UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of:	
PHH CORPORATION, **PHH MORTGAGE CORPORATION,** **PHH HOME LOANS LLC,** **ATRIUM INSURANCE CORPORATION,** **and ATRIUM REINSURANCE CORPORATION**	**ENFORCEMENT COUNSEL'S OPPOSITION TO PHH'S MOTION TO DISMISS THE NOTICE OF CHARGES OR, IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION**

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I. INTRODUCTION

For nearly 18 years, Respondents, PHH Corporation and its affiliates (together, PHH), manipulated captive reinsurance arrangements to extract kickback payments from the mortgage insurance industry. This massive scheme allowed the company to take advantage of opportunities to steer borrowers to one mortgage insurance company over another and to profit illegally from those referrals. PHH created an elaborate system to closely control borrower referrals for its own gain, collecting hundreds of millions of dollars in kickbacks in exchange. Section 8 of the Real Estate Settlement Procedures Act of 1974 (RESPA) explicitly prohibits this conduct.

PHH's brief supporting its motion to dismiss or in the alternative for summary disposition constructs a hall of mirrors to distract this tribunal from the company's conduct as set forth in the Bureau's Notice of Charges. But the Bureau's position is straightforward, not extraordinary. Though the captive reinsurance arrangements used by PHH were complex, the violation is simple: PHH used these elaborate instruments to demand side payments for itself in exchange for referrals of business. Any actions taken to extract or receive such payments violate RESPA. No state insurance regulator, no federal agency, and no outside consultant ever advised PHH that such conduct was permissible under RESPA.

To avoid liability, PHH relies upon a series of convoluted readings of RESPA that would render the statute virtually a dead letter. According to PHH's reading of RESPA:

- mortgage lenders can collect any amount of money for the purpose of referring consumers to settlement service providers, as long as the lender did more than "nothing" to receive those funds;
- the mere act of returning a percentage of a kickback to the payor qualifies as doing "something" to earn the retained percentage of the payment;

- once the mortgage lender is doing "something" for these payments by settlement service providers, under RESPA it can freely steer consumers to its preferred providers for the sole purpose of extracting payments from those providers;
- any contract purporting to offer "reinsurance" is categorically immune from RESPA; and
- the government can only prosecute RESPA violations as they occur at individual mortgage loan closing transactions.

For all the reasons set forth below, this is not and should not be the law. Rather, RESPA Section 8 must be construed broadly to meet the statute's consumer protection purpose to "eliminat[e] . . . kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2).

As PHH highlights, last year the Bureau achieved an industry-wide settlement with existing mortgage insurance companies that were previously engaged in this conduct. The purpose of that series of settlements, filed in federal court in the Southern District of Florida, was to ensure that abuses of captive reinsurance arrangements did not recur in the future. The settlements were necessarily limited because they engaged only one side of these transactions, the mortgage insurers, who were the payors of the kickbacks. At the time, the Bureau made clear its intent to enforce RESPA further by pursuing misconduct by the recipients of these kickback payments – namely, mortgage lenders such as PHH.[1] That is the purpose of the instant proceeding.

[1] *See* "Press Call on Enforcement Action Against Mortgage Insurers to End Kickbacks to Lenders," CFPB, Apr. 4, 2013, available at http://www.consumerfinance.gov/newsroom/prepared-remarks-of-richard-cordray-on-enforcement-action-against-mortgage-insurers-to-end-kickbacks-to-lenders/ (visited Feb. 19, 2014) ("Today's actions are an important step in our quest to improve markets for consumers by getting rid of harmful practices that impede their pathway to opportunity …. In the meantime, we are continuing to look into the lender side of these captive reinsurance arrangements.").

Enforcement Counsel respectfully submit that Respondents' Motion should be denied in its entirety.

II. FACTUAL BACKGROUND

A mortgage borrower who makes less than a 20% down payment is typically required by the lender to purchase mortgage insurance, often private mortgage insurance. Notice of Charges (NoC) ¶ 12. The borrower pays the premiums, but it is the lender's interest that is protected by the insurance, and the lender – here, PHH – typically "refers" the borrower to the insurer, i.e., selects the insurer. NoC ¶ 13. Private mortgage insurance providers, numbering fewer than ten in the United States during the period at issue here, are known as "MIs." For more than a decade before the 2007-08 financial crisis, private mortgage insurance was a highly profitable business, crucially dependent on the "referrals" controlled by lenders. NoC ¶ 15.

In the mid-1990s, many mortgage lenders began to establish subsidiaries to receive "reinsurance" payments from MIs pursuant to purported reinsurance agreements. PHH was and is one of the largest mortgage originators in the nation, and was among the first to engage in captive reinsurance, founding Atrium Insurance Corporation in 1994, which was succeeded by Atrium Reinsurance Corporation more than a decade later (together, "Atrium"). NoC ¶¶ 7, 8, 16. Atrium had no employees and conducted no independent underwriting or pricing for its reinsurance services. NoC ¶¶ 21, 22. Its purported reinsurance arrangements soon enabled Atrium to receive 40% of the insurance premiums that consumers paid to the primary mortgage insurers, a practice known as "deep cede" captive reinsurance. NoC ¶ 23. In exchange, Atrium provided purported reinsurance coverage to MIs.

PHH's captive reinsurance arrangements dictated in significant part how PHH allocated referrals of business to MIs. NoC ¶ 33. At first, PHH had only one captive reinsurance arrangement, with United Guaranty. NoC ¶ 17. During this time, from 1995-2000, PHH steered virtually all of its

business to United Guaranty. NoC ¶ 34. In 2000, PHH developed a second captive reinsurance arrangement, with Genworth, and began sending some business to Genworth in exchange. NoC ¶¶ 18, 35.

To enforce this kickback-driven regime, PHH maintained an automated "dialer" system to direct MI "referrals," according to predetermined percentages, exclusively to United Guaranty and Genworth, and excluded MIs who lacked captive arrangements with PHH, until 2008. NoC ¶¶ 28, 36. PHH also issued a 2006 Request for Proposal to open the dialer to additional MIs to pressure the MI industry to offer even more lucrative captive arrangements to PHH, made captive arrangements a "pay-to-play" precondition for MIs to do business with PHH, and charged borrowers through PHH's correspondent lenders who lacked captive arrangements with PHH an additional 75 basis points on their loans. NoC ¶¶ 29, 30, 40, 41, 49.

As of the beginning of 2008, thirteen years after receiving its first "premiums," Atrium had paid nothing in claims, and had paid itself tens of millions of dollars in "dividends." Enf. Counsel's Statement of Disputed Facts in Opp'n to Resp.'s Mot. for Summ. Disposition (SoF) ¶¶ 12(b),(d); 15. Then the financial crisis struck. Atrium paid out certain claims using some of the accumulated funds that the MIs had paid, or "ceded," to it. SoF ¶ 12(d). Effectively, the crisis forced Atrium to return some of the kickback payments to the MIs, but Atrium still made a substantial profit from the scheme and was never at any real risk of losing money.

As set forth in the Notice of Charges, PHH continued to pursue new captive reinsurance arrangements and steer business referrals according to those plans through at least 2009. NoC ¶¶ 40-53. New arrangements were thwarted only after Freddie Mac decreed in early 2008 that it would no longer accept loans subject to deep cede captive reinsurance arrangements. NoC ¶ 47. Nonetheless, PHH continued to receive payments pursuant to these arrangements and to factor

plans for captive reinsurance arrangements into its mortgage insurer selections. NoC ¶¶ 48, 49, 51, 53.

From their inception, captive reinsurance arrangements provoked RESPA concerns. In 1996, the Department of Housing and Urban Development (HUD), then responsible for enforcement of RESPA, sought information regarding one of the first arrangements, between Countrywide Finance Corporation and Amerin Guaranty Corporation.[2] Pursuant to that inquiry, Countrywide sought clarification concerning RESPA compliance in connection with captive mortgage reinsurance arrangements. HUD responded with a letter to Countrywide setting forth "the facts concerning captive reinsurance programs as we understand them, relevant law, and how the Department will scrutinize these arrangements to determine whether any specific captive reinsurance program is permissible under RESPA" (1997 HUD Letter, Donald R. Gordon Decl. Ex. X). The letter did not grant any permission for lenders to steer referrals of business to mortgage insurers in exchange for their participation in captive reinsurance arrangements. In fact, the letter warned that "[i]f the lender or its captive reinsurance affiliate is merely given a thing of value by the primary insurer in return for this referral, in monies or the opportunity to participate in a money-making program, then section 8 would be violated; the payment would be regarded as payment for the referral of business or the split of fees for settlement services." 1997 HUD Letter at 3.

Separately, since 2008, PHH has been defending a class action asserting RESPA claims relating to PHH's purported captive reinsurance activities.[3] Among other things, PHH has asserted

[2] Though PHH discusses the purported review of state insurance regulators, *see* Resp. Br. at 11-12, such regulators typically did not review for compliance with RESPA. This responsibility fell to HUD. For instance, while PHH touts its regulatory examination by the New York Insurance Department in 2008, Resp. Br. at 11-12, nothing in that report addresses RESPA. In fact, shortly after this examination, PHH created a new entity, Atrium Reinsurance Corporation, in order to move its captive reinsurance business to Vermont.

[3] *See generally* Compl., *Munoz v. PHH Corp.*, No. 108cv00759 (E.D. Cal. June 2, 2008), ECF No. 2.

in that litigation that the 1997 HUD Letter "doesn't constitute formal agency guidance and, as such, it is not entitled to any deference."[4]

The CFPA transferred jurisdiction over the Real Estate Settlement Procedures Act (RESPA) from HUD to the Bureau on July 21, 2011 (the transfer date). The Bureau pursued and expanded certain investigations begun by HUD of various entities, including PHH,[5] an investigation of which led to the initiation of this proceeding.[6]

In addition, the Bureau settled claims with four MIs relating to purported captive mortgage reinsurance in April of 2013, and with a fifth in November of 2013, all in the U.S. District Court for the Southern District of Florida, and consent orders were issued by the court in each matter.

Enforcement Counsel initiated this proceeding by filing a Notice of Charges on January 29, 2014. On January 31, PHH answered and filed the present Motion to Dismiss. Though PHH makes no mention of it in its Motion to Dismiss, on the same day the Motion was filed, PHH also filed in the Southern District of Florida a "Motion to Administratively Reopen Case and Intervene for the Limited Purpose of Interpreting and Enforcing the Consent Order" (Motion to Intervene), brief, and proposed complaint in one of the settled cases.[7] The Motion to Intervene seeks, *inter alia*, a "declaration" that payments from UGI to Atrium were permitted by the consent order and did not

[4] Def.'s Objections to Magistrate Judge's Findings and Recommendations, *Munoz v. PHH Corp.*, No. 108cv00759 (E.D. Cal. 2008), ECF No. 233, at *17-18. Enforcement Counsel agrees that the HUD letter is not entitled to deference. *See, e.g., Carter v. Welles-Bowen*, 736 F.3d 722, 724(6th Cir. 2013) (even a HUD "policy statement is not binding on the Department or anyone else and … is not otherwise entitled to deference").

[5] *See* PHH Corporation, SEC Form 10-K, Feb. 28, 2012, at *10 ("In January 2012, we were notified that the Consumer Financial Protection Bureau had opened an investigation to determine whether our mortgage insurance premium ceding practices to captive reinsurers comply with [RESPA] and other laws enforced by the CFPB.")

[6] On January 25, 2012, the Bureau entered into an agreement with PHH tolling any applicable statutes of limitations which, as extended, remained in force as of the filing of the Notice of Charges.

[7] *CFPB v. United Guar. Corp.*, No. 1:13-cv-21189-KMW (S.D. Fl, Jan. 31, 2014), ECF No. 7.

violate RESPA, and an injunction from the district court "requiring the CFPB to abide by the Consent Order," based on substantially the same judicial estoppel argument advanced in support of the present Motion. *Id.*; *see* Resp. Br. at 21-25. In other words, the Motion to Intervene – which Enforcement Counsel and UGI have opposed – seeks to stop the present proceeding against PHH in its tracks.

III. ARGUMENT

The Legal Standard for a Motion to Dismiss

To prevail on a motion to dismiss for failure to state a claim, a respondent must show that it is entitled to judgment as a matter of law. 12 C.F.R. § 1081.212(a). For purposes of the motion, all allegations in the Notice of Charges must be accepted as true. *Id.*[8] While the detailed Notice of Charges here would easily survive review under a *Twombly* or *Iqbal* pleading standard adopted for federal court cases,[9] that is not the correct standard in this administrative forum. Simply put, PHH must show that it lacks fair notice of the conduct it must defend. *Katz v. S.E.C.*, 647 F.3d 1156, 1161-62 (D.C. Cir. 2011) (citing *Flying Food Grp. Inc. v. NLRB,* 471 F.3d 178, 183 (D.C. Cir. 2006)). Notice "is sufficient if [Respondent] 'understood the issue' and 'was afforded full opportunity' to justify its conduct during the course of the litigation."[10]

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[8] *Accord, e.g., Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 164 (1993) (construing Federal Rules of Civil Procedure).

[9] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

[10] *Aloha Airlines, Inc. v. Civil Aeronautics Bd.,* 598 F.2d 250, 262 (D. C. Cir. 1979) (quoting *NLRB v. Mackay Radio & Tel. Co.,* 304 U.S. 333, 350 (1938)). *Accord Flying Food Grp. Inc.*, 471 F.3d at 183. *See also Brock v. Dow Chemical U.S.A.*, 801 F.2d 926, 931 (7th Cir. 1986) ("'[A]n issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue,' so long as the cited party had actual notice and a fair opportunity to litigate the issue.") (quoting *National Realty & Construction Co. v. OSHRC,* 489 F.2d 1257, 1264 (D.C.Cir.1973)); *Donovan v. Williams Enterprises, Inc.*, 744 F.2d 170, 177 n.10 (D.C. Cir. 1984) (administrative pleadings are "very liberally construed and very easily amended") (quoting *Nat'l Realty & Construction Co. v. OSHRC,* 489 F.2d 1257, 1264 (D.C.Cir.1973)).

The Legal Standard for a Motion for Summary Disposition

"A party may make a motion for summary disposition asserting that 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 in connection with a motion for summary disposition 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." 12 C.F.R. § 1081.212(c).[11]

A. This Forum's Jurisdiction is Not Constrained by the Transfer Date of the CFPA

PHH first argues that it is entitled to summary disposition for violations that occurred prior to the Bureau's transfer date, July 21, 2011, arguing that the statute under which the Bureau is proceeding was not yet effective and is not retroactive. This is plainly wrong. The Bureau alleges violations of RESPA, a statute that has existed for 40 years. RESPA's prohibition on kickbacks has been the law for decades. With the enactment of the CFPA, Congress simply transferred these powers to the Bureau and extended the ability to use administrative procedures to enforce that pre-existing statute. This change does not raise retroactivity concerns.

Prior to the enactment of the CFPA, HUD held the authority to enforce RESPA, though it did not possess an affirmative grant of statutory authority to pursue administrative adjudication.[12] The CFPA transferred the authority to enforce RESPA from HUD to the Bureau. *See* 12 U.S.C. § 5581(b)(7). Jurisdiction over all existing RESPA claims or proceedings thus passed from HUD to the Bureau as of July 21, 2011. *Id.* ("The Bureau shall have all powers and duties that were vested in

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[11] *See e.g. Porter v. Shah*, 606 F.3d 809, 813 (D.C. Cir. 2010) ("In assessing whether a genuine issue exists, we view the evidence in the light most favorable to the nonmoving party") (citations and quotations omitted) (applying Fed. R. Civ. P. 56)

[12] The prudential regulators possessed this power over their constituent banks. *See, e.g.,* Stipulation and Consent Order, *In re Chicago Title Ins. Co. et al.*, No. AA-EC-2004-84 (O.C.C., Feb. 24, 2005) (settling RESPA claims), available at http://www.occ.gov/static/enforcement-actions/ea2005-12.pdf (visited Feb. 19, 2014).

the Secretary of the Department of Housing and Urban Development relating to the Real Estate Settlement Procedures Act . . . on the day before the designated transfer date.") Subtitle E of the CFPA further authorized the Bureau:

> to conduct hearings and adjudication proceedings with respect to any person . . . in order to ensure or enforce compliance with (1) the provisions of this title . . . ; and (2) any other Federal law that the Bureau is authorized to enforce, including an enumerated consumer law, . . . unless such law specifically limits the Bureau from conducting a hearing or adjudication proceeding and only to the extent of such limitation.

12 U.S.C. § 5563(a)(2). This authorization provides for administrative adjudication of claims under RESPA, an enumerated consumer law. *See* 12 U.S.C. § 5481(12)(M) (listing RESPA).

As a general principle, "a court must apply the law in effect at the time it renders its decision." *Landgraf v. USI Film Products*, 511 U.S. 244, 245 (1994) (citing *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)). But because of the "potential for disruption or unfairness" when a new law is applied to past conduct and a general rule that retroactivity is disfavored, the Supreme Court developed a retroactivity test. *Id.* at 268. When conducting a retroactivity analysis, courts will: (1) consider whether Congress expressly prescribed the statute's temporal reach (either prospectively or retrospectively) in the plain text of the statute or in some other way that can be determined using normal rules of statutory construction, which, if it has, ends the inquiry; (2) if the statute's temporal reach remains unclear, determine whether application of the statute would have a retroactive effect in the disfavored sense by affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment; and (3) if the statute does have an impermissible retroactive effect, apply the presumption against retroactivity by finding the statute inapplicable to the conduct in question absent clear congressional intent that the statute should apply. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37-38 (2006); *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *Landgraf*, 511 U.S. at 278, 280.

The CFPA's grant of administrative adjudication authority over RESPA violations can be applied to conduct occurring before the enactment of the CFPA without raising retroactivity concerns because this change in law does not impact substantive rights. "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Landgraf*, 511 U.S. at 274. "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.* Vesting jurisdiction in an administrative tribunal is therefore a procedural change in the law that can be implemented immediately, even as applied retroactively to prior conduct. As the D.C. Circuit has described, the proper inquiry focuses on fairness:

> Justice requires a fair tribunal, not one which is optimal from the point of view of a particular party. A change in jurisdiction which results in the transfer of claims from one forum to another is generally deemed to be a procedural change that can be given retroactive effect if the transferee forum has requisite qualities of fairness. *This rule applies even when the transfer is from a judicial to an administrative tribunal.*

Haney v. Chesapeake & O. R. R. Co., 498 F.2d 987, 992 (D.C. Cir. 1974) (emphasis added) (internal citations omitted); *see also Arevalo v. Ashcroft*, 344 F.3d 1, 13-14 (1st Cir. 2003) (rights deemed procedural "can be taken away retroactively" by statute, including rights to certain hearings).

Therefore, the Bureau, through its Office of Administrative Adjudication, has jurisdiction to preside over these proceedings and may take action to remedy the violations of law alleged here, regardless of whether the conduct occurred before the enactment of the CFPA.[13]

B. There is No Basis for Judicial Estoppel

PHH contends that the Bureau should be judicially estopped from pursuing its claims because it supposedly "persuaded" four federal judges to "accept" its "position" that premiums

[13] To the extent that PHH argues that certain remedies or penalties would result in retroactive effects, such concerns are unrelated to jurisdiction and can be addressed when relief is granted.

ceded by MIs to captive reinsurers "were legal" under RESPA. Resp. Br. at 22-23. PHH's contention relies solely on the following provision in Consent Orders reflecting settlement agreements between the Bureau and MIs: "Nothing in this Order shall be construed, however, as preventing 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.*, Consent Order, *CFPB v. United Guar. Corp.* (UGI Order), at 5 (Ex. W to the Declaration of Donald R. Gordon).

PHH's estoppel claim is meritless because the Consent Orders cannot be used as the basis for an estoppel claim. Consent orders ordinarily support claim preclusion, which (absent the parties' express intention to the contrary) would bar further litigation between the parties on any claim or defense they raised or could have raised in the action.[14] But as to issues raised in consent orders, it is well-settled that consent orders are not to be given preclusive effect unless the parties manifest their intention that the order be given such effect. As the Supreme Court held in *Arizona v. California*, in the case of a consent judgment, "none of the issues is actually litigated," so consent judgments are ordinarily "not intended to preclude further litigation on any of the issues presented." 530 U.S. 392, 414 (2000) (internal citations omitted). *See also*, *e.g.*, *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278 (5th Cir. 2006) ("Settlement agreements, like consent judgments, are not given preclusive effect unless the parties manifest their intent to give them such effect."); *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1245 (11th Cir.1991) ("The proper analysis . . . is whether the parties specifically agreed to preclude a given issue in the consent decree.").

While these cases show that estoppel based on a consent order is inappropriate absent the parties' express intention to apply such preclusive effect, here the parties have gone further and expressly disclaimed preclusive effect. Paragraph 4 of the Consent Order states: "The parties intend

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[14] *Arizona v. California*, 530 U.S. 392, 414 (2000).

that this Order a) not be an adjudication of any fact or legal conclusion, and b) *not have any preclusive effect in any other action or proceeding*." *See*, *e.g.*, UGI Order at 2 (¶ 4) (emphasis added) (Ex. W to Gordon Declaration). Because this provision (which PHH fails to mention in its brief) shows that the parties intended that estoppel *not* apply to any statement in the Consent Order, it is particularly inappropriate for PHH to attempt to use the Consent Order as a basis for preclusion.

Even if the Consent Orders could provide a basis for judicial estoppel (they cannot), PHH's claim must be rejected because it cannot satisfy any of the required elements. First, PHH cannot establish that the Bureau took "two positions that are irreconcilably inconsistent." *In re Prosser*, 534 Fed. Appx. 126, 130 (3d Cir. 2013). The Consent Orders include the MIs' agreement to broad prohibitions against future participation in captive arrangements, including a general ten-year ban. *See*, *e.g.*, UGI Order at 4-5 (Exh. Y to Gordon Declaration).[15] With respect to past payments, the Bureau obtained the MIs' agreement to pay civil money penalties "by reason of the alleged violations of law" in the Complaint, reflecting the Bureau's view that those past payments violated RESPA. *Id.* at 6. And each Consent Order states that the "Complaint states a claim upon which relief may be granted under Section 8 of RESPA," *id.* at 2-3 (¶¶ 2, 5), establishing that the Bureau did not concede (much less affirmatively take the position) that those payments were legal under RESPA or that it could not file an action or proceeding against other entities stating a similar claim for relief.

Against the Consent Orders' broad prohibitions, the statement on which PHH relies represents a carve-out for a subset of future conduct. As part of the parties' compromise, and in recognition that banning the MIs from ceding premiums under then-existing agreements would require the MIs to fail to perform contractual obligations under its agreements with non-parties to

[15] The MIs were specifically prohibited from entering into any new captive arrangements, revising existing arrangements, and obtaining reinsurance from any captive reinsurer for any new loans originated after the Order was entered. *Id.* at 4-5 (¶¶ A.1-A.3).

the settlement, the Consent Orders allowed the MIs to continue to cede "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 (¶ 3) (Ex. W to Gordon Declaration). The statement allowing continued contractual payments, both alone and in the greater context of the Complaint and Consent Orders, cannot be read to bless the premium ceding as legal under RESPA – or to bless *PHH's receipt* of those payments. The statement simply clarifies that the *Consent Orders* do not prevent the MIs from meeting their contractual obligations on already-existing contracts. It is not a statement about what *RESPA itself* prohibits. In short, there is no inconsistency, much less an irreconcilable one, between the Consent Orders and the Bureau's positions in this proceeding.

Second, even if PHH could identify irreconcilably inconsistent statements, "judicial estoppel is generally not appropriate where the defending party did not convince the [first court] to accept its earlier position." *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 486 (3d. Cir. 2013). PHH cannot meet this requirement because the Consent Orders state that they were entered "*without … adjudication of any issue of fact or law*," *id.* at 1 (emphasis added), and shall "*not be an adjudication of any fact or legal conclusion*." *Id.* at 2 (¶ 4) (emphasis added). PHH cannot establish that the Bureau convinced any court to decide any issue, much less accept any position.

Third, PHH must establish that the Bureau "changed [its] position in bad faith." *In re Prosser,* 534 Fed. Appx. at 130. The doctrine of judicial estoppel exists to "prevent a litigant from playing fast and loose with the courts," *In re Kane*, 628 F.3d 631 (3d Cir. 2010), and "should only be applied to avoid a miscarriage of justice," *Krystal Cadillac–Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 319 (3d Cir. 2003). Because the Bureau did not change its position at all, this element does not apply. In any event, as discussed above, the reasons for the Bureau's carefully-considered decision to agree to a narrow carve-out on the scope of the MIs' prohibited conduct was reasonable,

not in bad faith, and allowing the Bureau's RESPA claims against PHH to proceed would of course not result in a "miscarriage of justice."[16]

C. The Notice of Charges States a Claim for Relief

The Notice of Charges contains ample allegations to state a claim under both RESPA Section 8(a) and 8(b), even under the pleading standard applicable to complaints filed in federal court. The Bureau's allegation that PHH accepted payments from MIs under the guise of "reinsurance" premiums in exchange for referring borrowers to the MIs adequately states a claim of a violation of Section 8(a). Likewise, the Bureau's allegation that PHH accepted a portion of borrowers' mortgage insurance premium payments to MIs despite performing no service for borrowers in exchange for those payments adequately states a claim of a violation of Section 8(b). PHH attacks the sufficiency of these allegations by grossly mischaracterizing RESPA case law and confusing the provisions of subsections 8(a), 8(b), and 8(c)(2).

PHH's argument is that because Section 8(b) allows payments for "services actually performed," only those actors who "did nothing" at all in exchange for fee splits or referral payments could be deemed to have violated Section 8(a) or 8(b) of RESPA.[17] PHH maintains that it cannot be liable under RESPA because Atrium provided a "service" by eventually returning some of the kickback payments to the MIs in the form of "reinsurance claims" after more than 10 years of collecting premiums. The Bureau does not dispute that Atrium returned some portion of the kickback payments to the MIs after 2008, when a global financial crisis hit. *See* NoC ¶ 60. The Bureau does dispute that this could be called a "service[] actually performed," in light of the

[16] The final requirement of a judicial estoppel claim is that the doctrine may not be employed "unless it is tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant's misconduct." *In re Prosser,* 534 Fed. Appx. at 130. Because there is no basis for judicial estoppel, there is no need to consider this element.

[17] *But cf.* 12 U.S.C. § 2607(a) (Section 8(a) makes no exception for "services actually performed").

evidence that the only purpose of these arrangements was to extract kickbacks in exchange for referrals. Whether PHH actually performed services is clearly a disputed issue of material fact suitable for trial, and the Bureau's well-pled claims should not be dismissed based on the lone, undisputed fact that PHH returned a portion of the kickback payments to the MIs.

Setting aside that these disputed factual issues preclude dismissal, PHH's contention that the Bureau has failed to state a claim is also meritless because it relies on an incorrect interpretation of the law. In attempting to make something simple seem complex, PHH conflates several concepts relating to Section 8 claims, including the differences between Section 8(a) and Section 8(b). Section 8(a), which focuses on payments *between providers* of settlement services, specifies that "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."[18] In contrast, Section 8(b) focuses on payments made *by borrowers*, and provides protection for recipients of such payments who actually perform real estate settlement services *for borrowers* (the "actual services" provision). Section 8(b) bars the giving or accepting of "any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed."[19] Section 8(b) does not require proof of an agreement or referral.

PHH cites a number of cases for the proposition that Section 8 does not prohibit "excessive" fees because it is not a "price control statute." Resp. Br. at 25-28. These cases are inapposite, because the Bureau is not alleging that "excessive" fees or "overages" constitute the violation. Rather, the Bureau alleges that PHH received kickbacks in exchange for referrals, in violation of Section 8(a), and that PHH accepted a split of mortgage insurance premiums other than

[18] 12 U.S.C. § 2607(a).
[19] 12 U.S.C. § 2607(b).

for settlement services performed, in violation of Section 8(b). The government's claims involve kickback payments between providers. The cases cited by PHH involve claims under Section 8(b), not Section 8(a), targeted at allegedly excessive fees paid by borrowers for real estate settlement services. *See Martinez v. Wells Fargo Home Mortgage Inc.*, 598 F.3d 549, 552–54 (9th Cir. 2010) (involving Section 8(b) claim alleging that fee charged to borrower was "excessive," and holding that such "overcharge" claims are not prohibited by Section 8(b)); *Arthur v. Ticor Title Ins. Co.*, 569 F.3d 154 (4th Cir. 2009) (Section 8(b) claim alleging that borrower was charged title insurance fee in excess of the "filed rate"); *Hazewood v. Found. Fin. Grp., LLC*, 551 F.3d 1223 (11th Cir. 2008) (same); *Friedman v. Mkt. St. Mortgage*, 520 F.3d 1289 (11th Cir. 2008) (No cause of action under Section 8(b) for claim that single settlement service provider overcharged borrower); *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 385 (3d Cir. 2005) (same); *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 56 (2d Cir. 2004) (same); *Boulware v. Crossland Mortgage Corp.,* 291 F.3d 261 (4th Cir. 2002) (allegation that defendant charged plaintiff $65 for a $15 service, resulting in a "$50 overcharge," not actionable under Section 8(b)); *see also Galiano v. Fidelity Nat'l Title Ins. Co.*, 684 F.3d 309, 314 (2d Cir. 2012) (citing *Kruse* for the proposition that "RESPA is . . . not a mechanism for federal courts to regulate the reasonableness of title insurance rates").[20] None of these cases has anything to do with a payment from one settlement service provider to another for the purpose of securing a referral. While RESPA may not impose a "price control" on fees charged to borrowers, it undoubtedly "controls" the price of referrals. The only allowable kickback fee is $0. These cases are therefore

[20] One case cited by PHH involved a Section 8(a) claim, which was dismissed because the court deemed that the plaintiff had conceded that the recipient of the "thing of value" had in fact performed an actual service entitling it to protection under Section 8(c)(2). *See Cedeno v. IndyMac Bancorp, Inc.*, No. 06 Civ. 6438, 2008 WL 3992304 at *3 (S.D.N.Y. Aug. 26, 2008) ("The plaintiff concedes that she is not challenging the fee itself, or that an appraisal was provided, but she challenged 'IndyMac's practices in relation to the appraisal services.'"). *Cedeno* and Section 8(c)(2) are discussed in Section III.E., below.

irrelevant to any Section 8(a) claim challenging payments between settlement service providers that are alleged to have been made in exchange for referrals.

PHH's price control argument is also irrelevant to the Bureau's Section 8(b) claim for several reasons. First, the Bureau has alleged that Atrium provided no "actual service" in exchange for the ceded premiums it received from MIs. PHH can only point to the money that Atrium eventually returned to the MIs in "reinsurance" claims. If merely making a payment to the other party to the fee splitting were enough to defeat a claim under Section 8(b), then all that a recipient of an otherwise illegal fee split would have to do to escape liability is to pay some nominal portion of its illegal share back to the other party to the split. Indeed, that is precisely the conduct that the Bureau alleges in the Notice of Charges. *See, e.g.*, NoC ¶¶ 60-65.

Second, even if Atrium's payment of "claims" to MIs were enough to constitute an "actual service" as a matter of law, it is the wrong kind of service. Section 8(b) protects only those who accept payment for and "actually" perform "real estate settlement services" *for borrowers* in exchange for the challenged payment. PHH has cited no case in which a service performed for another settlement service provider, rather than for a borrower, qualified as an "actual service" under Section 8(b).[21]

Third, discussions of the "price control" limitation on Section 8(b) arise almost exclusively in cases involving a Section 8(b) claim against a single culpable party.[22] For example, PHH quotes the

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[21] PHH's argument that the "service" that it claims to have provided to other settlement service providers, namely MIs, shield them from liability under both Section 8(a) and 8(b) is addressed in Section III.E., below.

[22] Section 8(b) claims tend to fall into one of four categories. Only one, referred to as "fee splitting," involves two culpable parties. The other three involve only one culpable party. *See Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 802 (5th Cir. 2010) (noting that the other three are an "overcharge," a "mark-up," and an "undivided unearned fee"), *aff'd*, *Freeman*, 132 S. Ct. 2034. *See also Haug v. Bank of America*, 317 F.3d 832, 836 (8th Cir. 2003) (Section 8(b) "unambiguously requires at least two parties to share a settlement fee in order to violate the statute"). Various courts presented with

Supreme Court's pronouncement that "[Section 8](b) manifestly cannot be understood to prohibit unreasonably high fees," *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2044, 566 U.S. ___ (2012), while failing to recognize that the case addressed only the question of "whether this provision prohibits the collection of an unearned charge by a single settlement-service provider," *id.* at 2039 (plaintiff alleged defendant had charged an "undivided unearned fee"), and the Court assumed, as the parties had, that Section 8(b) "does not reach unreasonably high fees" charged for a provider's own services, *id.* at 2040 (noting that "petitioners acknowledge that the statute does not cover overcharges" and concluding that "[i]n our view, § [8](b) unambiguously covers only a settlement-service provider's splitting of a fee with one or more other persons; it cannot be understood to reach a single provider's retention of an unearned fee").

Read in the proper context, the *Freeman* court's statement about "unreasonably high fees" is obviously a reference to "overcharges." Moreover, the Supreme Court's ruling is firmly rooted in the "portion, split, or percentage" language of Section 8(b), not the "actual services" exclusion, making it wholly irrelevant to PHH's argument that a "service" of any value is protected by *Freeman* and similar cases. *Freeman*, 132 S. Ct. at 2040-43 (noting that "[b]y providing that no person 'shall give' or 'shall accept' a 'portion, split, or percentage' of a 'charge' that has been 'made or received,' 'other than for services actually performed,' § [8](b) clearly describes two distinct exchanges," that "[t]he

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"overcharge," "mark-up", and "undivided unearned fee" claims under Section 8(b) have held that these claims boil down to attempts to turn RESPA into a price control statute because the plaintiff is simply challenging the reasonableness of the price he has been charged, rather than alleging that one settlement service provider has given up part of its fee to another provider who has not earned its share. *E.g. Martinez*, 598 F.3d at 552–54 (explaining that "overcharge" is a term of art in the RESPA Section 8(b) context denoting a fee charged by a single settlement service provider that is alleged to be "excessive," and holding that "overcharges" are not prohibited by Section 8(b)); *Boulware,* 291 F.3d 261 (defendant allegedly charged plaintiff $65 for a $15 service, resulting in a "$50 overcharge"); *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002) (defendant allegedly marked-up plaintiff's bill by $14, charging $50 for a $36 service). PHH strips these cases of this context when it quotes the courts' statements that "excessive" fee claims are beyond the reach of Section 8(b).

phrase 'portion, split, or percentage' reinforces the conclusion that § [8](b) does not cover a situation in which a settlement-service provider retains the entirety of a fee received from a consumer" and applying various rules of statutory construction to that phrase while all but ignoring the "actual services" provision). This "price control" or "excessive fee" rationale does not apply to claims, like the Bureau's, that two culpable parties have participated in the challenged fee splitting.

In short, not only has the Bureau given PHH fair notice of the conduct that it must defend, it has also sufficiently alleged, for Rule 12(b)(6) purposes, that PHH accepted payments from MIs in exchange for referring borrowers to the MIs in violation of RESPA Section 8(a). None of the authorities relied upon by PHH even pertain to such a claim, as they all relate to Section 8(b) claims for overages. Likewise, the Bureau has given fair notice and also sufficiently alleged that PHH received a portion of premiums paid to MIs by borrowers, and that PHH performed no service in exchange for those payments, thus violating RESPA Section 8(b). PHH's motion mischaracterizes Section 8(b) case law, implying that it confers much broader protection under the "actual services" provision than is actually the case, and fails to identify any flaw in the Bureau's pleading. The Notice of Charges gives fair notice and properly states a claim for relief under RESPA Section 8. PHH's motion should therefore be denied.

D. The Bureau's RESPA Claims Are Not Time-Barred

1. No Statute of Limitations Applies to this Administrative Proceeding

The three-year limitations provision relied upon by PHH has no application in this administrative adjudicatory proceeding. Section 16 of RESPA provides only that the Bureau has three years from the date of a "violation" of Section 8 to initiate an "action" in an appropriate "court." 12 U.S.C. § 2614. Under the rule established by *BP America Production Company v. Burton*, 549 U.S. 84 (2006), statutes of limitations that expressly reference "actions" filed in "courts" do not extend to administrative adjudications.

Burton held that the ordinary meaning of the term "action" denotes a judicial forum, which it also referred to as a "court," and not an administrative one.[23] The Supreme Court therefore read the statutory time bar for "actions" to have no application to administrative enforcement "proceedings."[24] Further, the Court noted, "[t]o the extent that any doubts remain regarding the meaning of [the statute], they are erased by the rule that statutes of limitations are construed narrowly against the government."[25]

Section 16 of RESPA uses the language discussed in *Burton*, and thus applies only to an "action" brought in a "court." Pursuant to *Burton*, these terms indicate that Section 16 is limited to judicial fora. The Bureau's administrative adjudicatory forum is not a "court" in which "actions" are filed, but an alternative Article I tribunal. Congress did not specify any limitations period for Bureau administrative enforcement actions generally. *Compare* 12 U.S.C. § 5563 (setting forth no limitations period for administrative "proceedings") *with* § 5564(g) (stating the limitations period for judicial "action[s]"). Therefore, no statute of limitations applies to Office of Administrative Adjudication proceedings for violations of RESPA.

When Congress enacted the CFPA and conferred authority on the Bureau to enforce the enumerated consumer laws administratively, it could have amended Section 16 of RESPA to extend its application to administrative proceedings. It did not do so, even as it amended Section 16 to extend enforcement authority to the Bureau.[26] Nor, as noted above, did Congress specify any limitations period for Bureau administrative enforcement actions generally.[27] These legislative

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[23] *Id.* at 91-92.
[24] The instant proceeding was initiated under Section 1053 of the CFPA. *See* 12 U.S.C. § 5563(a) ("The Bureau is authorized to conduct … adjudication *proceedings* ….") (emphasis added), 5563(b) (captioned "Special Rules for Cease-and-Desist *Proceedings*") (emphasis added).
[25] *Burton*, 549 U.S. at 95-96 (citation omitted).
[26] CFPA § 1098(9) (amending 12 U.S.C. § 2614).
[27] 12 U.S.C. § 5563 (setting forth no limitations period for administrative actions).

enactments, amendments, and abstentions convey Congress's intention to enable the Bureau to enforce Section 8 of RESPA in administrative proceedings unfettered by any time limitation and on the same basis as the prudential regulators.[28]

To hold otherwise would call into question the authority long exercised by federal prudential regulators to enforce RESPA (and other federal laws) in their administrative tribunals without respect to the statute of limitations on "actions" provided in the statute. "Federal agencies with supervisory powers over lenders [have always been able to] use their powers to require compliance with RESPA." *See, e.g.,* 53 Fed. Reg. 17427, 17441-42 (May 16, 1988) (codified, as amended, at 24 C.F.R. § 3500.19). The statute of limitations provided by section 16 of RESPA has never been applicable to administrative proceedings of the federal prudential regulators, which are brought pursuant to section 8 of the Federal Deposit Insurance Act. *See, e.g., In the Matter of: Clear Lake National Bank San Antonio*, 2003 WL 24308757 (O.C.C. Nov. 7, 2003) (consent order under 12 U.S.C. 1818(b) requiring restitution for violations of RESPA that occurred more than three years prior to the issuance of the order). A ruling declaring that the Section 16 statute of limitations applies to administrative proceedings initiated under Section 1053 of the CFPA would be inconsistent with, and call into doubt, the federal prudential regulators' longstanding administrative powers.

PHH points to limitations provisions of Section 1054 of the CFPA in support of its argument that the statute of limitations in Section 16 of RESPA applies to the instant proceeding. Resp. Br. at 30. But Section 1054 pertains to civil actions filed in a judicial forum. The Bureau agrees that the Section 16 statute of limitations would apply to a Section 8 claim asserted in an "action"

[28] *See Alden Management Services, 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") (citing *Burton*).

filed in a court under the Bureau's Section 1054 authority. Section 1054 says so explicitly. 12 U.S.C. § 5564(g)(2)(B) ("any action arising solely under an enumerated consumer law," including RESPA, must be commenced "in accordance with the requirements of that provision of law"). But this is not such an "action." It is an "adjudication proceeding" commenced under Section 1053 of the CFPA. 12 U.S.C. § 5563.

PHH also argues that the references to "any action, suit, or proceeding" in Sections 1054(b) and 1054(d)(2)(A) show that all of Section 1054 applies to administrative "proceedings." PHH does not explain why this should be so. Rather, it is far more sensible to apply only those provisions of Section 1054 which reference "proceedings" – namely: (1) Section 1054(b), which permits the Bureau to act in its own name and through its own attorneys, and (2) Section 1054(d)(2)(A) and (B), which require the Bureau to notify and consult the Attorney General regarding its involvement in certain proceedings – to administrative proceedings under Section 1053. The other provisions of Section 1054, which do not reference "proceedings," apply only to the types of adjudications that they specify. In particular, Section 1054(g) (entitled "Time for Bringing Action") applies only to "action[s]" filed in courts. 12 U.S.C. § 1054(g)(1) ("no *action* may be brought under this title more than three years after the date of discovery of the violation" (emphasis added)), 1054(g)(2)(A) ("An *action* arising under this title . . .") (emphasis added), 1054(g)(2)(B) ("In any *action* arising solely under an enumerated consumer law . . .") (emphasis added), 1054(g)(2)(C) ("In any *action* arising solely under laws for which authorities were transferred . . .") (emphasis added).[29]

[29] Enforcement Counsel agrees with PHH that the use of the phrase "court and administrative actions" in the heading of 1055(c), codified at 12 U.S.C. § 5565(c), indicates that money penalties are available to the Bureau in both judicial and administrative proceedings. Resp. Br. at n.27. Similarly, the use of the phrase "administrative proceedings or court actions" in the heading of Section 1055(a) and the phrase "action or adjudication proceeding" in subsection 1055(a)(1) indicates that jurisdiction to grant appropriate legal or equitable relief resides with both "the court (or the Bureau, as the case may be)." 12 U.S.C. § 5565(a), (a)(1). The location of these phrases within the CFPA

2. PHH Engaged in a Continuous Violation of RESPA through at least May 30, 2013

Even if the Section 16 statute of limitations applies to the instant proceeding, the continuing violations doctrine should be applied in this case because "all acts which constitute the claim are part of the same unlawful [] practice." *Mandel v. M & Q Packaging Corp.,* 706 F.3d 157, 165-66 (3d Cir. 2013). The Bureau alleges that PHH engaged in a long-running kickback scheme dating back to 1995 and continuing until at least 2013. The violations of RESPA presented in the Notice of Charges demonstrate a pattern and practice of manipulating captive reinsurance arrangements to extract kickbacks in exchange for referring volumes of business to certain MIs. PHH entrenched this conduct in its automated systems (which for a decade restricted consideration of MI referrals on PHH loans to those few that had captive arrangements) and its business model (which penalized borrowers whose correspondent lenders chose non-captive-eligible MI coverage). Because the nature of these violations goes far beyond the origination of individual loans, this conduct constituted a continuing violation of the law.

Under the continuing violations doctrine, all of PHH's violative conduct is actionable so long as some of the acts occurred within the limitations period.[30] Nothing in the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), restrains this result. In *Ledbetter*, the Court considered the timeliness of an individual plaintiff's EEOC charge under Title VII of the Civil Rights Act of 1964, and declined to apply a continuing violations theory to the

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support the Bureau's position that Section 1054(g), which contains neither the term "administrative" nor "proceeding," does not apply to administrative proceedings commenced pursuant to Section 1053.

[30] *Hanover Shoe, Inc. v. United Shoe Machinery Corp*., 392 U.S. 481, 502 n. 15 (1968); *see also Nat'l Fair Hous. Alliance, Inc. v. HHHunt Corp*., 919 F. Supp. 2d 712, 717-18 (W.D. Va. 2013) (holding that the continuing violation doctrine could be applied to claims against an architect for violations of the Fair Housing Act in multiple building projects); *Davis v. Gen. Motors Acceptance Corp.,* 406 F.Supp.2d 698, 705-06 (N.D.Miss.2005) (applying continuing violation doctrine to Equal Credit Opportunity Act claims alleging racially discriminatory mark-ups on auto loans).

plaintiff's particular claim of gender discrimination in her pay. PHH's attempt to draw upon *Ledbetter* by arguing that the "continued payment of a portion of the pmi premium by the pmi provider to the reinsurer is . . . simply a continued effect of the initial violation," Resp. Br. at 31 (citations/quotations omitted), misapprehends the Bureau's claim. PHH's captive reinsurance scheme is properly viewed as a single, continuous violation because it is comprised of a cycle of kickback payments and referrals beginning in 1995 and continuing into 2013. Each of PHH's actions to maintain and enforce this kickback scheme should be treated as part and parcel of an ongoing violation. These allegations extend far beyond the continued payment of purported reinsurance premiums. PHH created a pervasive pay-to-play system in which business was awarded in exchange for kickbacks. The misconduct is reflected through PHH's cumulative actions over the span of more than a decade, which, taken together, comprise the violation: demanding the kickbacks through deep-cede captive reinsurance, limiting access to PHH referrals to those selected MIs which complied, refusing to refer business to MIs that lacked reinsurance arrangements with PHH, impeding correspondent lenders from doing business with those MIs on PHH loans, and passing on higher charges to consumers if they did business with anyone outside the captive, "preferred" MIs. Because a substantial number of those mortgage originations, referrals of business, refusals of business, kickback payments, demands for payments, and further actions fall within the limitations period, the total conduct should be encompassed.[31]

[31] *See, e.g., Ramirez v. GreenPoint Mortgage Funding, Inc.*, 633 F. Supp. 2d 922, 930 (N.D. Cal. 2008) (internal citation omitted) (applying the continuing-violations doctrine to claims under the Fair Housing Act on the grounds that "a single incident of 'steering' constitutes an actionable violation of the FHA. . . That more than one incident of steering occurred only demonstrates a pattern of such violations. . ."); *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380-81 (1982) (only one of five individual violations occurred within limitations period but all were actionable under the continuing violations doctrine).

No court has yet ruled on whether the continuing violations doctrine may be advanced under RESPA in the context of a government enforcement proceeding, let alone an enforcement proceeding alleging such a far-ranging and intentional scheme to steer business according to kickback payments. [32] This inquiry is highly fact-specific. Courts have embraced the continuing violations doctrine in government enforcement actions, including by the Federal Reserve and the Securities and Exchange Commission, where deemed appropriate.[33]

The Bureau is charged with ensuring the consistent adherence to Federal consumer financial law by all participants in the markets for consumer financial products and services. 12 U.S.C. § 5511(b)(4). Here, Congress has empowered the Bureau with broad authority to enforce RESPA and other Federal consumer financial laws with an eye to market-wide effects of illegal conduct. 12 U.S.C. § 5511(b)(5) (charging the Bureau to "ensure" that markets for consumer financial products and services "operate transparently and efficiently"). The continuing violations doctrine is particularly well suited to vindicating this Congressional goal.[34] A "wooden" application of a statute of limitations that "ignores the continuing nature of the alleged violation" would only "undermine[ ]

[32] *Menichino v. Citibank, N.A.*, and *Mullinax v. Radian Guaranty*, two private class action suits cited by PHH, are distinguishable because they involved private claims for compensation and did not raise allegations of the same scope as the Bureau's here. No. 12-0058, 2013 U.S. Dist. LEXIS 101102 (W.D. Pa. July 19, 2013); 199 F. Supp. 2d 311 (M.D.N.C. 2002). In any event, they do not represent mandatory authority.

[33] *See, e.g., Interamericas Investments, Ltd. v. Board of Govs. of the Fed'l Resv. System*, 111 F.3d 376 (5th Cir. 1997) (recognizing a continuing violation under the Bank Holding Company Act); *S.E.C. v. Kovzan,* 807 F. Supp. 2d 1024, 1036 (D. Kan. 2011) (denying defendant's motion to dismiss in light of multitude of decisions recognizing continuing violations in SEC enforcement actions); *S.E.C. v. Jackson*, 908 F. Supp. 2d 834, 871-73 (S.D. Tex. 2012) (recognizing that "[i]f wrongdoers may continue to reap the benefit of their continuing violations with no threat of punitive enforcement actions, then, for some, the possibility that they may eventually merely have to return what may be left of their ill-gotten gains may become simply a cost of doing business. Such an outcome conflicts with congressional intent to prevent securities fraud") (quoting *S.E.C. v. Huff*, 758 F. Supp. 2d 1288, 1340–41 (S.D. Fla. 2010).

[34] Any doubt on this point should be resolved in favor of the Bureau in light of the rule that "statutes of limitations in the civil context are to be strictly construed in favor of the Government against repose." *Interamericas*, 111 F.3d at 382. *Accord Burton*, 549 U.S. at 95-96.

the broad remedial intent of Congress embodied in the Act." *Ramirez v. GreenPoint Mortgage Funding, Inc.*, 633 F. Supp. 2d 922, 929 (N.D. Cal. 2008) (citing *Havens Realty*).

The CFPA further recognized the potential for continuing violations of Federal consumer financial protection laws, including RESPA. The CFPA directs that civil money penalties apply for "each day during which such violation or failure to pay continues." *See, e.g.,* 12 U.S.C. § 5565(c)(2)(A) ("For any violation of a law, rule, or final order or condition imposed in writing by the Bureau, a civil penalty may not exceed $5,000 for each day during which such violation or failure to pay continues."). The Bureau is thus authorized to identify and prosecute continuing violations of law and obtain corresponding remedies where appropriate. *See Interamericas Investments, Ltd.*, 111 F.3d at 382 (recognizing a continuing violation under the Bank Holding Company Act and finding that "[w]here the civil penalty provision at hand contemplates per diem penalties for violations, then continuing violations are cognizable under the general statute of limitations") (internal citations omitted).

3. A Significant Number of Separate Violations Occurred After January 25, 2009

Even if the Section 16 statute of limitations applied to this enforcement proceeding without regard to continuing violations, the Bureau would have numerous timely claims. Indeed, each monthly or other periodic "premium" paid by the MIs to PHH should be deemed a separate violation of RESPA.[35] RESPA Section 8(a) prohibits any person from "giv[ing]" or "accept[ing]" any "fee, kickback, or thing of value" "pursuant to an agreement . . . that business incident to . . . a real estate settlement service," including mortgage insurance business, "shall be referred to any

[35] Each withdrawal of funds from a captive reinsurance trust account by PHH also constitutes a violation, as does PHH's acceptance of any other "thing of value" from an MI in exchange for referrals.

person."[36] This language plainly prohibits the act of accepting a "thing of value" in exchange for making a referral of real estate settlement business. Accepting a kickback at any time is a violation of Section 8(a), and should give rise to a Section 8(a) claim at the time the kickback occurred.[37]

Authority contrary to this straightforward reading of the statute exists, but it is inapplicable to government enforcement, depends on inaccurate assumptions about mortgage transactions, and is not mandatory in this proceeding. The Fifth Circuit, in litigation filed by a consumer, *Snow v. First American Title Insurance Company*, 332 F.3d 356(5th Cir. 2003), has held that a single Section 8(a) violation occurs on the date the consumer closed on the mortgage, regardless of when or how often the act of accepting (or giving) an illegal fee occurs; and as a consequence, a borrower's *only* Section 8(a) claim accrues, and the Section 16 statute of limitations on that sole claim begins to run, on the date of the mortgage settlement.[38] A number of district courts – but no other circuit courts – have adopted *Snow*'s holding in the context of private actions.[39]

Snow's "single violation at origination" theory has significant flaws in its interpretation, assumptions, and policy justifications, particularly as applied to this case. First, the *Snow* decision ignores the plain language of Section 8(a), which covers the receipt of payments, not the origination of mortgages. Second, *Snow* rests on the bizarre rationale that the RESPA statute of limitations' reference to a single "violation" in relation to the time in which an "action" may be brought implies

[36] 12 U.S.C. § 2607(a).

[37] Similarly, accepting an unearned split of a settlement service charge is a violation of Section 8(b) and should give rise to a claim under that provision of law at the time of acceptance.

[38] 332 F.3d 356 (5th Cir. 2003).

[39] The Third Circuit has mentioned the *Snow* decision in a discussion of the contours of a class settlement. *See In re Community Bank of Northern Virginia,* 622 F.3d 275, 281-82 (3d Cir. 2010) ("This [settlement] structure reflected the hurdle posed by RESPA's one-year statute of limitations, which begins to run 'from the date of the occurrence of the violation,' 12 U.S.C. § 2614, *i.e.*, the date the loan closed.") (citing *Snow*, 332 F.3d 356, 359–61 (5th Cir.2003)). Obviously, given the settlement posture, the parties did not litigate the question of the validity of the *Snow* holding, and the Third Circuit did not decide it, merely noting the issue as one bearing on the reasonableness of the proposed settlement.

that a mortgage transaction can involve only one violation. *Snow*, 332 F.3d at 359. The more plausible reading is that each independent "violation" triggers an independent period of time within which an "action" must be brought. Third, the Fifth Circuit reasoned that the other theory advanced – that each kickback was a separate violation (the "separate violations" theory) – would "negate" Congress's decision to enact different limitations periods for different sections of RESPA and for the government and private plaintiffs. *Id.* This, too, is patently wrong. If each kickback payment constituted a violation, the different limitations periods would still exist. There would simply be more violations, and therefore more claims, than under the court's interpretation. These interpretive flaws, alone, counsel against accepting *Snow*'s holding.

The *Snow* decision's policy justifications are also problematic. The *Snow* court noted that if the kickback payment starts the limitations period, there arises the possibility of multiple recoveries for "a single violation." *Snow*, 332 F.3d at 360. Strictly speaking, this is mistaken, since each recovery would actually be for a separate violation. Furthermore, since private plaintiffs in a RESPA action recover the cost of the charge to the borrower, violations where the borrowers' injury accumulates over time, like those presented in this matter, could only be fairly compensated if the statute of limitations likewise attaches over time. Where a borrower does not incur multiple infected charges, her recovery is capped by the amount she has paid, and it is only the number and timing of her claims that is affected by later violations. There would not be multiple recoveries. The *Snow* court also worried that a limitations period that attaches to each payment would "regenerate itself like a phoenix from the ashes" each time an illegal payment is made. But violators' solution to this problem is easy: do not make repeated illegal payments. *Snow*, 332 F.3d at 361. In addition, the court invoked the simplicity of its rule. But the theory of separate violations is equally simple. Each illegal payment gives rise to a separate claim, which must be asserted within the time prescribed for that claim.

A limitations theory more consistent with the statutory language is that each monthly premium ceding payment – irrespective of the date of the related mortgage settlement – constitutes a separate violation. So a single loan may be infected with multiple violations occurring at various times, based on the number and timing of the illegal payments. The plain language of RESPA Section 8(a) supports this interpretation, prohibiting the receipt (and payment) of a "thing of value" in exchange for a referral of mortgage settlement business—as opposed to prohibiting the origination of a mortgage tainted by such a payment. This interpretation also achieves the statutory purpose, and limits evasion on technicalities. For instance, it makes recovery possible as long as the culpable parties have continued to make and accept kickbacks within the applicable limitations period. And it is not susceptible to evasion by violators who wait sufficiently long between mortgage origination and illegal payment (only one year in the case of a claim by a private plaintiff). Indeed, PHH has asserted elsewhere that "mortgage reinsurance . . . is conducted separate and apart from the closing ….,"[40] conceding that the conduct challenged here – primarily the receipt of payments from MIs pursuant to "reinsurance" arrangements – does not occur at closing. PHH thus cannot be heard now to insist that a Section 8 claim challenging such conduct accrues only at closing.

4. Some Bureau Claims are Timely Even Under PHH's Interpretation

There is no dispute that the allegations presented in the Notice of Charges identify live claims, even under PHH's interpretation of the applicable law. The Bureau entered into its tolling agreement with PHH on January 25, 2012. PHH concedes that it originated mortgages subject to captive reinsurance arrangements with United Guaranty within three years of that date, that is, after January 25, 2009. (Mot. at 29.) According to PHH's own data, it originated approximately 2,400 mortgages subject to captive reinsurance arrangements during this time. While PHH seeks to rely

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[40] Def.'s Reply in Further Supp. Of Their Mot. for J. on the Pleadings, *Munoz v. PHH Corp.*, 2009 WL 3288775, at *3 (E.D. Cal. Jan. 26, 2009) (Gordon Decl. Ex. Y).

upon its three-year statute of limitations argument as a means to escape responsibility with minimal judgment, it concedes that none of this post-January 25, 2009 activity could be time-barred.

E. The Return of Some, but not All, Kickback Funds in the Form of Claims Payments is Insufficient to Support Summary Disposition

Lastly, PHH has failed to meet its burden for summary disposition of its RESPA Section 8(c)(2) affirmative defense. Resp. Br. at 28-29, 31-32; *see* Resp. Answer at 13 (Affirmative Defense #12).[41] Section 8(c)(2) provides that "[n]othing in this section shall be construed as prohibiting … 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 …."[42] Section 8(c)(2) does not give a person carte blanche to leverage a service actually performed into a referral agreement with the settlement service provider. This limited protection is available to the recipient of a challenged payment only upon a showing that (1) the recipient of the payment "actually performed" a service for the payor from which it received the payment, and (2) the payor's payment was *bona fide* – i.e., that it was made solely "for" the purpose of purchasing the service, and not also for the purpose of receiving referrals from the payee. [43]

The only evidence that PHH proffers in connection with its Section 8(c)(2) defense is that Atrium paid "reinsurance" claims and termination fees to MIs. PHH's position is that as long as

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[41] Parts of PHH's argument relating to Section 8(c)(2) appear in two separate sections of its brief (Sections III and V). Enforcement Counsel address the various parts of that argument together in this Section of its brief.

[42] 12 U.S.C. § 2607(c)(2) (emphasis added).

[43] PHH not only omits the requirement that the compensation in question be "bona fide" from its description of Section 8(c)(2)'s language, Resp. Br. at 31, it affirmatively suggests that such a requirement does not exist by citing a case that held that there was no such requirement in *a separate subsection*, Section 8(c)(4), while failing to mention that that case acknowledged the "bona fide" requirement of Section 8(c)(2). Resp. Br. at 31-32 (describing the case as "holding that HUD's non-rulemaking pronouncements could not add a requirement of *bona fides* to RESPA") (citing *Carter v. Welles-Bowen Realty, Inc.*, 736. F3d 722, 728 (6th Cir. 2013) (noting that "[t]he Act thus uses 'bona fide' in the salary-or-compensation exception [*i.e.*, Section 8(c)(2)] but omits the phrase in the affiliated-business-arrangement exception [i.e., Section 8(c)(4)]")).

Atrium paid *any* "reinsurance" claims, it "actually performed" a "bona fide" service, and PHH therefore qualifies for protection under Section 8(c)(2). The only legal authority on which PHH relies does not even interpret or apply Section 8(c)(2).

As a refrain to its arguments about "services actually rendered" under Section 8(b), PHH seeks to apply holdings and dicta about Section 8(b) to make sweeping statements about the Section 8(c)(2) defense. PHH cites Section 8(b) case law, rehashing its "price control" argument, for the proposition that RESPA "does not support a claim for overcharging for reinsurance." Resp. Br. at 28 (citing *Martinez*, 598 F.3d 549, and *Freeman*, 132 S. Ct. 2034). But neither *Martinez* nor *Freeman* has anything to do with Section 8(c)(2).[44]

PHH's Section 8(c)(2) defense is also belied by common sense. PHH offers no limiting principle that would prevent its proposed exception from swallowing Section 8 entirely. Under PHH'S reasoning, a dollar's worth of reinsurance could be "sold" for $10 million in premiums without offending RESPA, so long as a dime's worth of claims were paid, or could have been paid. Perhaps most outlandishly, PHH claims that "even if Atrium had never paid a claim. . . given the nature of insurance the company still would have provided a service." All a settlement service provider would need to do to receive a dollar's worth of kickback is to demand two dollars from the payor and then perform the "service" of returning one dollar. Such extreme results would render Section 8 meaningless.

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[44] The only authority PHH cites that actually pertains to Section 8(c)(2) is *Cedeno v. IndyMac*, No. 06 Civ. 6438, 2008 WL 3992304 (S.D.N.Y. Aug. 26, 2008). In that case, the plaintiff alleged that her lender had referred her to an appraiser in exchange for a "thing of value" in the form of an inflated appraisal. The court dismissed the complaint because it deemed the plaintiff to have conceded that Section 8(c)(2) applies. *Cedeno*, 2008 WL 3992304 at *3. In addition, both the plaintiff and the court misapplied Section 8(a), examining the legality of the payment to the appraiser instead of the "payment" (the inflated appraisal) from the appraiser to the lender. *Id.* at *3-4. For these reasons, this unpublished decision provides little guidance to the determination of the (not conceded) applicability of Section 8(c)(2) to the Bureau's claim.

RESPA is patently meant to control kickback fees—by eliminating them. 12 U.S.C. § 2601(b)(2) (one purpose of RESPA is to "*eliminat[e] . . . kickbacks or referral fees* that tend to increase unnecessarily the costs of certain settlement services" (emphasis added)). Section 8(c)(2) simply provides an affirmative defense to clarify that payments between settlement service providers that have no relationship to referrals are not prohibited by RESPA. Instead, PHH endeavors to use Section 8(c)(2) to turn the whole of Section 8 on its head, giving a green light to all manner of kickbacks and referral payments so long as the referral is accompanied by the most trivial "service."

The only evidence proffered by PHH, that it eventually paid some fraction of the "premiums" back to the MIs, does not even cast doubt on the Bureau's allegations that the premium payments were a quid-pro-quo for referrals, much less does it show that there is no genuine dispute as to whether PHH's reinsurance was a real "service," unrelated to referrals, for which the premiums were *bona fide* compensation. The documents cited in Enforcement Counsel's Statement of Disputed Facts show that PHH consistently engaged in a variety of risk-limiting mechanisms that prevented any real risk that Atrium would have to pay significantly more in claims to a MI than it had received in premiums from that MI, including by removing its capital contributions from the captive trust accounts at the first sign that significant claims might jeopardize those funds and using its leverage over MIs to obtain highly-favorable one-sided amendments that reduced or eliminated the risk to Atrium. *See* SoF ¶¶ 1-16. Whether PHH performed a real "service" is a disputed factual issue appropriate for trial. PHH is therefore not entitled to summary disposition on its affirmative defense under Section 8(c)(2).

IV. CONCLUSION

For all of the reasons set forth above, PHH's motion should be denied in its entirety.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on this 20th day of February 2014, I caused a copy of the foregoing "Enforcement Counsel's Opposition to PHH's Motion to Dismiss the Notice of Charges or, in the Alternative, for Summary Disposition" to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service on behalf of Respondents:

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