UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

EFRAIN MUNOZ, *individually and on behalf of all others similarly situated, et al.*,

Plaintiffs,

v.

PHH MORTGAGE CORPORATION, *et al.*,

Defendants.

No. 1:08-cv-00759-DAD-BAM

ORDER ON PARTIES' MOTIONS TO STRIKE, CROSS-MOTIONS FOR SUMMARY JUDGMENT AND ON DEFENDANTS' MOTION FOR CLASS DECERTIFICATION

(Doc. Nos. 336, 339, 340, 342, 350, 365)

INTRODUCTION

Plaintiffs allege in this certified class action that defendants PHH Corporation ("PHH Corp."), PHH Mortgage Corporation ("PHH Mortgage"), PHH Home Loans, LLC ("PHH Home Loans") (collectively, "PHH"), and Atrium Insurance Corporation ("Atrium") (collectively, the "defendants") violated the anti-kickback provisions of the Real Estate Settlement Procedures Act ("RESPA") by requiring mortgage insurers ("MIs") to which PHH had referred private mortgage insurance ("PMI") business to enter into captive reinsurance agreements with Atrium, a reinsurer owned by PHH. According to plaintiffs, this requirement allowed defendants to extract kickbacks from those MIs for the PMI business that PHH had referred them.

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Both parties have moved for summary judgment (Doc. Nos. 340, 342) and to strike each other's expert witnesses. (Doc. Nos. 336, 350, 365.) Defendants also move for class decertification. (Doc. No. 339.) The motions came before the court for hearing back on December 20, 2016.[1] (Doc. No. 384.) Attorneys Donna Siegel Moffa and Terence Ziegler appeared at that time for plaintiffs; Edward Ciolko, for intervenor Marcella Villalon; and Joseph Genshlea, David Souders, and Michael Trabon, for defendants. (Doc. No. 384.) For the following reasons, the court will grant in part plaintiffs' motion for summary judgment in the manner described below. All other motions will be denied.

BACKGROUND

A. RESPA and Mortgage Insurance

"Passed by Congress in 1974, RESPA broadly regulates various aspects of real estate transactions." *In re Zillow Grp., Inc. Sec. Litig.*, No. 2:17-cv-01387-JCC, 2018 WL 4735711, at *5 (W.D. Wash. Oct. 2, 2018) (citing 12 U.S.C. §§ 2601 *et seq.*). In passing RESPA, Congress sought to combat the "unnecessarily high settlement charges caused by certain abusive practices" by eliminating kickbacks and referral fees that inflate the cost of real estate settlement services. 12 U.S.C. § 2601(a), (b)(2). Specifically, § 8(a) of RESPA prohibits giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, [in relation to the referral of] a real estate settlement service involving a federally related mortgage loan." Real Estate Settlement Procedures Act § 8, 12 U.S.C. § 2607 (2012).

PMI is a real estate settlement service that is regulated pursuant to RESPA. *See Munoz v. PHH Corp.*, 659 F. Supp. 2d 1094, 1098 (E.D. Cal. 2009); *Kay v. Wells Fargo & Co.*, 247 F.R.D. 572, 576 (N.D. Cal. 2007). When a borrower purchases a home with a mortgage but puts less than 20% down, the mortgage lender generally requires the borrower to purchase PMI from a MI to guard against the risk of default. (Doc. Nos. 362-1, Pls.' Statement of Undisputed Facts ("PSUF") at ¶¶ 7–9; 342-2, Defs.' Statement of Undisputed Facts ("DSUF") at ¶ 40.) In most cases, the lender directs the borrower to one of its preferred MIs, though some borrowers have the

[1] The court apologizes to both counsel and the parties for the lengthy delay in the issuance of this order.

option to choose their own. (PSUF at ¶ 11; Doc. No. 352-1, Defs.' Resp. to PSUF ("DRF") at ¶ 11.) Although the lender is the primary beneficiary of PMI, the borrower pays the PMI premiums. (PSUF at ¶ 10; DSUF at ¶ 10.) As mortgages proliferated in number, size, and riskiness throughout the 2000s, MIs began entering into reinsurance agreements to transfer some of their risk to a reinsurer. (*See, e.g.*, PSUF. at ¶ 13; DSUF at ¶¶ 26–27; DRF at ¶ 17.) In response, some mortgage lenders, including PHH, created reinsurance affiliates to provide reinsurance to MIs. (PSUF at ¶¶ 13, 31–33; DSUF at ¶¶ 26–27.) These affiliates often operated on the basis of captive reinsurance agreements wherein a MI agrees to purchase reinsurance from a specific reinsurer, often in exchange for referrals of PMI business. (PSUF at ¶¶ 13, 17.)

Plaintiffs allege that defendants' captive reinsurance agreements were merely a means for defendants to extract kickbacks from the MIs to which defendants had referred PMI business, and that such an arrangement violated § 8 of RESPA. (*See* Doc. No. 96, First Am. Compl. ("FAC") at 2–3.)

B. The Parties

Defendant PHH is a residential mortgage originator and servicer that operates in the United States. (PSUF at ¶¶ 1–2.) Atrium, a PHH subsidiary, provides reinsurance exclusively for PMI issued in connection with loans originated or purchased by PHH.[2] (PSUF at ¶¶ 3–4; DSUF at ¶ 1.) During the period in question, Atrium had reinsurance agreements with the following four MIs: AIG United Guaranty Mortgage Insurance Company ("UGI"), Genworth Mortgage Insurance Company ("Genworth"), Radian Guaranty Inc. ("Radian"), and CMG Mortgage Insurance Company ("CMG") (collectively, the "captive MIs"). (PSUF at ¶ 16; DSUF at ¶ 8.)

The named plaintiffs represent a class of people who

> obtained residential mortgage loans originated and/or acquired by PHH and/or its affiliates on or after June 2, 2007, and, in connection therewith, purchased private mortgage insurance and

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[2] Atrium Insurance Corporation and Atrium Reinsurance Company are the issuing entities for the captive reinsurance agreements at issue in this case, and, for the purposes of this order, the court will refer to both as Atrium. (DSUF at ¶¶ 1, 3, 4–5; Doc. No. 342-4 at ¶¶ 3, 4, 7, Ex. A at 10–11.)

> whose loans were included within PHH's captive mortgage reinsurance arrangements (the "Class").[3]

Munoz v. PHH Corp., No. 1:08-cv-0759-AWI-BAM, 2013 WL 2146925, at *26 (E.D. Cal. May 15, 2013) ("*Munoz I*"), *findings and recommendations adopted*, No. 1:08-cv-0759-AWI, 2015 WL 3703972 (E.D. Cal. June 11, 2015).

C. The Captive Reinsurance Agreements between Atrium and the Four Captive MIs

1. How the Captive Reinsurance Agreements Worked

The captive reinsurance agreements at issue (the "CRAs") were structured as excess-of-loss arrangements, meaning that Atrium provided reinsurance coverage to pools of loans called "books," typically categorized by "book year," but only paid out claims after any losses exceeded a set percentage called the "attachment point," and only up to a set point called the "detachment point." (DSUF at ¶¶ 9–10.) The risk band contemplated by the CRAs ranged from an attachment point of 2.25–4% of a loan to a detachment point of 6.25–14%. (*Id.* at ¶ 12.) Loans were categorized by the year in which they closed, and the risk of each book year reflected various factors such as the "type of loans in the pool, as well as external market conditions, such as the employment rate, inflation, housing prices, and other economic factors." (*Id.* at ¶ 10.)

In exchange for reinsurance coverage by Atrium, the captive MIs ceded to Atrium between 25–45% of the gross premiums that the MIs had collected from the underlying PMI (i.e., the premiums paid by borrowers to the MIs). (*Id.* at ¶ 12.) Atrium then placed those proceeds into cross-collateralized[4] trust accounts for each MI from which claims could be satisfied. (PSUF at ¶¶ 34–36; DSUF at ¶ 11.) Atrium invested the funds in those accounts and, assuming certain

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[3] Although the certified class did not originally contain an explicit end date, the court subsequently recognized an end date when it approved a legal notice to the class that described the relevant class period as June 2, 2007 through December 31, 2009. (PSUF at ¶ 6; *see* Doc. Nos. 302-1 at 2; 304.) This date is consistent with the end of the captive reinsurance agreements ("CRAs") at issue, as they were all terminated or placed in run-off by, on, or around December 31, 2009. (DUSF at ¶¶ 14, 17–18.) After that date, no other mortgages were eligible for new reinsurance coverage under the CRAs in question. (*Id.*)

[4] Cross-collateralization refers to the practice of pooling funds from multiple book years in a single trust account from which claims from all book years could be paid out. (PSUF at ¶ 44; DSUF at ¶ 11.) This practice allows risk to be spread across multiple book years.

conditions such as minimum capital requirements were met, was allowed to collect dividends and withdraw funds from the accounts. (PSUF at ¶¶ 31, 45.)

The CRAs with Genworth, Radian, and CMG included additional liability-limiting provisions that protected the trust accounts from claims arising from other reinsurance agreements and limited Atrium's liability to the funds therein. (*See* Doc. Nos. 362-2 at 170; 362-3 at 20; 362-3 at 76.) For example, in an analysis of the Genworth CRA, Atrium wrote:

> Atrium supports the reinsurance with capital and the ceded net written premium deposited into a trust. If trust funds are depleted such that Atrium's capital is below the required capital, Atrium can infuse additional funds in order to continue reinsuring business [Atrium must maintain total capital of at least 10% of reinsured risk (i.e. a risk to capital ratio of 10 to 1)]. However, Atrium has no liability beyond the funds available in the trust.

(Doc. No. 362-4 at 238 (brackets in original).) During the time the CRAs were in effect, Atrium paid out every reinsurance claim made by the captive MIs. (DSUF at ¶ 19.)

In addition to the risk mitigation provided by reinsurance, Atrium contends that the MIs benefited from its services due to: (1) the resulting credit on the MIs' financial statements, which reduced the MIs' required reserves; (2) the "smoothing" of earnings and other financial results; and (3) "skin-in-the-game" on the part of the affiliated lenders such that they had an interest in underwriting higher quality loans. (DSUF at ¶¶ 22.) From time to time, the four CRAs were amended and renewed, but they have all since been terminated or commuted.[5] (PSUF at ¶ 19; DSUF at ¶¶ 14, 17, 18.)

2. PHH Referred the Majority of Its Loans to the Captive MIs

Using referrals of PMI business as an incentive, PHH encouraged MIs to agree to CRAs with Atrium. (PSUF at ¶¶ 54–68.) To facilitate this process, PHH used an automatic system nicknamed the "dialer" to parcel out loans to the captive MIs. (PSUF at ¶¶ 54–68.) The number of loans allocated to a particular MI depended on factors such as, but not limited to, the MI's

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[5] A commutation results in the complete and final settlement and discharge of any obligations arising from a reinsurance agreement. Commutations often include payments to the reinsured, the reinsurer, or both from any funds remaining in the trust account. (*See* DSUF at ¶ 16.)

level of cooperation with defendants, the MI's willingness to underwrite PHH's loans, and whether the MI ultimately reinsured those loans through Atrium.[6] (*Id.*)

Plaintiffs have come forward with substantial evidence supporting their allegations that defendants connected their referral of PMI business to a MI's willingness to agree to a CRA with Atrium. For example, Sam Rosenthal, a vice-president at PHH Mortgage, admitted in testimony before the Consumer Financial Protection Bureau ("CFPB") that PHH, using its dialer, directed the vast majority of its PMI business to the captive MIs that had agreed to CRAs with Atrium. (*See* Doc. No. 362-3 at 179–87; *see also* Doc. No. 340-5 at 88.) Corroborating Rosenthal's admission in this regard, an employee at Republic Mortgage Insurance Company ("RMIC"), a non-captive MI, explained in an email that Rosenthal informed him that "it would be next to impossible to get business without the [CRA]."[7] (Doc. No. 340-5 at 6.) Similarly, PHH employee Robert Nicosia detailed how, in 2006, 95% of all of PHH's insured mortgages were reinsured by Atrium, with that number rising to 100% for retail mortgages[8] that had PMI. (*Id.* at 85–86.) Historical tracking data from PHH's dialer confirms this trend over time, showing that PHH referred 100% of its retail PMI business to Genworth and UGI between May 21, 2001 and November 21, 2008. (Doc. No. 362-3 at 221.)

After November 2008, PHH began to allocate a portion of PMI business to MIs that had not agreed to CRAs with Atrium. (*Id.*) For example, on November 21, 2008, PHH began allocating 10% of its retail PMI business to the Mortgage Guaranty Insurance Corporation

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[6] A different process governed correspondent loans (i.e., loans that were originated by other lenders but acquired by PHH). In such cases, the original lender would typically select the MI. However, PHH imposed a "pricing adjustment" charge of up to 0.75% if the lender assigned the loan to a non-captive MI. (PSUF at ¶ 68; DRF at ¶ 68.)

[7] Defendants object that this email is not admissible evidence but provide no basis for their objection. (Doc. No. 352-1 at 29–30.) Accordingly, the objection is overruled. *See Burch v. Regents of Univ. of California*, 433 F. Supp. 2d 1110, 1123 (E.D. Cal. 2006) ("The burden is on defendants to state their objections with specificity."); *see also Warner-Tamerlane Publishing Corp. v. Leadsinger Corp.*, No. 2:06-cv-06531-VAP-PJW, 2008 WL 11334487, at *3 (C.D. Cal. Apr. 18, 2008).

[8] Retail mortgages are issued directly by the lender to the borrower. In addition to its retail channel, PHH sourced its loans from correspondent lenders and mortgage brokers. (DRF at ¶ 68.)

("MGIC"), a non-captive MI. (*Id.*) However, at no point during the class period did PHH direct less than 80% of its retail PMI business to the captive MIs. (*Id.*)

3. The UGI Reinsurance Agreement

Atrium entered into one of the mortgage industry's first captive reinsurance agreements with UGI in 1995, and, until 2000, UGI was the only MI that had a captive reinsurance agreement with Atrium. (PSUF at ¶ 20.) During that period, PHH referred the majority of its loans that required PMI to UGI. (*Id.* at ¶ 23.)

Atrium and UGI later agreed to a new CRA on January 1, 1997, which continued until the CRA was commuted on May 31, 2013. (PSUF at ¶ 21; DSUF at ¶ 18.) During that period, UGI ceded a total of $304,729,028 in premiums to its trust account with Atrium. (PSUF at ¶ 47; Doc. No. 362-3 at 118.) Atrium, in turn, made capital contributions to the trust account totaling $46,779,849, withdrew $102,663,805 in dividends, and paid out $28,571,236 in claims to UGI. (*Id.*) When the agreement was commuted, Atrium was allowed to withdraw an additional $69,169,499 from the trust account in exchange for a payment of $48,592,201 to UGI. (*Id.*)

4. The Genworth Reinsurance Agreement

In 2000, Atrium entered into a second CRA, this time with Genworth. That agreement provided for a 40% net cede to Atrium, which was later reduced to 25% starting June 1, 2008. (PSUF at ¶ 24; DRF at 13–14.) By 2001, PHH was referring PMI business to Genworth. (PSUF at ¶ 26; DRF at 15.)

The Genworth CRA ran from October 9, 2000 until its commutation on April 1, 2012. (DSUF at ¶ 17.) During that period, Genworth ceded a total of $136,312,066 in premiums to its trust account with Atrium. (PSUF at ¶ 48; Doc. No. 362-3 at 117.) Atrium, in turn, made capital contributions to the trust account totaling $5,500,000, withdrew a total of $13,900,000 in dividends, and paid out $28,571,236 in claims to Genworth. (*Id.*) When the agreement was commuted, Atrium was allowed to withdraw an additional $24,100,000 from the trust account in exchange for a payment of $37,149,869 to Genworth. (*Id.*)

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5. The Radian Reinsurance Agreement

In 2004, Atrium agreed to a CRA with Radian. (DSUF at ¶ 14.) The agreement with Radian provided for a 40% net cede to Atrium and ran from July 26, 2004 until its commutation on July 22, 2009. (PSUF at ¶ 27; DRF at 15.) During that period, Radian ceded a total of $3,845,554 in premiums to its trust account with Atrium, which, in turn, made capital contributions of $452,349. (PSUF at ¶ 49; DSUF at ¶¶ 14–15; Doc. No. 362-3 at 117.) Unlike with its agreements with UGI and Genworth, however, Atrium did not earn any dividends from this CRA. When the agreement was commuted, Atrium returned all the premiums it received from Radian and forfeited to Radian the remaining trust assets, including the capital contributions it had made. (*Id.*)

6. The CMG Reinsurance Agreement

Atrium's final CRA was with CMG. (PSUF at ¶ 29.) The agreement, which ran from December 1, 2006 until its commutation on August 31, 2009, provided for a 25% net cede to Atrium. (DUSF at ¶¶ 12, 14.) During that period, CMG ceded a total of $2,766,097 in premiums to its trust account with Atrium, which, in turn, made capital contributions of $440,634. (PSUF at ¶ 50; DSUF at ¶ 15; Doc. No. 362-3 at 117.) As with its agreement with Radian, Atrium did not earn any dividends from the CMG CRA. (*Id.*) When the agreement was commuted, Atrium returned all the premiums it received from CMG and forfeited to CMG the remaining trust assets, including the capital contributions it had made. (*Id.*)

Below is a table that summarizes key information about the CRAs and each of the associated books for the relevant class period. As explained above, the books contain loans that were reinsured throughout the class period (from June 2, 2007 to December 31, 2009); the books featured attachment points ranging from 2.25–4% and detachment points from 6.25–14%. In exchange for this band of reinsurance coverage, the captive MIs ceded between 25–45% of their gross PMI premiums to Atrium. The vast majority of loans were reinsured by UGI and Genworth, though CMG—and to a lesser degree, Radian—also reinsured a number of loans.

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Provider/Book	Dates	Attachment and Detachment Points	Gross Ceded Premium %[2]	Original Loan Count
UGI				
Book year 2007	(1/1/2007 - 12/31/2007)	Attachment Point: 4% Detachment point: 14%	45%	8,433
Book year 2008	(1/1/2008 - 5/31/2008)	Attachment Point: 4% Detachment point: 14%	45%	4,873
Book year 2009	(3/1/2009 - 12/31/2009)	Attachment Point: 4% Detachment point: 10%	25%	2,511
Genworth				
Book year 2007	(1/1/2007 - 12/31/2007)	Attachment Point: 4% Detachment point: 14%	45%	2,580
Book year 2008-A	(1/1/2008 - 5/31/2008)	Attachment Point: 4% Detachment point: 14%	45%	4,582
Book year 2008-B	(6/1/2008 – 3/31/2009)	Attachment Point: 4.5% Detachment point: 9.5%	25%	6,706
Radian				
Book year 2007	(1/1/2007 - 12/31/2007)	Attachment Point: 4% Detachment point: 14%	40%	550
Book year 2008	(1/1/2008 - 12/31/2008)	Attachment Point: 4% Detachment point: 14%	40%	195
CMG				
Book year 2007	(1/1/2007 - 12/31/2007)	Attachment Point: 2.25% Detachment point: 6.25%	25%	2,742
Book year 2008	(1/1/2008 - 12/31/2008)	Attachment Point: 2.25% Detachment point: 6.25%	25%	1,303

Figure 1: Summary of the Relevant Books. (DUSF at ¶ 12.)

Whether the structure of the CRAs and the alleged referrals relating to them violate RESPA's anti-kickback provisions turns in part on whether RESPA's safe harbor applies. The court will address the parties' arguments on those issues below.

D. RESPA's Safe Harbor

Although RESPA's prohibition on kickbacks and referral fees is written broadly, Congress tempered its reach by enacting a safe harbor, which provides that "[n]othing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(c)(2). The U.S. Department of Housing and Urban Development ("HUD") later issued an opinion letter on August 6, 1997 (the "1997 HUD Letter"), explaining

that captive mortgage reinsurance arrangements are permissible under RESPA's safe harbor "if the payments to the reinsurer: (1) are for reinsurance services 'actually furnished or for services performed'"—i.e., there is, among other things, a "real transfer of risk"—"and (2) are bona fide compensation that does not exceed the value of such services." U.S. Dep't of Hous. & Urban Dev., Opinion Letter on Captive Reinsurance Programs to Countrywide Funding Corporation (Aug. 6, 1997) ("1997 HUD Letter") at 3.

In an attempt to ensure that it complied with the safe harbor's requirements, Atrium engaged the services of Milliman, Inc. ("Milliman"), a third-party actuarial firm, to prepare independent risk analysis reports (the "Milliman reports") to confirm that the CRAs transferred a sufficient amount of risk and that the risk was commensurate with the premiums paid. (Doc. No. 362-3 at ¶ 18.) Applying "financial and actuarial analysis and judgment," Milliman analyzed the Genworth and UGIC CRAs for certain book years during the class period, (*see* Doc. No. 342-4 at 13–137), and concluded that those CRAs had "a reasonable probability of loss to the reinsurer" and "a net ceded premium which is reasonably related to the ceded risk." (*Id.* at 22, 60, 99.)

E. Procedural History

Plaintiffs filed this class action complaint on June 2, 2008, alleging a violation of § 8 of RESPA. (Doc. No. 1.) They later filed the operative FAC on December 10, 2010, which included claims outside of RESPA's one-year statute of limitations that plaintiffs assert were tolled by principles of equitable tolling, fraudulent concealment, and/or the discovery rule (collectively, the "tolled claims"). (Doc. No. 96.) However, the FAC did not name a plaintiff as a representative for the class members asserting the tolled claims, leading plaintiff-intervenor Marcella Villalon to file a motion to intervene on May 30, 2013, seeking appointment to serve as the named representative with respect to the tolled claims. (Doc. No. 231.) On July 29, 2013, the court permitted Villalon to intervene in the action as a proposed class representative but later granted defendants' motion for partial judgment on the pleadings as to the tolled claims on August 11, 2014. (Doc. Nos. 242, 266.) In an attempt to cure the deficiencies with the tolled claims, plaintiffs filed a Second Amended Complaint ("SAC") on October 14, 2014. (Doc. No. 274.) However, the district judge previously assigned to this action granted defendants' motion

for partial dismissal on May 22, 2015, dismissing the tolled claims with prejudice. (Doc. Nos. 276, 284.) At that time, the court also *sua sponte* struck all pleadings amended after August 11, 2014, including the SAC and defendants' answer thereto. (Doc. Nos. 274, 277, 284.) This action thus proceeds on the operative FAC and with a certified class. (Doc. Nos. 96, 230, 288.)

Now before the court are the parties' cross-motions for summary judgment (Doc. Nos. 340, 342) and motions to strike each other's expert witnesses (Doc. No. 336, 350, 365), as well as defendants' motion to decertify the class. (Doc. No. 339.) At the parties' request, the court entered a stay from December 8, 2017 to March 1, 2018, pending mediation. (Doc. No. 389.) The stay was extended until April 10, 2018 to allow time for further settlement discussions between the parties. (Doc. No. 393.) However, the parties later notified the court that they were unable to reach a settlement. (Doc. No. 396.)

MOTIONS TO STRIKE EXPERT REPORTS

In moving for summary judgment, plaintiffs have submitted four expert reports, one from each of their four expert witnesses, that analyze whether the CRAs were actual reinsurance contracts. (*See* PSUF at ¶¶ 69–85.) Defendants' expert witness in turn prepared (1) a report on whether Atrium's services were priced commensurate to their value and (2) a rebuttal report responding to plaintiffs' expert reports. (*See* Doc. No. 350-2 at 112–51, 152–84.) Both parties have moved to strike each other's expert witnesses. (*See* Doc. Nos. 336, 350, 365.) The court will address the parties' motions to strike first in light of the pending cross-motions for summary judgment.

A. Defendants' Motion to Strike Plaintiffs' Expert Reports

1. Plaintiffs' Expert Reports

a. *The Barrett Report*

Plaintiffs' first expert is Kent E. Barrett, who prepared a report addressing the following two questions:

> Did Atrium's captive reinsurance arrangements transfer significant insurance risk such that they qualified for insurance accounting?
>
> Were the premiums paid to Atrium commensurate with the risk transferred?

(Doc. No. 362-5 at 245–416.) Barrett is a certified public accountant and member of the American Institute of Certified Public Accountants with 33 years of experience in the profession. (*Id.* at 250.) Since 2000, he has been the managing director at Veris, a consulting firm, and has led major litigation engagements, served as an expert witness, and consulted regularly with clients on complex, technical insurance accounting matters. (*Id*.) Barrett focuses on accounting, auditing, and senior financial management for insurance companies and other financial services entities, and he has particular experience working on reinsurance issues. (*Id.* at 250–52.)

His expert report first provides a primer on various accounting principles. For example, he explains that publicly traded companies normally conduct accounting in adherence to Generally Accepted Accounting Principles ("GAAP"), but that the insurance industry has its own set of rules, the Statutory Accounting Principles ("SAP"). (*Id.* at 254.) SAP differs from GAAP in that "it is designed to meet the needs of insurance regulators and, accordingly, has a solvency focus and emphasizes measurement of the ability to pay future claims." (*Id.* at 255.) Both GAAP and SAP have rules that determine whether a given reinsurance contract qualifies for "insurance accounting" treatment by examining whether it transfers "significant insurance risk" such that "[i]t is reasonably possible that the reinsurer may realize a significant loss from the transaction." (*Id.* at 255–57.) This determination

> requires a complete understanding of all contracts or agreements with [the] reinsurer[]. Although an individual contract may appear to indemnify the ceding enterprise, the risk assumed by the reinsurer through one reinsurance contract may have been offset by other contracts or agreements. A contract does not meet the conditions for reinsurance accounting if features of the reinsurance contract or other contracts or agreements directly or indirectly compensate the reinsurer or related reinsurers for losses.

(*Id.* at 256–57 (citing GAAP and SAP).)

Using his experience in the field and the relevant accounting and actuarial standards, Barrett examined each of the CRAs and found that none of them transferred "significant insurance risk." (*Id.* at 272–75.) He explains:

> Atrium's reinsurance arrangement[s] with [the captive MIs] w[ere] structured and implemented so as to dramatically reduce the potential for loss while retaining high potential for gain. Unlike

> true catastrophe-type reinsurance where the reinsurer has the opportunity for substantial gain and equally substantial loss, Atrium's downside was severely limited while its upside was not.

(*Id.*) For example, Barrett's modelling of the UGI CRA indicated that there was a 90% confidence interval that Atrium would experience somewhere in between a $3.2 million loss to a $167.1 million profit as a result of the agreement. (*Id.* at 271–72.) Atrium's after-tax net profit from its CRA with UGI, its longest running agreement, ended up being approximately $127.4 million. (*Id.* at 271.) This was due to several factors such as: (1) the high percentage of total gross premiums ceded; (2) Atrium's sometimes non-compliant withdrawals of funds from UGI's trust account; (3) Atrium's failure to adequately fund the trust account; (4) the terms of the CRA, which restricted Atrium's liability to the funds contained in the trust account; (5) the lack of recourse available to UGI under the CRA if Atrium failed to fulfill its contractual obligations; and (6) the eventual commutation of the agreement, which discharged Atrium's liabilities under the CRA. (*See id.* at 286, 288, 290, 305, 306–07, 309, 317–18.) According to Barrett, the other CRAs at issue in this case featured similar characteristics. (*See id.* at 320–62.)

Barrett's review of the CRAs led him to conclude that all four of the agreements did not transfer significant enough insurance risk so as to qualify for insurance accounting treatment, and that the premiums paid by the captive MIs were not commensurate with the risk transferred. (*Id.* at 272–75.)

b. *The Schwartz Report*

Plaintiffs' second expert, Allan I. Schwartz, prepared a report analyzing whether the captive MIs' payments to Atrium were: (1) for reinsurance services actually furnished or for services performed, and (2) bona fide compensation that does not exceed the value of any such services provided. (Doc. No. 362-5 at 417–81.) Schwartz was formerly the Assistant Commissioner of the New Jersey Department of Insurance and the Chief Actuary for the North Carolina Department of Insurance. (*Id.* at 419.) He is now the president of AIS Risk Consultants, an actuarial consulting firm, and a member of various actuarial organizations. (*Id.* at 419–20.) He has also written papers on actuarial science, including on reinsurance, and testified in insurance rate proceedings in seventeen states and the District of Columbia. (*Id.* at 422–23.)

In his report, Schwartz identified several key features of the CRAs. For example, the fact that Atrium charged the captive MIs 25–40% of their gross ceded premiums for reinsurance using a multi-year risk model allowed it

> sufficient time to build up a cushion of underwriting profits that can be used to eventually pay claims, instead of Atrium having to use its own funds (capital) to pay for any economic ([as] opposed to claim) losses in a particular year.
>
> . . .
>
> The commitment of low capital amounts initially gave Atrium the ability to consider the results of the reinsurance arrangements before deciding whether to supply additional funds. If the reinsurance agreements were providing favorable results, then Atrium could supply additional capital, whereas if the results from the reinsurance arrangements were unfavorable, Atrium could cut off the agreements, minimizing financial losses. And in fact, that is exactly what occurred. . . . The Radian and CMG agreements produced unfavorable results and were cut off relatively quickly through commutation, with a minimal financial loss to Atrium.

(*Id.* at 441.) As an example, Schwartz pointed out Atrium's treatment of the CMG CRA. After failing to adequately fund the CMG trust account, "Atrium, with the unexplainable consent of CMG, decided to commute the reinsurance agreement[,] thereby cutting off its risk." (*Id.* at 447.) According to Schwartz, this "demonstrate[s] the illusory nature of the reinsurance agreements between Atrium and the mortgage insurance companies." (*Id.*)

Based on his professional experience and methodologies traditionally employed in the actuarial sciences, Schwartz ultimately concluded that:

> The agreement between Atrium and the four mortgage guaranty insurance companies did not in a practical sense represent reinsurance since there was no real transfer of risk to Atrium from the mortgage guaranty companies, and [t]he amount paid to Atrium from the mortgage guaranty insurance companies far exceeded the value of any such services provided.

(*Id.* at 419.)

c. *The Cummins Report*

Plaintiffs' third expert, J. David Cummins, Ph.D., was asked by plaintiffs to form an opinion about whether "the agreements between the various private mortgage insurers and Atrium constituted legitimate contracts of reinsurance" and whether "the agreements resulted in a real

transfer of risk." (Doc. No. 362-5 at 153–243.) Dr. Cummins is a former member of the faculty at the Wharton School of Business and currently a professor at the Fox School of Business at Temple University, where he teaches insurance, risk management, and actuarial sciences, especially as they relate to the economics of the insurance industry, insurance pricing, reinsurance, and insurance accounting. (*Id.* at 153–54.) In addition to teaching, Dr. Cummins has also published extensively in the fields of insurance and risk management, including more than 100 journal articles and 18 books on insurance and risk management. (*Id.*)

In his report, Dr. Cummins explains how the CRAs included an "escape option" for Atrium that allowed it to "not assume any significant risk or absorb any significant net losses and, in fact, [Atrium] realized a substantial net profit over the life of its reinsurance agreements." (*Id.* at 166, 189.) Using the Genworth CRA as an example, Dr. Cummins points out that "Genworth's sole remedy should Atrium fail to cure any deficiency in the trust account is to terminate the agreement." (*Id.* at 165.) This can take the form of a run-off, where "no new reinsurance would be issued following termination, but the agreement would remain in effect with policies already reinsured," or a cut-off, which "would transfer the risk of adverse loss development from Atrium to Genworth." (*Id.* at 166.) Termination of the CRA defaults to the former, unless both parties agree to the latter. (*Id.*) Despite this, both Genworth and UGI agreed to a cut-off of their CRAs "on terms that were quite favorable to Atrium," suggesting that the CRAs were "not intended to provide real insurance . . . but rather to divert reinsurance premiums to Atrium, on which no significant losses were anticipated." (*Id.* at 167, 172.) Radian and CMG agreed to similar commutations of their CRAs. (*Id.* at 174, 176.)

After reviewing the reinsurance and trust agreements as well as associated accounting, financial, and actuarial statements, Dr. Cummins concluded that "Atrium did not provide a real transfer of risk or legitimate reinsurance." (*Id.* at 184.)

d. *The Barile Report*

Plaintiffs' fourth and final expert, Andrew J. Barile, was asked by plaintiffs to determine whether the CRAs "were valid contracts for reinsurance that conform to the custom and practice in the reinsurance industry." (Doc. No. 365-2 at 380–412.) Barile is the President and CEO of

Andrew Barile Consulting Corporation, Inc., an insurance and reinsurance consulting corporation. (*Id.* at 399.) He has been employed in the insurance and reinsurance industry for more than fifty years and has worked on the feasibility, formation, structuring, and reinsurance negotiations of captive insurance companies. (*Id.*)

Based on his experience and expertise in the field, Barile concluded that PHH used Atrium, its captive reinsurance company, "to orchestrate purported 'reinsurance' for . . . Radian, CMG, Genworth, and UGC utilizing a reinsurance contract whose terms and conditions do not conform to reinsurance industry custom and practice and do not constitute valid reinsurance." (*Id.* at 384.) His conclusion was predicated, in part, on Atrium's ability to cut-off and commute its CRAs even though "traditional or open reinsurance market agreements do not permit the Reinsurer to walk away from the Agreement without any continuing responsibility to reinsure risk it has already contracted to reinsure." (*Id.* at 390.)

2. Analysis of Defendants' Motion to Strike Plaintiffs' Expert Reports

Relying on Rule 403, defendants argue that the court should strike plaintiffs' expert reports because they are irrelevant, redundant, and rely improperly on information beyond the class period. (Doc. No. 365-1 at 6.)

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403; s*ee also In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1016 (9th Cir. 2008) (same, "especially . . . with respect to expert witnesses"). However, Rule 403 favors the admissibility of relevant evidence. *See United States v. Fleming*, 215 F.3d 930, 939 (9th Cir. 2000) (citation omitted). If a party wishes to exclude evidence, it carries the burden "[w]ith respect to obtaining a ruling in advance of trial." Handbook of Fed. Evid. § 403:1 (8th ed.). That burden is significant, as exclusion under Rule 403 "is an extraordinary remedy to be

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used sparingly." *United States v. Monzon-Silva*, 791 F. App'x 671, 672 (9th Cir. 2020)[9] (quoting *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995)), *cert. denied*, __ S. Ct. __, No. 19-7853, 2020 WL 1496778 (U.S. Mar. 30, 2020); *see also United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983) (emphasizing that "this admonition comport[s] with the fact that the federal rules favor admission of evidence over exclusion if the evidence has any probative value."); *United States v. Guerrero*, 667 F.2d 862, 867 (10th Cir. 1981) ("[T]he balancing of probative value against prejudicial effect is a matter which is within the discretion of the trial court [because] Federal Rules and Practices favor the admission of evidence, rather than its exclusion if the proffered evidence has any value at all.").

Defendants first argue that all four expert reports offered by plaintiffs are irrelevant because "whether the insurance agreements complied with specific actuarial and accounting standards" is not at issue. (Doc. No. 379 at 5–10.) That argument, however, ignores the fact that the reports simply applied those standards in reaching the conclusion that the CRAs exhibited a "lack of a real transfer of risk." (*See, e.g.*, Doc. No. 362-5 at 425.) That conclusion is directly relevant to the claims at issue in this action because captive reinsurance arrangements are permissible under RESPA only if, among other things, the payments to the reinsurer are for reinsurance services "actually furnished or for services performed." 1997 HUD Letter at 3. In turn, the determination of whether reinsurance is "actually furnished" requires that there be a "real transfer of risk." *Id.* at 3, 6. That plaintiffs' experts chose to apply certain accounting and actuarial standards—prevailing ones such as GAAP—to analyze the evidence in this case does not render their reports irrelevant. The experts' analyses of the evidence tends to make it more probable than not that: (1) the CRAs did not affect a real transfer of risk; (2) Atrium did not actually furnish reinsurance services; and (3) the premiums paid by the captive MIs were not commensurate with the services provided. Thus, the reports constitute relevant evidence. *See* Fed. R. Evid. 401.

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[9] Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule 36-3(b).

Next, defendants argue that the reports are needlessly cumulative. (Doc. No. 365-1 at 17–18.) Although Rule 403 permits the court to exclude evidence where its probative value is substantially outweighed by its "needlessly . . . cumulative" nature, defendants' motion is premature and "serves no purpose at summary judgment." *Nelson v. Fluoropharma Med., Inc.*, No. 2:13-cv-1152-JAD-CWH, 2016 WL 53825, at *5 (D. Nev. Jan. 4, 2016) (citing *Burch*, 433 F. Supp. 2d at 1119). At this stage of the litigation, there is no jury to be misled or confused, and whether a party opposes a summary judgment motion by seeking to establish the existence of one genuine dispute of material fact or with ten, if they are successful, the outcome will be the same. *See Fraser v. Goodale*, 342 F.3d 1032, 1036–37 (9th Cir. 2003) ("At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents."); *Block v. City of Los Angeles*, 253 F.3d 410, 418–19 (9th Cir. 2001) ("To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rule[] of Civil Procedure 56.").

Finally, defendants argue that plaintiffs' expert reports relied improperly on information from outside the relevant class period. (Doc. No. 365-1 at 19.) Although defendants' concerns in this regard are well-taken, especially because plaintiffs attempted unsuccessfully to certify a class that included borrowers who fell outside of RESPA's one-year statute of limitations, the validity of those expert conclusions are not necessarily "vitiated by the consideration of data outside of the class period." *Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86, 95 (S.D.N.Y. 2010) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (holding that such data may constitute "background evidence in support of a timely claim")). This is especially so here because defendants have not alleged or shown that the practices at issue in this case changed materially between the relevant class period and the additional period examined by plaintiffs' experts. *See Duling*, 267 F.R.D. at 95.

For all these reasons, the court will deny defendants' motions to strike plaintiffs' expert reports. (Doc. Nos. 336, 365.)

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The court notes that defendants have not objected to the reports on the grounds that plaintiffs' experts do not qualify as experts under Federal Rule of Evidence 702. *See* Ann. Manual Complex Lit. § 23.351 (4th ed.) ("Failure to raise an objection [to expert testimony] could be considered a waiver[.]"). The court will nevertheless conduct a preliminary inquiry into the relevance and reliability of plaintiffs' experts pursuant to its gatekeeping responsibilities, *see Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007), though it need not avail itself of a *Daubert* hearing. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (holding that trial judges may "avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted"); *see also United States v. Wells*, 879 F.3d 900, 934 (9th Cir. 2018) ("Courts have broad latitude in determining the appropriate form of the [*Daubert*] inquiry."); *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (*en banc*) ("While pretrial '*Daubert* hearings' are commonly used, they are certainly not required.") (citations omitted); *United States v. Alatorre*, 222 F.3d 1098, 1100–03 (9th Cir. 2000) (concluding that "trial courts are not compelled to conduct pretrial hearings in order to discharge the gatekeeping function").

Under Federal Rule of Evidence 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In other words, only relevant and reliable expert testimony is admissible, and the district court, as a gatekeeper, has broad latitude in making that determination. *See Cooper*, 510 F.3d at 942 (citations omitted).

To be relevant, evidence must help "the trier of fact to understand or determine a fact in issue," *id.* at 942 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591–92 (1993)), while reliability is measured by "whether an expert's testimony has 'a reliable basis in the knowledge and experience of the relevant discipline.'" *Estate of Barabin*, 740 F.3d at 463

(quoting *Kumho Tire*, 526 U.S. at 149). The reliability question is "a flexible one." *Kumho Tire*, 526 U.S. at 150. The burden of admissibility is borne by the party presenting an expert, *see Cooper*, 510 F.3d at 942 (citations omitted), and the goal "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152; *see also Boyd v. City & County of San Francisco*, 576 F.3d 938, 946 (9th Cir. 2009).

As explained above, the court has found here that all four experts presented by plaintiffs have proffered testimony relevant to whether Atrium provided the captive MIs with actual reinsurance services under the CRAs—a question central to this case. Moreover, all four experts came to their conclusions on the basis of extensive professional, technical, and academic experience in the fields of accounting, auditing, actuarial sciences, and risk management, especially as they relate to risk transfer, insurance, and reinsurance. (*See* PSUF at ¶¶ 69–85.)

Accordingly, the court concludes that plaintiffs' expert reports are both relevant and reliable under Rule 703 and will consider them in resolving the pending cross-motions for summary judgment.

B. Plaintiffs' Motion to Strike Defendants' Expert Reports

1. Defendants' Expert Reports

Defendants' expert witness, Dr. Timothy Riddiough, prepared a report addressing the price commensurability of Atrium's services and a rebuttal report responding to plaintiffs' expert reports.[10] (*See* Doc. No. 350-2 at 112–51, 152–84.) Dr. Riddiough is currently a professor of

[10] The court notes that the first report issued by Dr. Riddiough does not appear to be before the court on the parties' cross-motions for summary judgment. It is not referenced in defendants' motion for summary judgment, their associated reply brief, or their opposition to plaintiffs' cross-motion for summary judgment. (*See* Doc. Nos. 352, 382, 352.) However, his rebuttal report was included in defendants' opposition to plaintiffs' cross-motion for summary judgment. (*See* Doc. No. 352-2 at 58–90.) Accordingly, the court cannot consider the first Riddiough report on summary judgment, though the rebuttal report is properly before the court. The court will nevertheless address plaintiffs' motion to strike the first Riddiough report at this time in the interest of expediency. *See Paulissen v. U.S. Life Ins. Co.*, 205 F. Supp. 2d 1120, 1126 (C.D. Cal. 2002) (ruling on a motion to exclude an expert witness in an order resolving a summary judgment motion).

real estate and urban economics at the University of Wisconsin – Madison. (Doc. No. 350-2, Ex. 16, Riddiough Report at 113–14.) Prior to working in academia, Dr. Riddiough worked as a finance manager for Foremost Guaranty, a private mortgage insurance company. (*Id.* at 114.) He has spent his career researching, speaking, teaching, and consulting on issues of credit risk in mortgage lending, and he served as a senior research fellow at the Central Bank of Hong Kong and a senior technical advisor to the Bank for International Settlements on the issues of real estate and financial market stability. (*Id.*)

Dr. Riddiough addressed two issues in his reports: (1) whether risk was transferred in relation to the CRAs executed between Atrium and the four primary mortgage insurers; and (2) whether Atrium provided beneficial services to the captive MIs. (*Id.* at 113.) After reviewing the CRAs, he concluded that there was a reasonable expectation that Atrium would pay claims under each of the agreements. (*Id.* at 115.) Dr. Riddiough also concluded that Atrium provided valuable services to the captive MIs, thus providing them with clear business justifications for agreeing to the CRAs. (*Id.* at 121.) His conclusion was premised, in part, on defining risk transfer "at the level of the reinsurance book year as it depends on the entry point percentage specified in the excess-of-loss reinsurance contract, occurring if there is a reasonable expectation that claims would ever be paid under the reinsurance agreement." (*Id.* at 121) (stating that his definition of risk transfer "is consistent with the definition of risk transfer as specified in the 1997 HUD [L]etter").

2. Analysis of Plaintiffs' Motion to Strike Defendants' Expert Reports

Plaintiffs move to strike both of Dr. Riddiough's reports under Rules 403 and 702. (Doc. No. 350-1.) They argue that: (1) his opinions are based on impermissible legal interpretations of the 1997 HUD Letter; (2) his risk transfer methodology is unreliable because it is not based on specialized knowledge; (3) his opinion on risk transfer is not relevant; and (4) he relies improperly on the opinions and conclusions of a third-party. (Doc. No. 350-1 at 2.) Plaintiffs also contend that Dr. Riddiough's opinion as to whether Atrium provided beneficial services to the MIs should be excluded because it is incomplete and prejudicial. (Doc. No. 350-1 at 23–25.)

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a. *Relevance of Dr. Riddiough's Reports*

As an initial matter, the court does question Dr. Riddiough's interpretation of the 1997 HUD Letter and the manner in which he defines "risk transfer". Although the 1997 HUD Letter explains that transactions in which there is no reasonable expectation that the reinsurer will ever have to pay claims do *not* constitute a transfer of risk, the inverse—that there is a risk transfer "if there is a reasonable expectation that claims would ever be paid"—is not necessarily true. (*Compare* Doc. No. 350-2 at 121, *with* 1997 HUD Letter at 6.) Notably, however, Dr. Riddiough specifies that his definition of "risk transfer" is "[f]or this report." (Doc. No. 350-2 at 121.) This is sufficient to put the finder of fact on notice that Dr. Riddiough's definition is distinct from—and perhaps "consistent" with—the standards for risk transfer set out in the 1997 HUD Letter, mitigating the risk that his report will be confused for any impermissible legal interpretations or conclusions. Moreover, if the court were to accept plaintiffs' argument that any expert interpretation of the 1997 HUD Letter necessarily intrudes on the court's prerogative, it would have to also exclude the reports of plaintiffs' own experts from evidence, since they too offered their own opinions about the various tests and standards set out in the 1997 HUD Letter. (*See* Doc. No. 376 at 11–12.)

Similarly, the court rejects plaintiffs' argument that Dr. Riddiough's report is unreliable. His analysis of the CRAs, even if it is in part premised on his own definition of risk transfer, integrates his expertise, experience, and knowledge in the fields of economics, finance, real estate, and mortgage insurance. (*See* Doc. No. 350-2 at 112–84). *See Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 813–14 (9th Cir. 2014) ("Like the test for admissibility in general, the test of reliability is also flexible."); *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) ("Expert opinion testimony is. . . reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline.") (citation omitted); *see also Cal. Steel & Tube v. Kaiser Steel Corp.*, 650 F.2d 1001, 1003 (9th Cir. 1981) (observing in a pre-*Daubert* decision that "[w]here an expert is not obviously unqualified, questions at the summary judgment stage as to the expert's qualifications should rarely be resolved by exclusion of the evidence"). His analysis of the CRAs and opinions on risk transfers are also directly relevant to

the claims at issue because the test for whether defendants provided actual reinsurance asks whether there was a "real transfer of risk." 1997 HUD Letter at 3.

Finally, the court disagrees with plaintiffs' assertion that Dr. Riddiough merely "adopt[ed] the conclusions" of the Milliman reports.[11] (Doc. No. 350-1 at 22.) To the contrary, it appears that Dr. Riddiough reviewed the Milliman reports to "assess the robustness of [his own] conclusions." (Doc. No. 350-2 at 122.) To the extent that plaintiffs believe that such conclusions are wrong, those issues go to the weight of Dr. Riddiough's testimony and not to its admissibility. *Allianz Sigorta, S.A. v. Ameritech Indus., Inc.*, No. 2:15-cv-01665-MCE-AC, 2018 WL 4281482, at *6 (E.D. Cal. Sept. 7, 2018); *see also Alaska Rent-A-Car, Inc. v. Avis Budget Grp.*, 738 F.3d 960, 969–70 (9th Cir. 2013) ("[T]he judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable. The district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury."); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230–31 (9th Cir. 1998) (agreeing that "[d]isputes as to the strength of an expert's credentials, faults in his use of a particular methodology, or lack of textual authority for opinion, go to the weight, not the admissibility, of his testimony") (quoting *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995)).

Dr. Riddiough's report also examines the captive MIs' business motives for agreeing to the CRAs with Atrium. (Doc. No. 350-2 at 127–32.) This is because the 1997 HUD Letter provides that "[t]he requirement [for a real transfer of risk] could . . . be met by excess loss arrangements, if the band of the reinsurer's potential exposure is such that a reasonable business justification would motivate a decision to reinsure that band." *See* 1997 HUD Letter at 6.

First, plaintiffs argue that this portion of Dr. Riddiough's opinion fails under Rule 403 because it does not quantify the actual value of the services provided to the MIs and is thus incomplete and prejudicial. (Doc. No. 350-1 at 23–25.) However, the fact that these services

[11] As noted above, these reports were commissioned by Atrium to confirm that the CRAs transferred a sufficient amount of risk, and that the risk was commensurate with the premiums paid. (*See* Doc. No. 342-4 at 13–137; Doc. No. 362-3 at ¶ 18.)

were not quantified in dollar terms is not grounds to strike Dr. Riddiough's testimony. The relevant part of the 1997 HUD Letter only requires that there be "a reasonable business justification" without requiring such justification to be expressed in dollars and cents. 1997 HUD Letter at 6. Under plaintiffs' theory, an expert would not be able to express opinions on qualitative topics that may not be quantifiable, an approach not grounded in law. *See* Fed. R. Evid. 403.

Next, plaintiffs argue that Dr. Riddiough's opinion on any services provided by Atrium is irrelevant because it is contradicted by the factual record. (Doc. No. 350-1 at 25.) However, the factual record on this point is clearly disputed because the parties disagree about the extent to which Atrium supplied the "valuable services" to which Dr. Riddiough refers. (*See* Doc. Nos. 350-1 at 25; 376 at 21.) Accordingly, the court rejects plaintiffs' challenge to Dr. Riddiough's testimony about the services provided by Atrium on relevance grounds.

b. *Reliability of Dr. Riddiough's Reports Under Rule 702*

Having determined that Dr. Riddiough's proffered testimony is relevant, the court will address plaintiffs' Rule 702 challenge pursuant to the court's gatekeeping obligations. *See Cooper*, 510 F.3d at 942.

As explained above, Dr. Riddiough has proffered testimony on whether the CRAs transferred risk from the captive MIs to Atrium and whether Atrium provided beneficial services to the captive MIs. (Doc. No. 350-2 at 113, 115, 121.) That testimony is directly relevant to questions central to this case. To the extent that Dr. Riddiough's definition of risk transfer is based on "common sense," plaintiffs' point is well-taken. (Doc. No. 350-1 at 18–19.) *See United States v. Finley,* 301 F.3d 1000, 1007 (9th Cir. 2002) ("Our case law recognizes the importance of expert testimony when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their knowledge."); *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001) ("To be admissible, expert testimony must . . . address an issue beyond the common knowledge of the average layman . . . .") *opinion amended on denial of reh'g*, 246 F.3d 1150 (9th Cir. 2001). However, Dr. Riddiough's definition of risk transfer is based in part on the definition contained in the 1997 HUD Letter, and the bulk of his report relies on his extensive

professional, technical, and academic experience in the fields of economics, finance, real estate, and mortgage insurance. (Doc. No. 350-2 at 113–14.) To exclude an expert report simply because it also employs common sense—in addition to expertise—is not supported by the caselaw. Rather, the court must balance its admitted "lack of specialized knowledge and experience" in various areas outside of the law, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973), with its responsibility to determine whether expert testimony "assert[s] a *reasonable opinion* given the state of the pertinent art or scientific knowledge." *Vallejo*, 237 F.3d at 1019 (emphasis added). But because a judge may not be able to make that assessment on purely technical grounds, it follows that an expert may couch his or her analysis in logical or common-sense terms when the methodology supporting that analysis is firmly grounded in technical knowledge but may otherwise be inaccessible to someone outside the relevant field.

Accordingly, the court concludes that Dr. Riddiough's reports are both relevant and reliable under Rule 703 and will consider his reports in resolving the pending cross-motions for summary judgment. For these reasons, the court will deny plaintiffs' motion to strike defendants' expert reports.

CROSS-MOTIONS FOR SUMMARY JUDGMENT

Next, the court addresses the merits of the parties' cross-motions for summary judgment. (*See* Doc. Nos. 340, 342, 362.) Plaintiffs contend that they have presented undisputed evidence satisfying all the elements of their § 8(a) anti-kickback claim. (Doc. No. 362 at 7.) Defendants respond by arguing that the evidence indisputably shows that their conduct complied with RESPA and the 1997 HUD Letter, that the losses they sustained paying out claims to the captive MIs show that they provided actual reinsurance, and that the payments they received for said reinsurance were commensurate with its value. (Doc. No. 342-1 at 5–7.)

A. Legal Standard

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact" and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party "initially bears the burden of proving the absence of a genuine issue of material fact." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Where a non-moving party bears the burden of proof at trial, "the moving party need only prove that there is an absence of evidence to support the non-moving party's case." *Oracle Corp.*, 627 F.3d at 387 (citing *Celotex*, 477 U.S. at 325). If the moving party meets its initial burden, it shifts to the opposing party to establish that a genuine dispute over a material fact actually exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

To meet their burden, the parties may not simply rest on their pleadings. Rather, parties must cite to specific parts of the record to show whether there is a genuine dispute over a material fact. *See* Fed. R. Civ. P. 56(c); *see also Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment."). A fact is material if it might affect the outcome of the suit under governing law, and the dispute, genuine if a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Although the court draws "all inferences supported by the evidence in favor of the non-moving party," *Walls v. Central Contra Costa Cty. Transit Auth.*, 653 F.3d 963, 966 (9th Cir. 2011), the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita*, 475 U.S. at 587 (citation omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted); *see also Celotex*, 477 U.S. at 322 ("[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.").

B. Discussion

1. Section 8(a): RESPA's Anti-Kickback Provision

Section 8(a) of RESPA prohibits giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, [in relation to the referral of] a real estate settlement service involving a federally related mortgage loan." 12 U.S.C. § 2607(a). A *prima facie* case under § 8(a) generally consists of three elements: "(1) a payment or thing of value was exchanged, (2) pursuant to an agreement to refer settlement business, and (3) there was

an actual referral." *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015) ("*Edwards II*"), *cert. dismissed sub nom. First Am. Fin. Corp. v. Edwards*, 136 S. Ct. 1533 (2016). As the court explains below, where a real estate settlement service is of the kind that is eligible for the safe harbor under § 8(c), plaintiffs must also show that the alleged conduct falls outside of the safe harbor provision in order to prevail on their claim.

a. *There was a payment or exchange of a thing of value*

As to the first element, defendants do not dispute that the captive MIs ceded a percentage of their PMI premiums to Atrium pursuant to the CRAs, and that those ceded premiums constitute a payment or a thing of value, (*see* Doc. No. 342-1 at 9, 17), which RESPA defines broadly to include "any payment, advance, funds, loan, service, or other consideration." *Edwards II*, 798 F.3d at 1178 (citing 12 U.S.C. § 2602(2)). Thus, plaintiffs have satisfied the first element of their RESPA claim.

b. *The payment was made pursuant to an agreement to refer real estate settlement services involving a federally related mortgage loan*

As to the second element, the question before the court is whether payments were made pursuant to an agreement to refer real estate settlement services.[12] Plaintiffs argue that the captive MIs made payments to Atrium pursuant to the CRAs, which were part of an arrangement whereby the captive MIs allegedly agreed to purchase reinsurance from Atrium in exchange for referrals of PHH's PMI business. (Doc. No. 362 at 20.)

It is undisputed that Atrium and the four captive MIs agreed to the CRAs at issue. (DRF at ¶ 16.) It is also undisputed that PHH referred the vast majority of its borrowers who needed

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[12] There is no question—and neither party disputes—that the CRAs involve federally related loans. *See* 12 U.S.C. § 2602(1) (defining "federally related mortgage loan" to include any "made in whole or in part by any lender which is regulated by any agency of the Federal Government").

PMI to one of the four captive MIs.[13] (*Id.* at ¶ 54 (not disputing that PHH, through its dialer, "selected which MI would receive the referral of [PMI] business"); *see also* Doc. No. 362-3 at 221.) And there is substantial evidence before the court on summary judgment that the MIs understood that they had to agree to a CRA in order to receive referrals of PHH's PMI business. For example, in 2007, an account manager at RMIC emailed PHH vice-president Rosenthal, "I know the captive relationship has driven your MI allocation, but isn't it about time we do some business? . . . PHH is the only top MI account we do no business [with] today." (Doc. No. 340-5 at 12.) In a subsequent 2008 email to PHH contacts, an RMIC employee explained that Rosenthal had told him that "it would be next to impossible to get business without the captive." (Doc. No. 340-5 at 6.) Internal PHH emails appear to confirm the MIs' understanding that agreeing to a CRA was required in order to obtain referrals from PHH, at least up until 2009. For example, in a 2007 email chain about adding MIs to PHH's dialer, PHH senior vice-president Richard Bradfield wrote, "I want to . . . get your thoughts / input on the value of adding a couple of MI vendors and setting up captives with them. . . . We have an opportunity to get some $ from a few MI providers to open up our dialer and set up a captive with them." (Doc. No. 340-5 at 654–55.) In that email, Bradfield acknowledged that PHH continued to refer PMI business to Genworth and UGI, even though "neither . . . were the lead dogs in offering compelling economics to us," suggesting that having a CRA with Atrium took precedence over the actual terms offered by the MIs. (*Id.*) After the mortgage insurance industry started to falter with the onset of the 2007–08 financial crisis, Rosenthal wrote:

> The motivation for adding the MI providers has changed. A few months ago, *the motivation was to optimize the value of our Captives*. Since the huge change in the MI market, we now need to add MI providers so that we can maintain a complete product offering to our origination platform. In the past, the MI's had a very similar position with one another as to which loans they would

[13] Defendants' corporate designee testified at his deposition as follows. For loans that PHH originated, borrowers were typically directed to one of the captive MIs. (Doc. No. 362-2 at 25–26.) For loans that came through the broker or correspondent channels, the original lender could choose a different MI. (*Id.* at 26.) However, PHH "historically [worked] to make [its] processes very efficient with a few MI companies rather than trying to deal with everybody under the sun." (*Id.*) If a broker or correspondent lender selected a different MI, they would be subject to a penalty or "pricing adjustment" of up to 0.75% of the loan. (DRF at ¶ 68.)

> insure . . . Now they are all establishing their own, specific underwriting / eligibility criteria. Some MI's are becoming more conservative than others.

(Doc. No. 340-5 at 647 (emphasis added).) Rosenthal nevertheless went on to note that "[w]e will be able to sign captives that are attractive to us with all" of the MIs PHH was looking to add. (*Id.*) And consistent with PHH's historical practices, a senior analyst at PHH confirmed in a subsequent email in 2008 that "we will not originate any loans with RMIC or MGIC until the captive agreements are in place." (Doc. No. 340-5.)

The evidence before the court on summary judgment thus indicates that PHH had a practice of referring PMI business to MIs that had agreed to CRAs with Atrium, and that the captive MIs ceded premiums to Atrium pursuant to the CRAs. Under CFPB regulations:

> An agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

12 C.F.R. § 1024.14(e). Thus, the "practice, pattern or course of conduct" identified above indicates the existence of an agreement to refer settlement services. The fact that the captive MIs ceded premiums on a percentage basis means that these payments were directly related to the volume of business referred by PHH, which is further "evidence that [payments were] made pursuant to an agreement or understanding for the referral of business." *Id.* (*See* DUSF at ¶ 12.)

Though defendants dispute the outer contours of various facts underpinning plaintiffs' argument,[14] defendants fail to meaningfully contest that the above arrangement existed between defendants and the captive MIs. In fact, defendants do not even address this contention in their opposition to plaintiffs' motion for summary judgment, instead arguing that RESPA does not prohibit such agreements so long as services were actually performed. (*See* Doc. No. 352.) Given the evidence presented on summary judgment, the court concludes that there is no genuine dispute that payments were made pursuant to an agreement to refer real estate settlement services

[14] For example, defendants point out that PHH began to refer limited amounts of PMI business to non-captive MIs starting in June 2009. (DRF at ¶ 51.) They also assert that the captive MIs had reasons other than the referrals for agreeing to CRAs with Atrium. (*Id.* at ¶ 17.)

involving a federally related loan. Plaintiffs have thus satisfied the second element of their RESPA claim.

c. *A referral actually occurred*

Finally, as to the third element, plaintiffs argue that the evidence before the court establishes that PHH actually did refer PMI business to the captive MIs. (Doc. No. 362 at 20–27.) The court agrees. As noted above, it is undisputed that PHH directed the vast majority of its borrowers who needed PMI to one of the four captive MIs. (*See, e.g.*, DRF at ¶ 54; Doc. No. 362-2 at 27.). In fact, at no point during the class period did PHH direct less than 80% of its retail PMI business to the captive MIs. (*See* Doc. No. 362-3 at 221.) And, at least for the part of the class period between September 19, 2007 and November 21, 2008, PHH directed *all* of its retail PMI business to just two captive MIs, Genworth and UGI. (*Id.*) This pattern appears to be consistent across all of PHH's insured mortgages, regardless of how they were sourced. (*See* Doc. No. 340-5 at 85–86.)

Though defendants' decision to send PMI business to the captive MIs may have been influenced by factors other than the CRAs, this does not obviate the fact that the evidence establishes that PHH referred business to the captive MIs. *See Edwards II*, 798 F.3d at 1184 ("For a referral to violate RESPA, it need not be the exclusive or even the primary reason that influenced a home buyer's choice of a real estate service provider."); *see also* 12 C.F.R. § 1024.14(f)(1) ("A referral includes 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."). Accordingly, the court can only conclude that plaintiffs have indisputably shown that PHH actually referred PMI business to the captive MIs. *See also Munoz I*, 2013 WL 2146925, at *17 ("Plaintiffs cite substantial evidence demonstrating that every Class member was referred to a Primary Insurer by PHH's in-house protocols and procedures.").

2. RESPA's Safe Harbor Under Section 8(c)

Regardless of plaintiffs' showing under § 8(a), defendants contend that they are sheltered by the safe harbor in § 8(c), which provides that "[n]othing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment

for goods or facilities actually furnished or for services actually performed." (*See* Doc. No. 352) (quoting 12 U.S.C. § 2607(c)(2)).

"[T]he basic statutory question" about whether § 8(c) "permits captive reinsurance arrangements where mortgage insurers pay no more than reasonable market value to the reinsurers" is "not a close call." *PHH Corp. v. CFPB*, 839 F.3d 1, 41 (D.C. Cir. 2016), *reinstated in relevant part and rev'd in part on other grounds*, 881 F.3d 75 (D.C. Cir. 2018) (*en banc*).[15] As the D.C. Circuit explained, § 8(c) states that "[*n*]*othing*" in § 8 shall be construed to prohibit bona fide payment for services actually performed, and "[n]othing means nothing." *Id.* at 41 (quoting 12 U.S.C. § 2607(c)(2)) (emphasis added); *see also Edwards II*, 798 F.3d at 1179.

Nonetheless, another question remains: "How do we determine whether the mortgage insurer's payment to the lender was a bona fide payment for the reinsurance rather than a disguised payment for the lender's referral of a customer to the insurer?" *PHH Corp*., 839 F.3d at 41. The answer to that remaining question is "commonsensical":

> If the payment to the lender-affiliated reinsurer is more than the reasonable market value of the reinsurance, then we may presume that the excess payment above reasonable market value was not a bona fide payment for the reinsurance but was a disguised payment for a referral. Otherwise, there is no basis to treat payment of reasonable market value for the reinsurance as a prohibited payment for the referral—assuming, of course, that the reinsurance was actually provided. In other words, in the text and context of this statute, a bona fide payment means a payment of reasonable market value.

Id. A bona fide payment then is one that "bears a reasonable relationship to the market value of the services performed or products provided." *Id.* at 41 n.22; *see also In re Zillow Grp., Inc. Sec. Litig.*, No. 1:17-cv-1387-JCC, 2019 WL 1755293, at *3 (W.D. Wash. Apr. 19, 2019) ("For the safe harbor to apply, the payments in question 'must be commensurate with the amount normally charged for similar services in similar transactions in similar markets.'") (citing *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1011 (9th Cir. 2002)).

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[15] Although the D.C. Circuit vacated this decision to rehear the case *en banc*, it later reinstated the "panel opinion[] insofar as it related to the interpretation of RESPA and its application to PHH and Atrium." *PHH Corp. v. CFPB*, 881 F.3d 75, 83 (D.C. Cir. 2018) (*en banc*), *abrogated on other grounds by Seila Law LLC v. CFPB*, __ U.S. __, 140 S. Ct. 2183 (2020).

Next, the court must determine which party bears the burden of proof with respect to the applicability of the safe harbor. According to plaintiffs, defendants pled § 8(c) as an affirmative defense, and "[a]s with all affirmative defenses, . . . the defendant bears the burden of proof." (Doc. No. 380 at 22–25) (quoting *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012)). Plaintiffs also rely on the decision in *Edwards II* in this regard, arguing that the Ninth Circuit in that case (1) defined a § 8(a) claim without putting the burden of proof for the safe harbor on the plaintiff and (2) described § 8(c) as an "exemption", implying that it had to be invoked as an affirmative defense. (*See* Doc. No. 380 at 22–25) (citing *Edwards II*, 798 F.3d at 1178, 1180–81).

Defendants dispute plaintiffs' characterization of the cited cases and point to the D.C. Circuit's decision in *PHH Corp.*, where the court held that "[p]roving that the mortgage insurer paid more than reasonable market value—and thus made a disguised payment for the referral—is an element of the Section 8 offense that the CFPB has the burden of proving by a preponderance of the evidence." (Doc. No. 382 at 7) (quoting *PHH Corp.*, 839 F.3d at 49 n.27).

As to plaintiffs' reliance on *Edwards II*, the court is not persuaded by their characterization of that case, which involved a § 8 claim against a title insurance company that had bought minority stakes in title agencies in exchange for referrals of title insurance business. *See* 798 F.3d at 1176. When the plaintiff in *Edwards II* moved to certify a class, the district court denied class certification, relying in part on cases that analyzed § 8(c). *Id.* at 1177. On appeal, the Ninth Circuit held that the district court had erred because § 8(c) cannot, as a matter of law, apply to the purchase of ownership interests, since equity stakes are not goods, services, or facilities under RESPA. *Id.* at 1180–81 (citing 12 U.S.C. § 2607(c)(2)). That conclusion reached by the Ninth Circuit in *Edwards II* has no bearing here because there is no dispute that reinsurance is a service that could qualify for the safe harbor provided by § 8(c).

Plaintiffs' other arguments regarding the safe harbor are similarly unavailing. Although the Ninth Circuit noted that "[c]ourts commonly find a violation of § 2607(a) when (1) a payment or thing of value was exchanged, (2) pursuant to an agreement to refer settlement business, and (3) there was an actual referral," the court added immediately thereafter: "Notwithstanding the

general prohibition of exchanging any thing of value for a referral, a statutory safe harbor exempts a payment from RESPA violation if the payment—despite being made simultaneously with a referral—was 'for goods or facilities actually furnished or for services actually performed.'" *Id.* at 1178–79 (quoting 12 U.S.C. § 2607(c)). It would be a stretch indeed to conclude from those two sentences that the Ninth Circuit was indicating that defendants *necessarily* bear the burden of proof as to the applicability of § 8(c). This is particularly true because the facts in *Edwards II* could not have even supported the application of the safe harbor as a matter of law.

The same is true as to the court's description of § 8(c) in *Edwards II* as an "exemption." *Id.* at 1180–81. Though it is a "general rule of statutory construction that the burden of proving [an] exemption . . . to the prohibitions of a statute generally rests on one who claims its benefits," *N.L.R.B. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 710 (2001) (quotation omitted), the court must "begin [its] analysis with the plain language of the statute." *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1050 (9th Cir. 2018) (citation and internal quotation marks omitted), *cert. dismissed*, 139 S. Ct. 1289 (2019); *see also United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000) ("In interpreting a statute, we look first to the plain language of the statute . . . ." (citation omitted)). "If the statutory text is plain and unambiguous, we must apply the statute according to its terms." *Marks*, 904 F.3d at 1050 (cleaned up). But if a statute is ambiguous or applying the plain meaning would lead to absurd or impractical results, then the court should look to "canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent." *Id.* (citation omitted); *see also Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 816 (9th Cir. 2004) (citation omitted).

Here, Congress has categorically declared that "[*n*]*othing* in [§ 8] shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed [.]" 12 U.S.C. § 2607(c)(2) (emphasis added); *see also PHH Corp.*, 839 F.3d at 41 ("Nothing means nothing."). This court can only take Congress at its word and read this expansive exemption as it is written, meaning that *nothing* in § 8, including § 8(a)'s prohibition on referrals, should prohibit bona fide

payments for services actually performed. *Cf. United States v. Carey*, 929 F.3d 1092, 1100–01 (9th Cir. 2019) (noting that where a "statutory exemption is *broad* and an exception is *narrow*, it is more probable that the exception is an affirmative defense" (emphasis added) (citation and internal quotation marks omitted)). Therefore, the undersigned concludes that plaintiffs here bear the burden of establishing as an element of their § 8(a) claim that the safe harbor does not apply to the challenged conduct.

This reading of § 8(c) comports with the D.C. Circuit's decision in *PHH Corp.*, where the court noted that "Congress explicitly made clear in Section 8(c) that [transactions such as captive reinsurance agreements] were lawful so long as reasonable market value was paid and the services were actually performed," and that "Section 8(c) was designed to provide certainty to businesses in the mortgage lending process."[16] 839 F.3d at 42. To place the burden on defendants to establish the applicability of the safe harbor provision would introduce uncertainty into the mortgage lending process and subvert the plain meaning of § 8(c) by forcing defendants to defend conduct that might otherwise be clearly protected by law. Other courts have reached similar conclusions. *See, e.g.*, *Howland v. First Am. Title Ins.*, 672 F.3d 525, 534 (7th Cir. 2012); *Arthur v. Ticor Title Ins. of Fla.*, 569 F.3d 154, 160 (4th Cir. 2009); *Walls v. Sierra Pac. Mortg. Co., Inc.*, No. 1:19-cv-00595-GLR, 2020 WL 1528626, at *6 (D. Md. Mar. 31, 2020); *Rambam v. Long & Foster Real Estate, Inc.*, No. 2:11-cv-05528-JP (E.D. Pa. June 22, 2012); *Capell v. Pulte Mortg. L.L.C.*, No. 2:07-cv-01901-SD, 2007 WL 3342389, at *6 (E.D. Pa. Nov. 7, 2007).

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[16] That is not to say that *PHH Corp*. is completely on point with respect to the issue posed in this case. There, the D.C. Circuit's holding that the CFPB had to show that the safe harbor did not apply relied in part on the Administrative Procedure Act, which imposes the burden of proof in such cases on the administrative agency pursuing an enforcement action. *See PHH Corp*., 839 F.3d at 49 n.27 (citations omitted). That rationale does not apply here, since plaintiffs are proceeding in their private capacity. The court in *PHH Corp*. also suggested in dictum that the burden of proof with respect to § 8(c) "might potentially" sit with a defendant if, for example, express payments had been made in exchange for referrals. *Id*. That reasoning is also inapplicable here and, regardless, was "not necessary to the decision [in *PHH Corp*.] and thus ha[s] no binding or precedential impact in the present case." *Exp. Grp. v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir. 1995) (citation omitted).

Accordingly, the court concludes that it is plaintiffs' burden here to show that defendants' conduct falls outside of § 8(c)'s safe harbor and to do so, they must show that defendants were paid more than reasonable market value for any reinsurance services actually provided.

3. Applying § 8(c)'s Safe Harbor

Both HUD and the CFPB—the latter of which took over enforcement of § 8 from HUD when it was created—have issued additional guidance with respect to § 8(c) and its application. The 1997 HUD Letter, which accords with Regulation X, 12 C.F.R. § 1024.14, and the D.C. Circuit's view of the safe harbor provision, clarifies that captive reinsurance "arrangements are permissible under RESPA if the payments to the reinsurer (1) are for reinsurance services 'actually furnished or for services performed', and (2) are bona fide compensation that does not 'exceed the value of such services.'"[17] 1997 HUD Letter at 3; *see also PHH Corp.*, 839 F.3d at 41–46 (explaining how the "1997 HUD Letter was widely disseminated and relied on" in the mortgage lending industry and that the letter harmonizes with Regulation X). Although the Ninth Circuit has not yet adopted the two-step test set out in the 1997 HUD Letter (the "HUD test"), it did endorse a nearly identical one prescribed by HUD with respect to § 8(c) and yield spread premiums,[18] a kind of referral fee also regulated by RESPA. *See Schuetz*, 292 F.3d at 1009–11; *see also Edwards II*, 798 F.3d at 1181. This court will therefore hew to persuasive authority and apply the two-step test to captive reinsurance agreements as set forth in the 1997 HUD Letter.

The first step of the HUD test asks whether Atrium actually provided reinsurance. The 1997 HUD Letter sets forth the relevant test as follows: (1) there must be a legally binding contract for reinsurance with terms and conditions that conform to industry standards; (2) the reinsurer must post capital and reserves satisfying state laws, and the contract must provide for adequate reserves to satisfy claims against the reinsurer; and (3) there must be a real transfer of

[17] In another opinion letter issued on August 12, 2004, HUD reaffirmed that the 1997 HUD Letter provides the proper test for determining if captive reinsurance agreements comply with RESPA. U.S. Dep't of Hous. & Urban Dev., Opinion Letter on Captive Title Reinsurance Programs to American Land Title Association (Aug. 12, 2004).

[18] Yield spread premiums "are fees paid by mortgage lenders to mortgage brokers that are based on the difference between the interest rate at which the broker originates the loan and the par, or market rate offered by the lender." *Schuetz*, 292 F.3d at 1005.

risk. 1997 HUD Letter at 6. Here, the parties dispute only the third prong of the test, whether the CRAs resulted in a real transfer of risk. (*See* Doc. Nos. 354 at 30–34; 382 at 9–12.)

The 1997 HUD Letter provides guidance about how the court is to assess whether there has been a real transfer of risk:

> The reinsurance transaction cannot be a sham under which premium payments (minus a ceding commission, if applicable) are given to the reinsurer even though there is no reasonable expectation that the reinsurer will ever have to pay claims. . . . The requirement [that there be a real transfer of risk] could [] be met by excess loss arrangements, if the band of the reinsurer's potential exposure is such that a reasonable business justification would motivate a decision to reinsure that band. Unless there is a real transfer of risk, no real reinsurance services are actually being provided. In either case, the premiums paid (minus a ceding commission, if applicable) must be commensurate to the risk.

1997 HUD Letter at 6. However, the parties in this case dispute what the scope of the court's inquiry should be. According to defendants, the court should conduct a risk transfer analysis by looking only at individual "snapshots" of Atrium's cash flow from the 2007–09 book years, which fall within the certified class period. (*See* Doc. Nos. 342-1 at 18–21; 352 at 13–17.) Although defendants concede that "there was cross-collateralization among book years for purposes of ensuring adequate funds for the payment of claims," they contend that "that is irrelevant where, as here, Atrium's reinsurance *obligations* were based on the loans in an individual book." (Doc. No. 352 at 17.) Using this approach, defendants have presented data indicating that Atrium paid out more in claims than it received in premiums for the Genworth 2007 and UGI 2007 and 2008 books. (Doc. No. 342-1 at 13–15.) For all other books from the class period, Atrium paid out all claims that were made by the captive MIs before the CRAs were commuted. (*Id.* at 18.)

In response, plaintiffs argue that defendants' methodology is misleading and fails to reveal whether the CRAs resulted in an actual risk transfer. (*See* Doc. No. 354 at 22.) Instead, plaintiffs contend that the court should analyze the CRAs comprehensively and over the lifetimes of those agreements. (*See* Doc. Nos. 354 at 22–25; 380 at 26–29.) Viewed through that lens, it appears that, at least with regards to UGI and Genworth, Atrium paid out substantially less in claims than it received in premiums, despite the effects of the 2007–08 housing and financial crisis. (Doc.

Nos. 354 at 22–25.) Plaintiffs also assert that defendants cut their losses by commuting the CRAs when the captive MIs' projected losses ballooned, further suggesting that the CRAs did not actually transfer risk from the captive MIs to Atrium. (*Id.* at 25.)

As this court has already concluded in a previous order, plaintiffs' approach to this issue is the more compelling one. *See Munoz I*, 2013 WL 2146925, at *13 n.11 (noting that defendants' practice of cross-collateralizing all book years in a given CRA "belie[s] their assertion that the reinsurance at issue is appropriately viewed at the book year level"). Evaluating whether there was an actual transfer of risk requires the court to look at multiple factors, such as the structure and contractual terms of a CRA, the rationale for and effects of cross-collateralization, and the way defendants' own actuaries analyzed the CRAs. (*See, e.g.*, Doc. No. 354 at 18–21.) But under the methodology advocated by defendants, the court would be limited to examining an individual book year in a vacuum. Indeed, it is somewhat perplexing that defendants continue to insist that the court adopt their myopic book year approach when it is undisputed that defendants themselves analyze and distribute risk across multiple book years. (*See, e.g.*, Doc. Nos. 352 at 17–18 (explaining the "whole point of risk sharing" is "trading profits in good years that are more than we need for losses in bad years"); 354 at 18–21 (noting that Atrium's own actuaries evaluated Atrium's financial performance by analyzing the effects of cross-collateralization and risk transfer across multiple book years).) Accordingly, the court rejects defendants' approach and will conduct its risk transfer analysis by examining all relevant aspects of the CRAs.

The court now turns to the evidence presented on summary judgment, and for the reasons explained below, concludes that there is a genuine dispute over whether Atrium provided actual reinsurance services. Plaintiffs' case here essentially focuses on: (1) provisions in the CRAs that limited Atrium's obligation to pay out claims while allowing it an unlimited upside as to profits, and (2) the lopsided balance of payments between the captive MIs and Atrium, wherein Atrium received much more in payments than it paid out in claims. (*See* Doc. No. 354 at 25–34.) According to plaintiffs, this meant that no real risk was transferred, and thus, Atrium did not provide actual reinsurance services.

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There is substantial evidence that supports this theory. For example, Atrium's liability under the Genworth, Radian, and CMG CRAs was limited strictly to the funds contained within each of the associated trust accounts, meaning that Atrium's obligations did not extend to its own assets.[19] (Doc. Nos. 362-2 at 170; 362-3 at 20, 76.) At the same time, Atrium was allowed to withdraw sizable sums from those accounts, as long as minimum contractual and capital requirements were met. (*See, e.g.*, DRF at ¶ 31.) Further, it appears that Atrium commuted the CRAs once it become apparent that the captive MIs were likely to suffer significant losses as a result of the 2007–08 housing and financial crisis, allowing Atrium to extinguish its liabilities arising from the CRAs. (Doc. 354 at 25; DSUF at ¶ 16.)

These liability-limiting provisions appear to have yielded significant profits. Financial data aggregated from all available book years show that Atrium collected $116,563,805 in dividends, far surpassing the $54,172,832 it paid out in reinsurance claims. (Doc. No. 354 at 24.) When the CRAs were commuted, Atrium withdrew an additional $93,269,499 from the trust accounts and paid $93,422,254 to the captive MIs. (*Id.*) The commutations also allowed Atrium to avoid another $171,719,746 in projected losses from the captive MIs. (*Id.* at 25.) Of course, the fact that defendants profited from the CRAs does not necessarily mean that Atrium did not provide actual reinsurance services. But plaintiffs' four experts provide additional context in this regard. After examining the CRAs, they concluded that, under the relevant accounting, actuarial, and risk management standards, the agreements did not result in a real transfer of risk and thus could not have been actual reinsurance services. (Doc. No. 354 at 25–34.) For example, Schwartz noted that "[t]he fact that Atrium incurred such a small financial loss during the height of the historic housing collapse/financial crises makes clear that there are no realistic set of scenarios which could ever lead to Atrium suffering a significant, material loss to its [] bottom line" as a result of the CRAs. (Doc. No. 362-5 at 448.) Likewise, Dr. Cummins has explained that "[b]oth Atrium and the PMI industry were affected adversely by the Financial Crisis, but . . .

[19] The UGI CRA did not restrict Atrium's liability to the funds in UGI's trust account. (Doc. No. 362-2 at 66–87.) However, Atrium's failure to deposit the required amounts into the UGI trust account eventually led to the termination of that agreement. (*Id.* at 81.)

the PMI industry was hit much harder than Atrium. . . . The reason is that the PMI firms did not have 'escape clauses' built into their contracts." (Doc. No. 362-5 at 187.)

In response, defendants point out that Atrium paid out more in claims than it received in premiums for the 2007–09 book years,[20] and that it also paid out every claim submitted by the captive MIs until the CRAs were commuted. (*See, e.g.*, Doc. Nos. 342-1 at 10; 352 at 13–17.) Defendants contend that this evidence demonstrates that there was a "reasonable expectation that the reinsurer will pay claims" when the CRAs were signed, meaning that the CRAs qualify as real reinsurance services under the 1997 HUD Letter.[21] (Doc. No. 409 at 5.)

Though it is clear that Atrium earned a net profit over the lifetime of the CRAs, it is equally clear that Atrium suffered losses in the 2007–09 book years. Is that loss representative of a real transfer of risk, or is it "such a small financial loss" given the magnitude of the 2007–09 housing market collapse and financial crisis that there could not have been a real transfer of risk? Likewise, were the provisions of the CRAs so favorable to Atrium that those CRAs were effectively "shams", or were they supported by "reasonable business justifications"? Based on the evidence before the court at this time, there is a sufficiently genuine dispute over the answers

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[20] Defendants claim that "with respect to the book years in question[,] Atrium lost in excess of $61,878,000." (Doc. No. 382 at 6.) This muddles the distinction between the losses sustained by the MIs—which resulted in claims that Atrium had to pay out—and any economic losses (i.e., negative profit) that Atrium may have suffered. (*See* Doc. No. 354 at 27 (noting the difference between "paying claims" and the reinsurer suffering "losses").) The evidence on summary judgment indicates that Atrium paid out $61,878,000 in claims for the 2007–09 book years, exceeding the $46,897,000 they collected in premiums in those book years. (Doc. Nos. 382 at 6; 342-2, DUSF at ¶ 20.) This suggests that Atrium sustained an economic loss of $14,981,000 for those specific book years, excluding any dividends earned and the effects of commutation.

[21] Defendants' expert witness, Dr. Riddiough, explains how the CRAs provided

> additional benefits to the MIs, including risk diversification, risk sharing, reduced capital requirements, the incentive on the part of the affiliated lender to originate higher quality loans to fill the reinsurance books, aka "skin-in- the-game," and reduced earnings volatility, in addition to the claims paying services provided by Atrium's reinsurance agreements.

(Doc. No. 409 at 7.) These ancillary benefits, however, depended on the provision of reinsurance services. If the CRAs were in fact a "sham," then these "additional benefits" were merely illusory in nature.

to these questions that the court cannot resolve on summary judgment whether Atrium provided actual reinsurance services to the captive MIs. This ends the court's inquiry under the two-step HUD test. Accordingly, neither party is entitled to summary judgment with respect to plaintiffs' § 8(a) RESPA claim.

4. Defendants' Affirmative Defenses

Both parties also move for summary judgment with respect to several affirmative defenses asserted by defendants.[22] [23] (Doc. Nos. 342-1 at 27–30; 362 at 27–35.)

a. *Plaintiffs Are Entitled to Summary Judgment on Defendants' "Compliance with Governing Law" Affirmative Defense*

Title 12 U.S.C. § 2617(b) provides that:

> No provision of this chapter or the laws of any State imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the [CFPB] or the Attorney General, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

This provision, according to defendants, shields them from liability under RESPA because their actions at issue in this case were allegedly committed in good faith and in conformity with governing law at the time. (Doc. No. 97 at 24–25.)

This affirmative defense fails for several reasons. First, § 2617(b) only applies to rules, regulations, or interpretations that are encompassed by 12 C.F.R. § 1024.4(a). Aside from implicitly relying on the 1997 HUD Letter, which the court addressed in its analysis above,

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[22] Plaintiffs' motion for summary judgment refers to defendants' affirmative defenses as they are numbered in defendants' answer to the SAC, which was stricken by the court. (Doc. No. 362 at 27–35; *see* Doc. Nos. 277 at 23–24; 284 at 13–14.) To avoid confusion, the court will refer to the defenses in substance, not by number.

[23] Defendants have raised a "consent by ratification" affirmative defense in two forms. In their answer to the SAC, defendants asserted that their conduct was consented to and ratified by *HUD and the CFPB*. (Doc. No. 277 at 24; *see also* Doc. No. 352 at 18.) However, this court struck plaintiffs' SAC and defendants' answer thereto on May 22, 2015. (Doc. No. 284 at 14.) Thus, the operative pleading here is defendants' answer to the FAC, wherein defendants asserted only that *plaintiffs* consented to and ratified the conduct alleged in the FAC. (Doc. No. 97 at 24.) Plaintiffs' motion for summary judgment, which addresses the version of the affirmative defense asserted in the answer to the SAC, will therefore be denied as moot. (Doc. No. 362 at 36.)

defendants have not identified any other rules, regulations, or interpretations that could possibly apply under § 2617(b). (*See* Doc. No. 352.)

Second, defendants neglected to even oppose plaintiffs' motion for summary judgment as to this affirmative defense, even though the burden of proving an affirmative defense lies with defendants. (*Id.*) *See Monge*, 688 F.3d at 1170 ("As with all affirmative defenses, . . . the defendant bears the burden of proof."). Defendants have thus waived this affirmative defense. *See DZ Bank AG Deutsche Zentral-Genossenschaftsbank v. Connect Ins. Agency, Inc.*, No. 3:14-cv-05880-JLR, 2016 WL 631574, at *25 (W.D. Wash. Feb. 16, 2016) ("A party waives or abandons an argument at the summary judgment stage by failing to provide more than a passing remark in support of its position.") (collecting cases). Accordingly, the court will grant summary judgment in favor of plaintiffs with respect to defendants' "compliance with governing law" affirmative defense.

b. *Filed Rate Doctrine Defense*

Next, defendants have asserted a defense based on the filed rate doctrine, even though the court has already twice rejected this argument. (Doc. Nos. 97 at 22; 342-1 at 27–30.) *See Munoz v. PHH Corp.*, No. 1:08-cv-00759-AWI-BAM, 2013 WL 1278509, at *7–8 (E.D. Cal. Mar. 26, 2013) (striking defendants' filed rate doctrine affirmative defense); *Munoz v. PHH Corp.*, 659 F. Supp. 2d 1094, 1099–1101 (E.D. Cal. 2009) (concluding that the filed rate doctrine does not bar plaintiffs' RESPA claims). Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018) (citations and internal quotation marks omitted). However, the district court may revisit its own rulings in some cases, particularly when: "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *Id.* (quoting *United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998)).

Here, defendants argue that new "facts developed in discovery, as well as new case law, warrant reexamination" of the court's prior decisions. (Doc. No. 342-1 at 27 n.19.) The court

disagrees. In reality, defendants have merely repackaged old arguments previously rejected by the court in this case, claiming that the arguments deserve another look because of new facts revealed during discovery despite citing to the *exact same facts* as they did before. (*Id.* at 19; *compare*, *e.g.*, Doc. No. 342-1 at 29 (arguing that "discovery has now revealed that . . . [b]orrowers paid the rates approved by state regulators and the MIs charged the *same* amount for [PMI] regardless of whether reinsurance was also obtained from Atrium"), *with* Doc. No. 120 at 9 (asserting that "discovery has revealed . . . that borrowers pay the same for [PMI] regardless of whether there is reinsurance").)

In addition, defendants have failed to show an intervening change in controlling law, pointing only to the decisions in *Rothstein v. Balboa Insurance Co.*, 794 F.3d 256 (2d. Cir. 2015) and *Sapuppo v. Allstate Floridian Insurance Co.*, 2013 WL 6925674 (N.D. Fla. Mar. 12, 2013), two non-binding decisions from courts outside of the Ninth Circuit. (Doc. No. 342-1 at 27–28.) Moreover, *Sapuppo* did not even involve a RESPA claim, and *Rothstein*'s approach towards the filed rate doctrine has been repeatedly rejected by district courts in California. *See, e.g.*, *Haddock v. Countrywide Bank, N.A.*, No. 1:14-cv-146452-PSG-FFM, 2016 WL 6802489, at *6 (C.D. Cal. June 2, 2016) (collecting cases); *Ellsworth v. U.S. Bank, N.A.*, 908 F. Supp. 2d 1063, 1082–83 (N.D. Cal. 2012) ("[I]ncreased costs incurred as a result of [an] alleged kickback scheme does not transform a challenge to conduct and practices into a challenge to [] premiums."); *King v. Nat'l Gen. Ins. Co.*, 129 F. Supp. 3d 925, 936 (N.D. Cal. 2015) ("*Rothstein* is not binding on this court, and other courts from this district have considered scenarios like those of *Rothstein* and arrived at the opposite conclusion."). Defendants have presented no basis for the court to diverge from its sister courts or to reconsider the prior rulings in this case. Accordingly, the court reaffirms those prior decisions and again finds that plaintiffs' claims are not barred by the filed rate doctrine.

5. Article III Standing

Finally, defendants argue that plaintiffs lack standing to pursue their claims in this action because they failed to allege an injury-in-fact and cannot demonstrate redressability. (Doc. No. 342-1 at 26.)

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a. *Plaintiffs Have Adequately Alleged an Injury-in-Fact*

According to defendants, plaintiffs' experts conceded that the PMI rates paid by plaintiffs were unaffected by the CRAs, meaning that plaintiffs cannot demonstrate any harm resulting from defendants' alleged conduct. (*Id*. at 26.) In response, plaintiffs argue that, even if they were not overcharged for PMI, they nonetheless suffered the violation of a procedural right granted by statute because they were "charged for a settlement service tainted by kickbacks or illegal referrals." (Doc. No. 354 at 43.)

In *Edwards v. First Am. Corp.*, 610 F.3d 514, 518 (9th Cir. 2010) ("*Edwards I*"), *abrogated by Frank v. Gaos*, __ U.S. __, 139 S. Ct. 1041, 1044 (2019), the Ninth Circuit held that "[b]ecause RESPA gives Plaintiff a statutory cause of action, . . . Plaintiff has standing to pursue her claims against Defendants." But *Edwards I* was abrogated by *Frank*, wherein the Supreme Court rejected the premise that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Frank*, 139 S. Ct. at 1045–46 (quoting *Spokeo, Inc. v. Robins*, __ U.S. __, 136 S. Ct. 1540, 1549 (2016), *as revised* (May 24, 2016)).

The Supreme Court did note, however, that

> the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.

Spokeo, 136 S. Ct. at 1549 (citations omitted). The question then is: Can a plaintiff alleging a § 8 claim under RESPA satisfy the injury-in-fact requirement even if he or she was not overcharged for real estate settlement services? Though this issue has yet to be resolved by the Ninth Circuit, this court is persuaded that the answer to that question is yes.

When Congress passed RESPA, it sought not only to eliminate "kickbacks or referrals fees that tend to increase unnecessarily the costs of certain settlement services," it also sought to ensure "more effective advance disclosure to home buyers and sellers of settlement costs." 12 U.S.C. § 2601(b). The 1997 HUD Letter provides additional guidance as to this latter goal:

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> [C]onsumers would be well served by a meaningful disclosure and a meaningful choice for consumers about having their loans included in a captive reinsurance program.
>
> . . .
>
> A meaningful disclosure would reveal that the captive reinsurance agreement exists, that the lender stands to gain financially under the arrangement, and that the consumer may choose not to have his or her insurance provided by an insurer in such an arrangement.
>
> . . .
>
> A meaningful choice whether to participate would provide the consumer an easy, non-burdensome opportunity to opt out by, for example, indicating a preference one way or the other on a form.

1997 HUD Letter at 5. Here, plaintiffs have alleged that they were actually and personally harmed when defendants "purposefully provided neither a meaningful disclosure nor a meaningful choice to its borrowers regarding its captive reinsurance arrangements," directly implicating one of the harms identified by and targeted for elimination by Congress. (FAC at 12–13.) *See, e.g.*, 12 U.S.C. §§ 2603, 2604, 2607(c) (requiring lenders to provide consumers with disclosures, including about the existence of "affiliated business arrangements" such as captive reinsurance agreements). Regardless of whether plaintiffs were overcharged for settlement services, inadequate disclosures could have led them to enter into an agreement they would not have otherwise entered into or to transact with a party they would not have otherwise elected to do business with. *Cf. Spokeo*, 136 S. Ct. at 1550 (citations omitted) (explaining, for example, that the inability to obtain information under the Freedom of Information and Federal Advisory Committee Acts "constitutes a sufficiently distinct injury to provide standing," but that the failure to provide some information, such as an accurate zip code, could be harmless); *see, e.g.*, *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 323 (2011) (explaining that economic injury, as defined under an analogous state law prohibiting unfair competition, can be shown when a party is "required to enter into a transaction, costing money or property, that would otherwise have been unnecessary"). Thus, the court concludes that plaintiffs' allegations in this action demonstrate that they "'suffered an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent,'" satisfying the injury-in-fact requirement needed to show standing. *See*

Spokeo, 136 S. Ct. at 1548–49 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

A review of RESPA's legislative history reveals other harms identified by Congress. For example, a 1982 House Committee Report noted that practices such as "'controlled business arrangements' . . . whereby an entity could provide a referral *without* the direct payment of a referral fee . . . could result in *harm beyond an increase in the cost of settlement services*." *Edwards I*, 610 F.3d at 517 (emphasis added) (citing H.R. Rep. No. 97–532, at 52 (1982)). That report explained:

> [T]he advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referror or his associates have a financial interest in the company being recommended. [Because the settlement industry] almost exclusively rel[ies] on referrals . . . the growth of controlled business arrangements effectively reduce[s] the kind of healthy competition generated by independent settlement service providers.

Id. Thus, plaintiffs' claim that they were not provided a meaningful choice as to whether they wished to participate in a captive reinsurance program constitutes an allegation that they suffered a concrete, particularized harm—one explicitly identified by Congress. (FAC at 12–13.) *See* H.R. Rep. No. 97–532, at 52. This provides further support for the court's conclusion that plaintiffs have adequately alleged an injury-in-fact under RESPA.

b. *Plaintiffs Have Demonstrated Redressability*

Defendants also assert that, in the absence of any alleged overcharges, a favorable judicial decision will do nothing to redress plaintiffs' claims. (Doc. No. 342-1 at 27.) However, RESPA clearly provides that a "person who is charged for a settlement service involved in a violation is entitled to three times the amount of *any* charge paid," and the "use of the term 'any' demonstrates that charges serving as the basis for the award are neither restricted to a particular type of charge, such as an overcharge, nor limited to a specific part of the settlement service." *Edwards I*, 610 F.3d at 517; *see* 12 U.S.C. § 2607(d). By adding the phrase "any charge paid" to RESPA, Congress sought to "address instances in which no direct referral fee has been paid." *Id.* at 518. Because the financial penalties provided for by RESPA would allow plaintiffs to recover treble any charges paid, it is apparent that the court can offer relief redressing the harms that

plaintiffs have allegedly suffered.[24] Accordingly, the court finds that plaintiffs have sufficiently demonstrated standing to proceed with their claims under RESPA.

MOTION FOR CLASS DECERTIFICATION

The court turns last to defendants' motion for class decertification. (Doc. No. 339.)

A. Legal Standard

A district court's decision to grant class certification is subject to change or even decertification. *Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 479 (C.D. Cal. 2008), *aff'd*, 639 F.3d 942 (9th Cir. 2011) (citing Fed. R. Civ. P. 23(c)(1)(C)). However, any such change must satisfy the requirements of Rule 23. *Howell v. Advantage RN, LLC*, 401 F. Supp. 3d 1078, 1085 (S.D. Cal. 2019) (citation omitted). Although plaintiffs are the non-moving party, as the party seeking to *maintain* class certification, they nonetheless "bear[] the burden of demonstrating that the requirements of Rules 23(a) and (b) are met." *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011) (*citing United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th Cir. 2010)). In resolving a motion for class decertification, the court may rely on "previous substantive rulings in the context of the history of the case," "subsequent developments in the litigation," and "the nature and range of proof necessary to establish the class-wide allegations." *Arredondo v. Delano Farms Co.*, 301 F.R.D. 493, 502 (E.D. Cal. 2014) (citations and internal quotation marks omitted).

Class treatment under Rule 23(a) is applicable if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Rule 23(b) requires that "questions of law or fact common to the members of

[24] Even in a case where the plaintiff *is* overcharged for a settlement service, the defendant is not liable to the plaintiff for treble the amount *overcharged* but for "three times the amount of *any charge paid* for such settlement service." 12 U.S.C. § 2607(d) (emphasis added). This makes clear that Congress viewed the harm caused by kickbacks as not limited to excessive fees but "with reference to the entire amount of the settlement service." *Edwards I*, 610 F.3d at 518; *see also* H.R. Rep. No. 98–123, at 77 (1983) (expecting that RESPA violators "involved in controlled business arrangements . . . shall be . . . liable . . . in the amount of three times the amount of the charge paid for the settlement service").

the class predominate over any questions affecting only individual members" and that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

B. Discussion

Defendants argue that in this case the class should be decertified because: (1) the remaining class representatives—Efrain Munoz, Leona Lovette, Stephanie Trudnowski, John Hoffman, and Daniel Maga—cannot adequately represent the class, and (2) there are material variations among Atrium's reinsurance agreements that negate plaintiffs' showing of predominance and commonality. (Doc. No. 339 at 22–31.) Given the court's previous rulings on class certification in this action, the court will only address the Rule 23 factors challenged by defendants. (*See* Doc. Nos. 230, 288.)

1. Adequacy

Rule 23(a)(4) requires that "the representative parties . . . fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23. To resolve this inquiry, the court must answer the following questions: "(a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1007 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1651 (2019) (citation omitted). In addition, the court must ensure that counsel is "qualified, experienced, and generally capable" of conducting the litigation. *Id.* (citation omitted).

Defendants contend that plaintiff Munoz "misunderstands basic details forming the foundation of this lawsuit and relies exclusively on information provided to him by his attorneys," while the other named plaintiffs lack a nuanced understanding of mortgage insurance, reinsurance, and the captive reinsurance agreements at issue in this case. (Doc. No. 339-1 at 31–38.)

"The threshold of knowledge required to qualify a class representative is low; a party must be familiar with the basic elements of her claim . . . [and] will be deemed inadequate only if she is 'startlingly unfamiliar' with the case." *United States ex rel. Terry v. Wasatch Advantage Grp.,*

LLC, 327 F.R.D. 395, 412 (E.D. Cal. 2018) (quoting *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611 (N.D. Cal. 2004)). Otherwise, a class representative is adequate when he "understands his duties and is currently willing and able to perform them. The Rule does not require more." *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001).

Here, the named plaintiffs have been willing and able to perform the duties required of them, such as attending depositions and assisting their counsel in preparing responses to discovery. (*See* Doc. No. 353 at 21–29.) Despite the complex nature of this litigation, the named plaintiffs have all demonstrated a layperson's understanding of the "gravamen" of their claim against PHH. (*Id.*) Finally, there is nothing in the record to suggest that plaintiffs' counsel has any conflicts of interests with the class members or would not fairly and adequately protect the interests of the class. Accordingly, the court concludes that the named plaintiffs and class counsel will fairly and adequately represent the class.

2. Commonality and Predominance

Rule 23(a)(2) requires "questions of law or fact common to the class." The class members must show that they "have suffered the same injury," *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (citation omitted), and that their claims "depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (quoting *Wal-Mart Stores*, 564 U.S. at 350). They must also "demonstrate the capacity of classwide proceedings to generate common answers to common questions of law or fact that are apt to drive the resolution of the litigation." *Id.* For example, "[c]ommonality is generally satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Benitez v. W. Milling, LLC*, No. 1:18-cv-01484-SKO, 2020 WL 309200, at *5 (E.D. Cal. Jan. 21, 2020) (internal quotation marks and citations omitted).

The rule does not require all questions of law or fact to be common to every single class member and "[d]issimilarities among class members do not [necessarily] impede the generation of common answers to those questions." *Parsons v. Ryan*, 754 F.3d 657, 684 (9th Cir. 2014); *see*

also Hanlon, 150 F.3d at 1019 (noting that commonality can be found through "[t]he existence of shared legal issues with divergent factual predicates"). However, the raising of merely any common question does not suffice. *See Wal-Mart*, 564 U.S. at 349 ("Any competently crafted class complaint literally raises common 'questions.'" (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 (2009))).

Once the prerequisites of Rule 23(a) are met, the plaintiffs must satisfy at least one of Rule 23(b)'s provisions. Here, plaintiffs have invoked Rule 23(b)(3), which requires that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action be superior to other available methods for fairly and efficiently adjudicating the controversy. *See Dukes*, 564 U.S. at 362; *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (*en banc*). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997), whereas the superiority requirement demands that courts "assess the relative advantages of alternative procedures for handling the total controversy" to determine whether "a class action is the 'superior' method of resolution." *Pointer v. Bank of Am. Nat'l Ass'n*, No. 2:14-cv-0525-KJM-CKD, 2016 WL 696582, at *8 (E.D. Cal. Feb. 22, 2016) (citing Fed. R. Civ. P. 23(b)(3)'s advisory comm. notes). Thus, the test of Rule 23(b)(3) is "far more demanding" than that of Rule 23(a). *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) (quoting *Amchem*, 521 U.S. at 623–24). Ultimately, "[t]he predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, __ U.S. __, 136 S. Ct. 1036, 1045 (2016) (quoting Newberg, § 4:49, at 195–96).

a. *Plaintiffs Can Show Through Common Evidence That Defendants Referred Loans Originating from a Correspondent Lender*

Here, defendants argue that common evidence cannot be used to demonstrate that they referred loans originating from a correspondent lender to the captive MIs, pointing out that nearly 4,000 class members obtained their mortgage from a correspondent lender, which selected the

PMI provider, originated and funded the loan, and only then sold the loan to PHH. (Doc. No. 339-1 at 24.)

However, the court has previously determined, and now reaffirms, that plaintiffs are capable of presenting common, class-wide evidence regarding defendants' referral of loans to the captive MIs, including loans that originated with a correspondent lender. *See Munoz I*, 2013 WL 2146925, at *14–17. As explained above, "[f]or a referral to violate RESPA, it need not be the exclusive or even the primary reason that influenced a home buyer's choice of a real estate service provider." *Edwards II*, 798 F.3d at 1184.

Defendants also argue that correspondent lenders had reasons other than influence from PHH for choosing a captive MI. (*See* Doc. Nos. 339-1 at 26–27; 378 at 8–9.) However, defendants have already conceded that PHH provided its correspondent lenders with a list of preferred, captive MIs, and plaintiffs have presented evidence on summary judgment about the various ways that PHH influenced its correspondent lenders into choosing a captive MI, such as selecting correspondent lenders in part based on their willingness to partner with captive MIs and imposing a penalty on lenders that selected a non-captive MI. (*See* Doc. Nos. 230 at 22; 353 at 10–11; DRF at ¶ 68.) Accordingly, the court reaffirms the prior ruling that common issues in this case predominate with respect to the issue of loans originated from correspondent lenders.

b. *All Four CRAs Involve Common Issues*

Defendants contend that Atrium's compliance with the 1997 HUD Letter is an issue that cannot be resolved based upon common evidence because each of Atrium's four CRAs must be assessed separately. (Doc. No. 339-1 at 27–31.)

Defendants previously advanced these same arguments in their opposition to plaintiffs' motion for class certification, all of which were rejected by the assigned magistrate judge and ultimately by the then-assigned district judge. *See Munoz I*, 2013 WL 2146925, at *12 ("The risk transfer analysis does not entail individualized inquiries."), *findings and recommendations adopted by* 2015 WL 3703972 (E.D. Cal. June 11, 2015). As before, "[d]efendants attempt to distinguish the contracts based on differing bands of loss and premium cedes[;] however, none of these differences concern liability-limiting features." *Id*. Rather, it is undisputed that the CRAs

involve pools of loans that were aggregated into four multi-year trust accounts, and that Atrium's CRAs were not with individual borrowers.

Though it is true that the CMG CRA had a slightly different risk band, it nonetheless had the same liability-limiting features contained in the other CRAs. *Id.* (*See* Doc. No. 353 at 17.) As such, the inquiry into whether the CRAs resulted in the real transfer of risk was and continues to be predominant and common to the class. Defendants' motion for decertification of the class will therefore be denied.

CONCLUSION

For all of the reasons explained above:

1. The parties' cross-motions for summary judgment (Doc. Nos. 340, 342, 362) are granted in part and denied in part;
    a. Summary judgment is granted in favor of plaintiffs as to the first three elements of their § 8(a) claim;
    b. Summary judgment is granted in favor of plaintiffs as to defendants' "Compliance with Governing Law" affirmative defense;
    c. Summary judgment is denied in all other respects;
2. The parties' motions to strike (Doc. Nos. 336, 350, 365) are denied;
3. Defendants' motion to decertify the class (Doc. No. 339) is denied; and

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4. The parties are directed to contact Courtroom Deputy Jami Thorp at (559) 499-5652, or JThorp@caed.uscourts.gov, within fourteen (14) calendar days of service of this order to set a date for a Status Conference in this case, at which time the rescheduling of dates for a Settlement Conference, Final Pretrial Conference, and Jury Trial will be discussed.[25]

IT IS SO ORDERED.

Dated: **August 11, 2020**

UNITED STATES DISTRICT JUDGE

[25] Law and motion in this case is now closed. (*See* Doc. No. 330.) The previously scheduled dates for a Pretrial Conference and Jury Trial were vacated pending the court's disposition of the pending motions. (Doc. No. 384.) While a new jury trial date may now be scheduled, the parties are reminded of two impediments in that regard. First, the courthouses of the Eastern District of California remain closed to the public, and jury trials are not currently being conducted in light of the ongoing COVID-19 pandemic and its spread through the counties within this district. *See* General Order 617. Second, even when the court reopens to the public and jury trials resume, absent the filling of current vacancies on the bench of this court, the likelihood is that any civil jury trial date set before the undersigned will eventually be vacated prior to trial due to the ongoing judicial emergency. (*See* Doc. No. 415.)