UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU
May 22, 2014

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of	:	
	:	
PHH CORPORATION,	:	
PHH MORTGAGE CORPORATION,	:	ORDER ON DISPOSITIVE MOTIONS
PHH HOME LOANS LLC,	:	
ATRIUM INSURANCE CORPORATION, and	:	
ATRIUM REINSURANCE CORPORATION	:	

On January 29, 2014, the Consumer Financial Protection Bureau (Bureau) filed a Notice of Charges Seeking Disgorgement, Other Equitable Relief, and Civil Money Penalty (Notice) in this proceeding. The hearing commenced on March 24, 2014, in Philadelphia, PA, and was not yet complete when it adjourned on March 28, 2014.

On March 13, 2014, I issued an Order Denying Motion to Dismiss the Notice of Charges or, in the Alternative, for Summary Disposition (Order Denying Dismissal), which denied Respondents' first dispositive motion. PHH Corporation, 2014-CFPB-002, Document 67. At the commencement of the hearing, I ordered the parties to file a second round of dispositive motions no later than April 18, 2014, for the purpose of further narrowing the disputed issues in the proceeding. The Office of Enforcement (Enforcement) timely filed a Motion for Summary Disposition as to Liability (SD Motion) and a Statement of Undisputed Facts (SUF), supported by citations to admitted hearing exhibits. PHH Corporation, 2014-CFPB-002, Document 102; Hearing Transcript at 58 (Hearing Tr. __) (admitting exhibits). Respondents timely filed an Opposition thereto (SD Opp'n) and an Opposition to the SUF (SDF), and Enforcement timely filed a Reply thereto (SD Reply). PHH Corporation, 2014-CFPB-002, Documents 121, 122, 136. Respondents timely filed a Renewed Motion to Dismiss or, in the Alternative, to Narrow the Notice of Charges, and a supporting memorandum (Dismiss Motion) with four exhibits (Dismiss Motion Exs. A-D). PHH Corporation, 2014-CFPB-002, Document 101. Enforcement timely filed an Opposition thereto (Dismiss Opp'n), and Respondents timely filed a Reply thereto (Dismiss Reply). PHH Corporation, 2014-CFPB-002, Documents 123, 135.

I. DISCUSSION

The Order Denying Dismissal summarizes the factual allegations of the Notice, familiarity with which is assumed. Additional relevant facts are addressed infra.

A. Dismiss Motion

The Dismiss Motion seeks to dismiss the Notice, in whole or in part, on various grounds, and raises certain factual and legal issues. A motion to dismiss may be granted if, "even assuming the truth of the facts alleged in the notice of charges, [a respondent] is entitled to dismissal as a matter of law." 12 C.F.R. § 1081.212(b). Although the standard for dismissal described in Rule 212(b) of the Bureau's Rules of Practice for Adjudication Proceedings (Rules) is not precisely the same as that described in Federal Rule of Civil Procedure (FRCP) 12(b)(6), rules and case law pertinent to FRCP 12(b)(6) are generally pertinent to Rule 212(b). See Order Denying Dismissal at 6.

The Dismiss Motion also seeks to revisit certain issues I have already resolved, and to that extent it is properly construed as a motion for reconsideration. Reconsideration of a final decision and order of the Bureau's Director "must be confined to new questions raised by the final decision or final order and upon which the petitioner had no opportunity to argue" before the Director previously. 12 C.F.R. § 1081.406. This is similar to the standard for a motion for reconsideration in federal court, where a litigant may not "simply reargue claims previously raised." Pellicano v. Blue Cross Blue Shield Ass'n, 540 F. App'x 95, 99 (3d Cir. 2013). Specifically, a motion for reconsideration may be granted if the movant establishes: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court issued the prior order; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. In re Linerboard Antitrust Litig., 361 F. App'x 392, 396 (3d Cir. 2010). Although the standard for a motion for reconsideration of an administrative law judge's order is not set forth in the Rules, I see no reason not to follow the standard applicable in federal court.

1. Factual Issues

Respondents argue that three factual issues should be resolved in their favor. Dismiss Motion at 4-7. Namely, they argue that the following allegations in the Notice should be rejected as a matter of fact: (1) Atrium Insurance Corporation (Atrium) conducted no underwriting to price any reinsurance risks that it purportedly assumed; (2) the captive trust accounts were controlled by PHH Corporation (PHH); and (3) mortgage insurers had no recourse to recover claims beyond the amount of funds in their trust accounts. Id. (citing to Notice at 4, 11, 12). These issues cannot be resolved in Respondents' favor – or in Enforcement's, for that matter – because Respondents have presented them pursuant to Rule 212(b), which requires an assumption that the allegations of the Notice are true. 12 C.F.R. § 1081.212(b).

2. Legal Issues Previously Resolved

Real Estate Settlement Procedures Act (RESPA) Section 8(a), 12 U.S.C. § 2607(a), 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.

Respondents argue that this language contains an exception for "services actually performed," similar to RESPA Section 8(b), 12 U.S.C. § 2607(b). Dismiss Motion at 7-8.

RESPA Section 8(c), 12 U.S.C. § 2607(c), in pertinent part, states:

> Nothing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

Respondents argue that the term "bona fide" modifies only "salary or compensation," and not "other payment." Dismiss Motion at 9-10.

I previously held that RESPA Section 8(a) does not contain a separate exception for "services actually performed," and that "bona fide" modifies "other payment" in RESPA Section 8(c). Order Denying Dismissal at 8. Respondents point to no intervening legal authority, newly available evidence, clear error, or manifest injustice, and I will not reconsider these holdings.

The McCarran-Ferguson Act prevents RESPA from being construed to "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless [RESPA] specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Respondents argue that this proceeding is a "blatant attempt to displace the role of state insurance regulators." Dismiss Motion at 30-34. I previously held, in open court shortly after the commencement of the hearing, that RESPA does not run afoul of the McCarran-Ferguson Act. Hearing Tr. 23 (citing <u>Patton v. Triad Guar. Ins.</u>, 277 F.3d 1294, 1299 (11th Cir. 2002)). Respondents point to no intervening legal authority, newly available evidence, clear error, or manifest injustice, and I will not reconsider this holding.

3. <u>Safe Harbor</u>

As noted, RESPA Section 8(c)(2) exempts "bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed" from the prohibitions of RESPA Sections 8(a) and 8(b). 12 U.S.C. § 2607(c)(2). This has been called a "safe harbor." <u>Pettrey v. Enterprise Title Agency, Inc.</u>, 241 F.R.D. 268, 275 (N.D. Ohio 2006). Respondents argue that Enforcement bears the burden of proving that the safe harbor does not apply, and that the safe harbor is not an affirmative defense. Dismiss Motion at 8-9. Enforcement argues that the safe harbor is an affirmative defense as to which Respondents bear the burden of proof. SD Motion at 22-23.

a. <u>Burden of Proof</u>

RESPA Section 8(c)(2) is not an element of proof as to which Enforcement bears the entire burden. First, although the case law on this issue is mixed, the more authoritative position is that Enforcement does not bear the entire burden. The Eleventh Circuit has articulated the elements of a Section 8(a) claim, which do not include disproof of any Section 8(c) exceptions. <u>Busby v. JRHBW Realty, Inc.</u>, 513 F.3d 1314, 1327 (11th Cir. 2008); <u>see</u> <u>Culpepper v. Irwin Mortg. Corp.</u>, 253 F.3d 1324, 1220 (11th Cir. 2001). Two other U.S. Courts of Appeal have followed the Eleventh Circuit.

See Galiano v. Fidelity Natl. Title Ins. Co., 684 F.3d 309, 314 (2d Cir. 2012); Egerer v. Woodland Realty, Inc., 556 F.3d 415, 427 (6th Cir. 2009). By contrast, two opinions from the Eastern District of Pennsylvania hold that a plaintiff bears the burden of proving that Section 8(c) exceptions do not apply. SD Opp'n at 6-7 (citing Rambam v. Long & Foster Real Estate, Inc., No.11-5528, 2012 U.S. Dist. LEXIS 184839, at 2 n.1 (E.D. Pa. Jun. 22, 2012), and Capell v. Pulte Mortg. LLC, No. 07-1901, 2007 U.S. Dist. LEXIS 82570, at *18 (E.D. Pa. Nov. 7, 2007); see also Edwards v. First American Corp., No. CV 07-3796 SJO, 2012 U.S. Dist. LEXIS 185448, at *8-10 (C.D. Ca. Nov. 30, 2012). As between these two lines of authority, the appellate courts' is entitled to greater weight.

Second, if disproof of Section 8(c) were truly an element, necessarily every plaintiff would have to plead and prove that every Section 8(c) exception is inapplicable, regardless of the facts of the particular case. Here, for example, Enforcement would have to plead and prove that payments were not: to an attorney, title company, or lender's agent; pursuant to a cooperative arrangement between real estate agents and brokers; pursuant to an affiliated business arrangement; and consistent with Bureau regulations. 12 U.S.C. § 2607(c)(2). It would be unreasonable to require this, regardless of the ease of proof.

Third, RESPA Section 8(c) appears in its own subsection; if it were truly an element of proof, it would likely appear directly in the language of Sections 8(a) and 8(b). "Exceptions to statutory definitions are generally matters for affirmative defenses, especially where the elements constituting the offense may be defined accurately without any reference to the exceptions." U.S. v. Beason, 690 F.2d 439, 445 (5th Cir. 1982); see EEOC v. Mach Mining, LLC, 738 F.3d 171, 174 (7th Cir. 2013) (whether a statutory provision is an affirmative defense requires examination of the statutory text). A Section 8(a) violation is established by proof of: (1) a payment; (2) given and received pursuant to an agreement to refer settlement business; and (3) an actual referral. Galiano, 684 F.3d at 314. A kickback by its very nature is not a bona fide payment, and proof of a kickback is therefore sufficient to establish liability under Section 8(a), without any reference to a Section 8(c) exception. Similarly, proof that a settlement service charge for a federally related mortgage loan was split with a non-settlement service provider is sufficient to establish liability under Section 8(b), without any reference to a Section 8(c) exception. See infra. Thus, Section 8(c)(2) is an affirmative defense and Respondents bear the burden of proving it.

b. Elements and Effect of Section 8(c)(2)

One consequence of Section 8(c)(2)'s status as an affirmative defense is that, once the elements of Section 8(a) or 8(b) have been established, there is a presumption that RESPA has been violated, and Respondents bear the burden of proving that the ceded premiums at issue were bona fide. If Respondents can establish that all the premiums ceded to Atrium were entirely bona fide, then necessarily they were not kickbacks or otherwise violative of Section 8. In that sense, Section 8(c)(2) provides a complete defense.

But the construction of "bona fide" urged by Respondents leads to absurd results. Dismiss Motion at 7-8 (arguing that Section 8 is only violated by parties who do nothing in return for their payments). Kickbacks may involve overbilling, that is, payments which have both a bona fide component and a mala fide component. E.g., City of Chicago Heights, Illinois v. Lobue, 914 F. Supp. 279, 281 (N.D. Ill. 1996) (describing kickback scheme where vendor billed for more goods

than were delivered, and kicked back a portion of the overbilled amount to city council member). If Section 8(c)(2) completely exempts liability for payment "for services actually performed," regardless of the size of the payment relative to the consideration, or whether some of the payment is not bona fide, any potential RESPA violator could avoid liability by the simple expedient of providing or receiving some de minimis service. RESPA's anti-kickback provision would then fail to reach kickback schemes which have been deemed unlawful since long before the enactment of RESPA. E.g., Crocker v. U.S., 240 U.S. 74, 77 (1916) (describing kickback scheme involving overbilling for postal carrier satchels).

On the other hand, treating Section 8(c)(2) as irrelevant once a Section 8 violation has been proven, as Enforcement argues, is also incorrect. SD Motion at 22-23. Instead, HUD's regulations and interpretive guidance suggest that, in the general case, Section 8(c)(2) is a partial affirmative defense, in the sense that it can limit monetary liability. In 1999, HUD issued a "Real Estate Settlement Procedures Act Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers" (1999 HUD Statement). 64 Fed. Reg. 10080 (Mar. 1, 1999). In 2001, HUD issued a "Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)" (2001 HUD Statement). 66 Fed. Reg. 53052 (Oct. 18, 2001). Both HUD Statements have the force of law. Schuetz v. Banc One Mortg. Corp., 292 F.3d 1004, 1012 (9th Cir. 2002) (citing 24 C.F.R. § 3500.4(a)(1)(ii)).

The 1999 HUD Statement pertained to payments from lenders to mortgage brokers, and set forth a two-part test for determining their legality under RESPA: (1) whether there were goods or facilities actually furnished or services actually performed for the compensation paid; and (2) whether the payment is reasonably related to the value of the goods or facilities actually furnished or services actually performed. 64 Fed. Reg. at 10084. It further stated that in evaluating the second element, whether the price is truly a market price should be examined, that is, whether in an arm's length transaction a purchaser would buy the services at or near the amount charged. 64 Fed.Reg. at 10085-86.

The 2001 HUD Statement pertained again to payments from lenders to mortgage brokers, and "essentially repeat[ed] the considerations that HUD set out in the 1999 [HUD] Statement for resolving the second, or reasonableness, part of the test." Schuetz, 292 F.3d at 1011 (citing 66 Fed. Reg. 53055). HUD clarified that, as to the first part of the test, "[c]ompensable services . . . do not include referrals or no, nominal, or duplicative work." 66 Fed. Reg. at 53055. The 2001 HUD Statement also pertained to unearned fees under Section 8(b), and stated, as pertinent here,[1] that Section 8(b) is violated where "[t]wo or more persons split a fee for settlement services, any portion of which is unearned." 66 Fed. Reg. at 53057.

HUD's RESPA regulation (Regulation X) first took effect in 1992 and was last amended in 2008. 57 Fed. Reg. 49607 (Nov. 2, 1992) (implementing 24 C.F.R. Part 3500); 74 Fed. Reg. 22822

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[1] The 2001 HUD Statement also held that an excessive fee by one settlement service provider violates Section 8(b). 66 Fed. Reg. at 53057. This aspect of the 2001 HUD Statement, which is inapplicable here, was overturned by Freeman v. Quicken Loans, Inc., 566 U.S. –, – 132 S. Ct. 2034, 2040 (2012).

(May 15, 2009) (amending 24 C.F.R. Part 3500). It was superseded on December 20, 2011, by the Bureau's interim final version of Regulation X. 76 Fed. Reg. 78978, 78978 (Dec. 20, 2011) (implementing 12 C.F.R. Part 1024). In both HUD's and the Bureau's versions of Regulation X, "[a] charge by a person for which no or nominal services are performed . . . is an unearned fee and violates" RESPA Section 8(b). 12 C.F.R. § 1024.14(c); 24 C.F.R. § 3500.14(c). Both versions also state that "[i]f the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided." 12 C.F.R. § 1024.14(g)(2); 24 C.F.R. § 3500.14(g)(2).

HUD's letter to Countrywide Funding Corporation, dated August 6, 1997 (Countrywide Letter), pertains specifically to captive reinsurance programs. ECX 193, Att. A.[2] Although the Countrywide Letter apparently lacks the force of law, it has been "relied upon by mortgage insurers, lender-owned reinsurers and courts alike to evaluate a captive reinsurance arrangement's compliance with Section 8." Munoz v. PHH Corp., No. 1:08-cv-0759-AWI-BAM, 2013 U.S. Dist. LEXIS 69306, at *15 (E.D. Cal. May 14, 2013). The Countrywide Letter articulates both general and specific guidance regarding captive reinsurance. ECX 193, Att. A. The general guidance is essentially the same as what HUD articulated in the 1999 HUD Statement, the 2001 HUD Statement, and Regulation X with respect to other contexts: captive reinsurance is permissible under RESPA if the payments to the reinsurer are for reinsurance services actually furnished or for services performed, and are bona fide compensation that does not exceed the value of such services. ECX 193, Att. A at 3.

The Countrywide Letter's specific guidance is highly pertinent:

> If [HUD] concludes that the compensation paid for the reinsurance exceeds the value of the reinsurance . . . the arrangement will be regarded as an impermissible reinsurance arrangement under RESPA and the payments exceeding the value of the reinsurance will be considered a referral fee or unearned fee.

ECX 193, Att. A at 7. This principle is a specific example of the more general principle articulated in Regulation X: "if the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided." 24 C.F.R. § 3500.14(g)(2). Although the Countrywide Letter is not legally binding, its guidance is a straightforward application of Regulation X to captive reinsurance. See Edwards, 2012 U.S. Dist. LEXIS 185448, at *10 (applying Regulation X to hold that plaintiff "must demonstrate that Defendants overpaid" for interests in title agencies to prove a violation of Section 8(a)).

Respondents cite cases suggesting that liability under Section 8 can only be found where no service is provided at all. But these cases either fail to consider the entirety of Section 8(c)(2), or do not address Regulation X. See Arthur v. Ticor Title Ins. Co. of Florida, 569 F.3d 154, 160 n.2 (4th Cir. 2009) (rejecting Section 8(a) claim without considering Regulation X); Mercado v. Calumet Fed. Savings & Loan Ass'n, 763 F.2d 269, 271 (7th Cir. 1985) (stating, without considering the

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[2] Enforcement and Respondent exhibits admitted into evidence during the hearing are cited as ECX and RCX, respectively. See Hearing Tr. 58.

term "bona fide," that Congress directed Section 8 "against a particular kind of abuse that it believed interfered with the operation of free markets – the splitting and kicking back of fees to parties who did nothing in return for the portions they received"); Cedeno v. Indymac Bancorp, Inc., No. 06 Civ. 6438 (JGK), 2008 U.S. Dist. LEXIS 65337, at *13 (S.D.N.Y. Aug. 25 2008) (holding that Section 8(c)(2) "specifically does not prohibit payments for services actually rendered," without considering the term "bona fide" or Regulation X); see also Boulware v. Crossland Mortg. Corp., 291 F.3d 261, 268 (4th Cir. 2002) (citing Mercado).

Respondents also cite Freeman for the proposition that RESPA is not a "price control statute." Dismiss Motion at 10 (citing Freeman, 132 S. Ct. at 2040, which suggests that RESPA did not give HUD the right to "engage in price regulation"). Certainly nothing in RESPA authorizes direct regulation of settlement service prices. But RESPA unequivocally prohibits kickbacks, which can be hidden within the price of otherwise legitimate goods and services. 12 U.S.C. § 2607(a). RESPA's legislative history on this point is clear: "'[t]o the extent the payment is in excess of the reasonable value of the goods provided or services performed, the excess may be considered a kickback or referral fee proscribed by Section [8].'" 64 Fed. Reg. at 10082 (quoting S. Rep. 93-866, at 6551). Consequently, "'[t]hose persons and companies that provide settlement services should therefore take measures to ensure that any payments they make or commissions they give are not out of line with the reasonable value of the services received.'" 64 Fed. Reg. at 10082 (quoting S. Rep. 93-866, at 6551). One example was "'a title insurance company [that] may give 10% or more of the title insurance premium to an attorney who may perform no services for the title insurance company other than placing a telephone call to the company or filling out a simple application.'" 64 Fed. Reg. at 10082 n.3 (quoting S. Rep. 93-866, at 6551).

Accordingly, if Respondents can prove that the entirety of the premiums ceded to Atrium or Atrium Reinsurance Corporation (Atrium Re) bore a reasonable relationship to the market value of any reinsurance provided – that is, the premiums in their entirety were bona fide payments for services actually performed – then they have a complete defense to the Notice's allegations under both Sections 8(a) and 8(b) of RESPA. If Respondents cannot prove this, but can prove that any reinsurance provided had some market value, then the difference between the ceded premiums and the market value is the amount of the referral fee under Section 8(a), or the unearned fee under Section 8(b). The market value would not be considered a referral fee or unearned fee, and would place a limit on damages, disgorgement, restitution, and any other monetary sanction.

4. Availability of Injunction

The Bureau has authority in this proceeding to "grant any appropriate legal or equitable relief," including, among other forms of equitable relief, "limits on the activities or functions" of Respondents. 12 U.S.C. § 5565(a). The Notice alleges that PHH began its violative conduct no later than 1995 and continued it until "at least May 2013," but does not unequivocally allege that the conduct is ongoing, and prays for relief in the form of, among other things, a "permanent injunction to prevent and restrain future violations of Section 8 of RESPA." Notice at 18-19. Enforcement stated in its prehearing brief that it intended to seek an injunction, although it did not describe the terms of the proposed injunction in any detail. Enforcement Counsel's Prehearing Brief at 18.

Respondents argue that no injunction of any kind, including a cease and desist order, may be imposed because all relevant reinsurance agreements were in run-off before January 1, 2010, and because the Notice does not allege a possibility of future violations. Dismiss Motion at 11-15 & n.12. Admittedly, an injunction may be unwarranted where "the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated." United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). But a court's power to grant an injunction "survives discontinuance of the illegal conduct." Id. Actual ongoing illegality is not required; an injunction may be justified even where there is only "some cognizable danger of recurrent violation." Id. (quoted in Anderson v. Davila, 125 F.3d 148, 164 (3d Cir. 1997)). The Notice alleges violations continuing for eighteen years, until about one year ago, which is sufficient to conclude that such a cognizable danger exists. Additionally, it is not clear at this point what precise injunctive relief Enforcement seeks, and it is thus premature to foreclose all such relief.

5. Atrium and Atrium Re

Respondents argue that Atrium and Atrium Re are not subject to Bureau administrative proceedings. Dismiss Motion at 34-37. Enforcement contends, among other things, that Atrium and Atrium Re are subject to Bureau administrative proceedings as covered persons, service providers, and/or related persons within the meaning of the Consumer Financial Protection Act (CFPA). See 12 U.S.C. § 5481 (defining "covered person," "service provider," and "related person"). Because Respondents move only for dismissal, and not for summary disposition, the facts alleged in the Notice are taken as true. So taken, both Atrium and Atrium Re were or are at least related persons.

The CFPA authorizes the Bureau to commence a civil action against "any person" who violates a Federal consumer financial law. 12 U.S.C. § 5564(a). It also authorizes the Bureau to bring administrative cease-and-desist proceedings, but only against "any covered person or service provider." 12 U.S.C. § 5563(b)(1)(A). A covered person is "any person that engages in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6). A consumer financial product or service includes "extending credit," where that credit is offered for use by consumers primarily for personal, family, or household purposes. 12 U.S.C. § 5481(5)(A), (15)(A)(i). The Notice alleges that PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans LLC originated home loans. Notice at 3. Originating home loans would appear to qualify as extending credit for household purposes, and the Notice thereby sufficiently alleges that PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans LLC are covered persons.

A related person "shall be deemed to mean a covered person" for present purposes and is defined, with exceptions inapplicable here, as including an agent for a covered person and a person who materially participates in the conduct of the affairs of a covered person. 12 U.S.C. § 5481(25)(B), (C). The Notice alleges that: Atrium and Atrium Re are wholly-owned subsidiaries of PHH Corporation; Atrium was formed to purportedly provide reinsurance to Mortgage Insurance Companies (MIs) that provided primary mortgage insurance for PHH-originated loans; Atrium never issued policies for loans originated by any lender other than PHH; Atrium had no employees that were not also employees of PHH; Atrium paid PHH dividends out of the captive trust accounts, for example, Atrium paid PHH a $16.5 million dividend in June 2007; and Atrium Re assumed Atrium's captive reinsurance business in January 2010. Notice at 2, 4, 14-15. This is sufficient to

find, for purposes of the Dismiss Motion, that Atrium and Atrium Re were the agents of, and materially participated in the conduct of the affairs of, PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans LLC. It is of no consequence that the Notice does not state in as many words that Atrium and Atrium Re were related persons, because the Notice's allegations are sufficient to reach that conclusion. See Dismiss Motion at 36. Nor are the two "service provider" examples listed in the CFPA exclusive, or otherwise a limitation on who qualifies as a "related person." Compare 12 U.S.C. § 5481(25)(C)(ii) (a related person means a person "who materially participates in the conduct of the affairs of such covered person") with 12 U.S.C. § 5481(26)(A) ("The term 'service provider' means any person that provides a material service [and]. . . includ[es] a person that . . .) (emphasis added)); see Dismiss Reply at 16-17.

6. Judicial Estoppel

Respondents renew their argument that judicial estoppel bars this action, and also argue more pointedly that they are entitled to dismissal of claims based on conduct occurring after entry of the Consent Orders. Dismiss Motion at 37-44. In support, Respondents present newly available evidence, specifically, the transcript of a March 10, 2014, hearing on Respondents' motion to intervene in CFPB v. United Guaranty Corp., No. 13-cv-21189-KMW (S.D. Fla.), and various compliance reports allegedly demonstrating the existence of numerous ongoing captive reinsurance arrangements. Motion at 38 & n.24. Respondents also present two emails (Dismiss Motion Exs. B and C) which they suggest, and which I assume without deciding, are newly discovered. Dismiss Motion at 39.

In view of the newly available evidence, I have reconsidered my previous ruling, and reached the same conclusion. Construing the Dismiss Motion as one for summary disposition as to this affirmative defense, in the same way I construed Respondents' first dispositive motion, Respondents have still "failed to demonstrate, at a minimum, that Enforcement took inconsistent positions." Order Denying Dismissal at 9, 14. There is nothing in the newly available evidence tending to undermine this conclusion. On the contrary, one of the new emails actually weakens Respondents' argument on the inconsistent position element, because it shows that Enforcement was adamant with opposing counsel that "the MIs have violated Section 8" of RESPA, and should be enjoined from doing so in the future. Dismiss Motion Ex. C at 2. Thus, there still exists a genuine issue of material fact as to judicial estoppel.[3] Enforcement's argument that this affirmative

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[3] Respondents assert that I "previously denied Respondents' judicial estoppel [defense] on the ground that because no defendant had been found liable in a RESPA case involving pmi reinsurance, the Bureau was entitled to settle with the MIs while continuing to prosecute the counterparty lenders." Dismiss Motion at 42. In fact, I did not address this issue in the Order Denying Dismissal. Order Denying Dismissal at 13-15. In support of their assertion, Respondents cite to the transcript of the first day of hearing, during argument on their Motion in Limine to Strike Claims Predicated on Ceding Payments Allowed by the Bureau in April and May 2013 (Motion in Limine). Dismiss Motion at 42-43 n.27 (citing Hearing Tr. 27-28, 220). Although I placed considerable weight on prior litigated RESPA cases during that argument, and I concluded that the Motion in Limine was inextricably intertwined with their judicial estoppel defense, Respondents stated unequivocally that the Motion in Limine did not rely on a judicial estoppel theory. Hearing

defense should be stricken is rejected as improperly presented in its opposition brief. SD Opp'n at 45.

7. Statute of Limitations

I previously held that 12 U.S.C. § 2614 does not generally apply to this proceeding. See Order Denying Dismissal at 8-9 & n.2. I also noted that I had not decided whether the statute of limitations established by 12 U.S.C. § 2614 applies to the extent it would have applied to HUD, when it begins to run, or whether it is subject to the continuing violations doctrine, and that the retroactivity of non-injunctive relief had not been adequately briefed. Id. at 9 n.2, 13 n.4. Respondents now argue that 12 U.S.C. § 2614 bars relief for claims accruing prior to either July 21, 2008, or January 25, 2009 (the effective date of the parties' tolling agreement), the statute of limitations begins to run upon loan closing, the continuing violations doctrine does not apply, and relief as to claims accruing prior to July 21, 2011, is limited to an injunction. Dismiss Motion at 15-29.

a. Tolling Agreement

I see no basis for giving any force or effect to the tolling agreement. I previously held that 12 U.S.C. § 2614 does not generally apply, so there is no reason to accept an accrual date for limitations purposes that presupposes that Section 2614 does apply. See Order Denying Dismissal at 8-9 & n.2. Accordingly, I reject Respondents' argument that claims involving loans closed before January 25, 2009, are time-barred. Dismiss Motion at 17.

b. Applicability of Section 2614 to HUD

I previously held that "[t]o the extent Enforcement seeks the same relief as was formerly available to HUD, Dodd-Frank's expansion of the available adjudicatory forum" was not impermissibly retroactive. Order Denying Dismissal at 12. Prior to July 21, 2011, HUD could have brought "an action to enjoin violations" of Section 8. 12 U.S.C. § 2607(d)(4). Such an action would have been subject to Section 2614. See 12 U.S.C. § 2614. Thus, on July 21, 2011, had HUD retained authority to bring an action, it could only have done so as to claims arising on or after July 21, 2008.

The question is whether Enforcement is subject to the same temporal limitation. Enforcement cites several cases for the proposition that a changed statute of limitations presents no retroactivity concerns. See Dismiss Opp'n at 32. However, Enforcement also characterizes the case law – correctly – as follows: "a newly-extended statute of limitations can be applied to pending cases . . . except where doing so would revive an otherwise time-barred claim." Dismiss Opp'n at 33 (citing FDIC v. Belli, 981 F.2d 838, 842-43 (5th Cir. 1993)). That is precisely what would happen if Section 2614 were not applied to violations accruing before July 8, 2008, that is, more than three years before the last day HUD could have filed a RESPA action. See Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 950 (1997); In re Enterprise Mortg.

Tr. 23-24. I therefore do not construe their present judicial estoppel argument as a renewal of the Motion in Limine, a renewal I explicitly authorized. Hearing Tr. 31.

Acceptance Co., LLC, Sec. Litig., 391 F.3d 401, 407 (2d Cir. 2004). I therefore conclude that, unless the continuing violation doctrine applies, no violations accruing prior to July 21, 2008, are cognizable in this proceeding.

c. Accrual Date

Respondents argue that the limitations accrual date under Section 2614 is the date of loan closing. Dismiss Motion at 18-19 (citing Snow v. First Am. Title Ins. Co., 332 F.3d 356 (5th Cir. 2003)). Snow has been followed by numerous district courts. E.g., Jensen v. Quality Loan Serv. Corp., 702 F. Supp. 2d 1183, 1195 (E.D. Ca. 2010); Edwards v. First Am. Corp., 517 F. Supp. 2d 1199, 1205 (C.D. Ca. 2007), aff'd, 610 F.3d 514 (9th Cir. 2010); Kamara v. Columbia Home Loans, LLC, 654 F. Supp. 2d 259, 265 (E.D. Pa. 2009); Perkins v. Johnson, 551 F. Supp. 2d 1246, 1252 (D.Colo. 2008). It has also been cited, arguably in dicta, by the Third Circuit Court of Appeals. See In re Community Bank of Northern Virginia, 622 F.3d 275, 281 (3d Cir. 2010). Other courts, independently of Snow, have also held that the limitations period begins to run at loan closing. See Sanborn v. American Lending Network, 506 F. Supp. 2d 917, 922-23 (D.Utah. 2007); Mullinax v. Radian Guaranty, 199 F. Supp. 2d 311, 325 (M.D.N.C. 2002); Pedraza v. United Guar. Corp., 114 F. Supp. 2d 1347, 1354 (S.D. Ga. 2000); Bloom v. Martin, 865 F. Supp. 1377, 1386 (N.D. Ca. 1994).

I generally agree with Enforcement that the statute of limitations should not be expected to accrue in the same way in every case. Dismiss Opp'n at 35 n.32. In particular, as alleged in this case, no violation could have occurred until an MI paid its first ceded premium to Atrium, which may not have happened until months after loan closing. Bay Area Laundry and Dry Cleaning Pension Fund v. Ferbar Corp. of California, 522 U.S. 192, 201 (1997) (a cause of action does not become complete and present until the plaintiff can file suit and obtain relief). This is because Enforcement's claim could not have accrued until an MI "gave," and Atrium "accepted," a ceded premium; prior to that moment, Respondents would not have committed a violation, even if they had a captive agreement obliging Atrium to accept ceded premiums. See 12 U.S.C. § 2607(a), (b). One of the hypotheticals examined in Snow illustrates this point. The Snow court posited that unlawful payments may take the form of "trips to the Olympics," which might occur more than one year (in the case of private litigation) after loan closing, and held that restarting the limitations period when the kickback recipient traveled to the Olympics was "unheard-of." 332 F.3d at 360. But what if there had never been a violation at loan closing in the first place, and the only kickback or unearned fee was paid more than one year (or three years) after loan closing? Then the plaintiff would confront a catch-22: file within one or three years of loan closing, and lose at summary judgment because there was no unlawful payment, or file after the unlawful payment is made, and face dismissal on limitations grounds. A defendant in private litigation could avoid all liability by the simple (though admittedly impractical) expedient of simply tendering any unlawful payment more than one year after loan closing.

Nonetheless, Enforcement has not pointed to a single case inconsistent with Snow, and indeed, their principal argument on this point appears to be that the Notice alleges a continuing violation. Dismiss Opp'n at 34-36; Enforcement Counsel's Opposition to PHH's Motion to Dismiss the Notice of Charges (First Dismiss Opp'n) at 27-29. I have found no cases clearly inconsistent with Snow. In Salois v. Dime Savings Bank of New York, FSB, 128 F.3d 20, 25 (1st

Cir. 1997), the First Circuit held that the plaintiffs' claims accrued when the defendant had them sign "corrective documents" as much as two years after loan closing. However, it is not clear from the opinion that the court was discussing the RESPA claims or one of the plaintiffs' other claims, and in any event the court found that the statute of limitations had run and was not subject to equitable tolling. Id. at 25-26.

In short, persuasive or not, the Snow doctrine is authoritative, and I am forced to conclude that RESPA is what the Supreme Court has called an "odd" statute – one where the cause of action can accrue at one time for limitations purposes, and at another time for purposes of bringing suit. Reiter v. Cooper, 507 U.S. 258, 267 (1993). I find that the statute of limitations began to run, on a loan-by-loan basis, at the time of each loan's closing.

d. Continuing Violation

The parties have identified two cases which are directly on point: continuing splits of monthly mortgage payments between MIs and captive reinsurers, allegedly in consideration of referrals of business to the MIs, do not constitute a continuing violation under 12 U.S.C. § 2614. See Menichino v. Citibank, N.A., No. 12-0058, 2013 U.S. Dist. LEXIS 101102, at *35-44 (E.D. Pa. Jul. 19, 2013); Mullinax, 199 F. Supp. 2d at 325. The holdings in both cases were based on careful reading of the statutory text and evaluation of hypothetical scenarios, and I consider them both well-reasoned.

Three additional considerations bolster the conclusion that the continuing violation doctrine does not apply. First, it is within the Bureau's authority to interpret RESPA as articulating a continuing violation. Interamericas Invs., Ltd. v. Board of Govs. of the Fed'l Reserve Sys., 111 F.3d 376, 382 (5th Cir. 1997), revised opinion 1997 U.S. App. LEXIS 12695, at *15-16 (citing Capital Telephone v. FCC, 777 F.2d 868, 871 (2d Cir. 1985)). It has not done so yet, however.

Second, case law suggests that the continuing violation doctrine does not apply. In the Third Circuit, where the continuing violation doctrine is "most frequently applied in employment discrimination" cases, three factors should be considered: (1) whether the violations constitute the same type of discrimination; (2) whether the acts are recurring or more in the nature of isolated incidents; and (3) "degree of permanence – whether the act had a degree of permanence which should trigger the plaintiff's awareness of and duty to assert his/her rights." Cowell v. Palmer Township, 263 F.3d 286, 292 (3d Cir. 2001). Although the first two factors weigh in favor of finding a continuing violation, the degree of permanence, which is "the most important" factor, is lacking. Id. If ceding a percentage of a mortgage insurance premium for something other than a settlement service violates Section 8(b), absent proof of the affirmative defense in Section 8(c)(2), then that should be immediately apparent, and no amount of repetition could make a difference. In the D.C. Circuit, a continuing violation is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred, "because its character as a violation did not become clear until it was repeated during the limitations period." Taylor v. FDIC, 132 F.3d 753, 765 (D.C. Cir. 1997) (quoting Dasgupta v. University of Wisconsin Bd. of Regents, 121 F.3d 1138, 1139 (7th Cir. 1997)). As with the degree of permanence factor in Cowell, there is no need for repetition to ascertain whether the conduct alleged here is violative of RESPA.

Third, concededly, statutes of limitations should be "strictly construed in favor of the Government against repose." Interamericas, 111 F.3d at 382. However, this principle does not make a continuing violation theory viable in the face of authority squarely to the contrary. Government requests to apply the continuing violation doctrine are not always successful. E.g., AKM LLC dba Volks Constructors v. Secretary of Labor, 675 F.3d 752, 756-57 (D.C. Cir. 2012); U.S. v. Rutherford Oil Corp., 756 F. Supp. 2d 782, 791 (S.D. Tex. 2010); see also 3M Co. v. Browner, 17 F.3d 1453, 1455 n.2 (D.C. Cir. 1994) (expressing "considerable doubt" about an administrative law judge's determination that violation of Toxic Substances Control Act was continuing). In sum, I conclude that the continuing violation doctrine does not apply to this proceeding.[4]

e. Retroactivity of Relief

Respondents contend that Enforcement "seeks to impose penalties that would not have been available at the time of the conduct" – that is, prior to July 21, 2011 – and that restitution, civil money penalties, recovery of costs, and disgorgement were "not previously available to HUD." Dismiss Motion at 16, 25; see Dismiss Reply at 9-11. Enforcement has clarified that it does not seek civil money penalties for conduct predating July 21, 2011, and it is almost certainly unavailable in any event. Dismiss Opp'n at 30 n.27; see Johnson v. SEC, 87 F.3d 484, 491 & n.12 (D.C. Cir. 1996); 3M Co. v. Browner, 17 F.3d 1453, 1456-57 (D.C. Cir. 1994); Arch Mineral Corp. v. Babbitt, 894 F.Supp. 974, 977-78, 984 (S.D. W.Va. 1995), aff'd, 104 F.3d 660 (4th Cir. 1997). Enforcement does contend, however, that RESPA's grant of authority to HUD to "bring an action to enjoin violations" permitted a district court to award to HUD "any form of equitable relief" before July 21, 2011. Dismiss Opp'n at 30.

As to conduct predating July 21, 2011, Enforcement seeks at least an injunction, disgorgement, and restitution.[5] See Enforcement Counsel's Prehearing Brief, PHH Corporation, 2014-CFPB-002, Document at 74 (under seal); Dismiss Opp'n at 26. The Bureau undeniably has the authority to order disgorgement and restitution based on post-July 20, 2011, conduct. See 12 U.S.C. § 5565(a)(2)(C), (D). The Bureau also has the authority to order "any appropriate legal or equitable relief," including "limits on the activities or functions" of respondents – in other words, an injunction. 12 U.S.C. § 5565(a).

Respondents do not dispute that the Bureau may impose an injunction. Dismiss Motion at 15. However, they argue that the Bureau lacks the "inherent equitable authority of an Article III court," and that awarding any equitable relief beyond an "order enjoining future conduct" is impermissibly retroactive. Dismiss Motion at 15; Dismiss Reply at 10. However, so long as a district court had the authority to award to HUD disgorgement and restitution prior to July 21, 2011,

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[4] Equitable tolling might be applicable here, because the reinsurance in suit is not a settlement service, as discussed infra, and thus would normally not even be disclosed to a borrower at closing. The parties have not raised this issue, however.

[5] The retroactivity of any other relief is not presently before me. If Enforcement seeks other forms of relief post-hearing, the retroactivity issue should be addressed in post-hearing briefing.

there is no retroactivity issue. It does not matter whether the Bureau has any inherent equitable authority, because the Bureau has statutory authority to impose those forms of relief. Nor does it matter what inherent equitable authority a district court possesses. Dismiss Reply at 15 n.6. So long as a district court could have awarded disgorgement and restitution in cases brought under 12 U.S.C. § 2607(d)(4) before July 21, 2011, there is no retroactivity problem.

I have found no reported cases addressing this precise question, nor have the parties cited any. See Dismiss Opp'n at 27 (citing to one unpublished district court opinion). However, Porter v. Warner Holding Co., 328 U.S. 395 (1946), is generally on point. In Porter, the Administrator of the Office of Price Administration brought an action under the Emergency Price Control Act of 1942 (EPCA). 328 U.S. at 397. The EPCA authorized actions seeking "an order enjoining [prohibited] acts or practices, or for an order enforcing compliance," and the Administrator accordingly sued to "enjoin acts and practices made illegal by the [EPCA] and to enforce compliance with the [EPCA]." 328 U.S. at 397-98. The Court held that both disgorgement and restitution were "an equitable adjunct to an injunction decree." 328 U.S. at 399.

Prior to July 21, 2011, HUD could have brought "an action to enjoin violations" of Section 8. 12 U.S.C. § 2607(d)(4). Under Porter, the authority to enjoin included the authority to award disgorgement and restitution. I see no reason not to apply this principle to RESPA, and find that retroactivity is not an issue. I accordingly find that disgorgement and restitution, as well as an injunction, are proper forms of relief with respect to pre-July 21, 2011, conduct.

f. Effect

In summary: (1) no claims arising from loans closed before July 21, 2008, are actionable; (2) at least disgorgement, restitution, and an injunction are presumptively[6] available as relief for claims arising from loans closed before July 21, 2011; and (3) at least disgorgement, restitution, an injunction, and civil money penalties are available as relief for claims arising from loans closed on or after July 21, 2011. It is established that Atrium's captive agreements with Radian Guaranty Inc. (Radian), CMG Mortgage Insurance Company (CMG), and Genworth Mortgage Insurance Corporation (Genworth) were placed in run-off no later than January 1, 2009. Order Denying Dismissal at 17. However, this is insufficient to dismiss en masse all claims associated with any one of those MIs, because it is possible that some such claims may be cognizable based upon loan closings taking place between July 21, 2008, and December 31, 2008. Respondents have neither moved for summary disposition, nor pointed to evidence already admitted into the hearing record, from which I could conclude that any particular captive agreement was in run-off prior to July 21, 2008. Indeed, Enforcement has produced evidence that newly originated loans were still being reinsured under all four agreements as of July 2008. See ECX 159 at tab 2008 & Column F, lines 16-21. Accordingly, I cannot conclude that "there is only one year of the UGI reinsurance agreement that remains," as Respondents urge. Dismiss Motion at 17.

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[6] The parties have not briefed, and I have not considered, the effect of 28 U.S.C. § 2462, which might bar some forms of relief for claims arising from conduct predating January 29, 2009. See Johnson, 87 F.3d at 488, 491 (holding that Section 2462 is applicable to a Securities and Exchange Commission order censuring and suspending a supervisor of a broker/dealer, but not applicable to an order of disgorgement or restitution).

B. SD Motion

Enforcement moves for summary disposition as to liability under both Section 8(a) and Section 8(b). SD Motion at 1, 25. In considering a motion for summary disposition, all evidence must be viewed in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). All justifiable inferences must be drawn "in favor of the nonmoving party, including questions of credibility and of the weight to be accorded to particular evidence." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1991). Once the moving party has carried its initial burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). That is, a party opposing summary disposition must present specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson, 477 U.S. at 247-48. A dispute is genuine if the evidence presents a sufficient disagreement to submit the matter to a reasonable factfinder. See id. at 251-52; Kautz v. Met-Pro Corp., 412 F.3d 463, 467 (3d Cir. 2005).

1. Section 8(a)

Proof of a RESPA Section 8(a) violation requires proof that: (1) a payment of a thing of value was (2) made pursuant to an agreement to refer real estate settlement business and (3) a referral actually occurs, where (4) the real estate settlement service involves a federally related mortgage loan. 12 U.S.C. § 2607(a); Culpepper, 132 F.3d at 696. The first element is undisputed. See SDF at ¶¶ 12, 31, 32 (disputing certain facts, but not disputing that all four MIs at issue paid Atrium a percentage of mortgage insurance premiums). As to the fourth element, a federally related mortgage loan includes a mortgage loan on residential property designed for occupancy by one to four families, and intended to be sold by the originating lender to the Federal National Mortgage Association (Fannie Mae) or Federal Home Loan Mortgage Corporation (Freddie Mac). 12 U.S.C. § 2602(1). There is no dispute that at least some of the loans originated by PHH Mortgage and PHH Home Loans meet this definition.[7] See SDF at ¶¶ 1, 2 (no dispute that PHH Mortgage and PHH Home Loans offered and provided residential mortgages, at least some of which were sold to Fannie Mae and Freddie Mac). Accordingly, there is no dispute that the fourth element has been satisfied.

Respondents dispute the third element. SD Opp'n at 5. A referral includes an action which has the effect of affirmatively influencing a borrower's selection of a mortgage insurer. See 12 C.F.R. § 1024.14(f)(1); 24 C.F.R. § 3500.14(f)(1). Respondents note that borrowers were not required to use any particular MI. See SDF at ¶ 6. There is evidence, however, that Respondents exercised veto power over the selection of an MI. Hearing Tr. 383-84 ("like, the case of PHH, we weren't an approved insured, so if the borrower wanted that, they probably would have said no"). In

[7] It is not clear how many loans meet this definition, because, for example, some loans were originated by correspondent lenders who intended to sell the loans to PHH, rather than directly to Fannie Mae or Freddie Mac. ECX 747 (describing involvement of correspondent credit union lenders). Nonetheless, the undisputed evidence is sufficient to establish that at least some loans were federally related mortgage loans.

2007, as one example, Atrium reinsured: 519 of 530 loans insured by CMG; 2911 of 3440 loans insured by Genworth; 0 of 38 loans insured by MGIC; 244 of 258 loans insured by Radian; 0 of 3 loans insured by RMIC; 8194 of 9541 loans insured by UGI; and 0 of 1 loan insured by PMI. ECX 159 at tab 2007. MGIC and RMIC did not have captive agreements with PHH in 2007; the other four MIs did. Order Denying Dismissal at 17-18. The mechanism for distributing loans to MIs was the dialer, which was the "only way to get MI in the PHH system." Hearing Tr. 108:12, (Rosenthal). The dialer was set to specific percentages of business for specific MIs. Hearing Tr. 108:14-17. Respondents admit that "[a]bsent the borrower selecting another pmi, PHH Mortgage and PHH Home Loans would select an MI with whom they had a relationship based on a number of factors," and "[i]f the borrower elected to allow PHH Mortgage or PHH Home Loans to select the MI, Respondents admit that it was likely that UGI would be selected as the provider during the 1995 to 2001 timeframe." SDF at ¶¶ 6, 22.

Such evidence is sufficient to conclude that the third element of Section 8(a) has been proven. Indeed, the existence of the dialer alone is sufficient. Respondents cite to a few items of evidence to rebut SUF ¶¶ 22-33, which are Enforcement's principal statements supporting the third element, but they are not enough to raise a genuine issue of material fact. See SDF at at ¶¶ 22-33. Respondents criticize Enforcement's use of ECX 132, 200, 495, and 747, but do not rebut the evidence contained in them. See id. They cite to Rosenthal's investigative testimony, in which he stated that he "did not choose to do business with Triad or PMI." See SDF at ¶ 28 (citing ECX 731 at 89). But that fact is not in dispute, nor does it undermine the conclusion that PHH referred business to Triad and PMI's competitors; to the contrary, it bolsters it. Similarly, the testimony that MGIC eventually sought out captive arrangements bolsters the conclusion that PHH referred business to only certain MIs. See SDF at ¶ 29 (citing Hearing Tr. 370). I accordingly find that the third element has been established.

As to the second element, there exist genuine issues of material fact. The existence of a referral agreement may be established "by a practice, pattern, or course of conduct." 12 C.F.R. § 1024.14(e); 24 C.F.R. § 3500.14(e). "When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business." 12 C.F.R. § 1024.14(e); 24 C.F.R. § 3500.14(e).

Enforcement cites numerous exhibits in support of its argument that referral agreements existed. See generally SD Motion at 14-19 (citing SUF at ¶¶ 18, 21-23, 25-36, 40-45). I have reviewed all the admitted exhibits cited in paragraphs 18, 21-36, and 40-45 of the SUF, and they are powerful evidence of the existence of referral agreements prior to July 21, 2008.[8] For example: (1) from 1995 to 2000, UGI had the only captive arrangement with Atrium, and received the vast bulk of PHH business (ECX 653 at 12-13; Order Denying Dismissal at 17-18; SDF at ¶ 23); (2) Genworth entered into a captive arrangement in 2000, and was added to the dialer in 2001, and thereafter split the vast bulk of PHH business with UGI (ECX 503; ECX 654 at Ex. M); (3) PHH used the dialer to refer business to MIs (Hearing Tr. 107-08, 113-15).

[8] ECX 814 was not admitted. Hearing Tr. 58; see SUF at ¶ 17.

There is also considerable evidence that UGI ceded premiums within the limitations period pursuant to a referral agreement. For example: (1) in February 2008 UGI gave notice of termination of its captive arrangement effective June 1, 2008 (notably, to PHH Mortgage, not to Atrium), because of Freddie Mac's prohibition on premium cedes in excess of twenty-five percent (ECX 31); (2) between June and November 2008, UGI received a negligible amount of business from PHH (ECX 159 at tab 2008); (3) by November 2008 it was clear that UGI and Atrium would amend their captive arrangement (ECX 220; ECX 269; ECX 409); (4) the existence of a captive arrangement was a significant, and possibly dispositive, factor in setting the dialer in November 2008 (ECX 220; ECX 407); (5) UGI started receiving non-negligible amounts of PHH business starting in December 2008 (ECX 159 at tabs 2008, 2009); (6) UGI and Atrium's amended captive arrangement was executed in April 2009 and was effective March 1, 2009, with a premium cede of twenty-five percent (ECX 520); (7) the dialer setting for UGI increased to 100 percent on April 6, 2009 (ECX 654 at Ex. M); and (8) UGI received the largest share of PHH business from May to December 2009 (ECX 159 at tab 2009).

Enforcement's evidence is especially strong with respect to the CMG-Atrium arrangement. The CMG-Atrium arrangement commenced on December 1, 2006, went into run-off on or about January 1, 2009, and was commuted on August 31, 2009. Order Denying Dismissal at 17; ECX 159 at tabs 2008, 2009. Some time prior to November 29, 2007, PHH Corporation (or PHH Mortgage or PHH Home Loans, it is not clear which) entered into a "License Agreement" with CMG, in which PHH agreed to "designate [CMG] as a preferred mortgage insurance provider in its correspondent channel," and "use its commercially reasonable efforts to obtain primary mortgage insurance from [CMG] for loans closed by or for the benefit of credit unions doing business with [PHH]." ECX 747 at CFPB-PHH-1368464. Although it does not appear that the License Agreement is in evidence, the pertinent passage of the License Agreement was excerpted in an email between PHH executives. Id. One PHH executive commented that "we don't like the captive we have with CMG right now," in the context of discussing adding CMG to the PHH dialer. Id. at CFPB-PHH-1368465. Another commented that PHH paid "approximately $70k per quarter for the use of the CMM name under the License Agreement." Id. at CFPB-PHH-1368464. He added that he believed CMG would be willing to renegotiate "the captive terms, since they could be losing the $280k licensing fee and all of the captive business." Id. (emphasis in original). He noted that PHH had to give notice "in August 2008 if we are not going to renew the Licensing Agreement (and presumably terminate new business into the captive)." Id. It is difficult to read ECX 747 as anything other than direct written evidence that referrals from PHH to CMG were made pursuant to an agreement to refer real estate settlement business in consideration of premiums ceded to Atrium.

However, there are still open questions which give rise to a genuine issue of material fact about the CMG-Atrium arrangement. For instance, it is not clear which Respondent entered into the License Agreement, or what other terms it may have had. Also, it would be helpful for a CMG representative to testify about the License Agreement and whether and how the parties performed under it. For example, it may be that CMG viewed the License Agreement as an agreement to license its name or intellectual property in return for referrals, rather than to cede premiums in return for referrals. Overall, summary disposition as to the CMG-Atrium arrangement is not warranted.

More generally, there is also evidence that any referral agreements that may have existed, including UGI's and CMG's, were no longer effective, or being honored by PHH, after July 21, 2008. MGIC never had a captive arrangement with Atrium, but started receiving more and more PHH business beginning approximately in August 2008, shortly before it was added to the dialer and after the effective date of UGI's notice of termination. ECX 159 at tab 2008; Order Denying Dismissal at 18; ECX 654 at Ex. M. That is, instead of shifting its business from UGI to an MI having a captive arrangement with Atrium, PHH shifted its business to an MI lacking such an arrangement. Similarly, RMIC never had a captive arrangement with Atrium, but started receiving PHH business beginning approximately in July 2009, just after it was added to the dialer. ECX 159 at tab 2009; Order Denying Dismissal at 18; ECX 654 at Ex. M. Genworth's captive arrangement with Atrium was placed in run-off on January 1, 2009, but Genworth continued to receive substantial business from PHH (indeed, almost as much as MGIC) through March 2009. ECX 159 at tab 2009; Order Denying Dismissal at 17. Indeed, there is an email dated May 19, 2009, before the UGI-Atrium arrangement went into run-off, suggesting that one PHH executive viewed captive arrangements as no longer relevant in allocating PHH business. See ECX 744 ("Unless there is value in us continuing to order, I am inclined to let the clients get mi themselves.").

Overall, the referrals to MIs lacking captive arrangements, starting around August 2008, suggest that, within the limitations period, PHH was willing to forgo Atrium's profits and still do business with particular MIs. By implication, PHH may have been willing to refer business to MIs having captive arrangements without regard to the existence of those arrangements. I conclude that Respondents have raised genuine issues of material fact as to whether, after July 21, 2008, referrals were made pursuant to agreements to refer real estate settlement business. Additionally, although it is clear that Atrium received ceded premiums, the liability of PHH Corporation, PHH Mortgage, and PHH Home Loans in referring business to the MIs, and the liability of Atrium Re in receiving ceded premiums, is not entirely clear.

2. Section 8(b)

Proof of a RESPA Section 8(b) violation requires proof that: (1) one person gave and a different person accepted (2) a portion, split, or percentage of a charge made or received (3) for the rendering of a real estate settlement service (4) involving a federally related mortgage loan, (5) other than for settlement services actually performed. 12 U.S.C. § 2607(b); Freeman, 132 S. Ct. at 2040, 2044. The same undisputed facts proving the first and fourth elements under Section 8(a) also prove the first four elements under Section 8(b): the MIs gave, and Atrium accepted, a percentage of mortgage insurance premiums paid in connection with federally related mortgage loans. See SDF at ¶¶ 1, 2, 12, 31, 32.

As to the fifth element, Respondents argue that the premiums ceded to Atrium were for settlement services, on the theory that by reinsuring mortgage insurance, Atrium assumed "the MIs' obligation in connection with a settlement service." SD Opp'n at 10. This is beside the point; the issue is whether the portions Atrium received were for rendering a real estate settlement service, not whether they were for reinsuring a real estate settlement service. Respondents previously conceded that the reinsurance at issue is not such a service: "'because mortgage reinsurance is secured after the settlement of a loan, and paid for on an ongoing basis from borrowers' monthly insurance premiums, it does not constitute a "settlement service" under RESPA.'" See Munoz v. PHH Corp.,

659 F. Supp. 2d 1094, 1098 (E.D. Ca. 2009) (quoting Respondents' motion for judgment on the pleadings). Additionally, Enforcement has pointed to evidence that the reinsurance at issue was incidental to, rather than "in connection with," real estate settlements. See 12 U.S.C. § 2602(3) (a settlement service "includes any service provided in connection with a real estate settlement"). Specifically, some mortgage insurers for PHH-originated loans did not obtain reinsurance from Atrium, particularly in later years, suggesting that reinsurance is not required for settlement of a federally related mortgage loan, and in 2006 PHH issued a Request for Proposal, seeking to obtain mortgage insurance for loans which PHH had self-insured. See ECX 159 at tab 2008; ECX 24 at 2. There is no genuine dispute over this fact. See, e.g., SDF at 5 (noting that loans originated by PHH Mortgage and PHH Home Loans were insured by Republic Mortgage Insurance Company starting in July 2009, without having a captive agreement). I find that reinsurance does not qualify as a settlement service.

Respondents also argue that the final element of a Section 8(b) claim should be read "other than for services actually performed," and that any service will suffice; that is, the service need not be a settlement service. SD Opp'n at 9-10. To be sure, the text of Section 8(b) states "other than for services," not "other than for settlement services." 12 U.S.C. § 2607(b). I nonetheless reject this argument, for two reasons.

First, the text of Section 8 makes little sense unless "services" is read as "settlement services." For example, it is perfectly reasonable for a mortgage insurer to have a fee-splitting arrangement with, say, a title insurer. So long as both insurers genuinely provide their respective service and there is no Section 8(a) violation, there is no reason why the fee-splitting arrangement should be unlawful, because both provide legitimate settlement services. By contrast, it would be strange, and even suspicious, if there were a fee-splitting arrangement between a mortgage insurer and a company that does not provide settlement services, for instance, a cleaning service or an equipment vendor. But the treatment of the cleaning service arrangement and the equipment vendor arrangement would be entirely different under Respondents' reading of the statute. The cleaning service arrangement would be permissible as a service, but the equipment vendor arrangement would be impermissible because it only involved goods. See 12 U.S.C. § 2607(c)(2) (distinguishing between "goods . . . actually furnished" and "services actually performed"). As another example, Respondents' reading of Section 8(b) renders Section 8(c) redundant. If any "service[] actually performed" will defeat a Section 8(b) claim, then there is no need for the "bona fide" qualifier in Section 8(c)(2), or for any of the exceptions in Section 8(c), all of which pertain to services and many of which are not necessarily settlement services. See 12 U.S.C. § 2607(c)(1)(a), (c)(3), (c)(4) (exempting any service provided by an attorney, agreements between real estate agents and brokers, and affiliated business arrangements); see also 24 C.F.R. § 3500.14(g)(1)(vi), (vii) (further exempting, pursuant to 12 U.S.C. § 2607(c)(5), "normal promotional and educational activities" and payments to employees for referrals). As a third example, RESPA's Congressional findings state that its purpose is the "elimination of kickbacks or referral fees," without reference to fee-splitting or unearned fees. 12 U.S.C. § 2601(b)(2). This implies that Section 8(b) is an alternative to Section 8(a) for circumstances where referral agreements may be difficult to prove, but fee-splitting with non-settlement service providers is easy to prove. As noted, such fee-splitting can be suspicious, and may be indicative of referrals. Once the elements of Section 8(b) are proven, any suspicion may be dissipated by proving one of the affirmative defenses in Section 8(c).

Second, although I have found no cases directly addressing this point, the case that comes closest strongly suggests that "services" should be limited to "settlement services." In U.S. v. Gannon, 684 F.2d 433, 435-36 (7th Cir. 1982), a "counterman" – an employee of the county recorder's office – was convicted of accepting bribes for processing real estate title applications, in violation of 12 U.S.C. § 2607(b). The court assumed that the counterman's work constituted a real estate settlement service. See id. at 437 ("his settlement services"). The principal issue on appeal was whether he could both "accept a portion of the charge 'received for' the rendering of real estate settlement services, and also accept the same charge 'other than for services actually performed.'" Id. The court held that he was liable even though he "kept the entirety of the [bribes] instead of passing a portion of them along to an unrelated third party," that is, "a third individual who did nothing for the customer in return." Id. at 438-39. In other words, the court assumed, without explicitly so holding, that the "services actually performed" had to be services performed in connection with real estate settlements.

Respondents cite to no authority other than the text of Section 8(b) itself in support of their contention that "services" is not limited to "settlement services." SD Opp'n at 9-10. I conclude that the reinsurance at issue is not a settlement service, that Enforcement has proven the fifth element of its Section 8(b) claim, and that, therefore, Enforcement has established a prima facie violation of Section 8(b).

3. Section 8(c)(2)

Enforcement argues that Section 8(c)(2) is inapplicable as a matter of law once violations of Sections 8(a) or 8(b) have been proven. SD Motion at 22-25. I have rejected that argument supra, and I previously held that genuine issues of material fact exist as to Section 8(c)(2). Order Denying Dismissal at 16-17. Section 8(c)(2) accordingly remains at issue.

4. Due Process

One of Respondents' arguments in opposition to the SD Motion is that it "deprives Respondents of their right to due process." SDF at 2 & ¶ 17; see SD Opp'n at 3-4, 10. Specifically, Respondents assert that the SD Motion "ignores this Tribunal's clear directive regarding the viability of such a motion," and that Enforcement's citation to certain exhibits "for the truth of the matter asserted deprives Respondents of their right to due process because they have not been entitled to cross-examine the authors." SD Opp'n at 4; SDF at ¶ 17. They also contend that it is "inappropriate" for Enforcement to rely on the testimony of various witnesses because Respondents have not had a chance to cross-examine them yet. E.g., SDF at ¶ 21.

On the first day of hearing, I noted that "this case is really big" and that "I really just don't see any way that I can resolve this case within 300 days." Hearing Tr. 33. I reminded the parties that Enforcement had hoped to file its own summary disposition motion, and noted that Respondents "still ha[d] some dispositive arguments to be able to make." Id. I then proposed a delay in the hearing and a second round of dispositive motions, to which Enforcement had no objection. Hearing Tr. 33-34. Respondents asked for clarification: "Are you suggesting that the CFPB will put their case on and then we will have dispositive motions?" Hearing Tr. 34. I then explained that "I need to do something to [pare] this case down," and I "anticipate[d] that

Enforcement will put on part of its case and then we'll have some summary disposition or motions to dismiss." Hearing Tr. 34-35. I then noted two particular issues, judicial estoppel and the statute of limitations, both of which had been raised by Respondents, and I observed that "there's a lot of sort of subsidiary legal issues that we need to deal with and it might be helpful to grapple with them now rather than in post-hearing briefs." Hearing Tr. 35-37. Respondents' counsel then stated:

> MR. KIDER: Well, we have no objection to that, Your Honor. I[n] fact, we agree with you. We tried to do that with our dispositive motions. We'll have another round, and, hopefully, we will be able to at least narrow the case down. So that will be fine with us.

Hearing Tr. 37. I emphasized that "I'm not passing judgment at this point on any of these things," and that "I may end up denying everybody's motions, in which case, we'll just make do." Id. I then asked Enforcement when it could "get me a motion for summary disposition," the parties agreed on a briefing schedule, and I stated, in response to a query from Respondents, that "both sides can move for whatever dispositive relief you want." Hearing Tr. 38-40. I thereafter admitted in evidence almost every exhibit offered by the parties, including all but one exhibit offered by Respondents. Hearing Tr. 58.

Taking a break midway through a hearing to consider dispositive motions is admittedly unorthodox, but Respondents have not shown that it has denied them due process. I explicitly authorized both sides to move for "whatever dispositive relief" they desired, and made it clear that I would entertain a motion for summary disposition from Enforcement. Because almost all of the documentary evidence has already been admitted, both sides could have relied on their hearing exhibits to the fullest extent without further foundation; Enforcement has done so, but Respondents, for whatever reason, have not. Compare SUF with SDF; see SD Motion Reply at 6. Had Respondents filed a second motion for summary disposition, with citations to the more than 800 exhibits of theirs already in evidence, I would have entertained it.

Respondents' complaint that they have not had an opportunity to put on their own witnesses is not persuasive. A universal practice at summary disposition (and summary judgment) is to solicit declarations from witnesses – i.e., hearsay – to support a party's contentions. See generally FRCP 56. Had Respondents desired to rebut Enforcement's contentions with witness testimony of their own, they could have obtained such declarations from their own witnesses. Rule 212(h) is especially generous in allowing a nonmovant to defend against a summary disposition motion on the ground that it needs more evidence, because, unlike FRCP 56(d), Rule 212(h) does not require an "affidavit or declaration." Compare 12 C.F.R. § 1081.212(h) with FRCP 56(d). Respondents have not explicitly availed themselves of this procedure, nor have they implicitly demonstrated "good cause" to defer ruling on the SD Motion. See 12 C.F.R. § 1081.212(h). Also, two of the three Enforcement exhibits to which Respondents object on the basis of hearsay were admitted without objection by Respondents, and I have not considered the third (although a witness discussed its contents in court without objection by Respondents). Hearing Tr. 58, 359-60.

Most importantly, I have strictly followed Rule 212 in deciding the SD Motion. See 12 C.F.R. § 1081.212. I have carefully considered the evidence, and where I have found a genuine issue of material fact, I have said so, and where I have not, I have also said so. Respondents have

been given a full and fair opportunity to present all of their documentary evidence, or any other evidence, including declarations from their own witnesses, in support of the Dismiss Motion and in opposition to the SD Motion. Both sides have prevailed in part, but not in full, on their respective motions. Respondents have been afforded due process.

II. RULE 213

Rule 213 states that if, as here, "a decision is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the hearing officer shall issue an order specifying the facts that appear without substantial controversy," which "shall be deemed established." 12 C.F.R. § 1081.213. Some of the facts appearing without substantial controversy from the SD Motion are duplicative of facts deemed established in the Order Denying Dismissal. Thus, the following facts appear without substantial controversy and are deemed established:

1. Atrium is liable for violating RESPA Section 8(a), except that it has not been established that the MIs' payments to Atrium were made pursuant to an agreement to refer real estate settlement business, and except for any affirmative defenses, including RESPA Section 8(c)(2).

2. Atrium is liable for violating RESPA Section 8(b), except for any affirmative defenses, including RESPA Section 8(c)(2).

3. PHH Mortgage sells all of the loans it originates or purchases on the secondary market, and government-sponsored entities such as Fannie Mae and Freddie Mac are among its major buyers. SUF at ¶ 2; SDF at ¶ 2.

4. Private mortgage insurance policies cover losses incurred by mortgage lenders in case of borrower default, and in such a case, the mortgage insurer pays to the lender a specified percentage of loss faced by the lender. SUF at ¶ 5; SDF at ¶ 5.

5. In a typical reinsurance arrangement, a reinsurer agrees to assume a certain percentage of the primary insurer's risk, in return for the primary insurer "ceding" a portion of the premiums it receives to the reinsurer. SUF at ¶ 9; SDF at ¶ 9.

6. Atrium issued policies exclusively for loans originated or purchased by PHH. SUF at ¶ 13; SDF at ¶ 13.

7. As of the first quarter of 2013, Atrium had not paid any claims pursuant to the UGI reinsurance agreement for loans in book years 1994 through 2002. SUF at ¶ 18; SDF at ¶ 18.

8. UGI had the only captive arrangement with PHH until late 2000. SUF at ¶ 23; SDF at ¶ 23.

9. From 2001 to November 2008, UGI and Genworth were the only two MIs in PHH's dialer. SUF at ¶ 26; SDF at ¶ 26.

10. The housing market and the mortgage insurance industry were collapsing by 2008. SUF at ¶ 41; SDF at ¶ 41.

11. In February 2008 Freddie Mac announced that it was "temporarily changing its Private Mortgage Insurer Eligibility Requirements," so that "[e]ffective on or after June 1, 2008, Freddie Mac-approved private mortgage insurers may not cede new risk if the gross risk or gross premium ceded to captive reinsurers is greater than 25 percent." SUF at ¶ 42; SDF at ¶ 42.

12. RMIC was added to PHH's dialer in June 2009. SUF at ¶ 48; SDF at ¶ 48.

13. Cession statements prepared by each of the MIs record the regular payments made to Atrium. SUF at ¶ 50; SDF at ¶ 50.

III. ORDER

It is HEREBY ORDERED that Enforcement's Motion for Summary Disposition as to Liability and Respondents' Renewed Motion to Dismiss or, in the Alternative, to Narrow the Notice of Charges, are GRANTED IN PART and DENIED IN PART as outlined supra.

Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission