UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU
November 25, 2014

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS LLC, ATRIUM INSURANCE CORPORATION, and ATRIUM REINSURANCE CORPORATION	RECOMMENDED DECISION (**PUBLIC VERSION**)

APPEARANCES: Lucy Morris, Cara Petersen, Sarah J. Auchterlonie, Donald R. Gordon, Kimberly J. Ravener, Navid Vazire, and Thomas Kim representing the Office of Enforcement, Consumer Financial Protection Bureau

Mitchel H. Kider, David M. Souders, Sandra B. Vipond, Leslie A. Sowers, Rosanne L. Rust, and Michael S. Trabon, Weiner Brodsky Kider PC, representing Respondents

BEFORE: Cameron Elliot, Administrative Law Judge, Securities and Exchange Commission

SUMMARY

This Recommended Decision (RD) finds that Respondents PHH Corporation, PHH Mortgage Corporation (PHH Mortgage), PHH Home Loans LLC (PHH Home Loans), Atrium Insurance Corporation (Atrium Insurance), and Atrium Reinsurance Corporation (Atrium Re) (collectively, PHH or Respondents) accepted reinsurance premiums in violation of Sections 8(a) and 8(b) of the Real Estate Settlement Procedures Act (RESPA). The RD recommends imposition of an injunction and disgorgement of $6,442,399 as to all Respondents jointly and severally.

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I. INTRODUCTION

A. Procedural Background

On January 29, 2014, the Consumer Financial Protection Bureau (Bureau) filed a Notice of Charges Seeking Disgorgement, Other Equitable Relief, and Civil Money Penalty (Notice of Charges or Notice) against Respondents. PHH Corporation, 2014-CFPB-002, Document 1.[1] On January 31, 2014, Respondents filed their Answer and Affirmative Defenses (Answer) and a Motion to Dismiss the Notice of Charges or, in the Alternative, for Summary Disposition. Documents 16, 17. On March 13, 2014, I issued an order denying that Motion to Dismiss. Document 67.

The hearing commenced on March 24, 2014, continued on March 25, 26, and 28, 2014, and recessed on March 28, 2014. It recommenced in Philadelphia, PA, on May 28, 2014, and continued on May 29 and 30, 2014, and June 3 and 4, 2014. At the start of the hearing, I ordered the parties to file a second round of dispositive motions to narrow the disputed issues in the proceeding. Tr. 38-40.[2] The Office of Enforcement (Enforcement) filed a Motion for Summary Disposition as to Liability and Respondents filed a Renewed Motion to Dismiss or, in the Alternative, to Narrow the Notice of Charges. Documents 101 (Apr. 18, 2014), 102 (Apr. 18, 2014). On May 22, 2014, I issued an order granting in part the Motion for Summary Disposition and that second Motion to Dismiss (Dispositive Motion Order). Document 152. Familiarity with the Dispositive Motion Order is assumed for purposes of this RD. On July 14, 2014, I issued an order closing the hearing record, and the parties thereafter timely filed post-hearing briefs and responsive briefs. Document 171. Although Respondents' Proposed Findings of Fact Following the Administrative Hearing are addressed throughout this RD, I have made no separate findings regarding them. See Document 178-A.

B. Summary of Allegations

The Notice of Charges alleges as follows. Respondents offer and provide residential mortgages and mortgage loan products. Notice at 2. Mortgage insurance is ordinarily required when a prospective borrower seeks a residential mortgage loan in excess of 80% of the value of the home. Id. at 3. PHH Corporation established Respondent Atrium Insurance in 1994 as a wholly-owned reinsurer, to provide purported reinsurance to mortgage insurance companies (MIs), which in turn provide mortgage insurance for loans originated by PHH. Id. at 4. In a typical reinsurance arrangement, a reinsurer agrees to assume a certain percentage of the primary

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[1] In this RD, citation to a "Document" or "Documents" refers to the document number(s) in the docket for this case, which is available in the administrative adjudication section of the Bureau's website.

[2] Citations to the transcript of the hearing are noted as "Tr. ___." Citations to exhibits offered by Enforcement and Respondents are noted as "ECX ___" and "RCX ___," respectively. Enforcement's and Respondents' post-hearing briefs are noted as "Enf. Br. ___." and "Resp. Br. ___.", respectively. Enforcement's and Respondents' post-hearing responsive briefs are noted as "Enf. Reply ___" and "Resp. Reply ___," respectively.

insurer's risk, in return for the primary insurer "ceding" a percentage of the premiums it receives to the reinsurer. Id. at 10. Respondent Atrium Re, a wholly-owned subsidiary of PHH Corporation, assumed Atrium's captive insurance business on January 1, 2010. Id. at 2.

Atrium entered into mortgage reinsurance arrangements, called "captive arrangements," with certain MIs. Notice at 4. Under each captive arrangement: (1) PHH originated loans and referred borrowers to those MIs having captive arrangements with Atrium, (2) the MIs ceded a portion of the borrowers' mortgage insurance premiums to Atrium in return for purported reinsurance, and (3) Atrium passed along its profits to PHH. Notice at 4, 7-8, 14-16. Such payments to Atrium allegedly constituted kickbacks and unearned fees under Sections 8(a) and 8(b) of RESPA, 12 U.S.C. § 2607(a), (b). Notice at 18.

Respondents deny most key allegations. See Answer. They also raise numerous affirmative defenses. Answer at 12-14.

C. Official Notice

In an addendum to their post-hearing brief, Respondents requested I take official notice of certain facts documented in federal court records and, presumably, in state administrative proceedings. Document 178-A at 7-9. Enforcement similarly requested I take official notice of certain facts documented in a public official record of the Securities and Exchange Commission (SEC). Document 177 at 53 & n.18 (citing 12 C.F.R. § 1081.303(c)). Between September 23 and October 22, 2014, I sua sponte took official notice of certain public official records of the SEC, one of which contained the fact for which Enforcement sought official notice. Documents 188, 189, 196.

On October 22, 2014, pursuant to 12 C.F.R. § 1081.303(c), I ordered any party seeking to disprove any officially noticed fact to file an objection no later than October 31, 2014. Document 196. Respondents filed such an objection, and Enforcement filed a response in opposition thereto; however, Enforcement did not file its own objection. Documents 199, 201.

Respondents object to all officially noticed facts other than the ones they proposed. See generally Document 199. They make no effort to disprove any officially noticed fact, however. Id. Instead, their principal argument is that due process in connection with official notice requires not simply notice and opportunity to be heard, but also an explanation of why the officially noticed facts are relevant. Document 199 at 5-10. This is not the law. See Amadasu v. The Christ Hospital, 514 F.3d 504, 507-08 (6th Cir. 2008); United States v. Garcia, 672 F.2d 1349, 1356 & n.9 (11th Cir. 1982).

Nonetheless, as Respondents correctly note, many of the officially noticed facts are established by other evidence in the record. Document 199 at 7-8; see, e.g., ECX 495 at 2 (PHH Mortgage document describing Genworth Mortgage Insurance Corporation's poor financial condition in 2010 and 2011). Reliance on officially noticed facts is therefore generally unnecessary, and except where specifically noted, I have not relied on them.

II. FINDINGS OF FACT

The findings and conclusions herein are based on the entire record. See 12 C.F.R. § 1081.400(c)(1). I applied preponderance of the evidence as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 102 (1981). I have considered and rejected all arguments, proposed findings, and conclusions that are inconsistent with this RD.

A. Respondents

PHH Corporation, headquartered in Mount Laurel, New Jersey, is in the business of providing home mortgage loans. Tr. 528-29; Answer at 2; ECX 153 at 8, 69; ECX 653 at 4. Atrium Insurance and its successor Atrium Re (collectively, Atrium) are wholly-owned subsidiaries of PHH Corporation. Tr. 121-23, 529; Answer at 2; ECX 153 at 37-39, 56-57. Atrium was established in 1994 to provide reinsurance on mortgage insurance policies. Tr. 123; Answer at 4; ECX 511 at 4843, 4846.[3] Atrium was established as a reinsurer to support captive reinsurance arrangements between MIs and PHH – specifically PHH Mortgage and PHH Home Loans – and no other lender. Tr. 124, 147; ECX 153 at 201; ECX 653 at 9, 28, Decl. of Bogansky at 1; see RCX 581 at 3.

PHH Mortgage, a wholly-owned subsidiary of PHH Corporation, originates mortgage loans. Answer at 2. PHH Home Loans also originates mortgage loans. Answer at 2. Mark Danahy (Danahy), the President and CEO of PHH Mortgage from December 2008 through mid-May 2010, who also concurrently held leadership titles at Atrium and PHH Home Loans, did not testify live at the hearing, but I admitted the transcript of his October 22, 2009, deposition into evidence, over Respondents' objection.[4] Tr. 1007-13; ECX 153 at 17-19, 22, 27-31; ECX 653, Decl. of Danahy at 1-2; RCX 929 at 1; see 17 C.F.R. 201.303(h). Danahy explained that PHH was spun off from Cendant in 2005, and that PHH Home Loans is a joint venture between PHH and another company, Realogy Corporation (Realogy). ECX 153 at 18-19, 39; see also Tr. 528, 665, 725; ECX 653, Decl. of Danahy at 3-4. PHH Home Loans is headquartered in Mount Laurel, New Jersey, and is specifically a joint venture between PHH Corporation (through its subsidiaries) and Realogy, with PHH Corporation controlling 50.1% of PHH Home Loans and Realogy 49.9%. ECX 653 at 4 n.3, Decl. of Danahy at 3.

Mortgage insurance provides credit enhancement to the underlying mortgage loans. Tr. 412, 1849. It is typically required, as alleged in the Notice of Charges, when a buyer makes a down payment of less than 20% of the value of the home. Tr. 119-20, 325; ECX 653 at 4; RCX 581 at 4; see Notice at 3. The government-sponsored entities (GSEs) Federal National Mortgage

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[3] Where an exhibit, or portion thereof, lacks page numbers or the page numbering causes confusion, citation in this RD is made to the last four digits of the bates stamps on the corresponding pages, with preference given to bates stamps starting with "CFPB-PHH."

[4] The deposition was taken on October 22, 2009, in a private civil suit, Munoz v. PHH, 1:08-cv-759 (E.D. Cal.). Danahy was designated as a Federal Rule of Civil Procedure 30(b)(6) deponent in that proceeding. ECX 153 at 9-10. Danahy joined PHH Mortgage as controller in December 2000, and was appointed CFO in April 2008 and president in early 2009. Id. at 26-28.

Association (Fannie Mae or Fannie) and Federal Home Loan Mortgage Corporation (Freddie Mac or Freddie) impose this requirement. Tr. 325. In effect, such insurance is required for all home loans originated by lenders, such as PHH, whose originations are ultimately sold to Fannie and Freddie, and for which the buyer has put down less than 20%. Tr. 325, 408-09, 413; see 12 U.S.C. § 1454(a)(2) (Freddie Mac); 12 U.S.C. § 1717(b)(2)(C), (b)(5)(C) (Fannie Mae).

"Captive" insurance exists in numerous industries. See Tr. 1141, 1145. Captive mortgage reinsurance refers to an arrangement under which an affiliated entity of a lender receives a portion of the premiums the MI, the primary insurer, receives from the borrower, in exchange for, at least in theory, sharing in the risk of the insurance coverage. Tr. 123-25; see ECX 193, Attach. A at 1-2; ECX 682; RCX 809 at 1-2. The effect of a captive mortgage reinsurance arrangement is that the lender reinsures loans that it also originates. See ECX 193, Attach. A at 1; ECX 682; RCX 809 at 1. The majority of captive mortgage reinsurers, a.k.a. "captives," in the United States are domiciled in Vermont. ECX 586 at 1; RCX 809 at 3.

Mortgage loans are aggregated into pools, typically according to their calendar year of origination, called "book years" or "policy years." ECX 153 at 99; RCX 581 at 8; RCX 809 at 3. Contracts for mortgage reinsurance normally are written at the book year level and carry a ten-year term. ECX 153 at 99; RCX 581 at 8; RCX 809 at 3. Under a captive arrangement, the captive normally establishes a trust account for the MI's benefit, and funds must be maintained in that account at certain levels to comply with state insurance regulations. Tr. 581, 2150; RCX 809 at 4, 7. MIs' premium rates are approved by state insurance regulators and tend to all be roughly the same. Tr. 119, 337; ECX 153 at 198. MIs market themselves to lenders, not buyers, and the lender generally selects the MI to provide insurance on a loan. Tr. 119-20, 334-35, 383-84; ECX 153 at 85. One of the lay witnesses at the hearing, Curt Culver (Culver), who is the chairman and CEO of MI Mortgage Guaranty Insurance Corporation (MGIC), testified that MGIC seeks inclusion on each lender's "allocated list," a list of MIs from which a certain percentage of the lender's business is allocated to each MI.[5] Tr. 321, 332-33. MGIC never had a captive arrangement with Atrium. ECX 653 at 9.

Each of Atrium's captive arrangement trust accounts, described in detail below, held capital contributions, premiums ceded by the MI, and investment income earned on trust account funds. Tr. 123-24, 581; ECX 153 at 54. Atrium paid reinsurance claims using funds in the corresponding trust account. Tr. 581. If a withdrawal was made from a trust account in the form of dividends, the dividends ultimately flowed to PHH. ECX 153 at 57, 59, 62-63; see, e.g., RCX 53 at 1540-41; RCX 54 at 1697-98. Withdrawals could also be made from a trust account to pay operating expenses and taxes. ECX 153 at 71; see, e.g., RCX 53 at 1540-41.

Loans originated by PHH Mortgage "typically" went to an MI with which Atrium had a captive arrangement. ECX 153 at 85, 119-20. Atrium reinsured nearly 100% of PHH's loans on which there was mortgage insurance when Atrium's captive arrangements were in effect. Id. at 86. With a minority of loans, typically when a loan did not meet the guidelines of an MI with

[5] Culver joined MGIC in October 1982 as a marketing program manager, and worked his way up to CEO in 2000. Tr. 322. He became chairman in 2004 or 2005. Tr. 322.

which Atrium had a captive arrangement, PHH worked with whatever MI was available to provide primary insurance. Id.

All of Atrium's captive arrangements were excess of loss, rather than quota share. Tr. 138, 140; ECX 153 at 75-77. In excess of loss reinsurance, the reinsurer covers losses starting at a specified threshold, called the attachment point. Tr. 138; ECX 153 at 94; ECX 193, Attach. A at 2; RCX 809 at 2. Often, as in Atrium's arrangements, the reinsurer covers losses up to another specified threshold, called the detachment point. Tr. 138-39; ECX 153 at 220; ECX 193, Attach. A at 2; RCX 809 at 2. Taking the example of a so-called "4/10/40" excess of loss structure, the attachment point is 4%, the risk "corridor" 10%, the detachment point 14%, and the premium cede, meaning the percentage of premium ceded to the reinsurer, 40%. Tr. 601, 1543; ECX 153 at 126-27, 220; ECX 793 at 11; RCX 581 at 8, 10. In quota share reinsurance, by contrast, the reinsurer shares a proportion of each loss in return for a proportion of each premium. Tr. 139-40; ECX 153 at 76; ECX 193, Attach. A at 2; ECX 733 at 11. Atrium made a business decision to never engage in quota share arrangements, which require greater capital contributions into the corresponding captive trust. Tr. 140-41; ECX 153 at 77.

Atrium never had any employees of its own, PHH employees handled all of Atrium's business, and Atrium never paid federal taxes separately from PHH. Tr. 125-26; ECX 153 at 29-30, 56-57, 67-70. However, PHH engaged third party consultants, typically actuaries and auditors, to perform work specifically for Atrium. Tr. 126; ECX 153 at 72, 127-28. Atrium was domiciled in New York, and regulated by New York state, from its foundation to 2009. Tr. 121-22, 2186; ECX 586 at 4; RCX 79. Although Atrium had a small, rented office in New York City, the office was typically vacant and maintained only to comply with New York insurance regulations. ECX 153 at 24-25.

B. Industry Developments Before 2001

A "deep cede" arrangement involves cedes around 40%. See ECX 713 at 8604; ECX 793; ECX 794; ECX 817 at 3; ECX 820; ECX 824 at 9913. Deep cede captive arrangements were popular in the mortgage reinsurance industry by the early 2000's. Tr. 336-38; ECX 589 at 2; ECX 793 at 1, 5. Culver testified that when captive mortgage reinsurance started in the early- to mid-1990's, premium cedes were around 12% or 16%, in return for coverage of all losses above a 3% or 4% attachment point. Tr. 336-38. [redacted] but actuarial consulting firm Milliman, Inc. (Milliman), among other firms, found "true risk sharing relative to the cedes" meaning that Milliman found risk transfer.[6] Tr. 148, 338. When Amerin, another MI, started entering into captive reinsurance arrangements in the 1990's, [redacted] Tr. 327, 344. By 1996, [redacted] Tr. 347-48; ECX 38 at 1-2. Although Culver was "not sure" what drove the evolution of captive reinsurance structures, he testified that some MIs marketed themselves on the basis of the size of ceded premiums, and it "became a competitive issue." Tr. 338-39, 360; see ECX 814 at 6.

[6] "Risk transfer" refers to the meaningful transfer of insurance risk from a primary insurer to a reinsurer. See, e.g., ECX 193, Attach. A at 6. This concept is addressed in greater detail infra.

Culver did not believe that captive reinsurance was implemented in the mortgage industry to "stabilize the claims experience" or protect against catastrophic loss, although in the end it did play a role in protecting against catastrophic loss. Tr. 399-400. Not all lenders had captive arrangements with premium cedes exceeding 25%; smaller lenders could not meet the capital requirements. Tr. 348-49, 363. Eventually, approximately ten lenders had captive arrangements involving 4/10/40 structures. Tr. 348-49. However, [REDACTED] Tr. 339. This was because typical loss ratios in the 1990's did not reach the attachment point. See Tr. 361-62.

[REDACTED] and it ultimately entered into about eighty or ninety captive reinsurance arrangements, of which five or six were quota share and the rest excess of loss. Tr. 341, 349; ECX 38 at 2; ECX 811 at 3. Its first captive arrangement was in effect no later than January 1998. Tr. 353; ECX 35 at 3. Beginning in 2008, [REDACTED] Tr. 423-25. However, until recently, commercial reinsurance through third parties was not affordable. Tr. 423-24.

In January 1998, the Mortgage Insurance Companies of America (MICA) expressed to the Arizona Department of Insurance (DOI) some concern regarding deep cede arrangements. Tr. 406; ECX 35 at 9394, 9404. In its presentation to the Arizona DOI, MICA wrote:

- There has recently been a proliferation of new risk-sharing arrangements by a mortgage insurer or an affiliate thereof with a lender or an affiliate thereof . . . . There arrangements include . . . captive mortgage reinsurance, ...
- [I]f not properly controlled, [these risk-sharing arrangements] also present a threat to the overall strength and claims-paying ability of the private mortgage insurance industry.
- Mortgage lending has become commoditized and very efficient, forcing lenders to look for other opportunities to generate income. Captive reinsurance is one manner in which lenders may participate, on a limited basis, in the mortgage insurance business, subject to compliance with applicable state and federal law.
- Captive reinsurance results in the segregation of premiums pledged to support losses on limited segments of a primary mortgage insurer's overall insured portfolio. Such segregation runs counter to the basi[c] insurance principle that an insurer's liabilities should be supported by all of its assets. If mortgage

> insurers are permitted to reinsure more than 25% of their business in captive reinsurance structures, locking up those premiums, this degree of segmentation will be financially detrimental to the mortgage finance industry.

ECX 35 at 9405-06, 9408 (formatting altered).

C. Atrium Starts its First Captive

Atrium's first captive arrangement was with United Guaranty Residential Insurance Corporation (UGI) and commenced in November 1995. Tr. 1850, 1925-26, 2130, 2180-81, 2184; ECX 153 at 58; ECX 586 at 1; ECX 708 at 1. The arrangement covered loans originating as far back as 1993. Tr. 142; Answer at 4; ECX 14 at 3; ECX 17; ECX 198 at Accumulation; ECX 586 at 1; ECX 733 at 1, 11. Atrium's first capital contribution into the UGI trust account was in 1997, in the amount of $460,000. ECX 653, Decl. of Bogansky at Ex. A. PHH and Atrium chose to do business initially just with UGI, because, according to Danahy, UGI was always a top-rated MI with some of the highest rating standards. ECX 153 at 197. By extending a large amount of business toward UGI, Atrium believed that their relationship would be stronger and more integrated, and that they would invest in technology together. Id. at 198. PHH initially viewed Atrium's engaging with a single MI as posing no disadvantage to the borrowers, i.e., PHH's customers, because mortgage insurance rates between MIs are roughly the same. Id. at 198.

A UGI employee, Daniel Walker (Walker), who was primarily responsible for developing UGI's captive reinsurance program in the mid-1990's, testified at the hearing.[7] Tr. 2125. He testified that PHH was a "very large and important lender." Tr. 2179, 2183. Also testifying at the hearing was Samuel Rosenthal (Rosenthal), who has been in PHH's Secondary Marketing Division for some time.[8] Tr. 92, 95-96. Rosenthal testified that prior to 2001, UGI had a "very heavy" percentage of PHH's mortgage insurance business. Tr. 111.

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[7] Walker is senior vice president of product development at UGI. Tr. 2121-22. He received a bachelor's degree in 1977 in economics from Virginia Tech. Tr. 2122. His first job after college was at Crum & Forster, an insurance company, and he joined UGI in 1987 as the actuarial and economic research manager. Tr. 2122-23. He became chief risk officer around 2001. Tr. 2124.

[8] Rosenthal works at PHH's headquarters in New Jersey. Tr. 91. He has worked for PHH for nearly twenty years, and is now a vice president in Secondary Marketing at PHH Mortgage. Tr. 91-92; RCX 929 at 3. Secondary Marketing handles relationships with MIs, relationships with Fannie and Freddie, pricing for PHH's retail loan business, and nonconforming loans, among other things. Tr. 97-101. Rosenthal earned an undergraduate degree in economics from the University of Pennsylvania. Tr. 92-93. He then earned an MBA in finance and accounting from the University of Chicago. Tr. 93. Prior to joining PHH, he worked for three other mortgage companies for a total of about six years. Tr. 94. Rosenthal is one of a small number of people at PHH focused on captive reinsurance arrangements, but prior to 2006, Rosenthal was not particularly involved in captive reinsurance. Tr. 137; see ECX 485 at 0979.

Although Walker did not recall whether UGI's share of PHH's business increased after it entered into the captive arrangement with Atrium, Tr. 2178-79, 2185. reinsurers had a "prejudice" against mortgage insurance based on losses arising from economic crises in the 1980's. Tr. 2127-29.

At first, the UGI captive arrangement carried cedes around 10%. ECX 708 at 3. By 1997, the cedes climbed to around 30%. ECX 646 at 8290; ECX 710 at 8872-73. By January 1, 2000, the UGI arrangement involved a 40% cede. Tr. 129; ECX 646 at 8290; ECX 710 at 8890-95. Walker could not recall whether Atrium's liability to UGI was limited to what was in the trust account, but did not consider that to be an issue in any event because the trust account was "enormous." Tr. 2169, 2187.

D. Atrium's Later Captive Arrangements

Atrium entered into its second captive arrangement, with Genworth Mortgage Insurance Corporation (Genworth), in January 2001, effective October 9, 2000.[9] Tr. 1926; Answer at 4; ECX 14 at 3; ECX 153 at 162-63; RCX 986 at 2; see e.g., RCX 51 at 1. The arrangement involved 40% cedes. ECX 646 at 8290; RCX 44 at 1572. Atrium chose to start working with a second MI because it felt it had no leverage with UGI without introducing competition. ECX 153 at 199. Atrium made an initial capital contribution into the Genworth trust account of $2.5 million, with an additional $2.5 million contribution later in 2001. ECX 653, Decl. of Bogansky at Ex. A.

In Respondents' retail loan line of business, "the dialer," essentially software Respondents developed, is used both to determine loan eligibility and to automatically select the mortgage insurance providers for loans. Tr. 107. The retail business involves loan originations working directly with the borrower, and comprises between 50% and 80% of PHH's business at any given time. Tr. 102. The small group involved in determining MI allocation of the dialer included: Rosenthal; Richard Bradfield (Bradfield), the head of Secondary Marketing and Rosenthal's boss; and Terry Edwards (Edwards), PHH's president and CEO at the time. Tr. 96-97, 109-10, 208-09, 224-26, 489. Rosenthal testified that an MI has to be in the dialer to receive mortgage insurance on retail loans. Tr. 107-08, 441. Rosenthal also explained that the dialer was not programmed so that additional MIs could be easily added to it until around 2008. Tr.

[9] Genworth was formerly known as General Electric Mortgage Insurance Corporation. Answer at 4; ECX 153 at 252; ECX 503. It is a subsidiary of Genworth Financial, Inc. RCX 956.

441-43; ECX 357. Id.

PHH had a list of "preferred providers" of mortgage insurance it used within its non-retail business, in which loans are acquired from someone other than the borrower; this was known as "net 3" business.[10] Tr. 465-66, 520-21, 526-27; RCX 825. By selecting from the preferred provider list, the seller of the loan would avoid an added charge. Tr. 521-25, 564-65; ECX 206 at 0443; ECX 654 at Ex. O; RCX 825; see Notice at 6. The added charge was 0.75% until August 2008, when it was reduced to 0.4%. ECX 132 at 3167; ECX 654 at Ex. O. At least until August 2008, when MIs lacking captive arrangements were added to the preferred provider list, PHH imposed the charge because the loan was not reinsured by Atrium, and imposed the charge even when no MI having a captive arrangement was willing to insure the loan. ECX 262 ("Unfortunately no . . . not captive eligible yet."). PHH was apparently able to influence the allocation of net 3 business, possibly by exhorting clients to select some MI providers over others. ECX 223; ECX 287; ECX 295 at 3174; ECX 419 ("Net 3 is 45/30/25 UGI/Radian/GE"); ECX 449 ("it is possible to direct a client to GE only").

Genworth was added to PHH's list of preferred providers in August 2001, which was around the same time that it was added to the dialer. Tr. 547-48; ECX 495 at 1; ECX 503 at 6551. In 2003, UGI ceded $22.8 million in premiums to Atrium, Tr. 2176-78[11]; ECX 145 at 1179; ECX 586 at 3. PHH's business was significant for UGI; as a point of reference, UGI currently does business with hundreds of lenders under hundreds of master policies. Tr. 2182.

Not all MIs were willing to enter into captive arrangements with terms like those in the UGI and Genworth agreements with Atrium. Culver explained that, initially,

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[10] I previously concluded that Respondents referred real estate settlement business within the meaning of RESPA Section 8(a). Document 152 at 15-16. As explained infra, Respondents generally referred business using two different mechanisms: direct referral via the dialer and indirect referral via the preferred provider list. Except where noted, the term referral throughout this RD means both direct and indirect referral.

[11] Although Walker did not dispute Enforcement's representation during the hearing that UGI ceded $31.3 million in premiums to Atrium in 2003, in fact it only ceded premiums of $22.8 million. Tr. 2177-78; ECX 145 at 1179.

Ultimately, Genworth continued its captive arrangement with PHH; Genworth, UGI, Radian Guaranty, Inc. (Radian), and PMI Mortgage Insurance (PMI) sought out 4/10/40 structures with MGIC's customers; and MGIC lost market share. Tr. 368-70, 386-87; ECX 822 at 3.

In approximately 2005, MGIC began offering 4/10/40 structures, after which it regained market share with "certain customers." Tr. 360-61, 370, 375-76; ECX 823 at 5. Tr. 376-77. MGIC received a favorable third party risk transfer opinion for every 4/10/40 arrangement it entered into, and accounted for every such arrangement as reinsurance. Tr. 388-90. MGIC ultimately had between five and ten deep cede captive arrangements. Tr. 414.

Culver testified that, between 1995 and 2008, MGIC "didn't do business with PHH," despite one or two meetings between MGIC and PHH executives where MGIC offered a deep cede arrangement.[12] Tr. 379-80, 388. He said that any business MGIC received from PHH in 2003, for example, "got through by mistake."[13] Tr. 387. Culver believed PHH did not do business with MGIC because it was satisfied with its existing MIs, and PHH never told MGIC that it would not do business with MGIC unless it agreed to a deep cede captive arrangement. Tr. 379-80, 385-87.

Atrium entered into its third captive arrangement, with Radian, effective July 26, 2004. Answer at 5-6; ECX 200; ECX 526. Radian had pitched a captive arrangement to Respondents in December 2003, which projected net profits to Atrium of $63 million over ten book years, and an ECX 580 at 0391. Through the entire life of the arrangement the cede was 40%. ECX 153 at 139; ECX 159; ECX 200 at 1623, 1639; ECX 526; ECX 646 at 8290. Atrium made an initial capital contribution of $16,120. ECX 653, Decl. of Bogansky at Ex. A. Danahy testified that starting a captive arrangement with Radian in mid-2004 was terrible timing; he could "hardly imagine a worse time to start reinsuring the housing sector." ECX 153 at 139. Radian was placed on PHH's preferred provider list no later than April 2006, and stayed

[12]

[13] As discussed infra, PHH Home Loans did not always use the same loan allocation system as PHH Mortgage.

on it so that loans insured by Radian would be reinsured by Atrium. ECX 132 at 3167; see ECX 294 ("since we have a captive with them, why don't we just keep them as a preferred provider").

Radian received net 3 business. Tr. 465-66; ECX 205 at 0036; ECX 522 at decision matrix; ECX 654 at 4 n.1. Specifically, [redacted] although it is not clear why PHH limited Radian's referrals in this way. ECX 223; ECX 287. Despite its captive arrangement, [redacted] RCX 848.

Atrium entered into its fourth and final captive arrangement, with CMG Mortgage Insurance Company (CMG), which specialized in credit union loan insurance, on December 1, 2006, with an effective date of February 1, 2006.[14] Tr. 482, 496, 762, 1822; ECX 153 at 163-64; ECX 202 at 2; ECX 522 at decision matrix; ECX 773 at 9579; see RCX 581 at 3. In contrast to the deep cede arrangements with UGI, Genworth, and Radian, the CMG agreement provided for 25% cedes, with a 2.25% attachment point and a 4% risk band. Tr. 1079; RCX 37 at 1742. Atrium wanted to establish a relationship with CMG because of CMG's prominence in the credit union loan insurance market. ECX 153 at 163-64, 199. PHH did business with CMG so that credit union correspondent lenders could use CMG for mortgage insurance, and, thus, [redacted] ECX 773 at 9579; ECX 262. Atrium made an initial trust contribution of $380,350. ECX 653, Decl. of Bogansky at Ex. A.

Between 2006 and early 2008, the dialer settings and the preferred provider list resulted in the vast bulk of PHH referrals going to one of the four MIs with captive arrangements. ECX 159 at tabs 2006-2008. On rare occasions during this period, other MIs insured PHH loans, apparently by "mistake." Id.; Tr. 387. For example, in June 2008, two loans originated by a correspondent credit union were going to be insured by Republic Mortgage Insurance Company (RMIC). ECX 262. The credit union evidently selected RMIC as the MI without knowing of the non-preferred provider charge. Id. at 6239-40.

E. Atrium Carves Out Subprime Loans From Reinsurance Coverage

Between 2000 and around 2007, the quality of loans in the U.S. mortgage market deteriorated relative to the underwriting process, and starting around 2004 or 2005, there was significant disparity in the underwriting quality of the various MIs. Tr. 377-78, 1973-74. Rosenthal described borrower credit score as a factor affecting loan risk. Tr. 227-29. According to Danahy, an average FICO score (i.e., credit score) is around 720, and Atrium originally reinsured loans with a weighted average of 705. ECX 153 at 80-82.

Substantially all PHH loans that are "originated for sale" are sold, and historically have been sold, pursuant to programs sponsored by Fannie Mae, Freddie Mac, or the Government National Mortgage Association (Ginnie Mae). ECX 653 at 4; see also Resp. Br. at 31. Rosenthal testified that, around 2006, Fannie Mae and Freddie Mac began to take on riskier loans, specifically, loans with FICO scores below 600. See Tr. 149-52. PHH was unwilling to

[14] CMG was a joint venture equally controlled by The PMI Group, Inc. (PMI Group) and CUNA Mutual Insurance Society, part of CUNA Mutual Group. ECX 618 at 1.

accept the higher underwriting risk associated with these loans, because MIs were underestimating the risk and not pricing their rates appropriately. Tr. 151; see ECX 502 at 4510 ("We do not believe that the MI Premiums for loans with these characteristics are priced correctly. We do not believe that we are being compensated correctly in the Captive for the risk on these loans." (formatting altered)). Rosenthal explained:

> [W]e started taking a hard look at what we thought was going to be the ultimate performance of these lower credit loans that the agencies were buying to achieve their housing goals, but we're like, wait a minute, we're the ones standing in first loss position. We're not so sure we want to play in that game. Everybody else, you guys can go on your merry way, but we're not going to want to insure those loans in the Atrium captive any longer.

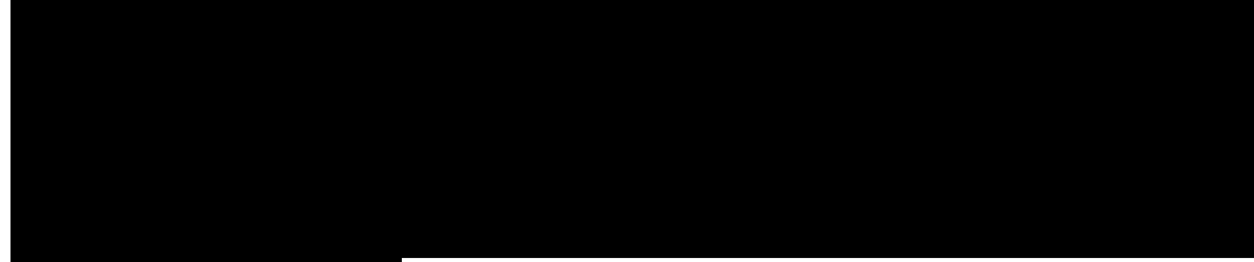
Tr. 150.

Danahy testified that Atrium needed to eliminate low credit score loans from its captive arrangements because there was not enough premium connected to these loans to compensate Atrium for the risk it was taking, because the MIs were not appropriately pricing risk. ECX 153 at 83-84, 156-58. Respondents thus decided to stop placing loans with borrower credit scores below 600 into Atrium's captive arrangements. Tr. 149; see ECX 241; ECX 502 at 4509-10 ("effective immediately, we desire to stop placing loans with Credit Scores of less than six hundred (600) into our Captive Re-Insurance Transactions"); RCX 798 (Aug. 15, 2007, letter from Atrium to New York DOI; "Atrium considered loans to borrowers with a FICO score below 600 to be indicative of borrowers with poor credit profiles that might fit a sub-prime characterization."). To remove Atrium's exposure to low credit score loans, Atrium needed to amend its existing captive arrangements. Tr. 156-58, 162, 167; ECX 153 at 80, 82, 117-18; ECX 502 at 4507-08. Accordingly, UGI and Genworth executed amendments to their captive arrangements in July 2006, and Radian executed an amendment in August 2006. ECX 175; RCX 49; RCX 53 at 1565-66. In February 2008, PHH unsuccessfully sought to remove "A-loans >600 <640" insured by UGI from Atrium's coverage. ECX 748.

PHH originated loans with sub-600 credit scores as early as 2001. Tr. 152. This continued into 2006 and later, because PHH "did want to get in on the business and make profit." Tr. 152-55; see ECX 502 ("We will continue to send GE these loans for Mortgage Insurance. However, we no longer want these loans placed into the Captive Re-Insurance Structure."); ECX 385 [redacted]). Rosenthal said that PHH came to participate in subprime loans around 2006 because the market was full of them, and PHH did not want to miss out on making a profit from Fannie and Freddie's broadening of the mortgage market by lowering their credit standards. Tr. 155-56.

Of those PHH loans closed in 2004 and insured by Genworth, 5.1% had FICO scores below 600. ECX 502 at 4512. However, the record does not clearly reveal how many subprime loans PHH originated in 2006 and thereafter, although there were likely over 300 in 2009. See ECX 159 at tab 2009 [redacted] Freddie stopped

purchasing subprime mortgages in February 2007. ECX 683 at 1. In response to an August 2007 inquiry from New York regulators, Atrium asserted that it did not consider loans originated in accordance with GSE guidelines to be subprime, even though the GSEs had purchased loans with FICO scores below 600. Tr. 151-52; ECX 502 at 4510; RCX 798. As of March 31, 2007,



Rosenthal testified that PHH did not "do a lot" of subprime loans where a borrower was not required to produce a W-2 or tax return information. Tr. 152-54.

F. 2006: Request for Proposal

PHH sent a Request for Proposal (RFP) to the MI industry in October 2006. Tr. 168, 182. Between 1997 and 2009, there were seven or eight MIs in the U.S. market at any given time, and recipients of the RFP included UGI, Genworth, and Radian, and MIs with which Atrium had never maintained a captive arrangement, including MGIC and PMI. Tr. 105, 172; ECX 28; ECX 41; ECX 44; ECX 421; ECX 537; ECX 738 at 8448; ECX 745 at 8460; ECX 749. It is not clear whether CMG received the RFP, and it did not respond to it in any event. ECX 749. Rosenthal was involved in preparing the RFP, and he was the main contact for the MIs during the RFP process. Tr. 168, 172.

The RFP was meant to expand the number of MIs PHH did business with, and to arrange beneficial captive arrangements that met risk transfer. Tr. 169-70, 176-77, 210; see, e.g., ECX 713 at 8603. It was motivated by PHH's plan to purchase mortgage insurance for a large segment of its business which it had previously self-insured, a plan which eventually resulted in a substantial increase in referrals to UGI and Genworth. Tr. 176-77; ECX 713 at 2; see ECX 159 at tabs 2006-2008 (showing increase in overall referrals in that period). Rosenthal testified:

> [I]t was not just captive reinsurance we were after, it was trying to understand what are the market conditions, what are the products you're offering, what are the different choices of insurance we can acquire for our customers, what are the different types of structures in captive reinsurance we can acquire. How our variable cap is getting back to – risk was changing, so how do we get the risk in the structure to change. Discussion of their counterparty strength, discussion of what kinds of things they'll delegate to PHH, what kind of work to perform. So it was a very broad picture of what this RFP was attempting to accomplish.

Tr. 179. He similarly testified:

> We were very interested in building relationships with mortgage insurance companies who could provide these strengths and expertise across many different disciplines, and this whole package was what was so crucial to us as we were

> evaluating which entities we were going to conduct business with in the future, because all in all, that would enable us to create a good product offering that was compliant and made good, accurate loans and developed efficiencies between the entities, so all of these things were important to us.

Tr. 574.

Notes prepared by Rosenthal around the time of the RFP reflect that the "goals" of the RFP were: [redacted] Tr. 171-72; ECX 738 at 8448 (capitalization altered). Rosenthal's "thoughts on freeing up capital in existing structures" at the time included to "petition insurance companies to release early." ECX 738 at 8448 (capitalization altered). Rosenthal testified that PHH chooses which MIs it works with based on their counterparty strength, ability to pay claims, being good to work with, and ability to share automated systems with PHH. Tr. 108-09. Rosenthal said that captive discussions originated in both directions: sometimes an MI approached PHH with a proposal ("the deal [it is] willing to give"), and other times PHH told an MI "here is the deal we desire to have." Tr. 134.

According to Danahy, PHH generally saw reinsurance agreements as a way to align the goals of an MI's business and PHH's business, and PHH always chose to do business with high-quality, well-capitalized MIs. ECX 153 at 200, 263. Danahy believed PHH should do business with a small number of MIs to build successful working relationships, although Rosenthal noted that PHH always wanted two MIs available, to ensure availability of insurance coverage. Tr. 532-34; ECX 153 at 199-200. Danahy had three criteria for evaluating whether reinsurance made business sense: whether the MI had adequate compensation for the risk assumed, whether the arrangement properly transferred risk, and whether PHH's originations could perform better than industry averages or the historical basis for the risk transfer assessment. ECX 153 at 78-79.

Speaking from the MI perspective, Walker explained that UGI felt that it was good for lenders to carry some portion of the mortgage guarantee risk. Tr. 2130-31. That is, if lenders had "skin in the game," they would not simply "originate to sell," a business model which "was always problematic in [the] industry." Tr. 2131. Under the traditional model of marketing mortgage insurance, a sales force visits lender branches, but in the 1990's and into the 2000's, very large lenders such as PHH sought out a centralized system, where the entire lender worked with a single account executive at the MI. Tr. 2143-44. Lenders consider a number of factors in determining whether to do business with a particular MI, and, if so, how much business. Tr. 2144-47. Walker did not recall PHH telling UGI that it had to have a captive arrangement to obtain PHH business, and he believed that PHH would still have done business with UGI without one, although he was not sure UGI would have stayed in PHH's top tier. Tr. 2147-49. He testified, however, that "[lenders] have more leverage, than, say, a third-party reinsurance company" and that lenders are the MIs customers and always have leverage. Tr. 2203. Walker thought that the quality of the reinsurance program provided to the lender affected the lender's overall allocation of business to an MI; for instance, UGI sought to expand its relationship with PHH by offering a favorable proposal in response to PHH's RFP. Tr. 2209-10; ECX 713; ECX 714 at 2.

Every recipient of PHH's RFP was asked to provide a company overview, to address corporate strengths, and to address its servicing of policies. Tr. 570-74; e.g., ECX 713 at 8604-05. Each cover letter stated in its introduction that PHH "want[ed] to continue to enhance [its] loan production and loan sales capabilities through creative structuring of credit enhancement products, captive reinsurance & contract underwriting services." ECX 713 at 8602. Significantly, recipients were also asked to discuss "deep cede XOL [excess of loss]," "risk based attachment points," "dividends based on sources and uses," and "provisions for commutation or sale," in their RFP responses. Id. at 8604 (capitalization altered); see Tr. 492. A commutation is a complete and final discharge of all or a portion of present and future obligations between the parties to a reinsurance agreement, with no remaining liability for the reinsurer, and without runoff of the reinsured books of business.[15] Tr. 2326; ECX 153 at 41, 135-36, 150, 152; ECX 790 at 62-14.

Rosenthal was initially evasive when asked whether the RFP's purpose was to use "PHH as leverage to renegotiate" its captive arrangements. Tr. 178-81. When Rosenthal was confronted with an outline he had put together around the time of the RFP, which included a bullet point that said, [redacted] he admitted that that was one of the RFP's purposes. Tr. 181; ECX 737; see ECX 324. He was evasive again when he was later asked the meaning of "leverage." Tr. 271. In his investigative testimony, however, he explained that "[t]he leverage would be, we'll send you mortgage insurance and you give us as good of a deal as is possible." Tr. 272.

The RFP process went on for several months, during which captive structures, including attachment points, were discussed with MIs. Tr. 182-83. During these months, the MIs were the primary proposers of captive arrangements. Tr. 184; see also Tr. 496, 501; ECX 13; ECX 437. According to Rosenthal, the MIs were more sophisticated when it came to understanding reinsurance and the mathematics of it. Tr. 184. Unlike PHH, the MIs tended to have actuaries on staff. Tr. 184, 586. The MIs also had opinions on what would pass risk transfer. Tr. 184. In investigative testimony, Rosenthal admitted that PHH chose to rely on the MI's expertise, and wanted to see what the MIs were "willing to offer" PHH. Tr. 187. The RFP did not result in any new captives with any of the MIs, and although Atrium entered into the CMG captive arrangement while PHH was reviewing the RFP responses, the CMG arrangement was negotiated "outside the RFP process." Tr. 576, 583. However, the RFP did instigate new "dialogues" with some MIs. Tr. 576.

Rosenthal was one of a small number of people at PHH involved in evaluating RFP responses. Tr. 208. In addition to him, the group comprised Bradfield, Danahy, Edwards, and Liz Rudolph (Rudolph), who reported to Bradfield. Tr. 208-09, 489-90; RCX 929 at 1, 3. PHH engaged Milliman to help evaluate RFP responses. Tr. 173, 507-08, 511-12; ECX 713 at 8606. Milliman was involved specifically to provide insight on what was going on in the mortgage insurance industry, offer ideas on different captive structures, and help PHH pick the best deal

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[15] "Runoff" refers to when the reinsurer retains the contractual obligation to pay claims on existing reinsured loans, but no new loans are being reinsured. See, e.g., ECX 653 at 10 n.15, 12.

that would still meet risk transfer requirements. Tr. 191, 512, 568. Milliman reviewed all responses to the RFP. Tr. 193-94; RCX 163.

Milliman's review focused on captive arrangements overall rather than risk transfer specifically. In a mid-December 2006 email string between Rosenthal and Ken Bjurstrom (Bjurstrom), who worked at Milliman, and relating to the "Genworth captive indication," Tr. 192, 238, 492, 1466; ECX 742 (ellipsis in original). An email string from early January 2007 shows that Rosenthal, in evaluating RFP responses, was concerned with comparing the proposed captive structures and the quantity of risk Atrium would be assuming under the structures. Tr. 241; ECX 346. In January 2007, Bjurstrom and Leighton Hunley (Hunley), also of Milliman, provided an analysis of the "proposed reinsurance structures" provided in response to the RFP. Tr. 194; ECX 14 at 1 (capitalization altered); ECX 313. Milliman's analysis involved some assessment of the risk transfer involved in the reinsurance structures, but the presentation was not focused on risk transfer, and a "next step" listed in it was to "obtain transfer of risk opinion letters." Tr. 514-17, 566-67; ECX 14 at 11-12, 15 (capitalization altered).

Rosenthal's evaluation focused on captive arrangements. Rosenthal prepared a summary of RFP responses from seven MIs, focusing on the features of proposed captive structures. Tr. 188-90; see ECX 749. In late October 2006, Rosenthal corresponded with PMI about the RFP, telling PMI: "Think high cede, late attachment, short corridor, low capital, fast dividend!" ECX 739 at 8451. Rosenthal explained that "I was trying to optimize the transaction from a profit perspective for Atrium reinsurance so we could get the best possible deal at Atrium that still achieved risk transfers." Tr. 207. In an early November 2006 email string between Rosenthal and Bjurstrom, Rosenthal mentioned needing to "understand the expected return" as to a couple of the MIs' submissions. Tr. 191; ECX 745 at 8460. As to UGI, Rosenthal wrote, ECX 745 at 8460.

In April 2007, Rosenthal wrote Bradfield regarding captive modifications. Tr. 436; ECX 419. These thoughts were shared:

ECX 419; see Tr. 438. In October 2007, Bradfield wrote Danahy, that "[w]e charge 75 [basis points] to the correspondent if they don't

use one of our preferred vendors. That would go away if we had a captive with them." ECX 205 at 1.

1. Radian

Radian responded to the RFP, and although Rosenthal was generally evasive and non-responsive on this topic, Tr. 197-98. On December 4, 2006, Rosenthal wrote Radian:

> Thanks for sending this over. It appears to me that this report states that our "variable" attachment for the 2006 book of business would be at 3.54, detaching at 13.54 for a net 39.6 cede. This is worse than our current deal of 4/10/40 in all respects. Is this an accurate assessment of this collateral and analysis? I was hoping that the risk in our current book would increase the attachment point, not decrease it. It feels / seems riskier to me than the prior books.

ECX 322 at 3776. On December 6, 2006, he wrote Radian: "This is going the wrong way – it is getting less aggressive, not more. . . . You might want to have your team re-look at this." Id. at 3775.

Radian was not in PHH's dialer until August 2009, by which time it had commuted its captive arrangement. RCX 848. In 2007, the number of loans PHH referred to Radian dropped by approximately 20% from the previous year. Compare ECX 159 at tab 2007 with ECX 159 at tab 2006. On December 19, 2007, a Radian sales employee wrote Rosenthal:

> I understand that in order for us to receive more of your [borrower-paid mortgage insurance] business, we need to be programmed into your "dialer". In talking to you, it sounds like this programming may not be completed until end of 1st Quarter 2008. We understand that until we are programmed into the dialer, your control over giving us [borrower-paid mortgage insurance] is limited.

Tr. 441; ECX 357. In response to this email, Rosenthal explained at the hearing that the Radian employee was seeking more borrower paid mortgage insurance from PHH. He further explained that "we were very . . . systematic in how we distributed mortgage insurance. You had to be in the dialer in order to receive any mortgage insurance out of our retail business and it was a pretty big effort to get the IT to program new participants into the dialer." Tr. 441. On December 27, 2007, Rosenthal wrote Bradfield about Radian and RMIC:

Tr. 444. PHH almost exclusively used borrower-paid mortgage insurance. Tr. 439.

2. UGI

UGI also responded to the RFP, despite its longstanding captive arrangement with Atrium. Tr. 234. UGI proposed exploring new captive structures to protect its share of mortgage insurance coming from PHH loans. Tr. 235-37; ECX 326; ECX 733 at 8934. In December 2006, PHH raised the possibility of commuting Atrium and UGI's captive agreement. Tr. 248, Tr. 2218; ECX 305; ECX 740. When PHH brought this up, UGI's Nick Nicholes (Nicholes) responded that "it would not be in PHH Mortgage's best interest" to pursue commutation at the time. ECX 740 at 8453. Very soon thereafter, discussions moved away from commutation and toward a large dividend from the UGI captive trust account. Tr. 250, 256, 2214-15; see ECX 304; ECX 475; ECX 719; ECX 750. On January 2, 2007, Rosenthal wrote Walker:

> I would like to have a conversation around the following items: (1) A quick return of the capital that is no longer required to be in the Captive Structure. With the end of the year, I believe that 3 of the books no longer have any capital requirements as they are completed. I would like to get all of the capital that is deployed against these books released immediately. How quickly can we make this occur? (2) A mathematical analysis of the remaining capital in Atrium with

> UGI. I would like to see how much of the capital that you are suggesting could be released to us as we discussed several weeks ago.

ECX 305 at 3422 (formatting altered); see also Tr. 251-52. Rosenthal believed that once ten years has passed from the end of a book year, the captive no longer receives any portion of the premium for that book year, and if no claim has come in, there is no risk in connection with that book year. Tr. 256, 261; ECX 475 at 9846. He explained that this justified the release of capital from the captive trust. Tr. 261; see also Tr. 721-22; ECX 580 at 0393.

On January 4, 2007, UGI proposed an amendment to the UGI agreement to allow $44.9 million to be released out of the UGI trust. Tr. 253-55, 2216; ECX 721; ECX 750 at 8470-71. Book years 2001 and earlier had no possibility of loss, so Walker suggested an amendment whereby the required capital for book years 2001 and earlier would be limited to the required contingency reserves. Tr. 2219; ECX 721. Rosenthal responded on January 8, 2007, that:

> we might be able to go a bit further than you suggested. It is my understanding that Book Years 1996, 1995, 1994-1993 are finished. Thus, I don't think that we are obligated to hold any capital against them. It is no longer our risk – we are no longer receiving any premiums, Atrium is out of the transaction entirely.

ECX 750 at 8470. Rosenthal concluded that $52.73 million should be released in dividends, not just the $44.9 million UGI had proposed. Tr. 255; see ECX 750 at 8470 ("I calculate that we can receive 52,734,498.50 of capital back, as opposed to the $44.9mm that your team calculated."). Later that day, Walker responded in relevant part:

> You touch on a very curious subject, one whose resolution I am always overlooking and finding myself corrected by our accountants. The contingency reserve is a statutory requirement and it is based on calendar year premiums. So if loans from book year 1994 produced ceded earned premium in calendar year 2004, then there is some calendar year 2004 ceded contingency reserve associated with book year 1994. This piece of the calendar year 2004 contingency reserve must remain on Atrium's books until 2014, even though book year 1994 may be totally expired. . . . So while we agree with you that there is little or no remaining risk on these older books and we have agreed to reduce the 20% required capital to zero we have to maintain the contingency reserve regardless.

Tr. 722-23; ECX 475 at 9845.

In response, PHH initially backed down. On January 10, 2007, Rosenthal wrote Walker that "[w]e would like you to pursue releasing the $44 [million] that we discussed earlier this week." Tr. 257; ECX 475 at 9845. On January 16, 2007, Nicholes wrote Rosenthal, "So, is your request that we agree to a 4.0 (add 50 [basis points]) attachment point where the analysis shows 3.5? Is this the request?" Tr. 237-38; ECX 751 at 8473. On the same day, Rosenthal responded, "The request would be to add 50 [basis points] to every number if you can. That would make you competitive against some of the other levels that I am seeing." ECX 751 at 8472. The next day, UGI sent a captive proposal over to PHH, containing variable attachment points starting at 4% and in line with Rosenthal's expressed preference. Tr. 246; ECX 718.

Ultimately, the UGI captive arrangement was not modified as a direct result of the RFP, but in March 2007, Atrium took a $52.56 million dividend from the UGI trust. Tr. 258, 264, 538-39, 2220; ECX 198 at Trust Deposits; RCX 868 at Trust Deposits. The release of dividends required an amendment to the captive agreement between UGI and Atrium, which was signed in February 2007. Tr. 257-58, 538-39, 2216-21, 2216-19; ECX 331; ECX 584 at 6640-42; RCX 55. The amendment reduced required reserves for book years 2002 and earlier, although UGI had initially favored a release for just book years 2001 and earlier. ECX 584 at 6640; ECX 721; RCX 55. Also, PHH's preference of a dividend of around $53 million ultimately prevailed over UGI's preference for a dividend around $45 million. ECX 198 at Trust Deposits; RCX 868 at Trust Deposits.

Nothing in the record explains why PHH's preference prevailed. Walker testified only that UGI made a "business decision" to allow the dividend. Tr. 2151-53, 2216-18. Neither Rosenthal nor Walker recalled UGI receiving any consideration in exchange for amending the agreement, nor is any consideration memorialized in the amendment itself. Tr. 264, 540, 2221; RCX 55.

G. 2008: Freddie Mac Changes its Reinsurance Policy

The housing market showed signs of weakness beginning in 2006, and Respondents and their counterparties reacted. See RCX 2 at 6 [redacted] RCX 706 at 33 (housing prices started to drop in 2006). As noted, in 2006 Atrium stopped reinsuring loans with FICO scores below 600. Between November 2006 and July 2007, UGI, Genworth, and Radian all tightened their underwriting standards, which had the effect of making many PHH loan products – some of which Rosenthal facetiously referred to as "crud" – more difficult to insure. Tr. 533; ECX 207 at 1 ("UGI is actively doing this now"); ECX 224 at 1006-07; ECX 293 at 2785-86. Rosenthal told Robert Smith (Smith), who was PHH Mortgage's senior vice president at the time, that as of November 28, 2007, "[w]e don't like the captive we have with CMG right now," and Smith replied that he believed CMG would "be willing to re-negotiate the captive terms." ECX 747 at 8464-65. In December 2007, Rosenthal suggested an amendment to Radian's captive arrangement because "expected loss rates have increased." ECX 348 at 4296. By March 2008, only UGI was willing to insure loans with FICO scores below 680. ECX 386 at 1. According to its analysis of data up to December 31, 2007, [redacted]

Smith negotiated the original (and only) CMG captive arrangement. Tr. 288, 576; ECX 747 at 8464-65. Sometime prior to late November 2007, CMG entered into a "License Agreement," which is not in the record. ECX 747 at 8464. The License Agreement allowed Respondents, presumably at least PHH Mortgage, to use what was apparently CMG's name for $70,000 per quarter. Id. The License Agreement required "Purchaser" – again, presumably including at least PHH Mortgage – to designate CMG as a preferred provider and to "use its commercially reasonable efforts to obtain primary mortgage insurance from [CMG]." Id. The License Agreement was apparently tied to the captive arrangement, [redacted]

Id.

On February 14, 2008, Freddie announced that, effective June 1, 2008, it would no longer purchase mortgages covered by deep cede reinsurance and would only accept captive loans with cedes of 25% or less. Tr. 350, 445-46, 2222; ECX 31 at 1569; ECX 153 at 107; ECX 378 at 5968; RCX 811. This came at a time of historically significant housing market turmoil. See ECX 153 at 194 (Danahy said "the housing market [was] in the tank" in "2008 for sure"); ECX 378 (February 14, 2008, email in which Walker says he is busy "forecasting billion-dollar incurred losses in this industry."). The purpose of the policy change was "to allow [MIs] to retain more insurance premiums to pay current claims and re-build their capital base." ECX 31 at 1569.

On February 14, 2008, PHH's dialer was set at for UGI and for Genworth. RCX 848. ECX 159 at tab 2008. This dialer setting corresponded closely to actual referrals: Id. PHH's preferred provider list for tier 3 loans as of November 2007 coincided with its captive arrangements; if a correspondent lender selected the MI, it would be charged a 0.75% fee unless the MI was UGI, Genworth, Radian, or CMG. ECX 132 at 3167; ECX 654 at Ex. O.

UGI was notified of the forthcoming policy change before Freddie's official announcement, and may have notified PHH in advance. Tr. 2232-33. Freddie's new policy meant that Atrium's captive arrangements with UGI, Genworth, and Radian had to be altered. Tr. 460. Danahy testified that Freddie's policy change meant that Atrium would be compensated less, meaning that Atrium needed to establish a lower risk profile. ECX 153 at 107. Lowering the risk profile could be achieved by adjusting the risk corridor or by only reinsuring loans of higher quality. Id. at 107-11. Although there was "oftentimes" talk about switching from excess of loss to quota share arrangements, Danahy, like Rosenthal, considered quota share arrangements "unattractive." Id. at 110-11, 123; Tr. 140-41. Milliman was consulted after Freddie's policy change to assess risk transfer and project losses. ECX 153 at 107-08, 127-28.

Rosenthal wrote Walker on the day of Freddie's announcement, asking his thoughts on the policy change's "implication to [their] future captive." ECX 378 at 5968. Walker responded, also on February 14, 2008: "With catastrophic losses in the MI industry virtually a certainty for 2008 and beyond, it might be a good thing for lenders to lighten up on their captive risk for a year or two." Tr. 2222-23; ECX 378 at 5967. When Rosenthal was asked at the hearing if he had "a sense why an MI company would care about a lender lightening up on their captive risk just at the moment when billion dollar incurred losses are happening," Rosenthal responded with only "I couldn't tell you." Tr. 448. Walker's February 14, 2008, email response also said:

> We have been working with Milliman on some alternatives for captives with 35%-40% cedes already – because we know that many of these are going to be

> clobbered (esoteric financial term) in 2008. So we will be able to propose to you shortly some 25% cede excess structures. Atrium will be one of the few adequately capitalized captives to survive more than a year or two by our preliminary estimates and you got a very nice dividend check last year.

ECX 378 at 5967. The referenced "dividend check" was the $52.56 million dividend paid in March 2007. Tr. 449.

PHH immediately attempted to convince UGI, without success, to allow PHH to "kill the A-loans . . . out of [the] captive." Tr. 452; ECX 748. An A- loan is a riskier loan involving a borrower with more credit trouble. Tr. 451-52. Atrium included such loans in its captive with UGI up to that point, but by 2007 and 2008 A- loans were defaulting at higher rates than in prior years. Tr. 453-54. Even though PHH had complete control over the quality of loans it originated and purchased from correspondent lenders, Rosenthal blamed Atrium's increased risk from A-loans on the GSEs' reduced standards and on the MIs' incorrect "pricing." Tr. 453-55, 457. Walker, however, testified that UGI "had numerous discussions and arguments, probably, with [PHH] about those business[es], as [it] did with all of [its] lending customers." Tr. 2236. UGI's losses from PHH's business eventually resulted in "a huge set of underwriting restrictions," and UGI "said [it would not] accept all the[] risky types of loans that we had been insuring." Tr. 2236.

In late February 2008, Bradfield and Walker discussed the possibility of selling the UGI captive arrangement to UGI – in essence, commutation of the arrangement – but Walker was not enthusiastic about it. ECX 350. On February 28, 2008, UGI formally gave notice that it was terminating its captive arrangement with Atrium, effective May 31, 2008. ECX 31; RCX 721; RCX 723. All book years with 40% cedes were put into runoff. ECX 31 at 2. While the notice stated that UGI "**would be pleased to amend its captive reinsurance agreement to reflect the new Freddie Mac requirement**," no alternative arrangement was reached before the effective termination date. Id. at 1567 (bold in original); see ECX 159 at 2008. As of May 12, 2008, PHH and Radian were still discussing renegotiating their captive arrangement, which would include a lowering of the cede from 40% to at or below the 25% threshold required by Freddie. Tr. 292-93; ECX 401. Radian never amended its captive arrangement with Atrium until it was commuted. ECX 153 at 139-42. On May 30, 2008, Radian sent Respondents a termination notice, with a runoff date of May 31, 2008. ECX 237 at 1. The cede under the CMG captive was already at 25%, but Milliman analyzed an alternative CMG structure for Atrium,

The Genworth captive arrangement was amended effective June 1, 2008, to reduce cedes from 40% to 25%, with a 5% attachment point and a 5% risk band. ECX 159 at tab 2008; ECX 503 at 6551; ECX 646 at 8290. The Genworth captive agreement covering June 2008 and after was referred to as the "2008-B" book year. Tr. 1851; ECX 503 at 6552; RCX 51. Thus, by June 1, 2008, only Genworth and CMG had captive agreements in place that complied with Freddie's new policy.

As a result of Freddie's policy change and UGI's termination, PHH started referring the vast bulk of its non-credit union business to Genworth. During May, June, and July 2008, Genworth received [redacted] PHH loans, respectively, all but [redacted] of which Atrium reinsured. ECX 159 at tab 2008. These were the only months Genworth received more than [redacted] referrals at any time between 2006 and 2011. ECX 159 at tabs 2006-2011. Genworth received almost as many loans from PHH just in May through December 2008 ([redacted]) than in 2006, 2007, and 2009 combined ([redacted]). ECX 159 at tabs 2006-09. By contrast, in June 2008 PHH sent a negligible amount of business to UGI and Radian, which no longer had Freddie-compliant captive arrangements: [redacted] ECX 159 at tab 2008. CMG, which had always had a Freddie-compliant captive arrangement and which had always received referrals outside the dialer, consistently insured [redacted] loans per month throughout the rest of 2008. Tr. 468-69; ECX 159 at tab 2008.

Freddie's policy change and UGI's termination also led PHH to seek out new MI partners, and to attempt to negotiate captive arrangements with them. Rosenthal notified RMIC that PHH was interested in "developing a captive re-insurance arrangement with RMIC." ECX 398. On June 2, 2008, Rosenthal's colleague at PHH, Kelly Redfearn (Redfearn), wrote Chris Kennedy (Kennedy), an RMIC sales person, "Chris, can you confirm if Credit Union rates are captive eligible or not?" Tr. 114; ECX 773 at 9581; RCX 929 at 3. Kennedy responded, "We can negotiate this in, especially if UG and Genworth allow this," and then Rosenthal responded, "Credit Unions are Captive Eligible." ECX 773 at 9580. On June 3, 2008, Rosenthal wrote, "The credit union performance was removed from the entire population of loans. You did not receive any information on this collateral, as it is not going to the MI dialer at this time," and:

> We completely control our retail via our dialer (tier 1, 2 & 4). Our wholesale and correspondents can either allow me to order the MI, then I select the provider. For the credit union business, we choose [CMG] at this time. Alternatively, they can choose the MI provider from our preferred MI provider list, which we control. Our ability to negotiate a suitable arrangement with you will enable you to become a preferred provider. Then, you can market to the Individual correspondents to influence their decision.

Id. at 9579. Rosenthal explained that his reference to a "suitable agreement" might refer to a "captive reinsurance mechanism," among other things. Tr. 115, 117-18.

Also on June 2, 2008, Mark Krauter (Krauter) of MGIC wrote Redfearn and Rosenthal, "[p]resently our Credit Union Rates are not captive eligible." Tr. 480-81; ECX 485 at 0983. Rosenthal responded, "Please supply us with the pricing / rates that you would allow to be placed into a captive. We are able to place our credit union business in our other captives. The ability to place Credit Union Business in captives is important to us." Tr. 483; ECX 485 at 0982. Krauter then wrote, "I need to followup . . . to see if we have rates that enable us to do this. I will let you know as soon as I hear back." Tr. 484; ECX 485 at 0982. Redfearn responded, seeking to make sure that MGIC's rates were competitive with other MIs' rates. ECX 485 at 0981. Rosenthal wrote in response to Redfearn's email, "Agreed – relatively low rates & captive eligible are likely required to play (and we want to play!)." ECX 485 at 0981. By "to play,"

Rosenthal meant "to receive business from" PHH. Tr. 488. Rosenthal later wrote that ECX 48 at 0439.

Despite the lack of captive arrangement, MGIC received much more PHH business in late 2008. For example, MGIC insured PHH loans in August 2008, its highest monthly share since January 2006. ECX 159 at tabs 2006-08. Between January and July 2008, MGIC insured loans, and between August and December 2008, . ECX 159 at tab 2008. Between September 2008 and December 2011, MGIC insured PHH loans monthly. ECX 159 at tabs 2008-11. Culver testified that MGIC started doing business with PHH when the market had changed and Freddie was "making waves." Tr. 381-82, 388. In September 2008, MGIC announced that it would no longer cede new business under excess of loss captive arrangements. ECX 299.

It appears that MGIC's increased share of PHH business was the result of the August 2008 change in PHH's preferred provider policy, and not the result of PHH's direct selection of MGIC for insurance. ECX 654 at Ex. O. Rosenthal prepared a spreadsheet in late 2008 showing ECX 522 at tab data. In August 2008, MGIC insured PHH loans, which, as noted, was MGIC's highest monthly share since January 2006. ECX 159 at tabs 2006-08. From August 2008, when MGIC became a preferred provider (and UGI was dropped as a preferred provider), through November 2008, when it was added to the dialer, MGIC insured , or about of all mortgage-insured PHH loans. Id. at tab 2008. During that same period, RMIC, which was added to the preferred provider list at the same time as MGIC, insured Id.; ECX 654 at Ex. O. This was at least partially the result of PHH encouraging its correspondent lenders to select MGIC. ECX 295 at 3174. In other words, MGIC was virtually the sole beneficiary of the change in PHH's preferred provider policy.

As of June 1, 2008, the dialer was still officially set at , and it seemingly remained at that setting until November 21, 2008. RCX 848. How PHH adjusted the dialer during this period is not entirely clear. There is some evidence that the dialer could allocate business at different percentages for different loan products. ECX 221; ECX 223 There is also some evidence that PHH was able to manually block or limit referrals, and to bypass the dialer with the MI's assistance. ECX 214 at tab Cover ECX 405 at 7319.

Most importantly, Respondents may not have maintained careful records of dialer settings in 2008. The most straightforward source of dialer settings in evidence is RCX 848, which shows no changes to the dialer between November 2007 and November 2008. However, other evidence suggests that the dialer was actually set to April 4, 2008, about five weeks after UGI gave Respondents its termination notice. ECX 388 at 6098 Within

one month, this change dramatically altered the allocation of referrals: between April and May 2008, Genworth's referrals nearly doubled, [redacted] while UGI's plummeted [redacted] ECX 159 at tab 2008. Also, an email dated September 26, 2008, suggests that [redacted] ECX 472 at 8011.

In any event, the loans insured by Genworth in the second half of 2008 were clearly referrals, largely via the dialer. The spreadsheet Rosenthal drafted in late 2008 showed [redacted] of PHH loans in June and July 2008 were [redacted] and 5% were [redacted] with virtually identical percentages for the third quarter of 2008. Tr. 464; ECX 522 at tab data. In June 2008, PHH floated an internal proposal which [redacted] and which noted that [redacted] ECX 214 at tab Cover; ECX 215. Rosenthal testified that the dialer was PHH's only method of referring retail, i.e., non-net 3, business. Tr. 107-08, 441. As for net 3 business, Genworth remained on the preferred provider list after August 2008. ECX 654 at Ex. O.

H. UGI Amends its Captive Arrangement and Regains PHH Business

UGI had generated a proposed amendment to its captive arrangement with Atrium as early as [redacted]. ECX 400; RCX 2002. At that time, the proposed structure had an attachment point of 4.5%, a risk band of 5.5%, and a premium cede of 25%. RCX 2002. UGI apparently transmitted this proposal to PHH, and Milliman analyzed the proposal for both counterparties. RCX 2002; RCX 2003. PHH may have been willing to accept this amendment, but it was never actually executed. ECX 400; ECX 461 at 6746-47.

On August 7, 2008, PHH announced that UGI would no longer be a preferred provider for tier 6 and 7 loans, effective the next day. ECX 654 at Ex. O. It also added RMIC and MGIC to the preferred provider list and reduced the non-preferred provider fee from 0.75% to 0.4%. Id. On August 8, 2008, Bradfield asked Danahy whether a captive amendment with UGI had been signed. ECX 218. Danahy answered "[n]ot yet," noting that UGI had offered a "low attachment point" around 4.25%, but adding that "[o]f course we will lower if the risk is too low to make sure we are [RESPA] compliant." ECX 218. Bradfield responded that he would call UGI to inform it that it would no longer be a preferred provider for "Net 3 business," referring to PHH's line of business where it acquires loans from third parties. Tr. 465-66; ECX 218. Two weeks later, he stated in an email that UGI was removed from the preferred provider list because of its underwriting guidelines. ECX 302 at 2.

UGI insured a total of [redacted] PHH loans in August, September, and October 2008. ECX 159 at tab 2008. In September 2008 in particular, UGI insured [redacted], having a 40% premium cede. Id. The record is not entirely clear on this point, but it is likely that [redacted] and all loans with premium cedes exceeding 25% and origination dates after June 1, 2008, were refinancings, and they are referred to as such throughout this RD. Tr. 1246-47; ECX 159 at tab 2008; see ECX 212 (March 2009 email string between Rosenthal, Danahy, and Bradfield, discussing the implications of refinancings on Atrium captive arrangements).

In early October 2008, Genworth informed PHH that it would offer only a quota share captive structure after 2008. ECX 267 at 1. On November 7, 2008, Bradfield wrote Danahy and Edwards that UGI had "confirmed that an XOL [excess of loss] captive is something they are still interested in doing. Tr. 492; ECX 404 at 7315. Danahy then wrote, Tr. 492; ECX 404 at 7315. Bradfield then wrote:

Tr. 493; ECX 404 at 7315. At this time Genworth and MGIC received almost all of PHH's business. Compare ECX 388 at 6098 with ECX 159 at tab 2008; but see RCX 848 ( ).

On November 19, 2008, Rosenthal emailed Bradfield that he had "just received Captive XoL contracts from UGI." ECX 407 at 7442. Six minutes later, Tr. 551; ECX 220. On November 21, 2008, the dialer was set at RCX 848. Id. UGI's share of PHH loans increased almost immediately, ECX 159 at tabs 2008-09.

On December 24, 2008, Edwards wrote Bradfield that he thought PHH should ECX 487 at 1886. Id. In connection with this, Rosenthal summarized the "current state of captives":

- Genworth had offered an extension of the existing captive to March 31, 2009, but was only willing to offer a quota share arrangement after that. Genworth was indifferent to the price: "whatever corridor passes risk transference with Milliman is acceptable to them."
- UGI, as noted, had offered an excess of loss arrangement. ."
- CMG was in runoff.
- Radian had not committed to offering an excess of loss arrangement for 2009.

- MGIC and RMIC had only offered quota share arrangements.

Id. at 1884; see ECX 13, 60 (MGIC's October 2008 quota share offer).

The dialer was adjusted again in late January 2009: RCX 848. Genworth's share of PHH business immediately dropped; in February and March 2009, Genworth received referrals, respectively, most of which were reinsured. ECX 159 at tab 2009; but see ECX 493.[16] During those same two months, CMG (which still had a Freddie-compliant captive arrangement) received loans, of which reinsured, Radian (which did not have a Freddie-compliant captive arrangement) received MGIC and UGI ECX 159 at tab 2009.

In early January 2009, PHH and UGI signed a "term sheet," containing two possible captive structures: 4/6/25 and 5/5/21. ECX 253; ECX 409. The next month, Rosenthal expressed interest in accepting the 4/6/25 structure. ECX 437. Then, later in February 2009, Rosenthal and Walker met and discussed commutation. ECX 442. UGI at that time was "actively considering how to commute all of [its] captives as part of [its] re-structuring." Id. Rosenthal noted that "[i]t might be possible to perform a commutation, where [PHH] pay[s] incurred losses & receive[s] the calculated present value of future losses & future premiums," but also noted that this would increase UGI's capital requirements. Id. Based on the meeting, Rosenthal estimated that if a commutation were to occur, PHH would receive a commutation payment of around million. ECX 435.

On March 11, 2009, Rosenthal told Danahy and Bradfield that UGI was willing to treat refinancings as loan modifications, so that they would "remain in their original captive," but that Genworth would treat refinancings as payoffs, so that they would not remain in the captive arrangement. ECX 212 at 2702. On March 31, 2009, Atrium made its first payments on any claims associated with any of its reinsurance, a payment to UGI of and two payments to Radian totaling . ECX 153 at 121-22, 225-26; ECX 159 at tab Column F.

UGI amended its captive arrangement, making PHH loans captive-eligible again, in April 2009, effective March 1, 2009. ECX 520. The amendment reduced premium cedes from 40% to 25%, with a 4% attachment point and a 6% risk band. Tr. 461, 2234; ECX 520. One day before UGI signed the amendment, ECX 520 at 2266; RCX 848. Between April and November 2009, UGI's share of PHH loans never dropped below

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[16] The most comprehensive source of data on loans carrying mortgage insurance is ECX 159. ECX 493 purports to document mortgage insurance on PHH loans for 2009 only, including breakouts of "Cor Ordered," "Controllable," and "Non-Controllable" insurance, breakouts that are not found in ECX 159. The data in these two exhibits is not entirely consistent. Compare ECX 159 at tab 2009 with ECX 493. For example, Genworth received PHH loans in March 2009 according to ECX 493, but only according to ECX 159. Compare ECX 493 with ECX 159 at tab 2009. Because the parties rely on ECX 159, and not ECX 493, and no witness discussed ECX 493, I have relied on ECX 493 only when it is not inconsistent with ECX 159. E.g., Resp. Reply at 5, 35, 46 n.41 (citing ECX 159).

[REDACTED] ECX 159 at tab 2009. By contrast, Genworth's share dropped to [REDACTED] in April, and totaled [REDACTED], and MGIC's share dropped to [REDACTED] in April, and [REDACTED] between April and November 2009. Id.

The dialer was adjusted six more times in 2009, generally resulting in [REDACTED] RMIC and Radian were also added to the dialer in June 2009 and August 2009, respectively. ECX 493; RCX 848. These adjustments are reflected in UGI's gradually decreasing share of PHH business between June 2009, when it insured [REDACTED], and December 2009, when it insured [REDACTED]. ECX 159 at tab 2009. It is also reflected in sharp jumps in business received by RMIC and Radian in July and September 2009, respectively, that is, the month following their respective additions to the dialer. Id. Nonetheless, consistent with the dialer settings, UGI continued to receive the largest share of PHH business through December 2009. Id. MGIC continued to receive substantial business in April and May 2009, [REDACTED] possibly because of holdover business from February and March 2009, [REDACTED] ECX 159 at tab 2009; RCX 848. Between June and December 2009, when MGIC's dialer setting varied [REDACTED] its actual share of business varied [REDACTED] loans per month. ECX 159 at tab 2009; RCX 848.

On May 19, 2009, after the UGI agreement had been revived and the Genworth agreement was in runoff, Bradfield wrote: [REDACTED] ECX 744 at 8458. This was in response to Rosenthal suggesting a change to the dialer allocations, and expressing his view that PHH should [REDACTED] ECX 744 at 8458-59. Bradfield also expressed an interest in abandoning PHH's service of ordering MI for correspondent lenders: [REDACTED] Id. at 8458; see ECX 132 at 3167 (explaining "PHH Orders the PMI" service).

On September 25, 2009, UGI notified PHH that UGI would stop placing new business into captive structures effective December 31, 2009, and would terminate the captive arrangement between UGI and Atrium effective December 31, 2009. ECX 153 at 1, 41, 122-23, 153; RCX 722. That same day, PHH reduced UGI's share of the dialer [REDACTED] RCX 848. The last loan went into the UGI captive arrangement in December 2009. ECX 159 at tabs 2009-10. The UGI arrangement was amended for the tenth and last time in late February 2010, effective February 24, 2010. RCX 58.

I. Atrium's Captive Arrangement with Genworth Ends

Between July and December 2008, PHH referred [REDACTED] to Genworth, of which Atrium [REDACTED]. ECX 159 at tab 2008. Between January and March 2009, PHH referred [REDACTED] to Genworth, of which Atrium [REDACTED]. ECX 159 at tab 2009. Sometime early in 2009, Genworth changed its eligibility guidelines and requested "slowed down production" of PHH loans because it was "managing through financial difficulties." ECX 495 at 1. By mid-2009, Genworth was in a position to increase PHH business, but "PHH production quality was not meeting [Genworth's] quality rating." Id. Genworth also eliminated PHH's "delegated MI authority." Id.

Genworth stopped reinsuring PHH business as of March 31, 2009, and existing book years were put into runoff. ECX 153 at 153-54; ECX 159 at tab 2009; RCX 20; RCX 986 at 2. I previously concluded, pursuant to 12 U.S.C. § 1081.213, that the Genworth arrangement was in runoff as of January 1, 2009. Document 67 at 17. The parties agree, however, that the true runoff date for the Genworth captive arrangement was March 31, 2009. See Tr. 1083, 1246-47, 1266-1269, 1855-56; Enf. Br. at 50, 188; Resp. Br. at 37; Enf. Reply at 125; Resp. Reply at 15. [redacted] loans carrying 25% cedes went into the Genworth captive arrangement in May 2009, i.e., after the runoff date, and it is likely that they were loans that had not closed according to the expected schedule – holdovers or "stragglers," as Respondents' counsel characterized them. Tr. 1246; ECX 159 at tab 2009; see Resp. Reply at 35 n.32. Between June 2009 and December 31, 2009, [redacted] loans went into the Genworth captive, but at 40% cedes, indicating that those loans were refinancings. ECX 159 at tab 2009. Although PHH and Genworth discussed commutation in 2009, Genworth expected any commutation payment to PHH to be "below [redacted] which was unacceptable to PHH. ECX 427; ECX 431.

[redacted]. RCX 848. PHH's referrals to Genworth continued to drop after the Genworth arrangement went into runoff, [redacted] in February 2009 and [redacted] in March 2009 to [redacted] in April 2009. ECX 159 at tab 2009. However, Genworth continued to receive a small number of PHH loans through the end of 2009. ECX 159 at tab 2009. A comparison of ECX 159 and ECX 493 suggests that Genworth's slight increase in PHH business in November and December 2009, [redacted], respectively, is attributable to selection by correspondent lenders. ECX 654 at Ex. O; compare ECX 159 at tab 2009 with ECX 493.

J. Atrium's Captive Arrangement with Radian Ends

Respondents "never made the minimum capital requirements" to the Radian trust account. ECX 246; ECX 247. The Radian trust account was underfunded until at least the fourth quarter of 2005. ECX 247. On May 30, 2008, the same day Radian issued its termination notice, Mike Bogansky (Bogansky), a controller at PHH, directed a wire transfer of about [redacted] into the Radian trust account, to "make the trust whole." Tr. 1161; ECX 246; ECX 653, Decl. of Bogansky at 1, Ex. A. Respondents made another capital contribution of about [redacted] in the fourth quarter of 2008. ECX 653, Decl. of Bogansky at Ex. A.

Except for [redacted] in July 2008, no loans went into the Radian captive arrangement after May 2008. ECX 159 at tab 2008. By June 2, 2009, there was a capital deficiency in the Radian captive trust. Tr. 293-94; ECX 254; ECX 425. PHH and Radian disagreed over the level of capital deficiency; Radian claimed "Atrium would eventually [redacted] shortfall," while PHH believed, relying on analysis by Milliman, that the shortfall was around [redacted] ECX 430 at 1; ECX 434. On June 2, 2009, Rosenthal wrote others at PHH, including Danahy, about the Radian trust account:

> [redacted]

ECX 425; see ECX 254 at 3820 (Danahy expressing same opinion). Respondents put no additional capital into the Radian trust in 2009. ECX 219; ECX 653, Decl. of Bogansky at Ex. A. Consequently, under the terms of the arrangement, Radian had the right to terminate for insufficient capital, and termination could happen automatically. Tr. 297, 1926; RCX 40 at 1626-28; see Tr. 1999 (a failure to contribute sufficient capital "can lead to cutoff"). The parties agreed to a commutation effective July 22, 2009. Tr. 296-97; ECX 653 at 12; RCX 42.

Danahy and Rosenthal were involved in the negotiations that led to the commutation. ECX 153 at 141. Danahy testified that the bad timing of the Radian agreement, and the need to lower the cede to 25% to comply with Freddie's policy, influenced Atrium's desire to terminate the agreement. ECX 153 at 139, 141. According to Danahy, for Atrium to continue, it would have had to add more capital to an unprofitable line of business. ECX 153 at 141-42. He testified that both PHH and Radian were interested in commutation, but he did not know why Radian was interested. ECX 153 at 139-40.

Over the life of the Radian arrangement, from July 26, 2004, through July 22, 2009, [redacted] was ceded to Atrium and PHH deposited about [redacted] into the Radian trust account. Tr. 1927; ECX 653, Decl. of Bogansky at Ex. A; RCX 4 at 25. Atrium made two claim payments, [redacted] on March 31, 2009. ECX 153 at 121, 225-26; ECX 159 at tab Column F; ECX 653, Decl. of Bogansky at Ex. A. PHH never withdrew dividends from the Radian trust and received no funds upon commutation. ECX 653, Decl. of Bogansky at Ex. A. Instead, Atrium paid approximately [redacted] to Radian, constituting the remaining balance in the Radian trust. ECX 153 at 45-46, 137, 148; ECX 653, Decl. of Bogansky at Ex. A.

Between entering into runoff and commutation, Radian continued to receive a small number of referrals from PHH, [redacted] ECX 159 at tab 2009. Radian's referrals did not increase substantially until September 2009, the same month UGI announced the termination of its captive arrangement, and one month after Radian was [redacted] ECX 159 at tab 2009; RCX 848. Between September and December 2009, Radian received [redacted], which was more than it received in the entirety of 2008. ECX 159 at tabs 2008-2009. Radian's referrals continued to be substantial after all captive arrangements were placed in runoff: in 2010, Radian received [redacted] from PHH, [redacted] ECX 159 at tabs 2010, 2011.

K. Atrium's Captive Arrangement with CMG Ends

Between July and December 2008, PHH referred [redacted] to CMG which Atrium reinsured. ECX 159 at tab 2008. The arrangement went into runoff as of January 1, 2009, although [redacted] reinsured in January 2009. See ECX 159 at tab 2009 [redacted] ECX 544 at 6705 ("During 2009, CMG had no new captive arrangements and effective January 1, 2009, the captive deal[] with [Atrium] [was] put into runoff.").

As with the Radian agreement, PHH concluded in 2009 that it did not make economic sense for the captive arrangement with CMG to continue, and PHH declined to correct a

deficiency of capital in the CMG trust. ECX 153 at 150; ECX 219; ECX 544 at 6705; ECX 630 at 6771. CMG calculated the trust deficiency as [redacted], and apparently made a presentation to PHH in July 2009, arguing that the deficiency was due "within 30 days." ECX 429; ECX 544 at 6705. On August 12, 2009, Rosenthal reached out to Alan Bahr (Bahr) at CMG, asking the status of "the commutation agreement." ECX 630 at 5203. The next day, Bahr responded, expressing CMG's disappointment with PHH's choice to stop funding the captive trust:

> While we understand the economics behind PHH's choice not to fund the Atrium trust deficiency and concur that commutation of the captive is the resulting next step, I must express CMG MI's deep disappointment in the decision. We had anticipated a resolution that would support the integrity of the structure in place. That being said, our legal people have looked at the commutation document you drafted and we've agreed to execute it.

Id. Rosenthal explained that PHH thought it did not have any obligation under the arrangement to put additional capital into the trust, and that it could simply "forego all the money that we had put into the deal" and thereby escape any future liability for CMG-insured loans. Tr. 498. This was CMG's understanding, as well. ECX 544 at 6705.

Atrium and CMG entered into a commutation agreement effective August 31, 2009. Tr. 582, 1927; ECX 153 at 55, 151, 256-57; RCX 39. Under the commutation, Atrium paid [redacted] to CMG, constituting the remaining balance in the CMG trust. ECX 153 at 45-46, 151; ECX 653, Decl. of Bogansky at Ex. A. Over the life of the CMG arrangement, about [redacted] was ceded to Atrium, Respondents contributed about [redacted] to the captive trust account, and Atrium paid no claims. ECX 653, Decl. of Bogansky at Ex. A. PHH withdrew no dividends from the CMG trust account and received no funds at commutation. Id. Following commutation, CMG received [redacted] referrals from PHH each month through December 2011; by contrast, in February 2009, CMG received [redacted] referrals, in March 2008, [redacted] and in April 2007, [redacted] ECX 159 at tabs 2007-11.

L. Developments Since 2009

During 2010 and 2011, PHH's actual referrals bore at least a general relationship to the dialer settings documented in RCX 848, and the correspondence was closer than it had been between June 2008 and December 2009. Compare ECX 159 at tabs 2008-2011 with RCX 848. For example, in January 2011, [redacted] Id.

Atrium paid a Genworth claim for the first time on December 31, 2009, in the amount of [redacted] and for the second time on March 31, 2010, in the amount [redacted] ECX 159 at Column F. On March 4, 2010, a few months after the last of Atrium's captive arrangements was put into runoff, the dialer was set, for the first time ever, to allocate referrals to five different MIs: [redacted]

RCX 848. This dialer adjustment was linked to Genworth's March 2010 restoration of PHH's MI "delegation authority": ECX 495 at 1. The dialer was adjusted again three times before July 29, 2011, when RMIC was removed from the dialer after it had announced it would no longer write insurance because of financial difficulties, leaving four MIs in the dialer. Tr. 327, 2155-56; RCX 848.

The Genworth arrangement was amended on May 3, 2010, about four months after Atrium paid its first Genworth claim. RCX 51. The amendment "proscribe[d] any dividend to [Atrium] until the parties agree otherwise following an actuarial evaluation of the sufficiency of the funds in trust." RCX 51. This provision was added to Tr. 1991-92; see RCX 20 at 7. The amendment also moved the attachment point from 5% to 4.5%, although the risk band remained at 5%, and limited Atrium's liability to the "sum of the amounts required to be deposited into the Trust" pursuant to the contract. RCX 51 at 1; RCX 2004 at 364 of 454 pages. Milliman's risk transfer opinion had assumed RCX 20 at 9.

Less than six weeks later, and despite the proscription on dividends, Atrium took its first dividend from the Genworth trust, in the amount of .[17] ECX 258 at tab trust; ECX 653, Decl. of Bogansky at Ex. A. There is no evidence in the record of an associated "actuarial evaluation of the sufficiency of the funds in trust." RCX 51. By this time, Atrium Re had assumed the rights and obligations of Atrium. RCX 52; RCX 79. Over the next few weeks, PHH and Genworth unsuccessfully attempted to agree on a commutation. ECX 373; ECX 374. Genworth's offer as of June 15, 2010, was a payment to PHH of ECX 413. On June 28, 2010, Genworth's share of the dialer increased RCX 848. RCX 848.

In March 2011, Atrium Re and Genworth amended their arrangement for the sixth time by eliminating the requirement of an "actuarial evaluation of the sufficiency of trust funds" in connection with a dividend request. RCX 52. On May 16, 2011, PHH (not Atrium) requested a dividend from the Genworth captive trust in the amount of . ECX 396 at 6507. In response, Genworth observed that the captive agreement permitted withdrawals only at the end of the calendar year, calculated that was available for withdrawal at the end of 2010, and noted its concern that a withdrawal greater than could reduce the trust balance below the minimum capital requirement. Id. Bogansky responded that PHH believed the captive arrangement "did not reference the permitted dividend to the year end capital requirement," but

[17] The date of the dividend is somewhat unclear. Respondents' NORA submission placed the dividend in "Q1 2010." ECX 653, Decl. of Bogansky at Ex. A. However, a Genworth spreadsheet stated "Excess of Funds Release – 1q 10," followed by the date "6/9/10." ECX 258 at tab trust. An email dated June 4, 2010, stated that "Genworth is processing dividend paperwork now." ECX 375. It seems most likely that the dividend was earned in the first quarter and released from the trust account in the second quarter. Accordingly, I find that the dividend was paid in June 2010, after the captive arrangement was amended in May 2010.

that PHH was willing to wait until the end of the year for the dividend. Id. Bogansky also stated that PHH did not "view the trust balance requirements as a risk." Id.

Genworth suffered losses of $580 million in 2010 and $507 million in 2011. ECX 495 at 2; see also RCX 920. Its risk to capital ratio as of December 31, 2011, was 33.1, which PHH called "well in excess of 25:1 regulatory maximum, and worst among active MIs." ECX 495 at 2. In July 2012 Genworth's parent, Genworth Financial, Inc., was trading at less than 25% of book value. RCX 919, 920. Moody's Investor Service rated Genworth Financial, Inc. at Baa3, the lowest investment grade rating, and had placed it on review for downgrading below investment grade. RCX 920. Genworth increased its rates in the third quarter of 2011. Id. PHH described this in 2012 as [redacted] Tr. 549; ECX 495 at 2. PHH nonetheless believed that [redacted] ECX 495 at 2; see ECX 272.

By late 2011, Genworth had streamlined the process for releasing dividends from the Genworth captive, and Genworth had "an active bid to commute active Atrium captive re-insurance underway with PHH." Tr. 550; ECX 495 at 2. In the fourth quarter of 2011, presumably at year end, Atrium withdrew a dividend of $8.9 million from the Genworth captive trust. ECX 258 at tab trust; ECX 653, Decl. of Bogansky at Ex. A. This was the second and last dividend before commutation, and over the life of the captive arrangement Atrium's capital contributions into the Genworth trust totaled $5.5 million, and its dividends totaled $13.9 million. ECX 258 at tab trust; ECX 653, Decl. of Bogansky at Ex. A. [redacted] RCX 848.

PHH and Genworth discussed commutation again in December 2011 and January 2012; Genworth's offers dropped from [redacted] to [redacted] during that time. ECX 411; ECX 412; RCX 986 at 2. PHH, in contrast, valued the commutation at [redacted] ECX 412 ("our value at about [redacted]"). The derivation of these sums was not discussed by any witness. Genworth's calculation appears to have been determined by assuming a "stress scenario" using data from September 20, 2011, and calculating what commutation payment would result in Genworth breaking even. RCX 986 at 12. Genworth reduced its offer again in March 2012 to $33 million – $24.1 million after the previous quarter's $8.9 million dividend – which was projected at that time to result in lifetime net income to Genworth of [redacted], as opposed to breaking even. ECX 509; RCX 986 at 9. PHH's initial calculation appears to have used a similar methodology, based on data from December 31, 2009, and it explicitly considered the present value of cash flows for the 2008-B book year. ECX 413; ECX 414.

PHH evidently accepted Genworth's reduced offer, and they commuted their captive arrangement in May 2012, effective April 1, 2012. ECX 188. Ultimately, over the life of the Genworth arrangement, which covered ten books of business, about $137.2 million[18] was ceded

[18] I previously concluded, pursuant to 12 C.F.R. § 1081.213, that Genworth's gross premium cedes totaled $137.2 million. Document 67 at 18. Although this number unquestionably does not account for $15.3 million in ceding commissions, the full record is otherwise inconsistent on

to Atrium, and Atrium paid about $28.6 million in claims. ECX 653, Decl. of Bogansky at 3 & Ex. A; RCX 859. Respondents received a commutation payment of about $24.1 million, and Genworth a commutation payment of about $37.1 million. ECX 653, Decl. of Bogansky at 2 & Ex. A. Across all book years, PHH made a substantial profit on the Genworth captive arrangement, although specific book years, including 2008-B, were projected to be unprofitable. ECX 147 at Genworth-IRR; RCX 2004 at 368 of 454 pages. As of March 31, 2012, Milliman projected book year 2008-B ultimate losses at [redacted] although no book year 2008-B claims had been paid up to that time. RCX 2004 at 368, 378. Milliman also projected an ultimate written premium for book year 2008-B of [redacted] and UGI's most recent cession statement, dated March 31, 2012, documented actual earned premiums of [redacted] RCX 2004 at 368, 370; ECX 257 at tab Inception to Date.

In April 2013, the Bureau filed civil suits against UGI, Genworth, Radian, and MGIC, alleging violations of RESPA Section 8; the Bureau filed against RMIC in November 2013. See generally Document 67 at 13-14. All five MIs settled and agreed to injunctions against, among other things, entering into new captive arrangements and obtaining reinsurance from captive reinsurers for ten years. E.g., Document 18-A (Genworth Final Consent Judgment and Order). All five MIs also agreed to pay civil penalties ranging from $100,000 (RMIC) to $4.5 million (UGI and Genworth). Documents 18-A to 18-E. MGIC "strongly" believed that its reinsurance arrangements were structured in accordance with HUD guidance, and Culver believed that the arrangements it had in place when it settled with the Bureau complied with RESPA. Tr. 396-97, 401, 406. Over the past five years, MGIC paid more than $10 billion in claims, and received nearly $900 million in loss reimbursements from its captive reinsurers. Tr. 397; RCX 816. Culver characterized that $900 million as "very important to saving the company," but acknowledged that the premiums MGIC paid to captive reinsurers exceeded $900 million, whereas if it had self-insured, it would have been paying those premiums to itself. Tr. 399, 418-19.

In 2012, PHH hired Deutsche Bank to "sell" the UGI arrangement. ECX 498 at 2702; see ECX 411 (UGI trust was offered to Genworth). Deutsche Bank projected a sale price reflecting an assumed discount rate (or "IRR") in the "mid-teens." ECX 498 at 2702. In late March 2013, UGI offered PHH a commutation payment of [redacted], reflecting a discount rate of 7.5%, which was more favorable to PHH. Id. Respondents and UGI commuted their arrangement in June 2013, effective May 31, 2013, two months after UGI agreed to be enjoined against entering into new captive arrangements. ECX 15; RCX 59. UGI received a commutation payment of about $48.6 million, and PHH a commutation payment of about $69.2 million. ECX 653, Decl. of Bogansky at 3 & Ex. A; RCX 59.

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the total. ECX 147 at Gross Premiums; see Document 43-E at 8440 (unaudited first quarter 2012 financial statements reporting "assumed premiums" of $137.2 million); RCX 2004 at 368 (Milliman report as of March 31, 2012, projecting "ultimate written premium" of $135.1 million); Document 43-H at 2 (spreadsheet dated March 31, 2012, listing "Inceptions-to-date" of $136.4 million). The relatively small differences between these sums are immaterial, and I continue to find that Genworth's gross premium cedes totaled $137.2 million.

Over the life of the arrangement, UGI ceded about $349.6 million (not accounting for ceding commissions of about $44.9 million), Respondents contributed about $44.5 million to the trust account, Respondents withdrew dividends from the trust account totaling about $101.2 million, and Atrium paid $127.7 million in claims. ECX 147 at tabs UG-Trust Bal, Gross Premiums; ECX 653, Decl. of Bogansky at 3 & Ex. A. Atrium's arrangement with UGI covered sixteen books of business and nearly 285,000 reinsured loans. RCX 868 at Accumulation. Across all book years, PHH made a substantial profit on the UGI captive arrangement. ECX 147 at UGI-IRR; RCX 838 at 351. Although he "[didn't] think we could ever keep it in [a] savings account," Walker admitted that UGI would have been better off financially if it had put its premiums in a savings account, because its ceded premiums exceeded the sum of the paid claims and the commutation payment. Tr. 2162-64, 2188. As of March 31, 2013, Milliman projected an ultimate gain to Atrium for book year 2009 of [redacted]; no book year 2009 claims had been paid up to that time. RCX 838 at 351, 359, 363. Milliman also projected an ultimate written premium for book year 2009 of [redacted] and UGI's most recent cession statement, dated September 30, 2012, documented earned premiums of [redacted] RCX 838 at 351, 363; ECX 198 at tab Earned Premium.

M. <u>Summary Witness for Enforcement</u>

Ryan Thomas (Thomas) was called as a summary witness for Enforcement. He is a forensic accountant in the Bureau's Department of Enforcement, and has held that position since December 2012. Tr. 1149.[19] In January 2013, Thomas was assigned to conduct forensic accounting work in connection with the PHH investigation. Tr. 1151, 1211. He focused on the flow of funds into and out of Atrium over Atrium's entire operating history. Tr. 1152. He derived the majority of his data points from the cession statements for the trusts – which PHH's MI partners sent PHH periodically and which list information such as premiums ceded, claims paid, and capital contributed and withdrawn – as well as financial statements for the captive trusts, financial statements for Atrium, and other internal PHH documents. Tr. 1152-53, 1155. He also relied on information reported in PHH's response to the Bureau's Notice and Opportunity to Respond and Advise (NORA).[20] Tr. 1256-57, 1160; ECX 653. Thomas focused

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[19] He performs forensic accounting work for Enforcement, which requires him to use his technical expertise to review and analyze documents, such as contracts and accounting and financial records. Tr. 1151. He graduated from the University of Maryland College Park with bachelor's degrees in accounting and in criminology and criminal justice, and has been a licensed accountant and licensed fraud examiner since 2004. Tr. 1149-50. He worked at Deloitte as an accountant in its audit practice and later as a forensic accountant in its Financial Advisory Services section. Tr. 1150. In 2010, he moved from Deloitte to FINRA. Tr. 1150. There, he was a Senior Principal Investigator in the Office of Enforcement and worked on securities fraud and FINRA rule violations investigations. Tr. 1150. Between his work at FINRA and the Bureau, Thomas has been involved in over fifty investigations. Tr. 1150.

[20] The Bureau's NORA process is much like the SEC's Wells process, and affords a subject notice of its potential violations and provides it with an opportunity to respond to allegations prior to potential prosecution. <u>See</u> Tr. 1160; <u>Notice and Opportunity to Respond and Advise (NORA)</u>, CFPB Bulletin 2011-04 (Nov. 7, 2011, updated Jan. 18, 2012).

on records relating to the UGI and Genworth trusts specifically, as those comprised the majority of records relating to PHH's captive arrangements. Tr. 1153.

Around February 2014, Thomas prepared summary exhibit ECX 147, an Excel spreadsheet reflecting Atrium's performance under the UGI and Genworth captive arrangements. Tr. 1164-65, 1265, 1290, 1296. This spreadsheet's data is derived mostly from UGI's and Genworth's cession statements and data in the NORA response. Tr. 1164-65. ECX 147 shows that Atrium's internal rate of return over the course of the Genworth agreement (2001 through 2012) was . Tr. 1166-68; ECX 147 at Genworth-IRR. For the same period of time, the S&P 500 had a much lower rate of return. Tr. 1168-69, 1284-85. ECX 147 also shows that Atrium's internal rate of return over the majority of years in the UGI agreement (1997 through 2013) was Tr. 1169; ECX 147 at UG-IRR. For the same period of time, the S&P 500 had a much lower rate of return. Tr. 1169-69, 1284-85.

In contrast, PHH's initial NORA response, dated September 6, 2013, said that "[t]here is no question that PHH ultimately received some funds out of the entire transaction," but that "[t]hose funds . . . represent a meager return of approximately on a capital investment of approximately ."[21] ECX 653 at 28 (emphasis added); see also id., Decl. of Bogansky at 1, 4. This internal rate of return was derived from the analysis of Bogansky, a controller at PHH. Tr. 1161, 1211; ECX 653, Decl. of Bogansky at 1, 4; ECX 654 at 7; RCX 929 at 1. Bogansky arrived at his smaller figure because he calculated return on invested capital on a *quarterly* basis, even though nothing in the NORA response indicated that it was calculated on a quarterly basis, and it would have been typical, and more appropriate, to calculate the rate on an *annual* basis. Tr. 1163, 1170-71, 1174, 1278, 1284. Enforcement initially learned how Bogansky arrived at his figure during a September 10, 2013, NORA meeting between Enforcement and PHH, and PHH later explained the calculation in its second NORA submission. Tr. 1174, 1255; ECX 654 at 6-7; see ECX 840.

ECX 147 shows that over the course of Atrium's captive arrangements, Atrium was ceded a total of about $493.1 million in premiums, less commissions paid to UGI and Genworth and other adjustments totaling around $60 million.[22] Tr. 1172-74; ECX 147 at Gross Premiums. It also shows that after about $66.6 million was withdrawn from the UGI captive trust in 2007, Atrium had withdrawn more capital from the trust than it contributed, and shows that when Atrium first paid claims to UGI out of the trust, which was in 2009, it was effectively paying claims entirely from premiums ceded to it, as it had no initially contributed capital still in the trust. Tr. 1177, 1179-80; ECX 147 at UG-Trust Bal; see also ECX 653, Decl. of Bogansky at Ex. A. Atrium made a withdrawal of $6.8 million from the UGI trust in 2012, and made two withdrawals totaling over $70.6 million in 2013, one of which was the commutation payment. Tr. 1178; ECX 147 at UG-Trust Bal; see also ECX 653, Decl. of Bogansky at Ex. A. Thomas's

[21] "Entire transaction" appears to mean PHH's captive arrangements over their history. See ECX 653, Decl. of Bogansky at 3-4.

[22] The total premiums ceded to Atrium were in fact somewhat higher, as Thomas did not have, and could not account for, the data for the premiums ceded by UGI between October 2012 and May 2013. Tr. 1173-74.

analysis does not account for investment income earned by Atrium in the captive trust, because Thomas was missing some data relating to investment income in the latest UGI cession statement; however, during hearing testimony, Thomas testified that Atrium earned investment income of about $49 million from the funds in the UGI trust over its history. Tr. 1175-76, 1178, 1187; see ECX 198. He was not aware of any claims ever being paid by Atrium to UGI from funds located elsewhere than the UGI captive trust. Tr. 1175. He also said that the cession statements show that Atrium withdrew $50 million from the trust from 1997 through 2013 for tax and operational expenses. Tr. 1176-77; see ECX 198.

The first time Atrium paid claims under the Genworth captive arrangement was in 2009, and as of 2011, after Atrium withdrew $8.9 million in dividends from the trust, Atrium had removed more capital from the trust than it had ever contributed to the trust. Tr. 1183-84, 1189-90; ECX 147 at Genworth-Trust Bal.; see also ECX 653, Decl. of Bogansky at Ex. A. When the Genworth agreement was terminated in 2012, Atrium received a commutation payment of $24.1 million. Tr. 1185; ECX 147 at Genworth-Trust Bal. Atrium removed about $37 million from the Genworth trust for tax and operational expenses over the life of the captive agreement. Tr. 1182, 1186; see ECX 257. Thomas was not aware of any claims ever being paid by Atrium to Genworth from funds located elsewhere than the Genworth captive trust, and Atrium earned about $10 million in investment income from assets in the Genworth trust over its history. Tr. 1182, 1185, 1187; see ECX 257.

Between the UGI and Genworth trusts, Atrium made withdrawals totaling nearly $160 million. Tr. 1188, 1190; ECX 147 at UG-Cap Bal, Genworth-Cap Bal. In 2007, Atrium had withdrawn more from the UGI trust than it ever had contributed, and over the life of the UGI agreement, Atrium withdrew $127.3 million more from the trust than it had ever put into it. Tr. 1188; ECX 147 at UG-Cap Bal.

Thomas prepared demonstrative exhibit ECD 1 based on data produced by Respondents. Tr. 1194, 1196-97; ECX 158, 159. The exhibit shows that from July 21, 2008,[23] through December 31, 2009, PHH originated 5,497 loans that went into captive arrangements and resulted in captive cedes to Atrium. Tr. 1194; ECD 1. This 5,497 loan figure, however, includes Genworth-insured loans from 2009 with 40% cedes, meaning that they were not part of the Genworth 2008-B book year. ECX 159 at tab 2009. Of the 2,640 loans going into the Genworth and UGI captive arrangements in 2009, 2,608 carried 25% cedes. Id.

ECD 1 shows that from July 21, 2008, through 2011, PHH originated 4,103 loans that carried UGI mortgage insurance, and 6,500 that carried Genworth mortgage insurance. Tr. 1197; ECD 1. ECD 1 also shows the number of, and percentage of, originations involving mortgage insurance for entities that never had a captive with PHH – MGIC, RMIC, PMI, and Triad (no-captive MIs) – for the period from 2006 through 2011.[24] Tr. 1197-99; ECD 1. From 2006

[23] I previously held that any claims of RESPA violations relating to loans closed before July 21, 2008, were not actionable, and that relief for any conduct relating to loans closed before July 21, 2011, is limited to disgorgement, restitution, and an injunction. Document 152 at 14.

[24] Only the period from 2006 through 2011 was covered because those are the years for which ECX-159 included complete data. Tr. 1198.

through 2008, less than 3.5% of PHH originations went to no-captive MIs. ECD 1. In 2009 and 2010, about a third of PHH originations went to no-captive MIs, and in 2011, the figure dropped down to 19.2%. Id. For almost the entire period from January 2006 through November 2011, Atrium's captive partners received a much larger percentage of PHH originations than no-captive MIs, and for the period from January 2006 through May 2008, almost 100% of PHH originations carrying mortgage insurance went to Atrium's captive partners. Tr. 1200-03; ECD 1; see Enf. Br. at 64. While there was a short period in early 2009 when no-captive MIs received slightly more originations than Atrium's captive partners enjoyed, the number of loans going to captive partners rose around March 2009. ECD 1; see Enf. Br. at 64.

Thomas put together demonstrative exhibit ECD 2 based on data from cession statements and Respondents' NORA response. Tr. 1195. The exhibit shows the total premiums ceded into the UGI and Genworth trusts for the period from July 21, 2008, through 2013. Tr. 1195; ECD 2.[25] Between the two MIs, over $107 million in premiums were ceded, with about $72.8 million of that going into the UGI trust, and about $34.2 million going into the Genworth trust. Tr. 1211; ECD 2. These net cede figures are distinct from, and much larger than, the about $2 million in cedes from UGI and the about $5.5 million in cedes from Genworth that Atrium received specifically relating to loans originating on or after July 21, 2008. Tr. 1225-30; ECX 198 at Earned Premium; ECX 257 at Inception to Date.

The following table summarizes Atrium's captive arrangements:

Table 1[26]	UGI	Genworth	Radian	CMG
Commencement date	10/1/93	10/9/00	6/26/2004	12/1/2006
Commutation date	5/31/2013	4/1/2012	6/22/2009	8/31/2009
All books in runoff date	December 31, 2009	March 31, 2009	May 31, 2008	January 31, 2009
Loans originated in 2007	[redacted]	[redacted]	[redacted]	[redacted]
Loans originated in 2008	[redacted]	[redacted]	[redacted]	[redacted]
Loans originated in 2009	[redacted]	[redacted]	[redacted]	[redacted]

[25] The exhibit does not include information on CMG and Radian because for the time period covered, Thomas did not have comprehensive data from cession statements. Tr. 1196.

[26] Data regarding commencement dates is derived from ECX 198, ECX 200, ECX 202, ECX 586, ECX 654, and RCX 986. Data regarding commutation dates is derived from ECX 15, ECX 188, ECX 526, ECX 653, RCX 39, RCX 42, and RCX 59. I use the term runoff date here to describe the date as of which new loan originations stopped going into the relevant captive arrangement. Data regarding runoff dates is derived from ECX 159, RCX 20, RCX 986. All new loan origination data is derived from ECX 159, and all dialer percentage data is derived from RCX 848.

Table 1[26]	UGI	Genworth	Radian	CMG
Loans originated in 2010				
New originations into captive in 2007				
New originations into captive in 2008				
New originations into captive in 2009				
New originations into captive in 2010	0	0	0	0
Percentage of dialer in 2007				
Percentage of dialer in 2008				
Percentage of dialer in 2009				
Percentage of dialer in 2010				

N. The HUD Letter and Milliman

In August 1997, Nicholas Retsinas, Assistant Secretary for the Department of Housing and Urban Development (HUD), wrote a letter (HUD Letter) to the General Counsel of Countrywide Funding Corporation (Countrywide). ECX 193, Attach. A. Countrywide had asked HUD to clarify the applicability of RESPA Section 8 to captive reinsurance programs. Id. at 1. In response, the HUD Letter included this guidance:

> [W]e have concluded that, so long as payments for reinsurance under captive reinsurance arrangements are solely "payment for goods or facilities actually furnished or for services actually performed," these arrangements are permissible under RESPA. See paragraph 8(c)(2) of RESPA, 12 U.S.C. § 2607(c)(2).
>
> . . .
>
> [HUD's] view of captive reinsurance is that the arrangements are permissible under RESPA if the payments to the reinsurer: (1) are for reinsurance services "actually furnished or for services performed" and (2) are bona fide compensation that does not exceed the value of such services.
>
> . . .
>
> Where [HUD] scrutinizes a captive reinsurance arrangement, it will apply a two-part test for determining whether the arrangement violates RESPA. [HUD] will first determine whether the reinsurance arrangement meets three requirements that establish that reinsurance is actually being provided in return for the

compensation. If one or more of the requirements is not met, the inquiry will end, and the arrangement will be regarded as an impermissible captive reinsurance arrangement under RESPA. If all of the requirements are met, [HUD] will determine whether the compensation exceeds the value of the reinsurance. To facilitate its analysis, [HUD] may use information obtained from the lender, the primary insurer, the captive reinsurer, or other sources, including data on the rate, magnitude, and timing of default losses and mortgage insurance payments and any other information necessary to undertake the analysis and may exercise its subpoena authority . . . to obtain such information.

. . .

To determine that a real service – reinsurance – is performed by the reinsurer for which it may legally be compensated, the following requirements must be satisfied:

(a) There must be a legally binding contract for reinsurance with terms and conditions conforming to industry standards.

(b) The reinsurer must post capital and reserves satisfying the laws of the state in which it is chartered and the reinsurance contract between the primary insurer and the reinsurer must provide for the establishment of adequate reserves to ensure that, when a claim against the reinsurer is made, funds will exist to satisfy the claim. Unless the reinsurer is adequately capitalized and adequate reserves (which may include letters of credit or guarantee arrangements) and funds are available to pay claims, real services are not being provided.

(c) There must be a real transfer of risk. The reinsurance transaction cannot be a sham under which premium payments . . . are given to the reinsurer even though there is no reasonable expectation that the reinsurer will ever have to pay claims. This requirement for a real transfer of risk would clearly be satisfied by a quota share arrangement, under which the reinsurer is bound to participate pro rata in every claim. The requirement could also be met by excess loss arrangements, if the band of the reinsurer's potential exposure is such that a reasonable business justification would motivate a decision to reinsure that band. Unless there is a real transfer of risk, no real reinsurance services are actually being provided. In either case, the premiums paid . . . must be commensurate to the risk.

. . .

[HUD's] evaluation of [whether the compensation paid for reinsurance does not exceed the value of the reinsurance] may:

- Compare, using relevant mathematical models, the risk borne by the captive reinsurer with the payments provided by the primary insurer.
- Analyze the likelihood of losses occurring, the magnitude and volatility of possible losses, the amount of payments received, the timing of the payments and potential losses, current market discount rates, and other relevant factors.
- Take into account the relative risk exposure of the primary lender and the captive reinsurer.

- Consider the extent to which the lender or the firm controlling the captive reinsurer is shielded from potential losses by inadequate reserves and a corporate structure that segregates risks.
- Examine other financial transactions between the lender, primary insurer, and captive reinsurer to determine whether they are related to the reinsurance agreement.
- Examine whether the ceding commission is commensurate with the administrative costs assumed by the primary insurer.

Id. at 1, 3, 5-7.

Thus, the HUD Letter imposes four requirements for captive reinsurance to be considered lawful under RESPA: (1) There must be a legally binding contract for reinsurance with terms and conditions conforming to industry standards; (2) the reinsurer must post capital and reserves satisfying state insurance regulatory requirements; (3) there must be real transfer of risk; and (4) the compensation to the reinsurer must not exceed the value of the reinsurance services provided. ECX 193, Attach. A at 6-7. In this RD, the third requirement is termed "risk transfer" and the final requirement "price commensurability." HUD's guidance specifically and only applies to captive mortgage reinsurance. Id. at 1; see Tr. 2043. As I previously noted, "[a]lthough the [HUD] Letter is not legally binding, its guidance is a straightforward application of [24 C.F.R. § 3500.14(g)(2)] to captive reinsurance." Document 152 at 6; see Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (agency "interpretations contained in formats such as opinion letters are 'entitled to respect' . . . only to the extent that those interpretations have the 'power to persuade'" (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). The HUD Letter has been "relied upon by mortgage insurers, lender-owned reinsurers and courts alike to evaluate a captive arrangement's compliance with [RESPA] Section 8." Munoz v. PHH Corp., No. 1:08-cv-759, 2013 U.S. Dist. LEXIS 69306, at *15-16 (E.D. Cal. May 15, 2013) (citing McCarn v. HSBC USA, Inc., No. 1:12-cv-375, 2012 WL 7018363 (E.D. Cal. 2012); Kay v. Wells Fargo & Co., 247 F.R.D. 572 (N.D. Cal. 2007)).

PHH relied on Milliman for actuarial work relating to its captive arrangements. Tr. 586; ECX 153 at 156. Rosenthal and Danahy were both involved in consultations with Milliman, which were frequent. Tr. 148; ECX 153 at 35. The Secondary Marketing Division was Milliman's point of contact at PHH, as Secondary Marketing had knowledge of loan characteristics and when loans require mortgage insurance, which was relevant to Milliman's analyses. ECX 153 at 116-17. A large part of Milliman's work for PHH involved evaluation of risk transfer and reporting on risk transfer findings. Tr. 128, 508-09. Milliman also was typically engaged annually to conduct a risk transfer assessment on the present or prior book year of each captive arrangement, and was also consulted when PHH was considering changes in the structure of a captive arrangement. Tr. 133, 508; ECX 153 at 113. For each annual engagement, Milliman issued a report, which described its analysis and conclusions on risk transfer and price commensurability with risk (price commensurability), and which were reviewed by Danahy and Rosenthal, among others. Tr. 1931-32; ECX 153 at 113-15. Milliman also prepared and submitted Atrium's annual statements, which focused on financial solvency,

and which it needed to file initially with the New York DOI and later with the Vermont DOI. Tr. 517-18, 2038-39; see, e.g., ECX 26; ECX 653 at 11.

There is no documentary evidence of Milliman's risk transfer analysis for any PHH captive arrangement prior to book year 2004, or for any book year of the CMG captive arrangement. Both Rosenthal and Danahy testified that PHH always worked with Milliman to establish risk transfer before entering into a new captive agreement. Tr. 128, 577; ECX 153 at 33, 35. However, the record contains Milliman reports prepared for Atrium only for the following book years:

- UGI: 2004-08
- Genworth: 2004-07, 2008-A, 2008-B
- Radian: 2004-05

ECX 194; RCX 15-19, 21-27. Although there is no Milliman report for any CMG book year in evidence, some exhibits suggest that Milliman performed at least some risk transfer analysis. Enf. Br. at 127 & n.56; see generally Resp. Reply; RCX 163 at 8-10; RCX 2003.

There is no Milliman report commissioned by Respondents in evidence for the UGI 2009 book year, but in early July 2008, Milliman conducted a risk transfer analysis for UGI of the then-proposed 2008-B book year, which had a [redacted] structure. RCX 2002. Milliman concluded that the book year exhibited risk transfer and price reasonably related to risk. Tr. 1908; RCX 2002. The proposed 2008-B book year contract was never entered into; however, the UGI 2009 book year had less favorable terms for Atrium than the proposed 2008-B book year, because the attachment point was 4% and the risk band was 6%. Compare RCX 2002 at Ex. 1 with ECX 520 at 2259, 2261 and RCX 838 at 348.

Atrium worked mostly with Milliman actuary Michael Schmitz (Schmitz) and non-actuary Ken Bjurstrom. Tr. 127-28, 140, 2036; ECX 153 at 13-14 113-14. Schmitz testified at the hearing. He is a Fellow of the Casualty Actuarial Society and a Member of the American Academy of Actuaries,[27] has worked for Milliman since he was an actuarial student in the 1990's, and currently holds the titles of Principal and Consulting Actuary at Milliman. Tr. 518-19, 1307, 1841-46; see, e.g., ECX 194. While Milliman has offices across the United States, Schmitz is located in Wisconsin. Tr. 1841-42. Throughout his career at Milliman, Schmitz has worked for private clients as well as state government guarantee insurers and the Federal Housing Administration.[28] Tr. 1847. Schmitz frequently speaks on matters pertaining to

[27] The former designation, abbreviated as FCAS, reflects that he passed a series of exams. Tr. 1843. The latter, abbreviated as MAAA, reflects that he obtained a certain credential and spent the requisite years actively working as an actuary. Tr. 1844.

[28] Schmitz earned his undergraduate degree from the University of Wisconsin at Madison's School of Business, where he majored in actuarial science and risk management and insurance. Tr. 1843. He is the president and founder of the Credit Risk Special Interest section of the Casualty Actuarial Society, and a member, on Milliman's behalf, of the Mortgage Bankers' Association. Tr. 1844. He has worked on an emerging issues task force organized by the

mortgage insurance, and has spoken at industry group conferences, or for industry group webinars, numerous times. Tr. 1848. Milliman has hosted an annual reinsurance conference for over ten years. Tr. 2068-69. Schmitz presented at these conferences, discussing the state of the mortgage insurance industry and sometimes captive reinsurance specifically. Tr. 2069.

Milliman promoted its capacity to conduct analyses of captive mortgage reinsurance to MIs and mortgage lenders over the years. Tr. 2051; see RCX 573. Schmitz started regularly doing actuarial analyses relating to captive mortgage reinsurance around 2000, which was after the HUD Letter was issued. Tr. 1974. Over the course of his career, he has performed over 400 risk transfer opinions relating to captive mortgage reinsurance. Tr. 1928, 2052-53; RCX 881. Milliman has earned fees of over ██████ in connection with engagements relating to captive reinsurance. Tr. 2053-54; RCX 881. Milliman has performed analyses for numerous MIs, including Genworth, whose fees paid to Milliman have totaled over ██████, UGI, with fees over ██████, and Radian, with fees over ██████ Tr. 1975, 2055; see ECX 586 at 1; RCX 558. Milliman conducted all the analyses in evidence that focused on the risk transfer and pricing requirements explained in the HUD Letter for books of business under Atrium's captive arrangements, and Schmitz worked on every one of them. Tr. 1927-28, 1977, 1984. Milliman earned fees approaching ██████ for its work for PHH and Atrium. Tr. 2055.

Walker explained that Milliman prepared risk transfer opinions for numerous mortgage lenders, and touted its service of providing risk transfer opinions on captive reinsurance relationships. Tr. 2193. "Milliman is one of the larger actuarial consulting firms," having offices across the United States, and UGI felt that Milliman had "good standards of practice." Tr. 2138. Walker considered Milliman's opinions to be accurate and believed the premiums UGI ceded to Atrium met all the requirements imposed by the HUD Letter. Tr. 2139-40, 2192, 2200. Rosenthal believed that PHH always met all regulatory requirements relating to its captive reinsurance arrangements. Tr. 127.

Milliman's analyses for Atrium addressed two major topics raised in the HUD Letter. Tr. 1930-31, 1974, 1977; see, e.g., ECX 194 at 2-3. Milliman first looked at whether the reinsurance agreement at issue produced risk transfer, and second looked at whether the agreement had price commensurability. Tr. 1851-52, 1855, 1919, 1932, 1957. Milliman's risk transfer analyses were created by Schmitz and others at Milliman, including Bjurstrom, who cosigned most of the risk transfer analyses. Tr. 1843, 1977, 2063; see, e.g., ECX 193 at 2614, 2639; ECX 194 at 3114, 3137.

Schmitz explained that a risk transfer analysis involves looking at the individual loans under the specific book of business, the underwriting characteristics of the loans, and the economic conditions surrounding the loans, including home prices. Tr. 1854-57, 1884. For example, for the later book years analyzed for Atrium, Milliman's models took into account the real estate market's collapse. Tr. 1857. Substantial work is involved in a risk transfer analysis, with the goal of forecasting prospective losses as a function of loan and economic characteristics

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American Institute of Certified Public Accountants. Tr. 1844. He has previously been qualified as a mortgage insurance expert in several litigations. Tr. 1846. His testimony in these litigations involved opinion testimony on risk transfer, among other topics. Tr. 1846-47.

that might influence loss. Tr. 1856-57, 2032. Generally speaking, when Milliman conducts a risk transfer analysis for a lender or MI, Milliman relies on the reinsurance contract itself and obtains other information from the client, such as data on the characteristics of the insured loans. Tr. 1978-80, 2025. Milliman also sometimes relies on industry data and information obtained from the MI. Tr. 1978.

Rosenthal's testimony suggested that Milliman was engaged to give Respondents assurance that they were "compliant with the RESPA laws." Tr. 136. In fact, Milliman's analyses addressed the HUD Letter's requirements, but did not provide an opinion on whether RESPA's requirements were met. Tr. 1960; see Tr. 1972-73; ECX 194 at 2. Additionally, Milliman's analyses did not address some items discussed in the HUD Letter: that the lender must not be shielded from potential losses because of inadequate reserves or corporate structure; that other financial transactions between the lender, the primary insurer, and the reinsurer be considered to determine whether they are related to the reinsurance agreement; and that ceded premiums be commensurate with administrative costs. Tr. 1958-60, 1960, 2099-2100; ECX 193, Attach. A at 7; ECX 194 at 3-4. Further, Milliman's analyses expressed no opinion on whether any reinsurance contract was legally binding, as Schmitz and his colleagues at Milliman were not lawyers, and its analyses did not constitute capital adequacy exercises, although for each analysis, the relevant captive trust's ability to cover losses was considered. Tr. 1960, 1970.

On the specific issue of risk transfer in compliance with the HUD Letter, as opposed to the related issue of price commensurability, Milliman at first used only the "10/10" test in its analyses prepared for Atrium, but by 2008, Milliman was using both that test and the expected reinsurance deficit (ERD) test. Tr. 1867, 1931-32, 1974-75, 2014; see ECX 194 at 10-14. The 10/10 test asks whether the reinsurance arrangement has at least a 10% chance of causing the reinsurer a 10% loss – i.e., to pay out 110% of the collected premiums. Tr. 1868, 1939-40. Schmitz testified that he did not know whether, legally speaking, the HUD Letter specifically required performance of the 10/10 test, and he had no view on whether RESPA requires that a captive agreement, for a particular book year, passes the 10/10 test. Tr. 1970-73.

The ERD test is considered by some to be a better metric for testing risk transfer than the 10/10 test, and Schmitz described it as presenting a more granular view of risk, particularly with respect to the catastrophic parts of the loss distribution. Tr. 1867-69; ECX 194 at 13. It reflects the expected penetration of the reinsurer's loss ratio above the 100% level, or the reinsurer's likelihood of losing more than all the premiums ceded to it. Tr. 1867-68, 1939-40, 2011; ECX 194 at 13.[29]

Schmitz was emphatic that risk transfer, as an actuarial exercise, must be analyzed on a single book year basis, and thus, risk transfer normally does not address a reinsurer's risk for an entire captive agreement involving multiple book years. Tr. 1936-38, 1975-76, 1996. According

[29] Schmitz testified that risk transfer measured by the ERD test is important in analyzing a reinsurance agreement's pricing. Tr. 1871. Schmitz also testified that the outcome of the ERD test affected Milliman's judgment on whether the reinsurance agreement reflects price commensurability, although Milliman's reports on Atrium's reinsurance agreements do not document that. Tr. 2000-01.

to Schmitz, risk transfer analysis for a book of business specifically looks at whether there is a reasonable probability of loss just for that book year. Tr. 1854. This analysis, however, involves modeling of losses for prior book years of business, if any exist, because losses for prior book years affect the reinsurer's economic experience in the prospective book year. Tr. 1854, 2010-11, 2088.

In conducting risk transfer analyses, Schmitz did not give weight to a client's representation about whether it intends to enter into subsequent book years of business when determining whether an analysis should be conducted on a single versus multiple book year basis. Tr. 1961-62. This is because the intent of *both* parties to the agreement is the relevant inquiry. Tr. 1961-62. Schmitz conceded that he sometimes talks to both his client and the other party to the agreement before preparing a risk transfer analysis, but stated that, even if both parties express an intent to enter into subsequent books of business, it is still more conservative to actuarially model risk transfer on a single book year basis.[30] Tr. 1961-62.

Schmitz acknowledged that Statement of Statutory Accounting Principles No. 62 (SSAP 62) requires that, when assessing risk transfer, related contracts are taken into account.[31] Tr. 2033; see ECX 790 at 62-5. He also acknowledged that: none of Atrium's captive agreements were terminated after a single book year; he was not aware of any mortgage lender's captive agreement being terminated after a single book year; each captive trust Atrium established was used for all book years with the relevant MI; and minimum captive requirements applied to each trust as a whole and not to a specific book year. Tr. 2033-35. Schmitz admitted that it is "theoretically possible" to have an agreement where every book year of business in it satisfies the 10/10 test, but where all the book years, considered together, would not satisfy that test. Tr. 2027. Schmitz has performed multiple book year risk transfer analyses, but he would never perform such an analysis where the defining risk instrument for calculating reinsured losses was individual book years, as was the case with Atrium's arrangements and as was typical of mortgage reinsurance captives. Tr. 1909-12, 1919-20, 2030-31; RCX 809 at 3; see, e.g., ECX 194. He never analyzed risk transfer for a captive mortgage reinsurance agreement on a multiple book year basis. Tr. 1932-33, 2026-28.

In connection with its risk transfer and pricing analyses, Milliman's reports also looked at how the captive structure might cause risk mitigation. Tr. 1877, 1949, 1955; see, e.g., ECX 193 at 18-19; ECX 194 at 17. Whether an arrangement reduces the primary insurer's volatility in economic results, or mitigates risk, informs the judgment about whether the pricing of reinsurance is commensurate with the level of risk transfer. Tr. 2087-88. Milliman's reports gave no specific weight to risk mitigation, but Milliman made "judgmental assessment[s]" of how much more stability the primary insurer enjoyed because of the reinsurance agreement, and factored those assessments into its conclusions about the economic impact and value of captive agreements. Tr. 1955-57.

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[30] Schmitz acknowledged that while multiple book years would generally strengthen the risk transfer outcome, it would also strengthen the trust's ability to cover any claims on the reinsurer. Tr. 1961.

[31] SSAP 62 is discussed in greater detail infra.

In assessing price commensurability, Milliman first compared the expected loss ratio of the reinsurer with the expected loss ratio of the primary insurer. Tr. 1871, 1932, 1938-39, 1941; see, e.g., ECX 194 at 15. Schmitz said that comparing loss ratios to determine the fairness of the pricing is not only standard practice with respect to mortgage reinsurance, but also standard practice in the insurance industry generally. Tr. 1949. He testified that, if an arrangement does not transfer risk in the sense that the reinsurer bears no chance of losses whatsoever, the reinsurer's and primary's loss ratios would not be comparable, because the reinsurer's loss ratio would necessarily be zero. Tr. 1952.

Milliman second compared the reinsurer's and the primary insurer's expected rates of return under the reinsurance arrangement, which is another commonly used metric. Tr. 1873-74, 1899, 1941, 1945-48; see, e.g., ECX 194 at 15-16. It did this twice, the second time adjusting for the expenses that the primary carried, as Atrium bore far fewer insurance expenses under the captive arrangements. Tr. 1875, 1901, 1949-50, 2105; see, e.g., ECX 194 at 17.

As with risk transfer, Milliman analyzed price commensurability only on a single book year basis, and did not address Atrium's compensation under an entire captive arrangement or under all book years collectively. Tr. 1938. Milliman's analyses always assumed that the rates the MIs charged, and that were filed with the state insurance regulators, were reasonable. Tr. 1942. Milliman never tried to determine what the fair market value of the reinsurance Atrium offered would be, and never looked at reinsurance rates offered by non-captive, independent third party reinsurers. Tr. 1941-42. Schmitz suggested this was because the market for non-captive reinsurance was sparse and few such reinsurers existed. Tr. 1942, 2084.

Schmitz explained that "cross-collateralization" means that premiums received under book years other than the specific book year being looked at (the target book year) can be used to pay claims for the target book year, and that the target book year's premiums can be used to pay claims for other book years. Tr. 1937, 1998, 2024; see also RCX 581 at 8 ("Ceded premiums from each book year are available to pay claims from other book years until expiration."). In Milliman's book year analyses, it forecasted loss and premium levels associated with any prior, cross-collateralized book years, because those book years affect the ability of the captive trust to cover the reinsurer's obligations under the target book year. Tr. 1862-63; see, e.g., ECX 194 at 11. The capital going into each Atrium trust was not segregated in any way, meaning that funds deposited under one book year of business were not segregated from deposits from other book years of business. Tr. 2024. Each Milliman report stated that:

> in a scenario with more book years and additional capital from contingency reserves, retained earnings, and potential capital contributions for subsequent book years, it generally becomes more likely that all (or a greater portion) of the reinsured losses will be satisfied under the stress scenario due to cross-collateralization.

E.g., ECX 192 at 13; ECX 193 at 13; ECX 194 at 12. This means that if there are subsequent book years after the target book year being analyzed, then the odds that the trust account would be sufficient to cover all losses generally improved. Tr. 1866.

All of Milliman's reports prepared for Atrium clearly state that Atrium had no liability beyond the funds available in the relevant captive trust. Tr. 1859-60, 1984; see, e.g., ECX 194 at 7. They include this sentence: "Atrium has no liability beyond the funds available in the trust." E.g., ECX 193 at 8; ECX 194 at 7. Despite the plain meaning of this sentence, and the absence of any indication that this was merely an assumption that Milliman was making, Schmitz testified that he made this "assumption" to be conservative and because it was standard industry practice to consider the captive's funds limited to the trust account. Tr. 1860, 1985-88, 1990. Such an assumption was conservative because if Atrium's liability under each captive arrangement extended beyond the relevant captive trust, Milliman's conclusion of risk transfer for a particular book year would be strengthened. Tr. 1861. Schmitz admitted that his assumption that liability was limited to the trusts may have not reflected the reality of the arrangements. Tr. 2078. PHH never corrected this statement in any of Milliman's reports. Tr. 1985.

Rosenthal testified during the hearing that each MI with which Atrium had a captive could have gone after funds held at Atrium but outside the designated captive trust. Tr. 266. Rosenthal testified during the investigation, however, that he understood each captive trust to constitute a cap on Atrium's liability under the captive arrangement. Tr. 266-68. Rosenthal explained that his views on the liability cap changed because, since giving investigative testimony, he went back and studied the UGI and Genworth contractual terms and found language suggesting the MIs could go after anything at Atrium. Tr. 270. According to Rosenthal, "I got it ever so slightly wrong in my August 2013 [investigative] testimony." Tr. 285-86.

Milliman's analyses did not address posting capital and reserves to satisfy state insurance regulations. Tr. 1922-23. However, in separately conducted actuarial analyses, Milliman did look at the adequacy of reserves under Atrium's captive arrangements. Tr. 1923-24, 1967-69; see, e.g., RCX 32-35. In 2007 through 2010, Atrium's reserves were adequate. Tr. 1924-25. Milliman always assumed that Atrium would make no further capital contributions after the initial cash infusion into the trust at the origination of the arrangement. Tr. 1964. Milliman's analyses also assumed that: half of the premiums ceded to Atrium were placed into contingency reserves to be maintained for ten years, in the absence of a permissible release of reserves because loss ratios exceeded the designated threshold; and the minimum requirement for extracting dividends from the captive trusts would not be changed or weakened. Tr. 1964-66. Only occasionally would Atrium be obligated to make additional capital contributions when a book year was added to an agreement. Tr. 1998-99.

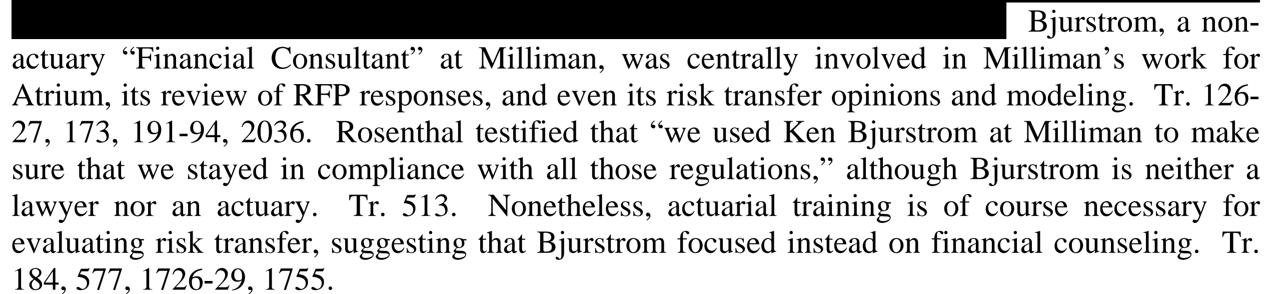
Milliman's book year analyses also assumed that the target book year and all existing book years were allowed to run off completely, unless the trust ran out of money. Tr. 1880, 1963. The analyses further assumed that, immediately after the loans underlying the target book year were originated, the arrangement would be immediately put into runoff, that is, the arrangement would not be renewed. Tr. 1960-61. This was assumed because Milliman could not anticipate how the parties would value a commutation before the time of the commutation. Tr. 1880-81. There are statements in all of Milliman's reports that commutation could materially impact the analysis, and Schmitz agreed that commutation might (or might not) have a material

impact on the financial positions of the parties to the agreement. Tr. 1880; see, e.g., ECX 194 at 20.

Milliman often performed analyses after the outset of the book year at issue, or even after the book year at issue ended. Tr. 1856; see, e.g., ECX 192 at 2442, 2450, 2466; ECX 194 at 3114, 3137. For example, the Genworth 2008-B book year ran from June 1, 2008, through March 31, 2009, but Milliman completed its analysis of it on April 24, 2009, after the entire Genworth captive arrangement had been terminated on a runoff basis. ECX 194 at 3114, 3137.

Milliman often wore the hat of financial consultant. See RCX 838 at cover page. Milliman regularly conducted analyses of Atrium's performance under its captive arrangements. Tr. 1906, 1929, 2038-41; see e.g., RCX 838, 2004. A large part of Milliman's role was helping PHH secure "profitable" business arrangements through captive structures. Tr. 128; see also Tr. 131-36. Danahy testified that Milliman was involved in ensuring "adequate risk transfer," i.e., meeting regulatory requirements on the one hand, while helping PHH meet its "business objective," i.e., profits, on the other hand. ECX 153 at 33-34, 194-95. Every Milliman report for Atrium found risk transfer and price reasonably related to risk. Tr. 2096-97; RCX 881.

In addition to analyzing existing captive arrangements, Milliman assisted PHH in analyzing potential captive arrangements, including in connection with the RFP. Tr. 2051-52, 2057; see ECX 315; ECX 537. Emails relating to the RFP reflect Milliman's role in assisting PHH in meeting economic goals. See ECX 314 at 3523



Bjurstrom, a non-actuary "Financial Consultant" at Milliman, was centrally involved in Milliman's work for Atrium, its review of RFP responses, and even its risk transfer opinions and modeling. Tr. 126-27, 173, 191-94, 2036. Rosenthal testified that "we used Ken Bjurstrom at Milliman to make sure that we stayed in compliance with all those regulations," although Bjurstrom is neither a lawyer nor an actuary. Tr. 513. Nonetheless, actuarial training is of course necessary for evaluating risk transfer, suggesting that Bjurstrom focused instead on financial counseling. Tr. 184, 577, 1726-29, 1755.

Schmitz's testimony suggests that Milliman assisted PHH in establishing structures that resulted in assumption of minimal risk at maximal cedes. Schmitz was asked at the hearing, with respect to the Genworth 2008-B book of business, which carried 25% cedes, how much the premium could have changed, while preserving a conclusion of price reasonably related to risk. Tr. 2100; see ECX 194. Schmitz said that reducing cedes to 20%, "would likely have narrowed the gap between the [MI's] results and Atrium's which would have made them more similar." Tr. 2103. At a 20% cede, for example, Milliman "likely" would still have found price reasonably related to risk, and "it passes the risk transfer test more easily." Tr. 2104, 2107-08.

Schmitz explained that "quite frequently" when Milliman ran risk transfer models relating to captive mortgage reinsurance, it found that a captive structure did not satisfy risk

transfer. Tr. 1916, 2097. One such situation was with the Genworth 2008-B book year. Tr. 1990-91. For that book year, Milliman ultimately concluded that the book year "likely" satisfied the HUD Letter's risk transfer requirement with expected 11% losses at the 10% probability level. Tr. 1858, 1869, 1995-96; ECX 194 at 11-12. Milliman also concluded there was significant protection to Genworth at or above the 80% probability level, meaning that, at that level, Atrium would carry a higher loss ratio than Genworth, and that pricing was reasonably related to risk. Tr. 1874-78, 1955-56, 2006; ECX 194 at 16-18. However, Milliman initially found – in April 2009, after the Genworth arrangement had been terminated – that risk transfer was not satisfied for the 2008-B book year, and as it typically would do in such a situation, Milliman discussed the adverse findings with its client. Tr. 1916, 1990-91, 2097; ECX 194 at 7 (paragraph starting with "However, we have not allowed future trust disbursements…"). Milliman advised Atrium that the terms of the 2008-B book year arrangement should be altered to satisfy risk transfer, by forbidding the withdrawal of dividends and the deduction of administrative expenses from the Genworth trust. Tr. 1991, 1994; see ECX 194 at 7. Respondents agreed to the proposed modifications, which were only implemented in May 2010. RCX 51. Schmitz said that any hypothetical easing by Atrium of the restrictions on the release of dividends, subsequent to the issuance of Milliman's report, could have nullified its conclusion of risk transfer. Tr. 1994-95.

Schmitz acknowledged that it "wouldn't be good" for Milliman's business if this proceeding resulted in a finding that Milliman's opinions were "not applicable." Tr. 2082.

O. Experts

Three expert witnesses testified, one for Enforcement and two for Respondents, all on topics relating to whether Respondents' captive arrangements passed risk transfer and price commensurability.

1. Mark Crawshaw

Mark Crawshaw (Crawshaw), FCAS, MAAA, testified on Enforcement's behalf. Tr. 590-591; Crawshaw Report at 1, Attach. 1. He is an actuary and currently works as the president of Madison Consulting Group, an actuarial consulting firm in Madison, Georgia, specializing in property casualty. Tr. 592; Crawshaw Report at 1. He has worked in the actuarial field for about thirty years, including at Milliman for about four years in the 1980's. Tr. 593; Crawshaw Report at 2-3, Attach. 1. All of his actuarial experience has been in a consultant capacity. Tr. 599. Over his career, Crawshaw's clients have included state insurance regulators, private insurance and reinsurance companies, and captive insurance companies. Tr. 593, 1020-23. Crawshaw has fairly regularly provided advice to clients on whether to enter into potential insurance or reinsurance arrangements, has experience analyzing the pricing of reinsurance, and has been involved in numerous commutations. Tr. 594-96; Crawshaw Report at 2-3. He has a bachelor's degree from Oxford University and a Ph.D. from the California Institute of Technology, both in mathematics. Tr. 589-90.

Crawshaw looked specifically at two questions for Enforcement: whether there was risk transfer under any of Atrium's captive arrangements, and if so, whether pricing was

commensurate with the level of risk being transferred. Tr. 599-600; Crawshaw Report at 1. In answering these questions, Crawshaw evaluated Atrium's four captive arrangements. See Crawshaw Report at 6.

2. Michael Cascio

Michael Cascio (Cascio), FCAS, MAAA, testified on Respondents' behalf. Tr. 1306; Cascio Report at 1, Attach. A. Cascio is an actuary who has been involved in the insurance business for about thirty-five years; among other positions, he worked at a number of reinsurance companies in Bermuda and served as president and CEO of a U.S. reinsurance company. Tr. 1323; Cascio Report at Attach. A. He is currently the president and CEO of Maragold Enterprises, LLC, in Pennsylvania. Cascio Report at Attach. A. Cascio's bachelor's in mathematics and physics was earned at Central Connecticut State University. Tr. 1306; Cascio Report at Attach. A. Cascio is currently a director of Philadelphia Insurance Company, and formerly served on the boards of Lincoln General Insurance Company, Jevco Insurance Company, and a Bermuda-based reinsurance company. Tr. 1308; Cascio Report at Attach. A.

Respondents asked Cascio to evaluate Atrium's captive arrangements, and he focused on the UGI and Genworth arrangements, considering, among other things, whether they passed risk transfer, both when carrying 40% cedes and when carrying 25% cedes. Tr. 1554-55; Cascio Report at 1, 3-5.

3. Vincent Robert Burke

Also testifying for Respondents was Vincent Robert Burke (Burke), CPA, who has about thirty-five years of experience as an accountant, including working for nearly three decades at Deloitte in various roles as an auditor. Tr. 1693-96, 1698; Burke Report at 3, 13, App'x A. He is currently the partner in charge of WeiserMazars LLP's Pennsylvania office and the firm's insurance audit practice. Tr. 1696; Burke Report at App'x A. Burke earned his bachelor's in business administration from Marist College, in Poughkeepsie, NY, and his MBA from Baruch College, which is part of the City University of New York. Tr. 1692; Burke Report at App'x A. In addition to passing the CPA exams, he is a Chartered Property Casualty Underwriter and a Fellow of the Life Management Institute. Tr. 1698; Burke Report at 3, App'x A. He has served on various professional committees of the American Institute of Certified Public Accountants, the New York State Society of Certified Public Accountants, and the Society of Insurance Financial Management. Tr. 1698-99; Burke Report at 3, App'x A. Unlike Crawshaw and Cascio, Burke is not, and has never been, an actuary. Tr. 1701. Over his career, Burke has primarily done work for private insurance clients, including property casualty, life, and health insurance companies. Tr. 1693. He has done a small number of projects for state insurance regulators. Tr. 1695, 1697, 1744-45. He has never himself conducted a risk transfer analysis. Tr. 1701. He has previously served as an expert witness in about six litigations. Tr. 1699.

Respondents asked Burke to provide his expert opinion on these topics: Crawshaw's use of a multiple book year analysis in determining whether a reinsurance contract meets the risk transfer test under Financial Accounting Standards Board Accounting Standard Codification 944 (ASC 944); Milliman's methodology and analysis performed for Atrium and the reasonableness

of relying on Milliman's reports to account for the various arrangements as reinsurance; and the Bureau's contention that the ceding premium was excessive compared to the risk assumed by Atrium. Tr. 1700-01; Burke Report at 3. In preparing his report, Burke among other things read Milliman's reports prepared for Atrium, and considered the various terms of the four captive reinsurance agreements. Tr. 1754, 1758, 1822, 1827; Burke Report at App'x B. He relied on the assistance of colleagues at his firm in preparing his conclusions. Tr. 1821.

4. Expert Opinions Regarding Risk Transfer

Cascio explained that risk transfer analysis is not a perfect science, making it unsurprising that reasonable minds might disagree, when looking at the same facts, about the presence or absence of risk transfer. Tr. 1393-94; Cascio Rebuttal Report at 2. Burke explained that the presence or absence of risk transfer, for the most part, is not self-evident or discernible without significant work and modeling. Tr. 1811-12. He further explained that determining risk transfer outcomes is challenging, and involves consideration of complex agreements that embody varying degrees and types of risk and that carry uncertainty about the range of possible outcomes. Tr. 1725, 1730-34; Burke Report at 5, 12; but see Tr. 1725-26 (Burke admits that some reinsurance arrangements are straightforward).

Crawshaw opined that Milliman's reports were incorrect in determining that Atrium's captive arrangements transferred risk. Crawshaw Report at 3-4. He concluded that there was no risk transfer for Atrium's arrangements, either preceding or anteceding July 21, 2008, writing, "Atrium is essentially a risk-free enterprise, with virtually guaranteed profits." Crawshaw Report at 74; see Tr. 857, 2257, 2309-10. Cascio opined that Atrium's captive arrangements transferred risk and that Atrium was in a more economically tenuous position than the MI under each captive arrangement. Tr. 1434, 1436-37, 1450, 1463; Cascio Report at 5, 14; Cascio Rebuttal at 1.

Burke testified that for accounting purposes, what qualifies as reinsurance depends strongly on risk transfer analysis, because a contract cannot qualify as reinsurance unless it transfers adequate risk from the primary insurer to the reinsurer. Burke Report at 5; see Tr. 698, 1060-61, 1106 (Crawshaw; discussing accounting treatment of reinsurance); Tr. 2046-47 (Schmitz; same). A company might conclude, presumably with the assistance of an actuary, that a contract can be accounted for as reinsurance. Tr. 1703; Burke Report at 9. It then becomes the CPA's job to evaluate the propriety of that conclusion, including the existence and quality of work done to support that conclusion. Tr. 1703; Burke Report at 9; see Tr. 391 (Culver). If payments into a reinsurance arrangement cannot be accounted for as reinsurance, they must be accounted for as cash deposits. Tr. 927, 1719, 1832; see Tr. 2137 (Walker).

a. 10/10 Test

While Cascio relied on the 10/10 test – which asks whether there is a 10% probability of incurring at least a 10% net economic loss – to arrive at his conclusion that Atrium's arrangements exhibit risk transfer, Crawshaw called the 10/10 test not definitive and said that, in certain scenarios, relying solely on it can lead to inaccurate conclusions of risk transfer. Tr. 612-13, 1456-57; Crawshaw Report at 9; Crawshaw Rebuttal at 7, 56. In his discussion of the

significance of ASC 944 on reinsurance accounting, Burke explained that the 10/10 test has been adopted as an industry standard in assessing risk transfer for purposes of accounting as reinsurance. Burke Report at 7. As relevant here, ASC 944 provides that accounting for reinsurance, with respect to agreements such as Atrium's captive arrangements, requires that: (1) the reinsurer assumes significant insurance risk; and (2) it is reasonably possible that the reinsurer may realize a significant loss from the transaction. Id. at 6-7, 10; see RCX 809 at 5 ("[T]he accounting model for short-duration contracts seems more applicable to risk exposures under mortgage guaranty insurance and reinsurance."). While the accounting literature has never adopted a bright line rule on the meaning of "significant," the industry has adopted the 10/10 test as the standard. Burke Report at 7.

b. FAS 113

Statement of Financial Accounting Standards Number 113, Accounting and Reporting for Reinsurance of Short-Duration and Long-Duration Contracts (FAS 113), which was promulgated by the Financial Accounting Standards Board (FASB) in 1992, addresses accounting treatment of an arrangement as reinsurance. ECX 843 at 4. Paragraph 9 of FAS 113 sets out the requirements for risk transfer: (a) The reinsurer assumes significant insurance risk under the reinsured portions of the underlying insurance contracts (9a test); and (b) it is reasonably possible that the reinsurer may realize a significant loss from the transaction (9b test).[32] Id. at 7; see ECX 586 at 8 (UGI document references 9a and 9b tests). It adds that a reinsurer shall not be considered to have assumed significant insurance risk under the reinsured contracts if the probability of a significant variation in either the amount or timing of payments is remote. ECX 843 at 7. Also relevant is FAS 113's paragraph 8:

> Determining whether a contract with a reinsurer provides indemnification against loss or liability relating to insurance risk requires a complete understanding of that contract and other contracts or agreements between the ceding enterprise and related reinsurers. A complete understanding includes an evaluation of all contractual features that (a) limit the amount of insurance risk to which the reinsurer is subject (such as through experience refunds, cancellation provisions, adjustable features, or additions of profitable lines of business to the reinsurance contract) or (b) delay the timely reimbursement of claims by the reinsurer (such as through payment schedules or accumulating retentions from multiple years).

Id. at 6-7.

Crawshaw called FAS 113 useful guidance on whether there is true shifting of risk to a reinsurer and significant potential of loss by a reinsurer. Crawshaw Report at 8. He opined that the 9b test is equivalent to the 10/10 test, and that Atrium's arrangements fail both the 9a and 9b tests under FAS 113. Id. at 8-9, 34-36, 55. According to Crawshaw, under FAS 113 a risk

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[32] This language is nearly identical to that in ASC 944 and similar to that in SSAP 62's paragraph twelve. As discussed supra, Burke said that it is the industry standard to assess significant insurance risk with the 10/10 test.

transfer assessment should consider other contractual features that might limit risk, such as cancellation provisions, and FAS 113 discusses economic loss, as opposed to just claims on the reinsurer that do not ultimately cause the reinsurer a net economic loss. Tr. 608, 611; Crawshaw Report at 11. In contrast, Respondents sometimes referred to "loss" under the captive arrangements as simply claims paid, rather than economic loss, where claims paid exceed premiums received. See, e.g., ECX 153 at 121.

Cascio believed that Atrium's arrangements passed risk transfer under FAS 113. Cascio Report at 14. However, Cascio opined that FAS 113 did not properly apply to Atrium's arrangements. Tr. 1467; Cascio Report at 9. In his view, it is incorrect to apply FAS 113 guidelines to Atrium's arrangements because the contracts are "catastrophic" excess of loss contracts, meaning they are designed to insure a channel of losses in catastrophe situations. Tr. 1468; Cascio Report at 2, 10-11. Crawshaw, by contrast, opined that Atrium's arrangements did not provide true catastrophe coverage. Crawshaw Rebuttal at 2, 8-12, 56.

Burke explained that accounting standards dictate that a company's management is ultimately responsible for the accounting of an arrangement as reinsurance. Tr. 1702, 1715-16, 1723, 1734-38, 1746; Burke Report at 8. He opined that it was prudent for Atrium to turn to Milliman to conduct analysis under FAS 113, but noted that a 2001 report by the FASB Emerging Issues Task Force (EITF Report) reflected disagreement in the industry on whether FAS 113 is applicable to captive mortgage reinsurance. Tr. 1778-79, 1826; Burke Report at 11-12; RCX 809 at 1, 8, App'x A; see also Cascio Report at 9-10. Both Schmitz and Bjurstrom served on the EITF. RCX 809 at 1, App'x B. The EITF Report addressed two issues: (1) whether FAS 113 or another model applies to captive mortgage reinsurance arrangements; and (2) if FAS 113 applies, what is a reasonable standard for evaluating risk transfer for captive mortgage reinsurance contracts? RCX 809 at 1. It discussed the conflicting viewpoints: on the one hand, that a FAS 113 risk transfer analysis must be performed to support risk transfer, because FAS 113 does not specifically exclude mortgage insurance, and on the other hand that "[m]ortgage reinsurance is not within the scope of FAS 113." Id. at 8.

c. Prospective vs. Retrospective Analysis

Crawshaw based his risk transfer opinion on historical analysis of Atrium's arrangements, but Cascio insisted that risk transfer can only be assessed on a prospective basis, without the benefit of hindsight. Tr. 1365-68, 1472, 1618. Crawshaw agreed that the actuarial exercise of risk transfer analysis, for example using the 10/10 test, must be done on a prospective basis. Crawshaw Report at 11, 40; Crawshaw Rebuttal at 139 see Tr. 1362, 1368, 1395, 1428, 1432 (Cascio). Nonetheless, Crawshaw opined that "the conduct of the parties throughout the [Atrium] arrangement[s], even viewed in retrospect, can inform an analysis of the parties' intentions with regard to risk transfer." Crawshaw Report at 11. Burke's position was consistent with that of Cascio. Tr. 1717, 1723-25.

d. Single Book Year vs. Multiple Book Year Analysis

Crawshaw's conclusion of no risk transfer rests in part in his view that the Atrium arrangements had high attachments points, so that Atrium expected to experience no claims in most years. Crawshaw Report at 3, 17. He explained that any claims on Atrium would not be

expected until a number of years into each arrangement, so that when claims needed to be paid, Atrium would have built up a substantial buffer of premiums, allowing Atrium to avoid any economic loss while still satisfying claims. Id. at 3, 18-19, 21, 28. Cascio agreed that it normally takes "a few years" before claims build up to a reinsurer's attachment point, and noted that Milliman's models showed no claims being paid before the second book year under any Atrium captive arrangement. Tr. 1489-90, 1539. Cascio explained that even after the attachment point is reached, the reinsurer does not necessarily experience an economic loss, because it can pay out claims from ceded premiums; it does not experience an economic loss at loss ratios of under 100%.[33] Tr. 1457-58; see Crawshaw Rebuttal at 8-9 nn.7-8. In Crawshaw's view, by contrast, there is no assumption of risk, and no risk transfer, where a reinsurer merely risks returning premiums to satisfy claims. Tr. 608, 611; Crawshaw Report at 10; Crawshaw Rebuttal at 34.

Crawshaw criticized Milliman's findings of risk transfer, in part based on his view that analyzing risk transfer through analysis of single book years was incorrect. E.g., Tr. 687, 693; Crawshaw Report at 3, 62. He argued that, because Atrium was pooling premiums from multiple book years in each captive trust, creating cross-collateralization of claims across book years, looking at a single book year snapshot of expected losses did not accurately reflect Atrium's assumed risk. Tr. 603, 632, 2265. He explained:

> A single book year loss ratio of 110% only means that the amount of Atrium's paid claims *for that book year* exceed the premiums ceded *for that book year* by 10%. It does not mean that Atrium used any of its own funds to pay claims, because the 10% excess can, and in practice did, come from the MI's own ceded premiums on other book years.

Crawshaw Report at 63 (emphasis added).

Crawshaw focused on an actuary's responsibility to understand the true intentions of the parties to a reinsurance agreement, with respect to the goals and expected longevity of the agreement. Tr. 1144, 2291-92; Crawshaw Rebuttal Report at 125-26 & n.254 (citing Reinsurance Attestation Supplement 20-1: Risk Transfer Testing Practice Note, published in 2005 by the American Academy of Actuaries[34]). He was "unaware of any industry practice or

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[33] Cascio, too, sometimes used the term "losses" when describing *claims* paid by Atrium, even where Atrium incurred no actual economic loss. See Tr. 1437, 1457-58.

[34] Reinsurance Attestation Supplement 20-1 includes the following language:

> In order to understand the substance of the agreement before evaluating and quantifying the amount of the economic losses being transferred, the actuary *may* wish to do the following:
>
> - Obtain and review as much background to the transaction as practicable, including the business purpose and the substance of the transaction. In this regard, the actuary may wish to have discussions with management or other key

principle that would support disregarding the intentions of the parties to have a multiple-book year arrangement just because the contract does not literally require coverage of multiple book years." Crawshaw Rebuttal at 67. He pointed to a number of things that he alleged show that each captive arrangement was always intended to be a multiple book year, long-term arrangement, including the existence of the contingency reserve for each captive and a 2003 presentation by Radian to PHH that implied that the proposed captive arrangement would involve "ten books of business." Tr. 725-26; Crawshaw Report at 27-28; Crawshaw Rebuttal at 66-67; ECX 580 at 0383.

While Burke agreed that an actuary ought to evaluate all available facts in assessing risk transfer, Cascio strongly disagreed that a multiple book year approach was appropriate for Atrium's captive arrangements. See Tr. 1802; Cascio Rebuttal at 2. Cascio opined that analysis on a multiple book year basis is inconsistent with industry practice and nonsensical where either party to the agreement can terminate the agreement with minimal advance notice; he also disagreed that the intent of the parties to have a long-term relationship can override the plain language of the contract's termination provisions. Cascio Rebuttal at 3-4. Cascio maintained that a multiple book year approach would only be appropriate if the contract were explicitly a multi-year agreement, or the contract made it punitive for the insurer not to renew. Id. at 4. Cascio said, "At best, lumping years together . . . is novel. At worst[,] I've never seen it done like that. For the types of things we're looking at here, I've never seen that approach." Tr. 1395.

Burke echoed Cascio's view that a single book year approach was correct for Atrium's captive arrangements. He opined that while it is common practice in the insurance industry for

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personnel as applicable. Furthermore, the actuary may wish to obtain and review internal accounting memoranda or other relevant internal documentation.

- Obtain and read the entire agreement, as well as any related agreements, including but not limited to interlinked reinsurance contracts or trust agreements.

  If it is not clear how certain contractual terms operate, the actuary *might* choose to seek assistance from accounting and legal professionals, as applicable. Should the actuary rely on the interpretation of contractual language from another person or party, the actuary usually discloses such reliance in his/her documentation. In reviewing the contract, the actuary may encounter contract provisions which may create contingent rights or obligations that appear to reduce risk if applied. These include special termination clauses, warranties, and adjustable limits or deductibles. In some cases, these provisions are worded in indefinite or ambiguous ways that make modeling difficult and, perhaps, impossible unless one were to make assumptions about the behavior of one or both parties to the contract. In those cases, if it is not possible to clarify the intent of the parties, the actuary might not be able to complete a quantification of the economic losses transferred under the agreement. Further, if the actuary does make assumptions about the behavior of parties to the contract, it may be appropriate to incorporate documentation of these assumptions in the analysis documentation.

ECX 632 at 13-14 (formatting altered and emphasis added).

the primary and the reinsurer to have continuing relationships and to renew their reinsurance contracts with similar terms and conditions on an annual basis, when evaluating whether the risk transfer requirements have been met, each book year must be independently evaluated. Burke Report at 10; see also Tr. 1716. Burke has never seen a multiple book year risk transfer analysis done. Tr. 1717.

Burke also pointed to SSAP 62 and the EITF Report in support of assessing Atrium's arrangements on a single book year basis. Burke Report at 10-11. In relevant part, SSAP 62 states that a reinsurance agreement "shall constitute the entire contract between the parties." ECX 790 at 4. The EITF Report states:

> The Task Force has concluded the contract is a series of individual book year contracts, renewable indefinitely. The basis for this conclusion is the contract may be terminated by either party at any time with minimal notice and the number of book years that ultimately will be included in the contract is unknown.
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> . . .
>
> Different interpretations exist regarding whether the trust fund functions (a) as an aggregate limit of coverage that is changing annually with the addition of a new book year or (b) as collateral to the ceding company and serves to maintain adequate capital commensurate with risk exposures. Depending upon this decision, the contract would be viewed either as (a) a contract evaluated annually on a prospective basis as new book activity occurs or (b) a "series of single book years" each evaluated separately.
>
> Under the "series of single book years" scenario there is a difference in view as to (a) whether the trust fund limitations should be considered in a FAS 113 cash flow analysis and (b) whether external capital must be deposited in the trust fund for each book year or whether retained earning of previous book years can be considered capital for subsequent book years without the need to deposit additional external capital.
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> . . .
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> When entering into the contracts, the lenders must comply with Section 8 of [RESPA]. [HUD], in providing guidance on RESPA, has stated the position that "arrangements are permissible under RESPA if payments to the reinsurer: (1) are for reinsurance services actually furnished or for services performed and (2) are bona fide compensation that does not exceed the value of such services." Premiums must be commensurate with the risk assumed and "there must be a real transfer of risk." RESPA does not include a reference to authoritative literature for evaluating risk transfer. The legal community, in part, has looked to accounting literature and accounting and actuarial conclusions for guidance.

RCX 809 at 5-6 (formatting altered); see also Tr. 1779, 1827. Based on SSAP 62, Burke concluded that each individual agreement to reinsure must stand on its own, and the fact that similar contracts may be entered into in the future is irrelevant to the risk transfer analysis; and

he concluded that it is inconsistent with FAS 113 to conduct a risk transfer analysis that considers more than just a single book year of business. Burke Report at 10, 15.

Crawshaw disputed the applicability of SSAP 62, which he called a general statement about property casualty reinsurance agreements. Tr. 2289-90. Crawshaw also believed that language in SSAP 62 undermined Burke's conclusion that every book year should stand on its own for risk transfer purposes. Tr. 2249-50. He noted that SSAP 62 says, "[I]f agreements with the reinsurer or related reinsurers, in the aggregate, do not transfer risk, the individual contracts that make up those agreements also would not be considered to transfer risk, regardless of how they are structured." Tr. 2250; ECX 790 at 23.

e. Structure of the Captive Trusts

Reinsurers normally segregate trusts by primary insurer. Tr. 827-28, 2333-34; Cascio Report at 15. Crawshaw testified that he could "see why that would be." Tr. 2330-31, 2333. He nonetheless criticized the structure of Atrium's captive trusts because they did not pool risk, which he called a fundamental principle of insurance, because they were segregated by MI and contained premiums from multiple book years. Tr. 621-22; 2267-68; Crawshaw Report at 12, 15; see also Notice at 11-12. For example, he wrote, "[t]he segregation of premiums by MI substantially reduced the probability and extent of potential recovery for each MI compared to a situation in which premiums from all MIs were pooled together and available to pay claims incurred by any MI." Crawshaw Report at 15; Tr. 2331-33.

f. Funding of the Captive Trusts

Crawshaw described Atrium's minimal capital contributions to the captive trusts as contributing to the lack of risk transfer, although he conceded that this might not apply to the Genworth arrangement given Atrium's level of capitalization of the Genworth trust account. Tr. 623, 688, 787; Crawshaw Report at 3, 16-17; see also ECX 739 at 8451 (discussed supra, Rosenthal tells PMI, "Think high cede, late attachment, short corridor, *low capital*, fast dividend!" (emphasis added)). He pointed out that Milliman's reports did not address the requirement articulated in the HUD Letter that the captive reinsurer post adequate reserves consistent with state insurance regulations. Crawshaw Report at 68; see Tr. 1958 (Schmitz testimony); ECX 193 at 5 (Milliman book year report). Cascio saw no evidence that Atrium did not post adequate capital in connection with the captive arrangements. Cascio Report at 2, 12. He opined that Atrium satisfied all of its obligations to pay claims. Cascio Report at 2, 15. Crawshaw conceded that Atrium met statutory contingency reserve requirements for the captive trusts. Tr. 767-77, 1027. Burke testified that for purposes of reviewing Milliman's risk transfer opinions, he did not need to know how much capital was in any particular trust account. Tr. 1823.

g. Whether Atrium's Liability was Limited to the Trusts

Crawshaw maintained that Atrium's liability under each captive agreement was limited to the funds in the respective trust account. Crawshaw Report at 12-14. In support of his position, he pointed to Milliman's plain statement, in each of its reports, that liability was limited to the

trusts, and noted that each commutation payment involved a payment to the MI not exceeding the total funds in the applicable trust account. Tr. 616, 619; Crawshaw Report at 8-9, 13-14; see, e.g., ECX 194 at 7.

Cascio generally disagreed that Respondents' liability under each captive arrangement was limited to the corresponding trust account, although he conceded that as to the CMG arrangement, liability was limited to the trust account. Tr. 1479; Cascio Report at 8-9, 11; Cascio Rebuttal at 5 & n.4. Burke believed that Milliman was conservative to assume that liability was limited to the trust accounts for purposes of its risk transfer opinion. Burke Report at 14; see also ECX 586 at 3 ("[redacted]").

Support for Crawshaw's position includes [redacted] the EITF Report's acknowledgement that some regard the trust as the limit on the reinsurer's coverage of claims.[35] ECX 586 at 2; RCX 809 at 5, 8. On the other hand, [redacted] and the EITF Report states that there is disagreement over the significance of the trust fund. ECX 586 at 3; RCX 809 at 5, 8-9, App'x A. As noted, Rosenthal changed his mind on this issue between his investigative testimony and his hearing testimony. Tr. 267-68.

Looking at the contractual language itself, there does not appear to be any language in the UGI contract or its amendments limiting liability to the trust account. ECX 584; RCX 58. However, the Genworth, Radian, and CMG agreements appear to have limited Atrium's liability to the trust accounts. The original Genworth contract made Atrium "in no event . . . liable . . . for any amounts in excess of the sum of the amounts required to be deposited into the [t]rust" and provided that "any assets not included in [the trust] are not available to support or secure" the agreement. RCX 44 at 1570, 1578. The former statement was repeated in the 2010 amendment to the Genworth contract, and the latter statement is also found in the Radian and CMG contracts. ECX 202 at 20; RCX 40 at 1633; RCX 51 at 1. Further, the Radian and CMG contracts each state the following:

> 3.03. Setoff and Recoupment. Any debts or credits, matured or unmatured, liquidated or unliquidated, regardless of when they arose or were incurred, in favor of or against either the [Insurer] or the Reinsurer with respect to this Agreement are deemed mutual debts or credits, as the case may be, and shall be set off, and only the net balance shall be allowed or paid. This setoff provision . . . shall not be modified or reconstrued due to the insolvency, liquidation, rehabilitation, conservatorship, or receivership of either party.

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[35] The EITF Report specifically addressed the conflicting views on whether "the limitations of the trust fund structure [should] be considered in a FAS 113 cash flow analysis." RCX 809 at 8. One view was that "[t]he trust is a significant element of the contract that must be modeled"; the other was that "the trust fund limitation is akin to a capital limitation as opposed to a coverage limitation." Id. at 8-9, App'x A.

> . . .
>
> 8.04. Remittances. The balance after set off (as provided in Section 3.03 above) that is due to a party by the other party hereunder shall be paid: (a) if to [Insurer], within thirty (30) days following the receipt by Reinsurer of the report delivered pursuant to Section 8.01 hereof, which payment *shall be made by withdrawal from the Trust Account*; or (b) if to Reinsurer, then such remittance shall be made by [Insurer] to the Trust Account.
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> . . .
>
> 12.02. Purpose of Trust. Reinsurer agrees to deposit . . . and maintain in said Trust Account assets to be held in trust by the Trustee for the benefit of the [Insurer] as security for the payment of the Reinsurer's obligations to the [Insurer] under this Agreement. Such assets shall be maintained in the Trust Account by the Reinsurer as long as the Reinsurer continues to remain liable for any Reinsured Loan.

ECX 202 at 8, 11-12, 17; RCX 40 at 1622, 1625-26, 1631 (formatting altered and emphasis added). The Genworth agreement includes in its Section 3.04 the language quoted above from the Radian and CMG agreements' Sections 3.03. RCX 44 at 5-6. The remittances provision in the Genworth agreement differs from that in the Radian and CMG agreements, and reads:

> 8.03. Remittances. The balance after set off (as provided in Section 3.04 above) that is due to a party by the other party hereunder shall be paid: (a) if to the [Insurer], within thirty (30) days following the receipt by the Reinsurer of a quarterly or annual report delivered pursuant to Section 8.01 above for each Accounting Period; or (b) if to the Reinsurer, within forty-five (45) days after the end of an Accounting Period and as an accompaniment to the quarterly report delivered pursuant to Section 8.01 for each Accounting Period except any Accounting Period ending on the last day of the [Insurer's] fiscal year, in which case, within ninety (90) days following the end of such Accounting Period.

Id. at 8. Similarly, the UGI agreement includes this language:

> 10.5. Remittances. The balance after offset due to a Party by the other Party hereunder shall be paid (a) if to Ceding Company, within fifteen (15) days following the receipt by Reinsurer of a quarterly report delivered pursuant to Section 10.1 for such Quarterly Cycle; or (b) if to Reinsurer, within forty-five (45) days after the end of a Quarterly Cycle and as an accompaniment to the quarterly report delivered pursuant to Section 10.1 for such Quarterly Cycle.

ECX 584 at 11 (formatting altered).

h. Purpose of Captive Arrangements

Cascio maintained that there are numerous legitimate business reasons why UGI and Genworth would have entered into captive arrangements with Atrium. Cascio Report at 14. In

his initial expert report, he said that it is reasonable to believe that UGI and Genworth entered into their captive arrangements with Atrium for protection from catastrophic exposure, utilization of reinsurer expertise, risk sharing, and smoothing of financial results. Id. at 2. He also cited surplus relief. Tr. 1496-97, 1503-04, 1506; Cascio Rebuttal at 14. Cascio made clear that his thoughts on the MIs' motivations were speculative, and he did not know their actual motivations. Tr. 1514, 1535, 1538; see Crawshaw Rebuttal at 10.

Pointing to the housing market downturn in 2008, he argued that "the mortgage insurance business has an element of catastrophic exposure" that might exhibit "multiple successive years of profitable underwriting results to be abruptly interrupted, and for future periods to be unprofitable, perhaps for an extended period of time until the market corrects." Cascio Report at 2. He suggested that protection from catastrophic exposure is relevant here because mortgage insurance has a "long tail," meaning it can take a long time for claims to mature under the agreement. Tr. 1354, 1387-88; Cascio Report at 3. Cascio called the smoothing of financial results, or the reduction of volatility, an often overlooked but significant benefit to an insurer, especially where the insurer is, or is part of, a publicly traded company. Tr. 1401; Cascio Report at 5-6; Rebuttal Report at 8. He explained that rating agencies care a great deal about insurers' volatility. Tr. 1356-57, 1402.

Cascio opined that the captive agreements benefited the MIs because they could use Atrium's "expertise," and as evidence pointed to the numerous amendments of the captive agreements, including the exclusion of lower FICO scores. Tr. 1517; Cascio Report at 3. His opinion on this point is conclusory; he did not clearly explain how the amendments reflect the MIs' using and benefiting from reinsurer expertise, or exactly how the exclusion of lower FICO scores from the captives benefited the MIs. Tr. 1522-24, 1527. Cascio also said that a reinsurer is useful to an insurer in setting up the insurance structure, but in this case Respondents had little insurance experience, while each MI's entire business involved insurance. Tr. 1515-16. Indeed, there is other evidence, especially surrounding PHH's October 2006 RFP, that MIs carried most of the burden in structuring the reinsurance arrangements. See Tr. 184 (Rosenthal testified, "I would say that the MIs are more sophisticated when it comes to understanding captive reinsurance than I am.").

Burke opined that an agreement accounted for as reinsurance, rather than as a deposit, provides multiple accounting benefits. Tr. 1717-20, 1830; Burke Report at 6-7; see also Crawshaw Rebuttal at 119 (Crawshaw acknowledges that moving of premiums to the trust allowed each MI to reduce liabilities on its balance sheet); ECX 843 at 5-6 (FAS 113 describes accounting of reinsurance as one way of offsetting assets and liabilities). Like Cascio, he cited the effect of smoothing earning patterns, which is particularly important to publicly traded companies. Tr. 1831.

Support for Cascio's and Burke's positions is found in the lay testimony. Danahy testified that a loan goes through foreclosure before the amount of loss can be determined, and stated that mortgage insurance, generally speaking, has a "fairly long tail." ECX 153 at 94-95, 102-04, 172, 184-86. Walker testified [redacted] and that he viewed mortgage insurance as a "catastrophic line of business, a little like flood insurance." Tr. 2134, 2142-43. Rosenthal testified that PHH

wanted to reinsure the possibility of catastrophic losses. Tr. 261. Culver, however, said that he did not think captive reinsurance was implemented for the purpose of protecting against catastrophic losses. Tr. 399-400.

Culver and Walker explained that [redacted] Tr. 339-40, 344-45, 419, 421-24, 2132-33, 2162-63. Culver specifically said there is "intense pressure from investors" to maintain a risk to capital ratio as high as possible, that is, to minimize capital so as to "leverag[e] the capital fully." Tr. 419, 422. Indeed, prior to the housing crisis, MGIC's risk to capital ratio was so low that it bought back $1.2 billion in stock. Tr. 399, 419. Walker noted that reinsurance proved helpful to UGI in surviving the financial crisis. Tr. 2153-4. UGI relied on the loss reserves held in captive trust accounts, and those reserves meant that UGI was not forced into "runoff" like some of its competitor MIs. Tr. 2155-56.

Crawshaw viewed Atrium's arrangements as intended to produce large profits to Atrium, so that, even in terrible years – such as 2008 – it would not face a significant loss. Tr. 631, 647, 652-53, 749, 1017. He took issue with Cascio's characterization of Atrium's captive arrangements as catastrophic excess of loss coverage. Crawshaw Rebuttal at 2, 5. He opined that "[i]n true catastrophe arrangements, the reinsurer's potential losses are typically many multiples of ceded premiums, and the reinsurer has capital on hand to fund losses of that magnitude," and "the layers that Atrium purported to reinsure is far below where the catastrophe, true catastrophe losses would occur." Tr. 2255-56; Crawshaw Rebuttal at 2. Nor did Crawshaw believe that Atrium's captive arrangements benefited the MIs by smoothing financial results. Crawshaw Rebuttal at 111-14 (quoting ECX 793, a March 2003 Bear Stearns document focusing on deep-cede arrangements' erosion of MIs' financial results). He explained that while business entities like to reduce volatility, the MIs could have reduced volatility by putting premiums into savings accounts. Tr. 802, 1051-52, 1097. He also said that there was no need for UGI to reduce its financial volatility because, as a subsidiary of behemoth AIG, it could not meaningfully affect AIG's overall financial performance. Tr. 802. Cascio, however, noted that whenever hindsight reveals that a reinsurer has made money under an arrangement, the primary insurer would have been financially better off not reinsuring the business. Tr. 1453. He opined, however, that such scenario was theoretical because UGI and Genworth likely could not have financially afforded to take on 100% of the risk associated with the loans that went into Atrium's captive arrangements. Tr. 1453-54.

i. Dividends and Commutations

Crawshaw believed that any risk that Atrium assumed was reduced by its withdrawals of dividends from the trusts, its ability to terminate the captive arrangements early by commutation, and other "concessions" that its counterparties provided to Atrium to ensure Atrium was never in an economically precarious position. See, e.g., Tr. 731, 735; Crawshaw Report at 15-16, 25-26, 40-43, 53; Crawshaw Rebuttal at 74. As examples, he cited UGI allowing Atrium to rewrite the captive arrangement so the PHH could receive the $52.56 million dividend in early 2007, and Atrium declining to add capital to the CMG trust account to address a capital deficiency. Tr. 674-77; Crawshaw Report at 15-16, 41; ECX 331; ECX 544 at 5; ECX 630; ECX 750; see also

Tr. 656 ("what's written in the contract at any one time isn't necessarily the same as the behavior of the parties in the subsequent periods"); ECX 254 (Atrium chose to commute the Radian agreement over putting additional capital at risk in the Radian trust). Regarding commutation, Crawshaw criticized Milliman for not take into account the impact commutation would have on risk transfer. Crawshaw Report at 69-70; see ECX 124 at 22 ("Our analysis assumes Atrium's books of business terminate at their natural expiration . . . and does not take into account any possible commutation of insured books."). He noted that Milliman itself acknowledged that commutation of books can reduce risk transfer below required levels and that UGI expressed the same sentiment. Crawshaw Report at 25, 69-70; see ECX 32 at 141763 ("Commutation of books of business before they reach peak claim years can reduce risk transfer below required levels."); ECX 124 at 22 ("It is possible that a commutation could materially impact Milliman's opinions with regard to the transfer of risk and the compensation commensurate with the risk.").

Cascio believed that Atrium's ability to commute its captive arrangements had no effect on risk transfer, assuming that there was no understanding to commute when the contract went into effect. Cascio Report at 12-13. Crawshaw disagreed with Cascio's position. Crawshaw Rebuttal at 4, 73-81.

Burke believed that Milliman was correct to assume that each book of business terminates at its natural expiration and not by commutation. Burke Report at 13-14. He called Milliman's approach consistent with SSAP 62, whose implementation guidance provides that "unless a commutation is expected in the scenario being evaluated, it should not be assumed in the calculation."[36] Id. at 14; ECX 790 at 23. He added that given the cross-collateralization feature of each captive trust, commutation of each agreement would not have been expected. Tr. 1772-73; Burke Report at 14. Crawshaw did not believe that Milliman's approach was consistent with SSAP 62, apparently because he believed Atrium had an appetite for commutation from early on. Tr. 2285-86.

j. Reliability of Milliman's Reports

Burke described Milliman as a recognized expert in the field of actuarial services and as having adequate qualifications and competency to conduct risk transfer analyses for Atrium. Tr. 1759-60; Burke Report at 12-13. He called Milliman "the crème de la crème among actuarial consulting firms," and Cascio named Milliman as one of the two biggest property casualty actuarial consulting firms in the United States. Tr. 1576, 1722. As noted, Crawshaw opined that Milliman did not properly analyze risk transfer for Atrium, but he did not discount Milliman's reputation in the field of actuarial analysis and consulting. E.g., Crawshaw Report at 62.

5. Expert Opinions Regarding Price Commensurability

Crawshaw believed that Atrium's captive arrangements did not involve premium cedes commensurate with the risk assumed. He called the compensation Atrium received "extremely high relative to any risk assumed," and called the approximately [redacted] profit margins that Atrium

[36] This language appears in the "Implementation Questions and Answers" exhibit that accompanies SSAP 62.

expected not justifiable in light of the insignificant risk transferred. Crawshaw Report at 4, 29-30; see also Crawshaw Rebuttal at 20. He pointed out that Milliman consistently calculated prospective underwriting profit margins around ███ Crawshaw Report at 29 & n.63; see also id. at 32 & n.75 (Atrium realized a gain of about ███ under the UGI agreement), 75-76 (Milliman expected an approximately ███ underwriting profit for the Genworth 2004 book year). He repeatedly called such profit margins unusually high, and such expected profitability unreasonable when compared to Atrium's probability of losses, which was generally 10%. Crawshaw Report at 9 n.12, 60; Crawshaw Rebuttal at 44. While Crawshaw conceded that margins around ███ are typical when catastrophic coverage is provided, he disagreed that Atrium's arrangements in fact provided catastrophic coverage. Tr. 748-49; Crawshaw Report at 61.

Cascio opined that Milliman properly conducted its actuarial analyses of price commensurability, and that Atrium's compensation was always commensurate with the risk assumed. Tr. 1505; Cascio Rebuttal at 10. However, when considering Genworth's 2008-B book year report, which showed Atrium carrying a 90% probability of experiencing a loss ratio under ███ Cascio conceded that if the premium ceded to Atrium climbed "even a little bit," the 2008-B book year would not pass the 10/10 test for risk transfer. Tr. 1666-67; ECX 194 at 11. Regarding loss ratios, he acknowledged that Atrium experienced ratios over 100% for only four of the sixteen years book years under the UGI arrangement, and that the expected loss ratio for the 2009 book year was less than 100%. Tr. 1604-07, 1612; ECX 839 at 5. However, he believed that for a catastrophic coverage provider, years of loss-free experience does not show that the reinsurer did not assume adequate risk. Tr. 1399; Cascio Report at 10. He added that higher expected profit margins around ███ are not unusual for catastrophic excess of loss agreements. Cascio Rebuttal at 7.

Burke's analysis did not focus on pricing. See Burke Report at 14-15 (Burke's consideration of price commensurability mostly quotes from FAS 133 and explains what Milliman did; Burke's own analysis comprises five lines). Burke typically is not involved in questions regarding pricing of reinsurance, and never performed an analysis of whether Atrium's arrangements exhibit price commensurability. Tr. 1704-05.

III. DISCUSSION AND CONCLUSIONS OF LAW

A. Atrium's Captive Arrangements Did Not Meet the Requirements of the HUD Letter

Enforcement argues that Atrium's captive arrangements, viewed in their entirety rather than on a book year basis, did not pass risk transfer. Enf. Br. at 109-10. As discussed supra, the HUD Letter imposes four requirements for captive reinsurance to be lawful under RESPA: (1) there must be a legally binding contract for reinsurance with terms and conditions conforming to industry standards; (2) the reinsurer must post capital and reserves satisfying state insurance regulatory requirements; (3) there must be real transfer of risk; and (4) the compensation to the reinsurer must not exceed the value of the reinsurance services provided. ECX 193, Attach. A at 6-7. I agree with Respondents that Atrium's captive agreements were legally binding contracts within the meaning of the HUD Letter. See Resp. Br. at 34-35. On and after July 21, 2008, Atrium kept each captive trust funded at levels required by state regulations, but not necessarily

by the captive agreements; for example, the Radian and CMG trusts eventually became contractually underfunded, which triggered the termination provisions under each contract. See Tr. 296-97, 767-77, 1027, 1924-25; ECX 202 at 1726; ECX 425; ECX 630 at 6771.

I find that Atrium's captive arrangements – with the notable exceptions of the Genworth 2008-B book year and all book years for which there is no Milliman risk transfer report in evidence, which includes the final Radian book year and all CMG book years – passed risk transfer. However, I also find that Respondents have not shown price commensurability as to any book year.

1. Some Book Years Exhibited Risk Transfer

As a preliminary matter, I credit the overwhelming evidence demonstrating that risk transfer analysis should be performed on a single book year basis, when the reinsurance is provided on a single book year basis and the reinsurance agreement allows termination with minimal notice. See, e.g., Tr. 1909-12, 1919-20, 1961-62, 2030-31. I do not credit Crawshaw's analyses, performed on a multiple book year basis, over those of Milliman, performed on a single book year basis. Accordingly, I analyze risk transfer on a book year by book year basis, rather than on a captive by captive basis.

Having considered all lay and expert testimony, I mostly credit Respondents' position that there was risk transfer under Atrium's captive arrangements, satisfying the HUD Letter's "real transfer of risk" requirement for excess of loss arrangements, for those book years analyzed by Milliman. Central to this conclusion is that the record overwhelmingly shows that actuarial analysis of risk transfer must be performed on a prospective basis. See, e.g., Tr. 1365-68, 1472, 1618, 1856-57, 2032; Crawshaw Report at 11. Crawshaw's approach, while raising points which I consider with respect to degree of risk transfer and price commensurability, was historical and retrospective, making his analyses not meaningful alternatives to Milliman's calculations.

Because risk transfer analysis is properly conducted on a prospective basis, I am not persuaded that Milliman's analyses should have taken into account the impact commutation might have had on risk transfer. When Milliman conducted each prospective analysis in the record, the possibility of commutation was merely hypothetical and the potential terms entirely unknown. I conclude that when preparing its reports, Milliman made reasonable assumptions about Atrium's intentions under the captive arrangements based on the information available at the time.

Milliman appropriately employed the 10/10 test on a prospective basis to assess risk transfer. The 10/10 test is an industry standard, relied on by both actuaries and accountants, for determining whether significant risk is transferred. See, e.g., Crawshaw Report at 8-9; Burke Report at 7. It is entirely logical and expected that Milliman would have tested risk transfer using the 10/10 test.

Moreover, there is credible evidence that the reinsurance arrangements at least hypothetically provided real benefits to the MIs by reducing volatility of financial results and

allowing the accounting of the arrangements as reinsurance.[37] See, e.g., Tr. 1401-02, 1717-20, 1830, 2087-88; ECX 194 at 16-18. I also find no issue with the structure of the captive trusts, despite Enforcement's criticisms of lack of pooling, because reinsurance agreements typically provide for trusts segregated by primary insurer. Tr. 827-28, 2330, 2333-34; Cascio Report at 15; see Crawshaw Report at 12, 15; Notice at 11-12; Enf. Br. at 95.

On the other hand, Milliman's application of the 10/10 test to Atrium's arrangements shows that Atrium sought captives that bore as little risk as possible. For example, the Genworth 2008-B book year carried a 90% chance of losses under 11% and an 88.8% chance of no losses; the Genworth 2008-A book year a 90% chance of losses under 26% and an 85.5% chance of no losses; the UGI 2008 book year a 90% chance of losses under 43% and an 82.8% chance of no losses; and the Radian 2005 book year a 90% chance of losses under 17%. ECX 194 at 11; ECX 195 at 11; RCX 19 at 10; RCX 27 at 12. Schmitz testified that he sometimes assumed counterfactual contractual terms to make the book years exhibit at least a 10% chance of a 10% loss, and that he specifically did this with the Genworth 2008-B book year analysis. Tr. 1991, 1994; see also Crawshaw Rebuttal at 63 (It is a "common practice in my experience for actuaries to first provide their reports in draft form so that the client can perform such a review and the report can be revised as necessary before it is finalized."). And Cascio testified with respect to Milliman's analysis of Genworth book year 2008-B that if the premium ceded to Atrium climbed "even a little bit," the arrangement would not pass the 10/10 test for risk transfer. Tr. 1667.

Further, there is extensive evidence that Respondents used their bargaining position to transfer as little risk as possible. See, e.g., Tr. 272 (Rosenthal: "[t]he leverage would be, we'll send you mortgage insurance and you give us as good of a deal as possible"); ECX 485 at 0981 (Rosenthal: "relatively low rates & captive eligible are likely required to play (and we want to play!)"); ECX 739 at 8451 (Rosenthal: "[t]hink high cede, late attachment, short corridor, low capital, fast dividend!"). As one example, beginning in 2006 Respondents sold an undetermined number of low FICO-score loans, but successfully excluded them from Atrium's captives, thus transferring the risk associated with PHH's "crud" entirely to the MIs (and potentially the GSEs). See Tr. 152-58, 452-58; ECX 224 at 1007.

There is ample evidence that Milliman has high, and respected, standards of actuarial work. See, e.g., Tr. 1759-60, 2138, 2200. However, Milliman did not just conduct actuarial analyses for Respondents, it also conducted economic analyses on Respondents' captive arrangements, sometimes employing the same personnel for both analyses, which casts some doubt on Milliman's objectivity. Moreover, a number of Milliman's book year analyses were performed significantly after the start of the book year in question. See ECX 193 at 2614, 2622; ECX 195 at 3183, 3190; ECX 594 at 1219, 1227. Respondents' own auditors criticized this

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[37] I place little weight on Crawshaw's opinion that the MIs could have achieved the same smoothing of results, among other benefits, through use of a savings account, because it is not a realistic comparison. Tr. 802, 1097. The business advantages of accounting for premium cedes as reinsurance are clear. By comparison, accounting for the same sums as deposits, either because the MI puts them in a savings account (as Crawshaw suggests) or because the MI's reinsurance does not pass risk transfer, has equally clear disadvantages.

practice in March 2009. ECX 461 at 6747. This suggests that Respondents may have viewed their reliance on Milliman as only a formality.

On balance, however, the evidence demonstrates that Milliman's analyses were reliable. Accordingly, I find that the following book years passed risk transfer:

- UGI: 2004-08
- Genworth: 2004-07, 2008-A
- Radian: 2004-05

Conversely, I find that as to the following book years Respondents have not carried their burden of proving risk transfer, because no Milliman reports as to these book years are in evidence:

- UGI: 1994-2003
- Genworth: 2000-03
- Radian: 2006-08
- CMG: all book years

UGI book year 2009 and Genworth book year 2008-B merit particular attention. There is no Milliman analysis for UGI book year 2009 commissioned by Atrium. However, in July 2008, Milliman conducted a risk transfer analysis for UGI, as to the then-proposed 2008-B book year. RCX 2002. Milliman found risk transfer. Tr. 1908; RCX 2002 at Ex. 2 [redacted] While the 2008-B book year was never entered into, the UGI 2009 book year ultimately had less favorable terms for Atrium than the proposed 2008-B book year; that is, if the proposed 2008-B book year passed risk transfer, then the actual 2009 book year necessarily did, as well. Compare RCX 2002 at Ex. 1 [redacted] with ECX 520 at 2260-61 (4% attachment point, 10% detachment point). Although there is no evidence that Respondents relied on Milliman's analysis, or even knew of it at the time, that analysis is sufficient to conclude that the UGI 2009 book year passed risk transfer.

As for the Genworth 2008-B book year, Schmitz testified that in or around April 2009 – well after the June 1, 2008, effective date of the 2008-B book year, and even after the March 31, 2009, Genworth runoff date – he counseled Atrium that the terms of the captive arrangement needed to be changed for risk transfer to be met; specifically, he had assumed a 4.5% attachment point, no dividend withdrawals, and no withdrawals to cover administrative expenses other than federal taxes. Tr. 1856, 1991, 1994; see ECX 194 at 3114, 3122; RCX 51 at 2995. However, the actual agreement between Atrium and Genworth was not amended to reflect these requirements until May 2010, and there is no evidence that Genworth had previously been informed of such requirements. See RCX 51. The May 2010 amendment conformed the arrangement to Milliman's assumptions by barring dividends "until the parties agree otherwise following an actuarial evaluation of the sufficiency of funds in trust" and lowering the attachment point to 4.5%. RCX 51 at 2995. But less than six weeks later, Atrium took a $5 million dividend. ECX 258 at tab trust; ECX 653, Decl. of Bogansky at Ex. A. There is no evidence in the record of an associated "actuarial evaluation of the sufficiency of funds in trust" other than Milliman's April

2009 report, which showed the 2008-B book year was almost as close to failing risk transfer as it was possible to be. ECX 194 at 3126; RCX 51 at 2995; see Tr. 1665 (risk transfer is passed if there is a 10% chance of a 110% loss ratio; 2008-B book year had a 10% chance of a [redacted] loss ratio). Milliman issued a draft report on Atrium's performance metrics as of the fourth quarter of 2009, but it assumed a 5% attachment point, and so cannot be relied on as such an actuarial evaluation. RCX 5 at 371 of 468 pages. Even assuming that it was reliable, it projected an expected present value loss ratio of [redacted] much higher than the April 2009 projection of [redacted] suggesting that any actuarial evaluation would have found insufficient funds for a dividend. Compare ECX 194 at 3143 with RCX 5 at 376.

In short, the record shows that, as to the Genworth 2008-B book year: (1) no risk transfer analysis existed prior to the start of the book year; (2) no risk transfer analysis existed until after the end of the book year and the entire Genworth arrangement had been placed in runoff; (3) the risk transfer analysis assumed a structure [redacted] that was not actually in effect until after runoff; (4) the risk transfer analysis assumed a restriction which Atrium and Genworth did not abide by; and (5) the June 2010 dividend both violated the captive agreement and nullified risk transfer. There is not simply a lack of evidence supporting risk transfer, as with the final book years of the Radian and CMG agreements. Instead, the evidence affirmatively demonstrates that Respondents only paid lip service to risk transfer for the Genworth 2008-B book year, and, therefore, that that book year was a "sham." Tr. 88.

In sum, thirteen book years passed risk transfer and twenty-one did not. More to the point, the UGI 2009 book year passed risk transfer, but the final book years of the Genworth, Radian, and CMG arrangements did not. One consequence is that Respondents have not shown that they reasonably believed that numerous book years under its captive arrangements met risk transfer. Nor have they shown that they consistently showed concern for regulatory compliance over the money-making aspect of their captive arrangements.

2. Respondents Did Not Prove Price Commensurability

Respondents have not carried their burden of proving that Atrium's compensation did not exceed the value of the reinsurance services provided, or indeed, that its services were worth any particular amount. Resp. Br. at 37-43. As explained infra, this is true for every book year under every captive arrangement.

Respondents argue that they were entitled to rely on Milliman's reports, but as noted, there are no Milliman reports for the final book years of the Radian and CMG arrangements. Resp. Br. at 42-43. Milliman's report for the Genworth 2008-B book year assumed conditions which, as noted, Atrium and Genworth did not meet, and Milliman's conclusion that that book year had a "net ceded premium which is reasonably related to the ceded risk" cannot be relied on to demonstrate either price commensurability or any particular market value for Atrium's service. ECX 194 at 3124.

Milliman's report for what became the UGI 2009 book year concluded that it passed risk transfer, but it did not conclude that that book year "satisfied the HUD Letter in all respects." Resp. Br. at 38; RCX 2002. Schmitz testified that Milliman's report documented risk transfer,

but he conspicuously did not testify that it documented price commensurability. Tr. 1908. Admittedly, Milliman's report apparently includes a draft "Expected Loss Ratio Comparison" similar to those found in other Milliman reports. Compare RCX 2002 at Ex. 9 with ECX 194 at 3131. But the UGI 2009 book year report does not actually opine that "net ceded premium [] is reasonably related to the ceded risk," as the Genworth 2008-B book year opines. ECX 194 at 3124; RCX 2002. Instead, the UGI 2009 book year report only describes Milliman's methodology. RCX 2002 at 14. This is insufficient to conclude that the UGI 2009 book year passed price commensurability, or that the terms of the UGI 2009 book year justified any particular premium cede at all.

Respondents contend generally that Milliman "concluded that the premium was consistent with the requirements of the HUD Letter." Resp. Br. at 38. But Milliman acknowledged that it was not providing legal opinions on price commensurability. E.g., ECX 194 at 3134. Moreover, no Milliman report actually concluded that premiums were consistent with the requirements of the HUD Letter. ECX 194; RCX 15-19, 21-27. Instead, Milliman's typical opinion was that "net ceded premium [] is reasonably related to the ceded risk, which likely satisfies the test in the HUD Letter that the compensation paid does not exceed the value of the reinsurance." E.g., ECX 194 at 3124; see ECX 193, Attach. A at 6-7 ("the compensation paid for reinsurance does not exceed the value of the reinsurance"). This is not the same as opining that compensation to the reinsurer does not exceed the value of the reinsurance.

Even construing Milliman's typical opinion as an opinion on price commensurability, Milliman's methodology was unpersuasive. Schmitz testified that one of Milliman's two "reasonably related" tests, the loss ratio comparison, is "standard" in the insurance industry. Tr. 1948-52. Cascio apparently based his opinion that the UGI and Genworth arrangements showed price commensurability (he did not opine on Radian or CMG) on a comparison of loss ratios. Cascio Rebuttal at 8-10. Comparing loss ratios as a measure of pricing plainly has an intuitive appeal. For example, if the ceding company's loss ratio is higher than the reinsurer's, the reinsurer's revenues (ceded premiums) are likely excessive compared to the ceded risk.

But Schmitz admitted that Milliman does not comprehensively analyze pricing, and that many pricing considerations are "outside the scope of any analysis that we can do," indicating that loss ratio comparisons do not tell the whole story. Tr. 1948-52. Also, Schmitz testified that if the Genworth 2008-B book year cede had been 20% instead of 25%, Atrium's loss ratio and Genworth's loss ratio would have been "more similar." Tr. 2103. That is, if comparing loss ratios is an appropriate method for determining whether compensation to the reinsurer exceeds the value of the reinsurance, then the Genworth 2008-B book year was overpriced, as was every other book year where Atrium's expected loss ratio was lower than its counterparty's.

The other "reasonably related" test, the return on capital comparison, has little probative value, as a comparison of the Radian 2004 book year report with the Genworth 2008-B book year report reveals. For Radian, Atrium actually contributed only [redacted] but Milliman assumed an initial capital contribution of [redacted] and calculated a [redacted] internal rate of return, a [redacted] net present value expected loss ratio, and a 10% chance of a [redacted] loss ratio. ECX 653, Decl. of Bogansky at Ex. A.; RCX 26 at 2416-17, 2423, 2428. For Genworth, Atrium's actual capital contribution was purely notional, but Milliman assumed an initial capital contribution of

[redacted] and calculated a [redacted] internal rate of return, a [redacted] net present value expected loss ratio, and a 10% chance of a [redacted] loss ratio. ECX 194 at 3126, 3131, 3138-39. In other words, the internal rate of return denominator (assumed capital contribution) was "fictitious," and where the expected loss ratio was lower the rate of return was also lower (as with Genworth), which is at best counterintuitive. Enf. Br. at 147. Moreover, Milliman determined the MI's rate of return, to which Atrium's rate or return was compared, in part based on data predating the time when captive reinsurance became prominent in the mortgage insurance market. Tr. 1946-49; see, e.g., Tr. 342 (MGIC's returns dropped below [redacted] with deep cede captive arrangements); ECX 194 at Ex. 5; RCX 19 at Ex. 5; RCX 27 at Ex. 10. In effect, Milliman's rate of return test compared apples and oranges.

Most importantly, Milliman typically qualified its opinions with the explanation that it had not addressed three of the six factors listed in the HUD Letter for evaluating price commensurability. Tr. 1958-60; Compare ECX 193, Attach. A at 7 with ECX 194 at 3119. That three of the six HUD Letter factors were not even considered fatally undermines Milliman's conclusions on price commensurability, as well as Cascio's opinion, because he appears to have simply adopted Milliman's approach.

Accordingly, Milliman's reports do not reliably prove that Atrium's compensation did not exceed the value of its services, for any captive arrangement or for any book year. Respondents therefore cannot rely on Milliman's opinions to prove the value of Atrium's services. See Resp. Br. at 42-43. Nor does the other evidence cited by Respondents prove that value. Resp. Br. at 38-41. Quota share reinsurance on mortgage insurance was commercially available in 2008, and [redacted] but there is no record evidence of pricing for commercial excess of loss reinsurance in that period. Tr. 424-25, 1942, 2084, 2140-41. It is irrelevant that a 25% premium cede was the industry standard in 2008 and 2009, because the risk assumed may not have been commensurate with such a cede; for example, the Genworth 2008-B book year had a 25% premium cede but did not even pass risk transfer, and the 25% premium cede only became the industry standard because it was forced on the industry by Freddie. See Resp. Br. at 38 (citing Tr. 1914-15). Respondents criticize Crawshaw's opinion that the appropriate level of profit to Atrium should have been "less than zero," but I have not relied on Crawshaw's opinion on this point. Resp. Br. at 39 (citing Tr. 752). Burke did not analyze price commensurability. Tr. 1704-05.

In short, Respondents have not carried their burden of proving price commensurability. To be sure, there is evidence that Atrium's services were not valueless. For instance, Atrium paid back to Radian and CMG the entire balance of their respective captive trusts at commutation, plus Atrium's capital contributions. Moreover, as to those book years passing risk transfer, there was plainly some value in providing the MI the right to account for its premium cedes as reinsurance rather than as deposits. But there is insufficient evidence to derive a market value, or even to conclude that the price of Atrium's services did not exceed their value.

In fact, the evidence shows that Respondents designed the captive arrangements to transfer as little risk as possible while passing substantial profits on to PHH, without regard to price commensurability. As noted, Respondents were more often than not lackadaisical about obtaining risk transfer opinions. As Cascio testified, if the Genworth 2008-B book year premium

cede had increased even a little bit, it would have not passed the 10/10 test. Tr. 1667. As Enforcement emphasizes, the cross-collateralization feature of each captive trust made it harder for Atrium to lose economically overall, even when it suffered losses in specific book years. Tr. 1677; Cascio Report at 7-8.

PHH's statements and actions, particularly during the RFP process, show that Atrium's captive arrangements were purposefully priced at a level incommensurate with the risks Atrium assumed under them. For example, in connection with the RFP, Rosenthal described [redacted] ECX 737; ECX 738. Rosenthal also expressed to one MI that Atrium was looking for an arrangement with high cedes, a high attachment point and low detachment point, and fast dividends. ECX 739 at 8451. PHH sometimes told an MI, "here is the deal we desire to have," and turned to Milliman to help pick such deals. Tr. 131, 134, 191, 207, 512, 568.

I also give weight to testimony suggesting, on the one hand, that there was no fair market value for mortgage reinsurance, and on the other hand, that captive reinsurance, priced to the lenders' advantage, was required for an MI to receive referrals from a lender. Tr. 1667, 1941-42; see Tr. 197, 360-61, 368-70, 375-77, 387, 444, 488. Schmitz testified that none of Milliman's reports prepared for Atrium analyzed what the fair market value of Atrium's reinsurance would be, nor did Milliman analyze rates charged by third-party reinsurers unaffiliated with lenders, because "[n]ot a lot of them existed." Tr. 1941-42. Culver testified that [redacted] Tr. 423-25.

Lastly, I find that at least the Genworth, Radian, and CMG captive trusts served as a cap on Atrium's liability. While the contractual language of the UGI agreement may have left room for the MIs' recovery of PHH or Atrium assets outside the captive trusts, the record shows that PHH and the MIs subjectively viewed the captive trusts as limits on reinsurer liability. For example, higher-ups at PHH viewed the captive trusts as the source of Atrium's risk exposure, and UGI stated that it is the norm for a captive's liability to be limited to the funds in the captive trust. See Tr. 267; ECX 254; ECX 425; ECX 586 at 2307. This is significant because one of the six price commensurability factors the HUD Letter recites – and one of the three which Milliman did not consider in its reports – is the extent to which the lender might be shielded from potential losses by a corporate structure that segregates risks. See ECX 193, Attach. A at 7. That the captive arrangements were structured to limit Atrium's risk weighs against a finding of price commensurability.

B. RESPA Section 8

I conclude that Respondents violated RESPA Sections 8(a) and 8(b), and have failed to prove entitlement to the Section 8(c)(2) safe harbor.

1. Respondents Violated RESPA Sections 8(a) and 8(b)

Section 8 of RESPA is an anti-kickback statute. Mercado v. Calumet Fed. Sav. & Loan Ass'n, 763 F.2d 269, 270 (7th Cir. 1985); see Patton v. Triad Guar. Ins. Corp., 277 F.3d 1294, 1296 (11th Cir. 2002). Congress fashioned Section 8 to combat "a particular kind of abuse that it

believed interfered with the operation of free markets – the splitting and kicking back of fees to parties who did nothing in return for the portions they received." Mercado, 763 F.2d at 271. Section 8(a) provides that:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a); see also 12 C.F.R. § 1024.14(b). Proof of a RESPA Section 8(a) violation requires proof of these elements: (1) a payment of a thing of value that was (2) made pursuant to an agreement to refer real estate settlement business and (3) a referral actually occurs, where (4) the real estate settlement service involves a federally related mortgage loan. 12 U.S.C. § 2607(a); Galiano v. Fid. Nat'l Title Ins. Co., 684 F.3d 309, 314 (2d Cir. 2012); Culpepper v. Inland Mortgage Corp., 132 F.3d 692, 696 (11th Cir. 1998). Under the second element, the agreement need not be written or explicit. See 12 C.F.R. § 1024.14(e).

Section 8(b) provides that:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b); see also 12 C.F.R. § 1024.14(c). Proof of a RESPA Section 8(b) violation requires proof of these elements: (1) the giving and receiving of (2) a portion, split, or percentage of a charge (3) made for the rendering of a real estate settlement service (4) involving a federally related mortgage loan, (5) other than for settlement services actually performed. 12 U.S.C. § 2607(b); see Document 152 at 18. "Section 8(b) . . . prohibits conduct where money is moving in the same way as a kickback or referral fee even though there is no explicit referral agreement." Boulware v. Crossland Mortgage Corp., 291 F.3d 261, 266 (4th Cir. 2002).

I previously ruled that the first, third, and fourth elements of a Section 8(a) violation have been proven, and that as to the second element – referral agreements – there existed a genuine issue of material fact, including with respect to loan originations after July 21, 2008. See Document 152 at 15-18. I also previously ruled that all elements of a Section 8(b) violation have been proven. See Document 152 at 19-20.

I now conclude that the second element of the alleged Section 8(a) violation has been established. Multiple strands of evidence support this finding.

A "very heavy" share of PHH's loans [redacted] went to UGI for mortgage insurance prior to 2001, when UGI was the only MI that had a captive with Atrium. Tr. 111. From January 2006 through May 2008, nearly 100% of PHH originations carrying mortgage insurance were insured by MIs that had captives with Atrium. Tr. 1201-03; ECD 1. Also, from January 2006 through November 2011, with the exception of a couple of months, over 60% of PHH

originations carrying mortgage insurance were insured by MIs that had captives. ECD 1. These figures suggest both that PHH favored MIs that entered into captives by sending more loans to them, and that this favoritism extended beyond 2009, when loans were no longer covered under, or going into, any captive arrangement.

Meanwhile, no-captive MIs received little PHH business: from 2006 through 2008, less than [redacted] of PHH originations went to no-captive MIs. ECD 1. In 2009 and 2010, about [redacted] of PHH originations went to no-captive MIs, and in 2011, fewer than [redacted] of originations went to no-captive MIs. Id. MGIC, one such no-captive MI, insured at least [redacted] PHH loans per year in 2009 through 2012, when Atrium's captives were ending. ECX 34 at Lender Profile. But MGIC insured fewer than [redacted] PHH loans for the entire period from 1995 through 2007. ECX 34 at Lender Profile; but see ECX 34 at Branch Listing (documenting loans apparently referred by PHH Home Loans outside the PHH system).

Lay witness testimony and admitted exhibits bolster the conclusion that referral agreements existed. Before February 2008, PHH's dialer was shared entirely by [redacted] and after UGI gave Respondents its February 2008 termination notice, PHH apparently set the dialer to [redacted]. ECX 388 at 6098; RCX 848. Rosenthal suggested that PHH used referrals to MIs as leverage for favorable captive terms, and explained that the ability to put insured loans into a captive was "required to play."[38] Tr. 272, 488; ECX 485 at 0981. Culver explained that MIs market themselves to lenders, and part of an MI's sales strategy is to seek inclusion on a lender's lists of preferred MIs, which allocates some of the lender's business to each preferred MI. Tr. 328, 332-33. Entering into a captive arrangement was important to PHH when deciding which MIs would be its preferred providers. See, e.g., ECX 220 (suggesting that PHH based allocation of loans to MIs on whether the MI had a captive with Atrium); ECX 407 (same); ECX 773 ("Our ability to negotiate a suitable arrangement with you will enable you to become a preferred provider."). Walker did not "know whether [UGI] would have stayed in [PHH's] top tier" of MIs if it did not have a captive with Atrium, and testified that lenders like PHH had significant leverage with MIs, making UGI feel "compelled" to enter into a captive with Atrium. Tr. 2147-49, 2206.

There are also the captive arrangements themselves. Each captive contract established, in writing, an arrangement whereby: (1) Respondents referred a loan to an MI; (2) the MI insured the loan; and (3) the MI ceded premium(s) associated with that loan to Respondents. Every referral to an MI with a captive arrangement resulted in a premium cede, and the captive arrangements would have been pointless without referrals. Respondents acknowledge an "incentive to place loans with MIs involved in captive reinsurance arrangements." Resp. Br. at 27. This incentive was so clear and so overwhelming that it is almost silly to think they would not have acted on it. See ECX 193, Attach. A at 4 ("particular scrutiny" by HUD may be warranted where the "lender restricts its mortgage insurance business in whole or to a large extent to a primary mortgage insurer that has a reinsurance agreement with the lender's captive reinsurer").

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[38] Evidence surrounding the RFP process, as discussed supra, generally shows that PHH viewed captive arrangements at their core as money-making arrangements.

Respondents point to evidence that the "decision to select a particular MI for a particular loan was based on a number of factors," rather than just on the availability of premium cedes. Resp. Br. at 24-25; see, e.g., ECX 408 at 7447 [redacted] Such evidence is unpersuasive. Essentially all insured PHH loans were originated by PHH Mortgage or PHH Home Loans or were originated by correspondents, and essentially all involved referrals. ECX 493; ECX 653 at 4, Decl. of Danahy at 2-3. As for PHH-originated loans, Respondents referred business directly via the dialer, and even characterized such business as "referral[s]" in their disclosures to borrowers. Tr. 107; RCX 790 at 17-18. I previously determined that dialer selections qualify as referrals under RESPA, and the evidence shows that the dialer essentially always determined the selection of an MI for a particular retail loan. E.g., Tr. 107, 441; Document 152 at 16. Other factors may have influenced the decision to do business with a particular MI – that is, to put the MI on the dialer – but once the MI was on the dialer, those other factors were generally irrelevant to selecting a particular MI for a particular loan. As for correspondent-originated loans, Respondents referred business indirectly via the preferred provider list. Tr. 465-66; ECX 654 at Ex. O. PHH created an incentive for correspondents to select MIs on the preferred provider list by adding a 0.75% or 0.4% fee when a non-preferred provider was selected. ECX 132 at 3167; ECX 654 at Ex. O. The preferred provider list accordingly qualified as a referral mechanism under RESPA, because it affirmatively influenced a borrower's selection of a mortgage insurer. See 12 C.F.R. § 1024.14(f)(1); 24 C.F.R. § 3500.14(f)(1). Between 2006 and August 2008 the preferred provided list consisted entirely of MIs having captive arrangements with Atrium. ECX 132 at 3167. In August 2008, UGI was dropped and MGIC and RMIC were added, but the list still included the three other MIs with captive arrangements, and the list apparently did not change substantively prior to January 1, 2010. ECX 654 at 11-12 & Ex. O. That is, as with direct referrals, once the MI was on the preferred provider list, other business considerations were generally irrelevant to PHH in the selection of the MI, and PHH encouraged indirect referrals to MIs with captive arrangements by keeping them on the preferred provider list.

In sum, the evidence clearly proves the second element of RESPA Section 8(a).

2. Respondents Violated RESPA After July 20, 2008

I previously found a genuine issue of material fact regarding whether any referral agreements existed on and after July 21, 2008. Document 152 at 17-18. The full hearing record demonstrates that agreements existed on and after July 21, 2008, between Respondents and each MI with which Atrium had a captive arrangement. In pertinent part, each agreement was identical: for every eligible loan PHH referred to an MI, the MI would cede a portion of its insurance premium to Atrium. Not all loans were eligible; for example, by July 2006, loans with FICO scores at or below 600 were not reinsured under the UGI arrangement. RCX 53 at 1565-66. But essentially all loans, even the ineligible ones, were directed to MIs with captives either via the dialer or via the preferred provider list, and for every eligible loan reinsured under a captive arrangement, Respondents received a premium cede. So long as Respondents received a premium cede from a referred loan that closed on or after July 21, 2008, a referral agreement existed within the limitations period. On the facts of this proceeding, a premium ceded in connection with a referral, and pursuant to a captive contract, was necessarily a premium ceded pursuant to a referral agreement.

Respondents apparently contend that their "purpose" in selecting an MI was relevant. Resp. Br. at 24. But RESPA does not require proof of intent. 12 U.S.C. § 2607(a); see In re Old Kent Mortg. Co. Yield Spread Premium Litig., 191 F.R.D. 155, 161 (D. Minn. 2000) (citing Nowacki v. Federated Realty Group, Inc., 36 F. Supp. 2d 1099, 1104 (E.D. Wis. 1999) ("a reasonable inference is that liability may be established under [RESPA Sections 8(a) and 8(b)] without the necessity of proving intent")). Respondents' purpose is therefore irrelevant. Also irrelevant is their referral of business to no-captive MIs; that some of their referrals did not violate RESPA, because they were not pursuant to captive arrangements and involved no premium cedes, is not a defense to a charge that other referrals did violate RESPA. See Resp. Br. at 24 ("The fact that Atrium never had a reinsurance relationship with MGIC or RMIC . . . further demonstrate[s] that the existence of a reinsurance arrangement was not a primary consideration . . . with respect to the selection of an MI.").

I noted previously that the record contains several suggestions that any referral agreements were no longer effective, or being honored by Respondents, on and after July 21, 2008. Document 152 at 17-18. The full hearing record refutes these suggestions. Most importantly, referrals to no-captive MIs are simply irrelevant. That PHH sent some business to no-captive MIs does not undermine the conclusion that at least some of its referrals resulted in premium cedes. In particular, the increase in referrals to MGIC beginning in August 2008, before it was added to the dialer, is explained by the fact that MGIC's PHH business came via the preferred provider list, with encouragement from PHH. Document 152 at 18; ECX 295 at 3174; ECX 522 at tab data; ECX 654 at Ex. O. The fact that MGIC was added to the dialer at all is explained by the fact that PHH desired multiple MI counterparties to give itself leverage, and by November 2008, [REDACTED] it was clear that UGI would renew its captive arrangement, but Genworth would not. ECX 153 at 199; ECX 267 at 1; ECX 407 at 7442. Indeed, [REDACTED] mere commitment to a captive was enough to increase referrals to UGI. ECX 407 at 7442; RCX 848. The continuing (but decreasing) referrals to Genworth after January 2009 are explained by stragglers and the fact that its captive arrangement was not actually in runoff until March 2009. In context, Bradfield's email in May 2009, in which he apparently expressed a desire to [REDACTED] clearly referred to the "PHH Orders the PMI" service, not to the dialer. ECX 132 at 3167; ECX 744. Indeed, in the very same email Bradfield stated that he preferred [REDACTED] ECX 744. Given the decline in the U.S. real estate market by 2009, PHH had various reasons to rely on no-captive MIs at that time: (1) the downturn made the captive arrangements less beneficial to PHH than expected; (2) borrower delinquencies were increasing and causing MIs financial difficulties; and (3) it was generally harder to close loans. See ECX 683; Enf. Br. 46; Resp. Reply at 39 n.33. These considerations also explain why PHH expanded its dialer [REDACTED] to include Radian and RMIC, MIs which had been on PHH's preferred provider list since August 2008. ECX 654 at Ex. O; RCX 848. Although the record is not entirely clear on this point, I find by a preponderance of the evidence that CMG's License Agreement was a written "agreement to refer real estate settlement business in consideration of premiums ceded to Atrium." Document 152 at 17 (citing ECX 747 at 8464-65).

Thus, any reinsured loan on or after July 21, 2008, involved a referral agreement. UGI insured 2,132 such loans in 2009, Genworth insured 474 between January and March 2009, and CMG insured 106 after July 21, 2008. ECX 159 at tabs 2008-2009. However, as to Radian, Enforcement has not proven any RESPA violations on or after July 21, 2008. No loans went into the Radian captive between August and December 2008, and while two loans went into the captive in 2009, it appears that those were not new originations because they carried 40% cedes. Tr. 1191; ECX 158; ECX 159 at tabs 2008-09; see Resp. Reply. at 35 & n.32. Enforcement does not argue that a refinanced mortgage supports a RESPA violation. See Enf. Br. at 49-50 (discussing captive reinsurance for new originations).

In sum, I conclude that after July 21, 2008, as to the UGI, Genworth, and CMG captive arrangements, but not the Radian arrangement, Respondents violated Sections 8(a) and 8(b) of RESPA, absent some defense available to Respondents.

3. Respondents Do Not Qualify for RESPA's Section 8(c)(2) Safe Harbor

Respondents assert that RESPA Section 8(c)(2) bars liability. Resp. Br. at 28. This section establishes a "safe harbor" for the payment of a "bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(c)(2); Pettrey v. Enter. Title Agency, Inc., 241 F.R.D. 268, 275 (N.D. Ohio 2006); Isara v. Cmty. Lending, Inc., No. 99-cv-310, 2000 WL 33680237, at *3 (D. Haw. Jan. 20, 2000). I previously ruled that once the elements of Section 8(a) or 8(b) have been established, there is a presumption that RESPA has been violated, and Respondents bear the burden of proving that the ceded premiums at issue were in fact bona fide. Document 152 at 4. If Respondents can prove that the entirety of the premiums ceded to Atrium did not exceed the market value of any reinsurance provided – that is, the premiums in their entirety were bona fide payments for services actually performed – then they have a complete defense to the Notice of Charges' allegations under both Sections 8(a) and 8(b). See id. at 7. If Respondents cannot prove this, but can prove that any reinsurance provided had some market value, then the difference between the ceded premiums and the market value is the amount of the referral fee under Section 8(a), or the unearned fee under Section 8(b). Id.

As noted, the evidence does not establish price commensurability, that is, that Atrium's premiums in their entirety were bona fide, or that the premiums exceeded the value of Atrium's services by any particular amount. See supra at § III(A)(2). In fact, Respondents argue only that the entirety of the premiums ceded to Atrium were bona fide, and make no alternative argument that the market value of Atrium's reinsurance differed by any particular amount from the value of the ceded premiums. See Resp. Br. at 28-43; Resp. Reply at 37-44. Thus, Respondents have proven neither a complete nor a partial defense under the Section 8(c)(2) safe harbor.

Respondents take issue with my holding on the burden of proof, and as a matter of discretion I have elected to reconsider it. Resp. Br. at 4-11, 28 n.17. Respondents argue that because RESPA carries both civil and criminal liability, the rule of lenity must apply to all RESPA Section 8 claims, meaning that the burden of proof on the Section 8(c)(2) safe harbor should fall on Enforcement. Id. The rule of lenity is a rule of statutory construction premised on the idea that fair warning should be given, in language commonly understood, of what a criminal

statute intends to do and that legislatures and not courts should define criminal activity. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 n.18 (1995); Bifulco v. United States, 447 U.S. 381, 387 (1980). The rule of lenity has been applied to hybrid criminal/civil statutes. See Maracich v. Spears, 133 S. Ct. 2191, 2222 (2013) (collecting cases); Rodriguez v. Holder, 705 F.3d 207, 213 (5th Cir. 2013) (citing Leocal v. Ashcroft, 543 U.S. 1, 11 n. 8 (2004)). Because RESPA's Section 9 creates criminal liability for violations of Section 8(a) or 8(b), RESPA is such a hybrid statute. See 12 U.S.C. § 2607(d)(1), (4). The rule of lenity is a rule of last resort, to be applied only when no other canon of statutory interpretation is capable of resolving its meaning. Adams v. Holder, 692 F.3d 91, 107 (2d Cir. 2012); United States v. Cook, 594 F.3d 883, 890 (D.C. Cir. 2010). Where a "statute's text, structure, and history reveal Congress's unambiguous intent," the rule of lenity should not be invoked to support a contrary interpretation. Adams, 692 F.3d at 107.

Even in cases involving purely criminal statutes, a criminal defendant bears the burden of proving affirmative defenses. E.g., Smith v. United States, 133 S. Ct. 714, 720 (2013) (statute of limitations); Dixon v. United States, 548 U.S. 1, 17 (2006) (duress); United States v. Hartsock, 347 F.3d 1, 9 (1st Cir. 2003) (statutory exception to liability for illegal possession of firearm). Whether a statutory provision is an affirmative defense, rather than an element of a civil/criminal violation, is a matter of statutory interpretation. See Dixon, 548 U.S. at 7; EEOC v. Mach Mining, LLC, 738 F.3d 171, 174 (7th Cir. 2013). As I previously held, as a matter of statutory interpretation, the elements of a Section 8(a) or 8(b) claim can be proven "without any reference to a Section 8(c) exception." Document 152 at 4. Consequently, proof of a Section 8(c) exception does not negate any element of Section 8(a) or 8(b). Thus, United States v. Kloess, 251 F.3d 941, 947-48 (11th Cir. 2001), on which Respondents rely, is not on point, because the statutory exception in Kloess was found to negate an element of the offense, namely, "improper purpose." Resp. Br. at 8-10. Neither improper purpose nor any particular state of mind is an element of RESPA Section 8(a) or 8(b). United States v. Rogan, 459 F. Supp. 2d 692, 716 (N.D. Ill. 2006), cited by Enforcement, is more closely on point: "Once the United States has demonstrated proof of each element of a violation of the [Medicare anti-kickback statute, 42 U.S.C. § 1320a-7b(b)], the burden shifts to the defendant to establish that his conduct was protected by a safe harbor or exception." See Enf. Reply at 20.

In any event, Respondents identify no ambiguity in RESPA with which they take issue and to which the rule of lenity should be applied.[39] See generally Resp. Br. at 5-6. Instead, they take issue with the mere fact that Enforcement brought this proceeding, note that Enforcement and HUD never previously sought to end allegedly illegal captive arrangements, and contend that the HUD Letter "specifically permitted the establishment of [captive] arrangements." Id. The first two points are irrelevant, and the third point misreads the HUD Letter. ECX 193 at Attach. A. Respondents' reliance on Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 727 (6th Cir. 2013), is misplaced, because Carter does not address the rule of lenity. There is no ambiguity in the statute's plain language, so there is no opportunity to apply the rule of lenity here.

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[39] To the extent Respondents rely on the rule of lenity to once again contest my holding that the term "bona fide" in RESPA Section 8(c)(2) modifies "other payment," the statutory language is unambiguous and Respondents' argument is meritless. Resp. Br. at 28 n.17 (citing Document 67 at 8).

4. Respondents' Defense of Satisfaction of the HUD Letter Test and Factors Is Unavailing

Respondents argue that Atrium's reinsurance arrangements satisfied all the "factors" set forth in the HUD Letter. Resp. Br. at 29. I find that some of these factors were not satisfied, and that even if they were, they would provide no defense.

The HUD Letter identifies eight "[f]actors which may cause [HUD] to give particular scrutiny to [a captive] arrangement . . . [which] include, but are not limited to, the following": (1) the amount charged to the consumer for mortgage insurance in a captive program is greater than the amount charged to the consumer for mortgage insurance not involving reinsurance for a similar risk; (2) the costs paid to the captive reinsurer are greater than the cost for comparable non-captive reinsurance available in the market; (3) the lender restricts its mortgage insurance business in whole or to a large extent to a primary mortgage insurer that has a reinsurance agreement with the lender's captive reinsure; (4) any major secondary market institution refuses to purchase mortgages insured under a particular captive reinsurance agreement or places special conditions on such purchases; (5) any credit rating agency reduces the rating of the primary mortgage insurer in whole or in part because of agreements with captive reinsurers; (6) any state regulatory body questions the adequacy of the reserves maintained by the primary mortgage insurer or the captive reinsurer; (7) the primary insurer's agreement to reinsure is conditioned on the affiliated lender's agreement to refer all of or a predetermined volume of its mortgage insurance business to the primary insurer; (8) adequate consumer disclosure is not provided. ECX 193, Attach. A at 4-5. These factors should not be considered "determinative of whether an arrangement merits scrutiny [and] the absence of any of these factors [is not] determinative that further scrutiny is not merited." Id. at 4-5, 6-7. These factors are distinct from what the HUD Letter identifies as the test for RESPA liability – namely, a legally binding contract, adequate reserves, real transfer of risk, and price commensurability. Id. at 4-5, 6-7.

Respondents maintain they did not "run afoul" of these factors. Resp. Br. at 29. They: (1) say there is no dispute that mortgage insurance rates were filed with and subject to jurisdiction of state departments of insurance; (2) point out that Enforcement has not shown that borrowers who obtained mortgage loans from PHH were charged higher mortgage insurance premiums because an MI that had a captive reinsurance arrangement with Atrium was used; (3) cite the lack of evidence of how the cost of the captive reinsurance compared to the cost of non-captive reinsurance; (4) maintain that PHH never restricted borrowers' choice of an MI and always provided them with disclosure of the captive arrangement; (5) state that PHH sold the majority of loans to Fannie and Freddie, was aware of Fannie and Freddie's requirements on reinsurance arrangements, and always complied with those requirements; (6) cite a lack of evidence that any MI suffered a reduced credit rating as a result of Atrium's captive arrangements; (7) maintain that Atrium held adequate reserves and that the New York Department of Insurance found as much; (8) claim that PHH never agreed to refer all or a predetermined volume of business to any MI; and (9) state that PHH provided borrowers with affiliated business disclosures with respect to the loans it originated. Resp. Br. at 30-34.

Even assuming the truth of these contentions, their truth does not – by the very terms of the HUD Letter – negate a finding that Respondents violated RESPA Section 8(a) or 8(b). Respondents have apparently abandoned the filed rate doctrine as an affirmative defense. See Answer at 12; Resp. Br. at 30 n.18, 32; Resp. Reply at 2-3, 8-9 n.9; Alston v. Countrywide Fin. Corp., 585 F.3d 753, 763 (3d Cir. 2009) (defining filed rate doctrine). In any event, state regulation is largely beside the point because the evidence shows that state regulators did not examine Atrium for risk transfer or price commensurability, or RESPA compliance in general. See RCX 129; RCX 143; see also ECX 583 (shows only that New York Department of Insurance, in 1999, believed that illegitimate captive arrangements would violate New York law). As to Respondents' third point, the issue of relative cost of mortgage insurance is meaningless here, because non-captive excess of loss mortgage reinsurance was virtually unavailable during the period in question. See Tr. 1941-42, 2084. As to their eighth point, PHH referred business to MIs in consideration for reinsurance premiums, and the lack of agreement to refer all or a specific, predetermined volume of business is immaterial. See supra § III(B)(1). Finally, PHH's disclosures to customers about their captive arrangements and affiliated business relationships were misleading, because there is no evidence that PHH would have ever honored a request for mortgage insurance through, say, Triad, had a borrower requested it. See ECX 159 at tabs 2006-2011. In any event, disclosures do not shield Respondents from liability under the HUD Letter or under RESPA. Cf. Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 835 F.2d 1031, 1035-36 (3d Cir. 1987) (in securities actions, there can be fraud liability even where the alleged perpetrator complied with disclosure requirements).

Respondents additionally argue that they established captive arrangements believed to be compliant with the HUD Letter based on opinions obtained from a well-known and reputable actuarial firm that reviewed the arrangement for risk transfer and appropriate pricing. Resp. Br. at 42. This is irrelevant; Respondents point to no authority, in the HUD Letter, RESPA, or elsewhere, suggesting that reliance on a reputable actuary is a complete or partial defense to liability under RESPA. In any event, Milliman may be well-known and reputable, but it did not opine that the captive arrangements were compliant with the HUD Letter in all respects, and Respondents thus could not have reasonably relied on Milliman's opinions as a complete defense to a RESPA violation.

In sum, I conclude that Respondents violated RESPA Sections 8(a) and 8(b) in connection with loans closed on or after July 21, 2008, and have not proven entitlement to the RESPA Section 8(c)(2) safe harbor.

C. Judicial Estoppel

The equitable doctrine of judicial estoppel is aimed at protecting the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully asserted by that same party in a prior proceeding. New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001); Brewer v. Madigan, 945 F.2d 449, 455 (1st Cir. 1991). "Courts have observed that the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any formulation of principle," but several factors "typically inform the decision whether to apply the doctrine," including: (1) whether "a party's later position [is] clearly inconsistent with its earlier position"; (2) "whether the party has succeeded in persuading a court

to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." New Hampshire, 532 U.S. at 750-51 (internal quotation marks and citations omitted). The Third Circuit permits judicial estoppel where the party to be estopped (1) took two irreconcilably inconsistent positions, (2) convinced the first court to accept its earlier position, and (3) changed its position in bad faith. In re Prosser, 534 Fed. App'x 126, 130 (3d Cir. 2013); see Enf. Reply at 25-26 (also citing MD Mall Assocs., LLC v. CSX Transp., Inc., 715 F.3d 479, 486 (3d. Cir. 2013); In re Kane, 628 F.3d 631, 638 (3d Cir. 2010)).

Respondents argue that judicial estoppel bars this proceeding, because Enforcement's positions in five previous cases against various MIs (the MI Cases) were "clearly inconsistent" with its current position. Resp. Br. at 60-64. Respondents unsuccessfully advanced the same argument in their dispositive motions. Document 67 at 14-15; Document 152 at 9-10 & n.3. Enforcement argues that re-analysis of Respondents' judicial estoppel defense is inappropriate, because Respondents raise no new facts or arguments to support it. Enf. Reply at 25-26. Although Respondents did not carry their burden previously, and still have not carried it, the defense remains in suit and must be considered.

The relevant facts are undisputed. On April 4, 2013, the Bureau filed four settled cases in the U.S. District Court for the Southern District of Florida against four MIs: Genworth, MGIC, Radian, and UGI. CFPB v. Genworth Mortg. Ins. Com., No. 1:13-cv-21183 (Genworth Case); CFPB v. Mortg. Guaranty Ins., No. 1:13-cv-21187 (MGIC Case); CFPB v. Radian Guaranty Inc., No. 1:13-cv-21188 (Radian Case); CFPB v. United Guaranty Com., No. 1:13-cv-21189 (UGI Case). On November 15, 2013, the Bureau filed a settled case against RMIC in the same district court. CFPB v. Republic Mortg. Ins. Co., No. 1:13-cv-24146 (RMIC Case). Consent orders were approved in the MI Cases on various dates between April 5, 2013, and November 19, 2013. See Docket Sheets in MI Cases. I took official notice of the docket sheets and filings in these five cases, pursuant to Rule 303(c), 12 C.F.R. § 1081.303(c). Document 67 at 13 n.5; Oral Argument Tr. 32-34. Respondents moved to intervene in the UGI Case, and I have also considered the transcript of the March 10, 2014, oral argument on that motion. UGI Case, ECF No. 30.

Each underlying complaint, unopposed motion to approve consent judgment and order, and consent order are essentially the same, and UGI's are representative. The complaint in the UGI Case alleged, in summary, that UGI paid kickbacks to captive reinsurers, disguised as reinsurance premiums, in exchange for referral of MI business from lenders, in violation of RESPA. UGI Case, ECF No. 1 at 2. The unopposed motion to approve consent judgment and order stated that the Bureau and UGI agreed to settle the case and consented to entry of the consent order. UGI Case, ECF No. 4. The consent order stated that the parties: agreed, "without trial or final adjudication of any issue of fact or law, to settle and resolve all matters in dispute," and that the settlement "does not settle or resolve any matters not alleged" in the UGI Complaint; and intended that the settlement "not be an adjudication of any fact or legal conclusion" and "not have any preclusive effect in any other action or proceeding." UGI Case, ECF No. 5 at 2. The consent order also released UGI from any other past liability, established certain compliance and

record keeping requirements, imposed a civil money penalty and, for ten years, an injunction against entering into any new captive arrangement, revising any existing arrangement without the Bureau's prior written consent, and obtaining reinsurance from a captive reinsurer on any new mortgage. Id. at 4-12. In each of the MI Cases, the injunctive relief ordered was subject to the following qualification, which amounted to a carve out or grandfathering of certain conduct under existing captive arrangements: "Nothing in this Order shall be construed, however, as preventing the ceding of premiums on policies originated as of, and subject to [captive arrangements] already in existence as of, the date of entry of this Order." Genworth Case, ECF No. 5 at 5; MGIC Case, ECF No. 5 at 6; Radian Case, ECF No. 5 at 5; UGI Case, ECF No. 5 at 5; RMIC Case, ECF No. 5 at 5.

Respondents argue that because UGI was specifically permitted to cede premiums to Atrium in April and May 2013, that is, after entry of the consent order in the UGI case, the consent order "deemed" the captive reinsurance arrangements "legally permitted." Resp. Br. at 60-62 & n.32; see UGI Case, ECF No. 18 at 2-3. They also argue that the Southern District of Florida must have specifically deemed everything that the consent order allowed legal, because a district court cannot enter a consent order unless it is legal, relying on a number of cases and language from Robertson v. National Basketball Ass'n that "a settlement that authorizes the continuation of clearly illegal conduct cannot be approved." 556 F.2d 682, 686 (2d Cir. 1977); see Alves v. Main, 559 F. App'x 151, 155 (3d Cir. 2014); Resp. Br. at 62. Respondents maintain that Enforcement's position in the MI Cases (allegedly that the captive reinsurance arrangements were legal) and its position in this proceeding (that the captive reinsurance arrangements violated RESPA Section 8) are inconsistent, justifying estoppel of their present argument. See Resp. Br. 60-64.

Respondents have not carried their burden of proving the applicability of judicial estoppel, under either New Hampshire or Prosser. See Document 67 at 14-15; see also Answer at 12 (Respondents listed judicial estoppel under affirmative defenses); Paul v. Monts, 906 F.2d 1468, 1474 (10th Cir. 1990) (estoppel is an affirmative defense on which the party asserting it bears the burden of proof). In particular, Respondents have not shown a clear or irreconcilable inconsistency between Enforcement's position in the MI Cases and its position in the present proceeding, the threshold element common to both New Hampshire and Prosser. Also. New Hampshire, 532 U.S. at 750-51; Prosser, 534 Fed. App'x at 130. There is literally no evidence showing such an inconsistency. To be sure, Enforcement compromised its claims against the MIs by agreeing to carve out premium cedes on existing mortgages. But a compromise like that is a common feature of settlements, and cannot reasonably be construed as a position, argument, or concession that the carved out conduct was legal. See Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc., 135 F. Supp. 2d 1031, 1047 (N.D. Cal. 2001) ("the fact that the New York plaintiffs settled with Houghton–Mifflin, without a finding of liability, does not bar them from suing defendants in this lawsuit for receiving the same discounts"). It makes no more sense to construe the consent orders as such a concession than it does to construe a criminal plea bargain as a concession that the dismissed counts of an indictment alleged lawful conduct.

Respondents attempt to buttress their position by citing arguments by UGI in opposition to Respondents' motion to intervene in the UGI Case. Resp. Br. at 61 n.32. But evidence of UGI's position is not evidence of Enforcement's position. Respondents also cite to a passage in

Crawshaw's expert report regarding reinsurance accounting. Resp. Br. at 63 (quoting Crawshaw Rebuttal Report at 121). Nothing in this passage is inconsistent with Enforcement's position.

Respondents further argue that Enforcement "obtained the district court's affirmation that the [carved out premium cedes] could continue," and that the consent orders improperly "permitted illegal conduct." Resp. Br. at 62. That is, if Enforcement "believed that the reinsurance arrangement between UGI and Atrium actually violated Section 8 of RESPA, then it was obligated to ensure that such conduct ceased with the entry of the Consent Order," and, apparently, the fact that Enforcement did not do so implies that Enforcement did not so believe. Id. There are two problems with this argument. First, the consent orders do not declare that the carved out premium cedes are lawful. E.g., UGI Case, ECF No. 5 at 5. Certainly the court in the UGI Case never believed it ruled on the legality of ceded premiums. UGI Case, ECF No. 30 at 11 ("You are asking me to decree the payments did not violate RESPA, which is something that was never before me to begin with."). Nothing in the consent orders would seem to bar, say, private parties or state regulators from successfully suing the MIs on the ground that the carved out premium cedes violate RESPA or state law.

Second, Enforcement was not "obligated" to ensure that the MIs' illegal conduct ended, any more than it was obligated to pursue the MI Cases in the first place, because it had "discretionary authority to settle on a particular set of terms." SEC v. Citigroup Global Mkts, Inc., 752 F.3d 285, 295 (2d Cir. 2014). A court reviewing a proposed consent decree involving an enforcement agency must determine that the proposed judgment is "fair and reasonable, with the additional requirement that the 'public interest would not be disserved.'" Id. at 294 (citation omitted). Although review for "basic legality" is required as part of the "fair and reasonable" element, a consent decree's adequacy, or lack thereof, is not properly a part of the court's analysis. Id. at 294-95. Respondents cite no persuasive authority to the contrary. United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) (Rubin, J., concurring), which states that a proposed consent decree involving the government must be "fair, adequate and reasonable," is only a concurring opinion. Resp. Br. at 62. Moreover, it was not clear, prior to this proceeding, that the MIs' conduct was even illegal. As in Robertson, the misconduct alleged in this proceeding "ha[s] not been held to be illegal per se in any previously decided case." 556 F.2d at 686.

Enforcement's discretionary determination that the consent orders were appropriate and "serve[d] the public interest" was thus entitled to "significant deference." Citigroup, 752 F.3d at 296. Enforcement's explanation for the carve out – it avoids disrupting the contracts of non-parties to the MI Cases – is reasonable, consistent with Eleventh Circuit precedent, and bolsters the conclusion that it properly exercised its discretion. UGI Case, ECF 30 at 9, 16-19; see Reynolds v. Roberts, 251 F.3d 1350, 1356-57 & n.12 (11th Cir. 2001). Enforcement was not required to settle the MI Cases on any particular terms, and the carved out premium cedes are not an implicit argument that those premium cedes were lawful.

Lastly, the Respondents were notified of the Bureau's investigation by letter dated January 3, 2012, and the investigation continued even after the MI Cases settled. ECX 126; ECX 653. Respondents were accordingly aware for over two years before the Notice issued that the Bureau considered their captive arrangements at least potentially unlawful. ECX 126 at 1.

Respondents therefore were not prejudiced or misled by the carved out premium cedes. To the contrary, had Enforcement not agreed to carve out premium cedes, Respondents definitely could not have received UGI's premium cedes for April and May 2013, and arguably could not have received their $69 million commutation payment from the UGI trust. ECX 653, Decl. of Bogansky at 3 & Ex. A. Enforcement will not be judicially estopped.

D. Jurisdiction Over Atrium and Atrium Re

Respondents argue that neither Atrium nor Atrium Re is properly subject to Bureau administrative proceedings. Resp. Br. at 53-57. I previously held that, taking the allegations of the Notice of Charges as true, the Bureau possesses jurisdiction to bring administrative proceedings against Atrium and Atrium Re because they "were the agents of" PHH Corporation, among other things. Document 152 at 8.

The Consumer Financial Protection Act (CFPA) authorizes the Bureau to commence a civil action against "any person [who] violates a Federal consumer financial law." 12 U.S.C. § 5564(a). It also authorizes the Bureau to bring administrative cease-and-desist proceedings, but only against "any covered person or service provider." 12 U.S.C. § 5563(b)(1)(A). A covered person is "any person that engages in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6). A consumer financial product or service includes "extending credit," where that credit is offered for use by consumers primarily for personal, family, or household purposes. 12 U.S.C. § 5481(5)(A), (15)(A)(i). PHH Corporation, PHH Mortgage, and PHH Home Loans originated home loans, which qualifies as extending credit for household purposes, and all three entities are accordingly covered persons.

A related person "shall be deemed to mean a covered person" for present purposes and includes, with exceptions inapplicable here, an agent of a covered person. 12 U.S.C. § 5481(25)(B), (C); see AT&T Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1434 (3d Cir. 1994) (defining "agency relationship"). The evidence demonstrates that Atrium and Atrium Re were wholly-owned corporate vehicles through which PHH Corporation received unlawful kickbacks and premium splits from the MIs, and were completely controlled and directed by PHH Corporation and its other subsidiaries. Answer at 2; see, e.g., ECX 153 at 57. Indeed, they were essential to each captive arrangement, because PHH established them for the purpose of collecting PHH's kickbacks and premium splits. This is sufficient to find that Atrium and Atrium Re were agents for a covered person, and accordingly that Atrium and Atrium Re are properly subject to this proceeding.

E. McCarran-Ferguson Act

Respondents renew their argument that this proceeding is barred by the McCarran-Ferguson Act, which prevents RESPA from being construed to "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless [RESPA] specifically relates to the business of insurance." 15 U.S.C. § 1012(b); see Resp. Br. at 57-60; Document 152 at 3. I previously held, in open court shortly after the commencement of the hearing, and again in the Dispositive Motion Order, that RESPA does not run afoul of the McCarran-Ferguson Act. Tr. 23 (citing Patton v. Triad Guaranty Ins., 277 F.3d 1294, 1299 (11th

Cir. 2002)); Document 152 at 3 (same). Respondents point to no intervening legal authority, newly available evidence, clear error, or manifest injustice, and I will not reconsider this holding. See In re Linerboard Antitrust Litig., 361 F. App'x 392, 396 (3d Cir. 2010) (articulating motion for reconsideration standard).

IV. SANCTIONS AND RELIEF

A. Joint and Several Liability

Enforcement asks that all Respondents be found jointly and severally liable for their violations of RESPA. Enf. Reply at 131. In private litigation, violators of RESPA are jointly and severally liable to persons charged for "the settlement service involved in the violation." 12 U.S.C. §§ 2602(5), 2607(d)(2). There is no principled reason not to follow the same rule in this proceeding. Moreover, numerous courts have concluded that entities ought to be held jointly and severally liable for violations of the Federal Trade Commission Act when the entities together function as a "common enterprise." See FTC v. E.M.A. Nationwide, Inc., 767 F.3d 611, 636-37 (6th Cir. 2014); FTC v. Tax Club Inc., 994 F. Supp. 2d 461, 469 (S.D.N.Y. 2014); FTC v. NHS Sys., Inc., 936 F. Supp. 2d 520, 533 (E.D. Pa. 2013); FTC v. Washington Data Res., 856 F. Supp. 2d 1247, 1271-72 (M.D. Fla. 2012), aff'd, 704 F.3d 1323 (11th Cir. 2013). Factors that are considered in determining whether entities constitute a common enterprise include maintaining officers and employees in common, operating under common control, sharing offices, commingling funds, and sharing advertising and marketing. E.M.A. Nationwide, 767 F.3d at 637; Tax Club, 994 F. Supp. 2d at 469. In securities cases, joint and several liability is appropriate when at least two entities collaborate or have close relationships in engaging in the violative conduct. See SEC v. Monterosso, 557 F. App'x 917, 929 (11th Cir. 2014); SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997).

Applying both the common enterprise and collaboration or close relationship tests, all Respondents must be held jointly and severally liable under RESPA. The record overwhelmingly shows that: Atrium functioned as a piece of PHH, controlled by PHH employees and doing business at PHH's offices; Respondents had overlapping employees, officers, and office space; and there generally was "no real distinction between the companies," at least in terms of their reinsurance operations.[40] See FTC v. Neovi, Inc., 598 F. Supp. 2d 1104,

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[40] Although the bulk of the evidence pertains to PHH Mortgage, PHH Home Loans is also clearly liable. PHH Home Loans, like PHH Corporation and PHH Mortgage, is based in Mount Laurel, New Jersey, and Danahy was President of PHH Home Loans at the same time as he was President and CEO of PHH Mortgage, President and a director of Atrium, and Executive Vice President of PHH Corporation. ECX 653, Decl. of Danahy at 1-3. Atrium insured loans by both PHH Mortgage and PHH Home Loans, and one of the four PHH Home Loans divisions uses the same Mount Laurel-based origination system that PHH Mortgage uses. Id., Decl. of Bogansky at 1, Decl. of Danahy at 3-4. ECX 159, the most comprehensive source of data on PHH loans carrying mortgage insurance, documents loans referred by both PHH Mortgage and PHH Home Loans. Document 122 at ¶ 22 ("If the borrower elected to allow PHH Mortgage or PHH Home Loans to select the MI, Respondents admit that it was likely that UGI would be selected as the provider during the 1995 to 2001 timeframe."); see also Document 122 at ¶ 6 ("PHH Mortgage

1116 (S.D. Cal. 2008), aff'd, 604 F.3d 1150 (9th Cir. 2010). For instance, the employees and officers of PHH Corporation, PHH Mortgage, and PHH Home Loans worked closely together to run Atrium and manage the relationships with the MIs.[41] See, e.g., ECX 404 (Bradfield and Danahy (PHH Mortgage) and Edwards (PHH Corporation) discuss UGI captive relationship); ECX 653, Decl. of Danahy at 1-2 (Danahy simultaneously high ranking officer of PHH Corporation, PHH Mortgage, PHH Home Loans, and Atrium); see generally RCX 929.

Respondents are jointly and severally liable under RESPA, and thus are jointly and severally responsible for satisfying the disgorgement award and complying with the injunctive terms, both described infra.

B. Disgorgement

1. Legal Standard

Enforcement seeks disgorgement of Respondents' ill-gotten gains. Enf. Br. at 2, 154. I previously ruled that disgorgement is "presumptively available" as relief for claims arising from loans closed before July 21, 2011. Document 152 at 14. Respondents argue against this ruling, but offer nothing new, and I will not reconsider it. Resp. Br. at 48-52; Resp. Reply at 45 n.40. Also, Respondents do not raise 28 U.S.C. § 2462 as a defense, although I previously suggested that it might be applicable, and accordingly I find that disgorgement is available here. Document 152 at 14 n.6; see generally Resp. Br.; Resp. Reply.

Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. See FTC v. Bishop, 425 F. App'x. 796, 797-98 (11th Cir. 2011); SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). It returns the violator to where he or she would have been absent the misconduct and

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and PHH Home Loans originated 3,869 loans between the years of 2006 through 2011 where MGIC was selected to provide the pmi," as shown in ECX 159 at tabs 2006-2011).

[41] Atrium Re was established in 2009, which was before PHH ceased placing new loans into the UGI captive arrangement and likewise ceased violating RESPA. RCX 79. However, no assets or liabilities were transferred into Atrium Re until Respondents' violations of RESPA had ended. Id. It is still equitable here to treat Vermont-domiciled Atrium Re as the original, New York-domiciled Atrium's successor, because Atrium Re essentially replaced the original Atrium, inheriting its assets and liabilities and allowing the original Atrium to go dormant. Tr. 121-22, 836-38; RCX 64 at 6696; RCX 70; RCX 79; RCX 127 at 4 ("This would in effect be very similar to a re-domestication of Atrium I to Vermont."); see Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252, 268 (1st Cir. 1997); cf. Brzozowski v. Corr. Physician Servs., Inc., 360 F.3d 173, 177 (3d Cir. 2004) (discussing Rego v. ARC Water Treatment Co. of Pa., 181 F.3d 396, 401 (3d Cir. 1999)). Alternatively, Atrium Re is liable as a nominal or relief defendant. SEC v. Colello, 139 F.3d 674, 675-77 (9th Cir. 1998) ("A nominal defendant is a person who holds the subject matter of the litigation in a subordinate or possessory capacity as to which there is no dispute.") (internal quotation omitted); see also SEC v. JT Wallenbrock & Assoc., 440 F.3d 1109, 1117 n.15 (9th Cir. 2006) (citing Colello).

deters others from violating the securities laws. First City Fin. Corp., 890 F.2d at 1230-32; see Zacharias v. SEC, 569 F.3d 458, 471-73 (D.C. Cir. 2009). The amount of disgorgement need only be a reasonable approximation of profits causally connected to the violation. See Laurie Jones Canady, 54 S.E.C. 65, 84 n.35 (1999) (quoting SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996), cert. denied, 522 U.S. 812 (1997)), pet. denied, 230 F.3d 362 (D.C. Cir. 2000). Disgorgement of ill-gotten gains is always in the public interest, and the only pertinent standard is but-for causation. Jay T. Comeaux, Securities Exchange Act of 1934 (Exchange Act) Release No. 72896, 2014 WL 4160054, at *3 (SEC Aug. 21, 2014); see Ambassador Capital Mgmt., LLC, Initial Decision Release No. 672, 2014 WL 4656408, at *81 (Sept. 19, 2014). Once Enforcement shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to Respondents to demonstrate that Enforcement's disgorgement figure is not a reasonable approximation. FTC v. Verity Int'l, Ltd., 443 F.3d 48, 67 (2d Cir. 2006); Guy P. Riordan, Securities Act of 1933 Release No. 9085, 2009 WL 4731397, at *20 (SEC Dec. 11, 2009), pet. denied, 627 F.3d 1230 (D.C. Cir. 2010). The consequence of uncertainty as to the disgorgement amount falls on the wrongdoer whose illegal conduct created the uncertainty. See FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 15 (1st Cir. 2010); First City Fin. Corp., 890 F.2d at 1232.

"Profit" in the present context means revenues less sums refunded to victims, in this case, MIs. See Washington Data, 704 F.3d at 1327 ("gross receipts minus refunds"); JT Wallenbrock, 440 F.3d at 1112-13 ("the entire proceeds from the scheme less amounts paid to investors"); see SEC v. Teo, 746 F.3d 90, 106 n.29 (3d Cir. 2014) ("Profit disgorgement (net benefit) is generally regarded as remedial and revenue disgorgement (gross benefit) is generally understood as outside the traditional realm of equity." (citation omitted)). Costs associated with committing illegal acts – here, ceding commissions, taxes, administrative expenses, and the like – may not be deducted. See Washington Data, 704 F.3d at 1327; JT Wallenbrock, 440 F.3d at 1114. Procedurally, Enforcement has the burden of proving the amount of illegal revenues – here, gross premium cedes – and Respondents then have the burden of proving the amount of offsetting payments to the MIs. See SEC v. Whittemore, 659 F.3d 1, 7-9 (D.C. Cir. 2011); Direct Marketing Concepts, 624 F.3d at 15; SEC v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1096-97 (9th Cir. 2010).

Enforcement contends that an illegal referral payment can be causally connected to a violation even if the payment occurred before loan closing. Enf. Br. at 2, 154-58. This is not the case here under RESPA Section 8(b), which prohibits the giving or accepting of a "portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service." 12 U.S.C. § 2607(b). As I previously noted, the violation occurs upon the giving or accepting (for purposes of bringing suit), or upon loan closing (for purposes of the limitations period). Document 152 at 11-12. Although it is theoretically possible that a mortgage insurance premium could be paid before loan closing, there is no evidence that happened here. Giving or accepting a portion, split, or percentage of a charge outside the limitations period did not violate Section 8(b), and the proceeds of the portion, split, or percentage cannot be disgorged.

The analysis is different under RESPA Section 8(a), which prohibits the giving or receiving of any "fee, kickback, or thing of value" pursuant to a referral agreement. 12 U.S.C. § 2607(a). A violation of Section 8(a) may be based on a kickback paid before loan closing. Edwards v. First American Corp., 517 F. Supp. 2d 1199, 1204-05 (C.D. Cal. 2007), aff'd in

pertinent part, 610 F.3d 514 (9th Cir. 2010). But the record does not support Enforcement's contention that all premiums ceded since June 2001, or October 2006, were causally connected to referrals of loans closed on or after July 21, 2008. Enf. Br. at 163, 169. Nor does the record even show that premiums ceded on or after July 21, 2008, associated with loans closed before that date, were causally connected to referrals of loans closed on or after July 21, 2008. Enf. Br. at 163, 172-74.

Specifically, there is insufficient evidence that continued premium cedes from loans already closed were the but-for cause of continued referrals. If anything, the record shows the opposite, that Respondents and the MIs had agreements that, once a loan closed, the MI was obligated to cede premiums to Respondents; this was the case whether or not the MI continued to receive referrals from Respondents.

Section 8(a) requires proof of an "agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). As noted, the record establishes that the "agreement or understanding" was, in sum: (1) Respondents refer loan to MI; (2) MI insures loan; and (3) MI periodically cedes premiums associated with that loan to Respondents. That is, the premium cedes were consideration for the referral, not the other way around; they were tied directly to the referred loan; and further referrals were entirely a matter of Respondents' discretion. Respondents' bargaining power was so strong that they had the power to unilaterally stop or limit referrals for any or no reason, and the MIs could do nothing to retaliate. Respondents' incentive to refer loans came from the fact that any referral would necessary result in new periodic premium cedes/kickbacks. The evidence shows that once Respondents started receiving premium cedes for a particular loan, they were under no obligation to refer new business again, and any incentive to do so came from the expectation of premium cedes, not as a quid pro quo for past or continuing cedes.[42]

The history of UGI's market share provides an example. In April 2008, seemingly in response to UGI's termination notice, Respondents apparently [redacted] ECX 388 at 6098. Even though it virtually stopped receiving referrals between July and November 2008, UGI continued to cede premiums. ECX 159 at tab 2008; RCX 864 at tab Earned Premiums. On November 19, 2008, Rosenthal emailed Bradfield that he had [redacted] ECX 407 at 7442. Two days later, UGI [redacted], and began receiving an increasingly larger market share, even though over four months passed before UGI started ceding premiums on new loans. ECX 159 at tabs 2008-2009; RCX 848. Atrium stopped all reinsurance as of January 1, 2010. ECX 159 at tab 2010. Thereafter, UGI's dialer setting

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[42] RESPA Section 8(a) prohibits kickbacks, which may involve agreements where the referring party is not obligated to refer business. See, e.g., United States v. Lennon, 814 F.2d 185, 186 (5th Cir. 1987) (defendant "extracted a kickback" in return for referred business); Slater v. United States, 562 F.2d 58, 60-61 (1st Cir. 1976) ("The [Davis-Bacon Act's] intention would be quite negated if a private contractor on a federal project could take advantage of a weak labor market to demand kickbacks as the price of continued employment."). Thus, it is irrelevant that the referral agreement here involved premium cedes in consideration for referrals, rather than referrals in consideration for premium cedes. See also ECX 193, Attach. A at 3.

more or less steadily eroded, even though UGI was still ceding premiums, until it reached ██ in August 2011. RCX 848; RCX 868 at tab Earned Premiums. Even after May 2012, when Genworth commuted its captive arrangement, and UGI was the only MI still ceding premiums, UGI's dialer setting remained at ██ ECX 188, RCX 848. Genworth, by contrast, had a dialer setting of ██ even after commutation. RCX 848.

In short, there is no reason to think that referrals to UGI had anything to do with UGI's past conduct, or with its continuing cedes. Enforcement's best evidence on this point is that in 2002 MGIC announced that it would not cede premiums in excess of 25%, and it lost business from lenders as a result. Tr. 363-66; ECX 816; see Enf. Br. at 165 n.80. But MGIC did not announce that it would stop ceding premiums on existing books of business, that is, that it would breach its captive contracts. See ECX 816. Indeed, Enforcement has pointed to no evidence that UGI, Genworth, CMG, or any other MI ever stopped ceding premiums when it had the financial wherewithal to continue ceding, or ever even considered that possibility. Enf. Br. at 158-75. Certainly it stands to reason that Respondents would have stopped referring business to MIs that stopped ceding premiums from loans already closed. But the evidence that ceded premiums caused new referrals is too attenuated to support disgorgement on that basis.

Enforcement argues that it "is no defense that ceding of premiums was contractually required, because [the MIs'] ceding was impermissible." Enf. Br. at 166 n.81. This misses the point. One of the terms of the "agreement or understanding" was that an MI would continue to cede premiums, even if it received no more referrals. Again, this was because the premium cedes were consideration for past referrals, not the other way around. Had an MI stopped ceding premiums, there is every reason to believe that Respondents would have sued it. Indeed, this was exactly why the Bureau agreed to carve out existing captive arrangements from its settlements with the MIs. UGI Case, ECF 30 at 9, 16-19.

Thus, only profits arising from premium cedes associated with loans closed on or after July 21, 2008, can properly be disgorged. Enforcement's request for disgorgement of premiums ceded prior to July 21, 2008, must therefore be rejected. Enf. Br. at 163, 169. Similarly, Enforcement's request for disgorgement of premiums ceded on or after July 21, 2008, but associated with loans closed before that date, must also be rejected. Enf. Br. at 168.

As an alternative measure, Enforcement seeks disgorgement of dividends and commutation payments. Enf. Br. at 175-87. Such a measure is superficially appealing under RESPA Section 8(a); at a minimum the dividends would seem more likely to qualify as kickbacks because they are unrestricted payments to Atrium, as opposed to payments directed into trust accounts, from which the MIs were permitted to make withdrawals without notice to Atrium. E.g., RCX 45 at 2. However, Enforcement's proposed measure runs afoul of Snow v. First Am. Title Ins. Co., 332 F.3d 356 (5th Cir. 2003). As I previously noted, Snow stands for the proposition that "the statute of limitations began to run, on a loan-by-loan basis, at the time of each loan's closing." Document 152 at 12. The fact that the associated kickback was paid to Atrium's trust account in installments over years, and to Atrium itself (and possibly passed on to PHH Corporation) in lump sums long after loan closing, is irrelevant under Snow. Id. at 11 (citing Snow, 332 F.3d at 360). Snow requires loan-by-loan analysis, such that no premium cedes for loans closed prior to July 21, 2008, are cognizable in light of the statute of limitations.

Because the dividends and commutation payments involved ill-gotten gains commingled with premium cedes on loans closed outside the limitations period, not all of the dividends and commutation payments are properly subject to disgorgement.[43]

2. Offsets and Calculation

As noted supra, Respondents have not shown that the reinsurance at issue had any particular value, meaning that Respondents are not entitled to offset on the basis of an established market value. The proper measure of disgorgement, then, is gross ceded premiums less amounts refunded to the MIs.

The parties do not agree on the exact amount of gross ceded premiums. [redacted] The most up to date data would seem to provide the most reliable measure of gross ceded premiums, because actual written premiums can deviate from expectations. [redacted] The most up to date data for UGI comes from Milliman's most recent performance metrics analysis, RCX 838, which is dated July 2013 and appears to be based on data through the first quarter of 2013. Tr. 939, 1090, 1409-10, 1906-07. The proper measure of gross ceded premiums, and the one used by Milliman, is the total premiums ceded to Atrium, even if "unearned"; an unearned premium is simply one that is prepaid. Tr. 2093-94; RCX 838 at 351, 388. As of the first quarter of 2013, the total premiums expected to be ceded under the UGI 2009 book year were [redacted] and the total premiums actually ceded were [redacted] RCX 838 at 351, 388. The total expected paid losses were [redacted] and no claims had actually been paid. RCX 838 at 351, 388.

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[43] Snow may well be distinguishable as applied to PHH Corporation. A plain reading of Section 8(a) suggests that intermittent lump sum payments to the referring party (here, PHH) as consideration for past referrals would qualify as kickbacks "pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person," just as quarterly payments to the initial recipients (Atrium Insurance and Atrium Re) do. 12 U.S.C. § 2607(a). If so, the statute of limitations would run (as to PHH) on a payment-by-payment basis, rather than a loan-by-loan basis, and the measure of disgorgement would be, at a minimum, the sum of all payments by Atrium to PHH taken on or after July 21, 2008 – here, about [redacted] ECX 653, Decl. of Danahy at 13. As a policy matter, Enforcement is correct that disgorging such a sum is consistent with both the statute of limitations and the purpose of disgorgement, namely, to "prevent the wrongdoer from enriching himself by his wrongs," because PHH did so enrich itself within the limitations period. Enf. Br. at 154 (citing SEC v. Hughes Capital Corp., 917 F. Supp. 1080, 1085 (D.N.J. 1996)). But Snow does not distinguish between different kinds of kickback recipients, and in the absence of any countervailing authority, Snow remains controlling.

Enforcement's estimate of total premiums ceded under the UGI 2009 book year through June 2013 [redacted] was calculated by totaling earned premiums through September 30, 2012 [redacted] dividing that amount by forty-three (representing forty-three quarters between March 2009 and June 2013) to get a monthly average (about [redacted] and then adding nine average months to the September 30, 2012, total. Enf. Reply at 124-25. Although this is a reasonable method, and the evidence shows that ceding continued for one month beyond the commutation date (i.e., for a total of forty-three months), the evidence also shows that the monthly cedes in 2012 and 2013 were less than the 2009-2013 average. RCX 1058 at 2470; RCX 1059 at 1. For example, the "Month to Date Earned Premium" for all book years for September 2012 was about [redacted] down from [redacted] in September 2011 and [redacted] in September 2010. ECX 159 at tab 2011; ECX 198 at tab Earned Premium.

A more accurate and up to date monthly premium for the 2009 book year after September 2012 is [redacted] the written premium for that book year for September 2012.[44] ECX 198 at tab Earned Premium. Adding three months of written cedes [redacted] to the March 31, 2013, total [redacted] yields a more realistic estimate: [redacted]. This is 96.43% of Enforcement's estimate of total premium cedes from UGI.

As for Genworth, the most up to date data comes from Milliman's most recent performance metrics analysis for the first quarter of 2012, RCX 2004, and from Genworth's final cession statement, ECX 257, which includes data through that quarter. Tr. 1417-19, 1903. The projected total premiums ceded under the Genworth 2008-B book year were [redacted] and the actual total premiums ceded up to that date were [redacted] ECX 257 at tab Inception to Date; RCX 2004 at 368, 408. The projected total paid losses were [redacted] and no claims had actually been paid. RCX 2004 at 368, 408. Because the 2008-B book year included loans closed between June 1 and July 20, 2008, Enforcement reasonably discounted its total by 61.6%, the fraction of loans closed after July 20, 2008. Enf. Reply at 125-26 & n.83. However, the total written premiums were slightly higher than the total earned premiums, on which Enforcement relied, and a better approximation of total post-July 20, 2008, premiums received by Atrium is thus 61.6% of [redacted] This is 100.25% of Enforcement's estimate of total premium cedes from Genworth.

As for CMG, Enforcement's methodology is sound, but as explained infra, the total ceded premiums are offset by Atrium's commutation payment. See Enf. Br. at 189. Therefore, there is nothing remaining for Respondents to disgorge with respect to CMG.

Enforcement argues that claim payments and commutation payments should not qualify as refunds to the MIs. Enf. Br. at 191-96. However, the law is clear that disgorgement must be based on both ill-gotten gains received (here, written premiums) and ill-gotten gains returned (here, claim payments and other refunds). Ill-gotten gains refunded to the person from whom

[44] The pertinent column is the fifth, entitled "Ceded Premium Written Quarter to Date." ECX 198 at tab Earned Premium (emphasis added). Because the eighth column lists earned premium month to date, and Milliman's analyses typically look at the month, not quarter, to date, I conclude that the fifth column has a typographical error, and this column shows monthly, not quarterly, premiums.

they were obtained are still ill-gotten, but they cannot be disgorged because they have already been given up. See Montford and Company, Inc., Investment Advisers Act of 1940 Release No. 3829, 2014 WL 1744130, at *23 (SEC May 2, 2014) ("the primary purpose of disgorgement" is to "force a defendant to give up the amount by which he was unjustly enriched") (citation omitted). There is no principled distinction for disgorgement purposes between ill-gotten gains refunded pursuant to an unlawful agreement, such as a captive contract, and ill-gotten gains refunded out of remorse or a desire to avoid liability. See First Jersey Sec., Inc., 101 F.3d at 1475 (allowing offset for private settlement); see also Washington Data, 704 F.3d at 1326-27. By contrast, payments to a third party, such as taxes and administrative expenses, constitute the costs of doing business unlawfully, and do not properly offset ill-gotten gains. See Washington Data, 704 F.3d at 1327; JT Wallenbrock, 440 F.3d at 1114.

The cases cited by Enforcement are not to the contrary. In SEC v. Milan Capital Group, Inc., No. 00-cv-108, 2014 WL 2815590, at *6 (S.D.N.Y. June 23, 2014), the court noted that "[o]ne of the costs associated with running a Ponzi scheme or similar frauds may be the return of some revenue to investors," and held that calculation of disgorgement without offset for refunds to investors was justified. See Enf. Br. at 193. Here, although claim payments were theoretically required under the captive arrangements, they were not as intrinsic to Respondents' scheme as Ponzi payments are to a Ponzi scheme, as demonstrated by the fact that Atrium paid no claims to CMG, paid them to Genworth for the first time only months after the arrangement went into runoff, and did not pay them at all as to the UGI 2009 and Genworth 2008-B book years. ECX 159 at tab Column F; RCX 838 at 359; RCX 2004 at 377. In SEC v. Benson, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987), and SEC v. Rosenfeld, No. 97-cv-1467, 2001 WL 118612, at *2 (S.D.N.Y. Jan. 9, 2001), the courts concluded that payments to co-conspirators cannot be offset. See Enf. Br. at 194. SEC v. Levine, 517 F. Supp. 2d 121, 139 (D.D.C. 2007), reached a similar conclusion, although the "co-conspirator" in that case was a company controlled by the defendants. See Enf. Br. at 193. Here, the MIs are arguably co-conspirators, if nothing else because three of them were enjoined against the same conduct, and ceding commissions might thus be considered "payoffs to participants in [the] scheme" (although the point is moot because Atrium paid no ceding commissions for the book years at issue). 657 F. Supp. at 1134; see ECX 503 at 6551; ECX 520 at 2258. But claim payments were not payoffs, because they were intended to cover actual insurance claims; the MIs presumably passed such payments on to the insureds. In theory, commutation payments cover future claims, and so are also not payoffs. As explained infra, though, the amount of the commutation payments here are unproven.

Thus, Respondents' ill-gotten receipts will be offset by claim and commutation payments. Accordingly, no disgorgement is appropriate as to CMG, because Respondents returned the entirety of CMG's ceded premiums at commutation, plus $440,634. Document 67 at 17.

As for UGI and Genworth, Respondents raise three points regarding offset. First, they contend that claim payments should offset ill-gotten gains. Resp. Reply at 46-49 & n.42. But Atrium paid no claims for the relevant book years. RCX 838 at 359; RCX 2004 at 377. Second, they contend that ceding commissions should offset ill-gotten gains. Resp. Reply at 49 n.43. But the book years at issue did not involve ceding commissions. ECX 503 at 6551; ECX 520 at 2258. Third, they contend that the losses Respondents expected to suffer under the Genworth

arrangement exceeded the profits they expected to earn under the UGI arrangement, and thus, what they paid back to Genworth at commutation offsets what they received from UGI. Resp. Br. at 51. They cite no authority supporting this contention, however, nor have I identified any authority that unequivocally supports it. Resp. Reply at 51; see SEC v. McCaskey, No. 98-cv-6153, 2002 WL 850001, at *5, *8 (S.D.N.Y. Mar. 26, 2002) (holding that losses incurred "when the scheme collapsed" could not offset gains).

Even assuming that Genworth actual losses can offset UGI actual gains, however, Respondents have failed to carry their burden of demonstrating what those amounts were. The cedes actually paid to Atrium are well documented, but no witness testified to, and no exhibit identified, the sums actually paid back to UGI and Genworth associated with the 2009 and 2008-B book years. With respect to UGI, Respondents aver that the commutation payments were arms-length transactions intended to "settle" the captive arrangements, and that Milliman projected approximately [redacted] losses on the 2009 book year, but cite no evidence quantifying actual refunds. Resp. Br. at 50-51 (citing Tr. 1907); see also Document 178-A at 4. With respect to Genworth, Respondents further aver that 2008-B book year losses were projected to exceed gains by about [redacted] Resp. Br. at 51; see also Document 178-A at 3-4. But the commutation payments were not broken out or itemized by book year, and Respondents have made no effort to demonstrate what portion of the commutation payments are attributable to each book year, so it is not clear how much of, say, UGI's $48.6 million commutation payment corresponds to the 2009 book year. Decl. of Bogansky at Ex. A; see Resp. Reply at 46 (discussing "projected" and "expected" losses). Ideally, disgorgement is based on tracing actual sums received and paid – as applicable here, cash accounting – but when such tracing cannot be performed, reasonable approximations can be made. See SEC v. First Pacific Bancorp, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998). Actuarial estimates may be reasonable approximations of what would have happened had the captive arrangements not been commuted, but Respondents have not sufficiently demonstrated that Milliman's projections are reasonable approximations of what actually happened.

The relevant evidence (which Respondents generally did not cite) is murky. Crawshaw was "not entirely clear" on how Respondents did their commutation calculation, but testified that he believed Milliman's projections were based on "what you would expect to happen to the contract if it plays out over the ten-year runoff." Tr. 2325, 2327; see also Crawshaw Rebuttal at 74 n.128. Cascio opined only that Atrium paid all claims under the UGI and Genworth arrangements; he did not opine that the commutations resulted in any particular payments apportionable to the two book years at issue, or that Atrium paid all claims projected at the time of commutation. Cascio Report at 2, 15. For UGI, Milliman reported total book year 2009 premiums actually ceded as [redacted] (as of March 31, 2013), and projected total premiums ceded and total paid losses (had the arrangement continued) as [redacted] respectively. RCX 838 at 351, 388. Following Respondents' apparent methodology, the proper disgorgement amount might be [redacted] But there is no clear evidence that Respondents actually paid to UGI [redacted] or some other amount, as the book year 2009 share of the commutation payment. Certainly Respondents have not identified any such evidence.

Also unclear is the overall basis for UGI's $48.6 million commutation payment. It may have been based on Milliman's "High Scenario" estimate of "Present Value of Future Paid Losses," which was about [redacted] RCX 838 at 357. But Milliman also provided a "Low Scenario" estimate and an "Actuarial Central Estimate," which were both lower than [redacted] RCX 838 at 353, 355. Respondents may have selected Milliman's High Scenario to be conservative, [redacted] but no explanation appears in the record, and it cannot be concluded that the commutation payment was merely an aggregation of projected payments due for each remaining book year.

The record with respect to the Genworth commutation, although arguably clearer, works against Respondents. As noted, Genworth offered a [redacted] commutation payment to PHH in March 2012, which was apparently based on data up to the fourth quarter of 2011 for all book years, except that it left Genworth with a projected profit of at least [redacted] ECX 509; RCX 986 at 9-12. Genworth calculated the trust account balance at the time as [redacted] and after the first quarter 2012 claim settlement of [redacted], the trust balance would presumably have been [redacted] ECX 257 at tab Settlement; RCX 986 at 2; <u>but see</u> ECX 197 at tab trust (trust account balance of [redacted] as of first quarter 2012). It may be inferred that Genworth projected Atrium's future paid losses as [redacted] Milliman's analysis for Atrium, also apparently based on data up to the fourth quarter of 2011 for all book years, estimated the "Present Value of Future Paid Losses" for all book years in the low, central, and high scenarios as [redacted] respectively. RCX 7 at 1813, 1815, 1817. Using the following quarter's data, Milliman produced estimates as of March 31, 2012, of [redacted] respectively. RCX 2004 at 371, 373, 375.

In short, based on December 31, 2011, data, Genworth estimated the present value of Atrium's future paid losses as [redacted] and Atrium estimated them as [redacted] (for the central scenario). Respondents make no effort to account for this disparity. The disparity shrank in the next quarter, when Atrium estimated its future paid losses as [redacted] (for the central scenario), but this was still 27% higher than Genworth's most recent calculation. In the end, PHH accepted Genworth's offer, resulting in a payment to Respondents of $33 million ($24.1 million plus the $8.9 million dividend, discussed supra) and a payment to Genworth of $37.1 million. ECX 509; ECX 653, Decl. of Bogansky at Ex. A. Even under Milliman's most optimistic estimate [redacted] present value of future paid losses) Respondents made a "profit" at commutation of [redacted]

Admittedly, Milliman estimated a [redacted] loss to Atrium for the entire Genworth 2008-B book year; prorated in the manner suggested by Enforcement (to account for loans closed prior to July 21, 2008), the relevant loss was [redacted] RCX 2004 at 368. But it cannot be concluded, as Respondents assert, that Atrium and Genworth "settled" their arrangement. On the contrary, the evidence shows that on the entire commutation Atrium made a profit of at least about [redacted] by its own estimate (that is, the payment to Atrium exceeded Milliman's projection of the net present value settlement amount by [redacted] and possibly much more, and Genworth made a profit of [redacted] by its own estimate. Resp. Br. at 51. Atrium apparently got the better end of the bargain, and some fraction of its profit may or

may not be apportionable to the 2008-B book year after July 20, 2008, which otherwise would have produced a [redacted] loss. But the size of that fraction is unknown – certainly Respondents have made no effort to demonstrate it – and Respondents' profit from the entire arrangement refutes their suggestion that the commutation resulted in the return of all ill-gotten gains associated with the 2008-B book year.[45]

Accordingly, Respondents have not carried their burden of showing that Enforcement's calculation of ill-gotten gains is unreasonable, and the proper amount of disgorgement is therefore the sum of Respondents' written premiums from UGI book year 2009 and Genworth book year 2008-B: [redacted] Enforcement requests prejudgment interest, an issue Respondents do not address. Enf. Br. at 200-06; see generally Resp. Br.; Resp. Reply. Prejudgment interest on disgorgement amounts is discretionary, but is "routinely" awarded. SEC v. O'Hagan, 901 F. Supp. 1461, 1473 (D. Minn. 1995); Waterview Mgmt. Co. v. FDIC, 257 F. Supp. 2d 31, 35-36 (D.D.C. 2003). Factors to consider include the remedial purpose of the statute involved, the goal of depriving the wrongdoer of its unlawful gains, and unfairness to the respondent. SEC v. Sargent, 329 F.3d 34, 40 (1st Cir. 2003). The first two factors plainly weigh in favor of prejudgment interest here, and in view of the size of PHH Corporation, the large cash flows through Atrium, and the size of the disgorgement award compared to the relatively small sum of prejudgment interest, the third factor does, as well. See, e.g., ECX 539 at 1177.

Because Enforcement's prejudgment interest calculation assumed disgorgement amounts slightly different from those awarded, Enforcement's requested amount must be adjusted slightly. Enf. Reply, Ex. A at tab Section 8(b). A reasonable approximation of adjusted prejudgment interest is a proration of Enforcement's calculation, based on the percentage differences between Enforcement's assumed amounts and the actual amounts. Thus, as to UGI, awarded disgorgement is [redacted] or 96.43% of Enforcement's total, and prejudgment interest should thus be 96.43% of Enforcement's total, or [redacted] Enf. Reply at Ex. A at tab Section 8(b). As to Genworth, awarded disgorgement is [redacted] or 100.25% of Enforcement's total, and prejudgment interest should thus be 100.25% of Enforcement's total, or [redacted] Enf. Reply at Ex. A at tab Section 8(b). Accordingly, Respondents will be ordered to pay disgorgement and prejudgment interest of [redacted] = $6,442,399.

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[45] Although disgorgement is not warranted for ill-gotten gains under the CMG arrangement, and there was no violation within the limitations period under the Radian arrangement, their respective commutation payments bolster the conclusion that the commutations of Atrium's captive arrangements did not settle the "net present value of the arrangements." Resp. Br. at 51. The commutation payment to CMG was limited to the trust balance, even though CMG's estimate of claim payments exceeded that amount by $1.8 million. ECX 429 at 6; ECX 653, Decl. of Bogansky at 1, Ex. A. The commutation payment to Radian was also limited to the trust balance, even though Respondents' estimate of Atrium's expected claim payments exceeded that amount by $800,000, and Radian's estimate exceeded it by at least $7 million. ECX 430 at 1; ECX 434; ECX 653, Decl. of Bogansky at 1, Ex. A. Overall, CMG and Radian likely did not experience "positive benefits" from their captive arrangements, as Respondents contend. Resp. Br. at 15.

C. Civil Money Penalties

Pursuant to the CFPA, the Bureau is authorized to impose civil money penalties. 12 U.S.C. § 5565(c)(1). I previously held, however, that civil money penalties are available as relief only for claims arising from loans closed on or after July 21, 2011. Document 152 at 13-14. I have already rejected most of the arguments Enforcement raises against this conclusion. Enf. Br. at 209-18; see generally Document 152 at 10-14. Enforcement now points out that the CFPA permits civil penalties "for each day during which such violation . . . continues." Enf. Br. at 210 (citing 12 U.S.C. § 5565(c)(2)). However, under Snow, each violation occurred on the date each loan closed. 332 F.3d at 360. "[C]ontinuing splits of monthly mortgage payments between MIs and captive reinsurers . . . do not constitute a continuing violation under 12 U.S.C. § 2614," nor do they constitute independent violations. See Document 152 at 10-14. No violations occurred on or after July 21, 2011, and no civil penalties may be awarded.

D. Injunction

Enforcement requests five injunctive provisions: (1) a bar on engaging in captive reinsurance; (2) a prohibition on any business arrangement with any mortgage insurance company for any purpose other than procuring mortgage insurance; (3) disclosure to Enforcement, within thirty days, of all services provided to them by any mortgage insurance company since 2004; (4) a bar on violating RESPA Section 8; and (5) other compliance reporting and monitoring requirements. Enf. Br. at 207; Enf. Reply at 130-31. The analysis depends on the precise injunctive relief requested, as discussed infra, and I accordingly consider each requested provision separately.

The second provision is rejected as overbroad. As Respondents note, an injunction must be narrowly tailored to remedy only the specific harms shown by the plaintiffs. Resp. Br. at 47 (quoting Price v. City of Stockton, 390 F.3d 1105, 1117 (9th Cir. 2004)). It is not clear that each MI with which Respondents might possibly do business limits its activities to mortgage insurance. For example, some MIs, or their affiliates, might sell title insurance, or some other settlement service. In the absence of an associated RESPA violation, it would be inappropriate to enjoin all business arrangements whereby PHH refers a settlement service to an MI. As another example, were Respondents to again enter into a License Agreement with CMG, it could presumably be made lawful by omitting any referral requirement. But such an agreement would seemingly be prohibited under the provision Enforcement proposes.

The fifth provision is rejected as vague, because Enforcement does not specify what requirements it seeks. Enforcement has not submitted "a proposed order reflecting the relief requested," as it said it would. Enf. Br. at 209 n.131. In the absence of such a proposed order, and without more information about the Bureau's compliance practices, it would be inappropriate to order any compliance requirements.

1. Cease and Desist Order

The fourth provision is granted. An order that "Respondents be barred from violating Section 8 of RESPA" is a cease and desist order, in the narrow sense employed in SEC

administrative proceedings. E.g., Montford, 2014 WL 1744130, at *21-22 (ordering Respondents "to cease and desist from committing or causing any violations or future violations of" certain provisions of the Investment Advisers Act of 1940, 80 U.S.C. § 80b-4, et seq.). There is disagreement over the degree to which a cease and desist order is distinct from other injunctive relief. See Rambus Inc., No. 9302, 2007 WL 431524, at *1 (FTC Feb. 5, 2007) (using "injunction" language beside "cease and desist" language in administrative opinion), modified by Rambus Inc., 2007 WL 2086203 (FTC Apr. 27, 2007), rev'd on other grounds, 522 F.3d 456 (D.C. Cir. 2008); Warner-Lambert Co. v. FTC, 562 F.2d 749, 757 (D.C. Cir. 1977) ("the [FTC] has the power to shape remedies which go beyond the simple cease and desist order"). The CFPA specifically authorizes the Bureau to issue such an order, as distinct from, and in addition to, imposing other injunctive relief. 12 U.S.C. §§ 5563(b)(1)(B), 5565(a)(2). I therefore follow the Bureau's practice, which is to issue a cease and desist order, or the equivalent, as one provision of a larger injunctive order. E.g., Lighthouse Title, Inc., 2014-CFPB-015, Document 1 at 7-8 (Respondent "must not violate Section 8 of RESPA"); Amerisave Mortgage Corp., 2014-CFPB-010, Document 1 at 19 (Respondents "shall cease and desist from any further violations of RESPA § 8(a)"); JRHBW Realty, Inc., 2014-CFPB-005, Document 1 at 6 (Respondents "shall refrain from committing violations of Section 8 of RESPA").

Construing the fourth requested provision narrowly has two important consequences. First, this proceeding was brought pursuant to 12 U.S.C. § 5563, the CFPA's authorization of cease and desist proceedings in the administrative setting. Notice at 1; Scheduling Conference Tr. 20-21. Because it is a very specific form of equitable relief, and is created by statute, a cease and desist order is not an improper "obey the law" injunction. Ponce v. SEC, 345 F.3d 722, 740-41 (9th Cir. 2003); Montford, 2014 WL 1744130, at *22; see Resp. Br. at 47-48.

Second, the applicable legal standard is different from that of an ordinary injunction. See KPMG Peat Marwick LLP, Exchange Act Release No. 43862, 2001 WL 47245, at *24-27 & nn.118-47 (Jan. 19, 2001) (collecting cases), pet. denied, KPMG, LLP v. SEC, 289 F.3d 109 (D.C. Cir. 2002). The term "injunction" is typically used in the enforcement context to describe orders providing injunctive relief in federal court, and as explained infra, the prevailing standard for such an injunction is set forth in eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006). But I have found no cases in which cease and desist orders have been considered under the eBay standard. Instead, they have been analyzed under the "public interest" factors: (1) the seriousness of the violation; (2) the isolated or recurrent nature of the violation; (3) the respondent's state of mind; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of its conduct; (6) the respondent's opportunities to commit future violations; (7) the recency of the violations; (8) the degree of harm caused by the violations; and (9) the remedial effect of a cease and desist order in the context of other sanctions imposed. KPMG Peat Marwick LLP, 2001 WL 47245, at *26. "Many of these factors are akin to those used by courts in determining whether injunctions are appropriate." Id.; see Lowry v. SEC, 340 F.3d 501, 505 n.4 (8th Cir. 2003). The inquiry is flexible, and no one factor is dispositive. KPMG Peat Marwick LLP, 2001 WL 47245, at *26. Absent evidence to the contrary, a single past violation raises a sufficient risk of future violation to justify a cease and desist order. Id.

Respondents' conduct was serious and recurrent. Respondents made a great deal of money by violating RESPA. Since July 21, 2008, Atrium forwarded over [redacted] to PHH.

ECX 653, Declaration of Danahy at 13. Even considering only the proven violations, Respondents' wrongdoing occurred thousands of times over more than a year, including the worst years of the recent financial crisis, resulting in almost [redacted] in ill-gotten gains. Respondents unquestionably focused on the moneymaking aspects of the captive reinsurance arrangements over their compliance with RESPA. Indeed, they continued to collect premiums under captive arrangements even after their captive partners had settled with the Bureau and had agreed to cease entering into captive reinsurance. While Respondents stress that they currently have no captive arrangements, see, e.g., Resp. Br. at 44, they have not showed any recognition that their actions were wrongful, see, e.g., Resp. Reply at 3. Respondents have never represented or averred that Atrium Re, which is still intact and thus available to be a party to future captive arrangements, will not engage in captive reinsurance arrangements in the future. While many MIs are now operating under injunctions preventing them from entering into captive reinsurance arrangements for a period of ten years, see, e.g., UGI Case, ECF No. 5 at 4-5, many industry features have not changed. In particular, PHH continues to have significant leverage over the MIs, just as it did when it initiated its four past captive arrangements. While some MIs have been enjoined from responding to that leverage via captive arrangements, at least CMG has not been enjoined, and it is entirely possible that new MIs might enter the market that would be willing parties to captive reinsurance agreements with PHH. Respondents' violations ended several years ago, and so were not especially recent. The degree of harm, however, was substantial, because Respondents removed millions of dollars from the assets of MIs at a time when the MIs needed every penny to pay claims. E.g., ECX 683 at 12 (in November 2008 Genworth's parent company announces intent to access TARP funds). Given the comparatively small amount of disgorgement ordered relative to Respondents' profit, the remedial effect of a cease and desist order will be significant.

As to Respondents' state of mind, Enforcement argues that Respondents acted recklessly, a point Respondents do not address. Enf. Br. at 218-20; see generally Resp. Reply. Recklessness, at least in the context of securities cases, means "highly unreasonable" conduct, "which represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978) (quoting Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977)); see also S.W. Hatfield, CPA, Exchange Act Release No. 69930 2013 WL 3339647 at *21 (Jul. 3, 2013). With respect to the UGI and CMG arrangements, I agree that Respondents acted recklessly. Any payment by one person to another of a "percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for [settlement] services actually performed" presumptively violates RESPA Section 8(b).[46] 12 U.S.C. § 2607(b). RESPA Section 8(c) establishes a number of affirmative defenses, but the burden of proving them falls on Respondents. That Respondents obtained opinions from Milliman in many instances shows that they knew the risk of not obtaining them –

[46] The HUD Letter is not the contrary. Cf. Resp. Br. at 27 & n.16. Quota share reinsurance is as presumptively unlawful under RESPA Section 8(b) as excess of loss reinsurance, but the HUD Letter takes no exception to quota share reinsurance because it is trivial to prove the applicability of Section 8(c)(2) to it. ECX 193, Attach. A (quota share reinsurance "clearly [] satisfie[s]" RESPA).

namely, that their arrangements might be found unlawful. See ECX 218 ("Of course we will lower [the attachment point] if the risk is too low to make sure we are respa compliant."); RCX 581 at 2232 ("Insurance companies are required to demonstrate that adequate risk has been transferred."). Indeed, Respondents were aware as early as 2006 that various regulators were investigating the propriety of captive arrangements. ECX 18 at 8065; ECX 430 at 1; ECX 733 at 13175. It was highly unreasonable for them to fail to obtain such opinions for the final book years of the UGI and CMG arrangements, because that failure rendered their conduct illegal.

With respect to the Genworth arrangement, however, I find that Respondents acted knowingly. See 12 U.S.C. § 5565(c)(2)(C). Given the very large civil penalties that can be imposed under the CFPA for knowing violations – up to $1 million per day – the most reasonable construction of "knowingly" in Section 5565(c)(2)(C) is the construction applicable to criminal cases. See United States v. X-Citement, Inc., 513 U.S. 64, 72 n.3 (1994) ("Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful."). Thus, for Respondents to have acted "knowingly" within the meaning of Section 5565(c)(2)(C), they must have known that their conduct violated a federal consumer financial law, in this case, RESPA. This is similar to the "willful" standard in federal criminal law. See Ratzlaf v. United States, 510 U.S. 135, 137 (1994) (willfulness requires proof "that the defendant acted with knowledge that his conduct was unlawful"); Bryan v. United States, 524 U.S. 184, 191-92 (1998).

Admittedly, at least two facts suggest that Respondents acted at most recklessly. First, Milliman's report on the Genworth 2008-B book year opined only that ceded premiums were reasonably related to ceded risk, and did not consider half the HUD Letter factors on price commensurability. ECX 194 at 3124. It was highly unreasonable, but not knowingly improper, for Respondents to rely on Milliman's report alone to support price commensurability. Second, Respondents obtained Milliman's report after the Genworth 2008-B book year was finished. ECX 194. Indeed, every Milliman report on Genworth was dated after the book year ended, in one instance (book year 2006) more than three years after it ended, and the reports for book years 2006, 2007, 2008-A, and 2008-B were all dated either February or April 2009. RCX 15-20. Such disregard for regulatory requirements suggests recklessness, but it does not rise to the level of knowing misconduct. See ECX 461 at 6747 (PHH's auditor criticizing the lateness of Milliman's reports).

However, two factors do rise to the level of knowing misconduct, particularly when viewed in combination with Respondents' highly unreasonable reliance on, and tardy solicitation of, Milliman's opinion. First, Respondents intentionally nullified Milliman's finding of risk transfer by taking a dividend from the Genworth trust just weeks after amending the agreement to conform to Milliman's assumptions. Respondents knew that taking a dividend was not consistent with passing risk transfer, because it said so in Milliman's report, but took the dividend anyway. ECX 194 at 3122. Second, Respondents informed borrowers in a written disclosure that they could "shop around to determine that [they] are receiving the best services and the best rate" for mortgage insurance. RCX 790 at 17-18.[47] This disclosure was apparently

[47] The disclosures in the record are undated, but the last one in RCX 790 appears to have been used in 2008 and 2009, because it is the only one which referred to CMG.

intended to satisfy the HUD Letter, which stated that adequate consumer disclosure would be less likely to result in scrutiny of a captive arrangement. ECX 193, Attach. A at 4-5; ECX 653 at 22. Respondents' standard disclosure was so misleading, however, that its use constituted knowing misconduct: it implied that borrowers could select their own mortgage insurer (the interpretation PHH intended) even though at the time borrowers would have been hard-pressed to insist on MI from PMI or RMIC, and definitely would not have been able to select Triad. Tr. 118-19; ECX 159 at tabs 2008, 2009; ECX 653 at 20 (PHH "provided a disclosure advising the borrower . . . that he/she could select a different pmi provider"); see Tr. 383-84 (Culver: "the borrower could suggest one of those four [MIs], . . . but if it was someone off that list, they would generally be told we don't do business with that company"). Although this second point is not particularly significant – certainly not significant enough to find knowing misconduct with respect to UGI and CMG, to which it also applies – it nonetheless bolsters the conclusion that Respondents knowingly disregarded the law to receive kickbacks from Genworth.

Thus, Respondents failed to obtain a risk transfer opinion on the final Genworth book year until after the book year ended, intentionally breached the conditions necessary to satisfy risk transfer, had no reasonable basis to conclude that the book year satisfied price commensurability, and misled their customers about the implications of their captive arrangements. Respondents' violation of RESPA with respect to the final Genworth book year was knowing, a state of mind consistent with intentional misconduct. See Toby G. Scammell, Advisers Act of 1940 Release No. 3961, 2014 WL 5493265, at *6 n.41 (SEC Oct. 29, 2014) ("Scienter is a mental state consisting of an intent to deceive, manipulate, or defraud, and includes recklessness."). A cease and desist order is therefore warranted, because every public interest factor except recency weighs in favor of imposing one.

2. Captive Reinsurance Bar

Enforcement's requested bar on captive reinsurance is properly considered under the legal standard for injunctions. An injunction is designed to prevent future violations and is an available remedy even without a showing of past wrongs. United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953). The party seeking an injunction "must satisfy the court that relief is needed," and the court must determine that "there exists some cognizable danger of recurrent violation." Id. The determination is distinguished by flexibility, and an injunction must not punish. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). The Supreme Court announced a standard for permanent injunctions in eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006):

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay is the standard by which courts assess requests for permanent injunctions in a wide variety of cases. eBay, 547 U.S. at 394; Ferring Pharm., Inc. v. Watson Pharm., Inc., 765 F.3d 205, 215

(3d Cir. 2014); Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 33 (1st Cir. 2011); Salinger v. Colting, 607 F.3d 68, 78 & n.7 (2d Cir. 2010); New York State Court Officers Ass'n v. Hite, 851 F. Supp. 2d 575, 579 n.16 (S.D.N.Y. 2012), aff'd, 475 F. App'x 803 (2d Cir. 2012). eBay also applies to government enforcement actions. See Citigroup, 752 F.3d at 294 ("the proper standard for reviewing a proposed consent judgment involving an enforcement agency requires . . . that the 'public interest would not be disserved'" under eBay); EEOC v. DCP Medstream, LP, 608 F. Supp. 2d 107, 109 (D. Me. 2009) (applying eBay and granting EEOC request for injunction against employer).

Prior to eBay, irreparable injury was presumed upon a strong enough showing on the merits, at least in government enforcement actions. United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 175-76 (9th Cir. 1987); United States v. Alameda Gateway, Ltd., 953 F. Supp. 1106, 1109-10 (N.D. Cal. 1996). After eBay, however, this presumption may not be valid. Courts appear to have found irreparable injury after eBay where the plaintiff possessed a right that could not be vindicated by damages, or the defendant violated a continuing duty to the plaintiff. E.g., United Steel, Paper and Forestry, Rubber, Mfg. Energy, Allied Indus. and Serv. Workers Int'l Union, AFL-CIO-CLC v. Kelsey-Hayes Co., 750 F.3d 546, 550, 559 (6th Cir. 2014) (elimination of retiree group health insurance in violation of collective bargaining agreement); Broadcom Corp. v. Emulex Corp., 732 F.3d 1325, 1336 (Fed. Cir. 2013) (lost contracts and market share); Aspen Tech., Inc. v. M3 Tech., Inc., 569 F. App'x 259, 273 (5th Cir. 2014) (inability to collect on prospective judgment and misuse of trade secrets); Rush Constr., Inc. v. United States, 117 Fed. Cl. 85, 101 (2014) (loss of otherwise lawfully won government contract). Courts appear to have found inadequacy of damages in similar situations. E.g., Entergy Nuclear Vermont Yankee, LLC v. Shumlin, 733 F.3d 393, 423 (2d Cir. 2013) (inability to sue defendant for damages); Broadcom, 732 F.3d at 1336 (incumbency effect of contracts going to competitors); Aspen, 569 F. App'x at 273 (use and sale of products containing trade secrets). The balance of hardships focuses on the harm to the parties. Acumed LLC v. Stryker Corp., 551 F.3d 1323, 1330 (Fed. Cir. 2008). The potential harm to Enforcement is that the public interest will be disserved, and this potential harm carries greater weight than Respondents' private interests. Nken v. Holder, 556 U.S. 418, 435 (2009); FTC v. World Wide Factors, Ltd., 882 F.2d 344, 346-47 (9th Cir. 1989).

The parties do not address eBay, or any of the factors recited in eBay. Enf. Br. at 206-09; Resp. Br. at 43-50. As a result, the parties' contentions regarding the eBay factors are unknown. The record demonstrates a likelihood of irreparable injury which cannot be adequately compensated by money damages, and which will likely occur in the absence of a bar on captive reinsurance. Specifically, any MI counterparty with a captive arrangement will be placed in a more precarious financial situation than otherwise, which increases the risk of bankruptcy and the inability to pay claims, particularly claims presented by the GSEs. E.g., Tr. 342, 362, 386 [redacted] If a captive arrangement lasts long enough, and accumulates enough in its trust account, that loss of insurance funds will have an adverse systemic effect on the mortgage insurance industry, and potentially on the housing market. See ECX 35 at 0646 (MIs predicted in 1998 that deep cede captives were a "threat to the overall strength and claims-paying ability of the private mortgage insurance industry"); ECX 683 at 12; Document 178-A at ¶¶ 34-36. Such loss is likely to be substantial: overall, Atrium collected net premiums totaling over $430 million, and between December 2002 and June 2013 withdrew almost $300 million in

dividends, commutation payments, and administrative expenses. Enf. Br. at 183-84; see also ECX 147 at tab Gross Premiums; ECX 653, Decl. of Bogansky at Ex. A. Respondents knew that Genworth was in dire financial condition in 2012, but still insisted on taking at least a [redacted] profit at commutation. See supra. The problem was so bad in early 2008 that Freddie – one of the ultimate beneficiaries of the insurance on Respondents' mortgages – stopped accepting loans reinsured under deep cede captive arrangements, and there is every reason to think that the same problem would arise during the next downturn of the housing cycle. Although Walker and Culver both testified that reinsurance helped their companies survive the recent financial crisis, UGI and MGIC clearly would have been better off not reinsuring their business, because they would have retained control over the entirety of their premiums, and in MGIC's case its returns would have been substantially greater. Tr. 342, 398-99, 418-19, 2154, 2162-64, 2188. It is possible that in the absence of captive arrangements the MIs might spend the revenues they otherwise would have ceded, but it is a virtual certainty that if an MI's trust account becomes sufficiently large (in contrast to CMG's), much of the reinsurance premiums will be retained by Respondents (as with UGI and Genworth).

Irreparable injury and inadequacy of damages will not be mitigated by "skin in the game," because Respondents' bargaining power remains so great that they can essentially dictate which loans will be excluded from reinsurance coverage. Cf. Resp. Br. at 12. That is, Respondents' ability to pick and choose which loans get reinsured, and by whom, allows them to engage in adverse selection, which largely nullifies the beneficial effect of aligning their interests with the MIs'. See RCX 831 at 20-21 (explaining adverse selection in the context of mortgage insurance); see also Tr. 555-56 (Rosenthal describing PHH's referrals to MGIC in May 2009 as involving "adverse selection"); ECX 432. The balance of hardships clearly weighs in Enforcement's favor, because Enforcement has a compelling interest in seeing the law obeyed, and Respondents have no legitimate interest in violating it. See World Wide Factors, 882 F.2d at 347 ("there is no oppressive hardship to defendants in requiring them to comply with the FTC Act") (citation omitted). As for the public interest, whether the public interest factors discussed supra are considered, or the public interest is considered as "economic effects" and "effective relief for the [Bureau]," the public interest weighs heavily in favor of enjoining future captive arrangements. Id.

Respondents point out that all violative conduct has ceased, and argue that an injunction is unwarranted on that basis. Resp. Br. at 43-50. The cessation of violations must of course be considered, but it does not preclude an injunction, as I previously held, and Respondents present nothing to warrant reconsideration of this holding. Document 152 at 8. More importantly, the evidence shows that Respondents are likely to violate RESPA again if not enjoined. To be sure, Respondents have apparently had no discussions with potential counterparties in the past three years regarding establishment of a new captive arrangement. Document 148, Decl. of Sam Rosenthal at 2. But this is not dispositive, as the public interest factors demonstrate. See SEC v. Colonial Inv. Mgmt. LLC, 381 F. App'x 27, 31 (2d Cir. 2010) (citing SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 99-100 (2d Cir. 1978)); SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984); SEC v. Blatt, 583 F.2d 1325, 1334 & n.29 (5th Cir. 1978). More specifically, Respondents accepted ceded premiums from UGI, their most important counterparty, for over fifteen years, and continued accepting them even after UGI had been enjoined from entering into further captive arrangements. Then, when the Bureau initiated the present proceeding, they immediately moved to intervene in the Bureau's closed case against UGI, seeking a declaratory

judgment that UGI's premium cedes did not violate RESPA. UGI Case, ECF No. 7-1 at 9. In sum, Respondents' assertion that "there was no evidence that . . . Respondents would enter into any [captive] arrangements in the future" is simply wrong. Resp. Reply at 44-45. I have also placed particular weight on the fact that Respondents' misconduct was knowing with respect to Genworth.

Accordingly, Respondents will be enjoined from "engaging in the business of providing captive insurance." Enf. Br. at 207. The overriding consideration with such an injunction is that captive reinsurance on mortgage insurance is presumptively illegal, because it involves payments of mortgage insurance splits to entities referring business to MIs. A less burdensome injunction is thus insufficient to remedy the potential harm. For example, I have considered a bar on captive excess of loss insurance only at a premium cede exceeding 25%; such a condition would be insufficient because risk transfer and price commensurability would remain difficult to evaluate. I have also considered a bar on only excess of loss captive insurance; this would mitigate the difficulty of proving risk transfer and price commensurability, but the likelihood of adverse selection and the danger represented by Respondents' market power over MIs would remain. However, out of concern that a truly permanent injunction may not be narrowly tailored, I recommend the injunction be effective for fifteen years. See ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Protection Dist., 724 F.3d 854, 876 (7th Cir. 2013) ("we can easily imagine that at some point in the future, the circumstances giving rise to the injunction will change and the injunction may therefore also need to change").

3. Disclosure Order

Enforcement requests an order that, within thirty days, Respondents "disclose to Enforcement all services provided to any of them by any mortgage insurance company since January 1, 2004." Enf. Br. at 207. Because Respondents are covered persons under the CFPA, the Bureau plainly has the authority to require such disclosure, without initiating an enforcement action and, indeed, without any justification at all. 12 U.S.C. § 5514(b)(1). Thus, it is not clear that the permanent injunction standard applies to this requested provision. Assuming that it does, the required analysis is largely duplicative of the analysis for a captive reinsurance bar, except that the irreparable injury and the balance of hardships differ. As for irreparable injury, Respondents were not fully forthcoming in response to Enforcement's investigation. For example, Respondents supposedly retired their preferred provider policy in June 2009 and replaced it with a "simplified" policy, but the nature of that simplified policy between June 2009 and August 2012, to the extent it differed from the preferred provider policy, was apparently not disclosed. ECX 654 at 11-12 & Ex. N; see Enf. Br. at 66. As another example, Respondents produced an email referencing the CMG License Agreement, but did not produce the License Agreement itself. ECX 747; see Enf. Br. at 29 n.8. As a third example, the primary dialer record produced by Respondents is sometimes inconsistent with other evidence, suggesting that Respondents were not diligent in compiling their records in response to Enforcement's investigative demands. See supra. As for the balance of hardships, the Bureau, as noted, has the authority to order the requested disclosure independently of the present proceeding. Although the requested disclosure is somewhat burdensome and invasive, Respondents have been on notice since the passage of the CFPA that the Bureau might require it, and the balance of hardships weighs against Respondents.

Accordingly, Respondents will be required to "disclose to Enforcement all services provided to any of them by any mortgage insurance company since January 1, 2004," within thirty days of entry of a final decision and order. Enf. Br. at 207; see 12 C.F.R. § 1081.405(d) (referencing the Bureau Director's "final decision and order").

V. PROPOSED ORDER

By reason of the above, entry of the following order is RECOMMENDED:

> It is ORDERED that, pursuant to Sections 1053 and 1055 of the Consumer Financial Protection Act, Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation shall jointly and severally DISGORGE $6,442,399.
>
> It is FURTHER ORDERED that, pursuant to Sections 1053 and 1055 of the Consumer Financial Protection Act, Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation shall CEASE AND DESIST from violating Sections 8(a) and 8(b) of the Real Estate Settlement Procedures Act.
>
> It is FURTHER ORDERED that, pursuant to Sections 1053 and 1055 of the Consumer Financial Protection Act, Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation are ENJOINED, for a period of fifteen (15) years from the effective date of this Order, from engaging in the business of providing captive insurance.
>
> It is FURTHER ORDERED that, pursuant to Sections 1053 and 1055 of the Consumer Financial Protection Act, Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation are ENJOINED to disclose to the Office of Enforcement of the Consumer Financial Protection Bureau, within thirty (30) days from the effective date of this Order, all services provided to any of them by any mortgage insurance company since January 1, 2004.

A notice of appeal may be filed within ten (10) days after service of this Recommended Decision. 12 C.F.R. § 1081.400(c)(1). Unless a party timely files and perfects a notice of appeal of the Recommended Decision, the Director of the Consumer Financial Protection Bureau may adopt the Recommended Decision as the final decision and order of the Consumer Financial Protection Bureau without further opportunity for briefing or argument.

Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission