UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING File No. 2014-CFPB-0002 In the matter of: PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC, ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE CORPORATION.	)	**FILED UNDER SEAL**

RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO STRIKE THE EXPERT REBUTTAL REPORT OF MARK CRAWSHAW

INTRODUCTION

Despite the Bureau's assertion to the contrary, Respondents' Motion to Strike demonstrates that Dr. Crawshaw's 151-page rebuttal report is improper. In fact, Dr. Crawshaw's report is anything but a "point-by-point response" to Mr. Cascio's opinions. Opp'n at 2. Instead, Dr. Crawshaw's rebuttal report is an obvious attempt by the Bureau to try and reframe Dr. Crawshaw's prior work product, and undo his unfavorable hearing testimony. His rebuttal report is also a poorly veiled attempt to add further arguments to his original expert report. As the controlling rule makes plain, "[a] rebuttal report ***shall*** be limited to rebuttal of matters ***set forth in the expert report for which it is offered in rebuttal***." 12 C.F.R. § 1081.210 (emphasis added). Stated otherwise, a rebuttal report has a very narrow function and if a party exceeds that scope, another party "may file a motion" to seek "appropriate relief," which includes "striking all or part of the report[.]" *Id.* Under this standard, Respondents' Motion to Strike is proper and should be granted.

ARGUMENT

As Respondents explained in their Motion to Strike, the Bureau tries to introduce exhibits and arguments based on materials that have no connection to Mr. Cascio's report. For example, the 2012 Milliman Report the Bureau references, Opp'n at 4, which Dr. Crawshaw relies on, has no application to the Atrium reinsurance agreements, or Mr. Cascio's discussion of the specific Milliman reports prepared on behalf of Atrium. Moreover, the 2012 Milliman Report does not discuss or pertain to reinsurance. Rather, it examines a mortgage insurance company's risk-to-capital ratio requirements – an analysis that is not similar to the risk transfer analysis of reinsurance agreements.

Additionally, Dr. Crawshaw's rebuttal arguments about state insurance are now irrelevant, as the Bureau has admitted that it "takes no position as to whether PHH's purported captive reinsurance is 'insurance' for purpose of any state's law." Opp'n to Resps.' Renewed Mot. to Dismiss at 39 n.33. In any event, the Bureau's argument regarding state insurance regulators only serves to highlight that Respondents' characterization of Dr. Crawshaw's rebuttal report was accurate, *i.e.*, it is an inappropriate attempt for Dr. Crawshaw to revisit ***his*** hearing testimony on the subject, rather than respond to Mr. Cascio's expert report. *See D'Andrea Bros. LLC v. United States*, No. 08-268C, 2012 U.S. Claims LEXIS 78, at *9 (Fed. Cl. Feb. 10, 2012) (ruling that a "party may not offer testimony under the guise of 'rebuttal' only to provide additional support for his case in chief") (citations omitted). Mr. Cascio references state regulation in only three places in his report, and his statements about that topic are very narrow: (1) the UGI agreement contains a provision concerning approval of amendments by the North Carolina Commissioner; (2) the state insurance regulators approve filed insurance rates; and (3) there is "no evidence that any dividends were not permitted by Atrium's regulator" or Atrium

Re's regulator. M. Cascio's Expert Report ¶¶ 6, 29.A & 29.B. In a blatant attempt to broaden Dr. Crawshaw's discourse on the subject, the Bureau incorrectly asserts that his rebuttal report responds directly to these statements. Not so. For example, Dr. Crawshaw discusses the unauthenticated 1998 presentation by the Mortgage Insurance Association of America, which may or may not have been actually presented to the Arizona Insurance Department. M. Crawshaw's Expert Rebuttal Report at 84. Objectively, reference to such a report and analysis of it cannot respond to Mr. Cascio's three limited points. Instead, the draft presentation was created by a trade association allegedly to be given to a regulator that never oversaw any of Atrium or Atrium Re's arrangements.

Furthermore, the Bureau improperly attempts to qualify Dr. Crawshaw as an "insurance regulator" in its Opposition. Dr. Crawshaw may have worked with state insurance departments during his career, but he himself is not a regulator, and many of his engagements appear to pertain to issues other than reinsurance, such as "[a]ssistance to state regulators in evaluating rate filings[.]" *See* M. Crawshaw's Expert Report, Attachment 1 "Professional Experience," at 8. Similarly, the Bureau's argument that Respondents' counsel's cross-examination of Dr. Crawshaw during the hearing was intended to show that he was qualified to testify "about how, if at all, state insurance regulation is relevant to risk transfer," is wrong. Opp'n at 7. To the contrary, such questions demonstrated that Dr. Crawshaw had no qualifications or rational basis for undermining the state insurance regulators on the point of assessing the reinsurance contracts at issue, or whether risk transfer existed for each. Regardless, that would not give the Bureau any justification for including this topic in Dr. Crawshaw's rebuttal report.

There is also no merit to the Bureau's argument that Dr. Crawshaw properly relied on the Radian and CMG agreements to rebut Mr. Cascio's report. The purpose of a rebuttal report is to

"directly contradict or rebut the opposing party's expert[]" report. *Withrow v. Spears*, 967 F. Supp. 2d 982, 1002 (D. Del. 2013) (citations omitted). The Bureau admits that Dr. Crawshaw's opinions on these two contracts are not for that purpose. Opp'n at 9 (stating that Mr. Cascio purportedly "neglected" to consider these two agreements in his report, yet "Crawshaw's rebuttal" can still discuss them). Therefore, the sections of Dr. Crawshaw's rebuttal report concerning these agreements must be struck. *See Proctor & Gamble v. McNeil-PPC, Inc.*, 615 F. Supp. 2d 832, 838 (W.D. Wis. 2009) (striking portions of the expert rebuttal reports "because they are improper supplementation" of the expert's original report, and "rebuttal reports are limited to responding to the issues raised by the opposing parties' experts[]").

Furthermore, it is of no consequence that Mr. Cascio responds to Dr. Crawshaw's analysis of the Radian and CMG agreements in his rebuttal report. There is no question that Dr. Crawshaw heavily relies on those two contracts in his report. Thus, they are clearly within the scope of a rebuttal report, which responds directly to those arguments, *see* 12 C.F.R. § 1081.210, and no "inequity," Opp'n at 11, exists with allowing Mr. Cascio to directly address arguments raised by Dr. Crawshaw in Mr. Cascio's rebuttal report.

Finally, the Bureau raises an issue irrelevant to the Motion to Strike, *i.e.*, whether expert testimony and expert reports comprise confidential material subject to the Protective Order.[1] The Bureau's attempt to raise this issue is inappropriate because it exceeds the scope of Respondents' Motion, and also constitutes an inaccurate portrayal of the Protective Order's

[1] Despite the Bureau's statement to the contrary, the Protective Order provides a mechanism for disputes among Parties regarding confidential designations. Dkt. 48 ¶ 12. The initial required step is for the Parties to "first try to resolve such a dispute in good faith on an informal basis[]" before bringing the matter to the Tribunal's attention. The Bureau has made no such attempt here, but instead has decided to raise the issue first with the Tribunal as part of its Opposition to the Motion to Strike.

scope. Indeed, the Bureau mischaracterizes not only the scope of the Protective Order (Dkt. 48), but also the generally accepted practice of not filing discovery materials – all under the guise that Respondents' counsel is somehow trying to keep discovery from the "light of day."[2] Opp'n at 1. To the contrary, Respondents are entitled to protect their confidential information pursuant to the terms of the Protective Order that was entered into by all Parties.[3]

CONCLUSION

For all of the foregoing reasons, and those in Respondents' Motion, this Tribunal should strike Dr. Crawshaw's Expert Rebuttal Report.

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[2] *See* Fed. R. Civ. P. 26(c) (discussing the use of protective orders to shield discovery materials from public disclosure). *See also Horizon Unlimited v. Silva*, No. 97-7430, 2001 U.S. Dist. LEXIS 275, at *3-5, *9 (E.D. Pa. Jan. 16, 2001) (upholding defendants' motion for contempt and sanctions against plaintiff's counsel for releasing an expert report in violation of a confidentiality and protective order).

[3] Notably, the Bureau misrepresents the confines of the Protective Order, and attempts to undo, or at best re-write, the Protective Order's scope. For example, the Bureau states that Dr. Crawshaw's rebuttal report must "provide competitor's [with] an advantage" in order to avoid disclosure. Opp'n at 1. That is wrong. If Respondents sought to designate documents as containing "Competitively Sensitive Information," which is a category of "Highly Confidential" materials, that requirement would apply. However, Respondents have asserted that the expert report contains "Confidential Information," and thus, it should remain under seal. The Protective Order defines "Confidential Information" to include, among other things, "(iii) any Document or other material prepared by, on behalf of, received by, or for the use by the Bureau . . . in the conduct of an investigation of or ***enforcement action*** against any person, and any information derived from such Document or other material[.]" Dkt. 48 ¶ 1.h. (emphasis added). There is no doubt that Dr. Crawshaw's rebuttal report (and his original expert report) fall squarely within this definition. The reports were created "on behalf of" and "for the use by the Bureau" in their "enforcement action" against Respondents. Indeed, this Tribunal has previously agreed with such an assessment. For example, this Tribunal has upheld expert testimony and expert report redactions submitted by the Parties because such content was deemed "confidential" under the Protective Order. *See, e.g.*, Respondents' brief in support of motion to dismiss (redacted), (Dkt. 101, released on May 12, 2014) (redactions, at 30, consisting of Dr. Crawshaw's expert report and expert testimony during the hearing). Given the plain language of the Protective Order and this Tribunal's actions with respect to expert materials, Respondents believe their position on the subject is well supported.

Dated: May 16, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

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CERTIFICATION OF SERVICE

I hereby certify that on the 16th of May, 2014, I caused a copy of the foregoing Respondents' Reply Memorandum in Support of Their Motion to Strike the Expert Rebuttal Report of Mark Crawshaw, to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

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