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 RESPONSE TO RESPONDENTS' OBJECTION TO REQUEST FOR ISSUANCE OF SUBPOENA REQUIRING PRODUCTION OF DOCUMENTS

Enforcement Counsel submits this response to Respondents' Objection to Enforcement Counsel's Request for Issuance of a Subpoena Requiring Production of Documents, filed on May 5, 2014.

PRELIMINARY STATEMENT

Enforcement Counsel's requested subpoena seeks communications between Respondents and any mortgage insurance company (MI) regarding this administrative proceeding, the underlying investigation, and the Consumer Financial Protection Bureau's (Bureau) actions against the MIs filed in the Southern District of Florida (including but not limited to their underlying investigations, discussions with the CFPB, and any settlement terms). Enforcement Counsel asserted two general justifications for the discovery requested, both of which are based directly on claims asserted by Respondents in this proceeding after the Notice of Charges was filed. First, Enforcement Counsel pointed out that Respondents have claimed that Atrium and United Guaranty, Inc. (UGI) together "acted in reliance" on a provision of the Consent Order (UGI Consent Order) entered by the Southern District of Florida in the action brought by the Bureau against UGI, by continuing to give or accept ceded premiums. Respondents have made this reliance claim to support both judicial estoppel and equitable estoppel defenses they have asserted in this proceeding. *See* PHH's Renewed Motion to Dismiss or, in the Alternative, for Summary Disposition (PHH's Renewed MTD), at 38 (making reliance claim in support of judicial estoppel defense) (Dkt. No. 101); PHH's Motion *in Limine* to Strike Claims Predicated on Ceding Payments Allowed by the Bureau in April and May 2013 (PHH's Equitable Estoppel Motion), at 2 (making reliance claim in support of equitable estoppel defense) (Dkt. No. 76). Respondents have invoked identical provisions in Consent Orders entered in actions brought by the Bureau against Genworth, Radian, MGIC and RMIC. *See* PHH's Renewed MTD at 41. Respondents' allegation is, in essence, that the Consent Orders led them and

the MIs to believe that the Bureau's position was that ceded premium payments that Atrium accepted from those MIs were lawful under RESPA.

Second, Enforcement Counsel noted that Respondents have also argued that what it called the Bureau's "outspoken detestation of [captive] arrangements, and its aggressive prosecution of them" foreclose any possibility that Respondents and an MI would enter into a captive arrangement in the future. *See* PHH's Renewed MTD at 13 n.11 (Dkt. No. 101). Respondents made this assertion to support their argument that injunctive relief is unnecessary. The Bureau's "aggressive prosecution" of captive arrangements, of course, includes its actions against the MIs, and the resulting Consent Orders. Indeed, in arguing that injunctive relief is unnecessary, Respondents contended that the Bureau's allegations of illegal conduct reflected in the Consent Orders precluded the possibility that Respondents would enter into a captive arrangement with *any* MI (not just those that were parties to the Consent Orders). *Id.* at 16 n.13 ("Furthermore, the Bureau's entry of consent orders with five of the largest MIs forecloses any possibility of the resumption of the captive arrangements that *are alleged to violate RESPA*.") (emphasis added). According to Respondents, given the position that the Bureau has taken in its actions against the MIs and in its prosecution of Respondents, "no rational mortgage company and/or lender would enter into [a captive] agreement." *Id.* at 13 n. 11.

The contradiction is stark. For their estoppel defenses, Respondents argue that the Consent Orders led them, and the MIs, to believe that the Bureau's position is clearly that ceded premium payments pursuant to captive arrangements were lawful under RESPA, and Respondents and at least one MI (UGI) rationally continued to give and accept ceded premiums in reliance on that purported position. Meanwhile, for their argument that injunctive relief is unnecessary, Respondents assert that the Consent Orders clearly reflect the Bureau's position that those payments are unlawful under RESPA, such that no rational entity would enter into a captive arrangement in light of them.

Regardless of which of these two inconsistent arguments Respondents ultimately settle on, or whether they continue to pursue both simultaneously, those factual assertions have been advanced in this proceeding, and each of them independently entitles Enforcement Counsel to the limited discovery it has requested. While Enforcement Counsel believes Respondents' arguments are without legal basis and that equitable estoppel is not available as a matter of law to Respondents[1], because those defenses continue to be asserted, most recently in PHH's renewed motion to dismiss, Enforcement Counsel should be permitted to obtain limited discovery to test the veracity of the factual predicates asserted by Respondents in support of those arguments.

This single request is narrowly tailored to those assertions. For example, Enforcement Counsel did not request production of *any internal PHH documents* discussing the Consent Orders or, more broadly, the Bureau's prosecutions of captive arrangements, even though it is likely that many internal documents are relevant to either: (1) Respondents' assertion that they relied on the Consent Orders in continuing with the UGI arrangement, or (2) Respondents' assertion that the Bureau's prosecution of captive arrangements absolutely deters any such further participation. Instead, because Respondents' assertions at issue have generally encompassed both their own conduct and that of the MIs, Enforcement Counsel believes relevant communications are more likely to be those exchanged between Respondents and the MIs. Thus, rather than serving a broader request that would include internal PHH documents, Enforcement Counsel has sought only communications between Respondents and MIs about the topics identified in the request, a much smaller set of documents that almost certainly excludes highly relevant documents.

Additionally, Enforcement Counsel submits that it would have been appropriate to seek discovery regarding a broader set of topics in light of Respondents' broad allegations about their

[1] *See*, *e.g.*, *Drozd v. I.N.S.*, 155 F.3d 81, 90 (2d. Cir. 1998) ("The doctrine of equitable estoppel is not available against the government 'except in the most serious of circumstances'") (internal citation omitted). Respondents also failed to plead equitable estoppel as an affirmative defense, thereby waiving that defense. *See* PHH's Answer and Affirmative Defenses.

conduct and that of the MIs. For example, while Respondents have repeatedly made the vague and general allegation that Atrium and UGI acted in reliance on the UGI Consent Order, they have never explained specifically how they changed their conduct in reliance on the UGI Consent Order.[2] Despite that lack of specificity, they have sought to dismiss Enforcement Counsel's claims on the basis of that allegation. Enforcement Counsel believes many communications between Respondents and UGI about their captive arrangements would be relevant to proving or disproving the existence of a change in conduct, even if those communications do not specifically discuss this proceeding, the underlying investigation, or any of the actions against the MIs (and their underlying investigations). Yet Enforcement Counsel has limited its request only to communications between the MIs and Enforcement Counsel about those few discrete topics.

Third, unlike discovery requests common in federal and state court actions, the requested discovery does not seek all documents "relating to" various topics. Enforcement Counsel's discovery request is far narrower in that it only seeks communications that contain some actual discussion regarding an aspect of the administrative proceeding, the Florida actions, or the underlying investigations.

Accordingly, there is no merit to Respondents' assertion that the request is "exceedingly broad."[3] Although Enforcement Counsel believes that a request commensurate in breadth with Respondents' very broad assertions would have been warranted, Enforcement Counsel narrowed its request in an effort to target the most likely sources of documents relevant to issues that Respondents elected to inject into this proceeding.

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[2] The Supreme Court has held that to establish reliance in support of an equitable claim, the moving party must show that it "relied on its adversary's conduct in such a manner as to *change his position for the worse*." *Heckler v. Community Health Servs,* 467 U.S. 51, 59 (1984) (emphasis added) (internal citation and quotation marks omitted).

[3] Enforcement Counsel addresses Respondents' specific objections to the purported overbreadth of the request in the sections below discussing the two justifications asserted by Enforcement Counsel for the subpoena.

ARGUMENT

I. The Bureau's Rules of Practice Allow Enforcement Counsel to Request Issuance of a Subpoena *Duces Tecum* After an Administrative Proceeding Has Commenced

Respondents contend that the subpoena is not permitted by the Bureau's Rules of Practice for Adjudication Proceedings (Rules of Practice). According to Respondents, once an administrative enforcement proceeding has commenced, the Rules of Practice allow only a respondent to request a subpoena for the production of documents. Respondents are incorrect. PHH Br. at 2-3. Rule 208(a), regarding "Availability" of subpoenas, provides: "In connection with any hearing ordered by the hearing officer, *a party* may request the issuance of one or more subpoenas requiring … the production of documentary or other tangible evidence returnable at any designated time or place." 12 C.F.R. § 1081.208(a) (emphasis added). Thus, the plain language of Rule 208(a) provides that a subpoena *duces tecum* is a discovery tool available to any "party" – either Enforcement Counsel or Respondents.

That Enforcement Counsel may request a subpoena *duces tecum* after a notice of charges has been filed is confirmed by Rule 203, which provides that a Scheduling Conference must take place "[w]ithin 20 days of service of the notice of charges or such other time as the parties and hearing officer may agree." 12 C.F.R. § 1081.203. Rules 203(a) and 203(b)(5) require counsel for the parties to meet before the Scheduling Conference to discuss "prehearing production of documents in response to subpoenas *duces tecum* as set forth in § 1081.208." Regarding this requirement, the section-by-section analysis explains: "It is also expected that at or before the scheduling conference, the parties will discuss … whether *either party intends to issue documentary subpoenas*." Rules of Practice for Adjudication Proceedings, 77 Fed. Reg. 39,058, 39,069 (June 29, 2012) (discussing Rule 203). This makes clear that "either party" may request issuance of documentary subpoenas after the notice of charges has been filed.

Finally, the section-by-section analysis of the Rules of Practice states that Rule 208 is "modeled after the SEC Rules, 17 CFR 201.232." *Id.* at 77 Fed. Reg. 39,075. Part (a) of the corresponding SEC rule provides, in relevant part: "In connection with any hearing ordered by the Commission, *a party* may request the issuance of subpoenas requiring the attendance and testimony of witnesses at the designated time and place of hearing, and subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place." 17 CFR 201.232(a) (emphasis added). The SEC is permitted to issue subpoenas after the institution of administrative proceedings. *See*, *e.g.*, Order Granting in Part Subpoena Request, *In the Matter of BDO China Dahua CPA Co.* et al., June 26, 2013, File Nos. 3-14872, 3-15116, *available at* http://www.sec.gov/alj/aljorders/2013/ap-768.pdf.

Respondents quote various statements from the section-by-section analysis referring to the ability of Respondents to conduct certain forms of limited discovery, including use of subpoenas. PHH Br. at 2-3. Nothing in these statements indicates that Respondents *exclusively* have the ability to use subpoenas. There is no basis to interpret these statements as restricting Enforcement Counsel's ability to use discovery tools expressly allowed by the Rules of Practice.

Respondents also contend that the requested subpoena is improper because "Enforcement Counsel's ability to gather information and documentary evidence is through the issuance of a Civil Investigative Demand ('CID') or Investigational Hearing." PHH Br. at 2. But Enforcement Counsel is not seeking the requested documents as part of its investigation of Respondents' captive arrangements. Rather, it seeks those documents to test the veracity of specific allegations Respondents made after the Notice of Charges was filed. When it filed the Notice of Charges, Enforcement Counsel could not reasonably have foreseen that Respondents would make these

allegations.[4] Respondents' allegation that "the Florida Consent Orders foreclose any possibility of the resumption of the captive arrangements that are alleged to violate RESPA" appeared for the first time in a motion filed three business days before the hearing commenced. *See* Respondents' Motion in Limine to Strike the Bureau's Claims for Remedies Other Than Injunctive Relief for Conduct Prior to July 21, 2011, at 3 n.1 (Dkt. No. 77). Respondents' allegation of reliance on the UGI Consent Order appeared for the first time in another motion filed the same day. *See* PHH's Equitable Estoppel Motion, at 2 (Dkt. No. 76). Both motions were denied at the hearing, and Enforcement Counsel did not believe it was necessary to request discovery relating to arguments already rejected by the Tribunal. But Respondents revived both of the allegations at issue in their recent Renewed Motion to Dismiss. Enforcement Counsel requested this subpoena before the deadline for its response to that motion, and almost one month before the hearing is scheduled to resume.

II. The Requested Discovery Should Be Granted Because Respondents' Objection Does Not Address One of Enforcement Counsel's Justifications for that Discovery

Respondents' objection does not address one of the two justifications asserted in Enforcement Counsel's written request – that the discovery sought is necessary to test Respondents' claim that the Bureau's "outspoken detestation of [captive] arrangements, and its aggressive prosecution of them" foreclose any possibility that Respondents and an MI will enter into a captive arrangement in the future. *See* PHH Renewed MTD at 13 n.11 (Dkt. No. 101). This claim independently justifies the requested discovery, regardless of whether or not the Tribunal determines that Respondents' estoppel claims also justify the requested discovery.

Because Respondents have not even attempted to explain how their specific grounds for objection undermine the validity of this justification, those objections should not be accepted.

[4] The requested subpoena is also appropriate because relevant documents may have been generated after April 2013, when Respondents informed Enforcement Counsel that their production of documents in response to the Civil Investigative Demand was complete.

Respondents made no such effort because there is no colorable argument that their objections apply to this justification. For example, Respondents claim that the request is overbroad because it seeks communications between Respondents and *any* MI regarding the topics identified in the request. PHH Br. at 4. But the sole basis of this objection is that "the purported purpose of Enforcement Counsel's Request … focuses on *one* agreement with *one* MI company." *Id.* at 5 (emphasis in original). As discussed below, that is not an accurate characterization of Enforcement Counsel's other justification. *See infra* 11-12. It certainly does not correctly describe Enforcement Counsel's justification directed at Respondents' assertion that the Bureau's "aggressive prosecution" of five MIs, which involved numerous captive arrangements with lenders other than PHH, completely forecloses any possibility that Respondents and any rational MI will enter into a new captive arrangement in the future. Because Respondents have made an assertion about the conduct of *all* MIs, there is no basis to limit Enforcement Counsel's request only to Respondents' communications with UGI.

Respondents also argue that the request is overbroad because "it is not limited to a time period that is relevant to Respondents' reliance on the UGI Consent Order" and "it is unclear why Enforcement Counsel would seek communications evidencing reliance up to the present date, long after commutation of the agreement." PHH Br. at 5. Again, Respondents lodge this objection only with respect to one of Enforcement Counsel's two justifications.[5] As to the other justification which Respondents do not address, there is no merit to their argument that the request is temporally overbroad. The request is inherently limited in time by the topics identified: this administrative proceeding, the underlying investigation, and the Bureau's actions against the MIs in Florida (and their underlying investigations). Communications about these fairly recent events could not precede the events themselves. With respect to Respondents' complaint about producing communications

[5] As discussed below, even as to that justification, Respondents' argument fails. *See infra* 13.

"up to the present date," there is no reason to conclude that a communication between Respondents and an MI about those topics is irrelevant just because it was made last week, as opposed to last year.

Enforcement Counsel's request for subpoena should be granted because Respondents have not contested the validity of one of Enforcement Counsel's justifications.

III. The Requested Discovery is Also Necessary to Test Respondents' Allegations of Reliance Made in Connection With Their Estoppel Defenses

Respondents contend that the requested discovery is inappropriate because Enforcement Counsel has "conflate[d] judicial estoppel with *equitable* estoppel" by asserting that the requested documents are necessary to test PHH's allegations that it relied on the Consent Order entered in the Bureau's action against UGI in the Southern District of Florida. PHH Br. at 3 (emphasis in original). According to Respondents, because reliance is not an element of its claim for judicial estoppel, reliance is "not an issue before this Tribunal" and "immaterial" to this dispute, so the discovery sought by Enforcement Counsel must be denied. *Id.* at 4. Respondents' arguments fail to undermine the validity of the requested subpoena.

First, while Respondents contend that Enforcement Counsel has manufactured a dispute over an irrelevant issue, Enforcement Counsel simply quoted the following claim in Respondents' Renewed Motion to Dismiss: "As a result, and *in reliance* on the Bureau's acquiescence, UGI gave—and Atrium received— private mortgage insurance premium ceding payments for approximately two months, under agreements previously in place." PHH's Renewed MTD at 38 (emphasis added). (Dkt. No. 101) The same claim was made (verbatim) in Respondents' March 19, 2014 Motion *in Limine* to Strike Claims Predicated on Ceding Payments Allowed by the Bureau in April and May 2013, in which Respondents asserted an equitable estoppel defense, or some variant thereof. (Dkt. No. 76) While Enforcement Counsel believes that Respondents' equitable estoppel defense is legally without merit, not available against the government, and waived by their failure to plead it as an

affirmative defense, Respondents have nonetheless continued to assert as a factual matter that they relied on the UGI Consent Order. They cannot now attempt to block Enforcement Counsel from seeking discovery to probe that allegation. If Respondents believe that reliance is "not an issue before this Tribunal" and "immaterial" to this dispute, as they now assert, they must admit that they have repeatedly burdened the Tribunal and Enforcement Counsel with irrelevant arguments and that their Renewed Motion to Dismiss rests on such arguments. *Id.* at 4.

As for Respondents' assertion that Enforcement Counsel has conflated judicial estoppel with equitable estoppel, it was Respondents that placed their reliance allegation in the section of their brief on judicial estoppel. Thus, Enforcement Counsel's statement that Respondents, as part of their judicial estoppel defense, "assert that Atrium and UGI together acted 'in reliance' on the Consent Order" is completely accurate. In any event, whether Respondents confused judicial estoppel with equitable estoppel in their Renewed Motion to Dismiss, or were also asserting a separate equitable estoppel claim in that motion, does not matter for purposes of determining the validity of Enforcement Counsel's request. The relevant point is that Respondents have repeatedly contended that they relied on the Consent Order – once in the context of an equitable estoppel claim and once in the context of a judicial estoppel claim – and they presumably believe their reliance claim has some legal relevance to those defenses. Moreover, Enforcement Counsel has no assurance that Respondents will not revive their equitable estoppel claim, for example, in their post-hearing brief. Enforcement Counsel is entitled to the requested discovery in light of Respondents' reliance claims.

Respondents nonetheless argue that the request is overbroad because Enforcement Counsel seeks communications between Respondents and *any* MI on the topics identified in the subpoena, even though, Respondents claim, the "purported purpose of Enforcement Counsel's Request … focuses on *one* agreement with *one* MI company." PHH Br. at 4-5. As discussed above, this objection should be rejected because it does not address Enforcement Counsel's other justification for the

subpoena. *See supra* 8. But even as to the justification discussed in this section, Respondents are incorrect.

First, in asserting their various estoppel defenses, Respondents have repeatedly sought to take advantage of all five of the Consent Orders entered in the Southern District of Florida to attempt to insulate their conduct from liability, even though they were a party to none of them. *See*, *e.g.*, PHH's Renewed Motion to Dismiss at 44 (Dkt. No. 101); Respondents' Pre-hearing Brief at 13 (Dkt. No. 78). Indeed, Respondents have attempted to avoid adjudication of Enforcement Counsel's claims based on their allegations about the conduct of *all* of the MIs who agreed to settle with the Bureau. In their pre-hearing brief, Respondents contended that approximately "160 other captive arrangements" involving those MIs were "*virtually identical in structure as the Atrium agreements at issue here*" and that "*there is no legal or factual basis to differentiate between such agreements*, such that the fact that the Bureau permitted UGI, Atrium's counterparty, to continue to cede payments, and it *allowed Atrium's other counterparties e.g., Genworth and Radian*, *to continue to cede payments under identical arrangements, bars the Bureau from pursuing its claims against Atrium*." *Id.* at 14 n. 16 (emphases added). Thus, Respondents claim that they are entitled to judicial estoppel based on what they allege "Atrium's other counterparties, *e.g.*, Genworth and Radian" did in response to the Consent Orders (*i.e.*, that they "continue[d] to cede payments").[6]

Respondents have similarly attempted to use the conduct of other MIs to support the equitable estoppel defense they asserted in their motion filed three days before the hearing commenced. In that motion, Respondents' basic argument was that UGI and Atrium relied on the UGI Consent Order by continuing to give and accept ceded premiums. PHH's Equitable Estoppel

[6] Likewise, in its first motion to dismiss, PHH argued that "the mortgage reinsurance structures utilized by" MGIC, Genworth, Radian and UGI had "*the same structure*" as the Atrium arrangements, notwithstanding differences between those arrangements and Atrium's arrangements. PHH's Motion to Dismiss or, in the Alternative, for Summary Disposition, at 12 (Dkt. No. 18) (emphasis added).

Motion at 2-3 (alleging reliance and characterizing 12 U.S.C. § 2617(b) as providing "no liability for acts relying in good faith on Bureau's interpretation"). Although Respondents in their motion did not explicitly make a similar reliance claim with respect to the other MIs, they argued that all of other MIs' Consent Orders, as well as the "160 arrangements in place" when those Consent Orders were entered, support their estoppel arguments with respect to the UGI Consent Order. *Id.* at 2 n.3.

Given that Respondents have sought to take equal advantage of the other four Consent Orders to support their estoppel defenses, and their assertion that there is no basis to differentiate between captive arrangements involving MGIC, Genworth, Radian, and RMIC and Atrium's arrangement with UGI, they cannot now argue that those other arrangements have nothing to do with the UGI arrangement when Enforcement Counsel seeks documents relevant to Respondents' estoppel defenses. Respondents' objection to producing communications with MIs other than UGI is particularly untenable given their attempt to use the alleged conduct of those other MIs in response to their Consent Orders as a basis for estoppel against Enforcement Counsel.[7]

Respondents' claim that the request is temporally overbroad because it seeks communications "up to the present date, long after commutation of the agreement," PHH Br. at 5, should be rejected because a communication that sheds light on how, if at all, Respondents and any of the MIs may have changed their conduct in response to the Consent Orders need not be

[7] To be sure, Respondents have not yet *explicitly* used the term "reliance" with respect to any Consent Order other than the UGI Consent Order. Although it is unclear what position Respondents will ultimately take, there are two possibilities: (1) Respondents will allege that they relied only on the UGI Consent Order, but did not rely on the others, even though they claim they are all identical; or (2) Respondents will allege that they also relied on the other four Consent Orders. Under either theory, Enforcement Counsel's discovery request is appropriate. If Respondents allege that they relied only on the UGI Consent Order but not the others, Respondents' communications with the other four MIs are necessary to determine whether Respondents' conduct under the UGI arrangement (as reflected in their communications with UGI) differed in some material respect from their conduct under the other arrangements (as reflected in their communications with those other MIs). If Respondents allege that they also relied on the other Consent Orders, then Respondents' communications with all of those MIs about those Consent Orders and the underlying actions are relevant to testing the veracity of their allegations of reliance.

contemporaneous with the arrangements to be relevant. A relevant discussion could be retrospective in nature.

IV. Respondents' Various Other Objections Are Meritless

Respondents argue that the request is overbroad because it encompasses "even the most general communications about this administrative proceeding with various MI companies, including communications regarding the agreement as to the language of the Protective Order, as well as its coverage and scope once entered." PHH Br. at 5. First, there is no authority for the proposition that a discovery request is invalid if it might capture some potentially irrelevant documents. But in any case, as discussed above, Enforcement Counsel's request is appropriate because it is narrowly tailored to assertions that Respondents have made in this proceeding. Respondents' argument that the request is improper because it would capture "general communications about this administrative proceeding with various MI companies" is also without merit. Although it is not clear what Respondents mean by "general communications," a communication need not be "specific" to be relevant. Moreover, the assertions to which the request is targeted are themselves exceedingly general, so communications that generally discuss this proceeding, the Florida actions or any of the underlying investigations may very well be relevant to those assertions.

Nor is there any reason to conclude that communications between Respondents and MIs about the Protective Order presumptively contain no discussion relevant to those assertions. It is possible that Respondents and MIs expressed views about the Bureau's "outspoken detestation of [captive] arrangements, and its aggressive prosecution of them" in the context of emails about the protective order. For example, on April 15, 2014, counsel for PHH wrote to counsel for UGI about issues relating to the protective order, but he also commented: "Also, I owe you a call regarding the hearing, which has been quite an 'event.' I also assume you saw the filing today regarding Radian's counsel." *See* email from Souders to Byrne, April 15, 2014 (Ex. A attached hereto). This indicates

that Respondents and the MIs discussed other aspects of this proceeding, such as the hearing itself and the motion to disqualify Schnader, in the context of discussions about the protective order.

Finally, Respondents assert that "demanding communications between, inter alia, 'counsel' is particularly inappropriate," PHH Br. at 5, but they fail to explain *why* requesting such communications is inappropriate. The attorney-client privilege does not protect communications between counsel for Respondents and counsel for any of the MIs, given that Respondents and the MIs are separate parties. Any privilege that might otherwise attach would be conclusively waived by the presence of a representative of the other party on the communication.

Excluding communications between counsel for Respondents and counsel for the MIs would be especially inappropriate because those communications may be among the most relevant documents. The assertions that provide the justification for the subpoena potentially implicate legal issues such as the interpretation of the provision of the UGI Consent Order that Respondents claim they and UGI relied on, and Respondents' or the MIs' views of the legal implications of entering into another captive arrangement in light of the Bureau's "aggressive prosecution" of captive arrangements. Thus, communications between counsel for Respondents and counsel for the MIs may well be the core set of documents that either refute or establish Respondents assertions.

CONCLUSION

Enforcement Counsel's requested subpoena is appropriate because it seeks documents that are necessary to test the veracity of assertions Respondents have made in this proceeding regarding their conduct and that of the MIs. Respondents' objections to the subpoena must be rejected. The subpoena is procedurally proper, and the document request is appropriately targeted to Respondents' assertions, and indeed, substantially narrower in scope than those assertions. Respondents fail to undermine the validity of Enforcement Counsel's justifications for the subpoena. Respondents effectively concede the validity of one of those justifications by failing to

challenge it altogether, and as to the other justification, their objection relies on a mischaracterization of their own arguments. Finally, there is no basis to exclude communications between counsel for Respondents and counsel for MIs, which are not privileged and may be among the most relevant documents in light of the nature of the assertions at issue.

DATED: May 12, 2014

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 12th day of May 2014, I caused a copy of the foregoing "Enforcement Counsel's Response to Respondents' Objection to Request for Issuance of Subpoena Requiring Production of Documents" 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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