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

ORAL ARGUMENT REQUESTED

BRIEF IN SUPPORT OF THE MOTION OF PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC, ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE CORPORATION TO DISMISS THE NOTICE OF CHARGES OR, IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION

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INTRODUCTION

The Consumer Financial Protection Bureau ("CFPB") has filed a Notice of Charges ("Notice") alleging that Respondents PHH Corporation**,** PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, "Respondents" or the "PHH Entities"), purportedly violated Section 8 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607, in connection with Atrium's receipt of mortgage reinsurance premiums pursuant to reinsurance agreements with private mortgage insurers, claiming that such payments are illegal under RESPA Section 8.

This would surely come as news to the four United States District Judges (and Senior District Judges) in the Southern District of Florida—Hon. James Lawrence King, Hon. Donald L. Graham, Hon. Joan A. Lenard, and Hon. Kathleen M. Williams—whom the CFPB persuaded to approve Consent Orders in four cases filed in that court on April 4, 2013, and another case filed November 15, 2013, against three of the private mortgage insurance companies for whom Atrium provided reinsurance, as well as two other companies utilizing the same type of structure. *See* Consent Order, *CFPB v. Genworth Mortg. Ins. Corp.*, No. 1:13-cv-21183-JLK, Dkt. No. 5 (S.D. Fla., entered Apr. 5, 2013) ("Genworth Order," attached hereto as Exhibit A); Consent Order, *CFPB v. Mortg. Guar. Ins. Corp.*, No. 1:13-cv-21187-DLG, Dkt. No. 5 (S.D. Fla., entered Apr. 5, 2013) ("MGIC Order," attached hereto as Exhibit B); Consent Order, *CFPB v. Radian Guar., Inc.*, No. 1:13-cv-21188-JAL, Dkt. No. 5 (S.D. Fla., entered Apr. 9, 2013) ("Radian Order," attached hereto as Exhibit C); *CFPB v. United Guar. Corp.*, No. 1:13-cv-21189-KMW, Dkt. No. 5 (S.D. Fla., entered Apr. 8, 2013) ("UGI Order," attached hereto as Exhibit D); *CFPB* *v. Republic Mortg. Ins. Co.*, No. 1:13-cv-24146-JAL, Dkt. No. 5 (S.D. Fla., entered Nov. 19, 2013) ("Republic Order," attached hereto as Exhibit E).[1]

These Consent Orders *explicitly permit* the continuation of the payments under the same reinsurance structures that are at issue here, including some of *the very same payments* from United Guaranty ("UGI") for which the CFPB now attempts to sue Respondents. In the Southern District of Florida, the CFPB took the position that continued premium payments by UGI to mortgage reinsurance companies controlled by mortgage lenders, such as Atrium, were legal and could continue. The CFPB now brings these administrative charges against PHH in this forum that can only succeed if those very same payments were in fact illegal.

The seriousness of the CFPB's unexplained about-face is put in sharp relief by the fact that Section 8 of RESPA provides for both civil and criminal liability. Thus, to proceed against PHH in this case, the CFPB would have to characterize *as crimes* the very same payments that it convinced four federal judges to permit going forward. Leaving aside the fact that the CFPB's assertions in the Notice of Charges are wrong both on the law and the facts (discussed below), the CFPB is judicially estopped from taking such diametrically-opposed positions with respect to the *same payments* in two different proceedings.

In addition to the judicial estoppel issue, the Notice is subject to dismissal both for failure to state a claim under RESPA and because the CFPB's claims regarding loans that closed prior to January 25, 2009, are barred by RESPA's three-year statute of limitations. In the alternative, because the CFPB is judicially estopped from asserting in this proceeding that the reinsurance

[1] The Administrative Law Judge may take judicial notice of public documents, including those filed in other courts and SEC filings. *See, e.g.*, *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000) (taking judicial notice of facts contained in SEC filings); *S. Cross Overseas Agencies v. Wah Kwong Shipping Grp.*, 181 F.3d 410, 426 (3d Cir. 1999) (approving judicial notice of opinion filed in another court).

premiums that Atrium received–payments it convinced four federal judges to approve—are illegal under RESPA, and because Atrium's payment of more than $156 million in claims on the reinsurance agreements establishes beyond dispute that Atrium "actually provided" "services" in exchange for those premiums, Respondents are entitled to summary disposition in their favor as a matter of law.

FACTUAL BACKGROUND[2]

A. PHH Corporation

PHH Corporation ("PHH" or the "Company") provides mortgage services to financial institutions and real estate brokers through its wholly-owned subsidiary, PHH Mortgage Corporation, and PHH Home Loans, LLC[3] (hereinafter, the loan originating entities are collectively referred to as "PHH Mortgage").[4] PHH Mortgage generally sells all mortgage loans that it originates to secondary market investors, which include a variety of institutional investors, and typically retains the servicing rights on mortgage loans sold. PHH Mortgage prides itself on originating high quality loans predominately for sale to Fannie Mae, Freddie Mac, and Ginnie Mae. During 2010, for example, 95% of PHH Mortgage's loans were sold to, or were sold pursuant to, programs sponsored by Fannie Mae, Freddie Mac or Ginnie Mae, and the remaining 5% were sold to private investors. PHH Mortgage did not originate subprime loans when virtually every other lender in the industry was originating such risky loan products. It was the

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[2] Respondents rely upon, and incorporate by reference, their Statement of Undisputed Facts ("SUF"), filed herewith.

[3] PHH Home Loans is a joint venture that PHH Corporation maintains with Realogy Holdings Corporation. PHH Corporation owns 50.1% of PHH Home Loans through its subsidiaries and Realogy Holdings Corporation owns the remaining 49.9% through its affiliates.

[4] PHH Corporation, 2012 Annual Report, *available at* http://corporate.phh.com/phoenix.zhtml?c=187859&p=proxy.

Company's conservative lending policies that allowed it to weather the catastrophic meltdown of the real estate market that began in 2007.

B. Private Mortgage Insurance and Reinsurance

Private mortgage insurance ("pmi") is typically required by a lender when a borrower makes a down payment of less than 20% for the purchase of a home. The premiums for pmi are usually collected by the lender as part of the borrower's monthly mortgage payment. Pmi protects the lender in the event the borrower defaults on the loan – if a borrower defaults and foreclosure proceeds do not fully pay off the loan amount, pmi covers some or all of the lender's loss. *PMI Mortg. Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 394 F.3d 761, 762 (9th Cir. 2005) (noting that pmi "covers a lender for losses incurred when a borrower defaults on the repayment of a mortgage loan and the collateral is not sufficient to make the lender whole"). "Private investors who purchase and securitize loans for re-sale on the secondary market also rely on private mortgage insurance to reduce the risk of default." *Pedraza v. United Guar. Corp.*, 114 F. Supp. 2d 1347, 1349 (S.D. Ga. 2000) ("In the absence of mortgage insurance, [] the marketability of many home loans would be reduced, thus reducing the amount of capital available for lenders to lend to home purchasers with little equity to offer at the time of purchase.").

Private mortgage insurance providers reduce their exposure on the loans they insure by transferring part of the risk to a reinsurer that assumes the transferred risk in return for a share of the premiums collected. *See, e.g.*, *N. River Ins. Co. v. Ace Am. Reinsurance Co.*, 361 F.3d 134, 137 (2d Cir. 2004).[5] The most common form of reinsurance in the mortgage industry is a captive

[5] Like insurers of other risks, private mortgage insurance companies protect themselves against catastrophic loss by purchasing reinsurance. "Reinsurance provides protection against catastrophic loss in much the same way it helps stabilize an insurer's loss experience."

arrangement. In a captive reinsurance structure, a subsidiary or lender affiliate acts as the reinsurer. Such a structure is not only a common risk-spreading device, but it provides many benefits such as surplus relief, catastrophic exposures, utilization of reinsurer's expertise, risk sharing/transfer, and smoothing of financial results. For example, captives provide private mortgage insurers with capital relief, in addition to "creat[ing] a scenario where the lender captive . . . and the MI all have a stake in minimizing losses[.]" Amy Friedman, *Standard & Poor's Commentary Report: Lender Captives Benefit Both Lenders and Mortgage Insurers, For a Price* (May 24, 2007).[6] In other words, the captive reinsurance structure ensures that lenders have "skin in the game," which results in the origination of better quality loans—at least for "business ceded to the captive." *Id.* *See also* Letter from Tony Riddick, Deputy Commissioner, Financial Evaluation Division, North Carolina Department of Insurance, to Mortgage Guaranty Insurance (E) Working Group (Mar. 27, 2013) (stating that "a captive arrangement could be a means for the lenders to hold a portion of the insured risk and maintain an interest in how the loans perform").[7] Moreover, captive reinsurance "may also cause lenders to encourage borrowers to use mortgage insurance for loans of more than 80% of a property's purchase price, instead of pushing piggyback loans, or second loans made on a property concurrently with a first lien mortgage. Piggyback loans became popular between 2003 and 2006, and they cut significantly into the market for mortgage insurance." Amy Friedman, *Standard & Poor's Commentary Report: Lender Captives Benefit Both Lenders and Mortgage Insurers, For a Price*

Reinsurance Association of America, *Fundamentals of Property and Casualty Reinsurance* 4 (2007).

[6] *Available at* http://media.corporate-ir.net/media_files/irol/63/63356/LenderCaptivesBenefitBothLendersMortgageInsurers0507.pdf.

[7] *Available at* http://www.naic.org/meetings1304/committees_e_mortgage_guaranty_insurance_wg_2013_spring_nm_materials.pdf.

(May 24, 2007). For some or all of these reasons, the pmi companies actively sought out lenders for the purpose of entering into captive reinsurance arrangements. *See, e.g.*, Exhibit F, hereto (The PMI Group, Inc., Analysis of Deep Cede Excess-of-Loss Captive Reinsurance Programs) (noting that such arrangements "align the interests of pmi and the lenders on origination quality, servicing and loss mitigation," "[enable] pmi to lower its expense ratio," "serve as an important source of reinsurance to protect against market downturns," and "reduce pmi's volatility of returns").

After origination, a loan is placed into the appropriate "book" for the specific mortgage insurer in the year that the loan closed (commonly referred to as "book year"). The amount of risk assumed by a reinsurer varies by type of loan product as well as other factors such as loan-to-value ratio. The risks for each book year change depending on the types of loans in the pool, as well as external market conditions such as the employment rate, inflation, housing prices and other economic factors. Borrowers are not charged additional premiums as a result of reinsurance. The rates charged by mortgage insurers are filed with and approved by state departments of insurance; thus, the pmi premium paid by the borrower is the same regardless of whether the mortgage insurer has obtained reinsurance on the particular borrower's loan.

C. The Regulator's Approval of Captive Reinsurance Arrangements

Section 8 of RESPA generally prohibits "giv[ing]" or "accept[ing] any fee, kickback, or thing of value" in exchange for the referral of real estate settlement service business, 12 U.S.C. § 2607(a), as well as "giv[ing]" or "accept[ing] any portion, split, or percentage of any" settlement service charge. *Id.* at § 2607(b). RESPA § 8(c) specifically provides, however, that "[n]othing . . . shall be construed as prohibiting . . . the payment to any person of . . . compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(c)(2).

In 1997, the Department of Housing and Urban Development ("HUD"), the agency responsible for enforcement of RESPA, issued guidance in the form of an informal letter that approved of the formation of captive reinsurance arrangements such as those entered into by Atrium. *See* Letter from Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner, to Sandor Samuels, General Counsel of Countrywide Funding Corporation (Aug. 6, 1997) ("HUD Letter").[8] HUD recognized in its guidance that as a result of a captive reinsurance arrangement the lender "has a financial interest in having the primary insurer in the captive reinsurance program selected to provide the mortgage insurance." HUD Letter at 1. Yet, HUD specifically allowed lenders to enter into such arrangements as long as the payments to the reinsurer "(1) are for reinsurance services 'actually furnished or for services performed' and (2) are bona fide compensation that does not exceed the value of such services." HUD Letter at 3. Simply stated, HUD recognized the potential incentive to use the primary insurer with which there was a reinsurance arrangement. Critically, HUD placed no limitation on a lender's use of the pmi provider under such circumstances. Indeed, if HUD had wanted to prohibit captive arrangements pursuant to its authority under RESPA, it had the opportunity to do so in 1997, but did not.

D. The Role of Captive Reinsurance Following the Housing Market Collapse

It is an undeniable fact that, in the wake of the housing market meltdown, captive reinsurance coverage has proven invaluable to the pmi companies. *See, e.g.*, Press Release, MGIC Comments on Captive Reinsurance Consent Order Settlement (Apr. 4, 2013) ("MGIC received nearly $900 million in loss reimbursements from its captive reinsurers. These reimbursements provided much needed capital to MGIC that helped MGIC survive the worst of

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[8] *Available at* http://www.alta.org/govt/issues/99/MIReinsur.pdf.

the housing downturn.");[9] *see also* Letter from Tony Riddick, Deputy Commissioner, Financial Evaluation Division, North Carolina Department of Insurance, to Mortgage Guaranty Insurance (E) Working Group (Mar. 27, 2013) (noting that banning captive reinsurance arrangements with originating banks is not the best change for the industry as "[s]ome insurers have received significant benefit during the crisis from their captive arrangements[]"). This is not surprising, however, because captive reinsurance is most "similar to certain forms of property-catastrophe insurance." Amy Friedman, *Standard & Poor's Commentary Report: Lender Captives Benefit Both Lenders and Mortgage Insurers, For a Price* (May 24, 2007); *see also* NAIC, *Concepts-List of Potential Regulatory Changes Prepared by the Mortgage Guaranty Insurance (E) Working Group* (Feb. 19, 2013) ("Mortgage guaranty insurance is a form of economic catastrophe insurance in which long periods of very great profitability are punctuated by periods of varying duration of catastrophic loss. Absent countervailing legal requirements, this leads to corporate income taxes and stockholder dividends that are excessive in relation to actual profits over the life of a company in this line of business.");[10] Press Release, MGIC Comments on Captive Reinsurance Consent Order Settlement (Apr. 4, 2013) ("Captive reinsurance was commonly used by mortgage insurers in the past to stabilize claims experienced and protect against catastrophic losses."); Basel Committee on Banking Supervision Joint Forum: Mortgage insurance: market structure, underwriting cycle and policy implications (Aug. 2013) ("The events of the last few years, particularly those in the global financial crisis that began in 2007, indicate that [mortgage insurance] is subject to significant stress. . . . [Indeed,] MI is subject

[9] *Available at* http://online.wsj.com/article/PR-CO-20130404-911510.html?mod=crnews.

[10] *Available at* http://www.naic.org/meetings1304/committees_e_mortgage_guaranty_insurance_wg_2013_spring_nm_materials.pdf.

over the years to occasional catastrophic loss. . . . [Worse yet,] if mortgage insurers fail, the credit risk will revert to, and crystallize in, the banking sector.").[11]

E. Atrium's Reinsurance Agreements

Atrium Insurance Corporation ("Atrium") is a New York corporation and a wholly-owned subsidiary of PHH Corporation. SUF ¶ 1 (referencing the Declaration of Michael Bogansky, attached hereto as Exhibit G). Atrium's business was to provide reinsurance on pmi issued in connection with loans originated by PHH Mortgage and PHH Home Loans. *Id.* While there are a number of pmi providers, Atrium had reinsurance agreements with only four pmi providers: CMG Mortgage Insurance Company ("CMG"), Genworth Mortgage Insurance Company ("Genworth"), Radian Guaranty, Inc. ("Radian"), and AIG United Guaranty Mortgage Insurance Company ("UGI"). SUF ¶ 2.[12] All of the reinsurance agreements with these entities were excess-of-loss arrangements whereby Atrium agreed to provide reinsurance on pools of loans, commonly referred to as "books," once losses exceeded a certain percentage (typically 4% -- the attachment point), and only up to a certain percentage of losses (typically 14% -- the detachment point), although these entry and exit points vary for some years and for some providers. SUF ¶ 3. Atrium obtained risk transfer opinions from Milliman, Inc. ("Milliman"), a

[11] *Available at* http://www.bis.org/publ/joint33.pdf. As the Basel Committee notes: "[T]he US MI industry was severely affected by the recent global financial crisis. Two of the five big US mortgage insurers (The PMI Group and Republic) are under orders of supervision (proceedings in a spectrum of preventative regulatory actions), and the other three [Genworth, MGIC and Radian] are sub-investment grade, whereas all five were investment grade prior to the crisis."

[12] PHH Mortgage used a variety of pmi providers, several of which did not have reinsurance agreements with Atrium. Further, not all loans insured by a pmi provider that had a reinsurance agreement with Atrium were placed into the reinsurance books.

third-party actuarial firm, confirming true risk transfer for its reinsurance arrangements. SUF ¶¶ 7, 10.[13]

The current status of Atrium's reinsurance agreements with the four private mortgage insurers is as follows:

- **Radian** – Atrium's reinsurance agreement with Radian commenced on July 26, 2004. Prior to January 1, 2009, this agreement has been in "run-off," which means that no new business is reinsured, but that all obligations continue for both parties on existing books of business. Effective July 22, 2009, by mutual decision and pursuant to the terms of their agreement, Atrium and Radian commuted the agreement. As part of the termination, Atrium forfeited to Radian capital contributions in the amount of $452,349, in addition to all premiums previously ceded. SUF ¶¶ 8, 9.

- **CMG** – Atrium's reinsurance agreement with CMG commenced on December 1, 2006. This agreement was placed in run-off prior to January 1, 2009. Effective August 31, 2009, by mutual decision and pursuant to the terms of their agreement, Atrium and CMG commuted the agreement. As part of the termination, Atrium forfeited to CMG capital contributions in the amount of $440,634, in addition to all premiums previously ceded. SUF ¶ 11.

- **Genworth** – Atrium's reinsurance agreement with Genworth commenced on October 9, 2000. Since January 1, 2009, this agreement has been in run-off, which means that loans originated after that date were not subject to the reinsurance agreement. Effective April 1,

[13] On November 12, 2009, PHH Corporation formed Atrium Reinsurance Corporation ("Atrium Re"), a Vermont corporation that is a wholly-owned subsidiary of PHH Corporation. On January 25, 2010, the New York Insurance Department issued its non-disapproval of the reinsurance assumption agreements between Atrium and Atrium Re, thereby allowing Atrium Re to assume Atrium's existing reinsurance agreements. SUF ¶¶ 5, 6. For purposes of this memorandum, reference to Atrium includes both Atrium and Atrium Re unless otherwise specifically noted.

2012, by mutual decision and pursuant to the terms of their agreement, Atrium and Genworth terminated the agreement. SUF ¶¶ 12, 13.

- **UGI** – Atrium's reinsurance agreement with UGI commenced on January 1, 1997. This agreement has been in run-off since January 1, 2010. Effective May 31, 2013, by mutual decision and pursuant to the terms of their agreement, Atrium and UGI terminated the agreement. SUF ¶ 14.

To date, Atrium has paid more than $156 million in claims pursuant to its reinsurance agreements.[14] For certain book years, Atrium's claim payments exceed the amount of reinsurance premiums that Atrium could have collected over the entire life of the reinsurance agreement for that book. SUF ¶¶ 17, 18.

F. Regulatory Examination of Atrium

As a New York corporation, the operations of Atrium were fully and extensively examined by the New York Insurance Department ("NYID"). In 2008, the NYID conducted an audit of Atrium which covered the six-year period from January 1, 2002, through December 31, 2007. SUF ¶ 19. The NYID conducted the examination in accordance with "the guidelines and procedures established in the Financial Condition Examiners Handbook of the National Association of Insurance Commissioners" and found Atrium in compliance with all substantive provisions of New York Insurance Law, including that "the [reinsurance] contracts contained the required clauses, including the insolvency clauses, meeting the requirements of Section 1308 of

[14] In addition, more than $93 million was paid by Atrium to the private mortgage insurers in exchange for a release from future liability pursuant to commutation agreements that were the result of arms-length negotiations between sophisticated financial entities.

the New York Insurance Law." 2008 Report on Examination at 2, 6 (Apr. 18, 2008).[15] The 2008 Report on Examination, as well as an earlier examination in 2003, reviewed all aspects of Atrium's business, including the history of the company; management and control; corporate records; territory and plan of operation; business in force by states; loss experience; reinsurance; accounts and records; and financial statements.[16] Both Reports found Atrium's trust accounts to be fully compliant with all applicable laws.

G. <u>The CFPB's Settlements with the PMI Companies</u>

On April 4, 2013, the CFPB announced that it had filed, and settled, suits against four pmi companies—Genworth, MGIC, Radian and UGI—alleging that the mortgage reinsurance structures utilized by those companies, the same structure that is the subject of the Notice in this Action, violated Section 8 of RESPA. *See* Complaint, *CFPB v. Genworth Mortg. Ins. Corp.*, No. 1:13-cv-21183-JLK, Dkt. No. 1 (S.D. Fla., Apr. 4, 2013); Complaint, *CFPB v. Mortg. Guar. Ins. Corp.*, No. 1:13-cv-21187-DLG, Dkt. No. 1 (S.D. Fla., Apr. 4, 2013); Complaint, *CFPB v. Radian Guar., Inc.*, No. 1:13-cv-21188-JAL, Dkt. No. 1 (S.D. Fla., Apr. 4, 2013); Complaint, *CFPB v. United Guar. Corp.*, No. 1:13-cv-21189-KMW, Dkt. No. 1 (S.D. Fla., Apr. 4, 2013). Along with those Complaints, the CFPB filed a motion in each case, asking the court to approve and enter the Consent Order in that case. *See* Unopposed Motion to Approve Consent Judgment and Order, *CFPB v. Genworth Mortg. Ins. Corp.*, No. 1:13-cv-21183-JLK, Dkt. No. 4 (S.D. Fla., Apr. 4, 2013); Unopposed Motion to Approve Consent Judgment and Order, *CFPB v. Mortg. Guar. Ins. Corp.*, No. 1:13-cv-21187-DLG, Dkt. No. 4 (S.D. Fla., Apr. 4, 2013); Unopposed

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[15] 2008 Report on Examination (Apr. 18, 2008), *available at*: http://www.dfs.ny.gov/insurance/exam_rpt/10362f07.pdf.

[16] 2003 Report on Examination (Feb. 1, 2004), *available at*: http://www.dfs.ny.gov/insurance/exam_rpt/ 10362f01.pdf.

Motion to Approve Consent Judgment and Order, *CFPB v. Radian Guar., Inc.*, No. 1:13-cv-21188-JAL, Dkt. No. 4 (S.D. Fla., Apr. 4, 2013); Unopposed Motion to Approve Consent Judgment and Order, *CFPB v. United Guar. Corp.*, No. 1:13-cv-21189-KMW, Dkt. No. 4 (S.D. Fla., Apr. 4, 2013). The proposed Consent Orders, which the court in each case entered (hereinafter, the "PMI Consent Orders" (Ex. A-D)), specifically permit "the ceding of premiums on policies originated as of, and subject to Arrangements already in existence as of, the date of entry of this Order." *See, e.g.*, UGI Order at 5 (Ex. D).

On November 15, 2013, the CFPB filed a similar complaint against Republic Mortgage Insurance Company, along with a motion to approve a settlement on essentially the same terms as before. *See* Complaint, *CFPB v. Republic Mortg. Ins. Co.*, No. 1:13-cv-24146-JAL, Dkt. No. 1 (S.D. Fla., Nov. 15, 2013). The court entered the Proposed Final Consent Judgment and Order on November 19, 2013, again containing the same language permitting "the ceding of premiums on policies originated as of, and subject to Arrangements already in existence as of, the date of entry of th[e] Order." Republic Order at 5 (Ex. E).

There is no record that the CFPB has ever disavowed the position it took in these cases, that the ceding of payments to the lenders' captive reinsurers under existing contracts was legal and could continue, nor has the CFPB provided any justification to Respondents for why its position should have changed so drastically in less than three months.

H. <u>The Notice of Charges Against Respondents</u>

While not necessary for Respondents' motion to dismiss, the Notice contains certain factual allegations, along with glaring omissions, that simply cannot go unaddressed. First, the Notice fails to mention the HUD Letter. Indeed, nowhere in its 104-paragraph Notice does the CFPB even mention the 1997 letter from HUD – the agency then responsible for RESPA enforcement – which provides the *only* guidance ever issued by the federal government concerning captive reinsurance arrangements.[17] Nor did the CFPB bother to mention that fact that the Government Sponsored Entities ("GSEs"), Fannie Mae and Freddie Mac, both reviewed and approved of the captive reinsurance arrangements.[18] As of late 1997, a number of national banks had received approval from the Office of the Comptroller of the Currency to form mortgage reinsurance subsidiaries. SUF ¶ 26. The omission of these undisputed facts from the Notice is telling because it signals that the CFPB cannot show how or why Atrium's reinsurance agreements did not comply with applicable regulatory guidance.

Second, the Notice excoriates Respondents because "Atrium never paid claims or made any other payments to MIs that exceeded the then-available funds to the applicable captive trusts." Notice ¶ 67. In other words, the CFPB has declared that it is illegal to have a reinsurance arrangement that results in a profit. Having investigated Respondents for more than two years, the CFPB knows, for example, that Atrium paid more than $156 million in reinsurance claims. Further, the CFPB was fully apprised of the fact that, prior to commuting the agreement with UGI, Atrium had already paid *more* in reinsurance claims than it would have

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[17] The HUD Letter fully supports PHH's actions vis-à-vis its reinsurance business. Such arrangements are permissible as long as the payments for reinsurance "are solely 'payment for goods or facilities actually furnished or for services actually performed.'" HUD Letter at 1.

[18] In 2008, Freddie Mac "temporarily" imposed a 25% commission cap on any reinsurance arrangement for any pmi provider that insured loans sold to Freddie Mac. Atrium's agreements were modified to reflect Freddie Mac's new requirement. The reason for the change, however, was not because of any RESPA concerns, but rather an interest on the part of Freddie Mac to push more capital into the pmi companies to bolster their capital so that these entities, which were under enormous financial stress because of the collapse of the housing market, would have more funds to pay on current claims by Freddie Mac. *See* Exhibit H, hereto (Press Release, Freddie Mac Changes Mortgage Insurer Eligibility Rules to Cap Premium Cedes on Captive Reinsurance (Feb. 14, 2008) ("Freddie Mac today announced it is temporarily changing its Private Mortgage Insurer Eligibility Requirements in order to increase the claims-paying and capital retention capacities of its mortgage insurance counterparties during the current market correction.")).

ever collected in premiums for book years 2005, 2006 and 2007. For Genworth, prior to commutation, Atrium was projected to pay *more* in reinsurance claims that it would have ever collected in premiums for book years 2005 through 2008. SUF ¶ 18. These are material facts that eviscerate the CFPB's case. Rather than confront these facts, however, the CFPB chose to omit them from its Notice.

Third, the CFPB's claim that captive reinsurance arrangements increased the severity of the 2008 financial crisis is a reckless and sensational assertion that finds no support in the facts. Notice ¶ 90. As discussed in section D., *supra*, captive private mortgage reinsurance arrangements gave lenders "skin in the game" and further promoted the origination of high quality loans. More to the point, however, it is undisputed that such reinsurance prevented further disruption in the financial markets by backstopping the private mortgage insurance providers who were suffering catastrophic losses. "In the years immediately preceding the recent financial crisis, strong loan performance meant that [private mortgage insurance companies] received little actual loss coverage from captive reinsurance arrangements. But the reinsurance landscape has changed significantly since the mortgage crisis began. [Private mortgage insurance companies] have recently realized material recoveries from captive reinsurance, drawing on (and sometimes exhausting) trusts containing years of premium reserves accumulated by the captives." Promontory Financial Group, LLC, *The Role of Private Mortgage Insurance in the U.S. Housing Finance System* (Jan. 2011). *See also* Genworth Financial, Inc., 2007 Annual Report ("While loss pressure will continue during 2008, our captive reinsurance agreements will provide important protection against increasing losses in subsequent years as we position Genworth for future income growth.”);[19] Genworth Financial, Inc., 2012 Annual Report (“We have exhausted certain captive reinsurance tiers for our 2005, 2006, 2007 and 2008 book years based on worsening loss development trends.”).[20] Thus, the CFPB’s attempt to distort the role that pmi reinsurance played in the recent financial crisis is nothing short of alarming.

Fourth, the CFPB chastises Respondents for their failure to do business with two mortgage insurers: The PMI Group (“PMI”) and Triad Guaranty Insurance Corporation (“Triad”). Notice ¶ 52. The CFPB neglects to mention, however, that Triad and PMI ended up defaulting on their insurance obligations and are now under regulatory supervision and paying only a portion of their claims. SUF ¶¶ 24, 25. The fact of the matter is that the PHH Entities carefully evaluated and monitored their counter-parties, took appropriate steps to distribute their risk, and chose not to rely on Triad and PMI for any significant portion of its portfolio. As history now bears out, the Companies’ evaluations were correct. Accordingly, the CFPB’s insinuation that Respondents were legally required to conduct business with entities they found not to be good business partners further reveals that the CFPB’s assault on Respondents is premised not on a colorable RESPA claim, but rather on the agency’s position that it is illegal to make a profit in this country. *See United States v. Witmer*, 835 F. Supp. 208, 214-15 (M.D. Pa. 1993) (“A government lawyer ‘in a civil action or administrative proceeding’ is held to a higher standard than a private lawyer, because ‘government lawyers have ‘the responsibility to seek justice,’ and ‘should refrain from instituting or continuing litigation that is obviously unfair.’”)

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[19] *Available at* http://phx.corporate-ir.net/phoenix.zhtml?c=175970&p=irol-reportsannual (last visited Jan. 30, 2014).

[20] *Available at* http://phx.corporate-ir.net/phoenix.zhtml?c=175970&p=irol-reportsannual (last visited Jan. 20, 2014).

(quoting *Freeport-McMoRan Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45, 47 (D.C. Cir. 1992), *aff'd without opinion at* 30 F.3d 1489 (3d Cir. 1994)).

LEGAL STANDARDS[21]

Motion to Dismiss

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should be granted if the complaint does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). As the Supreme Court explained in *Twombly*, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" 550 U.S. at 555 (internal quotation marks and citation omitted). "Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). "Threadbare recitals" of nothing more than the elements of a claim "supported by mere conclusory statements," are not enough to state a claim under Rule 12(b)(6). *Id.* (citing *Twombly*, 550 U.S. at 555).

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

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

[21] For purposes of this motion, PHH relies upon the well-developed case law interpreting Rules 12 and 56 of the Federal Rules of Civil Procedure. CFPB rules governing motions to dismiss and for summary disposition provide standards that are virtually identical to the applicable Federal Rules of Civil Procedure, however, the CFPB's rules of procedure have not been interpreted by any court. *See* 12 C.F.R. § 1081.212.

> allege the plaintiff's entitlement to relief. A complaint has to show such an entitlement with its facts.

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

Summary Disposition

"If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d).

Summary judgment is appropriate where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The mere existence of some factual dispute does not defeat a summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). To be material, the fact must relate to a disputed matter that "might affect the outcome of the suit." *Anderson*, 477 U.S. at 248.

In considering a motion for summary judgment, the court considers all evidence in the light most favorable to the nonmoving party. *Id*. at 255. Affidavits or declarations may be "used to support or oppose a motion," as long as they are "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). "If a party fails to properly . . . address another party's assertion of fact [however] . . . the court may . . . consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e), (e)(2). Summary judgment must be granted, then, if the non-moving party fails to produce significantly probative evidence on every essential element of his or her claim. *See Jakimas v. Hoffmann-La Roche, Inc.*, 485 F.3d 770, 777 (3d Cir. 2007) ("[T]he non-moving party must present more than a mere scintilla of evidence; 'there must be evidence on which the jury could reasonably find for the [non-movant].'") (second alteration in original) (quoting *Anderson*, 477 U.S. at 252); *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1065 (D.N.J. 2011) ("The non-movant's burden is rigorous: it 'must point to concrete evidence in the record'; mere allegations, conclusions, conjecture, and speculation will not defeat summary judgment.") (quoting *Orsatti v. N.J. State Police*, 71 F.3d 480, 484 (3d Cir.1995)).

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotation marks omitted).

ARGUMENT

PHH is entitled to dismissal of the Notice of Charges, or in the alternative, for summary disposition, for five independent reasons: 1) there is no jurisdiction for this administrative proceeding; 20 the CFPB's claims are barred by judicial estoppel because the CFPB convinced four federal judges to approve the very payments they now, inexplicably, claim are illegal; 2) the Notice fails to state a claim under RESPA because § 8(c) *exempts* payments for services actually provided; 3) the CFPB's claims are barred by RESPA's 3-year statute of limitations for any reinsurance contract entered into prior to January 25, 2009; and 4) the CFPB's suggestion that the reinsurance contracts were shams is belied by the undisputed fact that Atrium paid more than $156 million dollars in claims under those contracts.

I. <u>There Is No Jurisdiction Regarding Conduct Prior to July 21, 2011</u>

Respondents are entitled to summary disposition covering all alleged violations occurring prior to July 21, 2011, because the statute under which the CFPB is proceeding was not yet effective and is not retroactive. Accordingly, no law provides jurisdiction to the Office of Administrative Adjudication to hear such claims. Moreover, since all of the reinsurance agreements were in run-off prior to that date, this entitles Respondents to summary disposition as to all of the CFPB's allegations in this matter, for lack of jurisdiction.

Neither RESPA nor Regulation X contains any provision authorizing an administrative agency to bring an administrative action for alleged violations of Section 8.[22] Prior to the Dodd-Frank Act, however, HUD could not enforce RESPA through an administrative proceeding such as this one. *See* 12 U.S.C. § 2607(d)(4) (regulators could seek injunction in court). The CFPB stands in HUD's shoes under RESPA after the designated transfer date. *See* Dodd-Frank Act § 1061(b)(7) (12 U.S.C. § 5581(b)(7)).

The statutory provision relied upon by the CFPB—Section 1055 of the Dodd-Frank Act (12 U.S.C. §5565), which lists the relief generally available to the CFPB—did not go into effect until July 21, 2011, the designated transfer date. Dodd-Frank Act § 1058 (12 U.S.C. § 5561 note). No provision of the Dodd-Frank Act makes these powers retroactive, and in any case, there is a presumption against the retroactive application of statutes—particularly statutes such as this one that are punitive or penal in nature. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law."); *see also Fernandez-Vargas v.*

[22] The Mortgagee Review Board claimed some authority to enforce RESPA against FHA mortgagees under 24 C.F.R. § 30.35, and HUD could theoretically have raised RESPA violations in debarment proceedings, *see* 24 C.F.R. § 3500.19, but the HUD Secretary would not have had the authority to seek *any* relief against Respondents in a proceeding such as this, and injunctive relief only if it went to court. Moreover, the Mortgagee Review Board's authority under 24 C.F.R. § 30.35 did not transfer to the CFPB, and the Mortgagee Review Board would not have had jurisdiction over the non-mortgagee Respondents in any event.

Gonzales, 548 U.S. 30, 37 (2006) (retroactivity especially disfavored where it would "increase a party's liability for past conduct").

Where Congress has not expressly stated that a statute is retroactive, and where "applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of 'affecting . . . liabilities'" for "conduct arising before [its] enactment," the statute must be construed "as inapplicable to the event or act in question." *Id*. at 37-38 (alteration in original) (citation omitted). Here, the CFPB seeks to impose penalties that would not have been available at the time of the conduct, when the CFPB's predecessor could only obtain injunctive relief in a court of competent jurisdiction and could not have not have obtained any recovery in a proceeding such as this.

Accordingly, since the law did not authorize the relief the CFPB is seeking until July 21, 2011, and since the statute under which the CFPB purports to be proceeding is not retroactive, the CFPB does not have jurisdiction to take enforcement action for alleged pre-transfer violations, the Office of Administrative Adjudication lacks jurisdiction over such matters as well, and Respondents are entitled to summary disposition for all conduct allegedly occurring prior to July 21, 2011, namely all of the CFPB's claims in this matter.

II. <u>The CFPB's Claims Are Barred by Judicial Estoppel</u>

The doctrine of judicial estoppel bars the CFPB from suing PHH for receiving the same payments that the CFPB recently persuaded four federal judges to approve going forward.

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

The application of judicial estoppel "should not be formulaic, but should follow the framework set out in" Third Circuit case law, and "be decided on its unique facts." *Motley v. N.J. St. Police*, 196 F.3d 160, 163-64 (3d Cir. 1999). As the Third Circuit has explained:

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

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

First, there can be no doubt that the CFPB's positions are "inconsistent." In asking four federal judges to approve and enter the PMI Consent Orders, which permit "the ceding of premiums on policies originated as of, and subject to Arrangements already in existence as of, the date of entry of th[e] Order," the CFPB necessarily—and consistently—took the position that payments of reinsurance premiums to mortgage lenders' captive reinsurers were legal, and established that the pmi companies could continue making such payments without violating RESPA. *See, e.g.*, UGI Order at 5. The PMI Consent Orders both explicitly permit such payments under existing agreements to continue, and release the pmi companies from liability for those payments under the existing agreements. *See, e.g.*, UGI Order at 12. Four federal judges accepted the CFPB's position a total of five times, and approved the ceding payments going forward. Not only are the ceding payments over which the CFPB is suing PHH substantively indistinguishable from the payments that Atrium received from three of the five pmi companies, but in the case of UGI, the payments made by UGI to Atrium after April 8, 2013, were, in fact, the *same exact payments* that the CFPB induced Judge Williams to approve, and which she did approve.

Second, the CFPB's sudden and unexplained reversal evidences bad faith. Courts find bad faith where a party has "behaved in a manner that is somehow culpable," and has done so "vis-a-vis the court." *Montrose Med.*, 243 F.3d at 781. Such culpable behavior is found where, for example, "intentional self-contradiction is being used as a means of obtaining unfair advantage," *Scarano v. Cent. R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) (quoted by *Ryan Ops.*, 81 F.3d at 362), or a litigant "'play[s] fast and loose' with the court[.]" *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996), *explained on other grounds by Motley*, 196 F.3d at 163. Here, the CFPB—represented, incidentally, by the same enforcement attorneys—has taken the contradictory positions that the *same ceding payment* violates RESPA when it is *received* by Atrium from a private mortgage insurer, but does not violate RESPA when it is *paid* by a private mortgage insurer to a captive reinsurance company such as Atrium. That is impossible, because giving and receiving are two sides of the same RESPA coin. If a payment is prohibited, RESPA criminalizes both "giving" and "accepting" it. 12 U.S.C. § 2607(a) ("*No person shall give and no person shall accept* any fee, kickback, or thing of value . . . .") (emphasis added); § 2607(b) ("*No person shall give and no person shall accept* any portion, split, or percentage of any charge . . . .") (emphasis added); *see Freeman v. Quicken Loans, Inc.*, 566 U.S. __, 132 S. Ct. 2034, 2041 (2012) (because a consumer's payment of an alleged overcharge for a settlement service was legal, the receipt of that charge by the service provider could not be illegal under RESPA). Yet the CFPB—as part of the same national investigation of private mortgage reinsurance arrangements—convinced four federal judges to approve the "giving" of continuing ceding payments, so that the CFPB could settle with the pmi companies and obtain more than $15 million from them. And now that it has the pmi companies' money and wants to sue PHH, the CFPB is telling this Court that "accepting" the same ceding payments is actionable under RESPA (and therefore a criminal act), without renouncing its previous position.

Third, the implication of the CFPB's attempted change in position would be that the CFPB convinced a United States District Court to specifically permit criminal conduct, and that it is continuing to do so. The PMI Consent Orders are still in effect and will be for some time,[23] and the judges of the Southern District of Florida "retain jurisdiction . . . for purposes of construction, modification, and enforcement of th[e] Order[s]." *See, e.g.*, UGI Order at 13. Yet the CFPB has made no effort to modify the PMI Consent Orders, nor taken any other action to notify the judges who relied on the CFPB's prior representations, that it was wrong and the PMI Consent Orders erroneously sanction criminal activity. Effectively, the CFPB is maintaining these contradictory positions *at the same time*.

[23] Atrium has recently commuted its last remaining captive reinsurance agreement, for business reasons, but understands that the pmi companies continue to cede premiums under the same arrangements, to other lender-captive reinsurers.

The CFPB cannot have it both ways, and having obtained millions of dollars by convincing federal judges to approve the continuation of the ceding payments, it cannot now assert that those same payments are illegal in an attempt to recover millions more from PHH. Because the CFPB 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.

III. The CFPB Has Failed to Plead a Viable Claim Under RESPA Section 8

The CFPB alleges that the reinsurance premiums paid to Atrium by the private mortgage insurers constitute a "thing of value" that "was and is made in consideration of the lender's continued referral of mortgage business" in violation of Section 8(a) of RESPA. Notice. ¶ 95. The CFPB also alleges that Atrium violated Section 8(b) of RESPA by accepting a "portion, split or percentage of the private mortgage insurance premiums." *Id.* ¶ 99. According to the CFPB, "each such ceding payment: (a) was not and is not for services actually furnished or performed, or (b) grossly exceeded or exceeds the value of any such services." *Id.* ¶ 96. The CFPB's Notice fails as a matter of law and is subject to immediate dismissal. In the alternative, PHH is entitled to summary disposition because the undisputed facts demonstrate that reinsurance services were provided by Atrium in exchange for the payments it received.

RESPA was enacted to prevent kickbacks and referral fees to parties "'who did nothing in return for the portions they received.'" *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 268 (4th Cir. 2002) (citation omitted). RESPA Sections 8(a) and 8(b) provide as follows:

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

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

12 U.S.C. §§ 2607(a) and (b).

Importantly, the above prohibitions are subject to the following exception set forth in RESPA Section 8(c):

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

12 U.S.C. § 2607(c) (emphasis added). *See also Cedeno v. IndyMac Bancorp, Inc.*, No. 06-Civ-6438, 2008 U.S. Dist. LEXIS 65337, at *13 (S.D.N.Y. Aug. 25, 2008) (stating that RESPA Section 8 "specifically does not prohibit payments for services actually rendered").

The CFPB's attempt at "artful pleading" is apparent in its pleading of its RESPA claim. Recognizing that its predecessor, the Department of Housing and Urban Development ("HUD"), repeatedly lost in its effort to turn RESPA into a price control statute, the CFPB hedges its bet and 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.[24] Under either theory, however, the Notice is subject to dismissal.

HUD, the agency authorized to administer RESPA until the CFPB recently assumed the role, issued a regulation interpreting RESPA Section 8 as prohibiting overcharges. 24 C.F.R. § 3500.14(g)(2) ("If the payment of a thing of value bears no reasonable relationship to the market

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[24] One would think that after more than six years of investigation by both HUD and the CFPB that the regulatory agencies would have a better understanding of the underlying reinsurance arrangements. That is obviously not the case. It is plainly not credible for the CFPB to assert two mutually exclusive theories of liability: either services were or were not performed by Atrium. If the CFPB cannot articulate a response to that question, then this action is premature and the CFPB should be sent back to gather a fuller understanding of what it purports to be investigating and pursuing.

value of the goods or services provided, then the excess is not for services or goods actually performed or provided."). However, courts interpreting RESPA have concluded otherwise: "Section 8(b) cannot be read to prohibit charging fees, excessive or otherwise, when those fees are for services that were actually performed. . . . We join our sister circuits in holding that the text of Section 8(b) is unambiguous and does not extend to overcharges, and therefore we do not reach the second step of a *Chevron* analysis by determining if HUD's interpretation warrants deference." *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 553-54 (9th Cir. 2010); *Friedman v. Mkt. St. Mortg. Corp.*, 520 F.3d 1289, 1291 (11th Cir. 2008) ("subsection 8(b) does not apply to settlement fees that are alleged to be excessive"); *Santiago v. GMAC Mortg. Grp., Inc*., 417 F.3d 384, 385 (3d Cir. 2005) (concluding that "RESPA does not provide a cause of action for overcharges"); *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 56 (2d Cir. 2004) ("We conclude that section 8(b) clearly and unambiguously does not extend to overcharges.").

More recently, in *Freeman*, the Supreme Court weighed in on the issue in considering a RESPA Section 8(b) case. The Court noted that HUD's position is "manifestly inconsistent with the statute HUD purport[s] to construe," 132 S. Ct. at 2039, and that "§ 2607(b) manifestly cannot be understood to prohibit unreasonably high fees . . . ." *Id.* at 2044. Accordingly, the CFPB's allegation that the ceding payment by the pmi provider 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. *Arthur v. Ticor Title Ins. Co.*, 569 F.3d 154, 158 (4th Cir. 2009) ("Congress directed Section 8 at the particular situation in which fees are split with parties who perform no services in return. That is not the situation we have here."); *Hazewood v. Found. Fin. Grp., LLC*, 551 F.3d 1223, 1226 (11th Cir. 2008) ("[F]or a settlement fee to be actionable, *no* services must be rendered in exchange for it.") (emphasis in original); *Kiefaber v. HMS Nat'l, Inc.*, 891 F. Supp. 2d 796, 800 n.6 (E.D. Va. 2012) ("*Freeman* teaches that the actual monetary value of a service actually performed is irrelevant in determining whether a payment is proper under § 2607.").

Similarly, the CFPB's assertion that that Atrium performed **no** services (*i.e.*, that it assumed no risk) in exchange for the portion of pmi premiums received, is wholly implausible for two reasons.

First, and quite simply, the CFPB cannot plausibly allege that Atrium has not provided actual services, *i.e.*, reinsurance in exchange for the premiums it received. Indeed, as the CFPB is aware from its two-year investigation, Atrium has paid more than $156 million in claims pursuant to its reinsurance agreements.[25] Moreover, as discussed above, any attempt by CFPB to scrutinize the amount of the premium received by Atrium would also fail in light of *Martinez* and *Freeman* because RESPA is not a price control statute and, as such, it does not support a claim for overcharging for reinsurance. Stated otherwise, the CFPB is barred from alleging a RESPA violation based on the allegation that the premium was "excessive" for the risk that was assumed. *See Galiano v. Fid. Nat'l Title Ins. Co.*, 684 F.3d 309, 314 (2d Cir. 2012) ("RESPA is [] not a mechanism for federal courts to regulate the reasonableness of [] insurance rates.").

Second, even if Atrium had never paid a claim, which is not the case, given the nature of insurance the company still would have provided a service. As explained by the court in *Kay v. Wells Fargo & Co.*, 247 F.R.D. 572 (N.D. Cal. 2007):

> [I]t is an indisputable fact in this case that [the reinsurer] was and remains

[25] In addition, more than $93 million was paid by Atrium to the private mortgage insurers in exchange for a release from future liability pursuant to commutation agreements that were the result of arms-length negotiations between sophisticated financial entities.

> obligated to operate as the reinsurer for each borrower's private mortgage insurance. That [the reinsurer] has yet to be called upon to make any payments in no way means that it does not continue to be liable in the event that any of the requisite contingencies occur. [The reinsurer] continues to provide a service, namely reinsurance. By definition, therefore, [the reinsurer] has provided and will continue to provide a service.

Id. at 577.

For these reasons, the CFPB's Notice fails to state a claim upon which relief can be granted.

IV. The Statute of Limitations Bars All of the CFPB's Claims with the Exception of One Year Under the UGI Agreement

All of the CFPB's claims involving loans closed prior to January 25, 2009, are time-barred because of the three-year statute of limitations governing RESPA enforcement actions. Given the fact that three of the four reinsurance agreements were either placed in run-off or commuted prior to January 2009, there is only one year of the UGI reinsurance agreement that remains within the three-year statute of limitations for any potential RESPA claim.

The Third Circuit allows a statute of limitations defense to be raised by a Rule 12(b)(6) motion "where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994) (citations omitted). Here, it is evident from the face of the Notice that virtually all of the CFPB's claims come too late.

RESPA has a specific provision governing enforcement actions: "actions brought by the Bureau, Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation." 12 U.S.C. § 2614 (emphasis added).[26] As the Third Circuit has recognized, the date of the occurrence of the

[26] The statute of limitations for a private action under RESPA Section 8 is "one year . . . from the date of the occurrence of the violation." 12 U.S.C. § 2614.

violation is the date the loan closed. *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 281 (3d Cir. 2010) (citing *Snow v. First Am. Title Ins. Co.*, 332 F.3d 356, 359-61 (5th Cir. 2003)); *see also Taggart v. Wells Fargo Home Mortg., Inc.*, No 10-cv-00843, 2010 U.S. Dist. LEXIS 102747, at *9 (E.D. Pa. Sept. 27, 2010); *Morilus v. Countrywide Home Loans, Inc.*, 651 F. Supp. 2d 292, 306 (E.D. Pa. 2008).

There is no question that the CFPB is bound by the three-year statute of limitations set forth in RESPA. Indeed, the plain language of Section 1054 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), 12 U.S.C. § 5564(g)(2)(C) ("Transferred Authority"), provides that "[i]n any action arising solely under laws for which authorities were transferred under subtitles F and H [which includes RESPA], the Bureau may commence, defend, or intervene in the action *in accordance with the requirements of that provision of law*, as applicable." (emphasis added)). Accordingly, the CFPB's attempt to bring an action against PHH for conduct involving reinsurance agreements between Atrium and CMG, Radian or Genworth is in complete disregard of RESPA's controlling statutory provision. Further, the CFPB's attempt to hold PHH liable for conduct back to 2000 – or more than 12 years prior to the tolling date of January 25, 2012, and long before the CFPB even existed – on the apparent theory that there is no applicable statute of limitations for a CFPB-initiated action – is specious and patently unreasonable.[27]

[27] Nor can the CFPB seek to extend the stature of limitations under any other provisions of Dodd Frank. Indeed, those statutory provisions reinforce PHH's position. For example, the three-year statute of limitations in 12 U.S.C. § 5564 (titled "Litigation authority") applies to administrative proceedings as evidenced by the reference to "any action, suit or proceeding" throughout the section. Moreover, under the companion section, 12 U.S.C. § 5565 ("Relief available"), the relief specified is applicable in both "court and administrative actions." In other words, the CFPB is bound by a three-year statute of limitations.

Further, the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), eviscerates any argument that the continued pmi payments constitute a "continuing violation." RESPA governs the provision of real estate settlement services. The CFPB has alleged that the pmi reinsurance is actually a kickback or referral fee for the referral of a borrower to a specific pmi provider. Setting aside PHH's disagreement with such an assertion, what is incontrovertible is that any such alleged RESPA violation, *i.e.*, referral, must have occurred prior to closing. The continued payment of a portion of the pmi premium by the pmi provider to the reinsurer is, as the Supreme Court explained, simply a continued effect of the initial violation which "cannot breathe life into prior, uncharged [illegal conduct]." *Id.* at 628; *see also Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008) ("Put differently, a continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.") (internal quotation marks and citations omitted). Further, every court that has considered the assertion that continuation of payments after the alleged violation constitutes a "continuing violation" has rejected it, including two cases specifically in the context of pmi reinsurance claims. *Menichino v. Citibank, N.A.*, No. 12-0058, 2013 U.S. Dist. LEXIS 101102 (W.D. Pa. July 19, 2013); *Mullinax v. Radian Guar.*, 199 F. Supp. 2d 311 (M.D.N.C. 2002).

V. PHH Is Entitled to Summary Disposition Because Atrium Paid $156 Million in Claims

Finally, PHH is entitled to summary disposition because it is undisputed that Atrium paid more than $156 million in claims, which proves that the reinsurance contracts were, in fact, not a "sham."

RESPA Section 8(c) clearly exempts all payments for services actually performed (or goods or facilities actually provided). 12 U.S.C. § 2607(c)(2). Thus, while HUD and the CFPB have attempted to add additional requirements to RESPA to require that the goods, facilities or services being paid for are "*bona fide*," such an attempt cannot succeed. *See Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 728 (6th Cir. 2013) (holding that HUD's non-rulemaking pronouncements could not add a requirement of *bona fides* to RESPA); *see also id*. at 729-36 (Sutton, J., concurring) (rule of lenity would prevent a regulator from adding requirements to RESPA even through formal rulemaking).

Even if RESPA could be read to contain such a requirement, however, there can be no suggestion that the reinsurance was not "real" reinsurance or did not impose risk on Atrium, because it is undisputed that Atrium did, in fact, pay out more than $156 million under the reinsurance agreements, and its payouts in certain years exceeded the maximum premiums it could have received for those years. *See* SUF ¶¶ 18, 19.

Atrium paid claims and suffered losses, and just as importantly, stood ready to do so under the terms of the agreements, providing a valuable service to the pmi companies. Since payment for services actually provided is *ipso facto* not a RESPA violation, there cannot have been a RESPA violation even under the CFPB's theory, and PHH is entitled to summary disposition on all counts in the Notice.

CONCLUSION

The CFPB's Notice in this matter is entirely without merit. Atrium provided reinsurance in exchange for the premiums it received and paid more than $156 million in claims. Reinsurance arrangements have been a part of the insurance industry for many years. There is no question that captive reinsurance arrangements in connection with private mortgage insurance are permissible under RESPA. In fact, such arrangements have been sanctioned by HUD since at least 1997 when it issued informal guidance on them.[28] Atrium's four reinsurance agreements were fully compliant with the informal guidance issued by HUD, and Atrium was subject to, and routinely audited by, the New York Department of Insurance.

Atrium operated in compliance with the law and in a fully transparent manner. This lawsuit is simply an attempt to compel a consent order along the lines of what the agency extracted from the pmi providers. Simply stated, the CFPB cannot have it both ways. Having convinced four different United States District Judges to enter detailed consent orders sanctioning as legal the "giving" of payments, the CFPB cannot now contend that it is illegal for Atrium to "accept" those very same payments.

In sum, because the CFPB has previously obtained millions of dollars in settlements by convincing federal judges to bless the same payments it is suing over here, because the CFPB cannot state a claim under RESPA, because almost all of the CFPB's claims are barred by the statute of limitations, and because the undisputed facts show that the reinsurance Atrium provided was real (and costly to Atrium), the Notice should be dismissed with prejudice or, in the alternative, summary disposition entered on all counts in the Notice in favor of Respondents.

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[28] Similarly, the GSEs, Fannie Mae and Freddie Mac, both reviewed and approved of the captive reinsurance arrangements. In 2008, Freddie Mac "temporarily" imposed a 25% commission cap on any reinsurance arrangement for any pmi provider that insured loans sold to Freddie Mac. Atrium's agreements were modified to reflect Freddie Mac's new requirement. The reason for the change, however, was not because of any RESPA concerns, but rather an interest on the part of Freddie Mac to push more capital into the pmi companies to bolster their capital so that these entities, which were under enormous financial stress because of the collapse of the housing market, would have more funds to pay on current claims by Freddie Mac. *See* Exhibit H, hereto (Press Release, Freddie Mac, Freddie Mac Changes Mortgage Insurer Eligibility Rules to Cap Premium Cedes on Captive Reinsurance (Feb. 14, 2008) ("Freddie Mac today announced it is temporarily changing its Private Mortgage Insurer Eligibility Requirements in order to increase the claims-paying and capital retention capacities of its mortgage insurance counterparties during the current market correction.")).

Dated: January 31, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 31st day of January, 2014, I caused a copy of the foregoing Motion to Dismiss the Notice of Charges or, in the Alternative, for Summary Disposition, and the accompanying Brief, to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties who have consented to electronic service:

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