UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of: HOUSING AND REDEVELOPMENT INSURANCE EXCHANGE, Respondent.	22-AF-0004-OH-001 May 13, 2022

RULING ON RESPONDENT'S AND GOVERNMENT'S DISPOSITIVE MOTIONS AND INITIAL DECISION

This matter arises from a Complaint filed by the U.S. Department of Housing and Urban Development ("HUD" or "the Government") against the Housing and Redevelopment Insurance Exchange ("Respondent" or "HARIE") seeking to revoke Respondent's approval as a Qualified PHA-owned Insurance Entity ("QPIE").

A QPIE is an insurer that has been granted special status by HUD that permits public housing agencies ("PHAs") to obtain the insurance coverage required by HUD without engaging in a competitive bidding process. As relevant here, a QPIE operates as an insurer for its member PHAs, which means that the members are functionally both the insurer and the insureds. This special status is granted upon meeting certain requirements and approval by HUD, and the QPIE must remain in compliance with the regulatory standards in order to retain its approval.

In the *Complaint*, HUD seeks the revocation of Respondent's approval as a QPIE based on changes in its ownership, control, and membership allegedly affecting its eligibility. The matter is currently before the Court upon Respondent's *Motion to Dismiss* and HUD's *Motion for Summary Judgment*.

PROCEDURAL HISTORY

On September 24, 2021, HUD issued a *Superseding Notice of Withdrawal* to Respondent. On October 6, 2021, Respondent requested a hearing pursuant to 24 C.F.R. § 965.205(e).

On October 21, 2021, this matter was set for hearing to commence on March 16, 2022 by the first *Notice of Hearing and Order*. On November 5, 2021, HUD filed a *Complaint* outlining HUD's basis for revoking Respondent's approval as a QPIE. The *Complaint* alleged two independent bases for revocation, namely: Respondent is not exclusively owned and controlled by PHAs (Count 1); and Respondent does not limit participation to PHAs (Count 2). On December 3, 2021, Respondent filed an *Answer* raising a number of affirmative defenses.

On January 24, 2022, HUD filed a *Motion to Strike Respondent's Affirmative Defenses*. On February 1, 2022, Respondent filed a *Response* to the *Motion to Strike*. On February 23, 2022, the Court issued a *Ruling on Government's Motion to Strike Affirmative Defenses*, granting in part and striking Respondent's defenses as to failure to state a claim and that the regulation exceeded statutory authority; and denying in part and not striking Respondent's defenses as to deprivation of due process, waiver, ratification, and estoppel.

On April 22, 2022, Respondent filed the present *Motion to Dismiss* and HUD filed the present *Motion for Summary Judgment*. On May 2, 2022, HUD filed a response to the *Motion to Dismiss* and Respondent filed a response to the *Motion for Summary Judgment*.

I. Respondent's Motion to Dismiss

On April 22, 2022, Respondent moved to dismiss this proceeding. Respondent asks the Court to dismiss this proceeding because, it asserts, that HUD has failed to state a claim upon which relief can granted on the bases that: (1) HUD has not promulgated a regulation requiring QPIEs to be exclusively owned or controlled by PHAs; (2) Congress has not enacted a statute requiring QPIEs to be exclusively owned or controlled by PHAs; (3) the terms ownership and control are not defined by the relevant regulation or statute; and (4) Respondent is not in violation of the regulation or statute, because it "insures municipalities and their political subdivisions as the same exclusively and solely provide essential services to PHAs and housing authority residents including, but not limited to water services, sewer services, police protection, fire protection, waste collection, public education, etc."

In response, HUD asks this Court to deny Respondent's *Motion to Dismiss*. Specifically, HUD asserts that (1) the motion (captioned as a motion to dismiss) is more properly characterized as a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c); (2) this Court has already rejected the statutory and regulatory arguments presented by Respondent, and that the law-of-the-case doctrine is a sufficient basis to deny Respondent's motion; and (3) Respondent's motion should be denied on the merits because it is inconsistent with the relevant regulation.

Applicable Legal Principles

Motions to Dismiss. When reviewing a motion to dismiss, the Court "must accept all factual allegations in the complaint and draw all reasonable inferences in the [non-moving party's] favor." ATSI Commc'ns, Inc, v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). A motion to dismiss will be granted only if the non-moving party has failed to plead sufficient facts to state a claim to relief that is facially plausible. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A facially plausible claim is one that contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662 (2009). More specifically, a plaintiff must allege facts showing "more than a sheer possibility that a [respondent] has acted unlawfully." Id. A complaint that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Additionally, if a plaintiff has not "nudged [its] claims across the line from conceivable to plausible, [those claims] must be dismissed." Id. at 570.

The Federal Rules of Civil Procedure, which do not govern this proceeding but serve as persuasive authority, consider an involuntary dismissal under Rule 41 or a dismissal not under that rule as operating as an adjudication on the merits. Fed. R. Civ. Pro. 41(b). Furthermore, a motion asserting that the nonmovant has failed to state a claim upon which relief can be granted may only be made in any pleading allowed or ordered under Rule 7(a),[1] by a motion for judgment on the pleadings under Rule 12(c); or at trial. Fed R. Civ. Pro. 12(h)(2). Like Rule 12(b)(6), "Rule 12(c) does not allow for any resolution of contested facts; rather, a court may enter judgment on the pleadings only if the uncontested and properly considered facts conclusively establish the movant's entitlement to a favorable judgment." Patrick v. Rivera-Lopez, 708 F.3d 15, 18 (1st Cir. 2013) quoting Aponte-Torres v. Univ. of P.R., 445 F.3d 50, 54 (1st Cir. 2006).

Discussion

Where a motion asks the Court to dismiss for failure to state a claim upon which relief may be granted, the Court must accept all factual allegations in the complaint and draw all reasonable inferences in the non-moving party's favor. See ATSI Commc'ns, Inc, supra. A motion to dismiss[2] will be granted only if the non-moving party has failed to plead sufficient facts to state a claim to relief that is facially plausible. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

Here, Respondent has not identified any actual factual gap to serve as the basis for dismissal of Count 2, which alleges that Respondent permits non-PHAs to participate. This is a problem for Respondent, as the essential requirement for a motion to dismiss to succeed is to show that there is a deficiency in the pleadings. Instead, Respondent functionally asks the Court to find that it is correct on the merits. This is not the purpose of a motion to dismiss, nor is it the purpose of a motion for judgment on the pleadings. Respondent has not shown that it is entitled to judgment in its favor on the pleadings and Respondent's *Motion* shall be denied as to Count 2

Respondent also asks this Court to dismiss Count 1 on the basis that the relevant statute and the Regulation here do not require exclusivity in ownership and control by PHAs. The Court

[1] (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer. Fed R. Civ. Pro. 7(a).

[2] Respondent's motion requesting that this proceeding be dismissed because "HUD has failed to state a claim upon which relief can be granted" is captioned as a motion to dismiss. Here, where the motion asserts that the nonmovant has failed to state a claim upon which relief can be granted, it is more properly characterized as a motion for judgment on the pleadings. Nonetheless, this does not make any significant difference in this proceeding, as the same standard apples to both a motion to dismiss under 12(b)(6) and a motion for judgment on the pleadings under 12(c). Jacobsen v. Deseret Book Co., 287 F.3d 936, 941 n.2 (10th Cir. 2002) citing Lowe v. Town of Fairland, Okla., 143 F.3d 1378, 1381 n.5 (10th Cir. 1998); Republic Steel Corp. v. Pennsylvania Eng'g Corp., 785 F.2d 174, 182 (7th Cir. 1986); and Atlantic Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1160 (10th Cir. 2000). Thus for ease of reference and in keeping with Respondent's designation, Respondent's motion shall be referred to as a *Motion to Dismiss*.

need not decide this issue, though it is skeptical as to Respondent's possibility of success. [3] A motion to dismiss or a motion for judgment on the pleadings must identify a legal or factual deficiency in the pleadings – here, Respondent only challenges a matter of legal interpretation. [4] As such, Respondent has not shown that it is entitled to judgment in its favor on the pleadings and Respondent's *Motion* shall be denied as to Count 1.

Accordingly, Respondent's *Motion to Dismiss* is denied in its entirety.

II. HUD's Motion for Summary Judgment

HUD asks the Court to grant summary judgment in its favor because, it asserts, that: (1) there is no genuine issue of material fact remaining; (2) Respondent does not limit participation to PHAs and entities only serving PHAs because it insures municipalities and their subdivisions; (3) Respondent is not solely owned and controlled by PHAs because the majority of its voting members are non-PHAs, and because one of Respondent's board members represents a non-PHA member; (4) Respondent's affirmative defense of estoppel fails as a matter of law and fact; (5) Respondent's affirmative defense of ratification fails as a matter of law and fact; and (6) Respondent's affirmative defense of a denial of due process fails as a matter of law and fact.

In response, Respondent asks this Court to deny HUD's *Motion for Summary Judgment*. Specifically, Respondent asserts that: (1) it is compliant with the applicable statute and regulations; (2) if it is not compliant with the applicable regulation, the regulation is invalid, arbitrary, capricious, an abuse of discretion, and in excess of statutory authority; and (3) Respondent's affirmative defenses of waiver, equitable estoppel, ratification, and deprivation of due process involve facts in dispute (and thus are not appropriate for summary judgment).

Applicable Legal Principles

Standard of Review for Summary Judgment. Pursuant to 24 C.F.R. § 26.32(l), this Court is authorized to "decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact." The Court may exercise its discretion in application of Rule 56 of the Federal Rules of Civil Procedure. 24 C.F.R. § 26.40(f)(2).

Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Fed. R. Civ. P. 56(a). A "genuine" issue exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson,

[3] If the Court were to take Respondent at face value and accept Respondent's argument that the lack of definition for "ownership and control" should mean that the Regulation is invalid, the Court would logically have to conclude that no entity could ever be approved as a QPIE – including Respondent – and thus might be required to approve the revocation of Respondent's QPIE status regardless.

[4] When it comes to statutory interpretation, "we give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import," and where the word at issue appears in an agency publication, the same exercise still provides helpful guidance. (internal quotations omitted) *In re* Prime Venture Realty Associates, LLC, 2011 HUD ALJ LEXIS 1, *25 and fn. 15 (Mar. 31, 2011) quoting Williams v. Taylor, 529 U.S. 420, 431 (2000).

477 U.S. at 249. Additionally, a fact is not "material" unless it affects the outcome of the suit. Id.

Summary judgment is a "drastic device" because, when exercised, it diminishes a party's ability to present its case. Selva & Sons, Inc. v. Nina Footwear, Inc., 705 F.2d 1316, 1323 (Fed. Cir. 1983). Accordingly, the moving party bears the burden of demonstrating the absence of any material issues of fact. See Anderson, 477 U.S. at 256. Rule 56 provides that when a party asserts that a fact cannot be genuinely disputed, that party must: (i) cite to materials in the record; or (ii) show the cited materials do not establish the presence of a genuine dispute. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, the Court's function is not to resolve any questions of material fact, but to ascertain whether any such questions exist. *In re* Beta Dev. Co., HUDBCA No. 01-D-100-D1, at *12 (February 21, 2002). Therefore, when the moving party has carried its burden under Rule 56(c), the nonmoving party may not rest upon mere allegations or denials, but must come forward with "specific facts showing that there is a *genuine* issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (emphasis added) (citing Fed. R. Civ. P. 56(e)).

Law of the Case. The law of the case doctrine "posits that 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." Pepper v. United States, 131 S.Ct. 1229, 1250, 179 L. Ed. 2d 196 (2011) (internal quotation marks omitted). The law-of-the-case doctrine binds the parties on issues previously decided both explicitly and "by necessary implication." LaShawn A. v. Barry, 87 F.3d 1389, 1394 (D.C. Cir. 1996) (*en banc*).

Qualified PHA-owned Insurance Entities. PHAs are generally required to obtain that insurance through a competitive bidding process, which helps ensure objective contractor performance and eliminate unfair competitive advantage. See 2 C.F.R. § 200.319; 24 C.F.R. § 965.205(a). Competitive proposals are:

> [G]enerally preferred when procuring professional services because it allows for the consideration of technical quality or other factors (in addition to price) for securing services … Competitive offers are solicited, proposals are evaluated, and an award is made to the offeror whose proposal is most advantageous to the PHA, with price and other factors (as specified in the solicitation) considered."

In 1992, Congress instructed HUD to promulgate regulations to allow certain nonprofit, PHA-owned and -controlled insurance entities to offer insurance to PHAs without regard to competitive bidding requirements normally applicable to PHAs. See 42 U.S.C. § 1436c. In response, and after notice and comment, HUD promulgated the 1993 regulation setting standards for QPIEs, 24 C.F.R. § 965.205 ("the Regulation"). See 58 Fed. Reg. 51952 (Oct. 5, 1993).

Among other requirements, the Regulation specifies that an eligible QPIE must: (1) "limit[] participation to PHAs (and to nonprofit entities associated with PHAs that engage in activities or perform functions only for housing authorities or housing authority residents);" and (2) be "owned and controlled by PHAs." 42 U.S.C. § 1436c; 24 C.F.R. § 965.205(a), (c). If an

insurance entity meets these and other regulatory criteria, then a PHA may obtain insurance from it without being subject to the competitive bidding requirements. See 24 C.F.R. § 965.205. However, HUD may revoke its approval of a non-profit insurance entity under the Regulation when the QPIE no longer meets the requirements of this section. See 24 C.F.R. § 965.205(e).

Material Facts not Genuinely in Dispute

Respondent has filed a response to the *Motion for Summary Judgment*, but only genuinely contests one material fact asserted in support of the *Motion for Summary Judgment*. Where the moving party has cited to materials in the record supporting its account of the material facts, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(c) and Matsushita Elec. Indus. Co., 475 U.S. at 586-587.

Accordingly, the Court finds the following material facts to be undisputed:[5]

1. Respondent is a QPIE subject to the requirements of the Regulation.

2. Respondent is a reciprocal insurance exchange. Entities pay an annual membership fee to become a member of Respondent. Members can exchange certain types of liability and indemnity contracts.

3. Respondent began insuring municipalities and their political subdivisions on July 1, 1995.

4. In 2014, Respondent formally amended its by-laws to allow municipalities and their political subdivisions to join the company's membership, and formally amended its membership agreements to expressly acknowledge the participation of municipalities as members.

5. Respondent amended its by-laws again in 2020. The amended by-laws retained the exact language of the 2014 by-laws and permit municipalities and their political subdivisions to join Respondent's membership.

6. Respondent admitted that as of September 2021, the members of Respondent included school districts, counties, municipalities, water and sewage authorities, and parking authorities.

7. Respondent admitted that it currently markets and solicits membership from school districts, counties, municipalities, water and sewage authorities, and parking authorities.

8. As of September 2021, Respondent's members included 110 municipalities or their political subdivisions, including school districts and sanitary authorities, along with 64 housing authorities.

[5] Some proposed facts have been omitted as not material to this decision.

9. As of April 21, 2022, Respondent identifies itself on its website as "a governmental insurer, which means it can insure any governmental entity, this includes, but is not limited to, counties, cities, sewer and water authorities, transit authorities, boroughs, townships, and school districts."

10. Respondent is managed by a board of directors ("the Board"), which consists of seven persons who meet at least four times per year.

11. Respondent's website touts that "[s]hared ownership of the Exchange and policy management through a Board of Directors elected by a membership" is one of the benefits of membership in Respondent.

12. Any representative of a member may submit his or her name for nomination to the Board and a candidate who submits a petition signed by 35% of members automatically will be nominated.

13. The members may remove an individual director or the entire Board from office, with cause, by a majority vote of the members.

14. Members have the right to review Respondent's books, records, and annual financial statements.

15. The Board delegates authority to and oversees the performance of an attorney-in-fact, who is responsible for the day-to-day operations of Respondent.

16. The Board manages and has final say over all operations and "shall take all actions necessary for [Respondent] to transact the business of the insurance in the Commonwealth of Pennsylvania," including but not limited to:

    i. Approving the management agreement setting forth the duties and compensation of Respondent's attorney-in-fact;

    ii. Directing or approving advertising decisions;

    iii. Directing or approving firing, hiring, and salary decisions;

    iv. Directing or approving decisions regarding company travel;

    v. Retaining professional services including consultants, actuaries, and accountants;

    vi. Directing donations;

    vii. Selling assets; and

    viii. Approving premium and deductible increases.

17. In February 2017, HUD wrote to Respondent inquiring about the status of filings and whether Respondent complied with the Regulations requirement limiting approval for the

bid exemption to "non-profit entities associated with PHAs that engage in activities or perform functions only for housing authorities or housing authority residents."

18. At the February 27, 2018 meeting of the Board, Respondent's Solicitor's Report discussed the exchange of correspondence between Respondent and HUD about the bidding waiver, and that "[Counsel] does not anticipate any future detrimental consequences and if so, [Respondent] will strenuously fight any such decisions." The Board unanimously approved the Solicitor's Report.

19. HUD and Respondent exchanged letters regarding Respondent's compliance with the Regulation throughout 2017 and 2018. During that exchange, HUD offered Respondent the opportunity to come into compliance with the Regulation, writing:

> [Respondent] has two possible options it could pursue. First, it could create a distinct entity to legally separate its Public Housing from non-Public Housing business lines. Alternatively, it could request a waiver of the requirement that it limit participation to PHAs. To support its request, it would need to establish a good cause, and provide evidence that it has mitigated financial and legal risk to the PHA component of its business. This would, at minimum, require the submission of financials, actuaries, as well as opinions from counsel that there is no cross liability between the Public Housing business line and other business lines.

20. Respondent replied to HUD on January 3, 2018 but agreed to neither option.

21. On September 14, 2018, HUD issued a *Notice of Withdrawal* to Respondent, stating that Respondent's "approval as a qualified PHA-owned insurance entity under 24 CFR 965, Subpart B, is rescinded, effective sixty days from the date of this letter, and [Respondent] can no longer provide insurance on a noncompetitive basis to PHAs in the Commonwealth of Pennsylvania." The September 14 letter did not cite to 24 C.F.R. § 965.205(e) or Respondent's right under the Regulation to request a hearing.

22. Respondent requested a hearing to contest the proposed revocation on September 20, 2018.

23. At the September 25, 2018 Board meeting, the Solicitor's Report discussed HUD's *Notice of Withdrawal*, stating "it is still business as usual for [Respondent]. [Respondent] will meet with any [Housing] Authorities which may have questions." The Board unanimously approved the Solicitor's Report.

24. On September 28, 2018, HUD notified all PHAs in Pennsylvania that HUD had initiated a process to revoke Respondent's approval under 24 C.F.R. § 965.205(e), that

> "HARIE is entitled to and has requested a hearing," and that pending the outcome of that hearing, "HUD's approval of HARIE under [the Regulation] remains intact. As such … PHAs may continue to obtain any line of insurance from HARIE without

> regard to competitive selection procedures. After a decision is made, HUD will notify, in writing, Pennsylvania PHAs of the outcome of the hearing."

25. On September 28, 2018, HUD confirmed to Respondent that Respondent would receive a hearing consistent with 24 C.F.R. part 26, subpart A, and that "HUD will take no action on this revocation until a decision is rendered by the Hearing Officer and will advise PHAs in the Commonwealth of Pennsylvania that the revocation is under administrative hearing review."

26. HUD took no further action to revoke Respondent's bid exemption until September 2021.

27. At the December 11, 2018 Board meeting, the Solicitor's Report discussed HUD's *Notice of Withdrawal*, stating "We have received no response from HUD. ... [W]e are very well prepared and have excellent documentation to back our stand on this whole issue."

28. At the February 26, 2019 Board meeting, the Solicitor's Report stated, "We have had no contact with HUD in the past five or six months [and] will demand a formal acknowledgement from HUD to prevent a similar situation from arising in the future." The Board unanimously approved the Solicitor's Report.

29. At the April 23, 2019 Board meeting, the Attorney-in-Fact's Report stated, "There are 320 property and casualty carriers in [Pennsylvania] and [Respondent] currently ranks 32nd in that group. This is certainly something of which [Respondent] can be very proud." The Board unanimously approved the Attorney-in-Fact's Report.

30. At the February 11, 2020 Board meeting, the Attorney-in-Fact's Report stated, "[Respondent] [is] establishing a significant presence in the western part of the state." The Board unanimously approved the Attorney-in-Fact's Report.

31. At the April 21, 2020 Board meeting, the Attorney-in-Fact's Report stated, "No housing authority business was lost for the upcoming June 1 renewal period." The Solicitor's Report stated, "We have not heard anything from HUD in over two years." The Board unanimously approved the Attorney-in-Fact's and Solicitor's Reports.

32. At the September 29, 2020 Board meeting, the Solicitor's Report stated, "Things are quiet and running smoothly…Nothing major is pending … [and] no correspondence has been received from HUD in over two years." The Board unanimously approved the Solicitor's Report.

33. At the June 28, 2021 Board meeting, the Attorney-in-Fact's Report stated, "We are looking at the strongest financial position in our history and predict[] another banner year in 2021." The Board unanimously approved the Attorney-in-Fact's Report.

34. On September 24, 2021, HUD issued a *Superseding Notice of Withdrawal* informing Respondent that HUD was withdrawing HARIE's bid waiver approval pursuant to 24 C.F.R. § 965.205(e). The September 2021 *Notice* advised that it superseded the

September 2018 *Notice* and notified Respondent that it had 30 days to request a hearing to challenge the withdrawal action in accordance with 24 C.F.R. part 26, subpart A.

Discussion

HUD claims the material facts are not genuinely in dispute and that it is entitled to judgment as a matter of law on Counts I and II. Respondent disputes a material fact in Count I and raised several affirmative defenses in its answer. As noted supra, a QPIE must meet all eligibility requirements in order to be approved or retain approval as a QPIE. Therefore, if it is proven that either requirement is not satisfied, HUD will prevail in the matter at hand, even if it has not prevailed on the other count.

A. The material facts support Count 2 of the Complaint ("HARIE does not limit participation to PHAs")

The Regulation provides an answer as to whether non-PHAs may participate in a QPIE, providing that only some non-PHAs may participate. The text of the Regulation indicates:

> Under the following conditions, HUD will approve a nonprofit self-funded insurance entity created by PHAs that *limits participation to PHAs* (*and to nonprofit entities associated with PHAs that engage in activities or perform functions only for housing authorities or housing authority residents*)

(emphasis added) 24 C.F.R. § 965.205(c).

From the perspective of regulatory history, the parenthetical phrase including some non-PHAs appears to have included in response to a suggestion from the public during notice and comment and considered in the Final Notice of 1993:

> *Comment*. Organizations other than [PHA]s should be able to obtain coverage from [QPIEs]. In many cases, an organization may have been created solely to provide certain services for a [PHA] or its residents, *e.g.*, a child care center, a resident management corporation, or a food service organization. The rule should be broadened to permit this.
>
> *Response*. The Department agrees that certain organizations that perform functions for a housing authority should be able to obtain coverage from the nonprofit insurance entity. Consequently, the final rule provides that approval will be given to a nonprofit self-funded insurance entity created by [PHAs] that limits participation to [PHAs] (and to nonprofit entities associated with [PHAs] that engage in activities or perform functions only for housing authorities or housing authority residents).

58 Fed. Reg. 51952, 51953 (Oct. 5, 1993). The Secretary has thus already spoken to whether non-PHAs may participate in in a QPIE by restricting participation to nonprofit entities associated with PHAs ("NPEs") that only engage in activities or perform their functions for PHAs or PHA residents.

For purposes of the proceeding before the Court, where the question is whether a municipality (or its political subdivisions) may participate in a QPIE, the answer is plainly no. Respondent has admitted that municipalities and other local government subdivisions participate in Respondent. Respondent has not alleged that the municipalities or political subdivisions only serve PHAs or PHA residents – instead, Respondent has alleged that PHAs and PHA residents had no available alternative but to obtain services from these non-PHA members. Respondent argues that it is not in violation of the Regulation or statute, because it "insures municipalities and their political subdivisions as the same exclusively and solely provide essential services to PHAs and housing authority residents including, but not limited to water services, sewer services, police protection, fire protection, waste collection, public education, etc." This convoluted statement misconstrues the meaning of "only" referenced in the Regulation, where the "only" indicates that the NPE only engages in activities or performs functions for PHAs and PHA residents, and for no one else. Instead, Respondent has asserted that its non-PHA members are the "only" source of certain civic services for PHAs and PHA residents – but not that the non-PHA members only provide those services to PHAs and PHA residents. These are critically different propositions, and this dooms Respondent's argument and proves HUD's argument.[6]

Thus, HUD has shown that it is entitled to summary judgment as to Count 2.

B. The material facts are disputed as to Count 1 ("HARIE is not exclusively owned and controlled by PHAs")

Turning to Count 1, HUD has not established every material fact regarding the ownership and control of Respondent. While it might be possible to establish these facts at a hearing, they remain in dispute, and thus HUD is not entitled to judgment as a matter of law as to Count 1. Accordingly, HUD's *Motion* as to Count 1 shall be denied.

III. Respondent's affirmative defenses are insufficient.

Respondent raised several affirmative defenses in the *Answer*. As noted *supra*, the Court struck several of those defenses for being insufficient as a matter of law. With the remaining affirmative defenses of waiver, ratification, and estoppel, the Court concluded that it was premature to consider the adequacy of those defenses as discovery was not complete. The Court further declined to strike a possible defense of deprivation of due process, as it was not specifically addressed by the *Motion to Strike*. Discovery has now closed and the Court now considers the adequacy of those defenses on summary judgment.

[6] To the extent that Respondent argues that the Regulation is arbitrary and beyond statutory authority, those arguments have already been rejected in the *Ruling on Motion to Strike*, and remain rejected by the law of the case.

A. Respondent's defense of deprivation of due process

On September 14, 2018 and prior to the *Notice* at issue in this proceeding, HUD proposed to revoke Respondent's QPIE status. On September 20, 2018, Respondent requested a hearing regarding that proposed revocation and HUD informed Respondent that one would be scheduled. However, no such hearing was ultimately scheduled. On November 5, 2021, the present superseding *Notice* was issued, Respondent again requested a hearing regarding the proposed revocation, and this proceeding was initiated.

Respondent argues that the prior failure of due process—not providing a prompt hearing in response to a request for a hearing after a notice of proposed revocation similar to the one underlying the present *Complaint*—should be a basis to deny HUD's current *Complaint* and proposed revocation and implies that this procedural defect is incurable. The Court previously declined to strike this defense in its *Ruling on Motion to Strike*, as it was not addressed directly by HUD's *Motion to Strike*. Now HUD specifically asks for this defense to be rejected on legal and factual grounds; Respondent does not specifically ask the Court to do anything as to this defense but does ask for the *Motion for Summary Judgment* to be denied in its entirety.

From an inspection of the filings before the Court, the crux of Respondent's argument is that HUD should have granted referred its request for a hearing to an ALJ sooner, and by implication that this is an incurable procedural defect. Respondent cites to no precedent or other legal authority suggesting this is case. HUD in turn suggests that no deprivation of any right occurred at all, and that Respondent has not shown that it suffered any harm as a result. Given that the reasonable remedy for the delay would be to institute a proceeding under 24 C.F.R. § 965.205(e) and part 26, subpart A to Respondent, it has already been granted. As Respondent has not identified any meaningful deprivation of due process or impingement upon any right of Respondent, Respondent has not shown any factual evidence or provided any legal authority to support this defense.

Accordingly, this defense shall be stricken.

B. Respondent's defenses of waiver of claims, ratification, and estoppel

In its affirmative defenses, Respondent invokes waiver and ratification by HUD as a justification to estop HUD's enforcement action. Respondent recites a history where HUD previously proposed the revocation of Respondent's QPIE status before ultimately withdrawing the proposal. Essentially, Respondent's argument as to waiver (and ratification of waiver) is that HUD waited too long to bring the present proceeding because it had already known about the conduct underlying the present *Complaint*, and that HUD either waived or ratified the waiver of the present issues. HUD counters that the appropriate frame of reference is for the Court to consider Respondent's affirmative defenses as an estoppel defense, which should fail as a matter of law for Respondent failing to plead its elements. This Court considered essentially the same arguments in the *Ruling on Motion to Strike*, but declined to strike these defenses at that time in recognition that while discovery remained ongoing, there was a possibility that Respondent would uncover and produce evidence in support of these then-speculative affirmative defenses. With the close of discovery, these defenses are now ripe to consider, and the Court will examine the applicability of these defenses in turn.

Waiver is not generally available as an affirmative defense against the United States, especially where there is no indication that the employee acted within the scope of their authority. "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." United States *ex rel*. Liotine v. CDW Gov't, Inc., No. 05-33-DRH, 2012 U.S. Dist. LEXIS 94837, at *44-45 (S.D. Ill. July 10, 2012) quoting Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384, 68 S. Ct. 1, 92 L. Ed. 10 (1947)); see also Ferguson v. Fed. Deposit Ins. Corp., 164 F.3d 894, 896-99 (5th Cir. 1999) (affirming summary judgment that defendant's affirmative defense of waiver was not available against United States where an employee acts outside the scope of the authority).

Ratification is the affirmance by a person of a prior act which did not bind the person but which was done or professedly done on their account, whereby the act is given effect as if originally authorized. For ratification to be effective, a superior must not only (1) have possessed authority to contract, but also (2) have fully known the material facts surrounding the unauthorized action of the subordinate, and (3) have knowingly confirmed, adopted, or acquiesced to the unauthorized action of her subordinate.[7] See Leonardo v. United States, 63 Fed. Cl. 552, 560 (2005).

As an initial matter, Respondent has not identified or otherwise alleged the involvement of a person with authority to waive or ratify a waiver, and to thus bind HUD as to Respondent's QPIE status. Respondent does not address who had the authority to waive or ratify the waiver of the present claim against Respondent. Respondent also identifies the letter of October 10, 2000 as sent by Ms. Regina McGill of HUD's Funding and Financial Management Division as a basis to believe that waiver or ratification has occurred. However, even assuming that a hypothetical person with authority to waive sent the letter (or hypothetical superior with authority to ratify waiver did in fact ratify the letter of October 10, 2000), the relevant language of the letter does not indicate any action beyond "[b]ased upon the information you sent to [HUD] on September 15, 2000, HUD is withdrawing the pending non-approval of [Respondent] as a [QPIE]." It is difficult to identify the relevance of this letter as to this proceeding, as it does not include any statement beyond the very narrow fact that the then-pending non-approval had been withdrawn. This is not facially a statement of waiver. Further, ratification is not appropriate, as even accepting the existence of a superior with authority to ratify (which has not been alleged) and the materiality of the letter, Respondent has not alleged any material facts known by this person, nor knowing confirmation, adoption, or acquiescence to the letter of October 10, 2000. As such, neither waiver nor ratification have been raised as a legally sufficient defense, and will be stricken.

Even if waiver or ratification thereof could apply in this matter, such defenses would also need to provide appropriate support for the application of estoppel. Estoppel is an equitable

[7] To the extent that Respondent argues that United States *ex rel*. Spay v. CVS Caremark Corp. stands for the proposition that "if plead properly the [court] would have allowed [defendant] to move forward on the affirmative defense of ratification in a non-contractual dispute," it is incorrect. 875 F.3d 746, 751 (3d Cir. 2017). The quotations provided by Respondent are not contained in the Third Circuit's opinion, but the Court presumes this to be a product of sloppiness rather than an intentional misrepresentation of legal authority.

doctrine capable of a flexible application. See Heckler v. Cmty. Health Servs., Inc., 467 U.S. 51, 59 (1984). In general, a party claiming estoppel must prove that (1) the opposing party made a misrepresentation, and (2) the party claiming estoppel reasonably relied on that misrepresentation, (3) to its detriment. See Kennedy v. United States, 965 F.2d 413, 417 (7th Cir. 1992). For public policy reasons, however, "it is well settled that the Government may not be estopped on the same terms as any other litigant." Heckler, 467 U.S. at 60. In fact, the Supreme Court has never permitted equitable estoppel to lie against the government. In the limited circumstances where other courts have entertained an estoppel argument against the government, they have required an additional showing that the government engaged in affirmative misconduct. See Estate of James v. USDA, 404 F.3d 989, 995 (6th Cir. 2005) (rejecting estoppel argument); Kennedy, 965 F.2d at 417 (same); HUD v. Lowe, No. 09-M-098-PF-19, 2010 HUD ALJ LEXIS 17, at *9-10 (HUDALJ Jan. 6, 2010) (same). Furthermore, the party claiming estoppel must also plead that it will be seriously injured if the government is not estopped, and that estopping the government will not harm the public interest. See *In re* Navajo Housing Authority, No. 14-JM-0121-IH-002, 2015 HUD ALJ LEXIS 10, at *32 (HUDALJ Dec. 14, 2015) aff'd 2016 HUD ALJ LEXIS 2 (HUD May 2, 2016.) citing Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 421 (1990); ATC Petroleum Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988); Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1298-1299 (D.N.M. 1996); and Prieto v. U.S., 655 F. Supp. 1187, 1194 (D.D.C. 1987).

Respondent has failed to plead any facts to support a finding that the government made a material misrepresentation or engaged in affirmative misconduct related to Respondent's exemption from competitive bidding as a QPIE.[8] Respondent speculated that discovery might potentially uncover affirmative misconduct on the part of HUD, but did not ultimately do so. However much HUD's alleged history of proposing and withdrawing a revocation of Respondent's exemption from competitive history may be fairly considered in Respondent's favor in this case, it does not provide a basis for the Court to take the fairly exceptional step of allowing an estoppel defense against the government.

Further, Respondent has not alleged any reasonable reliance upon misrepresentation, and, most crucially, Respondent has not alleged any detriment to it as a result of a reasonable reliance upon misrepresentation. Respondent has made only the conclusory statement that "[t]o suggest that [Respondent] is not in a worse position because of this…is naïve, if not, insulting. [Respondent] would be required to change its business model entirely." *Brief in Support of Response to Motion for Summary Judgment*, p. 11. When considered in the light of the counterfactual, *i.e.*, where Respondent would be if HUD had previously withdrawn Respondent's approval as a QPIE or not granted it QPIE status at all, it becomes difficult for this Court to identify the detriment. It may even be reasonable to think that Respondent has received an unambiguous benefit under the facts as alleged by permitting it to operate for longer with a special preference it no longer merited. Indeed, when Respondent is viewed as an insurer, it has received a special dispensation from the government to avoid competing with other potential insurers; when viewed as a group of insureds, that it has had additional choices for insurance unavailable to others. In essence, while Respondent may experience a detriment, it has not identified that detriment for consideration by this Court, nor any reasonable reliance leading to

[8] The Court is not endorsing the alleged conduct of HUD employees as perfect or blameless; indeed, it may be quite reasonable to be frustrated, but that does not necessarily rise to a legal wrong within this Court's purview.

that detriment. Respondent has also not identified any way in which it will be seriously injured if the government is not estopped, and has not pled any facts suggesting that estopping the government will not harm the public interest.

Accordingly, Respondent's defenses as to waiver of claims, ratification, and estoppel are stricken as legally insufficient.

CONCLUSION

Consistent with the foregoing, Respondent's *Motion to Dismiss* as to both counts is legally insufficient and is **DENIED**. HUD has demonstrated that material facts are not in dispute as to Count 2 and the Court finds Respondent's affirmative defenses to be insufficient. Accordingly, HUD is entitled to judgment as a matter of law for Count 2 of the *Complaint*. HUD's *Motion for Summary Judgment* as to Count 1 (ownership and control) is **DENIED** because relevant material facts remain in dispute.

As each count would be a sufficient basis independent of the other, HARIE's approval as a QPIE pursuant to 24 C.F.R. § 965.205 shall be **REVOKED**. Count 1 of the Complaint is dismissed without prejudice as moot and in the interest of judicial economy. See, e.g., Damasco v. Clearwire Corp., 662 F.3d 891, 894-95 (7th Cir. 2011) (holding that where there is no longer a live case or controversy under Article III of the Constitution because the requested remedy has been granted, dismissal of the count is appropriate).

So **ORDERED**,

ALEXANDER FERNANDEZ-PONS

Digitally signed by: ALEXANDER FERNANDEZ-PONS
DN: CN = ALEXANDER FERNANDEZ-PONS email = ALEXANDER.FERNANDEZ-PONS@HUD.GOV C = AD O = OFFICE OF THE SECRETARY OU = OHA
Date: 2022.05.13 11:48:11 -04'00'

Alexander Fernández-Pons
Administrative Law Judge

Notice of appeal rights. The appeal procedure is set forth in detail in 24 C.F.R. § 26.26. This Order may be appealed by any party to the Secretary of HUD. Any appeal and the required brief must be received by the Secretary within 30 days after the date of this Order. Any statement in opposition to an appeal must be received by the Secretary within 20 days after service of the appeal and brief.

Service of appeal documents. Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development
Attention: Secretarial Review Clerk
451 7th Street S.W., Room 2130
Washington, DC 20410
Facsimile: (202) 708-0019
Scanned electronic document: secretarialreview@hud.gov

Copies of appeal documents. Copies of any Petition for Review or statement in opposition shall also be served on the opposing party(s), and on the HUD Office of Administrative Law Judges.

Finality of decision. The agency decision becomes final as indicated in 24 C.F.R. § 26.25(f).

Judicial review of final decision. After exhausting all available administrative remedies, any party adversely affected by a final decision may seek judicial review of that decision in the appropriate United States District Court. 5 U.S.C. § 701 *et seq*. A party must file a written petition in that court within 60 days of the issuance of the Secretary's final decision. Fed. R. App. Pro. 4(a)(1)(B).