protest, the ALJ dragged Atrium and Atrium Re through the entire proceeding despite the lack of allegations or evidence to support jurisdiction. Order on Dispositive Motions, Docket No. 152 at 8-9; RD at 82. Respondents have now renewed their longstanding objection, and EC respond with a full-throated attempt to extend the Bureau's authority over every type of "agent" a covered person might have.[13] Their position is based on a misunderstanding of statutory construction and would lead to preposterous results. Additionally, EC somewhat meekly attempt to rescue a position that even the ALJ abandoned in the RD: that an indirect subsidiary somehow (despite no evidence) "materially participates in the conduct of the affairs of" its indirect parent. Because neither theory has merit, Atrium and Atrium Re must be dismissed.

A. Not All "Agents" Are Related Persons Under Section 1002(25)

First, EC do not meet the substance of Respondents' *noscitur a sociis* argument. In short, a "director, officer, or employee charged with managerial responsibility for, or controlling shareholder of" a covered person are all persons who *exercise managerial or greater control over* the covered person. Accordingly, the general phrase "or agent for" must be interpreted in a similar fashion.[14] An indirect subsidiary providing reinsurance to third-party MIs is not anything like the above-quoted list of persons controlling covered persons.

Second, if "agent" in the definition of Related Person meant *all* agents of any kind, the

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disputed the Bureau's jurisdiction over Atrium and Atrium Re. Finally, § 8(a) does not prohibit being "enriched"—it prohibits giving or receiving money under certain circumstances. Shareholders are not liable for a corporation's actions, even "100%" shareholders.

[13] One type of agent is an attorney. *See, e.g.*, *Kimble v. DJ McDuffy, Inc.*, 648 F.2d 340, 354 n.4 (5th Cir. 1981) (en banc) ("[A]n attorney is an agent or substitute for the client."), *overruled on other grounds by Kush v. Rutledge*, 460 U.S. 719 (1983); *In re Rhoads Indus.*, 162 B.R. 485, 488 (N.D. Ohio Bankr. 1993) ("It is axiomatic that an attorney is an agent of the client."). Surely EC do not contend that undersigned counsel are related persons subject to the plenary jurisdiction of the Bureau, simply because they represent Respondents (and other covered persons in other contexts). Yet EC's argument would reach precisely that absurd result.

[14] *See Freeman*, 132 S. Ct. at 2042 (interpreting "portion" or "percentage" based on their proximity to "split" in RESPA § 8(b)).

same provision would not need to separately include an "employee charged with managerial responsibility," because all employees *are* agents of their employer (even employees *not* "charged with managerial responsibility").[15] In this context, EC's position makes no sense.

Third, EC mischaracterize Respondents' arguments when they argue that an affiliated company *could* be an agent. In fact, Respondents object to the RD's purported finding of agency based *solely* upon the corporate relationship and shared staff and facilities incident to that relationship. *That* is what impermissibly ignores the corporate form, as Respondents have already explained. Resp. Br. at 12. EC have not responded to the substance of this argument.

B. Subsidiaries Don't Run Their Corporate Parents

EC have no explanation for how Atrium or Atrium Re supposedly "materially participate[d] in the conduct of the affairs of" the other Respondents, but merely repeat the assertion and state in conclusory fashion that Atrium and Atrium Re are therefore related persons. Opp'n at 28. This theory has the corporate relationship exactly backwards, and EC's conclusory statement should be ignored. *See* Doc. 178 at 56; RD at 83 (abandoning theory).

VI. EC CANNOT USE RESPA TO REGULATE REINSURANCE

McCarran-Ferguson prohibits the Bureau from using federal statutes of general application to regulate the details of insurance. Resp. Br. at 13-14. EC attempt to avoid the application of McCarran-Ferguson by asserting that RESPA is an insurance statute and that, in any case, there is purportedly no state statute with which "applying RESPA in this proceeding" conflicts. But RESPA § 8 is not an insurance statute, and EC's other arguments are similarly unavailing. Since EC's whole case depends on the Bureau deciding what does or does not qualify as "real" reinsurance, and—according to the RD—on the ALJ's regulating the

[15] *See, e.g., Spirides v. Reinhardt*, 613 F.2d 826, 831 n.26 (D.C. Cir. 1979) (defining "servant" or "employee") (citing Restatement (Second) of Agency § 2 (1957)).

reinsurance rates and second-guessing the profitability and reserves of Atrium and Atrium Re, RESPA emphatically and intrusively interferes in New York and Vermont's regulatory regimes, a result that McCarran-Ferguson forbids.

A. RESPA § 8 Does Not Directly Regulate Insurance

Respondents have already explained why RESPA is not an insurance statute. Resp. Br. at 13. EC's only response is that Regulation X—not RESPA—defines "settlement service to include mortgage insurance." EC propose that this single extra-statutory provision "conclusively demonstrates" that McCarran-Ferguson does not apply. Opp'n at 28-29. Yet, a regulator cannot avoid McCarran-Ferguson by issuing a regulation to override that statute, and even if RESPA applied on the periphery of insurance, that does not make RESPA "specifically relate[] to the business of insurance."[16] Congress did not give the Bureau the power to use RESPA to regulate insurance products directly. Yet that is precisely what EC—and the ALJ—have attempted to do.

B. This Action Attempts to Misuse RESPA to Interfere Fundamentally With State Regulation of Reinsurance

It is well-established that McCarran-Ferguson prohibits interpretation or use of a general federal statute to regulate the business of insurance. *See, e.g., Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 564 (7th Cir. 1999). It does not require that a specific statutory provision be impeded—although Respondents have certainly cited specific statutes and regulations (Motion in Limine, Document 75 at 2-3)—but rather, is also implicated where a statute is used to "interfere with a State's administrative regime."[17] A review of what EC and the ALJ have attempted to do

[16] 15 U.S.C. § 1012(b) ("unless such Act specifically relates"); *see also SEC v. Nat'l Secs., Inc.*, 393 U.S. 453, 460 (1969) (securities statute that specifically applied to insurance companies did not regulate the "business of insurance").

[17] *Humana, Inc. v. Forsyth*, 525 U.S. 299, 309-10 (1999); *Nat'l Secs.*, 393 U.S. at 460 ("[T]he type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.'").

here leaves no doubt that they are delving far too deeply into insurance regulation.[18]

EC would have the Bureau ignore McCarran-Ferguson because otherwise, "any payment prohibited by federal law need only be labeled 'insurance premium' in order to escape liability." Opp'n at 29. But those are not the facts here. [19] Rather, EC are interfering in the regulation of what even the ALJ found to be reinsurance. RD at 64.

CONCLUSION

EC's litigation strategy permeates their opposition – ignore the guidance issued by HUD, the agency responsible for RESPA until July 21, 2011 (which encompasses all of the conduct at issue); argue that the law should be different and retroactively applied to Respondents (violating their constitutional rights); avoid any book-year discussion of the losses suffered by Atrium (because such facts establish beyond any doubt that since 2004, Atrium suffered, or would have suffered, losses far in excess of the premiums it was projected to receive); supplement missing evidence with EC "testimony"; and avoid any difficult legal issues. While the ALJ properly gutted EC's case by limiting the claims to loans originated after July 21, 2008, and by rejecting Crawshaw's analysis, the ALJ got it wrong as it relates to the panoply of legal issues raised by Respondents in their appeal. The Bureau should not accept the ALJ's fundamentally flawed RD.

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[18] For example:

- EC have arrogated the authority to decide what is or is not "real" reinsurance. EC Appeal Br. at 27.
- EC seek to be the arbiters of risk transfer and insurer capital contributions. Opp'n at 6.
- The ALJ purported to decide whether Atrium's reserves were adequate. *E.g.*, RD at 20.
- The ALJ second-guessed Atrium's pricing. RD at 68.
- EC attack Atrium's pricing based on how much of a profit they think an insurance company should earn. Opp'n at 6 n.9.
- The ALJ would determine what types of reinsurance are lawful at all. RD at 96 n.46; 101.
- EC asked the ALJ to calculate risk transfer in a way that has never been done in the industry. *See, e.g.*, RD at 55.

[19] *See also Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185, 192 (3d Cir. 1998) ("[I]f we were to construe the 'business of insurance' phrase by reference to federal legality, the statute would be read out of existence.") (citation omitted).

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Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 20th day of February, 2015, I caused a copy of the foregoing Reply Brief in Support of Respondents' Appeal of the Administrative Law Judge's Recommended Decision Dated November 25, 2014 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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