UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of:	)	
PHH CORPORATION,	)	**ENFORCEMENT COUNSEL'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENTS' APPEAL**
PHH MORTGAGE CORPORATION,	)	
PHH HOME LOANS LLC,	)	
ATRIUM INSURANCE CORPORATION,	)	
and ATRIUM REINSURANCE CORPORATION	)	

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Table of Abbreviations

Throughout this brief, Enforcement cites prior filings in this proceeding using the following abbreviations:

Filing	Docket No.	Abbreviation
Notice of Charges	1	NoC
Brief in Support of Respondents' Motion to Dismiss or, in the Alternative, for Summary Disposition	18	PHH 1st MTD Br.
Enforcement Counsel's Opposition to PHH's Motion to Dismiss	41	EC Opp. to 1st MTD
Expert Report of Mark Crawshaw	55	Crawshaw Rep.
Order Denying Motion to Dismiss, or, in the Alternative, for Summary Disposition	67	March Order
Enforcement Counsel's Prehearing Brief	74	EC Prehearing Br.
Brief in Support of Respondents' Renewed Motion to Dismiss, or, in the Alternative, to Narrow the Notice of Charges	101	PHH 2nd MTD Br.
Rebuttal Expert Report of Vincent Burke	105	Burke Rebuttal Rep.
Rebuttal Expert Report of Mark Crawshaw	108	Crawshaw Rebuttal Rep.
Enforcement Counsel's Opposition to Respondents' Renewed Motion to Dismiss	123	EC Opp. to 2nd MTD
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Respondents' Post-Hearing Reply Brief	183	PHH Reply Br.
Enforcement's Post-Hearing Response Brief	184	EC Resp. Br.
Recommended Decision	205	RD
Brief in Support of Respondents' Appeal	210	PHH App. Br.
Enforcement's Opening Appeal Brief	212	EC App. Br.
Enforcement's Opposition to Respondent's Motion for Leave to Submit Additional Evidence into the Record	213	EC Mot. Resp.

Enforcement also uses the following other abbreviations:

Title	Abbreviation
Administrative Law Judge	ALJ
Letter from Retsinas, Assistant Secretary of H.U.D., to Samuels, Countrywide Funding Corp., August 6, 1997 (**ECX 0194**, Att. A.)	HUD Letter
Respondents	PHH

Introduction

Now that the ALJ's authority over this matter has ended,[1] PHH has much to say about him. We are told that the ALJ "hijacked" the adjudication, PHH App. Br. at 1, "deci[ded] to act as grand inquisitor," *id.* at 18, and "assumed the roles of investigator, prosecutor, expert witness, and even fact witness," *id.* at 1, that when Enforcement supposedly failed to carry its burden on one matter, he "did it for them," *id.* at 8 n.6, that he "took it upon himself to spin a fanciful theory of the case," *id.* at 18, that his description of a live witness's testimony as "evasive" was "specious," "without factual basis," and "spurious," *id.* at 18 n.18, that he "fabricated a number of conclusions out of whole cloth to justify his unwarranted and unsupported recommendations," *id.* at 26, that certain of his statements are "nonsensical," *id.* at 9, "nonsensical" (again), *id.* at 21, "both wrong and nonsensical," *id.* at 19, and "make no sense," *id.* at 21. We are darkly cautioned that these supposed transgressions denied PHH due process, *id.* at 1, and further enlightened about the ALJ's intentions, including that his "overt hostility towards Respondents is evident in virtually every Order he issued as well as in the RD," *id.* at 30, that the RD shows "the degree to which he views his opinion as the only one that matters," *id.* at 20, that he "had already made up his mind … before Respondents put on their case," *id.* at 16, that he "ignor[ed] testimony … to manufacture non-compliance … and support his accusation," *id.* at 24, and that the RD demonstrates his "bias," *id.* at 21, 23, 26.

What PHH has virtually nothing to say about is this: the overwhelming evidence of its liability, as shown in the RD. In fact, looking past the blizzard of characterizations, the single striking feature of PHH's appeal is that it fails even to contest, much less effectively refute, the RD's core findings and the mountain of evidence supporting them. PHH's objections to the factual findings in the RD, its claim of a due process violation, and its rehashing of prior arguments concerning the burden of proof and other matters, are unsupported and should be rejected.

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[1] *See* 12 C.F.R. § 1081.400(e)(2).

Argument

I. PHH provides no basis to reverse the ALJ's factual findings

In seeking reversal of certain factual findings, PHH does not address compelling evidence on which the ALJ relied, proffers arguments that do not undermine the ALJ's reasoning, and asserts that the ALJ ignored relevant evidence when in fact he considered that evidence and provided ample reasons to either disregard it or draw conclusions different from those urged by PHH. PHH also claims that reversal of several factual findings is warranted because Enforcement never requested the finding, but rather, the ALJ manufactured it *sua sponte*, with no notice to PHH. But in *every* such instance claimed by PHH, Enforcement presented the facts and precise arguments during the proceeding and the ALJ simply agreed with Enforcement or (in one instance) PHH made an argument and the ALJ reached a conclusion different from what PHH urged. And while PHH asserts that the ALJ inappropriately "construe[d] snippets of documents against" PHH, PHH App. Br. at 20, it does not explain *how* it believes the ALJ misinterpreted any of the numerous documents cited in the RD to support his conclusion that PHH violated RESPA.

PHH's appeal brief leaves untouched the core factual bases of the ALJ's conclusion that PHH violated RESPA. For example, PHH does not dispute the ALJ's central conclusion that "PHH referred business to MIs in consideration for reinsurance premiums," RD at 78, or any of the following findings:

- Atrium was established "for the purpose of collecting PHH's kickbacks and premium splits," *id.* at 82;
- PHH used its "dialer" to make referrals, and until 2008, the dialer was restricted to its captive MI partners, *id.* at 8-9;
- "From January 2006 through May 2008, nearly 100% of PHH originations carrying mortgage insurance were insured by MIs that had captives with Atrium," *id.* at 71;
- "PHH favored MIs that entered into captive arrangements by sending more loans to them, and … this favoritism extended beyond 2009," *id.* at 72;

- PHH "designed the captive arrangements to transfer as little risk as possible while passing substantial profits on to PHH," *id.* at 69; and
- "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," *id.* at 99.[2]

PHH provides no basis to reverse the ALJ's factual findings. Accordingly, the Bureau should affirm his conclusion that PHH violated RESPA.

a. Genworth 2008-B book year

i. Risk transfer

The ALJ found that Atrium's $5 million dividend withdrawal from the Genworth trust nullified risk transfer for the Genworth 2008-B book year. RD at 66-67. Although PHH calls the finding "wrong and nonsensical," PHH App. Br. at 19, it does not dispute that it took the dividend knowing that doing so violated an essential condition of Milliman's conclusion that the book year passed risk transfer.[3] Rather, PHH seeks reversal on procedural grounds, arguing that this claim was "not raised by EC" and the "RD provided the first notice" of the claim. *Id.* But all of the facts supporting the claim were elicited at the hearing, **Tr. 1990:25-1995:7** (6/3 Schmitz), **1183:22-1184:3** (5/28 Thomas), and Enforcement made the claim precisely in its Post-Hearing Brief, EC Br. at 181.

On the merits, PHH argues that the ALJ erred because Genworth's approval of the dividend means "there was no breach." PHH App. Br. at 19. But whether Genworth approved the dividend has no impact on Milliman's risk transfer conclusion. And Genworth's acquiescence actually

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[2] Because it cannot deny that its MI referrals were influenced by the captive arrangements, PHH mischaracterizes the ALJ's finding of liability as an "accusation that the *only reason* [PHH] dealt with particular MIs is because of the existence of a reinsurance arrangement." PHH App. Br. at 24 (emphasis added). In fact, the ALJ explained that PHH violated RESPA even if "[o]ther factors may have influenced the decision to do business with a particular MI." RD at 73.

[3] PHH's claim that the 2008-B book year passed risk transfer "by a significant margin" is wrong. RD at 67 ("the 2008-B book year was almost as close to failing risk transfer as it was possible to be").

underscores PHH's leverage over the MIs.[4] PHH also seeks to justify the dividend by pointing out that "there is a single trust account covering all book years." *Id.* But when Milliman determined that the Genworth 2008-B book year could pass risk transfer only if Atrium took no dividends, it assumed that the trust "also supports previous books of business," **ECX 0194** at 7, so whatever relevance that fact may have to the analysis was *already* accounted for in Milliman's determination.

The ALJ also found that the Milliman opinion for the Genworth 2008-B book year was untimely, because it was performed after the end of the book year. RD at 67. PHH responds that a risk transfer analysis cannot be performed until the end of the book year, when all of "the actual loans" are placed into the captive. PHH App. Br. at 18. But the very accounting rules on which PHH relies require risk transfer to be assessed "*at contract inception*, based on facts and circumstances known at the time." **ECX 0790** at 22 (emphasis added). *All* of the Milliman reports should be disregarded, because none were prepared at the inception of the book year; rather, they were all prepared after the end of the book year. EC Br. at 128-30.[5] Moreover, PHH's claim that a risk transfer analysis cannot be performed until the end of the book year is contradicted by its attempt to rely on a draft Milliman opinion, dated July 9, 2008, to establish risk transfer for the UGI 2009 book year, which incepted on March 1, 2009. **RCX 2002**; **RCX 0057** at 1, ¶ 1.

ii. Price commensurability

The ALJ concluded that the methodology Milliman used to test price commensurability is fatally flawed. RD at 68-69. He rejected Milliman's loss ratio test as incomplete, and explained that even if it were a valid methodology, the results for the Genworth 2008-B book year would disprove

[4] The dividend clearly violated the Fifth Amendment to the Genworth agreement. RD at 66. While the impact of the dividend on the validity of Milliman's risk transfer opinion does not depend on whether the dividend also violated the written agreement, the fact that PHH removed the dividend after committing not to do so supports the ALJ's findings of scienter.

[5] Because PHH's Section 8(c)(2) defense relies entirely on its interpretation of accounting rules as permitting each book year to be treated as a separate contract for purposes of analyzing risk transfer, a risk transfer analysis that does not even comply with those accounting rules must be disregarded.

price commensurability because Atrium's expected loss ratio was lower than Genworth's expected loss ratio. *Id.*[6] He also found that Milliman's return-on-capital test relied on a "capital contribution" assumption that was "fictitious." *Id.* As Schmitz admitted, the capital contribution he assumed for the Genworth 2008-B book year was not money that Atrium actually put in the trust; rather, Schmitz himself simply designated $2,060,488 of funds already in the trust (the vast majority of which were premiums ceded by Genworth) as Atrium's "capital contributions." **Tr. 2009:13-2010:10** (6/3); *see also* EC Br. at 147-48.

PHH's appeal does not address, let alone refute, the ALJ's reasoning.[7] PHH does not identify any flaw in the ALJ's logical observation that the loss ratio comparison for the Genworth 2008-B book year would (if anything) indicate excessive pricing. Nor does PHH assert that Schmitz's "capital contribution" figures reflected reality, or explain why Schmitz selected those particular amounts. Instead, PHH argues that the ALJ improperly referred to a Milliman report for the Radian 2004 book year because that book year had a different ceding rate from the Genworth 2008-B book year. PHH App. Br. at 21. But Milliman used the *same metric* to test pricing under both book years, and it is fictitious, for the same reason, in both cases.[8]

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[6] Loss ratio comparisons are meaningless as measures of value. It is trivially easy to devise an arrangement that harms the MI by ensuring a profit to the reinsurer at the MI's expense, even though the reinsurer's loss ratio over the arrangement will be *higher* than the MI's loss ratio. Such a guaranteed transfer of profit to the reinsurer will occur if the arrangement is structured so that the reinsurer's loss ratio over the arrangement cannot exceed 100%. *See* **Crawshaw Rebuttal Rep.** at 34-35 (providing example); *id.* at 46-48 (providing example); EC Br. at 108-09; **Tr. 1954:14-19** (6/3 Schmitz). Comparing loss ratios for a period of less than the entire duration of an arrangement is even more misleading, because any excess of claims over premiums during one period can be paid using premiums from other periods, without any risk of economic loss incurred by the reinsurer.

[7] PHH discusses its defense of Milliman's methodology for testing price commensurability for the Genworth 2008-B book year in the section of its brief titled "UGI 2009 Book." Its arguments are not relevant to the UGI 2009 book year because Milliman never applied its methodology to that book year. *See* p. 6, *infra*.

[8] PHH provides no explanation for why Milliman assumed a $92,304 capital contribution in its analysis of the Radian 2004 book year when Atrium in fact contributed only $16,120. *See* RD at 68.

Crucially, Milliman's risk transfer opinions are also fictitious for the same reason. A return to the MI of some previously ceded premiums already in the trust cannot be called an "economic loss" to Atrium, just as an arbitrary portion of the funds already in the trust cannot be called an Atrium "capital contribution." Both are accounting tricks that elevate form over substance.

Finally, while PHH asserts that the ALJ, in criticizing Milliman's methodology, "embarked on his own theory of the case," in fact Enforcement made these arguments at the hearing, in its Post-Hearing Brief, and in its expert's reports. *See, e.g.,* **Tr. 2009:13-2010:10, 2023:12-2025:5** (6/3 Schmitz); EC Br. at 147-48; **Crawshaw Rep.** at 71-72; **Crawshaw Rebuttal Rep.** at 45-48; **Tr. 700:3-17** (3/26 Crawshaw).[9]

b. UGI 2009 book year

i. Risk transfer

As discussed, *see* p. 4, *supra*, PHH attempts to excuse the untimeliness of the Milliman opinions by claiming that a valid risk transfer analysis cannot be performed until the end of the book year. PHH App. Br. at 18. As discussed above, this is incorrect, *see* p. 4, *supra*, but if that position is accepted, PHH must be precluded from claiming that the UGI 2009 book year passed risk transfer, because the draft opinion that it claims applies to that book year was prepared before the end of that book year (and before its inception). And regardless of its date, this draft opinion must be disregarded for the additional reason that it is not a final opinion, and is therefore unreliable even under Milliman's methodology.

ii. Price commensurability

The ALJ concluded that PHH failed to establish price commensurability for the UGI 2009 book year because the draft Milliman opinion on which PHH relies contains no analysis of price

[9] Crawshaw's reports provide an alternative basis to deny PHH's claim of price commensurability. As Crawshaw explains, Atrium's expected profit margin (even on a book year basis) was vastly in excess of profit margins in typical property and casualty insurance or reinsurance arrangements. **Crawshaw Rep.** at 59-61; **Crawshaw Rebuttal Rep.** at 21-26; **Tr. 2257:7-24** (6/4 Crawshaw).

commensurability. RD at 67-68. Because the Milliman reports are the sole evidentiary basis of PHH's Section 8(c)(2) defense, this omission is fatal to its claim that the 25% ceding rate was commensurate with the purported value of that book year. PHH's appeal ignores this evidentiary gap, and instead simply asserts that the 25% rate was "industry standard." PHH App. Br. at 20. But this does not establish price commensurability, because other, similar captive arrangements were very likely also overpriced. RD at 69; EC Resp. Br. at 61-62.

PHH should not be permitted to rely on the Milliman opinions as its sole evidence of price commensurability, and at the same time ask the Bureau to ignore its failure to obtain such an opinion for particular book years. The Bureau should affirm the ALJ's finding that the UGI 2009 book year fails price commensurability, even under PHH's artificial book year construct.

c. The HUD Letter

PHH argued before the ALJ that HUD declared in the HUD Letter that captive mortgage reinsurance arrangements were permissible under RESPA. PHH Br. at 27. PHH contends that the ALJ, in rejecting that argument, "ignored the plain language" of the HUD Letter – in particular, HUD's statement that a captive arrangement gives the lender "a financial interest in having the primary insurer in the captive reinsurance program selected to provide the mortgage insurance." PHH App. Br. at 27; **ECX 0194**, Att. A. Contrary to PHH's characterization, that statement did not give lenders permission to use captive arrangements to steer referrals in exchange for kickbacks; the lender's "financial interest" in the referrals simply explains *why* captive arrangements are potentially problematic under Section 8(a).[10] Indeed, HUD warned that "[i]f the lender or its reinsurance

[10] PHH bizarrely asserts that the ALJ made a "significant error" by attributing HUD's "financial incentive" statement to PHH. PHH App. Br. at 22. The ALJ did not attribute HUD's statement to PHH. In its Post-Hearing Brief, PHH contended that its captive arrangements did not violate RESPA because HUD permitted such arrangements when it "recognized the incentive to place loans with MIs involved in captive arrangements." PHH Br. at 27. So the ALJ, directly quoting PHH, noted that "Respondents acknowledged an 'incentive to place loans with MIs involved in captive arrangements.'" RD at 72.

affiliate is merely given a thing of value by the primary insurer in return for this referral, in monies or the opportunity to participate in a money-making program, *then section 8 would be violated,*" and that a payment under a captive reinsurance arrangement would qualify for protection under Section 8(c)(2) only if it is "solely" for reinsurance services actually performed. **ECX 0194**, Att. A at 1, 3 (emphasis added). *See also* EC Resp. Br. at 5-7. HUD also explained that the payment must be bona fide compensation "for reinsurance services." **ECX 0194**, Att. A at 3.

Thus, rather than absolving PHH, the HUD Letter supports the ALJ's holding that PHH violated RESPA, because PHH does not even claim that the MIs ceded premiums to Atrium "solely" to obtain reinsurance from Atrium. PHH cannot make such a claim in light of the voluminous evidence that those payments were for referrals, and the absence of documentary evidence that the MIs entered into the arrangements with Atrium out of any desire to purchase protection against the risk of housing defaults. Atrium was established to collect kickbacks, RD at 82, and "[a] kickback by its very nature is not a bona fide payment," May Order at 4.

d. The alleged "benefits of reinsurance and paid losses"

PHH claims that the ALJ's "bias" led him to disregard many of its arguments about various "benefits of reinsurance" other than risk transfer. PHH App. Br. at 23. As Enforcement has explained, they are not real benefits to the MIs. EC Resp. Br. at 65-77. Moreover, PHH has not cited a single contemporaneous document from PHH or any of its MI partners reflecting any of these other "benefits." The lack of such documentary evidence belies the claim, made in self-serving testimony at the hearing, that those "benefits" motivated any MI to cede premiums to Atrium.[11]

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[11] The ALJ noted that Dan Walker of UGI "admitted that UGI would have been better off financially if it had put its premiums in a savings account." RD at 35. PHH claims that the ALJ is "hostil[e]" to insurance because he "believes that where an insurer collects more in premiums than it pays in claims, there is wrongdoing." PHH App. Br. at 25 n.23. The wrongdoing, however, is not the mere fact that premiums exceeded claims, but that the arrangements were "designed" so that it was a "virtual certainty" that premiums would substantially exceed claims, resulting in "substantial profits" to PHH even after a once-in-a-generation real estate crisis. RD at 69, 100.

In any event, PHH cannot avoid the risk transfer requirement by pointing to other "benefits of reinsurance." An arrangement that lacks the essential ingredient of risk transfer is not reinsurance at all, so there can be no "benefits of reinsurance" from such an arrangement. *See* **ECX 0790** at 5, ¶ 9 ("The *essential ingredient* of a reinsurance contract is the transfer of risk …. *not only in form but in fact*") (emphases added). Because Atrium never "in fact" assumed any risk under the arrangements, no other benefit can turn them into real reinsurance. EC Resp. Br. at 62-65.[12]

PHH also contends that Atrium's payment of over $150 million in claims to the MIs entitles it to protection under Section 8(c)(2). PHH App. Br. at 23. But PHH does not assert that it paid those claims using anything other than ceded premiums, or that it ever faced a significant risk of having to do so. Section 8(c)(2) does not allow participants to a kickback scheme to avoid RESPA liability simply by returning some kickbacks.

e. PHH's alleged efforts to comply with RESPA

PHH claims that the ALJ ignored its "significant efforts to engage Milliman to ensure" RESPA compliance. PHH App. Br. at 25. But PHH's illegal scheme was already a decade old before it decided to retain Milliman, PHH did not obtain any Milliman report for the majority of book years, and those it did obtain were all untimely,[13] with some completed three years after the

[12] Thus, while the ALJ found that Atrium's arrangements "at least hypothetically provided real benefits to the MIs by reducing the volatility of financial results and allowing the accounting of the arrangements as reinsurance," those hypothetical "benefits" cannot be considered, because they cannot legally be obtained without the essential element of risk transfer. Arrangements that do not transfer risk cannot be used to smooth earnings. *See, e.g.*, *SEC v. Stanard*, No. 06 Civ. 7736 (GEL), 2009 WL 196023 at *3 (S.D.N.Y. Jan. 27, 2009) ("At least one effect of [the risk transfer requirement] is to prevent reinsurance companies from distorting their profits by artificially smoothing earnings."); *see also* EC Resp. Br. at 68-69. And without risk transfer, arrangements may not be accounted for as reinsurance. **ECX 0790** at 5 ("Unless the agreement contains this essential element of risk transfer, no credit shall be recorded."). Section 8(c)(2) does not protect payments made to obtain illegal benefits.

[13] The ALJ found that PHH's auditors, KPMG, criticized the tardiness of the Milliman opinions. RD at 65-66. PHH objects that the finding was based on an exhibit, ECX 0461, that was not referenced in Enforcement's Post-Hearing Brief. PHH App. Br. at 19 n.20. But Enforcement referenced a different version of the email in its Post-Hearing Brief. EC Br. at 115-16, 129 (citing ECX 0459).

inception of the book year. EC Br. at 127-30. These facts show that the Milliman reports were an afterthought, commissioned only to provide a *post hoc* justification for the scheme. They were, as the ALJ suggests, "only a formality." RD at 66. Moreover, the reports expressly preclude PHH's attempt to rely on them to establish RESPA compliance.[14]

f. PHH's attempt to use Milliman's estimates as a basis for offsets

PHH contends that the ALJ erred in declining to recommend an offset based on Milliman's estimates of the expected value of future claim payments, which they allege UGI and Genworth actually received through commutation payments. PHH App. Br. at 25-26. As Enforcement has explained, no offset should be applied to any disgorgement award, even if PHH could quantify it. EC App. Br. at 16-20; EC Br. at 190-200. But as the ALJ found, PHH provided no basis to quantify any offset to a disgorgement award based on premiums ceded under the UGI 2009 book year and the Genworth 2008-B book year, because it presented no evidence of what portion of the commutation payments was allocated to those book years. RD at 92-93. PHH's appeal should be denied because it points to no such evidence. PHH simply asserts that "Atrium paid both Genworth and UGI the net present value of those expected losses," PHH App. Br. at 26, but the only source cited is Crawshaw's testimony in which he stated (on the page before the cited pages) that he does not know how the commutation payments were calculated, **Tr. 2325:24-25** 6/4.[15] Thus, the ALJ

[14] PHH seizes on Crawshaw's testimony that it was "reasonable" to rely on Milliman, but it is unremarkable to acknowledge that a company can rely on an *actuary* to perform *actuarial* work. EC Br. at 48-49. Both parties agree that the *ultimate* decision as to whether an arrangement can properly be accounted for as reinsurance is solely management's responsibility. *Id.* at 49. Moreover, setting aside that Crawshaw is not qualified to opine on legal issues such as whether an actuarial report immunizes a referral scheme from RESPA liability, PHH ignores Crawshaw's other testimony that PHH should not have relied solely on Milliman, but should have also performed a careful internal review of the arrangements using its own experts and attorneys. **Tr. 960:25-961:12** (3/28).

[15] PHH also refers to Crawshaw's statement that he saw no evidence that the UGI and Genworth commutations were not "arms-length" transactions. PHH App. Br. 25 n.24. But contrary to PHH's argument, this statement does not mean that the commutations were in fact arms-length transactions, nor does it enable the Bureau to determine what portion of the commutation payments are apportionable to particular book years.

correctly found that nothing in the record shows how, if at all, Milliman's estimates were incorporated into the calculation of the commutation payments. PHH's failure to present the documents showing how those payments were calculated renders any offset based on Milliman's estimates sheer speculation. *See, e.g.*, *United States v. McKenzie*, 550 F. App'x 221, 226 (5th Cir. 2013) (defendant "bore the burden of proving the amount of any … offset" but "failed to provide credible evidence in the district court" to quantify any offset).[16]

g. The effect of captive arrangements on the housing market

The ALJ's conclusion that long-lasting captive arrangements have an "adverse systemic effect" on the MI industry and potentially the housing market, RD at 99, is well supported. The cited source is a 1998 presentation from the country's major MIs. PHH argues that the document's age makes it irrelevant, but the fact that it was generated just as captive arrangements were beginning to proliferate enhances its reliability, because it contains the MIs' unvarnished view of the threats posed by those arrangements to the stability of the MI industry and the housing market *before* the practice became entrenched. It is far more credible than the testimony of witnesses who participated in the practice for years, and now have an incentive to defend it.[17]

[16] If the Bureau nonetheless assumes that the commutation payments incorporated Milliman's projections as is, any disgorgement award based on premiums ceded under the UGI 2009 book year and Genworth 2008-B book year must be increased to reflect Milliman's estimates of the present value of future ceded premiums under those book years. *See* EC Resp. Br. at 128-29. No offset to this amount for any expected claim payments would be appropriate, for the reasons discussed on pages 190-200 of Enforcement's Post-Hearing Brief.

[17] Contrary to PHH's argument, PHH App. Br. at 27, the fact that the record does not show how, if at all, state regulators responded to the MIs' concerns does not undermine this document's significance. The MIs' truthfulness in the document does not turn on whether the regulators later responded to it. Moreover, once captive arrangements proliferated throughout the industry, the participants ceased being forthcoming to state regulators about the nature of the arrangements. Rather than express concerns to regulators about captive arrangements, they concealed their misconduct by representing on their financial statements that the arrangements provided genuine reinsurance. **Tr. 1739:3-12, 1746:4-25** (5/30 Burke).

h. PHH's express contractual referral agreement with CMG

The ALJ concluded that a contract provision quoted in an internal PHH email was a written "agreement to refer settlement business [to CMG] in consideration of premiums ceded to Atrium." RD at 74; *see id.* at 20-21. PHH asserts that the ALJ's conclusion is "erroneous," but it does not explain why. PHH does not contend that the email misquotes the contract, or that the quoted language was never actually executed as an agreement between PHH and CMG. Nor does PHH explain how it believes the ALJ misinterpreted that language.

PHH's objections are procedural. PHH complains that "EC never produced" the contract and criticizes the ALJ for opining on a document "he has never seen." PHH App. Br. at 27. But it was PHH that was responsible for producing the document, and PHH failed to do so, RD at 74, even though it was responsive to a CID request. PHH states that the Bureau never called a CMG witness, PHH App. Br. at 27, but PHH could have called a CMG witness to rebut the ALJ's preliminary findings regarding the CMG arrangement in the May Order. The Bureau should uphold the ALJ's conclusion that the contract is an agreement to refer, and reject PHH's request for a favorable inference, when it wrongfully concealed the contract.

i. PHH's affiliated business disclosure

According to PHH, the ALJ "took it upon himself" to analyze PHH's affiliated business disclosure and conclude that it was misleading. PHH Br. at 28. In fact, PHH injected that disclosure into the proceeding, quoting it in its Post-Hearing Brief and relying on it to make several points for its defense. *Id.* at 11, 27, 33-34. Rather than find that the disclosure reflected PHH's transparency to borrowers, as PHH argued, the ALJ determined that it was misleading. RD at 97-98. PHH's "appeal" on this point is simply a complaint that the ALJ, after PHH asked him to analyze the disclosure, found that it showed the opposite of what PHH claimed. The ALJ's conclusion is correct. PHH's assertion that its disclosure "is virtually identical to the form HUD promulgated in

1996," PHH App. Br. at 28, does not refute that conclusion, which turned on the material omissions that made PHH's use of the HUD form misleading. RD at 98.[18]

j. The preferred provider list

The ALJ correctly found that PHH's preferred provider list was a referral mechanism. PHH disputes the finding because the correspondent lender "always had the option to select the MI," PHH App. Br. at 28, but to prove a referral, Enforcement need not show that PHH dictated the choice of MI. Imposing a fee when a non-preferred provider was selected clearly had "the effect of affirmatively influencing the selection" of the MI. 12 C.F.R. § 1024.14(f). PHH's argument that the fee did not influence "the borrower's selection" of the MI is unavailing. When a correspondent lender selected a preferred provider to avoid the fee, that selection became the borrower's selection by default, absent a contrary selection by the borrower. PHH influenced the borrower's selection by influencing the correspondent's selection.

k. The UGI March 2007 dividend

In response to the ALJ's finding that "[n]othing in the record explains why PHH's preference" regarding the $52 million dividend from the UGI trust "prevailed" over UGI's preference for a smaller dividend, PHH asserts that the dividend was permissible, because it did not violate any regulatory trust fund requirements and the trust contained an "enormous" amount of premiums to fund the dividend. PHH App. Br. at 29. PHH's responses do not undermine the ALJ's finding. Compliance with regulatory trust fund requirements does not establish compliance with RESPA, and the fact that the trust contained large sums is completely consistent with the ALJ's findings that Atrium charged an excessive price and that the arrangements were established to

[18] Nor was PHH deprived of "the opportunity to demonstrate that borrowers had a choice." PHH Br. at 28. PHH had every opportunity to put on evidence at the hearing to support the claim it made in its Post-Hearing Brief that borrowers had a choice. In any event, the theoretical option of a borrower to choose a different MI from the one selected for her by PHH does not negate the existence of a referral, because PHH, at a minimum, "influenced the selection" of the MI provider. *See* EC Resp. Br. at 32-34.

funnel kickbacks to PHH. RD at 67-69, 82. As for why PHH's preference prevailed, the record provides the explanation – PHH had "a lot of leverage" over UGI from its ability to control referrals. **Tr. at 2206:6-10** (6/4 Walker). The $52 million dividend is especially notable, because PHH has relied on contractual reserve requirements as evidence that its arrangements provided real reinsurance.[19] When those requirements prevented PHH from taking as much as it wanted from the trust, it simply obtained an amendment to change the requirements (without providing any consideration to UGI in return), rendering them meaningless.

II. PHH has not been denied due process of law

PHH raises three separate arguments for why it was denied due process of law in the hearing. None has merit.

First, PHH argues that the opportunity the ALJ granted Enforcement under the rules to file its only dispositive motion – granted simultaneously with the opportunity for PHH to file its *second* such motion – resulted in a "preemptory" ruling that "foreclosed Respondents from presenting evidence in support of their position on [certain] liability issues." PHH App. Br. at 16. In fact, the dispositive motions offered PHH an unfettered opportunity to present evidence in support of its position on liability issues; that PHH elected not to do so (with the exception of very limited evidence cited in opposition to Enforcement's motion) cannot be ascribed to procedural unfairness. *See* May Order at 21 ("I explicitly authorized both sides to move for 'whatever dispositive relief' they desired …. both sides could have relied on their hearing exhibits to the fullest extent without further foundation; Enforcement has done so, but Respondents, for whatever reason, have not.").[20] As the

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[19] **ECX 0653** (PHH NORA Submission) at 11, 23 ("Atrium always met its contractual funding obligations with respect to the four trusts that were created in connection with its reinsurance arrangements …. There has never been any question that Atrium met all required reserves.")

[20] PHH objects to the ALJ's "preemptory" ruling, even though this does no more than describe the proper function of summary disposition, which "preempts" unnecessary proceedings. *See, e.g.*, 10A Fed. Prac. & Proc. Civ. § 2712 (3d ed.) (summary judgment is "a method of promptly disposing of actions" where "parties need not wait until a case is fully tried"); *see also* 12 C.F.R. § 1081.212(c). In

ALJ showed in detail, there was no procedural unfairness. *Id.* at 20-22.

Second, PHH raises the same argument recited in its motion filed concurrently with its appeal brief, Dkt. 211, that PHH was not given notice of one "theory of liability" on which the RD was decided. PHH App. Br. at 22.[21] Enforcement has already refuted this argument in detail. *See generally* EC Mot. Resp. In support, PHH states or implies a series of premises, including 1) that the sole "theory of liability" in the NoC was that Atrium's reinsurance was worthless; 2) that determining whether the price charged by Atrium was commensurate with the value of any service provided is necessary to resolve Enforcement's claims, rather than PHH's Section 8(c)(2) affirmative defense; 3) that there is a real difference between the argument that the reinsurance was overpriced because it had no value, and the argument that, even if it had some value, it was still overpriced (i.e., an "overbilling" theory); 4) that this supposed difference is so significant as to require separate notice of each "theory" and separate evidence to prove or rebut; and 5) that PHH did not receive such notice. As Enforcement has already demonstrated, although all are essential to PHH's due process claim, every single one of these premises is false. *See* EC Mot. Resp. at 1-8.

The entire pretext for PHH's argument is a brief, off-the-cuff characterization by the ALJ of the parties' pleadings from the bench on one occasion. PHH App. Br. at 16-17; *see* EC Mot. Resp. at 1 n.1; **Tr. 962-63**. That the ALJ happened to refer to "overbilling" as an "alternative" theory he did not "see[] in anybody's prehearing brief" does not make it so, much less render the theory so materially different that due process compels separate notice of it. In fact, Enforcement did include

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fact, it is likely the success of Enforcement's motion that PHH really objects to here, since at first PHH welcomed the ALJ's invitation. *See* **Tr. 37** (3/24); *see also* May Order at 21.

[21] PHH also cites to *United States v. Santos*, 553 U.S. 507 (2008), a criminal case turning on the interpretive canon known as the rule of lenity, without addressing the authorities cited in the ALJ's reasoned rejection of this same argument. PHH App. Br. at 16; *see* RD at 75-76. Even if the rule of lenity had hypothetical application to this civil RESPA matter, a point Enforcement does not concede, PHH has not identified any ambiguity in RESPA permitting use of the rule of lenity, a "rule of last resort." RD at 76 (citations omitted); *see Santos*, 553 U.S. at 514 ("[t]he rule of lenity requires *ambiguous* criminal laws to be interpreted in favor of the defendants subjected to them.") (emphasis added; citations omitted). *See also* EC Resp. Br. at 12-15.

the "overbilling" expression of the argument in its prehearing brief, *see* EC Prehearing Br. at 14, 16, and in the NoC, its expert's written report, and its post-hearing brief, *see* EC Mot. Resp. at 2, 6-8.

And the assertion that "[w]hile Respondents answered the allegations in the NOC, they could not respond to the ALJ's allegations because they were revealed for the first time in the RD" is, again, simply false. A mere *two days* after the NoC was filed, PHH moved to dismiss and asserted that the NoC "seeks to have it ***both ways*** – the payment for the reinsurance was either an ***'overcharge'*** for the services rendered; ***or*** was a payment for which ***no services*** were performed" and "[u]nder ***either theory*** … the Notice is subject to dismissal." PHH 1st MTD Br. at 26 (emphases added); *see also* EC Mot. Resp. at 7. Thus, PHH, having instantly understood from the NoC that Enforcement sought to "have it both ways," then, apparently, forgot it – notwithstanding Enforcement's repeated highlighting of the theme throughout the litigation – until reminded of it by the RD. There is no due process violation. Nor is there any basis to find that the ALJ "ac[ted] as a litigant." The case cited by PHH, *N.L.R.B. v. Tamper*, is not on point since due process was held violated there only because respondents were held liable by an ALJ for violation of an entirely different statutory provision than the one charged. 522 F.2d 781, 789 (4th Cir. 1975).

Enforcement has already addressed PHH's last due process argument, that the ALJ's use of documents not testified to at the hearing (or cited by Enforcement) was improper. *See* EC Mot. Resp. at 8-9. PHH argues, again without citation to authority, that "the use of such documents cannot take the place of additional testimony that is necessary to refute the numerous baseless conclusions reached by the ALJ discussed *infra*." PHH App. Br. at 17-18. Since, as shown above, PHH was on timely notice of all the theories and evidence in this matter, if such testimony was "necessary," PHH's failure to adduce it when given the opportunity at the hearing is attributable not to the ALJ but to PHH – and there is no due process violation.

III. PHH provides no basis to reverse the ALJ's legal rulings

a. Burden of proof under Section 8(c)(2)

PHH contends that Enforcement bears the burden of proving that Section 8(c)(2) does not shield PHH from liability for violating Sections 8(a) and (b).[22] PHH App. Br. at 3-5. Its arguments are all erroneous.[23] Section 8(c)(2) is an affirmative defense that must be proved by the respondent.[24] Similar provisions in other federal statutes have been held to be affirmative defenses that must be proved by defendants, and Section 8(c)(2) should be interpreted consistently with those decisions. EC Resp. Br. at 19-21. PHH offers no compelling reason to hold otherwise. Instead, PHH misreads a number of authorities that, properly construed, do not support its position.

First, quoting part of Rule 303(a) of the Bureau's Rules of Practice for Adjudication Proceedings (Adjudication Rules), PHH asserts that Enforcement "bear[s] the burden of establishing all 'ultimate issues' in these proceedings." PHH App. Br. at 3. But Rule 303(a) places the burden on Enforcement only with respect to "the ultimate issue(s) of *the Bureau's claims*." 12 C.F.R. § 1081.303(a) (emphasis added). An affirmative defense is not the Bureau's claim.[25]

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[22] Even if the Section 8(c)(2) burden of proof were placed (incorrectly) on Enforcement, it would meet the burden. Only Crawshaw analyzed the *substance* of the arrangements, and he concluded that, setting aside the artificial book year form, they did not transfer any *actual* risk to Atrium (consistent with the conclusions on pages 99-100 of the RD). *See generally* **Crawshaw Rep.**, **Crawshaw Rebuttal Rep.** His opinions were unrebutted – Schmitz never analyzed the probability that Atrium would incur an actual economic loss under any arrangement *in its entirety*, and Cascio and Burke just relied on Schmitz's risk transfer opinions. **Tr. 1936:14-1937:2** (6/3 Schmitz); *id.* **1459:13-16** (5/29 Cascio); *id.* **1701:12-14** (5/30 Burke); **Burke Rebuttal Rep.** at 14.

[23] Enforcement also addressed this issue on pages 16-21 of its Post-Hearing Response Brief.

[24] In its Opening Appeal Brief, Enforcement argued that the Section 8(c)(2) defense is unavailable to PHH as a matter of law because PHH obtained a thing of value as consideration for referrals. EC App. Br. at 23-25. If that argument is accepted, Section 8(c)(2) cannot shield PHH from liability regardless of which party bears the burden of proof. The arguments in this section assume that a Section 8(c)(2) defense is not categorically unavailable.

[25] Moreover, as PHH recognizes, under other agencies' administrative procedures, a respondent typically bears the burden of proving issues raised by it. PHH App. Br. at 3 n.3. Nothing in the Adjudication Rules indicates any intention to depart from this well-established standard. To the contrary, the Summary of the Final Rule states that it was "modeled on the uniform rules and procedures for administrative hearings adopted by the prudential regulators pursuant to Section 916

PHH next argues that RESPA also places the burden on the plaintiff to prove that Section 8(c)(2) does not apply. PHH cites *Public Employees Retirement System v. Betts*, 492 U.S. 158, 165 (1989), for its view that Section 8(c) is a "rule of construction and not a separate defense." PHH App. Br. at 3. In *Betts*, the Supreme Court construed a provision of the Age Discrimination in Employment Act (ADEA) as "the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the Act." 492 U.S. at 181 (discussing ADEA Section 4(f)(2)). PHH argues that because Section 8(c) of RESPA begins with language ("Nothing in this section shall be construed as prohibiting …") that it deems to be similar to that of the ADEA provision at issue in *Betts* ("It shall not be unlawful for an employer …"), Section 8(c) should be construed in the same manner as ADEA Section 4(f)(2) was construed in *Betts*. But the *Betts* interpretation of ADEA Section 4(f)(2) should be given no weight here, since, "as a result of [*Betts*]," Congress amended the ADEA to "restore the original congressional intent in passing and amending the [ADEA]." Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, § 101, 104 Stat. 978 (1990). More recently, in *Meacham v. Knolls Atomic Power Laboratory*, the Supreme Court explained that the OWBPA "clarif[ied] that §[4](f)(2) specifies affirmative defenses." 554 U.S. 84, 94 (2008). The clarifying amendments show that *Betts*' interpretation of the original congressional intent was wrong.[26]

In *Meacham*, in a case involving a neighboring provision of the ADEA, the Supreme Court reiterated "the familiar principle that when a proviso carves an exception out of the body of a statute or contract those who set up such exception must prove it." 554 U.S. at 91 (internal quotation marks and alterations omitted) (interpreting ADEA Section 4(f)(1)). "That longstanding convention is part of the backdrop against which the Congress writes laws, and [courts] respect it unless [they] have

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of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989; the [F.T.C.] Rules of Practice …; and the [S.E.C.] Rules of Practice …." Adjudication Rules, 77 Fed. Reg. 39058 (June 29, 2012) (codified at 12 C.F.R. § 1081) (internal citations omitted).

[26] *Betts* hinted at its own erroneousness, acknowledging that Section 4(f)(2) of the ADEA "appears on first reading to describe an affirmative defense." *Betts*, 492 U.S. at 181.

compelling reasons to think that Congress meant to put the burden of persuasion on the other side."[27] *Id.* at 91-92 (citation omitted). PHH supplies no reason – compelling or otherwise – to think that Congress meant to put the burden of proving the inapplicability of Section 8(c)(2) on the plaintiff.[28] There is thus no basis to depart from the "longstanding convention" discussed in *Meacham*. Consistent with that convention, provisions of other statutes that similarly describe exempted conduct as falling outside the prohibitory provisions have been held to be affirmative defenses that defendants must prove. *See*, *e.g.*, 42 U.S.C. § 1320a-7b(b)(3) (Anti-Kickback Statute subsection providing that prohibitions "shall not apply to" certain conduct); EC Resp. Br. at 20-21 (citing cases holding that defendants bear the burden of proving defenses under the Anti-Kickback Statute).[29]

PHH cites two district court cases which placed the Section 8(c) burden of proof on plaintiffs. PHH App. Br. at 4 (citing *Rambam v. Long & Foster Real Estate, Inc.*, No. 11 Civ. 5528, 2012 U.S. Dist. LEXIS 184839, at *2 (E.D. Pa. June 22, 2012), and *Capell v. Pulte Mortg. L.L.C.*, No. 07 Civ. 1901, 2007 U.S. Dist. LEXIS 82570, at *18 (E.D. Pa. Nov. 7, 2007)). But *Rambam* merely cited *Capell* without discussion, and *Capell* provides no explanation or authority for its bare statement that

[27] The Supreme Court also noted that the fact that "exemptions [are] laid out apart from the prohibitions" supported its conclusion that the exemptions were affirmative defenses. *Id.* at 91. Section 8(c)(2) is "laid out apart from the prohibitions" identified in Sections 8(a) and 8(b).

[28] In *Betts*, by contrast, the Supreme Court had several reasons to believe that Congress intended to put the burden on plaintiffs to prove that ADEA Section 4(f)(2) did not exempt the employer from liability. The Court found indications to that effect in the legislative history and in "the peculiarity of a pretext-revealing condition in the phrasing of the provision (that a benefit plan 'not [be] a subterfuge to evade the purposes' of the ADEA)," an analogue of which had previously led the Court to place the burden on plaintiffs asserting claims under Title VII of the Civil Rights Act of 1964. *Meacham*, 554 U.S. at 94 (discussing *Betts*). The Court also noted that the designation of the exempted conduct in Section 4(f)(1) as being "otherwise prohibited" dispelled "any doubt" that the "natural view" of such an exemption as an affirmative defense was correct. *Id.* at 93-94. But it does not follow that the absence of the "otherwise prohibited" language in Section 8(c) of RESPA, by itself, creates any doubt as to whether the "natural view" view applies. Such language would merely reinforce the "familiar principal" and "longstanding convention" that the "natural view" does indeed apply. *Id.* at 91-92.

[29] Like Section 8(c) of RESPA, the Anti-Kickback Statute's defense subsection does not characterize the exempted conduct as being "otherwise prohibited."

"a plaintiff asserting a RESPA § 8 claim must establish that the transaction is not exempt under RESP[A] § 8(c)." *Capell*, 2007 WL 3342389 at *6. The *Capell* court may have been referring to the plaintiff's claim under Section 8(c)(4) – the only subsection of Section 8(c) at issue in that case. But Section 8(c)(4) is unique in significant respects, so statements about the burden of proof under Section 8(c)(4) are not necessarily applicable to Section 8(c)(2).[30] And in any event, to the extent the *Capell* court's statement was intended also to be applied to Section 8(c)(2), it is contradicted by the decisions of several Courts of Appeal.[31] May Order at 3-4.

PHH also claims that Section 8(d)(3) "provides an affirmative defense for failure to comply with § 8(c)(4)(A) and explicitly shifts the burden to a defendant to prove that defense," and that "[t]o consider § 8(c) an affirmative defense would render 8(d)(3) surplusage." PHH App. Br. at 4. But given the unique features of Section 8(c)(4), the issue of which party bears the burden of proof under Section 8(c)(2) should not be determined based on arguments about Section 8(c)(4). Therefore, the Bureau need not resolve the precise meaning of Section 8(c)(4) and Section 8(d)(3) in this proceeding. In any case, Section 8(d)(3) does not "explicitly shift[] the burden." That provision

[30] In Section 8, Section 8(c)(4) is twice described as a provision that can itself be violated. *See* 12 U.S.C. § 2607(d)(3) (explaining that a plaintiff can be "*liable for a violation* of the provisions of subsection (c)(4)(A)") (emphasis added); 12 U.S.C. § 2607(c) (referring to "*violation* of clause (4)(B)" of Section 8(c)) (emphasis added). No other subsection of Section 8(c) is similarly described. And some courts have held that Section 8(c)(4) creates an independent cause of action (as to which a plaintiff would naturally bear the burden). *See, e.g.*, *Bolinger v. First Multiple Listing Serv.,* 838 F. Supp. 2d 1340, 1354 (N.D. Ga. 2012) ("Section 8(c)(4) provides an independent basis for liability under RESPA"); *Minter v. Wells Fargo Bank, N.A.*, 274 F.R.D. 525, 537-39 (D. Md. 2011) (finding "strong[] impl[ications]" that Section 8(c)(4) and Regulation X create an independent cause of action for failure to comply with the conditions of Section 8(c)(4)).

[31] The *Capell* court also mistakenly asserted, again without citing any authority, that proof of "required use" was a "central element in each of [the plaintiff's] RESPA claims," which included claims under Section 8(a) and (b). *Capell*, 2007 WL 3342389 at *6. Section 8 does not require proof that the defendant required the borrower to use a particular settlement service provider. *See* 12 C.F.R. § 1024.14(f)(1) (referral can be "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service"), (f)(2) (a referral may also take the form of "required use"). Section 8(b) does not require proof of a referral, so the degree of influence exerted on the borrower is not relevant to any element of the claim.

simply states that a defendant who violates Section 8(c)(4)(A) is not liable if he "proves … that such violation was not intentional," but this is compatible with the notion that the defendant *also* bears the burden of proving that the requirements of Section 8(c)(4)(A) were met. Deeming both Section 8(c)(4) and Section 8(d)(3) as affirmative defenses would not render either provision "surplusage," because each would provide a separate basis to avoid liability: the defendant can *either*: (1) prove that the requirements of Section 8(c)(4) were met; *or* (2) prove that any failure to meet the requirements of 8(c)(4)(A) was unintentional.[32] But even if Section 8(d)(3)'s reference to "violation of the provisions" of Section 8(c)(4)(A) were properly construed as meaning that the *plaintiff* bears the burden of proving the violation under Section 8(c)(4), the absence of a similar description of Section 8(c)(2) in the statute would, if anything, support the opposite conclusion with respect to the burden of proof under Section 8(c)(2).

PHH next claims that a statement in the HUD Letter, which explained that HUD would regard as "impermissible" any arrangement where HUD "concludes that the compensation paid" is excessive, was an interpretation of Section 8(c) as "qualifying – rather than providing defenses to – Sections 8(a)-(b)." PHH App. Br. at 4. In fact, HUD's statement is consistent with Section 8(c)(2) being an affirmative defense. It simply warned the recipient of the Letter that if HUD determined[33] that compensation was excessive, then the Section 8(c)(2) defense would be unavailable and the

[32] Section 8(d)(3) does not provide a similar exemption for failures to comply with the requirements of subsections 8(c)(4)(B)-(C).

[33] That HUD might have deemed an arrangement impermissible under Section 8 if it "conclude[d]" that compensation was excessive, **ECX 194**, Att. A (HUD Letter) at 7, does not mean that HUD would have borne the burden on that issue – HUD could have concluded that compensation was excessive because the information provided by the participants in the arrangement failed to carry their burden to show that the compensation was commensurate with the value of the service. HUD's statement also did not purport to interpret where the burden of proof lay. If HUD were to perform any analysis of value or pricing to reach its own view about the legality of an arrangement, that does not mean that HUD was *required* to perform such an analysis to prove a RESPA violation *in a court action or administrative proceeding.*

arrangement would therefore be deemed to violate Section 8.[34] PHH also argues that because Regulation X specifies that the Bureau may investigate high prices, *see* 12 C.F.R. § 1024.14(g)(2), it bears the burden of proving excessive pricing. PHH App. Br. at 4. But that provision goes on to state that any factual finding by the Bureau that pricing was excessive "*may* be used as evidence of a section 8 violation," *id.* (emphasis added), which means the Bureau is *not required* to prove excessive pricing to establish a Section 8 violation.[35]

Finally, PHH cites Sections 14(b) and 14(g)(1) of Regulation X, but it simply makes substantive arguments about what those provisions do or do not prohibit, without explaining why they should be interpreted to impose on the plaintiff the burden of proof under Section 8(c)(2). Regardless, those arguments are incorrect – while referrals are not per se illegal (as Section 14(b) of Regulation X makes clear), compensation for referrals is illegal.[36] Among the seven defenses set forth in Section 14(g)(1) of Regulation X are two *express* exceptions to this general prohibition, neither of which is relevant here. 12 C.F.R. § 1024.14(g)(1)(v) ("payment pursuant to cooperative brokerage and *referral* arrangements"), (g)(1)(vii) ("An employer's payment to its own employees for any *referral* activities") (emphases added). In contrast, the fourth defense listed in Section 14(g)(1) – which implements Section 8(c)(2) – contains no such express exception, so the general prohibition against compensation for referrals in Section 14(b) applies. Indeed, that defense cannot possibly be

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[34] PHH also cites *Dominguez v. Alliance Mortg. Co.*, 226 F. Supp. 2d 907, 913 (N.D. Ill. 2002). Enforcement respectfully disagrees with that court's characterization of the HUD Statements of Policy (SOPs) at issue as placing the burden of proof on the plaintiff, since the SOPs were unrelated to the issue of the burden of proof. *See id.* at 911-12 (quoting relevant language from SOPs). In addition, it appears from the *Dominguez* decision that there was no evidence of a referral agreement, and that the court (interpreting the SOPs) may have considered evidence of excessive compensation as a sufficient alternative to support a claim.

[35] It is perfectly reasonable for the Bureau to investigate not only facts relevant to its claims, but also those relevant to a subject's potential defenses. The Bureau does not assume the burden of disproving defenses simply because it investigates whether they might apply.

[36] PHH fails to recognize that this proceeding challenges the compensation that it accepted for the referrals it made to MIs, and not merely the fact that it made referrals. *See* PHH App. Br. at 5 ("it is inconsistent with the Bureau's own regulation to simply allege the existence of a referral").

read to allow compensation for referrals because a payment made for a referral is inherently not a "bona fide" payment made "for" any service performed. May Order at 4 ("A kickback by its very nature is not a bona fide payment").[37]

b. Statute of limitations

The ALJ correctly held that Enforcement's RESPA claims in an administrative proceeding are not subject to the Section 16 statute of limitations. PHH's arguments to the contrary are premised on a failure to appreciate the difference between civil "actions" and administrative proceedings. As Enforcement explained in its opposition to PHH's first motion to dismiss, the terms "action" and "court," both of which are used in the statute of limitations provision of RESPA Section 16, denote a judicial forum, not an administrative one.[38] *See generally BP Amer. Prod. Co. v. Burton*, 549 U.S. 84 (2006). Therefore, while it is true that the Section 16 limitations period applies to "any action" brought by the Bureau to enforce Section 8 of RESPA in a "court," this proceeding is not such an "action," and is therefore not subject to the Section 16 three-year limitation.

The CFPA also reflects this distinction. PHH cites Section 1054 of the CFPA for its provision that an "action arising … under [RESPA]" is subject to "the requirements of [RESPA]" pertaining to time limitations. PHH App. Br. at 5 (quoting 12 U.S.C. § 5564(g)(2)(C)). But the instant proceeding was initiated under Section 1053, not Section 1054. Section 1053 pertains to "hearings and adjudication proceedings," whereas Section 1054 controls "civil action[s]." *Compare* 12 U.S.C. § 5563(a) ("The Bureau is authorized to conduct hearings and adjudication proceedings ....") *with* 12 U.S.C. § 5564(a) ("the Bureau may … commence a civil action"). Unlike Section 1054, *see* 12 U.S.C. § 5564(g), Section 1053 contains no provision limiting the time in which a proceeding may be

[37] Although it does not articulate any argument, PHH quotes a passage from a decision relating to criminal evidentiary standards. PHH App. Br. at 3 n.4 (quoting *United States v. Kloess*, 251 F.3d 941, 947 (11th Cir. 2001)). To the extent PHH intends to reiterate arguments it made in its post-hearing brief by citing *Kloess*, Enforcement respectfully refers to its own arguments in response. *See* EC Resp. Br. at 19-20. *See also* RD at 76.

[38] *See* EC Opp. to 1st MTD at 19-22.

commenced. The CFPA therefore comports with RESPA Section 16 in that it subjects Bureau claims asserted in civil "actions" to the Section 16 limitations period but spares claims asserted in adjudication proceedings from such a requirement. PHH's bald assertion that this proceeding is an "action" fails to acknowledge this basic distinction, and therefore warrants no consideration. The Bureau should affirm the ALJ's holding that the RESPA Section 16 limitations provision does not apply in this proceeding.

c. Awarding injunctive relief

PHH argues that an injunction is unavailable where the challenged conduct is not "ongoing," and that "there is nothing to enjoin." PHH App. Br. at 7-9. This is the same argument that PHH made before the ALJ, PHH 2nd MTD Br. at 11-15, that the ALJ correctly rejected, May Order at 8, that PHH made again, PHH Br. at 44, and that the ALJ again rejected, RD at 100. PHH's argument again fails to reckon with, much less refute, contrary authority. That authority controls, and the recommended injunctive relief should be granted. RD at 94-102; *see* EC Resp. Br. at 120-23.

PHH also argues the RD "summarily concluded" that PHH was likely to violate RESPA again, justifying an injunction. PHH App. Br. at 9. In fact, the ALJ properly considered the evidence of the incentives facing PHH, and its past behavior, in concluding PHH is "likely to violate RESPA again if not enjoined," and that "[t]he overriding consideration with such an injunction is that captive reinsurance on mortgage insurance is presumptively illegal," stressing PHH's "market power over the MIs."[39] RD at 100-01. Among other things, the RD correctly weighed PHH's collateral attack on this proceeding in the Southern District of Florida, along with other corroborating evidence, to show the likelihood that PHH may violate RESPA again. RD at 100-01. This is not

[39] This market power is repeatedly shown in the many findings regarding PHH's "leverage" over the MIs. *See* RD at 96 ("PHH continues to have significant leverage over the MIs, just as it did when it initiated its four past captive arrangements."); *id.* at 8, 14, 15, 65, 70, 72.

"punishment" at all, *see* RD at 98 ("an injunction must not punish"); it is merely a justifiable inference from adjudicated facts, which in no way restricts "the right of access to the courts."[40]

d. Awarding disgorgement

There is no serious dispute that (1) prior to enactment of the CFPA, HUD had authority to seek the full range of equitable remedies for RESPA violations in federal court,[41] and that (2) the CFPA codifies this authority explicitly and grants the Bureau the ability to obtain the same equitable remedies, including disgorgement, in either federal court or administrative proceedings. *See* May Order at 13-14; March Order at 11-12 (*citing* 12 U.S.C. §§ 5563-5565).[42] Where "federal courts ha[ve] authority … to award [remedies] based upon equitable principles," a statute expressly providing for the same may be applied to conduct that occurred before enactment of the statute without provoking retroactivity concerns. *Landgraf v. USI Film Products*, 511 U.S. 244, 277 (1994); EC Opp. to 2nd MTD at 30 (citing additional cases). As a result, the ALJ correctly found that disgorgement was an available and appropriate remedy that would cause no retroactive effects. May Order at 13-14.

PHH's appeal resorts to arguing that even if HUD could have obtained disgorgement in the past, the Bureau cannot do so now for actionable pre-July 21, 2011 conduct without going to federal court. This attack on the administrative forum is meritless. Whether disgorgement is awarded administratively as authorized in Section 1055, or in federal court under either the same statute or

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[40] Even the case PHH cites notes that although parties "have the right of access to the agencies and courts [under the First Amendment,] …. that does not necessarily give them immunity from the antitrust laws." *Cal. Mot. Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513-14 (1972).

[41] First, there is directly-applicable federal court precedent interpreting RESPA to provide for disgorgement in federal court. Second, that ruling – *Jackson v. Property ID* – is based on applying long-standing Supreme Court precedent interpreting statutory language analogous to RESPA. CV-07-3372-GHK (CWx) at *3-4 (C.D. Cal. Mar. 24, 2008. *See also* EC Opp. to 2nd MTD at 27-30 (presenting this analysis in detail). In fact, PHH admits that HUD could have obtained disgorgement in federal court prior to the CFPA: "[i]f the Bureau wanted disgorgement it should have filed suit in court, because that is all that HUD could do." PHH App. Br. at 11.

[42] These provisions of the CFPA also grant the Bureau additional remedies that expand upon the relief previously available under RESPA alone, such as CMPs, which require different analysis.

the equitable authority that preceded it, makes no difference. The remedy is the same. Its application to this case does not impair any rights that PHH possessed when it acted, nor impose any new duty on PHH with respect to transactions already completed. *See* March Order at 11-13; May Order at 13-14; EC Opp. to 2nd MTD at 25-30; EC Prehearing Br. at 16-18. PHH presents no basis to challenge this plain proposition and must disgorge its illicit profits.

e. Liability against Atrium and Atrium Re

Atrium and Atrium Re (Atrium Entities) are subject to the Bureau's authority to conduct administrative proceedings because they are related persons of, and service providers to, the other PHH entities. PHH faults the ALJ for applying the definition of "agent" too literally in evaluating whether the Atrium Entities were "agents for" the other PHH entities within the meaning of the term "related person." PHH App. Br. at 12. Section 1002(25) of the CFPA defines "related person" as including, among other things, "any director, officer, or employee charged with managerial responsibility for, or controlling shareholder of, or agent for, such covered person." 12 U.S.C. § 5481(25)(C)(i). PHH argues that "not every 'agent' of a Covered Person is a Related Person" because some agents are "nothing like" some of the other categories of persons listed in Section 1002(25)(C)(i), and that in any case the Atrium Entities were not "any kind of 'agents'" of the other PHH entities. PHH App. Br. at 12.

The interpretive canons and corresponding cases that PHH cites do not support its view that some kinds of agents are excluded from the meaning of "agent." In *Circuit City Stores, Inc. v. Adams*, the Supreme Court interpreted the "residual clause" in the statute at issue – "engaged in … commerce" – in light of the specific items enumerated just before it, because "there would be no need for Congress to use the [more specific] phrases" if the more general phrase used in the residual clause were given a broader construction. 532 U.S. 105, 114-15 (2001). This was an application of the canon *ejusdem generis*, which dictates that "general words are construed to embrace only objects

similar in nature to those objects enumerated by the preceding specific words." *Id.* Therefore, "engaged in … commerce" was construed to include only objects similar to "seamen" and "railroad employees" – i.e., transportation workers. *Id. Circuit City* has no application here. The term "agent" is not a "residual clause" at the end of a list intended to capture other objects similar in nature to the ones that precede it[43]; rather, "agent" is one of several equally specific terms in the list.[44] And consistent with *Circuit City*'s use of *ejusdem generis* only in the face of "an insurmountable textual obstacle," *id.* at 114, the doctrine "may apply *only* to help clarify *ambiguous* legislative intent or statutory meaning," 2A Sutherland Statutory Construction § 47:18 (7th ed.) (emphasis added). There is no ambiguity here. "Agent" should be given its natural meaning.

Similarly, in *United States v. Williams*, the Supreme Court was faced with terms that were "susceptible to multiple and wide-ranging meanings," and therefore applied the *noscitur a sociis* canon to select one of the "multiple" possible meanings that most closely resembled the other words in the list in question. 553 U.S. 285, 294-95 (2008). The word "agent" is not susceptible to multiple meanings. There is therefore no dilemma as to which of the various meanings of "agent" should be chosen, and no cause to turn to the canon applied in *Williams*.

PHH is also wrong to assert that the corporate form of the Atrium Entities prevents them from having been their affiliates' agents. PHH cites no authority for this proposition. To the contrary, "[a]s all corporations must necessarily act through agents, a wholly owned subsidiary may be an agent" of the parent. *D'Jamoos v Pilatus Aircraft Ltd.*, 566 F.3d 94, 108 (3d Cir. 2009) (quoting *Curtis Publ'g Co. v. Cassel,* 302 F.2d 132, 137 (10th Cir. 1962)) (determining personal jurisdiction over parent as principal). As the ALJ documented, the Atrium Entities "were essential to each captive

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[43] If, for example, the list in Section 1002(25)(C)(i) ended with "and any other person associated with such covered person," that final clause might constitute a residual clause in need of narrowing, in light of the other objects in the list.

[44] This is evident from, among other things, the fact that a "controlling shareholder" is not typically considered an "agent" of the controlled corporation.

arrangement, because PHH established them for the purpose of collecting PHH's kickbacks and premium splits," and they easily qualify as agents of the other PHH entities. RD at 82.[45]

In addition to their status as agents of the other PHH entities, the Atrium Entities are also related persons because they "materially participate[d] in the conduct of the affairs of" the other PHH entities, 12 U.S.C. § 5481(25)(C)(ii), and are service providers to the other PHH entities. *See* EC Resp. Br. at 21-23; EC Opp. to 2nd MTD at 39-43; May Order at 8-9; RD at 82.[46]

f. The McCarran-Ferguson Act

PHH's kickback scheme is subject to RESPA. PHH argues that the McCarran-Ferguson Act bars the application of RESPA to its conduct. Enforcement thoroughly refuted this argument when PHH raised it before the ALJ. EC Opp. to 2nd MTD at 36-39; EC Resp. Br. at 24-25. Even after having briefed the issue multiple times, PHH still fails to show that even one of the three requirements for applying the McCarran-Ferguson Act to "reverse preempt" RESPA has been met. PHH App. Br. at 13-14; *see* EC Opp. to 2nd MTD at 37 (enumerating requirements). RESPA specifically relates to the business of insurance, and is therefore not subject to the McCarran-Ferguson Act. *Id.* at 37-38. In any event, PHH does not even identify a particular state law, much less explain how applying RESPA in this proceeding would "invalidate, impair, or supersede" that law. *Id.* at 38-39. PHH's argument fails in every possible way.

This proceeding takes aim at PHH's illegal acceptance of kickbacks in exchange for referrals to MIs over the course of more than 15 years. There is no question that RESPA Section 8 regulates referrals involving mortgage insurance. 12 C.F.R. § 1024.2(b) (defining "settlement service" to

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[45] The Bureau should also reject PHH's argument that jurisdiction over the Atrium Entities is "too attenuated because PHH Corp. is not a Covered Person but rather is itself merely a Related Person to Lender Respondents." PHH App. Br. at 12. A related person is a covered person, 12 U.S.C. § 5481(25)(B), and in any case, PHH does not dispute that the Lender Respondents are covered persons under 12 U.S.C. § 5481(6).

[46] In the alternative, PHH would be liable for Atrium's conduct because (1) the corporate veil should be pierced; and (2) it owned 100% of Atrium, so any "thing of value" Atrium received in violation of RESPA enriched PHH to the same extent. EC Br. at 68-69 n.22; EC Resp. Br. at 21-22 n.11.

include mortgage insurance). This conclusively demonstrates that McCarran-Ferguson does not bar this proceeding. The fact that PHH chose to mask the kickbacks as reinsurance premiums does not affect the result. By PHH's logic, any payment prohibited by federal law need only be labeled "insurance premium" in order to escape liability. Not surprisingly, PHH cites no authority for such a broad reading of the McCarran-Ferguson Act. The Bureau should reject PHH's radical argument and hold that the McCarran-Ferguson Act has no application in this proceeding.

g. PHH's judicial estoppel defense

The ALJ properly denied PHH's attempt to judicially estop Enforcement's claims against PHH. First, the Bureau's position in its action against UGI is entirely consistent with its position here. RD at 78-82. While ignoring the clear statements in the complaint against UGI asserting the Bureau's position that ceding to captive reinsurers violated RESPA, PHH argues that a provision in the settlement agreement with UGI stating that certain conduct is not prohibited by that agreement constitutes the Bureau's "declar[ation] that [the conduct] is legal" under RESPA. PHH App. Br. at 14. But this provision does not reflect any legal position taken by the Bureau, because a consent decree "cannot be said to have a purpose" other than to embody a compromise in which the parties, to avoid the risk and expense of litigation, "each give up something they might have won had they proceeded with the litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).[47]

PHH must also prove that the Florida district court was "convince[d] …. to accept" the Bureau's alleged position,[48] but PHH effectively concedes it has no such evidence because it now argues instead that the mere act of approving the settlement reflects the court's implicit ruling that

[47] Authority supporting the "remarkable proposition" described on page 15 of PHH's brief includes, for example, the *Robertson v. N.B.A* case cited by PHH, in which the court permitted the defendant, for a period of ten years, to engage in conduct that the plaintiff alleged was in violation of the Sherman Act. 556 F.2d 682 (2d Cir. 1977).
[48] *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 486 (3d Cir. 2013). *See also New Hampshire v. Maine*, 532 U.S. 742, 743 (2001) (judicial estoppel generally requires the party to have "succeeded in persuading a court to accept that party's earlier position ….").

the payments were legal. PHH App. Br. at 14-15. This argument is contrary to law,[49] and defeated by the Consent Order's express statement that it is not "an adjudication of any fact or legal conclusion." UGI Case, ECF Dkt. 5 at 2. PHH's judicial estoppel defense also fails because it does not assert any bad faith on the Bureau's part, as it must.[50] PHH cannot assert bad faith because the carve-out provision at issue was fully consistent with Eleventh Circuit precedent, which does not allow parties to a consent decree to agree to provisions that impair the contractual rights of non-parties to the decree. *See* RD at 81; EC Resp. Br. at 27-28.

PHH's appeal brief repeats various other arguments it previously made to support judicial estoppel. The ALJ considered and rejected these arguments,[51] but PHH does not explain why it believes the ALJ's well-reasoned holding was erroneous. PHH cannot meet any of the elements of a judicial estoppel defense, so the ALJ's rejection of that defense must be upheld.

Conclusion

PHH has failed to show any defect in the findings and conclusions in the RD. Accordingly, its appeal points should be rejected.

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[49] *See*, *e.g.*, *Sleck v. Butler Bros.*, 202 N.E.2d 64 (Ill. App. Ct. 1964) (consent judgments "are uniformly understood to merely record a settlement or an agreement between the parties" and are not "a judicial determination of the rights of the parties or the issues involved in the litigation."); *Gillis v. Gillis*, 572 A.2d 323, 325 (Conn. 1990) ("A stipulated judgment is not a judicial determination of any litigated right …. It may be defined as a contract of the parties acknowledged in open court and ordered to be recorded by a court ….") (quotation marks/citations omitted).

[50] *In re Prosser*, 534 Fed. App'x 126, 130 (3d Cir. 2013).

[51] *See* RD at 80 (addressing *Robertson* case); May Order at 9 (addressing emails referenced in footnote 15 of PHH's appeal brief); RD at 80-81 (addressing PHH's argument in footnote 16 of its appeal brief based on statement in Mark Crawshaw's expert report).

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Certificate of Service

I hereby certify that on this 9th day of February 2015, I caused a copy of the foregoing "Enforcement Counsel's Answering Brief in Opposition to Respondents' Appeal" to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service:

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