</u>, a statute has impermissibly retroactive effect when it "attaches new legal consequences to events completed before [the statute's] enactment." <u>Landgraf</u>, 511 U.S. at 269-70.

The presumption against retroactivity, however, stands in tension with the principle that a court is to "'apply the law in effect at the time it renders its decision.'" <u>Id.</u> at 273 (quoting <u>Bradley v. Sch. Bd. of Richmond</u>, 416 U.S. 696, 711 (1974)). The <u>Landgraf</u> Court announced the following test for resolving this tension:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result.

511 U.S. at 280.

Dodd-Frank lacks an express retroactivity provision, and "'normal rules of [statutory] construction'" do not reveal Congress' intent regarding retroactivity. Pezza v. Investors Capital Corp., 767 F. Supp. 2d 225, 228 (D. Mass. 2011) (quoting Lindh v. Murphy, 521 U.S. 320, 326 (1997)); see also SEC v. Daifotis, No. C 11-00137, 2011 WL 2183314 at *14 (N.D. Cal. June 6, 2011); John W. Lawton, Investment Advisers Act of 1940 Release No. 3513, (Dec. 13, 2012), 105 SEC Docket 61722, 61732. The question, then, is whether application of Dodd-Frank's provisions would have retroactive effect.

The Court examined three categories of cases in Landgraf, one of which – involving purely a question of jurisdiction – is directly implicated here: "We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." Landgraf, 511 U.S. at 273-75 (addressing prospective relief, jurisdiction, and procedural rules). Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." Id. at 274 (quoting Hallowell v. Commons, 239 U.S. 506, 508 (1916)). Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties." Id. (quoting Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 100 (1992) (THOMAS, J., concurring)); Hamdan v. Rumsfeld, 548 U.S. 557, 577 (2006).

To the extent Enforcement seeks the same relief as was formerly available to HUD, Dodd-Frank's expansion of the available adjudicatory forum to include the present forum affects only jurisdiction. It does not impair rights Respondents possessed when they acted, increase their liability for past conduct, or impose new duties with respect to transactions already completed. See Landgraf, 511 U.S. at 280. It merely allows the Bureau, in addition to a district court, to determine Respondents' rights, liabilities, and duties in the first instance. See Cort v. Ash, 422 U.S. 66, 75-76 (1975) (retroactively applying new statute, which gave Federal Election Commission "primary jurisdiction" over certain citizen complaints); Haney v. Chesapeake & Ohio R.R. Co., 498 F.2d 987, 992 (D.C. Cir. 1974) ("A change in jurisdiction which results in the transfer of claims from one forum to another" is to be given retroactive effect, "even when the transfer is from a judicial to an administrative tribunal."). That other provisions of Dodd-Frank, if applied retroactively, may impair rights, increase liability, or impose new duties is immaterial, because Dodd-Frank's various provisions must be considered separately for retroactivity purposes. See Landgraf, 511 U.S. at 280-81 ("There is no special reason to think that all the diverse provisions of the [new legislation] must be treated uniformly for [retroactivity] purposes.").

To be sure, various provisions of Dodd-Frank have been held impermissibly retroactive. See generally Reply at 2-4. But the cases Respondents cite generally address Dodd-Frank provisions that do not qualify as prospective relief, jurisdiction, or procedural rules. See Ahmad v. Morgan Stanley & Co., No. 13 Civ. 6394 (PAE), 2014 WL 700339, at *5-6 (S.D.N.Y. Feb. 21, 2014) (declining to retroactively apply new cause of action); Megino v. Linear Fin., No. 2:09-CV-00370-KJD-GWF, 2011 WL 53086, at *8 n.1 (D. Nev. Jan. 6, 2011) (declining to retroactively apply change in substantive law); Citgo Petroleum Corp. v. Bulk Petroleum Corp., No. 08-CV-654-TCK-PJC, 2010 WL 3212751, at *3 n.4 (N.D. Okla. Aug. 12, 2010) (declining to retroactively apply new statute of limitations); see also Mathews v. Kidder, Peabody & Co., 161 F.3d 156, 164 (3d Cir. 1998) (holding that elimination of securities fraud as predicate act for racketeering cause of action affected substantive rights, as opposed to jurisdiction, and was not retroactive).

Holmes v. Air Liquide USA LLC, No. 4:11-cv-2580, 2012 WL 267194, at *6 (S.D. Tex. Jan. 30, 2012), held that Dodd-Frank's restrictions on mandatory predispute arbitration, an issue having some similarity to the instant question, were not retroactively applicable. However, Holmes explicitly declined to follow Pezza, which was more thoroughly reasoned and reached the opposite conclusion. Between the two cases, I find Pezza to be the better precedent. Id. at *6 n.2 (citing Pezza, 767 F. Supp. 2d at 232).

The Bureau therefore does possess jurisdiction to administratively adjudicate this proceeding, even as to claims arising prior to July 21, 2011, at least to the extent it seeks injunctive relief.[4]

2. Judicial Estoppel

On April 4, 2013, the Bureau filed four settled cases in the U.S. District Court for the Southern District of Florida against four MIs: Genworth, MGIC, Radian, and UGC. CFPB v. Genworth Mortg. Ins. Corp., No. 1:13-cv-21183-JLK (S.D. Fla.); CFPB v. Mortg. Guaranty Ins. Corp., No. 1:13-cv-21187-DLG (S.D. Fla.); CFPB v. Radian Guaranty Inc., No. 1:13-cv-21188-JAL (S.D. Fla.); CFPB v. United Guaranty Corp., No. 1:13-cv-21189-KMW (S.D. Fla.). On November 15, 2013, the Bureau filed a settled case against RMIC, also in the U.S. District Court for the Southern District of Florida. CFPB v. Republic Mortg. Ins. Co., No. 1:13-cv-24146-JAL (S.D. Fla.).[5] Simultaneous with filing the complaints in the MI Cases (Complaints), the Bureau filed proposed judgments and consent orders (Consent Orders), and unopposed motions to approve the judgments and consent orders (Unopposed Motions). CFPB v. Genworth Mortg. Ins. Corp., No. 1:13-cv-21183-JLK, ECF Nos. 1, 4, 5 (S.D. Fla.); CFPB v. Mortg. Guaranty Ins. Corp., No. 1:13-cv-21187-DLG, ECF Nos. 1, 4, 5 (S.D. Fla.); CFPB v. Radian Guaranty Inc., No. 1:13-cv-21188-JAL, ECF Nos. 1, 4, 5 (S.D. Fla.); CFPB v. United Guaranty Corp., No. 1:13-cv-21189-KMW, ECF Nos. 1, 4, 5 (S.D. Fla.); CFPB v. Republic Mortg. Ins. Co., No. 1:13-cv-24146-JAL, ECF Nos. 1, 4, 5 (S.D. Fla.). The Consent Orders were approved at various times between April 5, 2013, and November 19, 2013. Motion Exs. A-E.

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[4] The parties have not adequately briefed the issue of retroactivity of other forms of relief, a question which likely requires a different analysis. See Landgraf, 511 U.S. at 281 (retroactive imposition of punitive damages "would raise a serious constitutional question"); Oppo. at 10 n.13. Similarly, the issue of whether the Bureau has any enforcement authority against at all against Respondents was raised for the first time in their Reply. Reply at 4-5. I therefore do not reach these issues.

[5] I have taken official notice of the filings in these five cases (collectively, the MI Cases), pursuant to Rule 303(c), up to the date of entry of each Consent Order. 12 C.F.R. § 1081.303(c). Filings in federal court are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Id.; see generally Alan Ferraro, Initial Decision Release No. 558, 2014 WL 345340 (Jan. 30, 2014) (discussing the circumstances under which court documents may be officially noticed). Also, the parties stated during oral argument that they had no objection to official notice of the filings. Transcript at 32-34 (Mar. 5, 2014).

Each Complaint, Consent Order, and Unopposed Motion is substantively identical; UGC's are representative. The UGC Complaint alleged, in summary, that UGC paid kickbacks to captive reinsurers, disguised as reinsurance premiums, in exchange for referral of MI business from lenders, in violation of RESPA. United Guaranty Corp., ECF No. 1 (UGC Complaint) at 2. The UGC Unopposed Motion stated that the parties (i.e., the Bureau and UGC) agreed to settle the case and consented to entry of the UGC Consent Order, with no other representations of consequence. United Guaranty Corp., ECF Nos. 4, 5 (UGC Consent Order). The UGC Consent Order stated that the parties: (1) agreed, "without trial or final adjudication of any issue of fact or law, to settle and resolve all matters in dispute," and that the settlement "does not settle or resolve any matters not alleged" in the UGC Complaint; and (2) intended that the settlement "not be an adjudication of any fact or legal conclusion" and "not have any preclusive effect in any other action or proceeding." Motion Ex. D at 2. It also: (3) released UGC from any other past liability, established certain compliance and record keeping requirements, and imposed a civil money penalty – in UGC's case, $4,500,000; and (4) imposed, for ten years, an injunction against entering into any new captive arrangement, revising any existing arrangement without the Bureau's prior written consent, and obtaining reinsurance from a captive reinsurer on any new mortgage. Id. at 4-5, 6-12.

The injunctive relief was subject to the qualification that "[n]othing in this Order shall be construed, however, as preventing the ceding of premiums on policies originated as of, and subject to [captive arrangements] already in existence as of, the date of entry of this Order." Motion Ex. A at 5; Motion Ex. B at 6; Motion Ex. C at 5; Motion Ex. D at 5; Motion Ex. E at 5. Respondents argue that, by seeking and obtaining approval of Consent Orders containing this qualification and a release, "the [Bureau] necessarily – and inconsistently – 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." Motion at 22-23. They argue that Enforcement took the position in the MI Cases that payments by an MI to Atrium did not violate RESPA, and take the position in this proceeding that receipt of those payments by Atrium violates RESPA. Id. at 23. They argue that, in effect, Enforcement "convinced a United States District Court to specifically permit criminal conduct." Id. at 24.

Judicial estoppel precludes a party from prevailing on an argument and then relying on a contradictory argument or position to prevail in another case or another phase of the same case. New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001). There is no rigid test for judicial estoppel. Id. Instead, there are three non-exhaustive factors to consider: (1) whether the two arguments are clearly inconsistent; (2) whether the party was successful in asserting the earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that the first or second court was misled; and (3) whether the party seeking to assert the position would derive an unfair advantage or impose an unfair detriment upon the opposing party. Id. at 750-51; see also David F. Bandimere, Initial Decision Release No. 507, 2013 WL 5553898, at *75 (Oct. 8, 2013). Judicial estoppel in this case is an affirmative defense, as to which Respondents bear the burden of proof. Answer at 12; El v. Se. Penn. Transp. Auth., 479 F.3d 232, 237 (3d Cir. 2007). Respondents must therefore establish the "absence of a genuine factual issue." Nat'l State Bank v. Fed. Reserve Bank of N. Y., 979 F.2d 1579, 1582 (3d Cir. 1992).

Respondents have not carried their burden on summary disposition. I need examine only the first New Hampshire element to conclude that Respondents are not entitled to judgment as a matter of law. The UGC Complaint asserts that UGC paid kickbacks to captive reinsurers, disguised as reinsurance premiums, in exchange for referral of MI business from lenders, and that each "ceding payment therefore was and is an illegal kickback in violation of Section 8(a) of RESPA." UGC Complaint at 6. It also asserts that UGC "gave and lenders accepted a portion, split, or percentage of charges received by [UGC] . . . in violation of Section 8(b) of RESPA." Id. Such assertions are clear and unequivocal. By contrast, the language in the UGC Consent Order, which was filed the same day as the UGC Complaint and plainly should be read in conjunction with it, is far from a clear and unequivocal articulation of an inconsistent argument or position, as required by New Hampshire. Motion Ex. D at 5, 12; 532 U.S. at 749-50.

A reasonable factfinder, viewing the totality of the evidence, could place greater weight on the allegations of the Complaints than on the language of the Consent Orders. Indeed, a reasonable factfinder could conclude that the Consent Orders are nothing more than what they purport to be – court-ordered compromised claims – and that they neither contain nor imply any arguments or positions at all. The Unopposed Motions are of no assistance to Respondents, because they are little more than boilerplate. In short, Respondents have failed to demonstrate, at a minimum, that Enforcement took inconsistent positions. Judicial estoppel is not warranted.

3. Reinsurance Agreements

Respondents argue that RESPA Section 8(c)(2) authorizes payments for "services actually performed," and that because Atrium actually provided legitimate reinsurance services, RESPA was not violated. Motion at 31-32 (citing 12 U.S.C. § 2607(c)(2)). Enforcement's recitation of facts is sufficient to raise a genuine issue of material fact as to whether Atrium's services were bona fide. A reasonable factfinder could conclude that: (1) Atrium had no employees of its own (Oppo. Ex. B at 24); (2) Atrium conducted no underwriting or actuarial analysis to price its reinsurance[6]; (3) Atrium collected at least $493 million in reinsurance premiums over the life of its captive arrangements (Oppo. Exs. D-F), compared to $156 million in payments on claims; (4) Atrium's liability under the captive arrangements was limited to the premiums ceded by the MI plus Atrium's capital contribution (Oppo. Ex. C at 42-43); (5) Atrium withdrew $52 million in dividends from the UGC trust account in March 2007, only after Atrium and UGC amended their captive agreement in return for no consideration to UGC (Oppo. Exs. G, M, N); (6) Atrium's $52 million withdrawal from the UGC trust account vastly exceeded Atrium's remaining capital contribution at the time (Oppo. Exs. G, K); and (7) Atrium paid nothing on losses between 1995 and 2007 (Oppo. Ex. Q). See generally SODF at 3-9.

[6] In support of this point, Enforcement cites to the testimony of Samuel Rosenthal. Oppo. Ex. C at 37-40. As I suggested during oral argument, this testimony is not entirely clear. Transcript at 51-52 (Mar. 5, 2014). However, Respondents' counsel candidly admitted during oral argument that they did not know the origin of the generally standard ceded premium rate of forty percent. Transcript at 67 (Mar. 5, 2014). Under the totality of the record evidence, and in view of counsel's statement, a reasonable factfinder could conclude that the forty percent rate was not the result of underwriting or actuarial analysis.

Enforcement does not dispute that UGC and Genworth received approximately $156 million from their respective trust accounts over the lives of their respective arrangements. Motion at 32; Motion Ex. G at 8; SODF at 14-15. But the circumstances surrounding the payment of this money raise a genuine issue of material fact as to whether Respondents provided bona fide reinsurance.

Enforcement's evidence pertaining to Genworth is illustrative. Based on such evidence, a reasonable factfinder could reach the following conclusions. Atrium completed its capital contributions to the Genworth trust account by fourth quarter 2002, with a total of $5.5 million. Oppo. Ex. K at 7. Over the life of the captive arrangement, the trust account received approximately $137.2 million in ceded premiums and paid back to Genworth $65.7 million, in the form of "Reinsurance Paid Losses" of $28.6 million and commutation payments of $37.1 million. Id.; Oppo. Ex. H at 2; Oppo. Ex. E at 9.[7] By the end of 2006, the ceded premiums from inception totaled approximately $80 million,[8] over ten times Respondents' initial capital contribution. Oppo. Ex. H at 2. In 2009, Genworth ceded approximately $12.4 million in premiums to the trust, and the trust paid back to Genworth approximately $671,000. Oppo. Ex. H at 2. This was apparently the first time the Genworth trust made such payments, and by the end of 2009 the ceded premiums from inception totaled approximately $117.1 million. Id.; Motion Ex. G at 8. In 2010, Genworth ceded approximately $10.3 million, its trust paid back approximately $10.6 million, at a time when the total ceded premiums amounted to approximately $127.4 million, and Atrium withdrew $5 million from the trust, which was apparently its first withdrawal. Oppo. Ex. H at 2; Oppo. Ex. K at 7. In 2011, Genworth ceded approximately $8.2 million, its trust paid back approximately $12.7 million, at a time when the total ceded premiums amounted to approximately $135.6 million, and Atrium withdrew $8.9 million from the trust – that is, more than what Genworth ceded that year and $8.4 million more than necessary to recoup its remaining capital contribution (not including interest or investment returns). Oppo. Ex. H at 2; Oppo. Ex. K at 7. In 2012, when the captive arrangement terminated, there was apparently still approximately $61.2 million in the trust account, of which Atrium received $24.1 million and Genworth received $37.1 million. Oppo. Ex. K at 7.

In short, a reasonable factfinder could conclude that: (1) Atrium withdrew far in excess of its initial capital contribution from the trust, beginning when Genworth's losses started to mount; (2) in every year in which the trust paid on claims, the total ceded premiums from inception (and the trust balance) far exceeded Genworth's claims, and far exceeded Genworth's total claims over the life of the arrangement; (3) by 2006, Atrium was no longer at reasonable risk of losing any of its capital contribution, and all risk from losses instead fell on Genworth; and, therefore, (4) the Genworth captive arrangement was no better than self-insurance, and was not reinsurance at all. Indeed, it was significantly worse than self-insurance; in contrast to the $137 million in premiums it ceded, Genworth got back only $28.6 million from claims and $37.1 million in commutation payments. Atrium, however, recouped its entire $5.5 capital contribution, withdrew $8.4 million in dividends

[7] Different documents report slightly different total lifetime ceded premiums, although the variances are immaterial for summary disposition purposes. Compare Oppo. Ex. H at 2 with Oppo. Ex. E at 9.

[8] The year-end total ceded premiums for 2006, 2009, 2010, and 2011 assume total lifetime ceded premiums of $137.2 million, and were calculated by subtracting the yearly ceded premiums listed on Oppo. Ex. H at 2 from $137.2 million.

beyond its capital contribution, and received $24.1 million at commutation, all for not providing reinsurance, or so a reasonable factfinder could conclude based on the record evidence. Enforcement has established a genuine issue of material fact, and summary disposition on this basis is not warranted.

III. RULE 213

Rule 213 states that if, as here, "a decision is not rendered upon the whole case or for all relief asked and a hearing is necessary, the hearing officer shall issue an order specifying the facts that appear without substantial controversy," which "shall be deemed established." 12 C.F.R. § 1081.213. Based principally on the SOUF and SODF, the facts that appear without substantial controversy are as follows:

1. Atrium Insurance Corporation is a New York corporation and a wholly-owned subsidiary of PHH Corporation. SOUF at 1; SODF at 10.

2. Atrium had agreements with four MIs: CMG Mortgage Insurance Company (CMG), Genworth, Radian, and UGC. SOUF at 1; SODF at 10.

3. PHH made capital contributions totaling $53,172,832 in connection with the agreements. SOUF at 2; SODF at 10.

4. On November 12, 2009, PHH Corporation formed Atrium Reinsurance Corporation, a Vermont corporation that is a wholly-owned subsidiary of PHH Corporation. SOUF at 2; SODF at 10.

5. At various times Atrium utilized the services of Milliman, Inc., an actuarial firm, to provide opinions for specific book years related to the agreements. SOUF at 2; SODF at 11-12.

6. Atrium's agreements with Radian and CMG were placed in run-off prior to January 1, 2009, meaning that no new loans were part of the agreements. SOUF at 2; SODF at 12.

7. The agreement between Radian and Atrium was commuted on July 22, 2009, and Atrium forfeited to Radian capital contributions in the amount of $452,349, in addition to all premiums previously ceded as well as any earnings. SOUF at 2; SODF at 12.

8. The agreement between CMG and Atrium commenced on December 1, 2006, was commuted on August 31, 2009, and Atrium forfeited to CMG capital contributions in the amount of $440,634, in addition to all premiums previously ceded as well as any earnings. SOUF at 3; SODF at 12-13.

9. Atrium's agreement with Genworth commenced on October 9, 2000, and has been in run-off since January 1, 2009. SOUF at 3; SODF at 13.

10. The agreement between Genworth and Atrium was terminated on April 1, 2012, Atrium received $24.1 million from the trust account, and Genworth received $37,149,869 from the trust account. SOUF at 3; SODF at 13.

11. Atrium's agreement with UGC commenced on January 1, 1997, and has been in run-off since January 1, 2010. SOUF at 3; SODF at 13.

12. The agreement between UGC and Atrium was terminated on May 31, 2013, Atrium received $69,169,499 from the trust account, and UGC received $48,592,201 from the trust account. SOUF at 3-4; SODF at 13-14.

13. Neither Atrium, nor Atrium Reinsurance Corporation, ever entered into reinsurance agreements with MGIC, RMIC, the PMI Group, or Triad Guaranty Insurance Corporation. SOUF at 6; SODF at 18.

14. Over the lifespan of their respective agreements, Atrium collected ceded premiums of at least $349.6 million from UGC, at least $137.2 million from Genworth, at least $3,534,924.32 from Radian, and at least $2,726,736.47 from CMG. SODF at 3-4; Response at 4.

15. Atrium set up trust accounts for each agreement, into which each MI's ceded premiums were deposited. SODF at 4; Response at 4.

IV. ORDER

It is HEREBY ORDERED that Respondents' Motion to Dismiss the Notice of Charges or, in the Alternative, for Summary Disposition, is DENIED.

Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission