UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING File No. 2014-CFPB-0002 In the matter of: PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC, ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE CORPORATION.	)

REPLY BRIEF
IN SUPPORT OF RESPONDENTS' APPEAL OF THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION DATED NOVEMBER 25, 2014

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ABBREVIATIONS USED IN RESPONDENTS' BRIEFS

1. ALJ: Administrative Law Judge Cameron Elliot.

2. Atrium: All references to "Atrium" mean both Atrium Insurance Corporation and Atrium Reinsurance Corporation ("Atrium Re") unless otherwise specifically noted.

3. Bureau: Consumer Financial Protection Bureau.

4. CFPA: Consumer Financial Protection Act of 2010.

5. CMG: CMG Mortgage Insurance Company.

6. Document __: refers to specific documents filed with the CFPB's Office of Administrative Adjudication.

7. EC: Enforcement Counsel.

8. ERD: Expected Reinsurance Deficit Test. RD 44.

9. Feb. 14 Tr.: Transcript of the February 14, 2014 scheduling conference.

10. Genworth: Genworth Mortgage Insurance Corporation.

11. Genworth 2008-B Book: Contained loans originated between June 1, 2008, and March 31, 2009. RD 48.

12. HUD: United States Department of Housing and Urban Development.

13. HUD Letter: Letter from Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner, to Sandor Samuels, General Counsel of Countrywide Funding Corporation, dated August 6, 1997.

14. Lender Respondents: refers specifically to PHH Mortgage Corporation and PHH Home Loans, LLC.

15. Mar. 5 Tr.: Transcript of the March 5, 2014 hearing on Respondents' initial dispositive motion.

16. Mar. 13 Order: The ALJ's decision of March 13, 2014, denying Respondents' initial dispositive motion.

17. May 22 Order: The ALJ's decision of May 22, 2014, issued after commencement of the administrative hearing but before Respondents' case-in-chief.

18. MGIC: Mortgage Guaranty Insurance Corporation.

19. MIs: refers generally to entities providing private mortgage insurance.

20. Pmi: private mortgage insurance, a credit enhancement. Tr. 412, 1849.

21. NOC: Notice of Charges dated January 28, 2014.

22. OCC: Office of the Comptroller of the Currency.

23. OTS: Office of Thrift Supervision.

24. Radian: Radian Guaranty, Inc.

25. RD: Recommended Decision.

26. Rules: CFPB Rules of Practice for Adjudication Proceedings.

27. Tr.: Administrative Hearing Transcript.

28. UGI: United Guaranty Residential Insurance Company.

29. UGI 2009 Book: Contained loans originated between January 1, 2009 and December 31, 2009.

INTRODUCTION

Enforcement Counsel's interpretation of RESPA—and demand for more than $400 million—are based on what EC want the law to be rather than what the law is. EC's entire case rested on their expert witness, Dr. Crawshaw, and his novel theory that risk transfer must be evaluated over the "entire duration of the arrangement." The ALJ flatly rejected Crawshaw's analysis; yet EC attempt to revive it as part of their appeal. Further, while EC concede that the ALJ went off on his own in rendering many of his unsupported conclusions, thereby affirming Respondents' point, they nonetheless insist that Respondents were not denied due process. Further, EC unabashedly attempt to testify to try to overcome their lack of evidence; but their "testimony" cannot be admissible evidence. At bottom, EC simply refuse to acknowledge the HUD Letter, the fact that Respondents complied with that guidance, or even that their own expert testified that Respondents' reliance on Milliman was reasonable. Finally, EC's assertion that § 8(c)(2) is unavailable to Respondents is wholly unsupported by case law. And yet EC cannot understand why Respondents object so vigorously; they just don't get it.

ARGUMENT

I. EC'S ASSERTIONS OF LIABILITY ARE WRONG, AND ONLY CLAIMS RELATED TO LOANS ORIGINATED AFTER JULY 21, 2008 ARE AT ISSUE

EC's opposition consists of categorical statements that there was "overwhelming evidence" of liability.[1] But saying it does not make it so. In fact, HUD acknowledged in 1997 that "[t]he lender, [], has a financial interest in having the primary insurer in the captive reinsurance program selected to provide the mortgage insurance." HUD Letter at 1. EC's entire case comes down to their belief that, because Respondents selected an MI provider with whom

[1] Incredibly, EC state that PHH "fails even to contest . . . the RD's core findings." Opp'n at 1. While Respondents would usually ignore such a false statement as argument, this particular statement is troubling in that it both reflects a failure of EC to understand the underlying business of private mortgage insurance and, perhaps more troubling, draws into question whether EC even bothered to read Respondents' brief.

Atrium had a reinsurance agreement, there was a RESPA violation. Stated differently, EC believe either that Respondents were entitled to establish reinsurance arrangements but that no loans could be placed into such structures or that such structures are *per se* violations of RESPA. The first makes no sense; the latter runs counter to the HUD Letter. It is undisputed that pmi reinsurance through lender-affiliated entities gave lenders "skin in the game" by encouraging them to originate higher quality loans that would lead to fewer defaults. RD at 14. The ALJ also found other benefits – the "business advantages of accounting for premium cedes as reinsurance are clear," RD at 65, n.37,[2] but EC now claim the ALJ was wrong and that such benefits cannot be considered because the relevant testimony was "self-serving." Opp'n at 8. While they hide their assertion in a footnote, Opp'n at 9 n.12, their disbelief that the ALJ could be so careless as to actually accept Respondents' and the MIs' arguments shows the extent to which EC believe only they can decide what constitutes a benefit to market participants.

Further, while EC claim the ALJ's statements regarding EC's theory of the case are merely "off-the-cuff characterizations," the fact of the matter is that EC's case has always been that the reinsurance had no value. Further, their expert only analyzed that theory based on 40% ceding structures, and EC proffered nothing to support the assertion that a 25% cede was not reasonable. The ALJ's comments were correct; now EC—and possibly the Bureau—must live with the consequences of defending a decision that blindsided even them. Finally, it bears repeating: "[N]o claims arising from loans closed before July 21, 2008, are actionable." May 22 Order at 14. Respondents followed the Order; EC did not. EC's opposition is replete with allegations relating to issues that were specifically precluded by the ALJ's May 22 Order. *See,*

[2] *See also* RD at 64-65 (finding "credible evidence that the reinsurance arrangements at least hypothetically provided real benefits to the MIs by reducing volatility of financial results and allowing the accounting of the arrangements as reinsurance"); Tr. 400 (Culver: "no question" the reinsurance played a role in protecting MGIC from catastrophic losses).

e.g., Opp'n at 2 (EC's use of dialer settings "until 2008," and reliance on MIs used "from January 2006 through May 2008"); *id.* at 5 n.8 (EC's attack on the Radian 2004 book and capital contributions despite the ALJ's finding that the book passed risk transfer); *id.* at 9 ("PHH's illegal scheme was already a decade old before it decided to retain Milliman."). Because such issues raised by EC were not litigated by Respondents in reliance upon the May 22 Order, all must be ignored for purposes of this appeal.

II. THE TWO BOOKS MUST BE ANALYZED ON A SINGLE BOOK YEAR BASIS

As the ALJ made clear, the analysis of the only two books at issue must be on a single book year analysis. RD at 64. EC cannot escape the fact that Crawshaw, their expert, failed to conduct such an analysis. Tr. 2296. While it was EC's burden to demonstrate that there was no risk transfer and that the price was not reasonable, even if Respondents had the burden – which they did not – they fully satisfied it. As the evidence showed, Milliman determined that the structure passed risk transfer and that "the reinsurance premium [was] reasonable in relation to the reinsured risk since the projected expected loss ratios for Atrium [were] reasonable in relation to the loss ratios for the primary insurer." ECX 194 at 17.

A. Genworth 2008-B Book Passed Risk Transfer

Milliman performed two tests for risk transfer, the "10/10" and the ERD test, the latter of which the Genworth 2008-B Book passed by a "significant margin." Tr. 1870. EC's response is simply to ignore this fact in the hope that it goes away. The fact that there was a dividend to Atrium more than a year after the risk transfer analysis was done does not mean that there was no longer risk transfer. Indeed, no witness at the hearing testified that the dividend somehow invalidated Milliman's risk transfer analysis. Accordingly, this conclusion is based on the ALJ's acting as an expert witness and divining that there was no longer risk transfer, an issue on which

he is not competent to opine.[3]

Crawshaw conceded that it was reasonable for Respondents to rely on the Milliman opinions, and those opinions applied the HUD guidance and determined that the reinsurance premium was reasonable in relation to the reinsured risk based on the expected loss ratios for the reinsurer and primary insurer. ECX 194 at 17. As Cascio explained, the expected profit margin for Atrium was consistent with the type of catastrophic excess-of-loss agreements at issue here. Cascio Rebuttal Report at 7. That is so because, among other things: 1) the capital must be kept in place for the ten-year exposure period; 2) future premium streams are uncertain as mortgages become distressed; and 3) a single event has a cumulative effect on multiple book years. *Id.* These factors led Cascio to conclude that the premiums received by Atrium were commensurate with the risks it assumed. *Id.* at 10. Schmitz also confirmed at the hearing that Milliman analyzed the Genworth 2008-B Book and concluded that the net ceded premium was reasonably related to the ceded risk. Tr. 1858; *see also id.*, 1781-86; 1894-1902.

EC state that "[l]oss ratio comparisons are meaningless as measures of value." Opp'n at 5 n.6. But Schmitz explained at the hearing that "comparing loss ratios is a very standard assessment of profitability and assessment of pricing within the insurance industry at large, not just the mortgage insurance industry and not just mortgage reinsurance either." Tr. 1949. EC now counter with Crawshaw's analysis, which relied on the "entire duration of the arrangement,"

[3] Although they did not bother to appeal on this ground, EC now take issue with the ALJ's holding that "Milliman's analyses were reliable" and thus pass risk transfer for several book years—UGI 2004-08; Genworth 2004-07, 2008-A; and Radian 2004-05—because the opinions were issued after the loans were put into the books. Those Milliman opinions were deemed "reliable" by the ALJ, but inexplicably the Genworth 2008-B Book was not. RD at 66. In any event, it was proper to perform the risk transfer analysis after the loans were placed in the book, as Schmitz testified. Tr. 1856. Having failed to ask any witness about this language, EC cannot now "testify" by asserting that the term "contract inception" in ECX 790 means that the Milliman opinion was "late," *see* Opp'n at 4; moreover, that is not what that document requires.

the same analysis the ALJ ***specifically rejected***. RD at 64 ("I do not credit Crawshaw's analyses, performed on a multiple book year basis, over those of Milliman, performed on a single book year basis."); *id.* (Crawshaw's analyses are not a "meaningful alternative[] to Milliman's calculations"); *id.* at 65 n.37 ("I place little weight on Crawshaw's opinion . . . .").[4]

B. The Reinsurance Was Appropriately Priced for Both Books

The fact of the matter is that the reinsurance under the 25% cede structure was appropriately priced. PMI reinsurance is catastrophic insurance. Even Crawshaw said the price was appropriate for catastrophic insurance. Tr. 748. Milliman projected that Atrium had or would pay claims on the Genworth 2008-B Book totaling approximately $12 million, and it was projected to collect approximately $8.8 million in premiums, so the ratio of losses over premium was approximately 137%. Tr. 1905. For the UGI 2009 Book, Milliman projected losses of approximately $1.7 million and premiums of approximately $3.2 million. *Id*. 1907 (The exact figures are contained in RCX 838 and 2004). No one disputed the accuracy of the Milliman reports. EC's claim that Atrium charged too much rings hollow in light of the losses suffered on these books, as well as the losses in book years 2004 forward.

III. EC CANNOT CONTINUE TO IGNORE THE HUD LETTER, AND THEIR ATTEMPT TO DEFEND THE ALJ'S ERRORS IS UNAVAILING

EC conspicuously continue to avoid any analysis of the HUD Letter, instead engaging in a half-hearted attempt to defend the ALJ's repeated mistakes and erroneous conclusions.

A. Respondents Complied With the HUD Letter

EC continue to disregard the HUD Letter – the only guidance provided to the industry – because they desperately cling to their belief that Crawshaw can carry the day. He cannot, however, because the ALJ unmistakably rejected Crawshaw's novel theory of risk transfer. But

[4] EC's repeated attempts to rely on Crawshaw's reports in support of their positions must be rejected. *See, e.g.,* Opp'n at 5 n.6; 6, n.9; 17 n.22. All of Crawshaw's conclusions were based on his rejected position concerning multiple book year analysis.

that is all EC had to support their case, and the ALJ's decision on the eve of the resumption of the hearing after the experts had exchanged reports and rebuttal reports left EC with no evidence. Since EC's arguments fly in the face of the HUD Letter, they must be rejected.

B. EC's Arguments Do Nothing to Overcome the ALJ's Errors

1. *Ignoring Commutations*

EC's argument is that since there was no evidence that the commutations were "arm's length" transactions, then it must be assumed they were not. EC cite no authority that the "default" position is that EC wins. It is undisputed that in connection with the commutations, Genworth received $37,149,869 and UGI received $48,592,201. Mar. 13 Order at 18. EC make no mention of those payments, which were to provide the MIs with the net present value of the expected claims. Tr. 779; 1391. Milliman projected that Atrium would pay claims on the Genworth 2008-B Book in the amount of $12,058,000 and in the amount of $1,693,000 on the UGI 2009 Book. EC never dispute those projections or that the MIs received millions from Atrium as part of the commutations. EC's request to ignore those payments should be rejected.

2. *Effect on the Housing Market*

EC say that the ALJ's finding of an "adverse systemic effect" on "the MI industry and potentially the housing market" is "well supported." Opp'n at 11. Yet the ***only*** support for this fanciful assertion is the 1998 "presentation" that may not have even seen the light of day. Tr. 359; 406. In spite of that obvious infirmity, EC assert – without a shred of evidence – that "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." Opp'n at 11 n.17 (emphasis added). Simply stated, EC is making this up. There was no

supporting testimony and the citations they provide to the hearing transcript in no way support these serious allegations. Further, EC's allegation of "misconduct" regarding financial statements is hypocritical, as the Bureau entered into Consent Orders with four MIs that allowed them to continue to report such reinsurance agreements on their financial statements as insurance. Finally, EC refuse to acknowledge that the sole document supporting this "harm" to the market, ECX 35, in fact *supported* reinsurance arrangements at the 25% cede, the *only* structures at issue here. *See* ECX 35 at 18 (recommending that premiums not "exceed 25%").

3. *The CMG License Agreement*

EC miss the point concerning the ALJ's erroneous finding that the License Agreement constituted a "referral agreement." RD at 74.[5] To reiterate, the ALJ has never seen the agreement, nor was there any testimony at the hearing on the License Agreement. Once again, EC's response is to place the burden of disproving a violation on Respondents, but that does not explain or justify the ALJ fabricating a conclusion based on a document he has never seen.[6]

4. *The Affiliated Business Disclosure*

EC again miss the point with respect to the ALJ's erroneous conclusion that the affiliated business disclosure was "misleading." The disclosure was never discussed by any witness; accordingly, the ALJ's conclusion that it was misleading was a determination made by him, with no testimony or even documentary evidence, after the close of the record. Respondents should have been provided notice of exactly how the disclosure was purportedly misleading and an opportunity to respond. Respondents were provided neither.

[5] The Director's decision not to make the License Agreement part of the Record is disappointing since the reviewing court will be denied the benefit of the Bureau's reasoning for accepting or rejecting the ALJ's conclusion on that point.

[6] To be sure, EC ignored both the Radian and CMG arrangements, which were commuted at a loss to Atrium.

5. *The Preferred Provider List*

EC's response to Respondents' objection regarding the preferred provider list is to provide their own testimony. According to EC, "PHH influenced the borrower's selection by influencing the correspondent's selection" of an MI provider. Of course, no correspondent or borrower testified that was the case. EC did not even bother to cite a document to support this proposition. EC's position is simply that it is true because they now say so.

6. *The 2007 UGI Dividend*

The 2007 UGI dividend has nothing to do with the two books at issue, so there was no reason for Respondents to litigate that issue once the ALJ limited the case to loans originated after July 21, 2008. Even so, there was testimony that the dividend was appropriate given the runoff of loans in the prior book years. Tr. 259-61. EC now attempt to rely on Walker's deposition testimony regarding a different issue for the general proposition that Respondents ignored the "contractual reserve requirements." Opp'n at 14. Respondents did not; EC never showed that such requirements were ever violated; and Atrium paid every claim presented.

7. *Disgorgement*

Disgorgement is not available as a matter of law since HUD could not get disgorgement through an administrative action. EC finally admit that disgorgement is available under Section 1055 of Dodd-Frank or in federal court. Opp'n at 25. But EC did not go to federal court where an Article III judge could exercise his or her inherent equitable authority, and Dodd-Frank is not retroactive. EC's simplistic response that the ALJ was "correct" and that Respondents' "attack on the administrative forum is meritless" are not arguments but rather wishful thinking.

8. *Injunctive Relief and Judicial Estoppel*

EC's responses to Respondents' legal arguments are not responses at all but simply reiterations of the ALJ's findings. The record is devoid of any ongoing conduct or even a

propensity to enter into any new arrangements; rather, EC cite to the "attack on this proceeding in the Southern District of Florida." It is a sad day when the government seeks to punish parties for accessing the courts, but that is exactly what EC are seeking to do here. EC's casual disregard of Respondents' due process concerns may get them past the administrative process, but courts have been unwilling to be so cavalier. Finally, rather than disparaging and mischaracterizing Respondents' judicial estoppel argument, EC should explain why it is permissible under RESPA for UGI to make ceding payments that Atrium cannot accept – a simple proposition that EC have, to date, managed not to explain, other than to state that the Bureau did not want UGI to "breach" its contractual obligations. But there is no authority for the proposition that a contractual obligation trumps compliance with a criminal statute.

IV. ENFORCEMENT COUNSEL CANNOT IGNORE SUPREME COURT PRECEDENT OR READ THE SAME PROVISION OF 8(c) IN MULTIPLE WAYS TO SHIFT THE BURDEN TO RESPONDENTS

EC's argument for shifting its burden under § 8(c)(2) to Respondents relies upon two dubious propositions. First, that Congress' subsequent amendment of a statute can somehow override Supreme Court precedent concerning the *earlier* version of that statute; and second, that identical words—"[n]othing in this section shall be construed as prohibiting"—used within the very same statutory provision—RESPA § 8(c)—can have different meanings depending upon which succeeding paragraph of the same subsection they are being applied to.[7] Since both

[7] EC also attempt to argue that the Bureau's Rule 303 does not apply to ultimate facts that related to "affirmative defenses," but this misses the point. Even if § 8(c)(2) were an "affirmative defense," once it was properly raised, the "ultimate issues" of the Bureau's "claims"—that is, whether the reinsurance arrangements were unlawful—turn in particular on whether the payments at issue were "for goods or facilities actually furnished or for services actually performed." § 8(c)(2). This issue highlights the inseparability of the Bureau's claims in this matter from the § 8(c)(2) issue. Since, as the HUD Letter demonstrates, captive pmi reinsurance arrangements do not in and of themselves violate RESPA, the only allegation that would make such arrangements violate RESPA (*i.e.*, the only allegation that could possibly "state a claim") would be to allege that the payments *are* prohibited (*i.e.*, that they are not covered by § 8(c)(2),

propositions fly in the face of logic and precedent, EC has failed to overcome Respondents' argument and the burden stays with EC. Finally, even if the burden *were* shifted to Respondents, the burden of persuasion only comes into play where the evidence is in equipoise. Accordingly, the ALJ clearly erred in basing the RD on Respondents' purported failure to persuade him, because *all* of the competent evidence presented concerning pricing favors Respondents.[8]

A. Supreme Court Precedent Binds the Bureau

As previously explained, the Supreme Court in *Betts* interpreted a provision of the ADEA that is analogous to RESPA § 8(c) to impose the burden on the complaining party. EC attempt to avoid this binding precedent by stating—rather shockingly—that the Supreme Court's ruling "should be given no weight" because Congress subsequently amended the ADEA to include different language that would command a different result *under the new, different version of the ADEA*.[9] Opp'n at 18. Not so. While Congress changed the wording of the ADEA so that it would have a different effect than the language the Supreme Court had interpreted in *Betts*, the Supreme Court's interpretation of the *previous* statutory language could not have been and was not undone or undermined by Congress' decision to change the law.[10]

B. A Single Statutory Provision Cannot Mean Two Different Things

Section 8(d) of RESPA shifts the burden from the claimant (here, EC) to the

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which specifies things that are *not* prohibited).

[8] EC's arguments that Regulation X can somehow change the plain meaning of the statute are clearly in error and do not merit consideration. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. ___, 132 S. Ct. 2034, 2040 (2012) (no deference to HUD's interpretation that attempted to change RESPA).

[9] This continues a pattern of EC attempting to argue that case law does not apply to them. *See* EC Appeal Brief at 10-11 (discussing *Snow*).

[10] *See, e.g., Miller v. French*, 530 U.S. 327, 343-47 (2000) (amendment of statute "altered the relevant underlying law," rather than "'suspend' or reopen a judgment"); *Hayburn's Case*, 2 U.S. 409, 410 n.2 (1792) ("[N]o decision of any court of the United States can . . . be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested[.]").

defendant/respondent to prove an affirmative defense relating to the provisions of § 8(c)(4). Thus, Congress knew how to shift the burden when it wanted to, but did not do so for § 8(c); and the burden shifting language of § 8(d) would be mere surplusage if EC's interpretation of § 8(c) were to prevail. EC strain to avoid this conundrum by suggesting that the opening language of § 8(c)—"[n]othing in this section shall prohibit"—denotes an affirmative defense for purposes of § 8(c)(2), but not for § 8(c)(4). That is impossible. The Supreme Court has rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark v. Suarez Martinez*, 543 U.S. 371, 386 (2005). "To hold otherwise 'would render every statute a chameleon[.]'" *United States v Santos*, 553 U.S. 507, 522 (2008) (plurality) (quoting *Clark*, 543 U.S. at 382). Clearly, EC *need* § 8(c)(2) to be an affirmative defense, because they completely failed to carry their burden. But the statute must be interpreted consistently, and the text will not countenance this tortured reading.

C. The Evidence Was Not In Equipoise

Even if Respondents had the burden of persuasion, that burden was irrelevant because it only comes into play where the evidence is in equipoise.[11] Since the *only* pricing evidence favors Respondents, the burden is irrelevant and it was error to base the RD on it.

V. THE BUREAU LACKS JURISDICTION OVER ATRIUM AND ATRIUM RE

Nowhere in the NOC did EC allege, and never at the hearing did EC present evidence on the question of jurisdiction over Atrium or Atrium Re.[12] Rather, despite Respondents' strong

[11] *See, e.g.*, *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) ("'burden of persuasion'" determines "which party loses if the evidence is closely balanced").

[12] EC now half-heartedly suggest that "PHH" should be "liable for Atrium's conduct" "in the alternative" because "the corporate veil should be pierced" and "it owned 100% of Atrium, so any 'thing of value' Atrium received . . . enriched PHH." Opp'n at 28 n.46. First, even if PHH Corp. were liable for Atrium or Atrium Re's actions, there would still be no jurisdiction. Second, the conclusory statement that "the corporate veil should be pierced" is not explained, was not in the NOC, and was not pursued at the hearing despite EC's knowing that Respondents

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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