**UNITED STATES OF AMERICA**
**Before the**
**CONSUMER FINANCIAL PROTECTION BUREAU**

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| ADMINISTRATIVE PROCEEDING<br>File No. 2014-CFPB-0002<br><br>In the Matter of:<br><br>PHH CORPORATION,<br>PHH MORTGAGE CORPORATION,<br>PHH HOME LOANS, LLC,<br>ATRIUM INSURANCE CORPORATION and<br>ATRIUM REINSURANCE CORPORATION | ) |

**REPLY MEMORANDUM IN FURTHER SUPPORT OF RESPONDENTS' MOTION FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE INTO THE RECORD**

Enforcement Counsel ("EC") gratuitously utilizes their opposition to lob unprofessional ad hominem attacks on Respondents' counsel in a vain attempt to divert attention from what did -- or did not -- occur at the hearing in this matter. It is undisputed that the ALJ found "by a preponderance of the evidence that CMG's License Agreement was a written 'agreement to refer real estate settlement business in consideration of premiums ceded to Atrium.'" RD at 74. Yet, as Respondents pointed out, the ALJ made that determination without ever having seen that agreement, which was not part of the hearing record. *Id.* at 20. EC now concede that the License Agreement was not a "referral agreement," thereby undercutting the ALJ's decision on this point. EC go on, however, to claim that "[t]he ALJ ***believed*** this provision was contained in the License Agreement." Opp'n at 13 (emphasis added). EC's declaration regarding the ALJ's "belief" is inappropriate unless, of course, EC has information from the ALJ to support their supposition.[1] The plain fact is that the ALJ made a finding based on a document he had never seen. The License Agreement should be admitted into the record to ensure that the Director and any reviewing court understand the complete lack of support for the ALJ's finding. EC's assertion that Respondents "should have moved to supplement the record after the May Order was issued" is curious. Opp'n at 11. That Order did not place the burden of demonstrating the lack of a referral arrangement on Respondents, but rather denied EC's motion for summary judgment on liability because of "a genuine issue of material fact about the CMG-Atrium arrangement." May 22 Order at 17. EC put on absolutely ***no additional evidence*** regarding the "CMG-Atrium arrangement" during the hearing, and the ALJ, without receiving any additional evidence, concluded as a matter of law that a document he had never seen was a "referral agreement." RD at 74.

[1] EC would be required to disclose any communications with the ALJ, pursuant to Rule 110.

EC's assertions that the License Agreement is "responsive" to the CID and that "PHH has made no attempt to excuse its noncompliance with the CID" are incorrect and demonstrate a fundamental misunderstanding of the Bureau's own rules. Assuming the License Agreement is responsive to the CID -- a point Respondents dispute, since it has nothing to do with the reinsurance arrangements at issue -- and assuming that Respondents did not produce that document in response to the CID, then EC's sole remedy is to seek to enforce the CID in federal court. *See* 12 C.F.R. § 1080.10. EC never sought to enforce the CID, and EC have no ability or right at this juncture of the administrative proceedings to demand that Respondents "explain" anything in this regard. Nor did EC ever ask the ALJ to issue a subpoena for the License Agreement or, for that matter, the Asset Purchase Agreement, which they also claim not to have. Having failed to avail themselves of the proper procedures for seeking additional documents, EC cannot now complain that such materials were not produced.

The second category of documents Respondents seek to have included in the record relate to the issue of "re-capturing" HARP loans back into the Genworth captive and discussions between Respondents and Genworth regarding the Sixth Amendment. EC now object because they claim they raised the purported violation of the Genworth risk transfer opinion in their post-hearing brief. Yet in a footnote, EC concede, as they must, that they "did not note that the dividend also violated a term of the Fifth Amendment." Opp'n at 12, n.16. Thus, the ALJ took it upon himself to find that Respondents violated the Genworth reinsurance agreement, even though EC never proffered that theory of the case. The documents related to the Genworth reinsurance arrangement should be admitted now so that the Director and any reviewing court may understand the extent to which this case was prosecuted by the ALJ and not by EC.

As for whether the dividend resulted in a lack of risk transfer, Respondents stand by their

prior arguments. While EC characterize the ALJ's categorical statement that EC's case was that the reinsurance had zero value as "off-the-cuff," Opp'n at 1, n.1, the undisputed fact remains that EC's expert witness's sole theory of the case was that the reinsurance had no value. And this fact was repeatedly confirmed by the ALJ. *See* Tr. 752-53 (ALJ asking Dr. Crawshaw to "assume there was actually transferred risk"); *id.* 2280 (ALJ noting that Dr. Crawshaw has "already expressed the opinion about that [the UGI reinsurance agreement is] no better than a savings account"); *id.* 2309-10 (Dr. Crawshaw confirming that the reinsurance services had "zero" value); *id.* 2365 (The ALJ, during his questioning of Dr. Crawshaw: "I realize this may be -- you may think it's absurd, but I want you to assume that the Milliman report, ECX-194, where they opined about the Genworth post -- the 2008-B book year, I want you to assume that their risk analysis was correct."). *See also* Hearing Tr. 752 (Dr. Crawshaw confirming that he "ha[sn't] done a specific analysis, but it should be something less than zero percent underwriting profit."). Accordingly, there is no support for EC's assertion that Dr. Crawshaw's "pricing analyses nonetheless demonstrated that Atrium's premiums would be excessive *even if one assumed for the sake of argument that Atrium's reinsurance had value*." Opp'n at 6.[2] EC's assertion that "no value" is the "same" as alleging that "Atrium's pricing was excessive," *id.* at 1, is simply erroneous. Because the Director must have the whole record before him in order to determine whether the findings of fact, conclusions of law, and proposed relief in the RD are supported by reliable, probative, and substantial evidence, the additional documents proffered by

[2] EC's attempt to rely on Dr. Crawshaw's original report as evidence that they proffered this theory is misplaced. *See* Opp'n at 6, n.7. Dr. Crawshaw's statement was based on his comparison to "most types of property/casualty businesses." Dkt. 55 at 60. EC fails to note Dr. Crawshaw's additional statement that "[a] 40% underwriting profit margin is reasonably comparable to profit margins I have encountered for such reinsurance contracts that cover catastrophic property claims . . . ." Of the witnesses that testified, only Dr. Crawshaw believed that the reinsurance did not provide catastrophic coverage.

Respondents should be included in the record.

The more troubling aspects of EC's opposition are the spurious accusations of "unethical" conduct, "attempt to mislead the Bureau," "mischaracterizing" documents and "misconduct." *Id.* at 12-15. These baseless accusations arise from EC's general assertion that Respondents failed to produce the "Asset Purchase Agreement" in response to the CID.[3] First, Respondents object to this request because it is not in the form of a written motion, contrary to Rule 205. Second, EC's request, to quote EC, was "waived" by their failure to raise this issue previously. Indeed, while patting themselves on the back for their purported "diligence" in finding "another email produced by PHH," Opp'n at 13, EC should have been more forthcoming. In fact, upon a cursory review, Respondents have identified additional emails produced by them that relate to the CMG Asset Purchase Agreement, including one such document, CFPB-PHH 00056300-00056312, which includes a 10-page attachment titled "PHH/CMGMI Strategic Relationship September 29, 2006." The document discusses the "series of contracts to sell certain assets and transfer customer relationships" from CUNA Mutual Mortgage Corporation to PHH Mortgage. That document was produced to EC on April 22, 2013. Another document produced to EC on February 27, 2013, Bates No. CFPB-PHH 00034469-00034471, is an email dated November 29, 2007, which contains virtually the same language as ECX 747. These emails demonstrate that EC had ample notice regarding the existence of the Asset Purchase Agreement; yet at no time before or during the hearing did they ever ask Respondents for a copy of that agreement, despite their admission now that they are "unable to locate the Asset Purchase Agreement among the documents produced by PHH." Opp'n at 15, n.22.

[3] EC further request, in complete contravention of their position that ***none*** of Respondents' proffered documents be included in the Record, that "the Asset Purchase Agreement and PHH 00016305 also be admitted." Opp'n at 15, n.22.

EC's assertion that the ALJ "was mistaken only as to the name of the contract," Opp'n at 13, is telling. EC profess not to possess the particular agreement; yet they, like the ALJ, conclude that it was a referral agreement without ever having seen the document; without ever asking anyone about how the parties operated under the terms of the various agreements between the parties; and apparently without ever asking CMG. It should not escape notice that the ALJ previously concluded that there was a "genuine issue of material fact about the CMG-Atrium arrangement" and that it would be "helpful for a CMG representative to testify about the License Agreement and whether and how the parties performed under it." May 22 Order at 17. While EC listed a representative from CMG on their witness list, they never bothered to call him. Nor did EC even bother to ask any witness about the License Agreement, either at the hearing or as part of the investigation they conducted prior to filing the administrative action.

## CONCLUSION

The Director should grant Respondents' motion to supplement the record because the documents at issue demonstrate the ALJ's error in finding that the License Agreement was "a written 'agreement to refer real estate settlement business in consideration of premiums ceded to Atrium.'" The documents relating to the Genworth reinsurance arrangement demonstrate the ALJ's error in concluding that the $5 million dividend violated the terms of that agreement. In both cases, the proffered documents are relevant and probative. Further, as previously explained, until the RD was issued and the ALJ's findings were known, Respondents were unaware that such documents were even considered to be at issue, a point EC concede with respect to the alleged violation of the Genworth Agreement. Opp'n at 12, n.16.

The rest of EC's opposition consists of baseless attacks on Respondents' counsel based on EC's feigned ignorance of the various agreements between CMG and some Respondents.

EC's story cannot be squared with reality. The very document upon which the ALJ relied, ECX 747, makes clear that there existed an agreement other than the License Agreement. How both EC and the ALJ misread this document is baffling. EC now claim to have found another document that was produced by Respondents. *See* Opp'n, Ex. C. This document is similar to others produced by Respondents and raises the more fundamental question: why did EC not bother to ask about this during their two-year investigation of Respondents or during a hearing that took place over the course of several months? The reason is obvious – the CMG arrangement was of no concern to EC because, among other things, the reinsurance agreement was terminated and Atrium returned all of the premiums, capital contributions, and earnings to CMG. *See* RD at 31 ("PHH withdrew no dividends from the CMG trust account and received no funds at commutation."). Respondents ultimately received nothing in connection with that arrangement while, according to the Bureau's expert, CMG earned a profit of 17%. Hearing Tr. 671, 950. Having decided not to investigate the CMG arrangement, or perhaps not even to read the documents provided by Respondents, EC should not be heard to complain about Respondents' efforts to correct clear errors made by the ALJ.

Rather than agree that such errors should be corrected, or mount a serious defense in support of the ALJ's conclusions, EC cast aspersions on Respondents' counsel.[4] Such accusations are unprofessional and inappropriate and should be ignored because they are entirely irrelevant to the issues before the Director. *Cf.* ABA Formal Opinion 94-383 (prohibiting threats made to embarrass, delay or burden opposing counsel) (construing Model Rule 4.4).

[4] EC's assertion regarding the veracity of Mr. Bogansky's statement in the initial NORA submission, Opp'n at 15, n.23, is particularly inappropriate given the ALJ's conclusion that he would "assume [Mr. Bogansky] made a mistake, the mistake was clarified by the supplemental NORA submission. So there was nothing misleading in the end." Hearing Tr. 1280.

Dated: January 30, 2015

Respectfully submitted,

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**CERTIFICATION OF SERVICE**

I hereby certify that on the 30th day of January, 2015, I caused a copy of the foregoing Reply Memorandum in Further Support of Respondents' Motion to Submit Additional Evidence in the Record to be filed 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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