UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of:	)	
PHH CORPORATION,	)	**ENFORCEMENT COUNSEL'S**
PHH MORTGAGE CORPORATION,	)	**OPPOSITION TO RESPONDENTS'**
PHH HOME LOANS LLC,	)	**RENEWED MOTION TO DISMISS**
ATRIUM INSURANCE CORPORATION,	)	
and ATRIUM REINSURANCE	)	
CORPORATION	)	

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I. INTRODUCTION

Now that a hearing in this matter has commenced, Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, PHH) are scrambling to turn back the clock. Rather than face the evidence in this case, PHH's motion seeks to relitigate threshold issues exhaustively briefed, argued, and decided more than a month ago.

PHH refers to its motion as a "renewed motion to dismiss" or a motion to "narrow the notice of charges." Regardless of the labels it uses, however, PHH's "motion to dismiss" is simply a motion for reconsideration of this Tribunal's decision denying PHH's original motion to dismiss, littered with isolated partial summary disposition arguments devoid of any evidentiary support. The ostensible purpose of this motion practice is to further "narrow the issues" in dispute and to focus the remaining presentation of evidence in this case. March 24 Hearing Tr. at 37:14-19. PHH's motion instead retreads old ground and fails to establish that there is no genuine issue as to any material fact or that it is entitled to any decision in its favor as a matter of law. Virtually every argument contained in PHH's motion has already been rejected by this Tribunal. PHH's judicial estoppel argument has been rejected not only by this Tribunal on two separate occasions, but also in an entirely separate forum, the United States District Court for the Southern District of Florida.

PHH paints its scattered arguments in the camouflage of a "renewed motion to dismiss" for a clear and obvious reason: it cannot find any refuge in the facts. PHH's assertion that it is at a "disadvantage" because this wave of briefing comes after one week of trial is just wrong. PHH has unfettered access to the facts through its own witnesses and documents. Since this matter proceeded to an expedited hearing at PHH's insistence, it has had ample time to prepare its own case and to review the Bureau's investigative file and pleadings (which rely primarily on evidence received from PHH in the first place). Furthermore, the very first witness presented in this matter was one of

PHH's own employees, identified by PHH as one of only two individuals

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[1]

But just as the record leaves PHH bereft of factual support, PHH cannot construct any legal argument to prevent this Tribunal from reaching the merits. These issues should be put to rest and the parties should proceed to the merits of the case. The Tribunal should use its authority under Rule 213 to deem these facts and issues established *against* PHH, and to strike PHH's failed affirmative defenses.

II. PROCEDURAL BACKGROUND

Enforcement Counsel incorporates by reference its Statement of Undisputed Facts in Support of its Motion for Summary Disposition (**SOUF**), Docket Entry No. (hereinafter, No. ___) 102-A, its Statement of Facts from its Prehearing Brief (EC Prehearing Br.) (No. 74), and the facts deemed established by the Hearing Officer's Order of March 13, 2014 (No. 67) (3/13 Order), at 17-18, and sets forth below only the procedural history relevant to this motion:

The Notice of Charges (No. 1) (NOC) was filed and served on PHH on January 29, 2014. On January 31, 2014, PHH filed both its Answer and Affirmative Defenses to the Notice of Charges (No. 16) (Answer), and its Motion to Dismiss the Notice of Charges, or in the Alternative, for Summary Disposition (No. 17) (PHH's First MTD). Enforcement Counsel filed its Opposition to

[1] Declaration of Donald R. Gordon, attached hereto as **Exhibit 1** (Gordon Decl.), **Att. A** (June 29, 2012 Interrogatory Responses) at 2 (Interrogatory Response #2); Gordon Decl., **Att. B** (Oct. 25, 2012 Letter from M. Kider) at 2 (stating that Redacted - Confidential

PHH's First MTD (EC First MTD Opp.) (No. 41) on February 20, 2014. PHH replied, and oral argument on these issues was held on March 5, 2014. The Tribunal decided the issues raised in PHH's First MTD in its March 13 Order, and rejected each of PHH's arguments. None of the claims pled in the NOC was dismissed, and none of the relief sought was excluded.

Prehearing briefs were filed on March 19, 2014. That same day, PHH filed four "motions in limine," which were all dispositive motions (Nos. 73, 75, 76, 77). On March 21, 2014, the Tribunal issued an order (No. 83) (3/21 Order), summarily declining to entertain two of those motions. On March 24, 2014, the hearing commenced and the Tribunal ruled on certain of those motions from the bench (March 24 Order).

III. LEGAL STANDARD

A. Reconsideration

To the extent it constitutes a cognizable motion at all, the majority of PHH's motion is subject to the legal standard for reconsideration.[2] "Motions for reconsideration are disfavored," such that "[t]he granting of such a motion is . . . an unusual measure, occurring in extraordinary circumstances." *2910 Georgia Ave. LLC v. District of Columbia*, -- F.Supp.2d --, No. CV 12-1993 (CKK), 2014 WL 1379248, at *1 (D.D.C. Apr. 9, 2014)) (internal quotation marks and citation omitted). Reconsideration is available only "as justice requires," such as where the court "has patently misunderstood a party, has made a decision outside the adversarial issues presented to the [c]ourt by the parties, has made an error not of reasoning, but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue

[2] Unlike the Federal Rules of Civil Procedure, the Bureau's Rules of Practice for Adjudication Proceedings do not provide for motions for reconsideration. *See* Fed. R. Civ. P. 59-60. To the extent the Tribunal deems it appropriate to nonetheless receive such a motion, the standard for reconsideration applied by the federal courts should serve by proxy as the standard of review here.

to the court." *Powell v. Castaneda*, 247 F.R.D. 179, 181 (D.D.C. 2007) (citing *Cobell v. Norton,* 224 F.R.D. 266, 272 (D.D.C. 2004)) (internal citation omitted).

Motions for reconsideration are limited by the law of the case doctrine, and as a result, may not be used to "relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Jung v. Assoc. of Am. Med. Colls.,* 226 F.R.D. 7, 9 (D.D.C. 2005) (internal quotation marks/citation omitted); *Singh v. George Wash. Univ.,* 383 F. Supp. 2d 99, 101 (D.D.C. 2005) (internal citations omitted) (reconsideration is "subject to the caveat that, where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again"); *Christianson v. Colt Indus. Op. Corp.*, 486 U.S. 800, 815-16 (1988) ("[T]he doctrine of the law of the case posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case" in order to "protect[] against agitation of settled issues.") (internal quotation marks, alterations, and citations omitted). To prevail on a motion for reconsideration, the movant bears the burden of identifying "at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Keifer v. Reinhart Foodservices, LLC*, No. 13-3159, 2014 WL 1465707, at *2 (3d Cir. Apr. 16, 2014) (quotation omitted); *Amer. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 188 (3d Cir. 2008) (listing these three grounds as "extraordinary circumstances" meriting reconsideration); *see also 2910 Georgia Ave. LLC,* 2014 WL 1379248, at *1 (adopting an identical standard); *Firestone v. Firestone,* 76 F.3d 1205, 1208 (D.C. Cir. 1996) (same).

B. Motion to Dismiss

Under Rule 212 of the Bureau's Rules of Practice for Adjudication Proceedings, a respondent may file a motion to dismiss. 12 C.F .R. § 1081.212(b). 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." *Id.* This Tribunal has held that "the rules and case law pertinent to FRCP 12(b)(6) are generally pertinent to Rule 212(b)." *See* 3/13 Order at 5-6.[3]

C. Summary Disposition

Purported motions to dismiss that raise matters outside the pleadings are properly treated as motions for summary disposition. *See* 3/13 Order at 9 (reasoning by analogy to Fed. R. Civ. P. 12(d) that "if, on a motion under FRCP 12(b)(6), 'matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment'"). A motion for summary disposition may be granted if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted show that: (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to a decision in its favor as a matter of law. 12 C.F.R. § 1081.212(c). A factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). 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).

The Bureau's Rules also provide for partial summary disposition where appropriate. Specifically, Rule 213 authorizes the hearing officer to "issue an order specifying the facts that appear without substantial controversy," which "shall be deemed established." 12 C.F.R. § 1081.213.

[3] Rule 212(b) provides that Respondents may file "a motion to dismiss" in the singular. Respondents filed their Motion to Dismiss (No. 17) on January 31, 2014.

IV. ARGUMENT

A. PHH Provides No Basis For Reconsideration of the March 13 Order or Any Other Prior Ruling

The factual findings and legal conclusions issued in the March 13 and March 24 Orders (collectively, the March Orders) are now the law of the case and may only be revisited if the "extraordinary circumstances" standard for reconsideration is met. *See Amer. Civil Liberties Union*, 534 F.3d at 188. PHH has not even attempted to demonstrate that any such extraordinary circumstance justifying reconsideration exists here, much less succeeded in doing so. PHH can point to no intervening change in the law, no newly-available evidence, and no risk of "clear error or manifest injustice." *Id.* (citations/quotations omitted). The Tribunal should therefore refuse to entertain PHH's "disagreements" with, and other attempts to relitigate issues settled by, the March Orders.

In the March Orders, this Tribunal held (among other things) that:

1. Section 8(a) of RESPA "has no separate exception for 'services actually performed.'" 3/13 Order at 8.

2. "RESPA Section 8(c)(2) establishes a safe harbor for salary, compensation, or other payment for services actually performed, but only if such payment is bona fide." 3/13 Order at 8.

3. "The Bureau therefore does possess jurisdiction to administratively adjudicate this proceeding, even as to claims arising prior to July 21, 2011, at least to the extent it seeks injunctive relief." 3/13 Order at 13.

4. PHH's motion to "strik[e] any relief other than injunctive [relief]" was denied for lack of "any merit . . . at all." 3/24 Hearing Tr. 32:3-25.

5. "To the extent Enforcement seeks the same relief as was formerly available to HUD, Dodd Frank's expansion of the available adjudicatory forum to include the present forum affects only jurisdiction. It does not impair rights Respondents possessed when they acted, increase their liability for past conduct, or impose new duties with respect to transactions already completed." 3/13 Order at 12.

6. Section 16 of RESPA applies only to "actions" filed in "courts" and has no application to this administrative proceeding. 3/13 Order at 8-9.

7. The McCarran-Ferguson Act does not bar this proceeding. 3/24 Hearing Tr. 23:4-14.

Each of the above issues has already been extensively briefed, litigated, and decided in this matter. Since there has been no intervening change in the law, no newly-available evidence, and no clear error or manifest injustice, this Tribunal should decline to reconsider any of these issues.

B. PHH's Request to "Correct" the March 13 Order or to Otherwise Obtain Rulings in Their Favor on Specific Factual Issues Unconnected to Any Claim for Dispositive Relief is Meritless

Despite being given the opportunity to file a dispositive motion that might narrow this proceeding, PHH leads its brief with an assertion that three sentences out of the 104 paragraphs in the NOC and two rulings in the 18-page March 13 Order are incorrect, and that the Tribunal must rule in its favor as to each of them. PHH Br. at 4-10. As to the three factual issues, PHH's request is inappropriate because it does not attempt to explain how a ruling in its favor would result in disposition of any of the Bureau's claims, or even meaningfully narrow the proceeding in light of the mountain of evidence (much of which has already been presented at the hearing) showing that, for a period of over 15 years, PHH accepted kickbacks in exchange for referring business to MIs. In any event, as discussed below, PHH's assertions as to those factual allegations are incorrect, and the Tribunal should establish them in the Bureau's favor pursuant to Rule 213. Moreover, PHH's motion for summary disposition on these issues (and any other issue raised in its motion that relies on matters outside of the pleadings) should be denied because PHH failed to file a statement of undisputed material facts as required by Rule 212. As to the two legal rulings in the March 13 Order, PHH's request for reconsideration should be denied because it makes no attempt to meet the requirements for reconsideration, and, regardless, its positions on those issues remain meritless.

1. <u>PHH Admits that Atrium Conducted No Underwriting to Price Any Reinsurance Risks It Purportedly Assumed</u>

PHH takes issue with the allegation that "Atrium conducted no underwriting to price any reinsurance risks that it purportedly assumed." PHH Br. at 4-5 (citing NOC ¶ 22). The March 13

Order held that "a reasonable factfinder could conclude that . . . Atrium conducted no underwriting or actuarial analysis to price its reinsurance," and left proof of that fact to the parties. 3/13 Order at 15. PHH sets forth no basis for reconsideration of that ruling. To the extent that PHH seeks a new finding that Atrium in fact did conduct underwriting to price its purported reinsurance, its request must be denied. Such a finding can only be made pursuant to the "partial summary disposition" provision of Rule 213, which authorizes the hearing officer to "issue an order specifying the facts that appear without substantial controversy," which "shall be deemed established." 12 C.F.R. § 1081.213. At the March 5 oral argument, PHH was given an opportunity to explain to the Tribunal what, if any, underwriting was performed by Atrium. *See* 3/13 Order at 15 n.6. It was unable to do so. *Id.* PHH has still not come forward with any evidence supporting such a finding.[4]

Indeed, PHH does not even argue that Atrium performed any underwriting, urging instead that "Atrium could rely upon the underwriting conducted by others." PHH Br. at 4.[5] This is an admission that Atrium did not perform any underwriting. Meanwhile, Enforcement Counsel have cited substantial evidence to support the allegation that Atrium did not perform any underwriting to price its purported reinsurance risks. *See* **SOUF**, ¶ 16; *accord* 3/24 Hearing Tr. 126:24-127:8 (Rosenthal). There is therefore no genuine dispute of material fact. The Tribunal should issue a factual finding that Atrium performed no underwriting to price any reinsurance risks it purportedly

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[4] PHH invokes documents outside the pleadings, specifically, a handful of generic letters issued by banking regulators to other entities (unrelated to PHH) that have no bearing on whether Atrium did any underwriting to price the reinsurance risks it purportedly assumed.

[5] Whether Atrium "could" rely on PHH's underwriting of mortgage loans – in that it had the capacity to do so – such reliance is not equivalent to conducting underwriting of the purported <u>reinsurance</u>. The purported reinsurance offered by Atrium supposedly consisted of covering claims on a specific portion of the underlying mortgage insurance – which itself covered losses on a specific portion of losses associated with each loan – in exchange for a particular percentage of mortgage insurance premiums. If it had occurred, the underwriting in question should have determined the appropriate portion of coverage and percentage of ceded premiums in light of the characteristics of the reinsured mortgage insurance policies. There is no evidence that any such underwriting process was undertaken by Atrium.

assumed, which shall be deemed established pursuant to Rule 213.

2. Atrium Controlled the Assets in the Trust Accounts

Under its Trust Agreements with the MIs, Atrium had the right to control the assets in each Trust Account, subject to the MI's right to withdraw assets for the limited purpose of either paying amounts for which Atrium was liable or paying dividends to Atrium. For example, the Trust Agreement between Atrium and UGI ("UGI Trust Agreement") provided that "[t]he responsibility for directing Trustee[6] to invest and reinvest the assets in the Trust Account shall be that of [Atrium] and unless and until directed by [Atrium], Trustee shall not be required to take any action with respect to the investment or reinvestment of the Trust Account's assets" and "[a]ll dividends, interest and other income resulting from the investment of the assets in the Trust Account shall be the property of [Atrium]." **ECX 0122** at CFPB-PHH-01142046 (UGI/Atrium Trust Agreement, 1/1/1997). Atrium also had the "full and unqualified right to vote and execute consents and to exercise any and all proprietary rights not inconsistent with this Trust Agreement with respect to any securities or other property forming a part of the Trust Account." *Id.* at CFPB-PHH-01142047.[7]

Although the UGI Trust Agreement allowed UGI to withdraw assets "at any time," it narrowly circumscribed the purposes for which such withdrawals could be made, providing that UGI "shall only withdraw the assets of the Trust Account to satisfy amounts due … for the following purposes only …." Only three purposes were permitted: (1) to pay or reimburse UGI for Atrium's share of amounts due under the captive agreement "if not otherwise paid by [Atrium]"; (2) to pay Atrium dividends (that is, to give money to Atrium); and (3) to deposit those funds into a

[6] The "Trustee" was Wachovia Bank of North Carolina.
[7] The other Trust Agreements have similar provisions. *See* **ECX 0528** at CFPB-PHH-00131120-122 (GEMICO/Atrium Trust Agreement, 10/9/2000); **ECX 0527** at CFPB-PHH-00130782-784 (Radian/Atrium Trust Agreement, 7/26/2004); **ECX 0203** at CFPB-PHH-00091747-749 (CMG/Atrium Trust Agreement, 12/1/2006).

separate account upon termination so that those funds could be used for the first two purposes. *Id.* at CFPB-PHH-01142047.[8] Given these limitations, the absence of any restriction on the *timing* of UGI's withdrawals does not mean that UGI controlled the assets in the Trust Account. Atrium and its parent PHH (through its control over Atrium) controlled the assets in the Trust Account. *See* Cascio Report at 7 ("The premiums received by the reinsurer for that policy year become the funds or assets of the reinsurer.").

3. Atrium's Liability was Limited to the Assets in the Trust Accounts

PHH contends that it was "inappropriate" for Enforcement to "attempt to demonstrate through testimony and documents that Atrium's liability under the reinsurance agreements was 'capped' at the amount in the trust accounts." PHH Br. at 6-7. What is inappropriate is PHH's attempt to exclude from this proceeding the copious and undisputed evidence that Atrium and the MIs – whether by written contract, by separate agreement, or through their conduct – actually *did* consider Atrium's liability to be limited to the assets in the Trust Accounts. As discussed below, each of the agreements contains provisions that explicitly or effectively limited Atrium's potential loss to the assets in the Trust Account.[9] But there is no basis to restrict the evidence on the issue of the extent of Atrium's liability to pay "reinsurance" claims to the four corners of the agreements. This is not a breach of contract action between the parties to the contracts, where Atrium might assert as a defense that extrinsic evidence should be excluded from a determination of the parties' contractual rights and obligations. Rather, this is a government enforcement proceeding alleging that PHH's captive arrangements were used to commit and cover up violations of RESPA's prohibition on

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[8] The other Trust Agreements have similar provisions. *See* **ECX 0528** at CFPB-PHH-00131120 (GEMICO/Atrium Trust Agreement, 10/9/2000); **ECX 0527** at CFPB-PHH-00130782 (Radian/Atrium Trust Agreement, 7/26/2004); **ECX 0203** at CFPB-PHH-00091747 (CMG/Atrium Trust Agreement, 12/1/2006).

[9] The "trust cap" in the CMG agreement is not addressed here because PHH admits that Atrium's liability under that agreement was limited to the funds in the CMG Trust Account. PHH Br. at 7 n.6.

kickbacks and unearned fees. Enforcement Counsel seeks to show that Atrium did not face a reasonable possibility of realizing a significant loss of its capital under any of its captive arrangements. This question is about much more than Atrium's contracts. Any limitation on the extent of Atrium's potential exposure to loss of its capital, whether it is found in the written contract itself or was simply a result of how the parties understood and applied their arrangements in practice, is clearly relevant to the issue of risk transfer. The contracts are not Atrium's only source of protection from liability for "reinsurance" claims. Other aspects of the captive arrangements' structure, as well as the structure of Atrium itself, demonstrate that there was no appreciable possibility that Atrium would ever be required to pay claims in excess of the assets in the Trust Accounts. Thus, PHH is not entitled to summary disposition on the issue of whether Atrium's assets outside of the Trust Accounts were exposed to potential loss.

It is particularly brazen for PHH to contend that the validity of its position is beyond reasonable dispute when the sworn testimony of its own key witness contradicts PHH's position. Mr. Rosenthal testified at his investigational hearing that Atrium's exposure under its agreements was limited to "all the capital that in, in that trust" because "the most it could lose was the money, all the premiums and all the capital it initially put in the trust." **ECX 0731**, Transcript of Investigational Hearing Testimony of Sam Rosenthal (Rosenthal IH Tr.) at 42:21-43:19.[10] And even though, at the hearing, Mr. Rosenthal attempted to recant his prior testimony with respect to UGI and Genworth, he still maintained that Atrium's liability to Radian was limited to the funds in the Radian Trust Account, 3/25 Hearing Tr. 55:22-23 (Rosenthal), which directly contradicts PHH's claim that Radian could reach Atrium's assets outside of the Trust Accounts. Even as to UGI and

[10] He also testified that "*if capital falls below a certain minimum threshold*, then Atrium is no longer permitted to receive its portion of the premium and it could choose to put a capital infusion in to the trust, but *it's not a contractual obligation that it must put a capital infusion in to the trust.*" *Id.* (emphasis added).

Genworth, Mr. Rosenthal's conflicting statements create an issue of fact that cannot be resolved in PHH's favor without assessing Mr. Rosenthal's credibility.

There is simply no basis to exclude Mr. Rosenthal's testimony, and other relevant evidence such as the following undisputed facts: (1) Milliman noted in its reports prepared for *both* Atrium and the MIs that Atrium "has no liability beyond funds available in the trust," and it obtained its understandings from its client (Atrium or the MI); (2) Radian's commutation payment was the exact amount of the funds in its Trust Account, even though Radian's estimated claim payments exceeded that amount; (3) PHH representatives referred to funds being "at risk" in the Trust Accounts, which means that funds outside of the Trust Accounts were not at risk; and (4) Atrium never paid a dollar of claims using assets outside of the Trust Accounts, which contradicts any contention that there was no distinction between Atrium's assets within the Trust Accounts and Atrium's assets outside of the Trust Accounts with respect to their availability to pay claims. *See* **ECX 0731**, Rosenthal IH Tr. 42:21-43:19; **ECX 0593** at CFPB-PHH-00381183, CFPB-PHH-00381195 (Milliman report for UGI, 1/12/2007); **ECX 0526** at CFPB-PHH-00130744 (Radian/Atrium Commutation and Release, 7/22/2009); **ECX 0653** (PHH NORA), at Ex. C; **ECX 0433** (Email from Keleher to Bogansky and Rosenthal, 7/7/2009); **ECX 0434** (Radian's "Atrium Captive Analysis," cells J27-N27); **ECX 0254** (Email from Danahy to Bogansky, 2/18/2009) ("I do not want to put additional capital at risk with this trust."). Enforcement Counsel is entitled to use the evidence identified above to establish any of the following: (1) the parties interpreted their contracts to limit Atrium's liability to the Trust Accounts; (2) the parties agreed, separately from the contracts, to such a limitation; (3) the parties, through their conduct, agreed to modify their written contract to include such a limitation; and (4) because they were dependent on referrals of business from PHH, the MIs were unwilling to assert any right to reach Atrium's assets outside of the Trust Accounts, reflecting PHH's ability to use its

power to refer business to avoid risk transfer. This evidence is relevant to the issue of the extent of Atrium's liability for paying "reinsurance" claims and there is no basis to exclude it.

a. The Agreements Between UGI and Atrium Limited Atrium's Potential Loss to its Capital in the UGI Trust Account.

The UGI Trust Agreement states that the Trust Account was created to "hold assets as security for the performance by [Atrium] of its Obligations … under the Reinsurance Agreement." **ECX 0122** at CFPB-PHH-001142044 (UGI/Atrium Trust Agreement, 1/1/1997). Black's Law Dictionary defines "security" as "[c]ollateral given or pledged to guarantee the fulfillment of an obligation; esp., the assurance that a credit will be repaid …" Black's Law Dictionary 1475 (9th ed. 2009). At a minimum, the Trust Agreement makes clear that Atrium made no pledge, guarantee or assurance to UGI that any assets outside of the Trust Account could be used to fulfill Atrium's payment obligations. Atrium's assets outside of the Trust Account were controlled by Atrium and PHH, and PHH's ability to remove such assets from Atrium could not be restricted in any way by potential or actual claim payments to UGI. In fact, PHH withdrew $74.8 million in dividends from Atrium from 2005 through 2011.[11] Those dividend payments from Atrium to PHH largely coincided with the real estate crisis, when Atrium finally began to return some funds under its agreements.[12]

[11] *See* Crawshaw Rebuttal Report (No. 108) at 129 (Table 11). As Dr. Crawshaw explains, these dividends transferred Atrium funds outside of any Trust Account to PHH. They are different from the dividends that Atrium withdrew from the Trust Accounts. *Id.* at 127.

[12] Section 13.1 of the UGI agreement describes the purpose of the Trust Account as follows: "*To support [Atrium's] obligations under this Agreement*, and in conformity with law, [Atrium] shall enter into a trust agreement (the 'Trust Agreement') to *establish a trust account (the 'Trust Account') for the benefit of [UGI]*." **ECX 0584** at CFPB-PHH-00116612 (UGI/Atrium Reinsurance Agreement, 1/1/1997) (emphasis added). Atrium's basic contractual obligation, for which the Trust Account was established to support, was to pay claims within its risk corridor. *Id.* ¶ 6. To the extent Respondents contend there was no distinction whatsoever between assets within the Trust Account and assets outside of the Trust Account with respect to their availability to support Atrium's payment obligations, such that all of Atrium's assets were equally available at all times, that interpretation of the agreement would render Section 13.1 meaningless because the stated purpose of establishing the Trust Account would be superfluous.

PHH contends that the following language in Section 5.4 shows that all of Atrium's assets were available, at all times, to pay claims under the UGI arrangement:

> *Notwithstanding any termination* as provided for in this Agreement, both Ceding Company and Reinsurer shall *continue to be liable* to each other for Reinsurance Premiums, Losses incurred (as set forth in Section 2.1), and all other obligations under this Agreement, with respect to all Reinsured Loans for each Policy Year prior to the termination of this Agreement, until the natural expiration, cancellation or termination of coverage of each Reinsured Loan within such Policy Year, or until the day preceding the tenth (10th) anniversary of coverage for each such Reinsured Loan, whichever shall first occur …..

PHH Br. at 7; **ECX 0584** at CFPB-PHH-00116606 (UGI/Atrium Reinsurance Agreement 3-44, 1/1/ 1997) (emphasis added). But Section 5.4, which deals only with events *after* a termination, does not define *what* Atrium's obligations were in the first place, nor does it give UGI any rights it did not already have. PHH's reading of Section 5.4 also contradicts Section 13.4, which states: "Notwithstanding any other provision of this Agreement, the *only* consequence of Reinsurer's failure to deposit any required amounts into the Trust Agreement will be the termination of the Agreement pursuant to Section 5.4." *Id.* ¶ 13.4 (emphasis added). If Section 5.4 provided UGI the right to reach Atrium's assets outside the Trust Account (as PHH contends), then even if Atrium failed to deposit a "required amount" into the Trust Account, it would still be liable to UGI for that same amount if the assets in the Trust Account were insufficient to pay claims. It would make no sense for the parties to have specified that the "only" consequence of a "failure" by Atrium to deposit "required amounts" into the Trust Account is exactly the same as if that specification did not exist.

b. The Agreement Between Genworth and Atrium Limited Atrium's Potential Loss to its Capital in the Genworth Trust Account.

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c. The Agreement Between Radian and Atrium Limited Atrium's Potential Loss to its Capital in the Radian Trust Account.

As discussed above, Mr. Rosenthal testified that the Radian agreement limited Atrium's liability to the funds in the Radian Trust Account. 3/25 Hearing Tr. 55:22-23 (Rosenthal).[15] Thus, there is no reasonable dispute as to Enforcement's contention that Atrium's liability was limited to the Trust Account under the Radian agreement. This testimony is uncontroverted and to the extent the issue is resolved on the papers, it should be resolved with a Rule 213 finding that Atrium's liability was limited to its capital in the Radian Trust Account.

4. <u>Section 8(a) of RESPA Contains No Exception for "Services Actually Performed"</u>

The March 13 Order held exactly what the plain language of the statute states: Section 8(a) of RESPA "has no separate exception for 'services actually performed.'" Order at 8. There is no

[14] Confidential

[15] Section 12.02 of the agreement between Radian and Atrium states that assets must be maintained in the Radian Trust Account "as security for the payment of the Reinsurer's obligations to the Company under this Agreement." **ECX 0200** at CFPB-PHH-00091631 (Radian/Atrium Reinsurance Agreement, 7/26/2004). For the reasons discussed above with respect to UGI, there was no pledge or guarantee that any assets outside of the Radian Trust Account could be used to fulfill Atrium's payment obligations, and PHH's ability to remove Atrium assets outside of the Trust Accounts could not be restricted by any obligations to the MIs.

basis for reconsideration of that obviously correct holding.

In addition, this Tribunal has already rejected PHH's argument that "one must provide no services at all" to be liable for violations of Sections 8(a) and 8(b) of RESPA. *Id.* at 6 (internal quotations and citations omitted); *see also id.* at 7-8. PHH offers no new controlling authority, no newly-available facts, and no basis to believe that this determination was erroneous. In any event, the evidence in this matter demonstrates that no "actual service" was performed by Atrium, and certainly not one that could be considered "bona fide" because (1) the payments were made to gain referrals, not to genuinely obtain the alleged service of "reinsurance," and (2) the value of any alleged service was not remotely commensurate with the payments received. *See* Enf. Counsel's Mot. for Summ. Disp. (EC MSD) (No. 102), at 24; EC First MTD Opp., at 30-32; Crawshaw Report (No. 55); Crawshaw Rebuttal Report (No. 108))

Irrespective of which party bears the burden, Section 8(c)(2) does not apply where it has been established that there was a referral agreement and things of value were accepted pursuant to that agreement, for the reasons set forth in Enforcement Counsel's Motion for Summary Disposition. *See* EC MSD at 22-25; *see also* EC First MTD Opp. at 14-19.

5. Payments Must Be "Bona Fide" To Qualify for the Section 8(c)(2) Defense

PHH "request[s] that the Tribunal *reconsider* its conclusion that the term 'bona fide' in RESPA Section 8(c)(2) modifies 'other payment for goods or facilities actually furnished or for services actually performed.'" PHH Br. at 9 (emphasis added). PHH proceeds as though it were entitled to reconsideration of this issue *de novo*, rehashing arguments it made or could have made in its first motion to dismiss. PHH's argument is premised on nothing more than its dissatisfaction with the March 13 Order, and certainly not on any of the "extraordinary circumstances" required to be shown as a precondition for reconsideration.

In any event, PHH's renewed motion with respect to the "bona fide" requirement is without merit. For example, PHH asserts that "the word 'other' would be rendered superfluous if the word[s] 'bona fide' w[ere] read in conjunction therewith, *i.e.*, 'bona fide other payment.'" PHH Br. at 9. PHH gives no explanation as to why this would be the case, and indeed it is not so. Section 8(c)(2) applies to any "salary," "compensation," or "other payment," so long as it is bona fide. No word is rendered superfluous by this interpretation, and it is certainly not "contrary to the plain language of the statute." PHH Br. at 10. Rather, it is PHH's interpretation that does violence to the language and meaning of Section 8(c)(2). As the Tribunal has already held, PHH's attempt to read the "bona fide" requirement out of the exemption from liability for "other payments" would enable that exemption to "be established in virtually every case by non-salary compensation," 3/13 Order at 8, since any payment of any magnitude, no matter how unreasonable in relation to the value of the purported service, would qualify for the Section 8(c)(2) exemption from liability.

As Enforcement Counsel explained in connection with PHH's first motion to dismiss on this issue, PHH's reliance on *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 566 U.S. ___ (2012), is misplaced. *See* EC First MTD Opp. at 17-19, 31. First, *Freeman* relates only to Section 8(b), which has nothing to do with Section 8(c)(2). Second, the sole question in *Freeman* was whether Section 8(b) requires two culpable actors or whether a single culpable actor, alone, can violate that section. *Freeman*, 132 S. Ct. at 2039 ("The dispute between the parties boils down to whether this provision prohibits the collection of an unearned charge *by a single settlement-service provider*" (emphasis added)). The case has nothing to do with the "services actually performed" provision of Section 8(b).[16] Third, *Freeman* did not hold that Section 8(b) permits a payment of any magnitude, no matter how

[16] Instead, *Freeman* turned on the meaning of the "portion, split, or percentage" language of Section 8(b). *Freeman*, 132 S. Ct. at 2040-43 (noting that "[b]y providing that no person 'shall give' or 'shall accept' a 'portion, split, or percentage' of a 'charge' that has been 'made or received,' 'other than for services actually performed,' § [8](b) clearly describes two distinct exchanges.").

excessive.[17] To the contrary, the Supreme Court characterized as "an absurdity" the notion that "a service provider could avoid liability by providing just a dollar's worth of services in exchange for [a] $1,000 fee" from another service provider. *Id.* at 2044 (internal quotation marks omitted).[18] Fourth, even if *Freeman* could be read to hold that Section 8(b) permits excessive fees of any magnitude, even when there are two culpable actors, because RESPA is "not a price control statute" (it cannot), the very notion of "price regulation" proscribing "unreasonably high fees" applies only to fees for *settlement services*. *See Freeman*, 132 S. Ct. at 2039-40 (explaining why it was obvious that Congress had not given HUD the authority "to proscribe the collection of unreasonably high fees *for settlement services*, *i.e.,* to engage in price regulation") (emphasis added); PHH Br. at 10. Proscribing overpayments between companies referring borrowers between one another, as Section 8(a) does, is not a "price control" of "unreasonably high [settlement service] fees." Such a proscription is simply

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[17] Although the Court spoke of "unreasonably high fees" being beyond the reach of Section 8(b), this was simply a reference to "overcharges" to borrowers – i.e., excessive settlement service fees *by a single culpable party*. *See Freeman*, 132 S. Ct. at 2040 ("Noting that even those Courts of Appeals which have found § 2607(b) not to be limited to fee-splitting situations have held that the statute does not reach *unreasonably high fees*, petitioners acknowledge that the statute does not cover *overcharges*") (emphasis added) (citations omitted). Similarly, the Court used the term "price controls" (once) to refer to overcharges – which it deemed "palpabl[y]" beyond the reach of Section 8(b), as the petitioners themselves had conceded. *Id.* at 2041. The Court simply held that excessive fees cannot form the basis for a violation *without the participation of a second culpable party*. In fact, when an excessive fee is split between two parties who have both performed settlement services, it is likely that the split violates Section 8(b) since at least the portion in excess of the value of the settlement service(s) for which the fee was charged is not "for services actually performed."

[18] Because the *Freeman* plaintiffs had conceded that mere "overcharges" were not covered by Section 8(b), the plaintiffs' argument that "undivided unearned fees" – a fee charged by a single culpable settlement service provider for which no service had been performed whatsoever – should be covered would have led to the "absurdity" that the culpable service provider could easily have turned the undivided unearned fee into an overcharge, and thereby escaped liability even under the plaintiffs' theory, simply by performing some nominal service. The Supreme Court explicitly deemed it "absurd" to craft a rule with such a glaring, rule-destroying loophole. That PHH would invoke *Freeman* as support for adopting just such a loophole (with respect to Section 8(c)(2)) demonstrates the vacuity of the argument.

a ban on kickbacks and referral payments. For all of these reasons, *Freeman's* Section 8(b) holding has no bearing on the applicability of Section 8(c)(2) to PHH's conduct.

PHH's argument that the "bona fide" requirement does not apply to "other payments" under Section 8(c)(2) is wrong for the additional reasons set forth in Enforcement Counsel's opposition to PHH's first motion to dismiss: (1) no case law supports PHH's position that Section 8(c)(2) erects a blanket safe harbor any time any service of any value has been performed, (2) PHH in fact performed no service whatsoever or, at minimum, there is a genuine dispute as to that fact precluding judgment in PHH's favor on this issue, and (3) PHH's interpretation of the scope of Section 8(c)(2) would negate Section 8 entirely because a dollar's worth of reinsurance could be "sold" for $10 million in referral payments (or more). *See* EC First MTD Opp. at 33-35.[19]

C. There is No Basis to Challenge this Tribunal's Jurisdiction Over All Claims Alleged and All Relief Sought in the Notice of Charges

In the March 13 Order, this Tribunal held that "[t]he Bureau therefore does possess jurisdiction to administratively adjudicate this proceeding, even as to claims arising prior to July 21, 2011, at least to the extent it seeks injunctive relief." 3/13 Order at 13. The decision further explained that "the issue of retroactivity of other forms of relief" had not been properly raised. *Id.* at 13 n.4. PHH nonetheless seeks reconsideration of its arguments that Enforcement Counsel lacks authority to pursue pre-July 21, 2011 claims and that the Bureau lacks jurisdiction to hear them. This motion for reconsideration raises no new law, no new facts, and no basis to believe there was error,

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[19] Enforcement Counsel also argued in its opposition to PHH's first motion to dismiss, as well as in Enforcement Counsel's own recent motion for summary disposition, that Section 8(c)(2) has no application where the payment in question was given or accepted in exchange for referrals. This limitation on the applicability of Section 8(c)(2) is reflected in, among other things, the requirement that a payment be bona fide – i.e., that it be for the service actually performed, and not for a referral. *See* EC First MTD Opp. at 30, 32; EC MSD at 22-25.

and should be summarily denied.[20]

To the extent PHH now argues that "the panoply of remedies in the CFPA" is only available "for conduct occurring after July 21, 2011," it is mistaken. The Bureau does *not* solely "stand in HUD's shoes under RESPA" *after* the designated transfer date (July 21, 2011). *See* PHH Br. at 11.[21] This proceeding was brought using the Bureau's powers under the CFPA, and it is the CFPA along with the other enumerated laws that govern this proceeding and any relief granted as a result. As the Tribunal has ruled, the Bureau's powers under "present law" – including the CFPA – can be invoked in this matter and applied to conduct preceding the transfer date, as long as they do not have "retroactive effect." 3/13 Order at 12-13. The only relevance of HUD's prior authority is to analyze whether the application of present law would have any impermissible retroactive effect, such as by "impair[ing] rights Respondents possessed when they acted, increas[ing] their liability for past conduct, or impos[ing] new duties with respect to transactions already completed." *Id.* at 12 (citing *Landgraf v. USI Films Prods.*, 511 U.S. 244, 280 (1994)). As Enforcement Counsel explained at the March 5 oral argument, March 5 Tr. at 36:14-39:17, later briefed, EC Prehearing Br. at 16-18, and as set forth in Subpoint 3 below, there is no such retroactive effect here. PHH's arguments that injunctive relief would be a moot remedy for its violations and that this Tribunal lacks "inherent" equitable authority are similarly misguided, for the reasons set forth below.

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[20] PHH has not produced any basis for reconsideration of the Tribunal's view of *Pezza v. Investors Capital Corp.*, 767 F.Supp.2d 225 (D. Mass. 2011). In any event, the cases cited by PHH deal only with the particular issue of how certain provisions of the Dodd-Frank Act may impact arbitration clauses, and whether those provisions are purely jurisdictional changes affecting procedural rights, or whether they impact the substantive rights of the parties. *See id.* at 232-233 ("The difficulty here is that Section 922 of the Act appears to fall, at least arguably, within the scope of two competing types of statutes referred to in *Landgraf,"* that is, statutes affecting contractual or property rights versus statutes "conferring or ousting jurisdiction."). This issue is irrelevant to this case and to PHH's retroactivity arguments.

[21] In its complete context, it is clear that Enforcement Counsel's reference to "HUD's shoes" merely sought to explain that its investigation was originally inherited from HUD. *See also* March 5 Tr. at 91:14-24 (clarifying this point).

1. Injunctive Relief Remains One of the Appropriate Remedies in this Case

PHH argues that an injunction cannot be obtained in this matter because the conduct at issue has ceased. This is purely a question of what relief might be appropriate once liability is found, but regardless, PHH is again incorrect. PHH raised this argument on a purported "motion in limine,"[22] which the Tribunal initially summarily declined to entertain, *see* 3/ 21 Order at 1-2, and later explicitly denied. March 24 Hearing Tr. 32:3-25 (denying motion to "strik[e] any relief other than injunctive [relief]" after finding that it lacked "any merit to [it] at all"). Yet again, PHH has offered no new law, no new facts, and no basis to reconsider this clear ruling.

PHH's attempted second bite at the apple fails to provide any basis to preclude injunctive relief as a remedy in this case. PHH claims that "there is nothing left to enjoin," and thus, apparently, that injunctive relief is moot. Under the facts and the governing law, including the cases it cites, PHH is mistaken.

A tribunal's "power to grant injunctive relief survives discontinuance of the illegal conduct." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Indeed, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.,* 528 U.S. 167, 190 (2000) (citations/quotations omitted). Voluntary cessation "moots a case … only if it is *absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (emphasis in original) (citation/quotation omitted). *See Friends of the Earth, Inc.*, 528 U.S. at 170 ("a defendant claiming that its voluntary compliance moots a case has a formidable burden."). Thus, "[o]nce a violation is demonstrated," a party seeking an injunction "need show only that there is some reasonable

[22] Resp. Mot. in Lim. to Strike the Bureau's Claims for Remedies Other Than Inj. Relief for Conduct Prior to July 21, 2011 (No. 77).

likelihood of future violations." *United States CFTC v. Yu*, 2012 WL 3283430, at *4 (N.D. Cal. Aug. 10, 2012) (quoting *Hunt*, 591 F.2d at 1220).

In weighing injunctive relief, the factors "[t]o be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." *W. T. Grant Co.*, 345 U.S. at 633. A party seeking to show that such relief is moot must demonstrate that "there is no reasonable expectation that the wrong will be repeated. The burden is a heavy one." *Id.*

"[T]he egregious nature of past violations is a factor" weighing in favor of broad, permanent injunctive relief. *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1296 (D. Minn. 1985) (citing *S.E.C v. Blatt*, 583 F.2d 1325, 1334, n. 29 (5th Cir. 1978)). A tribunal should examine the totality of the circumstances, and evidence indicating "that the infraction may not have been an isolated occurrence," too, is "always relevant." *Hunt*, 591 F.2d at 1220 (citations/quotations omitted); *see also EEOC v. Karenkim, Inc.*, 698 F.3d 92, 100 (2d Cir. 2012) (where conduct has ceased, whether past violations were "isolated" or "widespread" is relevant to consideration of an injunction). Past misconduct, while not conclusive, is "'highly suggestive' of the likelihood of future violations." *CFTC v. Complete Developments, LLC*, 2014 WL 794181, at *26 (N.D. Ohio Feb. 26, 2014) (quoting *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979)). Where the violator has continued to insist it did nothing wrong, it "has prompted some courts to look favorably on injunctive relief." *Hunt*, 591 F.2d at 1220 (citing *SEC v. Shapiro*, 494 F.2d 1301, 1308 (2d Cir. 1974); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972)). If a defendant's particular circumstances make future violations possible, injunctive relief is appropriate. *SEC v. Commonwealth Chem. Securities, Inc.*, 574 F.2d 90, 100 (2d Cir. 1978).

None of the cases cited by PHH are to the contrary. *SEC v. Tourre* is distinguishable in that the court denied an injunction because there was "no evidence that [the individual defendant] ha[d]

any intention of returning to the securities industry." -- F. Supp. 2d --, 2014 WL 969442, at *15-16 (S.D.N.Y. Mar. 12, 2014). In *W. T. Grant Company*, the Court declined to reverse the district court's denial of an injunction only under an exceedingly deferential review standard. *See* 345 U.S. at 634 ("Were we sitting as a trial court, this showing might be persuasive. But the government must demonstrate that there was no reasonable basis for the District Judge's decision."). And the *Monsanto* case has nothing to do with the alleged cessation of violative conduct. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S.Ct. 2743, 2761-62 (2010) ("this Court need not express any view on whether injunctive relief of some kind was available to respondents on the record before us.").

The undisputed evidence shows that PHH today remains a very large mortgage lender that controls the referral of substantial amounts of private mortgage insurance business, on which MI companies are critically dependent. **SOUF** ¶¶ 6, 7, 17, 18. Contrary to PHH's assertions, its pursuit of new and revised captive arrangements did not occupy a narrow window in 2006-2007 and then cease. Such efforts were continuing, from the late 1990s until well after the collapse of the mortgage market and financial crisis. **SOUF** ¶¶ 31, 32, 36-38, 40, 43, 44, 46. In other words, the incentives that gave rise to PHH's elaborate and coordinated violative scheme in the first place, beginning in 1995 and ending less than a year ago, have not changed. Moreover, contrary to PHH's assertion, there are multiple potential captive "partner" MIs that, like PHH itself, are not currently under injunction and with which PHH could form captive arrangements at any time if not enjoined from doing so.[23] PHH is well situated in the industry to repeat this or similar violative conduct, and has a strong profit motive to do so, as demonstrated by the hundreds of millions of dollars it has already received in illegal kickbacks. PHH, of course, continues to insist its conduct was spotless. Given all

[23] One of those MIs, Essent, is already receiving abundant referrals from PHH. *See* **ECX 0654** (PHH. Suppl. NORA), at Ex. M (showing dialer settings for Essent of 30% on 4/2/12, 45% on 8/2/12, 40% on 9/6/12, and 30% on 1/24/13). Another such company is NMI. 3/25/14 Hearing Tr. 326:22-25 (Culver).

these circumstances, PHH cannot meet its "stringent" burden to show that injunctive relief would be moot, *Friends of the Earth, Inc*, 528 U.S. at 189, namely that "it is *absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Adarand Constructors, Inc.* 528 U.S. at 222 (emphasis in original) (citation/quotation omitted). And PHH most certainly cannot show that it is entitled to dismissal of the plea for injunctive relief either purely as a matter of law, or because there is no triable fact issue.

An injunction as well as ancillary equitable relief, such as in the form of disgorgement and restitution, are necessary in this case to protect the public interest and enforce Section 8 of RESPA against captive reinsurance schemes. Injunctive relief would certainly have been necessary on July 21, 2011,[24] and it remains necessary today. There may well be no other available remedy to stop this conduct from repeating in the future.

2. This Tribunal Has Express Statutory Authority to Grant Equitable Relief

This Tribunal does not need "inherent" authority to provide equitable relief on the claims against PHH because it has express statutory authority to do so under Section 1055(a) of the CFPA:

> The court (or the Bureau, as the case may be) in an action or adjudication proceeding brought under Federal consumer financial law, **shall have jurisdiction to grant any appropriate legal or equitable relief** with respect to a violation of Federal consumer financial law . . .

12 U.S.C. § 5565(a)(1) ("Administrative Proceedings or Court Actions") (emphasis added).[25] Section 1055(a)(2) goes on to list, "without limitation," some of the particular forms of relief encompassed by this broad remedial authority. 12 U.S.C. § 5563(a)(2) (listing, *inter alia*, disgorgement and

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[24] It is undisputed that Atrium's captive reinsurance agreements with United Guaranty and Genworth – its two largest agreements – were in effect as of July 21, 2011 and that ceding to Atrium continued under those arrangements until their respective commutations in 2012 and 2013. *See* 3/13 Order at 18, ¶¶ 10 & 12; *see also* **SOUF** ¶ 51.

[25] The statute's definition of "Federal consumer financial law" includes RESPA. *See* CFPA, 12 U.S.C. § 5481(12)(M) (defining RESPA as an "enumerated consumer law").

restitution). This Tribunal noted this express authority in the March 13 Order. *See* 3/13 Order at 11 (citing 12 U.S.C. §§ 5563-5565) (the Bureau's "administrative authority extends to both legal and equitable relief"). PHH admits that "[t]he Bureau's administrative process can [ ] be utilized to enjoin conduct, get restitution, impose civil money penalties, obtain recovery of costs and seek disgorgement." PHH Br. at 11. Therefore, PHH was well aware that the following assertion a mere four pages later was clearly erroneous: "[the Bureau's] relief is limited to simply an order enjoining future conduct. That is so because any other equitable relief is only available in a court of law." PHH Br. at 15. This frivolous argument is belied by the plain language of Section 1055 of the CFPA, 12 U.S.C. §§ 5565, other statements within PHH's own brief, PHH Br. at 11, the Tribunal's March 13 Order, Order at 11, and the Tribunal's March 21 Order confirmed by the March 24 ruling at the start of the hearing denying PHH's Motion in Limine, 3/24 Hearing Tr. 32:3-25 (following 3/21 Order at 1-2). There is no basis for reconsideration of this well-settled issue.

3. Granting Equitable Relief to Remedy PHH's RESPA Violations Would Not Pose a "Retroactive Effect"

Any "appropriate legal or equitable relief" authorized by Section 1055 may be awarded in this proceeding, provided that the relief does not have an impermissible "retroactive effect." 12 U.S.C. § 5565(a)(1); *Landgraf v. USI Films Prods.*, 511 U.S. 244, 280 (1994). As discussed in Enforcement Counsel's Prehearing Brief, although the CFPA only recently expressly codified the availability of remedies such as disgorgement and restitution for RESPA violations in any enforcement proceeding, these are not new forms of relief for RESPA violations because these remedies were previously available to the government (that is, HUD) under equitable principles. This Tribunal has already ruled – correctly – that "[t]o the extent Enforcement seeks the same relief as was formerly available to HUD," there is no retroactive effect in applying present law to all the conduct alleged in this matter. *See* 3/13 Order at 12 ("To the extent Enforcement seeks the same relief as was formerly available to HUD, Dodd Frank's expansion of the available adjudicatory

forum to include the present forum affects only jurisdiction. It does not impair rights Respondents possessed when they acted, increase their liability for past conduct, or impose new duties with respect to transactions already completed.").

Prior to the enactment of the CFPA, RESPA's Section 8 anti-kickback provision provided that "[t]he Secretary . . . may bring an action to enjoin violations. . . ." 12 U.S.C. § 2607(d)(4).[26] Since the power to enjoin is an equitable one, an action for an injunction by HUD would have invoked the full equitable powers of the court. *See Jackson v. Property I.D. Corp., et al.,* CV-07-3372-GHK (CWx) (C.D. Cal. Mar. 24, 2008), **Exh. A** to EC Prehearing Br. In *Property I.D.*, the court held that the power to enjoin RESPA violations "calls forth the full equitable jurisdiction of this Court," "including a range of equitable relief, among which are disgorgement and accounting." *Property I.D.* at 3. Relying upon longstanding Supreme Court precedent, the court concluded that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Property I.D.* at 3 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (internal quotations omitted)). In cases of public interest, such as this one, "those equitable powers assume an even broader and more flexible character." *Id.* The court found that because nothing in RESPA "supports a negative inference about the availability of other equitable remedies in a suit brought by HUD," it would "not infer that Congress intended to exclude such remedies from § 2607 by failing to enumerate them." *Property I.D.* at 4. Instead, it determined that "Congress intended to invoke the full range of equitable remedies in § 2607," including disgorgement. *Property I.D.* at 4-5.

[26] The Dodd-Frank Act amended this language to include "the Bureau"; beyond that, no other changes were made to this language during the period relevant to the conduct at issue in this case. Additional aspects of the Bureau's enforcement authority relating to violations of RESPA, however, were codified in various other provisions of the CFPA, such as Section 1055.

PHH provides no authority to challenge the careful reasoning of *Property I.D.,* and no basis to believe that a HUD action in federal court to enforce RESPA would not have invoked the full range of equitable remedies. The holding of *Property I.D.* as applied to RESPA is consistent with myriad decisions assessing the scope of ancillary equitable relief in government actions or proceedings where the statute specifies only an agency's ability to enjoin.

For example, Section 13(b) of the Federal Trade Commission Act provides "[t]hat in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). Courts have widely held that although only injunctive relief is specified, "[t]his provision gives the federal courts broad authority to fashion appropriate remedies for violations of the Act." *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (approving restitution order); *FTC v. Amy Travel Serv., Inc.,* 875 F.2d 564, 571 (7th Cir.), *cert. denied,* 493 U.S. 954 (1989). In *FTC v. H.N. Singer, Inc.*, the FTC sought "refunds to third parties as a form of relief ancillary" to a Section 13(b) injunction. 668 F.2d 1107, 1109 (9th Cir. 1982). The district court froze the defendants' assets pending a trial on the merits, and they appealed. The Ninth Circuit invoked *Porter*:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Power is thereby resident in the District Court . . . 'to do equity and to mould each decree to the necessities of the particular case.'

Id. at 1112-13 (quoting *Porter*, 328 U.S. at 397-98 (internal citations omitted)). Without "a necessary and inescapable inference" in the statute to "restrict[] the court's jurisdiction in equity," the court concluded that the authority to obtain an injunction invoked the district court's "authority to grant any ancillary relief necessary to accomplish complete justice." *Id.* at 1112-13 (9th Cir. 1982) (citing *Brown v. Swann*, 10 Pet. 497, 503 (1836)) ("The great principles of equity, securing complete justice,

should not be yielded to light inferences, or doubtful construction."). The court upheld the availability of ancillary relief. *See also SEC v. Sekhri*, No. 98 Civ. 2320 (RPP), 2002 WL 31100823, at *16 (S.D.N.Y. July 22, 2002) ("disgorgement is rather routinely ordered for insider trading violations despite a lack of specific authorizations for that remedy under the securities law.") (quoting *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103-04 (2d Cir. 1972) ("[o]nce the equity jurisdiction of the district court has been properly invoked by a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy" even where not "specifically authorize[d]" by statute.), *id.* ("[i]t is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded.") (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)); *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (it does not matter that Congress did not "explicitly authorize a monetary remedy" for violations because power to award disgorgement and other equitable remedies rests in inherent authority of the district courts."), *id.* ("disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others").

In RESPA, as in the securities laws, there is "no indication in the language or the legislative history . . . that even implies a restriction on the equitable remedies of the district courts." *SEC v. Cavanagh*, 445 F.3d 105, 117-18 (2d Cir. 2006) (citing *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391 (1970)) (regarding the Securities Act of 1934). These powers are at their apex when the government's ability to pursue claims in the public interest is involved. *See also United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1054 (10th Cir. 2006) (the government could obtain equitable relief, including disgorgement, based on the Food, Drug, and Cosmetics Act's provision that "the district courts of the United States . . . shall have jurisdiction, for cause shown to restrain violations" (quoting 21 U.S.C. § 332(a)); *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 638-39 (S.D.N.Y. 2011) (finding that disgorgement was available as an equitable remedy for violations of the Sherman

Act, which vests a "district court with 'jurisdiction to prevent and restrain' § 1 violations, and charges 'the Attorney General[ ] [with the duty] to institute proceedings *in equity* to prevent and restrain such violations'" (quoting 15 U.S.C. § 4 (emphasis added)). These precedents all support the uncontroverted holding of *Property I.D.*: RESPA's authorization to "bring an action to enjoin violations" clearly gave HUD the power to obtain any appropriate form of equitable relief.

Where "federal courts ha[ve] authority . . . to award [remedies] based upon equitable principles," a statute expressly providing for the same may be applied to conduct that occurred before the enactment of the statute without provoking retroactivity concerns. *Landgraf v. USI Film Products*, 511 U.S. 244, 277 (1994) (reviewing its decision in *Bradley v. School Bd. of Richmond,* 416 U.S. 696, 94 (1974) to authorize attorney's fees under a new statute, even for services rendered before the enactment of the law); *see also SEC v. First Pacific Bancorp,* 142 F.3d 1186, 1193 n.8 (9th Cir. 1998), *cert. denied sub nom., Sands v. SEC,* 525 U.S. 1121 (1999) (the proposed remedy could be invoked without impermissible retroactive effect, because the new law "merely codified the equitable authority to impose [an] officer and director bar which the courts already possessed and exercised").

As applied to RESPA Section 8 violations, Section 1055's enumeration of equitable remedies simply makes their longstanding availability explicit. Its application to this case would not impair any rights that PHH possessed when it acted, nor impose any new duty on PHH with respect to transactions already completed. For the sake of clarity, this Tribunal should confirm that both injunctive relief and all forms of equitable relief may be awarded as it deems appropriate in this matter, without regard to the transfer date.[27]

[27] Enforcement Counsel seeks civil money penalties in this proceeding as well, but solely as to conduct occurring on or after the transfer date, July 21, 2011.

D. No RESPA Statute of Limitations Applies to this Adjudicative Proceeding

PHH resuscitates its argument, previously rejected by the Tribunal, *see* 3/13 Order at 8-9, that the three year statute of limitations for "actions brought by the Bureau" set forth in Section 16 of RESPA bars Enforcement Counsel's claims that accrued prior to January 25, 2009. PHH Br. at 17-25. Once again, PHH fails to recognize or satisfy the requirements for seeking reconsideration of a previously decided issue. On this basis alone, the Tribunal should deny this aspect of PHH's motion.

Even if PHH were entitled to a decision on its statute of limitations argument, the Tribunal should deny the motion for the same reasons it denied PHH's earlier motion.[28] In particular, under the rule set forth in *BP America Production Co. v. Burton*, the term "action" ordinarily denotes "judicial, not administrative, proceedings." 549 U.S. 84 (2006). That rule renders the Section 16 statute of limitations inapplicable to the instant proceeding. *See* 3/13 Order at 8. Section 16 applies only to an "action" under Section 8 that is brought in an appropriate "court." *See id.* at 9 (citing 12 U.S.C. § 2614). 12 U.S.C. § 5563 applies to administrative "proceedings," unfettered by any limitations period, whereas the forum and limitations provisions of 12 U.S.C. § 5564 apply only to civil

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[28] The Tribunal should also reject PHH's new argument that an injunction entered in a private action, *Pedraza v. United Guaranty Corp., et al.*, No. 199 Civ. 239 (S.D. Ga. 1999), precludes Enforcement Counsel "from arguing that UGI, and thus, Atrium, failed to comply with RESPA at any time prior to December 31, 2003." This argument is apparently premised on a provision of the injunction that would "deem[]" UGI's conduct "to be in compliance with RESPA" if it conformed to the requirements of the injunction. PHH Br. at 21 n.15. Neither HUD nor any government agency was a party to, or otherwise bound by, the injunction in that private litigation. This injunction therefore plainly does not "preclude" the Bureau in any manner. *See* Fed. R. Civ. P. 65(d)(2) (injunctions bind only the parties and those in privity with them). This rule has particular force in the case of government prosecutions because "the United States has an interest in enforcing federal law that is independent of any claims of private citizens" and "any contrary rule would impose an onerous and extensive burden upon the United States …." *Herman v. South Carolina Nat. Bank*, 140 F.3d 1413, 1425 (11th Cir. 1998) (quotations and citations omitted) (applying the "general principle that a private plaintiff's prior litigation does not bar the government's action").

"actions" brought in "court[s]." *See id.* at 9. As a result, RESPA Section 16 does not apply to this proceeding. *Id.*[29]

E. At a Minimum, This Tribunal May Award Relief for Any Violations Occurring or Continuing After July 21, 2008

The question of whether any part of an action or proceeding is barred by a statute of limitations is an affirmative defense on which PHH bears the burden. *See, e.g., Payne v. District of Columbia*, -- F. Supp. 2d --, No. CV 10-679 (RWR), 2013 WL 6234517, at *4 (D.D.C. Dec. 3, 2013) (noting that the defendants bear the burden of demonstrating that claims are time-barred); *Firestone v. Firestone*, 76 F.3d 1205, 1210 (D.C. Cir. 1996) ("The statute of limitations is an affirmative defense that defendant must prove"). As discussed at length above, this Tribunal has ruled that the statute of limitations set forth in Section 16 of RESPA has no application to this proceeding. 3/13 Order at 8-9. This Tribunal has also ruled that the CFPA provides no statute of limitations for administrative adjudications. *Id.* at 9. Both of those issues were correctly decided after thorough briefing, debate, and deliberation, and PHH has failed to present any basis for reconsideration. The only potential issue that remains is whether awarding equitable relief for the full scope of the violations alleged – after a finding of liability – would pose a "retroactive effect" in comparison to the status quo before enactment of the CFPA. *See* Section IV.C *supra*.

[29] Enforcement Counsel previously identified further grounds for denying PHH's current motion. *See* EC First MTD Opp. at 22-23. Other federal regulators enforce RESPA without any limitations period, under Section 8 of the Federal Deposit Insurance Act (FDIA). Section 1053 of the CFPA, 12 U.S.C. § 5563, was modeled on Section 8 of the FDIA. In addition, Section 1098 of the CFPA – the very statute that created the Bureau and endowed it with the authority to conduct administrative proceedings – amended RESPA in numerous respects, including RESPA Section 16 itself. Had Congress wanted RESPA's statute of limitations to extend to the Bureau's newly created administrative powers, it could have amended RESPA Section 16 to that effect in Section 1098. Congress's decision not to do so indicates its intention that RESPA's three year limitations period for "actions" should have the same application to the Bureau's administrative proceedings that it has always had to other federal regulatory agencies' administrative proceedings: none.

Changes to a statute of limitations are typically deemed "procedural" changes that do not provoke retroactive effects. *See Payne*, 2013 WL 6234517 at *4 (applying new statute of limitations to conduct occurring before its enactment because the change was procedural in nature). "Generally, retroactivity concerns do not bar a changed limitation period's application to a suit filed after the amendment's effective date." *Steven I. v. Cent. Bucks Sch. Dist.*, 618 F.3d 411, 414 (3d Cir. 2010) (citing cases); *see also Vernon v. Cassadaga Valley Cent. Sch. Dist.,* 49 F.3d 886, 890 (2d Cir. 1995) ("Retroactivity concerns, therefore, generally do not bar the application of a changed statute of limitations to a complaint filed after the amendment. . . . The conduct to which the statute of limitations applies is not the primary conduct of the defendants . . . but is instead the secondary conduct of the plaintiffs, the filing of their suit."); *Forest v. United States Postal Serv.,* 97 F.3d 137, 140 (6th Cir. 1996) (finding that the application of a new statute of limitations is prospective because it applies to the filing of the complaint, which occurred after the statute was enacted). It is clear that a newly-extended statute of limitations can be applied to pending cases where the conduct pre-dates that change in the law, except where doing so would revive an otherwise time-barred claim. *FDIC v. Belli,* 981 F.2d 838, 842–43 (5th Cir. 1993) (applying a statute extending the statute of limitations retroactively to pending cases except where to do so would revive an expired claim); *Chenault v. U.S. Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994) (same); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 950 (1997) (citing *Chenault* in dicta).

Applying the law of the case, there can be no doubt that the Bureau can adjudicate and remedy any RESPA claim that was live as of July 21, 2011, the Bureau's transfer date. This would encompass, at a minimum, any RESPA claim that accrued on or after July 21, 2008, because HUD would have been subject to a statute of limitations of three years to pursue those claims and could

have done so on July 21, 2011 (when its authority transferred to the Bureau).[30] But PHH has failed to meet its burden to prove that any of the claims at issue were time-barred as of July 21, 2011. As discussed in detail in opposition to PHH's first, failed motion to dismiss the NOC and incorporated here, all of PHH's violative conduct is actionable under the continuing violations doctrine so long as some of the acts occurred within the limitations period. *See* EC First MTD Opp. at 23-26; *see also* Sec. E, *supra*. Since the NOC properly pleads the vast scope of the violation, PHH cannot prevail on a motion to dismiss. *See, e.g.,* NOC ¶¶ 16-55, 71-83, 94, 97, 101, 103. In addition, Enforcement Counsel has already brought forth evidence to demonstrate that PHH engaged in a pattern and practice of violating RESPA through the use of captive reinsurance arrangements until at least May 30, 2013, and certainly by any measure, well after July 21, 2008. *See, e.g.,* **SOUF** ¶¶ 44-47, 51-52. By contrast, PHH has failed to meet its burden to prove that any of this conduct was time-barred.

In addition to the authority HUD possessed prior to the transfer date, however, authority possessed by state insurance commissioners to pursue RESPA claims must be considered in analyzing any potential "retroactive effects" upon PHH. *See* 12 U.S.C. 2607(d)(4). As PHH has constantly noted, for example, the New York State Department of Insurance (now Department of Financial Services) had authority to regulate PHH's activities with respect to Atrium. Under Section 2409(c) of the N.Y. Insurance Law, the Department could pursue RESPA claims as "determined violations," that is, "any unfair method of competition or unfair or deceptive act or practice, which is . . . determined by the superintendent pursuant to section two thousand four hundred five of this article to be such method, act or practice." Section 2405, in turn, empowered the Department to hold administrative proceedings "[w]henever the superintendent has reason to believe that a person . . . has been engaged in or is engaging in any method of competition, or any act or practice, which

[30] Such claims would clearly include any continuing violations of RESPA for which any act occurred on or after July 21, 2008. *See* EC First MTD Opp. at 23-26.

could become a determined violation . . . ." The Department's powers under Article 24 were "additional to any other powers to enforce penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices defined in section two thousand four hundred two of this article as defined violations or determined violations"; that is, these enforcement powers supplemented the authority directly granted to the insurance commissioners under RESPA. N.Y. Ins. Law § 2409(a). The N.Y. Insurance Law does not contain any time limit on when its administrative proceedings must be brought. For the same reasons that the statute of limitations on court actions set forth by Section 16 of RESPA has no application to Bureau administrative proceedings, it similarly would have had no application to an administrative proceeding brought by the New York insurance commissioner (or any other similarly-structured regulatory regime to which PHH might have been subject). Since PHH was continuously subject to these potential RESPA claims by the Department (and perhaps other state insurance regimes) and any such claims remain unexpired today, there is no retroactive effect in permitting these RESPA claims to proceed now before the Bureau without regard to Section 16 of RESPA.

To consider the full scope of the conduct alleged, the Tribunal may also determine whether the continuing violations doctrine applies and, if not, what constitutes a "violation" of Section 8(a). Enforcement Counsel respectfully directs the Tribunal to its earlier arguments on these issues, *see* EC First MTD Opp. at 23-26;[31] *id.* at 26-29,[32] as well as the extensive testimony at the hearing to

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[31] PHH argues that "[t]he language used by Congress can only apply to a discrete event" and not to a continuing violation. PHH Br. at 18. PHH cites only *Snow v. First Am. Title Ins. Co.*, 332 F.3d 356 (5th Cir. 2003), in support of this proposition. *Snow* is not a continuing violation case, and at any rate was incorrectly decided for reasons previously briefed. EC First MTD Opp. at 27-29.

[32] In its current motion, PHH quotes *Mullinax v. Radian Guaranty* for the argument that "a borrower who elected to make monthly payments would have a floating statute of limitations period based upon the date of his last payment." 199 F. Supp. 2d 311, 325 (M.D.N.C. 2002). PHH Br. at 19. The *Snow* court cited *Mullinax* on this point as well. *Snow*, 332 F.3d at 361. This argument has no application to a government enforcement proceeding. More importantly, this statement

date demonstrating the continuous, ongoing nature of the conduct at issue.

F. The McCarran-Ferguson Act Does Not Affect the Claims in this Matter

Once again, PHH argues that Enforcement Counsel's claims are barred by the McCarran-Ferguson Act. This Tribunal has already rejected this defense. March 24 Hearing Tr. 23:4-14. That ruling is now the law of the case and may not be reconsidered absent "extraordinary circumstances," which are lacking.

In any event, the motion should be denied insofar as it relies on the McCarran-Ferguson Act, and the corresponding seventh affirmative defense should be stricken, for the same reasons given by the Tribunal at the hearing on March 24, 2014, 3/24/14 Hearing Tr. 23:4-14 (citing *Patton v. Triad Guar. Ins. Corp.*, 277 F.3d 1294, 1299 (11th Cir. 2002)), or for any of the additional reasons set forth below.

The McCarran-Ferguson Act provides that

> No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee upon such business, unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012. The Act establishes an "anti-pre-emption rule . . . instruct[ing] courts not to 'construe' [f]ederal [s]tatute[s] to 'invalidate, impair, or supersede'" state statutes enacted for the purpose of regulating the business of insurance unless "the conflicting federal statute '*specifically relates*

mischaracterizes the conduct that constitutes a violation under Enforcement Counsel's (and the *Mullinax* and *Snow* plaintiffs') interpretation of Section 8(a). It is not the *borrower's* payment that constitutes a violation (and causes the statute of limitations to "float"). It is the *violator's* acceptance (or giving) of a kickback payment. Therefore, Enforcement Counsel is not advocating that Section 8(a) "allow[s] borrowers to elect what statute of limitations applies to their claims." PHH Br. at 19 n.14 (citing *Mullinax*). It is the Section 8(a) violator who elects when the violation occurs, and thus when the statute of limitations begins to run on that particular violation, by choosing to accept (or give) an illegal kickback at a particular time. The timing of the violations will match the timing of the borrower's payments only if the violator chooses, as PHH did, to tie its illegal kickbacks to the borrower's payments. There is no injustice or anomaly in this rule, and it is what the statute plainly requires.

to the business of insurance.'" *Barnett Bank of Marion County v. Nelson,* 517 U.S. 25, 37-38 (1996) (quoting 15 U.S.C. § 1012(b)) (emphasis in original). "'[T]he Act does not seek to insulate state insurance regulation from the reach of *all* federal law,' but only from *inadvertent* federal regulation." *Patton v. Triad Guar. Ins. Corp.*, 277 F.3d 1294, 1297 (11th Cir. 2002) (quoting *Barnett Bank*, 517 U.S. at 40) (emphasis in original). The McCarran-Ferguson Act essentially allows a state law to "reverse preempt" a federal law if three criteria are met: (1) the federal law does not "specifically relate[] to the business of insurance," (2) application of the federal law would "invalidate, impair, or supersede" the state law, and (3) the state law is enacted "for the purpose of regulating the business of insurance". 15 U.S.C. § 1012.

PHH's McCarran-Ferguson defense fails because RESPA "relates to the business of insurance." In addition to the Bureau, Section 8(d)(4) authorizes "the insurance commissioner of any State" to enforce Section 8; 12 U.S.C. § 2607(d)(4). This alone demonstrates that RESPA, and Section 8 in particular, "specifically relates to the business of insurance." 15 U.S.C. § 1012. The 11th Circuit has reached precisely this conclusion, reasoning that "[t]he Commissioners' authority to enforce RESPA is a persuasive indication that Congress contemplated that RESPA's provisions apply to insurers generally." *Patton*, 277 F.3d at 1299. Other provisions of RESPA reinforce this conclusion. One purpose of RESPA is to reduce the cost of funding escrow accounts "established to insure the payment of real estate taxes *and insurance*." 12 U.S.C. § 2601(b)(3) (emphasis added). "Settlement Service" is defined to mean several kinds of insurance, including: title insurance, 12 U.S.C. § 2602(3); 12 C.F.R. § 1024.2; mortgage insurance, 12 C.F.R. § 1024.2; hazard, flood, or other casualty insurance, 12 C.F.R. § 1024.2; and mortgage life, disability, or similar insurance designed to pay a mortgage loan upon disability or death of a borrower, 12 C.F.R. § 1024.2. These settlement services are all specifically subject to the requirements of Section 8. Furthermore, other provisions of RESPA regulate the manner in which a mortgage servicer administers escrow accounts by, among

other things: requiring a notice when servicing is transferred from the transferor servicer, which must include information about the impact of the transfer on "the terms of or the continued availability of mortgage life or disability *insurance* or any other type of optional *insurance* and what action, if any, the borrower must take to maintain coverage," 12 U.S.C. § 2605(b)(3)(F) (emphasis added); providing standards for the administration of escrow accounts, including "make payments from the escrow account for such taxes, *insurance* premiums, and other charges in a timely manner as such payments become due," 12 U.S.C. § 2605(g) (emphasis added); and regulating the use of "force-placed hazard *insurance*," 12 U.S.C. § 2605(k)(1)(A), (k)(2), (l), (m) (emphasis added). RESPA's evident and extensive "relat[ion] to the business of insurance," on its own, suffices to defeat PHH's defense.

Furthermore, enforcement of RESPA in this proceeding would not "invalidate, impair, or supersede" any state law that is enacted "for the purpose of regulating the business of insurance." The Supreme Court has explained that, within the context of the McCarran-Ferguson Act, the term "invalidate" means "to render ineffective, generally without providing a replacement rule." *Humana Inc. v. Forsyth,* 525 U.S. 299, 307 (1999). The term "supersede" means "to displace (and thus render ineffective) while providing a substitute rule." *Id.* RESPA, and Section 8 in particular, does not render ineffective any state law regulating the business of insurance, with or without providing a substitute rule. It therefore neither "invalidates" nor "supersedes" any such law. Finally, the term "impair" means "directly conflict with state regulation … frustrate any declared state policy or interfere with a State's administrative regime." *Id.* at 310. The Supreme Court has permitted the SEC "to unwind an insurance company merger that the Arizona Director of Insurance had approved" because "Arizona ha[d] not commanded something which the Federal Government s[ought] to prohibit. It ha[d] permitted respondents to consummate the merger; it did not order them to do so." *Id.* at 311 (discussing *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969) (internal quotation marks

and citations omitted)). The *Forsyth* Court went on to note that the federal law at issue in the *National Securities* case did not frustrate state policy or interfere with the administrative regime. *Id.* Similarly, the NOC targets conduct that state law, at most, merely allowed; not conduct that state law compelled. The state laws and regulations cited by PHH would not be impaired by the enforcement of RESPA against the Atrium entities, and certainly not by such enforcement against the PHH mortgage entities. The application of RESPA in this proceeding therefore does not impair any state's regulation of the business of insurance within the meaning of the McCarran-Ferguson Act. The absence of any "invalidat[ion]," "superses[sion]" or "impair[ment]" of state insurance law constitutes a second independent ground for summarily disposing of PHH's seventh affirmative defense. Likewise, enforcement of Section 8 against Atrium (or any other PHH entity) would not have any effect on any state insurance regulator's authority to "adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or regulator" in violation of 12 U.S.C. § 5552(d)(3).[33]

G. Atrium and Atrium Re Are Proper Respondents in This Proceeding

PHH next argues that "Atrium and Atrium Re must be dismissed from this action because they are neither Covered Persons nor Service Providers to Covered Persons," as required by Section 1053(b) of the CFPA, 12 U.S.C. § 5563(b). PHH Br. at 34. Atrium and Atrium Re (collectively "Atrium") cannot be dismissed based on this argument.

First, PHH forfeited this argument by failing to assert it in the Answer or to raise it in its

[33] To be clear, Enforcement Counsel takes no position as to whether PHH's purported captive reinsurance is "insurance" for the purpose of any state's law. We merely contends that, whatever its status under state law, PHH's purported captive reinsurance is not a compensable service within the meaning of Section 8 of RESPA, and that even if it is such a "service," PHH accepted excessive compensation in order to mask kickbacks and referral payments.

initial motion to dismiss.[34] *See*, *e.g.*, *Gilbert v. Napolitano*, 670 F.3d 258, 260-61 (D.C. Cir. 2012) ("a party must first raise its affirmative defenses in a responsive pleading before it can raise them in a dispositive motion"); *cf.* Fed. R. Civ. P. 8(c)(1) ("a party must affirmatively state any avoidance or affirmative defense" in its answer), 12(g)(2) (failure to raise defense in initial motion to dismiss constitutes waiver).[35]

Second, even if Atrium were not a "covered person" or a "service provider" to PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans, LLC (the PHH mortgage origination entities), the Tribunal should disregard the formal distinction between Atrium and the mortgage origination entities because PHH created Atrium for the sole purpose of funneling kickback payments from the MIs. Atrium has never had any independent employees, offices, or operations of any significance. Atrium served no function other than to facilitate the violations of law by PHH alleged in the NOC. *Cf. Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1336 (Fed. Cir. 2013) ("the [alter ego] doctrine can also be applied in reverse to reach the assets of a controlled entity. It is particularly appropriate to apply the alter ego doctrine in 'reverse' when the controlling party uses the controlled entity to hide assets or secretly to conduct business to avoid the

[34] The Tribunal summarily declined to entertain PHH's earlier "motion in limine" making the exact same argument. 3/21 Order at 1-2. To the extent this decision was based on PHH's forfeiture of this affirmative defense, that ruling is itself the law of the case and PHH is not entitled to reconsideration at this late date.

[35] PHH mistakenly suggests that Enforcement Counsel bears the burden of establishing that Atrium and Atrium Re are subject to it authority under Section 1053(b) of the CFPA. PHH's argument is tantamount to a challenge to personal jurisdiction, on which it bears the burden of proof. *See*, *e.g.*, *Silva v. Dep't of Homeland Sec.*, 112 M.S.P.R. 362 ¶ 6 & n.2 (2009) (analogizing the question as to "the category of parties against whom" an administrative appellate proceeding may be maintained as being "closely related to the concept of personal jurisdiction"). Personal jurisdiction is an affirmative defense as to which respondents bear the burden of proof and that is waived if not timely asserted. *See*, *e.g.*, Fed. R. Civ. P. 12(h)(1) (a party waives its personal jurisdiction defense by failing to raise it in its initial motion to dismiss); *Dillon v. Rogers*, 596 F.3d 260, 271 (5th Cir. 2010) ("certain affirmative defenses like personal jurisdiction and venue[] may be waived by a defendant"); *Trujillo v. Williams*, 465 F.3d 1210, 1217 (10th Cir. 2006) ("lack of personal jurisdiction and venue represent defenses that, similar to affirmative defenses, can be waived if not properly raised").

pre-existing liability of the controlling party.") (quoting *Olen v. Phelps,* 546 N.W. 2d 176, 181 (Wis. Ct. App. 1996)). The application of the veil-piercing or "alter ego" doctrine is fact intensive, and is certainly not one as to which the undisputed facts favor PHH and Atrium.[36]

Third, facts may be elicited at trial that demonstrate that Atrium is a service provider, a covered person, and a related person under the CFPA. Although it engaged in no legitimate activities and no real estate settlement services, Atrium provided a "material service" to the PHH mortgage origination entities "in connection with [PHH's] offering or provision" of mortgage loans to borrowers.[37] 12. U.S.C. § 5481(26)(A) (defining "service provider"). One such enumerated service is "processing transactions," which Atrium did when it received ceded premiums from MIs in connection with purportedly reinsured PHH mortgage loans; when it transferred dividends from the various MI trusts; when it paid some claims to MIs in connection with defaults on covered PHH mortgage loans; and when it disbursed commutation payments between itself and the MIs, which were calculated on the basis of projections of future defaults on covered PHH mortgage loans.[38]

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[36] Under New York law, reverse veil-piercing is appropriate "when the corporation has been so dominated by an individual or another corporation . . . and its separate identity so disregarded that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego." *16 Casa Duse, LLC v. Merkin*, No. 12 Civ. 3492 (RJS), 2013 WL 5510770, at *14 (S.D.N.Y. Sept. 27, 2013). "Under New Jersey law, a two element test applies to veil-piercing claims: First, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist. Second, the circumstances must indicate that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *Hunt Const. Group, Inc. v. Farina*, No. 11 Civ. 4933 (FSH), 2012 WL 72286, at *3 (D.N.J. Jan. 10, 2012) (internal quotation marks and citations omitted); *see id.* at *4 n.1 ("the same factors apply to direct and reverse veil-piercing claims").

[37] To be clear, the fact that Atrium provided a "material service" *to PHH* in connection with its mortgage loans does not imply, or even suggest, that Atrium also provided a "service actually performed" *to any MI* for which it received "bona fide" payment or that it provided a "real estate settlement service" *to a borrower.*

[38] *See*, *e.g.*, **ECX 0198** (UGI cession statement); **ECX 0257**, **0258** (Genworth cession statements); **ECX 0618** (CMG cession statement); **ECX 0650** (Radian cession statement); **ECX 0828** (Atrium "MI Remittance Summary").

These "material services" were "relat[ed] to the [mortgage loans]" that PHH originated. 12 U.S.C. § 5481(26)(A)(ii). That makes Atrium a "service provider" to the PHH mortgage origination entities.[39]

Atrium is also a "service provider" to the PHH mortgage origination entities because the services it performed for those entities – collecting premiums for the purported reinsurance, etc. – were integral to PHH's commission of the violations alleged in the NOC and could have been performed by the PHH mortgage origination entities directly. Such services are necessarily "material" to the offering or provision of the underlying mortgage loans, including taking steps to ensure that such offer or provision of loans complies with (or evades, as the case may be) applicable laws, including RESPA.[40] Because Atrium is an "affiliate" of the PHH mortgage origination entities, 12 U.S.C. § 5481(1), it is also a "covered person," 12 U.S.C. § 5481(6)(B).

Finally, Atrium is also a covered person because it is a "related person" to the PHH mortgage origination entities. It is undisputed that the PHH mortgage entities are covered persons.

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[39] The CFPA further provides that any service that a "bank service company" would be authorized to perform for a bank constitutes a service of the kind that may be performed by a "service provider." *See* 12 U.S.C. § 5514(e) ("A service provider . . . shall be subject to the authority of the Bureau under this section, to the same extent as if such service provider were engaged in a service relationship with a bank, and the Bureau were an appropriate Federal banking agency under section 7(c) of the Bank Service Company Act (12 U.S.C. § 1867(c)).") The Bank Service Company Act authorizes "bank service companies" to perform certain bank-related services, including "any other clerical, bookkeeping, accounting, statistical, or similar functions." *See* 12 U.S.C. §§ 1863, 1864. "Bank service companies" are essentially equivalent to "service providers" within the context of federal banking regulation, as enforced by the federal banking agencies. Among the activities that bank service companies are authorized to undertake is "[r]einsuring mortgage insurance on loans originated, purchased, or serviced by the bank." 12 C.F.R. §§ 5.34(e)(5)(v)(Q), 5.35(f)(2). To the extent that Atrium purported to "reinsure mortgage insurance on loans originated, purchased, or service by [PHH]," it engaged in services authorized for a bank service company and is therefore a "service provider" under the CFPA.

[40] Again, the federal banking agencies' authority over bank services companies is instructive. "Bank service companies" are authorized to perform any services that banks are authorized to perform (other than deposit-taking). 12 U.S.C. § 1864. A "service provider" similarly includes any person that performs a service that the covered person could have performed directly. The inclusion of such services prevents banks – and covered persons – from evading their regulators' authority by outsourcing any activity they could have performed themselves to a third party who would be beyond the regulators' authority if not for such a provision.

See PHH Br. at 35. Atrium was a "joint venture partner" of the PHH mortgage origination entities in their scheme to refer borrowers to certain MIs in exchange for kickback payments. Atrium is therefore a "related person" of PHH, 12 U.S.C. § 5481(25)(C)(ii), and thus a "covered person" in its own right, 12 U.S.C. § 5481(25)(B).[41] As both a "service provider" to the PHH mortgage origination entities and a "covered person" in its own right, Atrium is subject to this proceeding under 12 U.S.C. § 5563(b).

H. There Is No Basis for Judicial Estoppel

In the Third Circuit, judicial estoppel may be granted only if the party to be estopped: (1) took "two positions that are irreconcilably inconsistent"; (2) "convince[d] the [first court] to accept its earlier position," and (3) "changed [its] position in bad faith."[42] *In re Prosser*, 534 Fed. App'x 126, 130 (3d Cir. 2013); *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 486 (3d. Cir. 2013). The Third Circuit has "consistently stated that *the doctrine should only be applied to avoid a miscarriage of justice*" and is "not intended to eliminate all inconsistencies no matter how slight or inadvertent." *In re Kane*, 628 F.3d 631, 638 (3d Cir. 2010) (emphasis added).[43] PHH cannot establish any of these

[41] Persons "other" than shareholders, consultants and joint venture partners (like Atrium) must "materially participate[] in the conduct of the affairs of [the] covered person" in order to be a related person. Even if this requirement applied to Atrium (it does not), Atrium would be a related person. Atrium materially participated in PHH's scheme to accept kickback payments from MIs and to refer mortgage insurance business to those MIs who participated in captive reinsurance arrangements.
[42] If these three elements are met, judicial estoppel may be granted only if it is "tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant's misconduct. *In re Prosser*, 534 Fed. App'x at 130.
[43] *See also* 3/13 Order at 14 (noting that the Supreme Court has identified, but has not adopted, three factors that courts typically consider in deciding whether judicial estoppel applies: (1) whether the two arguments are clearly inconsistent; (2) whether the party was successful in asserting the earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that the first or second court was misled; and (3) whether the party seeking to assert the position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). In describing these factors, the Supreme Court was summarizing common elements of the doctrine of judicial estoppel applied in various Circuits across the country, rather than promulgating a fixed, uniform set of elements that

requirements, much less all of them, and it certainly cannot show that a miscarriage of justice will occur if its request is denied. To the contrary, it would be unjust to allow PHH to avoid any adjudication of the Bureau's claims, in any forum, based on a fabricated "inconsistency."

First, PHH cannot show that the Bureau's position in this proceeding is irreconcilably inconsistent with its position in the Florida action. The Bureau's position in the Florida action was that premiums ceded by UGI pursuant an agreement to refer business to UGI were made in violation of RESPA. 3/13 Order at 14-15. As the Tribunal has held, the Bureau's assertions in that complaint – which are consistent with Enforcement's positions here – are "clear and unequivocal." *Id.* at 15. Indeed, in another section of its brief, PHH argues that the Bureau's "outspoken detestation" and "aggressive prosecution" of captive arrangements, including its actions against MIs in Florida, make abundantly clear that the Bureau's position has consistently been that captive arrangements are illegal. PHH Br. at 13 n. 11, 16 n. 13. By contrast, the language of the provision of the Consent Order on which PHH relies "is far from a clear and unequivocal articulation of an inconsistent argument or position," and it would be reasonable to "conclude that the Consent Orders are nothing more than what they purport to be – court-ordered compromised claims – and that they neither contain nor imply any arguments or positions at all." *Id. See also U.S. v. Armour*, 402 U.S. 673, 681 (1971) (holding that consent decrees, because they are court-ordered compromises, "cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective

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displaces the formulations of the doctrine applied in specific Circuits. The Supreme Court noted that the factors it identified do "not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel" and that "additional considerations" may inform a court's decision as to whether judicial estoppel applies. *New Hampshire v. Maine*, 532 U.S. at 743-751. The elements cited in *New Hampshire v. Maine* are similar to those required in the Third Circuit. PHH cannot meet any element under either formulation, so its judicial estoppel defense fails regardless of which is applied.

parties have the bargaining power and skill to achieve").[44]

Second, even if PHH could identify irreconcilably inconsistent statements (it cannot), it could not establish that the Bureau convinced the Southern District of Florida to accept the position that UGI's ceded premiums were legally permissible under RESPA because the Consent Order states that it was entered "*without … adjudication of any issue of fact or law*" and shall "*not be an adjudication of any fact or legal conclusion*." UGI Consent Order[45] at 1, 2 (¶ 4) (emphasis added). These provisions preclude any finding that the Southern District of Florida was convinced to accept any position. Judge Kathleen Williams, who entered the Consent Order, confirmed this point at the hearing on PHH's motion to intervene in the Florida action, when she stated that the Consent Order was just "a settlement document" that "adjudicated nothing," and concluded: "*I don't know how you can now be heard to say you can raise [the Consent Order] as a defense*, as you have before the Administrative Law Judge." *Id.* (emphasis added). PHH's judicial estoppel defense must be dismissed because the judge who entered the Consent Order stated that she did not any accept any position and that she saw no merit to PHH's judicial estoppel defense.[46]

Third, PHH cannot show that the Bureau changed any position in bad faith. The Bureau did

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[44] Effectively conceding that the plain language of that provision does not support its judicial estoppel argument, PHH resorts to a statement made by Enforcement Counsel at the oral argument on PHH's motion to intervene in the Florida action that it contends shows that "the Bureau itself" (as opposed to the Consent Order) permitted UGI to continue ceding premiums to lenders. PHH Br. at 38. That statement was nothing more than a reference to the conduct that was subject to the limited carve-out provision on which PHH relies, as shown by the preceding sentence in which Enforcement Counsel cited that provision. Transcript of March 10, 2014 Hearing on Motion to Intervene at 22:1-8 (PHH Ex. A). It was not remotely an expression of a position held by the Bureau that UGI's ceding of premiums was legal under RESPA.

[45] *See* Ex. W. to Gordon Decl. in Supp. of EC First MTD Opp., filed Feb. 20, 2014 (No. 43-W).

[46] PHH refers to statements in a brief UGI submitted in response to PHH's motion to intervene, in which UGI asserted that the Consent Order "expressly authorized PHH's conduct in question" and "declared the ceded payments from United Guaranty to be lawful." PHH Br. at 37-38. UGI's characterizations are incorrect and defeated by the provisions of the Consent Order disclaiming any adjudication of any issue of fact or law, as well as by Judge Williams's statement.

not change its position at all, but in any event, the Bureau did not act in bad faith by agreeing to a narrow carve-out on the scope of prohibited conduct. That decision was fully consistent with Eleventh Circuit law. In *U.S. v. Miami*, a case cited by PHH and which PHH acknowledges is "binding precedent" in the Eleventh Circuit,[47] the Fifth Circuit held that consent decree provisions that adversely affect contractual rights of non-parties to the decree are invalid and must be stricken:

> Insofar as the decree does not affect the non-consenting party and its members, or contains provisions to which they do not object, the trial court properly exercised its discretion in approving it. *However, parts of the decree do affect the third party who did not consent to it, and these parts cannot properly be included in a valid consent decree.*

664 F.2d 435, 442 (5th Cir. 1981). The Fifth Circuit thus invalidated provisions of a consent decree that impaired the contractual rights of non-parties. *Id.* at 447. When the Bureau was negotiating the settlement agreement with UGI, it was aware that UGI's existing captive agreements with lenders required it to cede premiums to those lenders. In order to resolve the matter with the settling parties (the MIs), potential conflicts with third-party contractual rights needed to be avoided for pragmatic reasons. In light of *U.S. v. Miami*, a provision impacting the contractual rights of lenders who were not parties might not even have been permissible. It is not bad faith to follow the governing law.[48]

The Bureau's agreement to a limited carve-out against the broad prohibitions of the settlement agreement was also reasonable and in good faith because settlement agreements are

[47] In a brief submitted in support of its motion to intervene in the Florida action, PHH explained: "*City of Miami* is binding precedent in [the Eleventh] 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)." PHH Reply Mem. In Supp. of Mot. to Admin. Reopen Case and Intervene, *CFPB v. United Guaranty Corp.*, Feb. 24, 2014, at 12 n. 7 (Gordon Decl., at **Att. C**).

[48] PHH cites emails reflecting negotiations between the Office of Enforcement and the MIs to show that the Bureau was "fully aware of the issue of continued ceding payments under existing agreements." PHH Br. at 39. Enforcement's awareness of continued ceding payments supports the reasonableness of its decision to include the provision at issue, in light of *U.S. v. Miami*.

compromises. The Supreme Court has explained that "[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms" and "[n]aturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *Armour*, 402 U.S. at 681. Because of this practical reality, a rule prohibiting federal agencies from entering into any settlement agreements unless they can obtain the defendant's agreement to complete cessation of all activity that the agency alleges to be illegal would severely hamper their ability to enforce the law. Courts have consistently recognized that entering into settlement agreements reflecting compromises with certain defendants, before focusing their resources on other defendants, is completely appropriate. In *SEC v. Randolph*, the Ninth Circuit held that it was proper for the SEC to settle with the defendants, even if its case was strong, because "[t]he SEC's resources are limited, and that is why it often uses consent decrees as a means of enforcement." 736 F.2d 525, 529-30 (9th Cir. 1984). The Ninth Circuit noted that the SEC was "investigating other individuals who purportedly reaped much greater gains" and had "ample reason to allocate more of its resources in those investigations." *Id.* at 530.

Nonetheless, to support its bad faith claim, PHH asserts that a court cannot enter an order that permits "clearly illegal conduct," and that Enforcement's request for entry of the Consent Order was "an affront to both judicial and administrative integrity" because it permitted clearly illegal activity to continue. PHH Br. at 42 (citing *Robertson v. N.B.A.*, 556 F.2d 682 (2d Cir. 1977)). It is surprising that PHH would advance an argument that, if accepted, would require this Tribunal to determine that the alleged conduct at issue in this proceeding was "clearly illegal." If the Tribunal were to accept PHH's position, then PHH must be judicially estopped from arguing that Atrium's captive arrangements were *not* clearly illegal, thus establishing PHH's liability.

In any event, the cases cited by PHH to support its position do not show that the Bureau

acted in bad faith because there is a difference between conduct that has been *alleged* to be illegal and conduct has been *previously determined* to be illegal. This distinction was the foundation of the opinion in *Robertson v. N.B.A.*, a class action lawsuit cited by PHH. In *Robertson*, members of the class argued that an approved settlement agreement was invalid because it supposedly perpetuated illegal activity. 556 F.2d 682, 686 (2d Cir. 1977). The settlement agreement permitted the defendant to, for a period of ten years, engage in conduct that the plaintiff alleged was in violation of the Sherman Act, but required that conduct to be eliminated after ten years. *Id.* The Second Circuit held that the settlement agreement was valid because "looked at as a whole," it "radically modified" the allegedly illegal practices, and ultimately resulted in its elimination. Thus, contrary to PHH's argument, this case shows that there is nothing improper about asking a court to approve a settlement agreement that broadly prohibits *allegedly* illegal conduct, but carves out a limited subset of that conduct as part of the compromise. The key was that the challenged conduct that was allowed to persist during the phase out period had "*not been held to be illegal per se in any previously decided case*," and thus, "the settlement authorizes no future conduct that is clearly illegal." *Id.* (emphasis added).[49]

Nonetheless, PHH inexplicably insists that its captive arrangements were clearly illegal under RESPA, such that the Bureau's request for entry of a Consent Order permitting the continuation of such clearly illegal conduct demonstrates its bad faith. PHH Br. at 42-43. No court or tribunal has ever determined that any captive mortgage reinsurance arrangement violates RESPA Section 8.

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[49] The Second Circuit emphasized that a court "in approving a settlement should not in effect try the case by deciding unsettled legal questions." *Id.* Because the legality of the captive arrangements in which UGI participated was an unsettled question, there is no merit to PHH's argument that the Consent Order was a "sham" because it did not prohibit UGI from continuing to cede premiums or from accounting for the arrangements as reinsurance. PHH Br. at 37. Moreover, PHH's argument that the Bureau should have monitored and corrected UGI's accounting treatment of its captive arrangements, without any adjudication of the issue of whether those arrangements provided genuine reinsurance services, would require the Bureau to get far more involved in the business of reinsurance than anything it has done thus far. This argument cannot be reconciled with PHH's contention that the Bureau is precluded from regulating the business of reinsurance.

PHH, however, advances the self-destructive argument that any distinction between the finding or admission of illegal conduct in two unrelated RESPA cases it cites and its own conduct "is of no consequence." PHH Br. at 42-43 n. 27. To be sure, Enforcement Counsel alleges that PHH's conduct was clearly illegal (as the facts presented demonstrate). But the applicable standard is that the conduct be "held to be illegal *per se* in any previously decided case," *Robertson*, 556 F.2d at 686, which PHH cannot support. Moreover, the MI settlements were not solely about PHH. Those settlements involved the relationships of the MIs with hundreds of lenders, each of whose practices varied. Enforcement Counsel is proceeding here against PHH because it alleges that its use and manipulation of captive reinsurance arrangements clearly did violate RESPA.

PHH also claims that *Freeman* supports its contention that the Bureau acted in bad faith by seeking entry of an order that permitted clearly illegal activity. PHH Br. at 42-43. PHH argues that, per *Freeman*, the Tribunal does "not need an adjudicated RESPA case" at all (even an unrelated case) to determine that the illegality of captive arrangements is a settled area of RESPA law. *Id.* at 43. But *Freeman* did not even involve a consent order, so it clearly does not stand for the proposition that it is improper to seek a consent order that permits conduct that has never held to be illegal *per se*.

Oddly, after claiming that *Freeman* supports its argument that the Consent Order permitted clearly illegal conduct, PHH contradicts itself by arguing that *Freeman* actually proves that PHH's acceptance of ceded premiums "*could not be illegal under RESPA*." PHH Br. at 43 (emphasis in original). Regardless, *Freeman* does not show that PHH's conduct can be deemed clearly legal under RESPA without an adjudicated case. In *Freeman*, the Supreme Court did not need an adjudicated RESPA case *against consumers* to make the common sense conclusion that consumers do not violate RESPA by paying settlement-related fees. 132 S. Ct. at 2040-41. This obviously does not mean that payments by a *settlement service provider such as UGI* – and Atrium's acceptance of those payments – can be deemed automatically legal under RESPA without any adjudication of the Bureau's claims.

V. CONCLUSION

For all the reasons cited above, Enforcement Counsel respectfully request that Respondents' Renewed Motion to Dismiss, or, in the Alternative, to Narrow the Notice of Charges be denied in its entirety. Enforcement Counsel further respectfully request that, pursuant to Rule 213, partial summary disposition be granted to strike PHH's purported affirmative defenses (the McCarran-Ferguson Act, personal jurisdiction, and the judicial estoppel doctrine) and to resolve all issues as to which there is no genuine dispute of material fact.

DATED: May 2, 2014

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 2nd day of May 2014, I caused a copy of the foregoing "Enforcement Counsel's Opposition to Respondents' Renewed Motion to Dismiss" to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service on behalf of Respondents:

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