Respondents disagree with that finding, now that the Hearing has been completed and the record is closed, Enforcement Counsel have not satisfied their burden to present evidence sufficient to establish jurisdiction over Atrium or Atrium Re.

First, under the plain language of the statute, neither Atrium, nor Atrium Re is a Covered Persons. Covered Person is defined as a "person that engages in offering or providing a consumer financial product or service,"[30] or an affiliate of that person that is also a Service Provider to that person. 12 U.S.C. § 5481(6). There has been no allegation, let alone any evidence, that Atrium or Atrium Re at any time provided any consumer financial product or service, so Atrium and Atrium Re are not Covered Persons as such.

Second, Atrium and Atrium Re are not Service Providers. Service Provider is defined as:

> any person that *provides a material service to a covered person* in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that—(i) participates in designing, operating, or maintaining the consumer financial product or service; or (ii) processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes).

12 U.S.C. § 5481(26)(A) (emphasis added). The term "material service" is explained in the statute with reference to two examples: participation in "designing, operating or maintaining" the consumer financial product or service, or "process[ing] transactions relating to the consumer financial product or service." 12 U.S.C. § 5481(26)(A)(i), (ii). Here, there was no allegation and

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[30] "Consumer Financial Product or Service" is defined as "any financial product or service that is described in one or more categories under—(A) paragraph (15) *[defining Financial Product or Service]* and is offered or provided for use by consumers primarily for personal, family, or household purposes; or (B) clause (i) *[extending credit and servicing loans]*, (iii) *[providing most real estate settlement services, other than the business of insurance, or performing appraisals]*, (ix) *[provision or use of credit reports]*, or (x) *[debt collection]* of paragraph (15)(A), and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (A)." 12 U.S.C. § 5481(5) (with brief summaries of cross-referenced provisions added in bracketed italics).

no evidence that Atrium or Atrium Re ever engaged in either, and no evidence was presented that these two entities participated in any way in "designing, operating or maintaining" the loans made by the Lender Respondents, or that they "process[ed] transactions" relating to the loans. In fact, it is hard to see how providing reinsurance to independent third parties in connection with loans that were originated by the Lender Respondents could be deemed a "service" to the Lender Respondents at all, let alone a "*material* service . . . in connection with the offering or provision" of the loans, as the statute requires. Moreover, neither Atrium nor Atrium Re can be considered Service Providers to the MIs because pmi is not a "Financial Product or Service." *See* 12 U.S.C. § 5481(15)(C)(i) (excluding the business of insurance). At bottom, after nine days of testimony, Enforcement Counsel provided no evidence that Atrium or Atrium Re provided any "material service" to either of the Lender Respondents "in connection with the offering or provision by such covered person of a consumer financial product or service," and therefore Atrium and Atrium Re are not Service Providers.

Third, Atrium and Atrium Re are not Related Persons to either of the Lender Respondents. A "Related Person" is "deemed to mean" a Covered Person, and is defined as:

> (i) any director, officer, or employee charged with managerial responsibility for, or controlling shareholder of, or agent for, such covered person;
>
> (ii) any shareholder, consultant, joint venture partner, or other person, as determined by the Bureau (by rule or on a case-by-case basis) who materially participates in the conduct of the affairs of such covered person; and
>
> (iii) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any—(I) violation of any provision of law or regulation; or (II) breach of a fiduciary duty.

12 U.S.C. § 5481(25)(C). Enforcement Counsel have neither alleged in the NOC, nor attempted to show at the hearing, that either Atrium or Atrium Re is a "director, officer, [] employee . . . or controlling shareholder of, or agent for" the other Respondents; nor that Atrium or Atrium Re is

a "shareholder, consultant, joint venture partner, or other person . . . who materially participates in the conduct of the affairs of such covered person;" nor that Atrium or Atrium Re is an "independent contractor" to the other Respondents.

Although Enforcement Counsel did not present any evidence to establish that Atrium or Atrium Re "materially participat[ed] in the conduct of the affairs of [a] covered person," because this Tribunal previously raised that possibility, however, Respondents will briefly address the issue. Simply put, we respectfully suggest that in denying dismissal for lack of jurisdiction, the Tribunal was considering the possibility – legally irrelevant here – that PHH Corp. participated in the affairs of its indirect subsidiaries, Atrium and Atrium Re, and not that the subsidiaries somehow participated in the affairs of their indirect parent. Indeed, while Respondents would dispute that PHH Corp. participated in the conduct of the affairs of Atrium and Atrium Re (since this impermissibly ignores the corporate form), there is simply no evidence or even any allegation that either Atrium or Atrium Re had *anything* to do with conducting the affairs of PHH Corp. (or PHH Mortgage or PHH Home Loans), let alone that either "materially participate[d]." And *that* is the relevant inquiry.[31]

Since CFPA Section 1053(b) only applies to Covered Persons and Service Providers, and Enforcement Counsel have failed to proffer any evidence that either Atrium or Atrium Re is a Covered Person or Service Provider under the CFPA, this Tribunal lacks jurisdiction over

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[31] Moreover, it is clear that Atrium and Atrium Re could not properly be considered "other person[s]," since the canon of construction *ejusdem generis* requires that a general catch-all be limited by the nature of the specific items listed before it (here, "shareholder, consultant, joint venture partner"). *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). Since an indirect subsidiary is nothing like a "shareholder, consultant, [or] joint venture partner" who may have authority over the Covered Person, this provision is simply inapplicable to Atrium and Atrium Re.

Atrium and Atrium Re, and they are entitled to a recommended decision dismissing them from this action.

B. The Bureau Is Precluded From Using These Proceedings to Regulate the Business of Insurance

The NOC makes clear that the Bureau believes that the reinsurance arrangements entered into by Atrium, and subsequently assumed by Atrium Re, do not constitute "real insurance." *See* NOC ¶¶ 60-70. In its May 22 Order, the Tribunal again denied Respondents' renewed motion by simply referring to the Tribunal's statements at the beginning of the hearing that "RESPA does not run afoul of the McCarran-Ferguson Act." May 22 Order at 3; *see also* Hearing Tr. 23 (Tribunal denying Respondents' Motion in Limine on this issue on the basis of the court's decision in *Patton v. Triad Guaranty Ins.*, 277 F.3d 1294, 1299 (11th Cir. 2002)). However, now that the hearing has concluded, Respondents renew their objection to Enforcement Counsels' theory that the reinsurance arrangements do not constitute "insurance." Enforcement Counsel relies on its expert witness, Dr. Crawshaw, to decide what is, or is not, "insurance." Specifically, Dr. Crawshaw relies upon what he deems to be the "common features" of Atrium's captive arrangements – the purported limitation of liability to funds in the applicable trust accounts, segregation of the trust accounts, purported low capital contributions, Atrium's purported "ability to force termination of its captive arrangements" and the high expected underwriting profit margins – to conclude that, in his opinion, none of the four reinsurance arrangements "provide[d] a genuine reinsurance service." *See* Crawshaw Expert Report at 12-30; Rebuttal Report at 2 ("Atrium did not provide any genuine reinsurance service to those mortgage insurance companies."); Hearing Tr. 614-40; *id.* at 763-64.

The Bureau's blatant attempt to displace the role of state insurance regulators is inappropriate. Under the McCarran-Ferguson Act, "[n]o Act of Congress shall be construed to

invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b) ("McCarran-Ferguson"). A state law is "impair[ed]" under McCarran-Ferguson if application of a federal law would "frustrate any declared state policy or interfere with a State's administrative regime." *Humana, Inc. v. Forsyth*, 525 U.S. 299, 309-10 (1999).

Atrium Re is licensed and regulated by the Insurance Division of the Vermont Department of Financial Regulation. Atrium is licensed and regulated by the Insurance Division of the New York Department of Financial Services. Both Vermont and New York have comprehensive insurance and reinsurance regulatory regimes. Both states' regulators regularly supervised and examined their respective licensee, Atrium or Atrium Re, pursuant to a complex state regulatory scheme covering insurance, an issue essentially and exclusively reserved for state regulation under McCarran-Ferguson. Moreover, the MIs were also supervised and regulated by their respective state insurance regulators. As such, the Bureau's attempt to second-guess the state insurance regulators and appoint itself as the arbiter of whether reinsurance was "real reinsurance" is irredeemably inconsistent with McCarran-Ferguson. *See Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 564 (7th Cir. 1999) (McCarran-Ferguson prevented federal courts from applying federal law to question actuarial practices: "Even if the formal criteria are the same under federal and state law, displacing their administration into federal court—requiring a federal court to decide whether an insurance policy is consistent with state law—obviously would interfere with the administration of the state law.").

Respondents do not dispute the general statement by the *Patton* court that "the McCarran-Ferguson bar does not apply where Congress explicitly reveals its intent to regulate

the business of insurance." *Patton*, 277 F.3d at 1298. However, in that case, the court went on to find that Congress's inclusion of "underwriting" as a settlement service – which the court construed to refer to "mortgage insurance" – meant that "RESPA is a Congressional Act that 'specifically relates' to mortgage insurance." *Id.* Respondents are not aware of any other court that has construed the term "underwriting" as it relates to the settlement service in connection with the origination of a loan to be "mortgage insurance." Indeed, such an assertion is nonsensical where the lender "underwrites" the loan. Under *Patton*, the lender's underwriting department would fall within the purview of the state insurance department, a position not taken by any state insurance regulator. More to the point, simply including the term "underwriting" does not mean that RESPA occupies the field of mortgage insurance such that the Bureau has the authority over all aspects of mortgage insurance including, for example, what constitutes mortgage insurance reinsurance.

Curiously, the Bureau acknowledges the authority of state insurance regulators and their role in regulating the very same captive insurers it now seeks to regulate through this enforcement action. Specifically, Enforcement Counsel have introduced into evidence, and seeks to rely upon, the fact that the MIs allegedly "expressed alarm to state insurance regulators in 1998, asking for limits on captive and other 'risk-sharing' arrangements between MIs and lenders." NOC ¶ 25. According to the Bureau, "the MIs argued[] such arrangements 'present a threat to the overall strength and claims-paying ability of the private mortgage insurance industry.'" *Id; see also id.* ¶¶ 26-27. Further, the Bureau introduced exhibits discussing the purported involvement of the Arizona Department of Insurance in the issue of captive reinsurance, and Dr. Crawshaw relied upon such materials to support his conclusions. *See* ECX

35; *infra,* at 40. Thus, the Bureau concedes that state insurance regulators regulate the very issue it is seeking to affect through this enforcement action.

Finally, in addition to the fact that McCarran-Ferguson precludes the Bureau's evidentiary theories under RESPA, the CFPA itself—which gave the Bureau the authority to enforce RESPA—precludes this type of collateral attack that would "affect[] the authority" of the state insurance regulators. 12 U.S.C. § 5552(d)(3) ("No provision of this title shall be construed as altering, limiting, or affecting the authority of a State insurance commission or State insurance regulator under State law to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or regulator.").

Accordingly, the Bureau is precluded from using RESPA to attempt to regulate the business of insurance or collaterally attack the actions of the Vermont and New York insurance regulators which approved of the reinsurance arrangements at issue.

C. The Bureau is Judicially Estopped From Pursuing Respondents

In spite of the Enforcement Counsel's efforts to sweep the issue under the rug, the fact remains that it is the Enforcement Counsel's position in this administrative action that the reinsurance arrangement between UGI and Atrium was a "sham" and that the reinsurance was "worthless." However, the Bureau specifically permitted UGI to continue to make payments to Atrium and to account for this arrangement as reinsurance on its financial statements. In its May 22 Order, the Tribunal stated Respondents have "'failed to demonstrate that Enforcement took inconsistent positions.'" May 22 Order at 9 (citing the March 13 Order at 9, 14). Respondents continue to disagree with this finding. The fact that UGI was permitted to continue to cede premiums to Atrium after the entry of the Consent Order, and that UGI was permitted to continue to cede millions of dollars to other lender-captive reinsurers under similar arrangements demonstrates that the Florida Consent Order is a "sham."

As Respondents have pointed out, there is no question that UGI was permitted to cede premiums to Atrium after entry of the Consent Order.[32] Indeed, nowhere in any of the briefing on this issue has Enforcement Counsel ever challenged this fact. The Supreme Court has made clear that "giv[ing]" and "accept[ing]" a payment are two sides of the same RESPA coin, such that it cannot be legal for one party to pay money to another party, but illegal for the second party to receive it. *See Freeman*, 132 S. Ct. at 2041 (because a consumer's payment of an alleged overcharge for a settlement service was legal, the receipt of that charge by the service provider could not be illegal under RESPA). Respondents again reiterate their position that explicitly permitting UGI to continue to cede premiums to Atrium, while prosecuting Atrium for the receipt of those same premiums, is inconsistent on its face.

The Tribunal's explanation that one of the new emails "weakens Respondents' argument . . . because it shows that Enforcement was adamant with opposing counsel that 'the MIs have violated Section 8' of RESPA, and should be enjoined from doing so in the future," is curious. Contrary to the Tribunal's conclusion, Respondents assert that this is exactly what they have

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[32] Indeed, UGI made clear in its briefing on Respondents' motion to intervene in the Florida case that the Consent Order permitted UGI to pay, and Atrium to receive, ceding payments after the entry of the Consent Order. *See CFPB v. United Guaranty Corp.*, No. 13-cv-21189 (S.D. Fla. Feb. 14, 2014), UGI's Memorandum in Opposition to Respondents' Motion to Intervene in the Florida case ("UGI Mem."), ECF No. 18. As UGI explained, the ceding payments were permitted by the Bureau:

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

been arguing: the Bureau believes the reinsurance arrangements like those entered into between UGI and Atrium violated RESPA, yet the Bureau specifically allowed UGI to continue to violate RESPA and the Bureau even obtained the district court's affirmation that the conduct could continue. The Consent Order deems the conduct to be legally permitted; to hold otherwise would mean that the Bureau obtained an order that permitted illegal conduct, which is not permissible and, in fact, is inexcusable. *See, e.g., Howard v. McLucas*, 871 F.2d 1000, 1008 (11th Cir. 1989) (district court must "ensure that [consent order does] not violate federal law"); *United States v. City of Miami, Fla.*, 664 F.2d 435, 440-41 (5th Cir. 1981) (Rubin, J., concurring) (a court must ensure that a consent order "does not put the court's sanction on and power behind a decree that violates . . . [a] statute"); *Williams v. Vukovich*, 720 F.2d 909, 925 (6th Cir. 1983) (vacating consent decree as "illegal" where it "contain[ed] impermissible waivers of future" statutory violations); *Robertson v. N.B.A.*, 556 F.2d 682, 686 (2d Cir. 1977) ("*[A] settlement that authorizes the continuation of clearly illegal conduct cannot be approved*, but a court in approving a settlement should not in effect try the case by deciding unsettled legal questions.") (emphasis added).

Enforcement Counsel's attempt to explain their present position by pointing to the language in the Consent Order that there was no finding on the merits and that UGI did not admit liability for a RESPA violation is of no moment. If the Bureau 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. It did not. Rather, it took civil money penalties and then turned a "blind eye" to the continuation of the exact same conduct it said was illegal.

Enforcement Counsel's inconsistent position regarding their treatment of UGI vis-à-vis Respondents is further highlighted by Dr. Crawshaw in his Rebuttal Report wherein he states:

> [B]ecause Atrium's captive arrangements did not in fact transfer risk, **I do not believe it would have been appropriate for the MIs to reflect any reduction of risk in their financial statements as a result of entering into those arrangements**. Because the MIs in reality retained virtually all of the risk, any reduction in their risk-to-capital ratio would have been illusory and not consistent with the purpose of maximum risk-to-capital requirements.

Rebuttal Report at 121 (emphasis added). Inexplicably, the Bureau entered into a Consent Order with UGI that permitted UGI to continue to cede premiums and to account for the agreement with Atrium (and other lender-captive reinsurers) as insurance on its books while at the same time, Enforcement Counsel is advising this Tribunal that, in fact, such accounting treatment is inappropriate.

The doctrine of judicial estoppel seeks to protect the integrity of the judicial process. Enforcement Counsel's position here, that it can bring an action against Atrium for the receipt of the same payments that the Bureau allowed UGI to make, when RESPA specifically provides that "[n]o person shall give and no person shall accept" any fee for the referral of settlement service business, is repugnant to the judicial process. Stated differently, by paying a civil money penalty of $4.5 million, UGI is permitted to continue to cede premiums in connection with arrangements such as the one entered into with Atrium, for as long as it wants to. The only apparent qualification on that conduct is that the agreement had to be entered into prior to the entry of the Consent Order. Respondents are aware of no authority, and to date Enforcement Counsel have cited none, that stands for the remarkable proposition that a "person" can continue to participate in conduct that a federal agency of the United States is "adamant" is in violation of a federal law that carries criminal penalties. Respondents ask that the Tribunal reconsider its decision to permit Enforcement Counsel to take inconsistent positions in connection with this

administrative action. Because the Bureau is judicially estopped from asserting that the ceding payments violate RESPA, Respondents are entitled to a recommended decision in their favor on any claim based on the receipt of ceding payments or, in the alternative, at a minimum for conduct occurring after the entry of the Florida Consent Orders.

CONCLUSION

This action should have never been filed. RESPA was enacted to prevent kickbacks and fee splits with parties "who did nothing in return for the portions they received." *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 268 (4th Cir. 2002) (citation omitted). Respondents did not violate RESPA. As far back as 1997, HUD reviewed the very arrangements at issue here and concluded that they were permissible subject to certain conditions. The administrative hearing in this case proved one thing – that Respondents repeatedly took steps to ensure that they remained in compliance with HUD's guidance. Enforcement Counsel's case is not based on demonstrating that Respondents failed to comply with HUD's guidance; rather, their case is based on their belief that no captive mortgage reinsurance agreement is permissible under RESPA. That is why Enforcement Counsel made absolutely no attempt to demonstrate how or why Respondents' reinsurance agreements failed to satisfy the requirements in the 1997 HUD Letter. Indeed, Enforcement Counsel, and their expert witness, Dr. Crawshaw, paid mere lip service to that guidance, and then launched an attack based on their belief that pmi reinsurance was "worthless." But other than Dr. Crawshaw's post hoc, backward looking, "multi-year" analysis, Enforcement Counsel offered nothing to support their position. Standing in stark contrast to Enforcement Counsel's lack of evidence were the industry representatives who testified to the benefits of such reinsurance. Once this Tribunal determines that reinsurance services were provided – as it must given the dearth of evidence proffered by Enforcement Counsel – then the

Tribunal must also conclude that the amount of the cede was reasonable. That is so because Enforcement Counsel made no attempt to demonstrate that the 25% cede for the only two arrangements at issue was not reasonable, nor could they since their expert valued the services at $0.00. Therefore, the only evidence on this last point is that of the Milliman reports, which stand unrebutted. Further, given RESPA's criminal penalties, Enforcement Counsel's attempt to hold Respondents liable for conduct that was in compliance with HUD's guidance is inappropriate and contrary to the bedrock principle that clear notice of what constitutes a crime must be provided. Simply put, Enforcement Counsel cannot undermine Respondents' right to due process. Finally, even if Enforcement Counsel demonstrated a RESPA violation – which they did not – they are not entitled to any relief where, as here, there is no evidence to support the issuance of an injunction and "other" equitable relief is neither available through this administrative proceeding nor justified given the losses Atrium paid.

For all of the foregoing reasons, the Tribunal should recommend that Respondents are entitled to judgment in their favor on the Bureau's Notice of Charges.

Dated: August 8, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 8th day of August, 2014, I caused a copy of the foregoing Respondents' Post-Hearing Brief to be filed **under seal** with the Office of Administrative Adjudication and served by electronic mail on the following parties who have consented to electronic service:

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