UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

THE SECRETARY, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Complainant,

v.

OLIVIA M. MARTINEZ

Respondent.

HUDALJ 08-072-PF
FHEO Case: 08-3553-PF

December 22, 2008

HUD
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DEFAULT JUDGMENT AND ORDER

This case arises from a complaint for civil penalties and assessments alleging that, during 2002 and 2003, Olivia M. Martinez (the "Respondent"), during her employment as a loan officer for a mortgage company, fraudulently submitted false documentation to obtain mortgage insurance on ten loans, and caused claims for payment of such mortgage insurance on three of those loans.

Single Family Mortgage Insurance Program

The Department of Housing and Urban Development (HUD) administers the Single Family Mortgage Insurance Program pursuant to section 203(b) of the National Housing Act, 12 U.S.C. § 1709(b). Under this program, the Federal Housing Administration ("FHA"), an entity within HUD, insures mortgages originated by commercial lenders to finance home purchases by qualified borrowers. The program is designed to help low and moderate income families become homeowners by lowering some of the costs associated with mortgage loans and providing protection to lenders. Lenders are encouraged to make loans to borrowers who might not be able to meet conventional underwriting requirements but are otherwise creditworthy. In order to qualify for an FHA-insured mortgage, a borrower must have a source of income sufficient to cover the projected monthly mortgage payments and other fixed expenses, have an employment and credit history that satisfies FHA underwriting standards, and have assets sufficient to cover the required down payment.

A lender originates an FHA-insured mortgage by, among other things, taking the loan application and verifying the borrower's employment and earnings. FHA requires the lender to verify the borrower's employment for the most recent full two years. HUD Handbook 4155.1 REV-4 CHG 1 ¶ 2-6 (Sept. 1995). The verified income is used to determine whether the

borrower can reasonably be expected to meet the expenses involved in homeownership and otherwise provide for the family.

After the loan is underwritten and closed, the lender submits certain paperwork to FHA, including a form entitled HUD/VA Addendum to Uniform Residential Loan Application, Form HUD-92900-A. At Part II of the Addendum, the lender is required to certify in pertinent part as follows:

> The undersigned lender makes the following certifications ... to induce [FHA] to issue a firm commitment for mortgage insurance or a Mortgage Insurance Certificate under the National Housing Act....
>
> B. The information contained in the Uniform Residential Loan Application and this Addendum was obtained from the borrower by a full-time employee of the undersigned lender or its duly authorized agent and is true to the best of the lender's knowledge and belief....
>
> D. The verification of employment ... [was] requested and received by the lender or its duly authorized agent without passing through the hands of any third persons and [is] true to the best of the lender's knowledge and belief.

The Addendum containing these lender certifications is required to be submitted to FHA, and the truthfulness of such certifications is relied upon by FHA in endorsing the mortgage for insurance coverage. In the event that the borrower ever defaults on the mortgage, the lender holding the mortgage may acquire title to the property through foreclosure. The lender may then submit a claim to FHA for insurance benefits, including the costs of the outstanding principal balance on the defaulted mortgage, accrued interest, acquisition costs, legal fees, unpaid property taxes, unpaid homeowners association fees and other related costs. FHA pays the lender's claim and in turn, the lender conveys title and possession of the property to FHA. FHA may then resell the property in order to recoup some or all of its insurance claim losses.

Procedural Background

On July 8, 2008, HUD mailed a ten-count Complaint to the Respondent via certified mail. The Complaint proffered that, as a result of the allegations contained therein, the Respondent was liable under the Program Fraud Civil Remedies Act of 1986 ("PFCRA") for civil penalties for false statement in each of the mortgage applications, and assessments resulting from insurance claims made against HUD in three of the resulting mortgages. Such assessments may be imposed on any person who causes to be made, presented, or submitted, a claim to the Department that the person knows or has reason to know includes or is supported by any written statement that asserts a material fact which is false, fictitious, or fraudulent. See 31 U.S.C. § 3802(a)(1)(B); 24 C.F.R. § 28.10(a)(1)(ii). Records confirm that the Respondent received the Complaint, but she did not respond.

In Counts 1, 2, and 6 of the Complaint, the Department imposed the maximum civil penalty of $5,500[1] because the lender certification the Respondent signed on behalf of Keystone caused the filing of an insurance claim against HUD. See 31 U.S.C. § 3802(a)(1); 24 C.F.R. § 28.10(a). In Counts 1, 2, and 6, HUD paid the lenders' insurance claims for the amount of default, and HUD imposed on the Respondent—in addition to the civil penalty—an assessment (limited to not more than twice the amount of the paid claim). See 31 U.S.C. § 3802(a)(1) & (3); 24 C.F.R. § 28.10(a)(6).[2] In the remaining seven counts of the Complaint, there is no allegation that an insurance claim was made against HUD, but under the PFCRA, a civil penalty was imposed on the Respondent for making, presenting or submitting a written statement that she knew—or has reason to know—asserted a material fact that was false, fictitious, or fraudulent, accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement. See 31 U.S.C. § 3802(a)(2); 24 C.F.R. § 28.10(b)(1). In each of these seven counts, HUD imposed the maximum civil penalty of $5,500. In sum, the Complaint alleges that the Respondent is liable for ten civil penalties of $5,500 each, totaling $55,000, plus three assessments totaling $365,386.96, pursuant to 31 U.S.C. § 3802(a) and 24 C.F.R. § 28.10. The total amount sought from the Respondent by HUD under the PFCRA and 24 C.F.R. Part 28 is $420,386.96.

In accordance with 24 C.F.R. § 28.25(b), the Complaint informed the Respondent, among other things, of her right to submit a written response to HUD within 30 days, and that such a response would be considered a request for a hearing. The Respondent was further advised that a motion for default judgment would be filed if she did not submit a response, and that if a default order was issued she would be liable for the civil penalties and assessments sought in the Complaint. In accord with 24 C.F.R. § 28.25(c), copies of the laws governing HUD's action were provided to the Respondent with the Complaint.

The Complaint was mailed to the Respondent, via certified mail, return receipt requested, on July 8, 2008. The Complaint was delivered to the Respondent's residence and received by her on July 26, 2008. The Respondent has failed to submit a response to the Complaint prior to HUD's Motion for Default Judgment, filed with this Court on September 12, 2008, and, as of the date of this Order, the Respondent has not answered the Complaint. Pursuant to 24 C.F.R. § 28.30(a), the Respondent had 30 days from the date of service of the Complaint in which to submit a response to HUD. Service was complete when the Complaint was delivered to and received by the Respondent on July 26, 2008. Accordingly, a response to the Complaint was due to HUD on or before August 25, 2008, but none was received.

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[1] As originally enacted, the PFCRA provided that a civil penalty in an amount up to $5,000 could be imposed for any claim or false statement made in violation of the statute. 31 U.S.C. § 3802(a)(1) and (a)(2). Effective October 24, 1996, this amount was adjusted upward to $5,500 pursuant to the Federal Civil Penalties Inflation Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note. 61 Fed. Reg. 50208, 50214 (Sept. 24, 1996) (HUD final rule adjusting PFCRA civil penalty amount to $5,500) (24 C.F.R. § 28.10(a) and (b)(1)). The $5,500 maximum was in effect at all times relevant in this case. Currently, the maximum civil penalty is $7,500. 24 C.F.R. § 28.10(a) and (b)(1).

[2] A claim includes any request, demand, or submission made to the Department for money, including money that represents insurance. See 31 U.S.C. § 3801(a)(3)(A); 24 C.F.R. § 28.5 (definition of "claim").

Current Status

The above-entitled matter is now before this Court on a Motion for Default Judgment, filed on September 12, 2008, by HUD. An Administrative Law Judge may issue a Default Judgment against a respondent, upon motion, for failure to file a timely response to the Government's complaint. 24 C.F.R. § 26.39(a). Failure to file a response to the complaint constitutes an admission of all facts alleged in the complaint and a waiver of a respondent's right to a hearing. Id. at §26.39(c). The Respondent did not respond to the Motion for Default Judgment. Complaint, Exhibit 6.

On October 3, 2008, this Court issued an Order to Show Cause to the Respondent noting her failure to respond to the Motion for Default Judgment. The Respondent was afforded until October 23, 2008, to respond to the Court's Show Cause Order. The Respondent did not respond to the Court's Show Cause Order.

On November 3, 2008, this Court issued a Partial Initial Decision on the Motion for Default Judgment. As the Respondent had been advised, a default order constitutes an admission by the Respondent of all facts alleged in the Complaint and a waiver of the Respondent's right to a hearing on the allegations contained in the Complaint. 24 C.F.R. § 26.39(c).

Notwithstanding the Respondent's waiver of a right to a hearing on the facts and the penalty determination, the Court withheld imposing the proposed penalty and assessments pending determination of specified questions of law pertinent to determining whether the uncontested facts establish the conduct alleged in the complaint and the correctness of the penalty and assessment determinations.

FINDINGS OF FACT

As previously indicated, the Complaint informed the Respondent, among other things, of her right to submit a written response to HUD within 30 days, and that such a response would be considered a request for a hearing. The Respondent was further advised that a motion for default judgment would be filed if she did not submit a response; that the facts alleged in the Complaint would be deemed admitted; and that if a default order was issued she would be liable for the civil penalties and assessments sought in the Complaint. Accordingly, the Court finds as follows:

1. On May 2, 2008, pursuant to 31 U.S.C. § 3803(b), HUD received authorization from the United States Department of Justice to initiate administrative proceedings seeking civil penalties and assessments totaling $545,940.80 against the Respondent, pursuant to the PFCRA.

2. On July 26, 2008, the Complaint was delivered to and received by the Respondent, and thus proper service of the Complaint occurred on that date.

3. The Respondent has failed to respond or to defend this action. Based upon the Respondent's failure to respond to the Complaint, she has foregone her right to a hearing and has admitted to the facts recited in the Complaint. Accordingly, the Court further finds as follows:

4. At all relevant times, the Respondent was a loan officer employed by Keystone Mortgage and Investment Company ("Keystone"), an FHA-approved mortgagee located in Phoenix, Arizona.

5. Between March 2002 and June 2003, the Respondent received and processed ten fraudulent applications for FHA-insured mortgages on behalf of Keystone: (1) FHA No. 023-0931758; (2) FHA No. 023-1166018; (3) FHA No. 023-1234804; (4) FHA No. 023-1228397; (5) FHA No. 023-1394193; (6) FHA No. 023-1262597; (7) FHA No. 023-1422221; (8) FHA No. 023-1557814; (9) FHA No. 023-1721472; and (10) FHA No. 023-1611235. These loans correspond to the ten counts of the Complaint.

6. Each of the application packages for the ten loans originated by the Respondent contained false and fraudulent documents regarding the income/employment of the borrowers, including W-2 forms, pay stubs, and verification of employment ("VOE") forms.

7. The application packages for the ten loans originated by the Respondent contained nearly identical false pay stubs and W-2 forms using the same template, despite the fact that these loans were originated over a 15-month period and were associated with different borrowers, sellers, and realtors, properties located in different areas, and borrowers living in different areas prior to purchasing their homes. The involvement of the Respondent was the only common link between these disparate loan files.

8. The Respondent acknowledged that she was responsible for the truthfulness of the documentation in these loan files and that she failed to fulfill this responsibility by not conducting the proper quality control procedures to ensure that what was given to the lender and HUD was in fact valid. In this regard, the Respondent stated:

> "When the [Department] first came to me to question several items of documentation in the file[s] and advised me that many of them were false I was not surprised or alarmed because many times while originating loans over the past 3 years I had my own suspicions. There were many times when I had questioned documentation that was given to me by borrowers or [r]ealtors...."

9. The Respondent acted in deliberate ignorance or reckless disregard of the truth or falsity of the statements in the ten loan application packages for FHA-insured mortgages, and therefore knew or had reason to know that such documentation was false and fraudulent.

10. The Respondent signed the lender certifications on behalf of Keystone as to each of the ten application packages for FHA-insured mortgages, falsely and fraudulently certifying to FHA that the applications and VOEs are "true to the best of the lender's knowledge and belief."

11. The Respondent acted in deliberate ignorance or reckless disregard of the truth or falsity of the lender certifications she signed on behalf of Keystone as to each of the ten

application packages for FHA-insured mortgages, and therefore knew or had reason to know that such certifications were false and fraudulent.

12. The Respondent submitted or caused to be submitted to FHA the false and fraudulent documents regarding the employment/income of the borrowers, and the false and fraudulent lender certifications, as to each of the ten mortgages at issue.

13. FHA relied on the truthfulness of the lender certifications made by the Respondent in endorsing the ten mortgages for insurance coverage.

14. FHA would not have insured the ten mortgages at issue had it known about the false and fraudulent documents regarding the income/employment of the borrowers, and the false and fraudulent lender certifications submitted by the Respondent.

15. The false and fraudulent documents regarding the income/employment of the borrowers, and the false and fraudulent lender certifications submitted by the Respondent, were material to FHA's determination that the borrowers met the financial requirements to qualify for FHA-insured mortgages.

16. The borrowers subsequently defaulted on three of the ten mortgages originated by Martinez: (1) FHA No. 023-0931758; (2) FHA No. 023-1166018; and (3) FHA No. 023-1262597. As to these three mortgages, FHA received and paid claims for insurance benefits. See Counts 1, 2 and 6, infra.

17. The Respondent caused these claims to be made to FHA, knowing or having reason to know that materially false statements, consisting of the documents regarding the income/employment of the borrowers and the lender certifications she signed, supported the claims. Absent the false lender certifications made by the Respondent, FHA would not have been called upon to pay these claims for insurance benefits.

COUNT 1

18. Elijah Shelton submitted an application for an FHA-insured mortgage to Keystone, dated March 20, 2002, to finance his purchase of a property located at 10649 W. Alvarado Road, Avondale, Arizona (FHA No. 023-0931758).

19. The application indicated that "Far West Express" had employed the borrower for three years and that he earned $2,992 per month. The W-2 forms and VOE corroborated this information.

20. The income/employment information on the application, W-2 forms, and VOE were false and fraudulent because the borrower did not earn income near the amount represented on these documents.

21. The Respondent knew or had reason to know that the income/employment information on the application, W-2 forms, VOE, and lender certification she signed on behalf of Keystone were false and fraudulent.

22. The loan closing occurred on March 22, 2002, and the application package and lender certification were subsequently submitted to FHA for mortgage insurance endorsement, which occurred on May 15, 2002.

23. The borrower thereafter defaulted on the mortgage, and FHA received a claim for insurance benefits on August 10, 2004. FHA has paid a claim of $133,978.05, and recouped $165,896.00 upon resale of the property.

COUNT 2

24. Jose Luis Aguilar submitted an application for an FHA-insured mortgage to Keystone on June 12, 2002, to finance his purchase of a property located at 8028 W. Montecito Avenue, Phoenix, Arizona (FHA No. 023-1166018).

25. The application indicated that "R&R Transport" had employed the borrower for three years and that he earned $2,791 per month. The W-2 forms and VOE corroborated this information.

26. The income/employment information on the application, W-2 forms, and VOE were false and fraudulent because "R&R Transport" was a fictitious company and the borrower did not earn income near the amount represented on these documents.

27. The Respondent knew or had reason to know that the income/employment information on the application, W-2 forms, VOE and lender certification she signed on behalf of Keystone were false and fraudulent.

28. The loan closing occurred on June 13, 2002, and the application package and lender certification were subsequently submitted to FHA for mortgage insurance endorsement, which occurred on July 22, 2002.

29. The borrower thereafter defaulted on the mortgage, and HUD received a claim for insurance benefits on April 26, 2004. HUD has paid a claim of $112,091.96, and recouped $91,077.00 upon resale of the property.

COUNT 3

30. Manuel J. Ortiz submitted an application for an FHA-insured mortgage to Keystone, dated July 11, 2002, to finance his purchase of a property located at 5552 W. Cambridge Avenue, Phoenix, Arizona (FHA No. 023-1234804).

31. The application indicated that the borrower was employed by "Barrett Enterprises" and earned $2,513 per month, and was previously employed by "Upscale Contracting" for two

years and earned $2,400 per month. The W-2 forms, pay stubs, and VOE corroborated this information.

32. The income/employment information on the application, W-2 forms, pay stubs, and VOE were false and fraudulent because the borrower did not earn income near the amount represented on these documents.

33. The Respondent knew or had reason to know that the income/employment information on the application, W-2 forms, pay stubs, VOE and lender certification she signed on behalf of Keystone were false and fraudulent.

34. The loan closing occurred on September 24, 2002, and the application package and lender certification were subsequently submitted to FHA for mortgage insurance endorsement, which occurred on January 10, 2003.

COUNT 4

35. Daniel N. Kuester submitted an application for an FHA-insured mortgage to Keystone, dated August 19, 2002, to finance his purchase of a property located at 6339 W. Rose Lane, Glendale, Arizona (FHA No. 023-1228397).

36. The application indicated that "Alex Used Autos" had employed Kuester for 2.6 years and that he earned $2,390 per month. The W-2 forms, pay stubs, and VOE corroborated this information.

37. The income/employment information on the application, W-2 forms, pay stubs, and VOE were false and fraudulent because the borrower was never paid wages by "Alex Used Auto" and did not earn income near the amount represented on these documents.

38. The Respondent knew or had reason to know that the income/employment information on the application, W-2 forms, pay stubs, VOE and lender certification she signed on behalf of Keystone were false and fraudulent.

39. The loan closing occurred on August 26, 2002, and the application package and lender certification were subsequently submitted to FHA for mortgage insurance endorsement, which occurred on October 11, 2002.

COUNT 5

40. Rafale Ramirez submitted an application for an FHA-insured mortgage to Keystone, dated November 18, 2002, to finance his purchase of a property located at 4531 N. 49th Drive, Phoenix, Arizona (FHA No. 023-1394193).

41. The application indicated that the borrower was employed by "New Beginnings Floors" and earned $2,790 per month. The W-2 forms, pay stubs, and VOE corroborated this information.

42. The income/employment information on the application, W-2 forms, pay stubs, and VOE were false and fraudulent because the borrower had never worked for "New Beginnings Floors" and did not earn income near the amount represented on these documents.

43. The Respondent knew or had reason to know that the income/employment information on the application, W-2 forms, pay stubs, VOE and lender certification she signed on behalf of Keystone were false and fraudulent.

44. The loan closing occurred on January 3, 2003, and the application package and lender certification were submitted to FHA for mortgage insurance endorsement, which occurred on April 2, 2003.

COUNT 6

45. Jorge Rodriguez submitted an application for an FHA-insured mortgage to Keystone on or about November 22, 2002, to finance his purchase of a property located at 7509 W. MacKenzie Drive, Phoenix, Arizona (FHA No. 023-1262597).

46. The application stated that "La Guadulapana" had employed the borrower for four years and that he earned $2,457 per month. The W-2 forms, pay stubs, and VOE corroborated this information.

47. The income/employment information on the application, W-2 forms, pay stubs and VOE were false and fraudulent because the borrower had never worked at "La Guadulapana" and did not earn income near the amount represented on these documents.

48. The Respondent knew or had reason to know that the income/employment information on the application, W-2 forms, pay stubs, VOE and lender certification she signed on behalf of Keystone were false and fraudulent.

49. The loan closing occurred on December 27, 2002, and the application package and lender certification were subsequently submitted to FHA for mortgage insurance endorsement, which occurred on February 4, 2003.

50. The borrower thereafter defaulted on the mortgage, and HUD received a claim for insurance benefits on October 1, 2003. HUD has paid a claim of $109,109.97, and recouped $88,000.00 upon resale of the property.

COUNT 7

51. Raymundo Gordillo submitted an application for an FHA-insured mortgage to Keystone, dated December 27, 2002, to finance his purchase of a property located at 6142 W. Highland Avenue, Phoenix, Arizona (FHA No. 023-1422221).

52. The application indicated that the borrower was employed by "New Beginnings Floors" and earned $2,600 per month. The W-2 forms, pay stubs, and VOE corroborated this information.

53. The income/employment information on the application, W-2 forms, pay stubs and VOE were false and fraudulent because the borrower had been a contractor for rather than an employee of "New Beginnings Floors" and did not earn income near the amount represented on these documents.

54. The Respondent knew or had reason to know that the income/employment information on the application, W-2 forms, pay stubs, VOE and lender certification she signed on behalf of Keystone were false and fraudulent.

55. The loan closing occurred on December 20, 2002, and the application package and lender certification were subsequently submitted to FHA for mortgage insurance endorsement, which occurred on February 11, 2003.

COUNT 8

56. The Department re-alleges and incorporates by reference paragraphs 1-32, supra.

57. Carlos Lopez submitted an application for an FHA-insured mortgage to Keystone, dated April 15, 2003, to finance his purchase of a property located at 3823 W. Cavalier Drive, Phoenix, Arizona (FHA No. 023-1557814).

58. The application indicated that the borrower had been employed for three years at "Loftco, Inc." and had earned $2,773 per month. W-2 forms and pay stubs corroborated this information.

59. The income/employment information on the application, W-2 forms, and pay stubs were false and fraudulent because the borrower never worked for "Loftco, Inc." and did not earn income near the amount represented on these documents.

60. The Respondent knew or had reason to know that the income/employment information on the application, W-2 forms, pay stubs, and lender certification she signed on behalf of Keystone were false and fraudulent.

61. The loan closing occurred on June 4, 2003, and the application package and lender certification were subsequently submitted to FHA for mortgage insurance endorsement, which occurred on July 2, 2003.

COUNT 9

62. The Department re-alleges and incorporates by reference paragraphs 1-32, supra.

63. Alejandra Ramos submitted an application for an FHA-insured mortgage to Keystone, dated May 29, 2003, to finance his purchase of a property located at 10034 N. 40th Avenue, Phoenix, Arizona (FHA No. 023-1721472).

64. The application indicated that Ramos was employed by "Milla's Hair Salon" and earned $2,600 per month. The W-2 forms, pay stubs, and VOE corroborated this information.

65. The income/employment information on the application, W-2 forms, pay stubs, and VOE were false and fraudulent because the borrower was never employed by "Milla's Hair Salon" and did not earn income near the amount represented on these documents.

66. The Respondent knew or had reason to know that the income/employment information on the application, W-2 forms, pay stubs, VOE, and lender certification she signed on behalf of Keystone were false and fraudulent.

67. The loan closing occurred on July 28, 2003, and the application package and lender certification were subsequently submitted to FHA for mortgage insurance endorsement, which occurred on October 10, 2003.

COUNT 10

68. Lucino Rojas-Islas submitted an application for an FHA-insured mortgage to Keystone, dated June 9, 2003, to finance the purchase of a property located at 7972 W. MacKenzie Drive, Phoenix, Arizona (FHA No. 023-1611235).

69. The application indicated that the borrower was employed by "Trauman Painting" and earned $2,650 per month. The W-2 forms, pay stubs, and VOE corroborated this information.

70. The income/employment information on the application, W-2 forms, pay stubs, and VOE were false and fraudulent because the borrower was never employed by "Trauman Painting" and did not earn income near the amount represented on these documents.

71. The Respondent knew or had reason to know that the income/employment information on the application, W-2 forms, pay stubs, and lender certification she signed on behalf of Keystone were false and fraudulent.

72. The loan closing occurred on June 11, 2003, and the application package and lender certification were subsequently submitted to FHA for mortgage insurance endorsement, which occurred on July 1, 2003.

SPECIFIED QUESTIONS OF LAW

Notwithstanding the Respondent's default—waiving her right to a hearing on the facts and the penalty determination—the Court withheld imposing the proposed penalty and assessments to determine whether the uncontested facts constituted the misconduct alleged in the Complaint. The questions of law specified by the Court were responded to by the Complainant in a Memorandum of Point and Authorities, dated November 14, 2008, a copy of which was sent to the Respondent. Despite passage of the allotted time, the Respondent has not responded. Questions posed by the Court, and the Court's resolution of those questions, follow.

1. How did the Respondent "cause" claims to be made to FHA?[3]

a. The making of the FHA claims would not have occurred "but for" the Respondent's misconduct.

The Complainant asserts that the Respondent "caused" the claims at issue in Counts 1, 2 and 6 of the Complaint to be made to FHA within the meaning of 31 U.S.C. § 3802(a)(1)(B), because FHA would not have guaranteed the mortgages had it known about the materially false statements and certifications concerning the borrowers' financial qualifications that were submitted by the Respondent in connection with the applications for FHA mortgage insurance. Thus—but for the Respondent's materially false statements and certifications—FHA would never have been called upon to pay the claims.[4] This theory of causation has been adopted by federal courts in cases construing the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. The leading cases are U.S. v. Rivera, 55 F.3d 703, 707 (1st Cir. 1995), U.S. v. First Nat'l Bank of Cicero, 957 F.2d 1362, 1373-74 (7thCir. 1992), U.S. v. Ekelman & Assoc., Inc., 532 F.2d 545, 550 (6tbCir. 1992), U.S. v. Veneziale, 268 F.2d 504, 505-06 (3d Cir. 1959), and most recently U.S. v. Eghbal, 475 F. Supp.2d 1008, 1014-16 (C.D. Cal. 2007) (canvassing case law on causation).

A similar argument was made in a criminal case, where the defendants enabled unqualified home-buyers to obtain loans insured by the FHA by fraudulently providing down payment assistance to the borrower. United States v. Peterson, 538 F.3d 1064 (9th Cir. 2008). These loans subsequently went into foreclosure, causing a loss to HUD. Id. at 1077. In appealing the order of restitution issued against them, the defendants argued that defaults on loans they solicited were caused by the home-buyers' inability to repay the loans due to

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[3] A prima facie case of fraud under the PFCRA is established when a person "makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know...is false, fictitious, or fraudulent; [or] includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent. . . ." 31 U.S.C. § 3802(a)(1).

[4] See In re Salvador Alvarez, HUDALJ No. 04-025-PF, at 6 (June 23, 2005) (awarding assessment based upon a mortgage insurance claims supported by false statements submitted by the Respondent in applications for FHA-insured mortgage).

increased interest rates, inability to maintain employment, and decreased paychecks. Id. However, the Court rationalized that without defendants providing fraudulent down payment assistance, "the buyers would not have been eligible for FHA insured mortgages and could not have later defaulted on their payments because they never would have been able to qualify for HUD financing." Id. The Court held that "despite the multiple links in the causal chain, the [Defendants] directly and proximately caused the losses to HUD. ...[T]he causal chain here is not extended so far as to become unreasonable." Id.

The Ninth Circuit has determined that a "remoteness" analysis is not required in an action for fraud under the False Claims Act: the standard is merely "but for." The Court stated: "[A] demonstration that the government would not have guaranteed the loan "but for" the false statement is sufficient to establish the causal relationship between the false claim and the government's damages necessary to permit recovery under the False Claims Act." United States v. Eghbal, 475 F.Supp.2d 1008, 1014 (C.D. Cal. 2007); citing United States v. First National Bank of Cicero, 957 F.2d 1362, 1374 (7th Cir. 1992). The court went on to say that "[m]oreover, where a defendant's false statements concern the buyer's financial qualifications for a HUD-insured home mortgage loan, the false statements are "more than a but-for cause" of any damages that the government sustains as a result of the borrower's default." United States. v. Eghbal, at 1015; citing United States v. Spicer, 57 F.3d 1152, 1159-1160 (D.C.Cir. 1995).

b. The Respondent's misconduct was a direct cause in the filing of the claims for FHA mortgage insurance.

In three Counts of the Complaint the Respondent is charged with causing a claim to be made for the FHA insurance, after the borrower defaulted. In fact, the actual claim was made by the lender. The Respondent's role in the events was substantially complete a year or more previous, when she submitted false and fraudulent lender certifications as part of the application for an FHA insured mortgage.[5] Later, when three borrowers defaulted, the lenders made claims for payment of FHA insurance. HUD charged the Respondent with "causing" the submission of those claims for payment of the mortgage insurance (Counts 1, 2, and 6 of the Complaint). This remoteness in time, and the intervening actions of others permitting and asserting the claims, raises the question as to whether, as a matter of law, the Respondent "caused" the claims to be made. After all, the Respondent was not the one who defaulted on the mortgage. And she was not the one who submitted the claim for FHA insurance payment.

Causation has been the subject of much discussion by the courts. In the context of the Respondent's role in obtaining FHA insurance for these three loans, certainly her submission of false documentation concerning the borrower's financial status was calculated to (and did) induce HUD to insure the loans. And at the same time that false information enhanced the likelihood of a default.[6] But, did the Respondent's acts cause the claim to be made by the lender?

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[5] These certifications were material to FHA's determination that the borrowers met the financial requirements to qualify for FHA-insured mortgages and were relied upon by FHA in endorsing the mortgage for insurance coverage. See explanation of Single Family Mortgage Insurance Program, supra.

[6] See, United States v. Spicer, 57 F.3d 1152, 1159-60 (D.C. Cir. 1995) (where it was undisputed that defendant intentionally misrepresented buyer's financial qualifications in order to induce HUD to approve mortgage loan and

In the context of tort liability, students of American law will recall the discussion of causation in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (Ct.App. NY 1928), which established 'remoteness' as possible escape from liability. The Defendant was held not liable for negligence because Plaintiff was not a reasonably foreseeable victim within the "area of apparent hazard." The dissent, however, concluded that there is a duty to exercise due care, and proximate cause must be resolved with foreseeability as but one of many factors.

In the present case, it may be argued that the "cause" of the submission of the claim was the lender's independent action based upon the borrower's default. Certainly that was the most direct cause. However, the borrower's default itself was also a direct cause—and a pre-requisite for—submission of the claim. Before the claim was made to FHA for payment, there had to occur a default by the borrower. And following that default, the lender had to assert a claim to FHA. Those subsequent intervening events result in part from the independent acts of the borrower and the lender, not acting in concert with or, under the influence of, the Respondent. Was the claim made to FHA too remote to have been caused by the Respondent's action in falsely facilitating the loan?

The borrowers' financial information certified by the Respondent was material to HUD's risk evaluation in deciding to insure the loans. The falsity of that information precluded an accurate assessment of the borrowers' financial condition and made it more likely that the borrowers would default. As for the lenders, the HUD insurance was doubtless a factor in the decision to issue a mortgage loan, and, upon default, it was certainly likely that the lender would choose to avail itself of that insurance and recover its loss by asserting a claim against HUD for amount of the default. Simply stated, the Respondent's acts concealed the risk level in insuring the loan making it likely and foreseeable that claims would be made for the FHA mortgage insurance on the ten loans charged in the Complaint. To the extent that the false documentation certified by the Respondent understated the likelihood of default and understated the likelihood of a claim for the FHA insurance, the Respondent's misconduct was a cause of making such a claim. Thus, in the three loans where claims were subsequently asserted, the Respondent's acts were a direct cause of the claim for FHA insurance.

HUD suffered significant losses when buyer defaulted, defendant's misrepresentations were "more than a 'but-for' cause; they proximately caused HUD's losses"), cert. denied, 516 U.S. 1043 (1996); United States v. Miller, 645 F.2d 473, 476 (5th Cir. 1981) (finding that false statements regarding the "ability of purchasers to afford housing could very well be the major factor for subsequent defaults" and concluding that government had "clearly alleged the necessary causation factor" to avoid dismissal of complaint). Although the cited cases construe the FCA, the theory of causation adopted by these courts should be equally applicable to the Program Fraud Civil Remedies Act of 1986 (PFCRA"), 31 U.S.C. §§ 3801-3812. The PFCRA is a "sister scheme" to the FCA, and was enacted just before the False Claims Act was amended in 1986. The United States Supreme Court has recognized this close relationship between the two statutes, noting that the scope of the PFCRA is "virtually identical to that of the FCA." Vermont Agency of Natural Res. v. U.S. ex rel. Stephens, 529 U.S. 765, 786 n.17 (2000). Thus, as to the issue of causation, the two statutes should be construed in a similar manner to impose liability on persons who make (or cause to be made) materially false statements regarding borrower financial qualifications in applications for government-guaranteed loans which thereafter result in default and the payment of claims for insurance benefits. Compare 31 U.S.C. § 3729(a)(2) (FCA) with 31 U.S.C. § 3802(a)(1)(B) (PFCRA).

2. How is the Respondent liable under 31 U.S.C. § 3802(a)(1)?

As to Counts 1, 2 and 6 of the Complaint, the Respondent is liable for civil penalties and assessments under 31 U.S.C. § 3802(a)(1)(B) because she caused the claims to be made. Necessarily, any claim for HUD insurance based upon a subsequent default would be supported by the mortgage loan documents. The Respondent knew or had reason to know that she certified the accuracy of written statements asserting material facts in the loan application that were false and fraudulent. The written statements asserting material facts which were false and fraudulent consisted of the income/employment information on the loan applications, W-2 forms, pay stubs, and/or verification of employment forms, and the lender's certifications signed by the Respondent. The Respondent knew or had reason to know that the material facts set forth on these written statements were false and fraudulent, and this information was accepted and relied upon by FHA in deciding to endorse the mortgages for insurance coverage.

3. As a result of the default determination, to what extent, if any, does the Respondent remain potentially liable for assessments for claims paid on the seven mortgages in the complaint not yet resulting in foreclosure and claim for payment of FHA mortgage insurance?

Counsel for Complainant's Memorandum of Points and Authorities, dated November 14, 2008, provided additional facts and assurances to resolve this question to the Court's satisfaction. The Respondent will not be liable for assessments on potential claims as to the seven mortgages referenced at Counts 3, 4, 5, 7, 8, 9 and 10 of the Complaint.[7]

PENALTY FACTORS ANALYSIS

The Complainant has calculated and proposed imposition of the maximum civil penalties and assessments. Following the regulatory guidance for ALJs (and the Secretary upon appeal) the Court has summarized below its determination of the mitigating and aggravating evidence pertaining to the applicable regulatory factors, based upon the foregoing factual findings.[8]

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[7] The mortgage at issue in Count 3, FHA No. 023-1234804, was paid in full and the FHA insurance terminated on December 16, 2004, and thus no claim is possible. The mortgage at issue in Count 4, FHA No. 023-1228397, 023-1228397, was refinanced and the FHA insurance terminated on April 30, 2004, and thus no claim is possible. The mortgage at issue in Count 5, FHA No. 023-1394193, was paid in full and the FHA insurance terminated on November 23, 2004, and thus no claim is possible. The mortgage at issue in Count 8, FHA No. 023-1557814, was paid in full and the FHA insurance terminated on June 16, 2005, and thus no claim is possible. The mortgage at issue in Count 9, FHA No. 023-1721472, was paid in full and the FHA insurance terminated on March 7, 2005, and thus no claim is possible. The mortgage at issue in Count 10, FHA No. 023-1611235, was paid in full and the FHA insurance terminated on September 8, 2004, and thus no claim is possible. Finally, the mortgage at issue in Count 7, FHA No. 023-1422221, remains active. However, due to the passage of time and other factors, HUD has no intention of seeking an assessment against Respondent in the event that a claim is received for insurance benefits on this mortgage.

[8] Pursuant to 24 C.F.R. §28.40(b) (1) to (17).

1. Each of the application packages for the ten mortgage loans contained multiple false statements concerning the income/employment of the borrowers in addition to the Respondent's false certification that they were true, to the best of her knowledge and belief.

2. The false statements were made over a 15-month period, from March 2002 to June 2003.

3. The Respondent is highly culpable for the misconduct. Acting as a loan officer for Keystone, she received and processed 10 fraudulent applications for FHA-insured mortgages. She acknowledges that she failed by not conducting the proper quality control procedures to ensure that the documents were valid. The Respondent submitted or caused to be submitted to FHA the false and fraudulent lender certifications. As a result three claims were made to FHA for insurance benefits, because of defaults resulting from the false documentation in the loan applications.

4. HUD's actual loss resulting from the three claims caused by the Respondent is $49,834.47. Additionally HUD expended resources for a nine-month audit that uncovered the false statements and claims at issue. As a result, HUD's losses likely exceeded the civil penalties total of $55,000.

5. Respondent violated her responsibilities in a position of trust, and as a result ten unqualified borrowers were issued FHA insured mortgages, three of whom defaulted.

6. In originating the 10 loans at issue, the Respondent was responsible for ensuring that the loan application and verifications of employment were "true to the best of the lender's knowledge and belief". Respondent failed to fulfill that responsibility, which caused FHA to insure 10 mortgages based upon false and fraudulent income/employment information. Three of the borrowers defaulted on their mortgages, resulting in claims to FHA and the loss of Government funds.

7. The fraud perpetrated by the Respondent was not due to any complexity in the Single Family Mortgage Insurance Program, and on March 31, 2005, HUD debarred her from participating in all federal programs for a period of five years.

8. Deterrence of the Respondent and others from engaging in the same or similar misconduct is an appropriate consideration in assessing penalties. FHA relies on commercial lenders and their loan officers to originate insured mortgages with honesty and due diligence. In particular, FHA trusts lender personnel to verify the borrower's employment for most recent two years in order to determine whether the borrower can reasonably be expected to meet the expenses involved in the proposed mortgage, and provide for their other needs. The imposition of civil penalties and assessments against loan officers who submit false income/employment documentation for FHA insured loans should be reasonably calculated to deter the Respondent and others from engaging in such misconduct in the future.

9. The Respondent personally profited from her misconduct by earning commissions and/or other monetary incentives for originating the ten mortgages at issue. Additionally, the

audit reports that uncovered the false statements at issue in this case found an additional 38 Keystone loans applications, many attributable the Respondent, containing falsified borrowers information. Even though those other loan applications were determined to be not actionable under PFCRA, they are an aggravating factor that may be considered in this matter.

CONCLUSIONS

On the basis of the facts alleged in the Complaint, deemed to have been admitted by the Respondent's default, and found as fact by the Court, the Respondent knowingly submitted (or caused to be submitted) to FHA materially false statements in ten loan applications. As discussed above, in Counts 1, 2, and 6 of the Complaint, the submission of fraudulent documents by the Respondent was a direct, proximate cause of HUD's issuing FHA insurance, the borrowers' defaults, and the lender's making claims for payment of the FHA insurance.[9]

These false statements and claims violated 31 U.S.C. § 3802(a) and 24 C.F.R. § 28.10, and thus civil money penalties and assessments may be imposed. The unrebutted facts considered in determining civil penalties and assessments—as found above by this Court—warrant imposition the maximum amount of civil penalties and assessments.

ORDER

Accordingly, it is **ORDERED**:

1. Pursuant to the foregoing and the Court's PARTIAL INITIAL DECISION ON MOTION FOR DEFAULT JUDGMENT, dated November 3, 2008, the MOTION FOR DEFAULT JUDGMENT is **GRANTED** and the Respondent is hereby found in **DEFAULT**.

2. The Respondent shall pay HUD a total of $420,386.96 in civil penalties and assessments, such amount being due and payable immediately without further proceedings. 24 C.F.R. § 26.39(c).

3. This Order constitutes the final agency action. 24 C.F.R. § 26.39(b). The Respondent may seek judicial review of this decision as provided in 31 U.S.C. § 3805.

J. Jeremiah Mahoney
Administrative Law Judge

[9] Despite considerable case law supporting such a finding on the basis that the claims could not have been made "but-for" the Respondent's misconduct, to say that any opportunity for making the claim would have been avoided—"but for" the Respondent's misconduct—is not quite the same as saying that the Respondent's misconduct caused the making of the claim. As discussed supra in the first Specified Question of Law, the facts in this case establish that the Respondent's acts constituted a direct, proximate cause of the making of the claims for FHA insurance in Counts 1, 2, and 6 of the Complaint.

CERTIFICATE OF SERVICE

I hereby certify that copies of the above-entitled DEFAULT JUDGMENT AND ORDER issued by J. Jeremiah Mahoney, Administrative Law Judge, were sent to the following parties on this 23rd day of December, 2008, in the manner indicated:

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Chief Docket Clerk
for Becky Black

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[redacted]

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