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 SET FOR MARCH 5, 2014, AT 1:30 P.M.

RESPONDENTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS THE NOTICE OF CHARGES OR, IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION

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INTRODUCTION

The Bureau cannot have it both ways. The Bureau admits that if it brought this action in federal court, it would be bound by RESPA's three-year statute of limitations. Yet, the Bureau claims that by filing administratively, it is entitled to the very same remedies and it can penalize conduct going back twenty years. The Bureau also admits that its predecessor, HUD, did not have any ability to bring administrative claims under RESPA. Yet, the Bureau claims that its ability to bring such an action, with the full panoply of penalties that did not exist prior to July 2011, is simply "procedural." The Bureau further admits that UGI is entitled to pay premiums pursuant to existing reinsurance agreements – including the one with Atrium Re. Yet, the Bureau claims that the receipt of those premiums violates RESPA. While the Bureau will say anything to avoid dismissal of this action, the fact remains that none of its arguments can overcome the established legal principles in favor of dismissal and/or summary adjudication.

ARGUMENT

I. The Consumer Financial Protection Act Does Not Apply Retroactively; Thus, This Tribunal Has No Jurisdiction Over Conduct Before July 21, 2011

The Bureau's argument that the Consumer Financial Protection Act ("CFPA"), Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), has retroactive effect defies logic and clear legal precedent. Not only does the Bureau fail to point to any authority that the statute applies retroactively, it also completely disregards the fact that its reading of the CFPA would substantively alter Respondents' rights and liabilities under RESPA. To be clear, as courts examining provisions of the Dodd-Frank have concluded, the Act only applies to prospective conduct. Accordingly, Respondents are entitled to dismissal of all purported violations alleged in the Notice that occurred before the CFPA became law.

The "presumption against retroactive legislation" is deeply rooted in our legal system. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (citation omitted). Indeed, the "'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)); *see also Holmes v. Air Liquide USA, LLC*, No. H-11-2580, 2012 LEXIS 10678, at *14 (S.D. Tex. 2012) ("[S]tatutes are presumed to operate prospectively, not retrospectively.") (citation omitted). Thus, courts "apply this time-honored presumption unless Congress has clearly manifested its intent to the contrary." *Hughes Aircraft Co.*, 520 U.S. at 946.

Here, the Bureau has not – because it cannot – point to any CFPA provision that provides for retroactivity. More to the point, courts specifically examining Dodd-Frank have concluded that the Act's provisions cannot be applied retroactively. *See Ahmad v. Morgan Stanley & Co., Inc.*, No. 13-CV-6394, 2014 LEXIS 23543, at *18-20 (S.D.N.Y. Feb. 21, 2014) (concluding that the Dodd-Frank amendment did not apply retroactively); *Holmes*, 2012 LEXIS 10678, at *18-19 (ruling that the Dodd-Frank provision at issue did not apply retroactively where Congress did not intend it to); *Megino v. Linear Fin.*, No. 2:09-cv-00370, 2011 LEXIS 1872, at *20 n.1 (N.D. Nev. Jan. 6, 2011) (declining to retroactively apply added standards imposed by Dodd-Frank).

Moreover, a statute cannot apply retroactively where a party's substantive rights, liabilities or duties would be affected. *Landgraf*, 511 U.S. at 278; *see also United States ex rel. Radcliffe v. Purdue Pharm., LP*, 737 F.3d 908, 917-18 (4th Cir. 2013) (finding that the statutory amendments could not be applied retroactively where the amendments deprived defendants of a previously available defense); *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 163-64 (3d

Cir. 1998) ("[T]he fact that a statute is phrased in jurisdictional terms is not reason enough to ignore the strong presumption against retroactivity[.]") (citation omitted); *Holmes*, 2012 LEXIS 10678, at *18-19 (ruling that the Dodd-Frank provision "would not merely affect the jurisdictional location in which [the parties'] claims could be brought; it would fundamentally interfere with the parties' contractual rights") (citation omitted) (internal quotation marks omitted) (alteration in original).

Here, if the Bureau's argument is to be believed, the CFPA effectively amended RESPA not only by giving the Bureau authority to bring an administrative action for Section 8 violations where no such previous authority existed, but also by removing RESPA's three-year statute of limitations and imposing vastly greater penalties than those previously available.[1] According to the Bureau, Respondents' substantive rights or liabilities would not be affected, and therefore, the CFPA applies retroactively. Such a position is startling, especially given the fact that the Bureau concedes that "[w]ith the enactment of the CFPA, Congress simply transferred" HUD's "powers to the Bureau[.]" Opp'n at 8. As the Bureau is aware, HUD was merely authorized to bring a court action "to enjoin violations" of RESPA, Section 8.[2] 12 U.S.C. § 2607(d).

With respect to statute of limitations, such periods provide certainty regarding potential liabilities, in addition to relieving defendants of the burden and prejudice of stale claims. For that reason, "the resurrection of previously time-barred claims" has been found to have an impermissibly retroactive effect. *See, e.g.*, *Aetna Life Ins. Co. v. Enter. Mortg. Acceptance Co., LLC*, 391 F.3d 401, 410 (2d Cir. 2004) ("Extending the statute of limitations retroactively

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[1] CFPA, 12 U.S.C. § 5565(a)(2) (permitting the Bureau now to seek eight forms of relief, including restitution, payment of damages or other monetary relief and civil money penalties).

[2] The Bureau's attempt to circumvent its limited authority to enforce RESPA by pointing to the OCC's authority under a completely different statute is unavailing. Opp'n at 8 n.12. By its own concession, the CFPB inherited the powers HUD had under RESPA—no more, no less.

'increase[s] [a defendant's] liability for past conduct' by increasing the period of time during which a defendant can be sued.") (internal citation omitted); *Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08-CV-654, 2010 LEXIS 82277, at *8 n.4 (N.D. Okla. Aug. 12, 2010) (Dodd-Frank's amending of ECOA's statute of limitations was not retroactive).

Similarly, a statutory amendment that enlarges available penalties cannot be applied retroactively. *See, e.g., United States v. Murphy*, 937 F.2d 1032, 1038 (6th Cir. 1991) (it was "error for the district court to apply the amendments retroactively" because such amendments "were applied to increase the liability of an individual by more than $1,000,000[]") (citation omitted); *see also Ahmad*, 2014 LEXIS 23543, at *18-20 (Dodd-Frank amendment did not apply retroactively where recovery under the amendment would be "substantially greater" than the recovery previously available); *Holmes*, 2012 LEXIS 10678, at *18-19. Indeed, as the Supreme Court held in *Landgraf*, the Court has never "read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment." *Landgraf*, 511 U.S. at 284.

Finally, the Bureau cannot proceed under the CFPA because the Bureau "shall have no authority" to enforce the CFPA against "person[s] regulated by a [s]tate insurance regulator," CFPA, 12 U.S.C. § 5517(f), and cannot use the CFPA to "affect" the New York and Vermont insurance regulators' approval of the reinsurance arrangements at issue. *Id.* As licensed reinsurers, Respondents Atrium and Atrium Re are "persons regulated by a state insurance regulator," as defined by the CFPA. *See id.* § 5481(22) (defining "person[s] regulated by a [s]tate insurance regulator"); § 5481(3) (defining "business of insurance" to include reinsurance). To be clear, to the extent that the Bureau is enforcing RESPA, an "enumerated consumer law," the jurisdictional exclusion for "person[s] regulated by a [s]tate insurance regulator" does *not* apply. *See id*. § 5517(f)(2). The CFPA, however, is not an "enumerated consumer law;" so while the Bureau can enforce RESPA against insurers, it cannot enforce the CFPA against those same insurers. *See id*. § 5481(12) (listing the "enumerated consumer laws").[3]

II. Judicial Estoppel, Not Issue Preclusion, Bars The Bureau's Claims

The Bureau misunderstands judicial estoppel, and thus wrongly attempts to reframe the question as whether the Consent Order gives rise to issue preclusion.[4] The Bureau's argument is misconceived. Judicial estoppel emanates not from any preclusive effect of the Consent Order itself, but rather from the representations—both explicit and implicit[5]—that the Bureau made to the U.S. District Court *in order to get the Consent Order approved*. *See Macfarlan v. Ivy Hill SNF, LLC*, 675 F.3d 266, 272 (3d Cir. 2012) (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.") (alteration in original) (internal quotation marks and citation omitted). Simply put, the Bureau is estopped from representing that the conduct permitted by the Consent Order – which, by law, had to be legal conduct – is in fact illegal. Thus, the Bureau's argument that the Consent Order did not function as an adjudication on the merits is a red herring.

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[3] Moreover, because Dodd-Frank provides that "[n]o provision of [the CFPA] shall be construed as altering, amending, or affecting the authority of any State insurance regulator . . ." and since the state insurance regulators supervise the reinsurers, the Bureau cannot use the CFPA to mount a collateral attack on those determinations (as it has done here by arguing that the contracts at issue were not "real" reinsurance). CFPA, 12 U.S.C. § 5517(f)(1).

[4] The Bureau is similarly confused when it asserts that Respondents are seeking to impose judicial estoppel through the motion to intervene in the Florida litigation. Judicial estoppel is not at issue in those proceedings which seek merely to interpret and enforce the Consent Order.

[5] Courts routinely apply judicial estoppel based on prior implicit representations. *See, e.g.*, *Cannon-Stokes v. Potter*, 453 F.3d 446 (7th Cir. 2006) (plaintiff was judicially estopped from pursuing claim that she had failed to schedule as personal property in her bankruptcy, an implicit representation that she did not have such a claim).

The Bureau asked U.S. District Judge Kathleen M. Williams to approve and enter the Consent Order, which: a) prohibited RESPA violations (¶ I.C); b) permitted the continuing ceding payments (¶ I.A); and c) provided UGI with a release for future liability for the ceding payments based on existing contracts (¶ VII (releasing liability emanating from "practices" preceding the Consent Order)). It is well-settled that a court cannot enter an order permitting illegal activity to continue.[6] By filing the Motion for Entry of Consent Order on April 4, 2013, and by submitting the Proposed Consent Order on that date, the Bureau represented to the court that the conduct permitted (and prospectively released) by the Consent Order was not illegal. Now, the Bureau has brought administrative charges against Respondents, alleging that *the same exact ceding payments* violate RESPA, a criminal statute. Thus, the Bureau cannot contend that "there is no inconsistency" in its two, diametrically-opposed positions. Opp'n at 13.

Finally, the Bureau misreads the "bad faith" or "unfair advantage" prong of judicial estoppel to argue conclusorily that it did not act in "bad faith." As the Supreme Court explained, however, this factor is concerned with "whether the party seeking to assert an inconsistent position would derive an unfair advantage. . . ." *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001). Here, there can be no question that the Bureau is attempting to obtain an unfair advantage – namely, first to obtain entry of a consent order permitting future ceding payments,

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

by representing them as legal, so that it could receive millions of dollars from UGI as part of a settlement, and then to turn around and seek massive penalties against Respondents based on the argument that the *same exact ceding payments* are purportedly illegal.[7] In light of all of this, the Bureau is judicially estopped from asserting that the ceding payments violated RESPA.[8]

III. The Bureau Cannot Escape RESPA's Three-Year Statute Of Limitations

As explained in Respondents' motion, given RESPA's three-year statute of limitations for enforcement actions, all of the Bureau's claims involving loans closed *prior to* January 25, 2009, are time-barred. In response, the Bureau claims that its administrative proceedings are not subject to any statute of limitations. The applicable law does not support such a proposition.[9]

As the Bureau concedes, HUD had no authority under RESPA to pursue an administrative adjudication against Respondents. Opp'n at 8. Thus, it cannot be the case that the newly-created Bureau – which inherited RESPA's enforcement authority on July 21, 2011 – is entitled to bring an administrative adjudication under RESPA for conduct spanning nearly 20 years when HUD had no authority to bring such action during those same years. Moreover, as discussed in Section I, while the CFPA does give the Bureau the authority to commence

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[7] Having obtained an unfair advantage, it was the Bureau's burden to establish "inadvertence or mistake," which it cannot do. *See New Hampshire*, 532 U.S. at 753 (applying judicial estoppel where estopped party failed to establish inadvertence or mistake).

[8] The Bureau argues that the Consent Order's recitation that the complaint against UGI "states a claim" somehow defeats judicial estoppel. This argument is unavailing as it does not undo the representation the Bureau necessarily made to the court—namely, that the ceding payments could legally continue.

[9] The Bureau's insistence here that there is no statute of limitations stands in stark contrast to its conduct in dealing with Respondents. On January 25, 2012, the Bureau insisted that the Respondents execute a tolling agreement for the purpose of "suspension of the running of any applicable unexpired statute of limitations for any cause of action arising from the Investigation that could have been brought against PHH Corporation by the Bureau under Section 8 of [RESPA.]" *See* Exhibit 1, hereto. The Bureau subsequently demanded seven extensions of the tolling agreement, which extensions were executed on: October 25, 2012, January 24, 2013, April 15, 2013, June 6, 2013, September 20, 2013, October 16, 2013, and December 4, 2013.

administrative proceedings, the Act cannot be applied retroactively. Further, the Bureau has chosen to bring its administrative proceeding "solely under an enumerated consumer law." CFPA, 12 U.S.C. § 5564(g)(2)(B). Consequently, the Bureau is bound by RESPA's three-year statute of limitations for government actions. *Id.*

The case of *BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006) is not helpful to the Bureau's position inasmuch as it merely stands for the proposition that "[u]nless a federal statute directly sets a time limit, there is no period of limitations for administrative enforcement actions." *Alden Mgmt. Servs. v. Chao*, 532 F.3d 578, 582 (7th Cir. 2008) (citing *BP*). Here, the applicable federal statute contains an explicit three-year statute of limitations and, until July 21, 2011, the agency charged with enforcement of that statute – HUD – had no authority to pursue an administrative adjudication. Indeed, Congress could have given HUD the authority to administratively enforce RESPA; however, it did not. Further, in connection with the CFPA, Congress could have extended the statute of limitations for RESPA Section 8 claims; but it did not do that either.[10] Consequently, the Bureau should not be permitted to make an end-run around RESPA's three-year statute of limitations by pursuing its claim as an "administrative proceeding" unconstrained by any limitations period.

IV. The Bureau Cannot Avoid The Plain Meaning Of RESPA

The Bureau asserts that Respondents have a "convoluted reading[] of RESPA," Opp'n. at 1. In fact, it is the Bureau that is "confus[ed]" concerning "the provisions of subsections 8(a), 8(b), and 8(c)(2)." Opp'n. at 14. The Bureau's attempts to distinguish § 8(a) from § 8(b) and evade the Supreme Court's clear instructions in *Freeman* fail to account for the plain language of the § 8(c)(2) safe harbor, which applies to both § 8(a) and § 8(b).

[10] By contrast, in the CFPA (Pub. L. No. 111-203, § 1085(7), 124 Stat. 2085 (2010)), Congress extended the statute of limitations for ECOA from two to five years. 15 U.S.C. § 1691e(f).

The Bureau does not appear to dispute the language of § 8(c)(2), which provides unambiguously that "[n]othing in [§ 8] 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." Rather, the Bureau argues that the plain language should not control, for three reasons: 1) because the result would be that RESPA does not prohibit some activity of which the Bureau disapproves; 2) because the § 8(c)(2) safe harbor purportedly only applies to payments to third parties for settlement services; and 3) because, it claims, RESPA "must be construed broadly." Each of these arguments clearly fails. First, the Supreme Court in *Freeman* rejected the argument that RESPA should be interpreted to cover all objectionable conduct concerning the market for real estate settlement services. *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2044 (2012) (There was no "merit to petitioners' related contention that § 2607(b) should not be given its natural meaning because doing so leads to [an] allegedly absurd result . . . ."). Second, the language of § 8(c)(2) itself belies any notion that only payments for *settlement* services come within the safe harbor. Not only is the language itself not limited to "settlement services," but "goods" or "facilities"—which are clearly within the § 8(c)(2) safe harbor—by definition are not settlement services.[11] In other words, for the Bureau to be correct, one would have to read "goods" and "facilities" out of the statute![12] Third,

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[11] Contrary to the Bureau's assertion, Respondents previously cited to *Kiefaber*, a published case applying § 8(c)(2) to claims under § 8(a), and holding that, under *Freeman*, a court should not inquire into the cost of services for which payment was made in determining whether § 8(a) has been violated—the provision of any services forecloses a RESPA claim. *Kiefaber v. HMS Nat'l, Inc.*, 891 F. Supp. 2d 796, 800 & n.6 (E.D. Va. 2012) (services performed for home warranty company qualified for § 8(c)(2) safe harbor).

[12] The Bureau's suggestion that paying reinsurance claims was merely "refunding" some of a "kickback" fundamentally misunderstands the nature both of reinsurance and of Respondents' argument. A reinsurance facility is valuable to the insurer because the reinsurer takes some risk away from the insurer (as well as for other reasons). The availability of the reinsurance facility and the insurer's ability to rely upon it, are the compensable service or facility under RESPA.

because RESPA § 8 is a criminal statute, it must be interpreted narrowly, under the rule of lenity, and not "broadly," as the Bureau argues. *See Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729-36 (6th Cir. 2013) (Sutton, J., concurring) (explaining in detail the application of the rule of lenity to RESPA § 8); *cf. Freeman*, 132 S. Ct. at 2044 (rejecting expansion of RESPA based on "[v]ague notions of statutory purpose").

At bottom, the Bureau cannot reconcile its strained interpretation of the § 8(c)(2) safe harbor with either the plain language of the statute,[13] or with the Supreme Court's opinion in *Freeman*. The unanimous Supreme Court could not have been clearer: "a service provider could avoid liability by providing just a dollar's worth of services in exchange for the $1,000 fee." And although *Freeman* concerned a § 8(b) claim, the holding applies equally to § 8(a) because the § 8(b) exception for payments for goods, facilities, and services is essentially the same as the § 8(c)(2) safe harbor.[14] RESPA means what it says.

CONCLUSION

For the foregoing reasons, the Notice of Charges must be dismissed or summary disposition granted in Respondents' favor.

See Kiefaber, 891 F. Supp. 2d at 802 n.11 (the ability to rely upon a counterparty to a contract to do what is promised is compensable under RESPA § 8(a)). Thus, it is the provision of reinsurance that implicates the § 8(c)(2) safe harbor, and not the fact that substantial claims were later paid. Those claims simply further prove that the reinsurance was real.

[13] Contrary to the Bureau's assertion, the phrase "bona fide" in § 8(c)(2) modifies "salary or compensation," not "other payment." If "bona fide" were also meant to modify "other payment," it would read "bona fide salary, compensation or other payment." In any case, the ceding payments were "bona fide."

[14] After *Freeman*, it cannot be seriously disputed that RESPA § 8 *is not* a price-fixing statute. The Bureau's attempt to limit *Freeman* to mean that RESPA is not a price-fixing statute for real estate settlement services (which RESPA does regulate but for which it does not set prices), but *is* a price-fixing statute for other goods, services and facilities, such as reinsurance (which RESPA does not regulate at all), is preposterous. *See also Kiefaber*, 891 F. Supp. 2d at 800 n.6 (holding that a requirement to inquire into reasonableness of price of services under § 8(a) would be "glaringly inconsistent with the Supreme Court's discussion in *Freeman*").

Dated: February 28, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 28th day of February, 2014, I caused a copy of the foregoing Reply in Support of Respondents' 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 parties who have consented to electronic service:

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