ATTACHMENT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CONSUMER FINANCIAL PROTECTION BUREAU, Plaintiff, v. UNITED GUARANTY CORPORATION, Defendant.	Civil Action No. 1:13-CV-21189-KMW

REPLY MEMORANDUM IN SUPPORT OF PROPOSED DEFENDANT-INTERVENORS' MOTION TO ADMINISTRATIVELY REOPEN CASE AND INTERVENE FOR THE LIMITED PURPOSE OF INTERPRETING AND ENFORCING THE CONSENT ORDER

INTRODUCTION

The Consumer Financial Protection Bureau's ("CFPB" or "Bureau") conduct in this matter is nothing short of startling. Section 8(a) of the Real Estate Settlement Procedures Act ("RESPA"), which is both a civil and criminal statute, states:

> **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.

12 U.S.C. § 2607(a) (emphasis added). As United Guaranty Corporation ("UGI") makes clear throughout its opposition memorandum: "[T]his Court already approved the Consent Order, including the provision in it **that expressly authorizes PHH's [receipt of premiums]**." UGI Mem. at 2 (emphasis added).

Therein lies the rub. The CFPB presented this Court with a proposed Consent Order that authorized UGI to continue making ceding payments pursuant to existing reinsurance

arrangements. One of those existing arrangements was with Defendant-Intervenor Atrium Re, a wholly-owned subsidiary of PHH Corp.[1] The CFPB cannot now take the contrary position that Defendant-Intervenor Atrium Reinsurance Corp. ("Atrium Re") is not entitled to *receive* the same payments UGI is explicitly permitted to make.

At the time it presented the Consent Order to this Court, the CFPB was well-aware of the "giving" and "receiving" nature of RESPA. As Kent Markus, the Bureau's Director of Enforcement and a signatory to the CFPB's opposition brief, was quick to point out after entry of the Consent Orders: "In every kickback situation, there is somebody paying and somebody receiving. *It takes two to tango.* Today we're dealing with those paying the kickbacks. But we have more work to do on this matter."[2]

The CFPB tries to sidestep the issue by arguing that the *past* payments by UGI and the other PMI providers "in fact violated RESPA." CFPB Mem. at 9. But there is no legal basis to distinguish between past and future ceding payments -- if, as the CFPB asserts, the ceding payments purportedly violate RESPA. As Defendant-Intervenors view it, the CFPB requested, and obtained, a Consent Order that expressly permits Defendant-Intervenors to receive premiums from UGI after the entry of the Consent Order in exchange for the provision of reinsurance. That is the only plausible reading of the provision stating that "[n]othing" in the Consent Order "shall be construed . . . as preventing the ceding of premiums on policies . . . already in existence as of [] the date of entry of this Order."

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[1] PHH Corporation ("PHH"), PHH Mortgage Corporation ("PHH Mortgage"), PHH Home Loans, LLC ("PHH Home Loans"), Atrium Insurance Corporation ("Atrium"), and Atrium Reinsurance Corporation ("Atrium Re," collectively the "Defendant-Intervenors").

[2] Quoted, among other sources, in Joe Adler's "Lenders Likely Next Target in CFPB Reinsurance Kickback Probe," 178(65) AMERICAN BANKER (April 5, 2013), *available on LexisNexis*.

The CFPB further attempts to justify its decision by arguing that UGI was "contractually obligated" to continue with its possibly "hundreds" of existing reinsurance agreements, including the one with Atrium Re. What is missing from the CFPB's response, however, is any legitimate explanation as to why it engaged this Court to enter a Consent Order governing UGI's conduct for a period of ten years, yet permitting conduct the CFPB deems to be in violation of RESPA Section 8 to continue. This Court should not permit the CFPB to avoid explaining its conduct, as it has failed to do in its opposition. Further, as the response of UGI makes plain, there is a fundamental disagreement between the parties to this Court's Consent Order, and such confusion should not continue.

Finally, as the counter-party to a reinsurance agreement that is directly and explicitly affected by this Court's Consent Order, Defendant-Intervenors have a real and substantial interest in this action. By its terms, the Consent Order allows UGI to continue making payments pursuant to its reinsurance agreement with Atrium. UGI agrees with Defendant-Intervenors that the Consent Order allows Atrium to accept these premium payments. Given the substantial interest Defendant-Intervenors have in ascertaining whether their receipt of premiums for providing reinsurance to UGI is in violation of the law when this Court has already agreed that UGI can make such payments, intervention is justified.

Defendant-Intervenors simply ask that this Court exercise the jurisdiction it retained to interpret the Consent Order it entered and confirm that UGI was permitted to make the ceding payments prospectively and, therefore, that Defendant-Intervenors were permitted to receive them.

ARGUMENT

I. The CFPB's Attempt To Deprive This Court Of Jurisdiction To Review Its Own Order Is Baseless

In its opposition, the CFPB argues that this Court is jurisdictionally barred from permitting Defendant-Intervenors to intervene in this action because "requiring the Bureau to abide by PHH's interpretation of the Consent Order would have the same practical effect as a formal injunction." CFPB Mem. at 6, n.5. UGI, a party to the Consent Order, agrees with Defendant-Intervenors that the plain language of the Consent Order entered by this Court allows UGI to pay -- and Atrium to receive -- reinsurance premiums pursuant to its existing reinsurance agreement. As the CFPB stated in its press release issued when the Complaint and Consent Orders were filed in this District, "[t]he proposed Consent Orders . . . will have the full force of law . . . when signed by the presiding judge." The CFPB now claims that the "full force" of the Consent Order is tantamount to an injunction against its administrative proceeding and it attempts to argue that Section 1053 of the Consumer Financial Protection Act prevents this Court from acting. The CFPB's argument is unavailing.

First, the jurisdiction of this Court was invoked *by the CFPB* when it presented this Court with the Consent Order. While the CFPB seeks to diminish the legal effect of this Court's Order by stating that this Court "never adjudicated any factual or legal issue," CFPB Mem. at 2, there is no legal support for the proposition that "**IT IS DONE AND ORDERED**" means anything less under such circumstances. Further, the CFPB sought to invoke the full weight and authority of this Court in asking that it order UGI, as well as its "affiliates, officers, agents, representatives, and employees, *and all other persons or entities in active concert or participation with it* who receive actual notice of this Order" to be permanently restrained and enjoined from certain prohibited conduct. Consent Order at 5 (emphasis added). Having itself chosen this forum and

proposed language here that arguably encompasses Defendant-Intervenors, the CFPB cannot now be heard to complain that the Court's continued exercise of the jurisdiction that the CFPB invoked is an impermissible "collateral attack" on a later-filed administrative proceeding.

Second, the invoking of § 1053 is a red herring. Defendant-Intervenors are asking for nothing more than for the Court to clarify the Consent Order the CFPB asked to be entered in this case. Under the CFPB's interpretation, UGI is permitted to continue paying ceding premiums that the Bureau claims are in violation of RESPA. If the Court interprets the Consent Order to provide that UGI did not violate RESPA in making the continued ceding payments, then under Supreme Court precedent, it cannot be legal to "pay" but illegal to "receive" the same money. Once this aspect of the Consent Order is clarified, then the only result is that the CFPB will need to explain to the Administrative Law Judge in the pending administrative action how RESPA can be violated by pre-Consent Order ceding payments when post-Consent Order ceding payments are permitted. In other words, this Court will have done nothing to "affect by injunction" any aspect of the administrative action filed against Atrium and the other Defendant-Intervenors.[3]

Curiously, the CFPB is, at bottom, objecting to its own decision to allow UGI, as well as

[3] Defendant-Intervenors are not asking this Court to enjoin, review or modify the Notice of Charges or any final Order of the CFPB, so § 1053 would not apply even under the CFPB's reading. However, the CFPB's attempt to apply § 1053 to administrative hearings at all is implausible. Section 1053 (codified at 12 U.S.C. § 5563) by its plain language applies to enforcement of orders already issued. Read literally, if not limited to "enforcement of orders," as provided in the header, § 1053(d) would prohibit *any* court from "review[ing or] modify[ing]" any "notice or order" of the CFPB, permitting judicial review only upon a decision of the CFPB to seek judicial enforcement of an ensuing order in federal district court. *See* § 1053(d)(2) ("Except as otherwise provided *in this subsection* . . . ") (emphasis added). Yet such a reading would be belied by *the other subsections of the very same section*, which provide for various avenues of judicial review of CFPB orders. *See, e.g.*, § 1053(b)(3) (providing for direct appeals of cease-and-desist orders to the Federal courts of appeals). Does the CFPB really contend that § 1053(d)(2) nullifies § 1053(b)(3)? Rather, it seems clear that the statute was intended to apply only to "enforcement of orders."

four other PMI providers to continue making payments for reinsurance on existing books of business. Given the Bureau's recognition that "*it takes two to tango*," one might wonder why it made such a decision. But having made that decision, the CFPB cannot now blame the Court, the Defendant-Intervenors, or anyone else for its decision to settle with the PMI providers through a Consent Order.

II. Defendant-Intervenors Have Standing

Defendant-Intervenors have standing, and the mere fact that they are non-parties to the Consent Order does not deprive them of that standing.

Defendant-Intervenors established in their motion that they are entitled to intervene as of right pursuant to Rule 42(a). Although an intervenor does not generally need to establish Article III standing, where the parties' controversy has ended, so-called "piggyback" standing is not available, and the intervenor must establish the existence of a justiciable case-and-controversy relative to the intervention. *See Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1330 (11th Cir. 2007). Here, aside from the ongoing controversy between UGI and the CFPB over the interpretation of the Consent Order, there is no question that Defendant-Intervenors have a live, justiciable controversy with the CFPB -- Defendant-Intervenors assert that the Consent Order approved certain payments ceded by UGI to Atrium Re in April and May 2013. UGI agrees, but the CFPB disagrees.

Neither UGI nor the CFPB can effectively counter these facts (although the CFPB, ignoring the Consent Order's language appearing to cover business partners, rather audaciously suggests that because the Consent Order permits the ceding payments, rather than prohibiting them, Defendant-Intervenors are somehow irrelevant). Rather, UGI and the CFPB take mutually-inconsistent but equally flawed positions concerning Defendant-Intervenors' standing. UGI asserts that a third-party (even a third-party beneficiary) simply does not have standing to

enforce a consent order, citing dicta in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975). *Blue Chip Stamps* involved *antitrust* consent decrees and did not announce a general rule that a non-party may never *intervene* to seek construction of, or compliance with, a consent order. *See Reynolds v. Butts*, 312 F.3d 1247, 1249-50 (11th Cir. 2002) (case relied upon by UGI and cited without explanation by CFPB, holding that non-intervening movants lacked standing to file motion to enforce consent order, in appeal opposed by *intervenors* who did have standing in that case); *Brooks v. S. Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 56 n.2 (S.D. Fla. 1990) (case relied upon by UGI, citing *Blue Chip Stamps* for the proposition that "intended beneficiaries who were not parties[] cannot sue to enforce an *antitrust* consent decree") (emphasis added to word omitted by UGI in its brief); *Virgo v. Local Union 580*, 107 F.R.D. 84, 91 (S.D.N.Y. 1985) ("The *Blue Chip* decision, however, and those cited therein in support of the quoted rule, involved consent decrees entered in antitrust cases.");[4] *see also, e.g.*, *LULAC v. City of Boerne*, 659 F.3d 421, 428-31 (5th Cir. 2011) (reversing denial, on standing grounds, of motion to intervene by third-party, who sought intervention to oppose efforts by parties to amend consent order entered years

[4] The other cases cited by UGI are not binding on this Court and in many respects undercut UGI's argument:

- *SEC v. Dollar Gen. Corp.*, 378 F. App'x 511 (6th Cir. 2010), is an unpublished, out-of-circuit case, which differs from the Eleventh Circuit's approach to third-party standing as discussed in *Reynolds*, but notably would permit the Court to interpret and enforce a consent order through its inherent authority, even if the party bringing the violation to its attention did not have standing. *Id*. at 516.
- *United States v. New Jersey*, 373 F. App'x 216 (3d Cir. 2010), is another unpublished, out-of-circuit case, in which the court held that "there was no dispute among the parties to the Decree" that the consent decree had in fact been violated. In that case, the Civil Service Commission had already ruled that the consent decree had been violated *and had remedied the violation*, reversing the action that violated the decree. The matter only came before the federal court because a state court *subsequently* permitted the appellant to seek an advisory opinion in federal court. *Id*. at 220. The panel cited *Blue Chip Stamps*, but did not consider it to be a complete bar to third-party enforcement of consent orders, and would have permitted enforcement by a third party on a case-by-case basis under Third Circuit precedent. Moreover, Appellant was not seeking to enforce the consent order, but rather to *terminate* it. *Id*. at 221 & n.6.

earlier); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) (reversing denial of motion to intervene more than six months after settlement in order to gain access to terms of settlement agreement); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470 (9th Cir. 1992) (permitting intervention after settlement and dismissal to seek modification of consent protective order); *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 934 F.2d 1092 (9th Cir. 1991) (vacating denial of motion to intervene 10 years after entry of consent decree, where party to decree had changed its position concerning the consent decree's interpretation); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990) (affirming order granting intervention after settlement to modify stipulated protective order); *South v. Rowe*, 759 F.2d 610 (7th Cir. 1985) (permitting intervention by implied third-party beneficiary of consent order nearly two years after entry); *Sys. Fed. No. 91 v. Reed*, 180 F.2d 991 (6th Cir. 1950) (permitting post-judgment intervention to seek enforcement of consent order intended to benefit class); *S. Pac. Co. v. City of Portland*, 221 F.R.D. 637 (D. Or. 2004) (permitting association to intervene to enforce permanent injunction entered almost 50 years earlier); *Wilson v. Sw. Airlines Co.*, 98 F.R.D. 725 (N.D. Tex. 1983) (granting motion to intervene to challenge consent order, filed 54 days after consent order was final); *Wilson v. Paducah*, 100 F. Supp. 116 (W.D. Ky. 1951) (permitting intervention in order to seek injunction enforcing earlier judgment to which the intervenors were not party); *cf.* L. Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 321 (1988) (discussing the widespread practice of third-parties being *required* to intervene in litigation *after the entry of a consent order*, and suggesting a rule change to permit transfer and consolidation of "collateral" actions as a substitute).

The fallacy of UGI's position is similarly illustrated by the CFPB's argument concerning standing, which admits that there is no absolute bar to non-parties intervening to enforce a

consent order, citing Fed. R. Civ. P. 71, which authorizes third-party beneficiaries to do so. CFPB Mem. at 7. This point, which the CFPB relegates to a footnote, belies UGI's maximalist position.

In fact, as shown by the cases cited above, there is a long history of non-parties being permitted to intervene in closed suits to challenge, enforce, or seek to modify a consent order. Where, as here, Defendant-Intervenors seek intervention only for a limited purpose, and where the language of the Consent Order raises the possibility that the Consent Order may be applied to Defendant-Intervenors directly even absent intervention, Defendant-Intervenors clearly have standing.

III. Defendant-Intervenors' Motion Is Timely

Contrary to the CFPB's assertion, Defendant-Intervenors' Motion is timely. First, the CFPB (and UGI) cannot avoid the Eleventh Circuit standard for timeliness under Rule 24(a), which considers almost exclusively the prejudice to existing parties, and only prejudice *caused by the delay* after the movant reasonably should have known that it needed to intervene, not any prejudice that would have resulted from the fact of intervention itself. *See Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977) ("[T]he prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action."); *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970) ("this may well be the *only* significant consideration [in determining timeliness] when the proposed intervenor seeks intervention of right") (emphasis in original).

Yet the CFPB's timeliness argument fails to address prejudice at all. *See* CFPB Mem. at 10-14. Instead, the CFPB relies upon a quote from an ALR (non-federal) annotation from 1948,

as well as a series of cases primarily from outside the Eleventh Circuit.[5] Since the law in this Circuit equates timeliness with lack of prejudice, the CFPB's argument fails. *See McDonald*, 430 F.2d at 1073. And the only prejudice asserted by UGI is not cognizable since it would have occurred even if Defendant-Intervenors had moved to intervene last April. *See* UGI Mem. at 8-9 (asserting that UGI "could" be prejudiced from undoing negotiations and from the expense of participating in the case going forward); *cf. FTC v. Am. TelNet, Inc.*, 188 F.R.D. 688, 691-92 (S.D. Fla. 1999) (case relied upon by UGI, finding intervention approximately one month after consent judgment to be timely, but denying intervention because the settlement in that case could

[5] Instead of demonstrating prejudice, as required, the CFPB cites a Northern District of Florida case and a single Eleventh Circuit case for the proposition that Defendant-Intervenors must show "extraordinary circumstances" in order to intervene after the entry of the Consent Order. The cases do not require such a showing and so this argument is unavailing. First, the fact that intervention after a case has closed is unusual does not impose an additional requirement—not listed in the Eleventh Circuit case-law—to demonstrate "extraordinary circumstances." Second, the CFPB's citation to the Northern District of Florida case is merely to a citation parenthetical, quoting an out-of-circuit case. Third, and tellingly, the Eleventh Circuit case cited by the CFPB *does not require* a showing of "extraordinary circumstances" for intervention after settlement. Rather, the Court of Appeals' reference to "no unusual circumstances" concerned the fourth *Stallworth* factor, which *permits consideration* of unique circumstances on a motion to intervene. *See Campbell v. Hall-Mark Electronics Corp.*, 808 F.2d 775, 777, 779 (11th Cir. 1987) (district court did not abuse discretion where government agency failed to intervene even though it knew of the need to do so "long before the day of the district court hearing on approval of the settlement," having *participated in discovery*); *Doe v. Sch. Bd. for Santa Rosa Cnty.*, 264 F.R.D. 670, 692 (N.D. Fla. 2010) ("Under the fourth timeliness factor, the court should consider whether unusual circumstances exist, militating either in favor of or against a finding of timeliness."). These cases simply do not stand for the proposition that a movant must show "extraordinary circumstances."

Moreover, here, where the case was *settled before it was filed* and therefore any "prejudice" cannot emanate from any delay in moving to intervene—because even intervention one week after filing would have been after approval of the Consent Order and dismissal of the case—where Defendant-Intervenors were not involved in the negotiations, and where the Consent Order was approved only days later, if anything, the fourth *Stallworth* factor would support intervention. *Cf. Alaniz v. Tillie Lewis Foods*, 572 F.3d 657, 659 (9th Cir. 1978) (case cited by UGI, which affirmed district court's finding that motion to intervene was not timely because it "was filed after the entry of a consent decree *which was preceded by extensive, well-publicized industry-wide negotiations*," which intervenors "should have joined").

not have any impact on intervenor's own separate claims).

Second, although Defendant-Intervenors knew of the UGI settlement shortly after it was announced, they could not know that the CFPB would attempt to violate the Consent Order by bringing administrative charges against Defendant-Intervenors *for the same exact payments* authorized by the Consent Order. Defendant-Intervenors found that out only three days prior to filing the Motion to Intervene, on January 28, 2014. In fact, the CFPB refused to discuss the basis of the claims it threatened to bring, describing them only in the most general of terms. Accordingly, the Motion was clearly timely.

IV. The CFPB's Issue Preclusion Arguments Miss The Point

The CFPB's assertion that intervention should be denied because Defendant-Intervenors merely seek to obtain issue preclusion here, rather than litigate in the administrative action, misses the point.[6] First, Defendant-Intervenors are simply asking this Court to interpret and enforce its Consent Order. While the CFPB can hardly complain if the Consent Order -- which it wrote and submitted to this Court -- precludes claims concerning payments that it explicitly permits, the fact remains that this Court retained jurisdiction to interpret and enforce the Consent Order. Second, and more importantly, however, the CFPB's argument attempts to evade the

[6] Contrary to the CFPB's assertion, Defendant-Intervenors are not seeking to obtain the same relief here as in the administrative action. In the administrative action, Defendant-Intervenors have raised the defense of judicial estoppel, which precludes the CFPB from taking a position in the administrative action opposite to the *position* it took and *representations* it made here, in agreeing to the entry of the Consent Order, which allows for certain lawful conduct, specifically the payment of reinsurance premiums by UGI. By contrast, the issue of judicial estoppel is not before this Court, which has been called upon only to interpret and enforce the Consent Order -- which this Court has explicitly retained jurisdiction to do. Defendant-Intervenors have not asked the ALJ in the administrative action to enforce the Consent Order. The CFPB apparently misunderstands the difference between *judicial estoppel* and garden-variety *issue preclusion*, since its brief in opposition to the motion to dismiss in the administrative action addresses whether the Consent Order itself gives rise to issue preclusion, rather than the fact that the CFPB has been making inconsistent representations to this Court and to the ALJ, which triggers judicial estoppel.

gravamen of what the CFPB has done.

The CFPB, a powerful independent agency, made a deal with UGI, a private mortgage insurer. In order to obtain millions of dollars from UGI, the CFPB prepared and submitted the Consent Order to this Court, which: a) prohibited UGI from "failing to comply with any provision of RESPA . . . and its implementing regulations;" b) permitted UGI to continue to make ceding payments under existing contracts, including its contract with Defendant-Intervenor Atrium Re; and c) released UGI from further liability for the "practices" -- read, "agreements" or "arrangements" -- alleged in the Complaint, which would include the agreement (and alleged arrangement) with Atrium Re. In order to obtain entry of its desired Consent Order, the CFPB filed a motion with this Court (DE # 4), asking the Court to approve and enter the Consent Order, and representing that it "may be entered at this time without hearing." Additionally, by signing the motion, counsel for the CFPB certified that it was not being presented for an improper purpose. *See* Fed. R. Civ. P. 11(b)(1).

It is well-settled that a court cannot enter an order permitting illegal activity to continue. *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");[7] *see also Williams v. Vukovich*, 720 F.2d 909, 925 (6th Cir. 1983) (vacating consent

[7] *City of Miami* is binding precedent in this Circuit because it was decided by the full *en banc* Court of the former Fifth Circuit. *See Stein v. Reynolds Secs., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

decree as "illegal" where it "contain[ed] impermissible waivers of future" statutory violations); *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).

The CFPB asked this Court to enter the Consent Order, which explicitly permitted the ceding payments to continue -- ceding payments that the CFPB, a government agency, now claims it has always considered to be illegal -- and immunized UGI for continuing to make them pursuant to agreements already in existence. The CFPB owes this Court -- and the parties -- an explanation for how it reconciles these diametrically conflicting positions. Defendant-Intervenors cannot fathom how the *same exact payments* may be judicially-authorized for UGI to make, but would violate RESPA for Atrium Re to accept. After all, it "takes two to tango" under RESPA. And if those *post*-Consent Order payments do not themselves violate RESPA -- then how are *pre*-Consent Order payments under the same agreement any different? The CFPB has assiduously avoided providing answers to these questions.

V. The Conflicting Interpretations Of The Consent Order Warrants Intervention And Interpretation By This Court

Repeatedly throughout its opposition, the CFPB chides Defendant-Intervenors for their "incorrect" interpretation of this Court's Consent Order. Yet, UGI's response demonstrates that the CFPB's scolding is misplaced. As UGI points out:

- "Moreover, because this Court already approved the Consent Order, including the provision in it that expressly authorizes PHH's conduct in question . . . ." UGI Mem. at 2;
- "[B]ecause this Court has already approved the Consent Order, which contains an express approval of PHH's receipt of ceded payments from United Guaranty . . . ." *Id*. at 11.
- "United Guaranty negotiated a settlement that "*explicitly permitted* the continuation of the payments under the reinsurance contracts between UGI and Atrium." *Id*. at 12.

- "United Guaranty adequately represented [PHH's] interests by including a provision that declared the ceded payments from United Guaranty to be lawful." *Id.*

The CFPB argues vociferously that there is no need for this Court to interpret its Consent Order. Not so. As the memoranda of the parties make clear, there is a real and genuine dispute regarding what the terms of the Consent Order mean. Further, neither the CFPB nor UGI bothers to mention that the Order not only applies to them, but purports by its very terms, to: "United Guaranty, its affiliates, officers, agents, representatives, and employees, **and all other persons or entities in active concert or participation with it** who receive actual notice of this Order by personal service or otherwise." Consent Order at 5 (emphasis added). At the time the Consent Order was entered, Atrium had a reinsurance agreement with UGI. One could argue that as a result of that agreement, Atrium was "in active concert" and/or "participat[ing]" with UGI and, thus, subject to the terms of the Consent Order. Whether that is so is another issue.[8] What is clear, however, is the fact that the Consent Order's broad reach is beyond the CFPB and UGI and, as briefing on the motion to intervene has made plain, there is no agreement as to what the Consent Order permits. Failure to abide by the Consent Order exposes the person or entity to sanctions and contempt of court. The fact that an arm of the federal government would be so cavalier in its treatment of this Court's power and would be so adamant in trying to avoid any clarification of the terms of the Consent Order is nothing short of startling.

[8] The CFPB now certainly alleges it to be so. *See*, *e.g.*, Notice of Charges ¶ 51 (alleging that "[a]s late as May 2009, PHH executives directed that mortgage insurance referrals should be maximally steered towards United Guaranty because of their profitable captive arrangement, and that PHH should avoid sending business to MIs without captive arrangements"); Complaint ¶ 19 ("These arrangements obligated Defendant to split its profits with lenders, but simultaneously enabled Defendant to increase or maintain its market share.") (DE # 1).

CONCLUSION

The CFPB's raising of purported procedural hurdles in opposition to Defendant-Intervenors' motion to intervene is inappropriate and nothing more than a subterfuge to detract this Court's attention away from the fundamental issue, which is that this Court's Consent Order requires clarification. The Consent Order's reach is broad and this Court's power to enforce compliance is expansive. The CFPB invoked this Court's power and authority when it came to this Judicial District seeking entry of its Consent Order. Having made that decision, its arguments that this Court lacks the power to clarify the terms of the Consent Order, or that Defendant-Intervenors do not have any interest in such a clarification, are without merit. Defendant-Intervenors simply ask that this Court exercise the jurisdiction it retained to interpret the Consent Order it entered and confirm that UGI was permitted to make the ceding payments prospectively, and therefore that Defendant-Intervenors were permitted to receive them. Thus, because Defendant-Intervenors satisfy all of the requirements for intervention as of right, as set forth in detail in their initial brief (DE # 7), the Motion to Intervene should be granted for this limited purpose.

Dated: February 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2014, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Herman J. Russomanno III