

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)

**RESPONDENTS’ RESPONSE TO ENFORCEMENT
COUNSEL’S STATEMENT OF DISPUTED ISSUES OF MATERIAL FACT IN
OPPOSITION TO RESPONDENTS’ MOTION FOR SUMMARY DISPOSITION**

Pursuant to 12 C.F.R. § 1081.212(d)(2), Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, “Respondents” or the “PHH Entities”) hereby submit the following response to Enforcement Counsel’s Statement of Disputed Issues of Material Facts.

INITIAL OBJECTIONS

As an initial matter, Respondents take issue with Enforcement Counsel’s representation that their statement “does not include citations to evidence obtained from a third party that may be subject to a claim of confidentiality and which the Bureau has not yet disclosed to Respondents pursuant to 12 C.F.R. § 1081.119.” Enforcement Statement at 2. Enforcement Counsel relies upon documents from Mortgage Guaranty Insurance Corporation (“MGIC”) in connection with Disputed Fact Nos. 1, 2 and 12c, and Enforcement Counsel relies upon documents produced by Milliman in connection with the Bureau’s Response to Respondents Undisputed Fact No. 7. None of these materials have been provided to Respondents.

Second, Respondents take issue with Enforcement Counsel’s reliance on heavily redacted documents and Enforcement Counsel’s “extrapolation” of the meaning of snippets from such

documents. For example, Exhibit A to the Gordon Declaration is a heavily redacted document that was apparently produced by MGIC. Page MGIC-CFPB-00190646 is entirely redacted with the exception of the following sentence: “However, if not properly controlled, they also present a threat to the overall strength and claims-paying ability of the private mortgage insurance industry.” In spite of the complete redaction of all other information on that page, Enforcement Counsel has divined that this statement refers to a request by un-named “MIs” “privately express[ing] alarm to state regulators” and asking “for limits on captive arrangements between MIs and lenders.” Enforcement Statement at 2. Similarly, Enforcement Counsel represent that the “MIs also stated that when lenders issue captive reinsurance, ‘a true arms-length independent judgment of risk [is] more difficult to obtain.’” Yet, the page of Exhibit A relied upon by Enforcement Counsel, MCIC-CFPB-00190649, does not identify who is making that statement. Enforcement Counsel’s representations regarding the sentence is not supported by the document and by relying on a document that is almost entirely redacted, Respondents are prejudiced in their ability to refute Enforcement Counsel’s statements.

I. Response To The Specific Purported “Disputed Material Facts”

1. As noted above, Enforcement Counsel relies upon a heavily redacted document from which it draws unsupported conclusions. The fact that Enforcement Counsel did not name the specific “MIs” renders this purported “disputed fact” unreliable. Further, none of the private mortgage insurance companies with whom Atrium/Atrium Re did business were domiciled in Arizona, nor is there any evidence proffered by Enforcement Counsel that the Arizona Department of Insurance took any action based on the “1998 Presentation.” Respondents are aware that The PMI Group (“PMI”), was a pmi provider subject to regulation by the Arizona Department of Insurance and PMI participated in pmi reinsurance arrangements with lenders other than PHH Mortgage. Accordingly, any “presentation” to the Arizona Department of Insurance is of no significance and is not a disputed issue of material fact.

2. The statements proffered by Enforcement Counsel are not supported by the

document relied upon because, as noted above in response to Disputed Material Fact No. 1, the document is so heavily redacted as to eviscerate its usefulness.

3. Respondents admit that it utilized shared employees for the purposes of the operation of Atrium and Atrium Re. Such shared services arrangements are fully compliant with applicable state law. Respondents do not dispute this factual assertion. Respondents dispute Enforcement Counsel's suggestion that this fact has any legal significance to this proceeding.

4. Respondents dispute this purported Material Fact. First, because Atrium was a captive, the loans that were placed into the reinsurance books were underwritten by PHH Mortgage or PHH Home Loans, LLC, or by correspondent lenders to guidelines approved by one or more of the PHH Entities. Further, Atrium evaluated the risk it was assuming relative to the premium it was receiving in order to determine, among other things, whether the requirements established by HUD in the Letter from Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner, to Sandor Samuels, General Counsel of Countrywide Funding Corporation (Aug. 6, 1997) ("HUD Letter"), were met. Finally, Respondents submit that this fact is not material or even relevant to the underlying alleged RESPA claim filed against Respondents by the Bureau.

5. The Bureau's purported Disputed Material Fact is false, and the Bureau knows that it is false. At times, some of the reinsurance arrangements provided for the payment of a 40% ceding commission in exchange for the assumption of a layer of risk. However, that was not true for all of the four arrangements or for all time for any particular arrangement. For example, Atrium's reinsurance agreement with CMG Mortgage Insurance Company ("CMG"), never provided for a 40% cede. Further, as Respondents explained in their motion to dismiss, in 2008, Freddie Mac "temporarily" imposed a 25% commission cap on any reinsurance arrangement for any PMI provider that insured loans sold to Freddie Mac. Atrium's agreements were modified to reflect Freddie Mac's new requirement. *See* Motion to Dismiss at 33 n.28, and Exhibit G to the Gordon Declaration. The various reinsurance structures were explained repeatedly to the Bureau during its investigation and the Bureau was provided with the actual

agreements; accordingly, the Bureau's attempt to create a "disputed material fact" based on information it knows to be incorrect, is startling.

6. The amount of premiums ceded by the four pmi providers over the life of the reinsurance arrangements in exchange for the risk that Atrium and Atrium Re assumed is not in dispute, nor is it a fact that has any significance by itself to the Bureau's RESPA claim against Respondents. Further, the Bureau omitted the fact that, upon commutation of the CMG and Radian agreements, Atrium forfeited all premiums earned as well as its capital contributions and all earnings. Motion to Dismiss, Ex. G, Attachment 1, Bogansky Decl. ¶¶ 8, 9. Accordingly, this is not a disputed issue of material fact.

7. Respondents agree that trust accounts were set up by Atrium for each reinsurance arrangement and that premiums earned were deposited into the trust accounts in accordance with the trust agreements and New York Insurance Law. Accordingly, this is not a disputed issue of material fact.

8. Enforcement Counsel's characterization of Mr. Rosenthal's testimony is incorrect and fails to recognize that earnings on the funds in the trust accounts were also included. Enforcement Counsel recognizes that earnings were included in the trust accounts in their Material Fact Nos. 11 and 12d. In any event, this purported fact is neither material nor relevant to the Bureau's claim of a RESPA Section 8 violation.

9. Enforcement Counsel's characterization of Mr. Rosenthal's testimony is incorrect. Further, Enforcement Counsel is in possession of the actual agreements which explain Atrium's liability under each specific arrangement. For example, Respondents previously explained to Enforcement Counsel that the UGI agreement does not "cap" Atrium's liability at the funds in the trust accounts. Enforcement Counsel cannot manufacture a disputed issue of material fact through mischaracterization of testimony or failing to acknowledge the controlling written document. In any event, it is undisputed that Atrium and Atrium Re paid all claims for reinsurance that were presented; accordingly, Enforcement Counsel's representation regarding alleged "caps" on the liability of the reinsurer is neither material nor relevant to the Bureau's

claim of a RESPA Section 8 violation.

10. This is not a disputed material fact. The payment of claims by Atrium and Atrium Re is not disputed. The fact that Atrium and Atrium Re had sufficient funds in the trust accounts to pay all claims presented is not a disputed issue of material fact.

11. The statements by Enforcement Counsel are false. However, because the operation of the reinsurance arrangements was governed by the actual agreements, Enforcement Counsel cannot rely on misstatements to defeat Respondents' motion for summary disposition. It is undisputed that Atrium and Atrium Re paid all claims for reinsurance that were presented for payment. It is undisputed that pmi reinsurance is catastrophic insurance; accordingly, it is not uncommon to have many successive years of loss-free experience. Enforcement Counsel's rendition of the removal of funds from the trusts ignores the plain language of the reinsurance and trust agreements, which are in the possession of Enforcement Counsel. For example, pursuant to the agreements, Atrium could not unilaterally withdraw funds from the trust accounts. Further, Enforcement Counsel's assertion that the dividends withdrawn from the trust accounts consisted of the capital contributions demonstrates a fundamental misunderstanding of accounting principles. The capital contributions made by Respondents to the trusts, the premiums earned in exchange for the provision of reinsurance coverage, the earnings on the trust balances, the dividends paid, and the distribution of assets upon commutation for all four reinsurance arrangements over the life of the agreements are all facts not in dispute. Enforcement Counsel's attempt to create a "material factual dispute" by misinterpreting the agreements or failing to understand basic insurance or accounting principles is insufficient to carry their burden of demonstrating a disputed issue of a material fact sufficient to defeat Respondents' motion for summary disposition.

12. Enforcement Counsel inappropriately distorts written documents in an attempt to create what they then claim is a material disputed issue of fact. However, the cited materials do not support the conclusions they attempt to draw from them. First, Respondents do admit that they treated all pmi providers as sophisticated counterparties and that Respondents sought to

negotiate arrangements with various pmi providers at various times that would result in a benefit to Respondents' loan origination business. As Mr. Rosenthal testified in response to questions from Enforcement Counsel, there are a number of factors to consider when dealing with a pmi provider, including, for example, the ability to enter into a reinsurance arrangement that would reward Respondents for the origination of better performing loans. That is why, for example, the Office of the Comptroller of the Currency approved the establishment of operating subsidiaries by national banks for the purpose of reinsuring a portion of the mortgage insurance on loans originated by the parent bank. *See, e.g.*, Corporate Decision #97-15 (dated March 17, 1997) (Attachment A); Interpretive Letter #743 (dated October 17, 1996) (Attachment B, hereto); Corporate Decision #99-26 (dated September 2, 1999) (Attachment C, hereto). The statements in this paragraph regarding Respondents' purported "leverage" over UGI are manufactured out of whole cloth and have no basis in fact. Indeed, each time Enforcement Counsel makes this statement, there is no citation to any authority in support. Respondents admit that Atrium and UGI reached an agreement on an amendment to the trust agreement that allowed Atrium to withdraw surplus funds from the trust account. However, that agreement was reached following an arms-length negotiation (despite Enforcement Counsel's attempt to ascribe some unsupported nefarious motivation for the contractual amendment), and dividends were paid by Atrium only with the approval of the New York Department of Insurance. Dividend payments by Atrium Re must be approved by the Vermont Department of Financial Regulation. It is undisputed that the withdrawal of funds cited by Enforcement Counsel was agreed to by UGI and complied with all regulatory requirements. Furthermore, Enforcement Counsel does not allege, nor can they allege, that Respondents failed to pay any claims submitted by UGI even during the financial crisis. Accordingly, this is not a disputed issue of material fact.

13. The statements are those of Enforcement Counsel and have no basis in fact.

14. The cited email speaks for itself and does not support Enforcement Counsel's embellishment. This cannot be a disputed issue of material fact for the sole reason that Respondents never established a reinsurance arrangement with PMI. Accordingly, this is not a

disputed issue of material fact.

15. Enforcement Counsel's statement regarding the payment of losses is misleading and fails to recognize that pmi reinsurance provides catastrophic insurance. In fact, Atrium and Atrium Re paid claims on books of loans as early as 2004. The fact that the pmi companies did not liquidate their losses and make demands on their reinsurance policies until after 2007 is simply an issue of timing. It is undisputed that Atrium and Atrium Re paid all claims presented for payment. Accordingly, this is not a disputed issue of material fact.

16. Enforcement Counsel's representation regarding the amount of funds in Atrium's trust accounts is of no moment since the amount of required funds is dictated by the requirements of the reinsurance agreement and accompanying trust agreement, as well as by state regulatory requirements. It is undisputed that the Atrium and Atrium Re trust accounts satisfied all regulatory requirements. While it is not material, Respondents dispute Enforcement Counsel's calculation of "an approximately 20% annualized internal rate of return" and note that while the Bureau claims that this constitutes a disputed issue of material fact, Enforcement Counsel did not bother to explain how they calculated that number.

II. Respondents' Reply To The Bureau's Response To Respondents' Statement Of Undisputed Facts

In opposing Respondents' motion for summary disposition, the Bureau attempted to dispute some or all of the facts supporting Respondents' motion. As explained below, the Bureau's purported disputes consist, in large measure, of the unsupported legal conclusion that Atrium and Atrium Re did not provide reinsurance. However, the Bureau cannot proceed under the CFPA because the Bureau "shall have no authority" to enforce the CFPA against "persons regulated by a state 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 CFPA. *See id.* § 5481(22)

(defining “persons regulated by a state insurance regulator”); § 5481(3) (defining “business of insurance” to include reinsurance). Because Dodd-Frank provides that “[n]o provision of [the CFPBA] shall be construed as altering, amending, or affecting the authority of any State insurance regulator . . .,” the Bureau’s attempt to mount a collateral attack on those determinations, as it has done here by arguing that the contracts at issue were not “real” reinsurance, should be rejected. *Id.* § 5517(f)(1).

In addition, the Bureau did not put in any evidence in the form of affidavits or declarations to support its assertions that Respondents’ statements of fact are disputed. As explained above, the Bureau attempts to rely on out of context quotes, unusable documents, and partial disclosures in a strained attempt to create an issue of fact where none exists.

Turning to the Bureau’s specific response to each undisputed fact proffered by Respondents in support of their motion for summary disposition, Respondents state as follows:

1. The Bureau does not dispute Undisputed Fact No. 1, other than to proffer the legal conclusion that, in the Bureau’s opinion, Atrium did not provide reinsurance on private mortgage insurance (“pmi”) issued in connection with loans originated by Respondents PHH Mortgage Corporation and PHH Home Loans, LLC. Thus, the Bureau has not disputed this fact.

2. The Bureau does not dispute Undisputed Fact No. 2, other than to proffer the legal conclusion that, in the Bureau’s opinion, Atrium did not provide pmi reinsurance. Thus, the Bureau has not disputed this fact.

3. The Bureau does not dispute Undisputed Fact No. 3, other than to proffer the legal conclusion that, in the Bureau’s opinion, Atrium did not provide pmi reinsurance. Thus, the Bureau has not disputed this fact.

4. The Bureau does not dispute Undisputed Fact No. 4, other than to proffer the legal

conclusion that, in the Bureau's opinion, Atrium did not provide pmi reinsurance. The Bureau's response is also insufficient in that the Bureau simply cites to every document it submitted in connection with its opposition. The Bureau has no good faith basis to dispute the fact that PHH made capital contributions totaling \$53,172,832 in connection with the establishment and maintenance of the four reinsurance agreements.

5. The Bureau does not dispute Undisputed Fact No. 5.

6. The Bureau does not dispute Undisputed Fact No. 6. Rather, the Bureau, without any support, states that the New York Department of Insurance did not assess Respondents' captive arrangements for RESPA compliance. The Bureau's response has no bearing on Respondents' Undisputed Fact No. 6.

7. The Bureau does not dispute Undisputed Fact No. 7. Rather, without any citation to any authority, the Bureau simply disputes the findings by Milliman. Without any authority, the fact remains undisputed. The Bureau's citation to the purported "holding" from the Court's May 15, 2013 opinion in the *Munoz* litigation is taken from a Report and Recommendation of the Magistrate Judge and is taken out of context. Finally, the Bureau's assertion that the Milliman opinions were somehow inaccurate based on its purported "strong financial incentive to provide opinions approving purported reinsurance arrangements" is sheer speculation on the part of Enforcement Counsel and insufficient to create a disputed issue of fact.

8. The Bureau does not dispute Undisputed Fact No. 8, other than to proffer the legal conclusion that, in the Bureau's opinion, Atrium did not provide pmi reinsurance. Thus, the Bureau has not disputed this fact.

9. The Bureau does not dispute Undisputed Fact No. 9, other than to proffer the legal conclusion that, in the Bureau's opinion, Atrium did not provide pmi reinsurance. Thus, the

Bureau has not disputed this fact.

10. The Bureau does not dispute Undisputed Fact No. 10, other than to assert that Mr. Bogansky is not telling the truth. The Bureau has been investigating this matter for more than two years, and HUD was investigating this matter since at least 2008. The Bureau's assertion that it is unable to verify Mr. Bogansky's statement regarding the losses on the Radian 2007 Book is startling.

11. The Bureau does not dispute Undisputed Fact No. 11, other than to proffer the legal conclusion that, in the Bureau's opinion, Atrium did not provide pmi reinsurance. Thus, the Bureau has not disputed this fact. Enforcement Counsel speculates that they know the reason the CMG agreement was terminated based on an email exchange with Mr. Bogansky; however, the CMG commutation agreement speaks for itself and reflects an agreement between CMG and Atrium to commute the agreement, which resulted in the forfeiture by Atrium of all of its capital contributions as well as the payment to CMG of all ceded commission payments earned, as well as any earnings on the trust funds.

12. The Bureau does not dispute Undisputed Fact No. 12, other than to proffer the legal conclusion that, in the Bureau's opinion, Atrium did not provide pmi reinsurance. Thus, the Bureau has not disputed this fact.

13. The Bureau does not dispute Undisputed Fact No. 13 with any credible evidence to support Enforcement Counsel's misunderstanding of reinsurance. Specifically, Enforcement Counsel takes no issue with the statement as drafted; rather, Enforcement Counsel rewrites the undisputed statement in order to manufacture a dispute. Enforcement Counsel's purported dispute fails to recognize the capital contributions made by PHH to the Genworth captive arrangement; the earnings on the capital in the trust accounts; or the fact that Atrium, and later

Atrium Re provided reinsurance to Genworth on various books of loans.

14. The Bureau does not dispute Undisputed Fact No. 14, other than to proffer the legal conclusion that, in the Bureau's opinion, Atrium did not provide pmi reinsurance. Thus, the Bureau has not disputed this fact.

15. The Bureau does not dispute Undisputed Fact No. 15 with any credible evidence to support Enforcement Counsel's misunderstanding of reinsurance. Specifically, Enforcement Counsel takes no issue with the statement as drafted; rather, Enforcement Counsel rewrites the undisputed statement in order to manufacture a dispute. Enforcement Counsel's purported dispute fails to recognize the capital contributions made by PHH to the UGI captive arrangement; the earnings on the capital in the trust accounts; or the fact that Atrium, and later Atrium Re provided reinsurance to UGI on various books of loans.

16. Enforcement Counsel concedes that with respect to three of the four agreements Atrium always met its contractual funding obligations with respect to the trusts that were created in connection with its reinsurance arrangements. With respect to the fourth arrangement with CMG, Enforcement Counsel speculates that there was a deficiency in the funding of the trust based on an email exchange with Mr. Bogansky; however, the CMG commutation agreement speaks for itself and reflects an agreement between CMG and Atrium to commute the agreement, which resulted in the forfeiture by Atrium of all of its capital contributions as well as the payment to CMG of all ceded commission payments earned, as well as any earnings on the trust funds.

17. The Bureau does not dispute Undisputed Fact No. 17 with any credible evidence; rather, the purported dispute simply reflects Enforcement Counsel's misunderstanding of reinsurance. Specifically, Enforcement Counsel takes no issue with the statement as drafted;

rather, Enforcement Counsel rewrites the undisputed statement in order to manufacture a dispute. Enforcement Counsel's purported dispute fails to recognize the capital contributions made by PHH to the UGI and Genworth captive arrangements; the earnings on the capital in the trust accounts; or the fact that Atrium, and later Atrium Re paid substantial claims to both UGI and Genworth on various books of loans.

18. The Bureau does not dispute Undisputed Fact No. 18, other than to assert that Mr. Bogansky is not telling the truth. The Bureau has been investigating this matter for more than two years, and HUD was investigating this matter since at least 2008. Enforcement Counsel's assertion that they are unable to verify Mr. Bogansky's statement regarding the losses on the various books is startling.

19. The Bureau does not dispute Undisputed Fact No. 19. Rather, the Bureau, without any support, states that the New York Department of Insurance did not assess Respondents' captive arrangements for RESPA compliance. The Bureau's response has no bearing on Respondents' Undisputed Fact No. 19. Further, Respondents note that the Bureau is specifically prohibited from attempting to regulate the business of insurance.

20. The Bureau does not dispute Undisputed Fact No. 20. Rather, the Bureau, attempts to create a dispute by asserting that there may be "variations" in the types of agreements that were entered into by the four pmi companies that the CFPB announced that it had filed, and settled, suits against —Genworth, MGIC, Radian and UGI. The Bureau's Consent Orders speak for themselves and, but the Bureau's own admission, included reinsurance structures that are the same that are the subject of the Notice in this Action. The Bureau's attempt to negate the fact that it permitted UGI to continue to cede premiums to Atrium Re and allowed UGI to continue to receive the benefits of the reinsurance demonstrates the lack of merit to the Notice of Charges.

21. The Bureau does not dispute Undisputed Fact No. 21. As noted above, the Consent Order the Bureau entered into with UGI specifically permitted UGI to continue to cede premiums to Atrium Re and allowed UGI to continue to receive the benefits of the reinsurance. Having entered into that Consent Order, the Bureau cannot now charge Respondents with a violation of Section 8 of RESPA for participating in a reinsurance arrangement that the Bureau specifically allowed to continue. The Bureau's statement that "premiums previously ceded by UGI were made in violation of RESPA" is curious since the Bureau does not explain how payments ceded before the entry of the Consent Order violate RESPA while those same payments after the entry of the Consent Order are legal. The Bureau's statement is a concession that the ceding payments by UGI do not violate RESPA and, accordingly, the receipt of those same payments are also not a violation of RESPA.

22. The Bureau does not dispute Undisputed Fact No. 22.

23. The Bureau does not dispute Undisputed Fact No. 23.

24. The Bureau does not dispute Undisputed Fact No. 24.

25. The Bureau does not dispute Undisputed Fact No. 25 as stated by Respondents. The Bureau's explanation that RMIC intends to recapitalize and finally pay on its insurance obligations misses the point. It is undisputed that in January 2012, RMIC was placed under regulatory supervision by the North Carolina Commissioner of Insurance, as stated by Respondents.

26. The Bureau does not dispute Undisputed Fact No. 26 as stated by Respondents. Specifically, the Bureau does not dispute that the OCC has issued a number of interpretive letters stating that it is permissible under the National Bank Act for a bank to establish an operating subsidiary to reinsure a portion of the mortgage insurance on loans originated or purchased by

the parent bank or one of its affiliates. The Bureau's acknowledgement of this regulatory permission is a concession that pmi reinsurance arrangements that are identical in structure to those entered into by Respondents are permissible under Section 8 of RESPA.

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 Respondents' Response to Enforcement Counsel's Statement of Disputed Issues of Material Fact in Opposition to Respondents' Motion 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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