

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:

JOSEPH MILLER,

Respondent.

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Docket No. 11-3681-DB

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice of Proposed Debarment dated October 06, 2010 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent JOSEPH MILLER that HUD was proposing his debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for an indefinite period from the date of the final determination of this action. The Notice further advised Respondent that his proposed debarment was in accordance with the procedures set forth in 2 CFR parts 180 and 2424. In addition, the Notice informed Respondent that his proposed debarment was based upon his conviction in the United States District Court for the Southern District of Florida for violation of 18 U.S.C. 1349 (conspiracy to commit mail and wire fraud).

In brief, Respondents and his four codefendants were indicted on twelve counts that alleged they conspired to commit wire and mail fraud, a violation of 18 U.S.C. 1349, wire fraud in violation of 18 U.S.C. 1343, and mail fraud in violation of 18 U.S.C. 1341. Respondent pleaded guilty to one count charging him with conspiracy to commit wire and mail fraud and was sentenced to a term of imprisonment for 18 months, placed on supervised release for three years, and ordered to make joint and several restitution of \$669,271.00 with one of his co-defendants.

A telephonic hearing on Respondent's proposed debarment was held in Washington, D.C. on May 03, 2011, before the Debarring Official's Designee, Mortimer F. Coward. Respondent was present by phone, appearing *pro se*. Ana I. Fabregas, Esq. appeared on behalf of HUD. The record closed on May 4, 2011.¹

¹ This matter originally was set for hearing on March 8, 2011. Because of Respondent's unavailability, the matter was reset to be heard on April 12, 2011, but continued again because of similar scheduling difficulties related to Respondent's present situation.

Summary

I have decided, pursuant to 2 CFR part 180, to debar Respondent from future participation in procurement and nonprocurement transactions, as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government for a period of five years from the date of this Determination. My decision is based on the administrative record in this matter, which includes the following information:

1. The Notice of Proposed Debarment dated October 6, 2010.
2. A letter from Respondent dated November 1, 2010, addressed to the Debarment Docket Clerk requesting a hearing on his proposed debarment.
3. Respondent's Brief in Opposition of Indefinite Debarment along with an accompanying letter dated February 22, 2011.
4. The Government's Pre-Hearing Brief in Support of Indefinite Debarment filed January 19, 2011 (including all exhibits and attachments thereto).

Government Counsel's Arguments

Government counsel recites that Respondent at all relevant times was an attorney licensed to practice law in Florida and New York. Respondent conspired with his codefendants in a scheme in which they derived financial benefit from fraudulent mortgage transactions. Respondent acted as the title agent and closing agent in several closings of mortgage loans involving his two coconspirators. Respondent developed a relationship with his coconspirators who were branch managers of a correspondent mortgage company, TopDot, that originated FHA-insured loans. Some time later, while still practicing law in New York, at the invitation of one of the coconspirators, Respondent opened a law office in Boca Raton, Florida in the same building with TopDot's office. TopDot referred a substantial amount of business to Respondent.

The scheme, which lasted from about January 2006 to October 2007, involved Respondent's preparing two settlement statements to account for the proceeds of each fraudulent transaction with his coconspirators. The lender would receive one statement that showed the disbursement of the proceeds from the closing consistent with the lender's instructions. The other statement, of which the lender had no knowledge, would show the actual disbursements, including large transfers of the mortgage funds into the personal accounts of Respondent's coconspirators. Respondent facilitated the deception of the lenders by having the lenders' funds deposited into his escrow account from whence the payments to his coconspirators were made. Respondent admitted that he transferred at least \$739,843.00 to his coconspirators through disbursements not shown on the HUD-1. Respondent also admitted that the loss to the mortgage lenders deceived by his wrongdoing could be between \$1 million and \$2.5 million.

Government counsel discusses the relevant debarment regulations and argues that the government has demonstrated that "debarring Respondent is both legally proper and appropriate to protect the integrity of federal government programs." Counsel asserts that the evidence shows that Respondent's "actions are cause for debarment because he was convicted of fraud or the 'commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects [his] present responsibility,'

2 C.F.R. 180.800(a)(1) and (4).” Counsel adds that Respondent may reasonably be expected to be involved in covered transactions because of the closings and title work he did in the past.² See 2 C.F.R. § 180.120. In this regard, counsel specifically references Respondent’s involvement with FHA-mortgage transactions and Respondent’s expressed desire to return to work, which raises the “likelihood that Miller will become a participant in an FHA-insured transaction.”³

Counsel elaborates that Respondent abused his position as a closing attorney for personal gain and showed disdain for the ethical standards and rules of the legal profession, which “reflects how he might approach future responsibilities when transacting with the government.”⁴ Counsel also argues that, notwithstanding Respondent agreed in his Plea Agreement to surrender his law licenses that “does not preclude him from resuming work in the real estate and mortgage business, either as an attorney or in another capacity.”⁵

Counsel next argues that debarment of Respondent for an indefinite period is appropriate because of his lack of present responsibility and the absence of mitigating circumstances in his favor. In adopting this position, counsel reviews the mitigating and aggravating factors set forth in 2 C.F.R. § 180.860 and their applicability to this case, as follows: (1) Respondent’s wrongdoing caused harm to the extent the court ordered him to make restitution of \$669,271.00 and by Respondent’s own admission the fraudulent scheme in which he engaged caused losses to mortgage lenders of between \$1 million and \$2.5 million; (2) Respondent participated in the scheme for well over a year and did substantial business with his coconspirators; (3) Respondent’s wrongdoing continued for over 15 months; (4) Respondent knowingly and willfully participated in the scheme; (5) Respondent’s acceptance of wrongdoing was influenced by his interest in receiving a “more favorable sentence rather than out of a genuine desire to correct the wrongdoing he had committed”; (6) Respondent pleaded guilty, thus saving the government expenditure of its resources in a trial; however, the guilty plea was in exchange for a recommendation by the prosecution of a lighter sentence. According to counsel, this suggests that Respondent’s cooperation was “not the result of his remorse, his understanding of the wrongdoing, or an attempt to make amends.” (7) there is no evidence Respondent alerted the authorities of his misconduct until he was apprehended; (8) the punitive effect of Respondent’s imprisonment has no relevance to the remedial purpose of debarment. Moreover, Respondent’s potential to reenter the mortgage business makes an indefinite debarment appropriate. Lastly, Respondent’s voluntarily leaving his profession is insufficient to mitigate his wrongdoing.

² Gov’t Pre-Hearing Brief at 5-6.

³ *Id.* at 10.

⁴ *Id.* at 7.

⁵ Respondent surrendered his Florida and New York licenses; however, the government points out that, under Florida’s rules, Respondent may apply for reinstatement after five years from the date of disbarment. Also, Respondent while surrendering his licenses in New York and Florida did not promise not to seek a license in another state. (The Debarring Official takes administrative notice of the fact that it is very difficult for an attorney disbarred in one state from obtaining a license to practice in another state.)

Counsel concludes that given Respondent's conviction, which provides cause for his debarment under 2 C.F.R §§ 180.800(a)(1) and (4), the fact that, based on his extensive experience in the real estate industry, he may reasonably be expected to be a "participant" as defined in the debarment regulations, his previous participation in FHA-insured loans, his lack of present responsibility as shown by his recent fraudulent activities, and considering the aggravating factors discussed above, Respondent should be debarred for an indefinite period.

Respondent's Arguments

Respondent takes issue with what he characterizes as HUD's emphasis on his past wrongdoing and how he might conduct business relations in the future. Respondent argues that HUD's brief intentionally misrepresents the truth and ignores facts and evidence that are in opposition to HUD's position.

Respondent testified that he does not dispute HUD's right to debar him for his misconduct. What he does dispute, however, is the appropriateness of the indefinite debarment proposed by HUD. The law, Respondent contends, is clear that he is entitled to the benefit of the doubt when an agency proposes to debar a person for an indefinite period. Similarly, he is entitled to earn a living when he is released from prison in October 2011.

Respondent argues that "HUD has failed to demonstrate any evidence that [he] in the future 'cannot operate in compliance with the law.'" (citation omitted) In this connection, Respondent points out that HUD offered no credible evidence to show wrongdoing by him before March 2006 (i.e., when he moved to Florida and began doing business shortly thereafter with TopDot) and March 2007 (i.e., when he voluntarily terminated his association with TopDot). Respondent views as willful HUD's failure, as he sees it, to disclose, among other things, his unblemished record as a practitioner from 1972 until his association with TopDot in 2006 and from March 2007 through March 2010, when he was.

Respondent argues, citing cases, that mitigating factors are to be weighed heavily in a debarment proceeding, and "a spotless record before any criminal activity is an important factor to be weighed and considered along with a person's extensive business background." Resp. Brief at 6. Respondent compares his situation to that of bankers who engaged in "fraudulent practices," thus precipitating the current crisis in the mortgage industry. Respondent asks what punishment has been meted out to them and have they "been estopped from seeking employment in the mortgage industry in the future." Equal protection of the law, according to Respondent, requires that he and the offending bankers be treated similarly to the extent they will have the "ability to obtain future employment in the mortgage lending industry." Any difference in treatment between him and the bankers, Respondent posits out, would mean that he "is being held to a higher standard that [sic] the law requires."

Respondent distinguishes and dismisses the cases cited by government counsel in support of HUD's proposal to debar him as "inapplicable" to this case. Respondent submits what he describes as "overwhelming evidence of mitigating factors" that the Debarring Official should consider in denying HUD's move to debar him indefinitely. In this regard, alluding to the factors in 2 C.F.R. § 180.860, Respondent argues that, with respect to the frequency of incidents and duration of the wrongdoing, his misconduct is limited to the three transactions cited in the superseding indictment which occurred over a period of less than one year.⁶ Respondent adds as mitigating factor the absence of any prior history or pattern of wrongdoing and the absence of any evidence that he "planned or initiated the conduct of TopDot." Respondent also avers that by pleading guilty he "unequivocally accepted responsibility" and had "the forthrightness to stand up and admit he had done wrong." Respondent also offers for consideration by the Debarring Official, the letters submitted by his character witnesses in the criminal trial. *See* Ex. B of Resp. Brief. Additionally, Respondent submits for favorable consideration his record as a title agent, stating that no claims ever have been made against any of his settlements.

Findings of Fact

1. Respondent was at all relevant times a closing attorney and title agent.
2. Respondent was admitted to practice law in New York and Florida.
3. Respondent acted as the closing attorney and title agent on several real estate closings involving two of his co-defendants who were branch managers for TopDot Mortgage Company.
4. Respondent did substantial mortgage business with his coconspirators.
5. Respondent voluntarily surrendered his law license in New York and Florida as a result of the criminal investigation into his wrongdoing.
6. TopDot was a New York corporation licensed in Florida to conduct business as a correspondent mortgage lender.
7. TopDot's approval to originate FHA-approved loans was terminated by HUD on January 25, 2010.
8. Respondent and his co-conspirators engaged in a conspiracy to enrich themselves by preparing fraudulent and false documents to obtain mortgage money to purchase homes.
9. Respondent's participation in the scheme lasted about a year.
10. The HUD-1's submitted to lenders contained false information designed to mislead the lenders with respect to the ultimate distribution of the mortgage money obtained from the lenders.
11. Specifically, Respondent, acting as the closing attorney, would prepare two Settlement Statements, one of which reflected the actual transaction as agreed to by the lender, while the other showed fraudulent payments to the conspirators. The latter Statement was hidden from the lender.
12. The illicit payments were made from proceeds of the fraudulent transaction deposited in Respondent's trust account.
13. Respondent admitted in his plea agreement that he transferred at least \$739,843.00 to his co-conspirators through disbursements not reflected in the settlement statements.

⁶ The Superseding Indictment identifies four transactions. *See* Ex. 5 of Gov't's Pre-Hearing Brief at pp. 6-12.

14. Respondent further admitted that the losses sustained by the lenders as a result of his wrongdoing could be between \$1 million and \$2.5 million.
15. Respondent pleaded guilty to one count of conspiracy to commit wire and mail fraud and was sentenced to 18 months in prison, placed on supervised probation for three years, and ordered to make restitution of \$669,271.00 jointly with his co-conspirator.

Conclusions

Based on the above Findings of Fact, I have made the following conclusions:

1. As a closing attorney and title agent with extensive experience in the real estate industry, and who also did business with FHA-approved lenders, Respondent was a participant in covered transactions and is subject to HUD's debarment regulations. *See* 2 C.F.R. § 180.120(a).
2. Respondent's conviction for conspiracy to commit wire and mail fraud provides cause for his debarment. *See* 2 CFR 180.800(a)(1).
3. HUD has met its burden to prove a cause for debarment of Respondent exists. *See* 2 C.F.R. 180.850(b).
4. The debarment regulations at 2 C.F.R. parts 180 and 2424 and relevant case law provide the necessary guidance, not only to determine what type of misconduct provides cause for debarment or the necessary quantum of proof to impose a debarment, but just as importantly what is an appropriate period of exclusion for a person who offends the regulations. The regulation set forth at 2 C.F.R. § 180.865(a) states in part that a respondent's "period of debarment will be based on the seriousness of the cause(s) upon which [the respondent's] debarment is based." The regulation further provides that "[g]enerally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment." The discretion conferred on the debarring official to impose a longer sentence is circumscribed by judicial authority to the extent it has been held that the "length of the debarment period should reflect an assessment of projected business risk as a measure of the duration necessary to protect the public." *See In the Matter of Roy C. Markey*, HUDBCA No. 82-712-D33, HUD BCA Lexis 37, *6 (July 18, 1983). Additionally, 2 C.F.R. § 180.125 makes plain the government's responsibility to protect the public interest by excluding persons who are not presently responsible. A limitation on the exclusionary power of a federal agency is found at 2 C.F.R. 125 (c), which indicates that a person may not be excluded "for the purposes of punishment." In this connection, further guidance resides in 2 C.F.R. § 180.860, which sets forth aggravating and mitigating factors for the debarring official's consideration in determining an appropriate period of debarment.
5. What is self-evident from the foregoing brief survey of the applicable regulations in this matter is that there is no talismanic or formulaic way of determining an appropriate period of debarment. The inherent

tension in the debarment regulations, therefore, requires a careful balancing of all interests involved, mindful, however, that the overriding purpose of the debarment system is to “protect the public interest . . . by conducting business only with responsible persons,” 2 C.F.R. § 180.125(a), and that the “test for whether a debarment is warranted is present responsibility.” See *In the Matter of Kay Yarbrough*, HUDBCA No. 92-C-7514-D33, 1992 HUD BCA Lexis 15 (October 28, 1992).

6. The government argues that Respondent is not presently responsible, based on its analysis and application of the same regulations discussed here, and for the reasons set forth in its brief and presentation at the hearing requests that Respondent be debarred indefinitely. Respondent engaged in a similar analysis of the regulations and case law, and while acknowledging that debarment is appropriate for his misconduct, strenuously opposes his proposed indefinite debarment.⁷
7. First, there is little doubt of the power of a federal agency, including HUD, acting within its relevant regulatory authority, to impose an indefinite debarment. See, e.g., *U.S. v. Borjesson*, 92 F.3d 954 (9th Cir. 1996) and the cases cited therein. In the same vein, it has been held that “[i]n proposing an indefinite debarment, the Government has a greatly heightened burden of persuasion because a debarment generally shall not exceed three years, and **only special circumstances warrant imposing a longer period, commensurate with the seriousness of the causes for which debarment is imposed.** . . . Indeed, there is no specific provision for, or prohibition against, an ‘indefinite’ debarment in the regulations.” *In the Matter of Donald M. Defranceaux*, HUDBCA Nos. 91-5684-D5, 91-5685-D6, 1994 HUD BCA LEXIS 2 (April 7, 1994). (Emphasis added)
8. The salient facts are clear and are briefly restated here only to highlight the “special circumstances . . . and seriousness of the cause” for which HUD is proposing Respondent’s debarment. The restatement also is helpful in comparing “the record in this case, . . . with the facts considered in analogous decisions by this Department’s judicial officers.” *In the Matter of Charles Kirkland*, HUDBCA No. 90-5285-D57, 1991 HUD BCA LEXIS 3, *11. Respondent’s conviction results from his conspiratorial actions in a fraudulent scheme involving mortgage transactions. Respondent acted as the closing attorney and title agent in the mortgage closings at issue, and transferred at least \$739, 843.00 in settlement proceeds into his co-conspirators’ bank accounts. Respondent accomplished his role in the fraudulent scheme by preparing two HUD-1 Settlement Statements for each transaction, one of which was bogus.
9. An “analogous” case in which the government argued that the respondent should be debarred indefinitely because his misconduct “constituted a serious breach of trust” and because of the “seriousness of his offense” is *In the Matter of Philip D. Winn*, HUDBCA No. 95-G-108-D6, 1995 HUD BCA Lexis 5 (June 9, 1995). Winn, a former HUD

⁷ See Resp. Brief at 2-4.

Assistant Secretary for Housing, pleaded guilty and was convicted of conspiring to provide gratuities to the then-Assistant Secretary for Housing Thomas Demery and the then-General Deputy Assistant Secretary for Multifamily Housing Silvio J. Debartolomeis (and later acting Assistant Secretary for Housing) to influence their decisions with respect to certain funding requests made by Respondent under a HUD program over which he once had authority and which they now oversaw. Winn was sentenced to a two-year term of unsupervised probation and ordered to pay a fine of \$981,975.00, "the amount of the pecuniary gain related to the charge." The Administrative Judge noted that Winn's offense "is of a nature that is destructive of the public's confidence" and "raises serious questions with respect to [Winn's] honesty and integrity." *Id.* at *14-*16. The AJ nonetheless denied HUD's proposed indefinite debarment and debarred Winn for four years. The case of Joseph A. Strauss also is instructive in this regard. Strauss, while employed at HUD as a special assistant to the then-Secretary of HUD, developed a relationship with a real estate developer seeking HUD funding for a project. Strauss was assigned the task of assisting the project in its application for funding. At the same time Strauss was promised, and agreed to accept, future compensation from the developer for his assistance in securing the funding. Within weeks of leaving HUD and starting his own consulting business, Strauss received payments from the developer in accordance with their agreement. Strauss attempted to conceal his relationship with the project both during the criminal investigation and during a congressional inquiry into allegations of abuse in the HUD program that funded the developer's project. Strauss pleaded guilty to two counts of conspiracy and concealing a material fact and was sentenced to three years' probation and fined \$20,000.00. In the debarment proceeding, the AJ observed that Strauss' "past acts, which demonstrate an appalling, consistent lack of integrity on multiple occasions over an extended period of time, are sufficient to create a strong inference of a lack of present responsibility." HUD argued that Respondent should be debarred indefinitely "because of the seriousness of his offenses and because he abused his position . . . for personal gain." The AJ rejected the government's plea and debarred Strauss for five years. In *Defranceaux, supra*, the AJ found "the causes for debarment . . . both serious and egregious . . . when the company "willfully breached Government directives [.] and [Defranceau, the president of the company] . . . most responsible for DRG's course of willful misconduct." The Board imposed a five-year debarment rather than the indefinite debarment proposed by the government. In *In the Matter of William D. Lunday*, HUDBCA No.93-G-D31, 1993 HUD BCA LEXIS 13 (June 25, 1993), Lunday, the Executive Vice President and part-owner of a mortgage company, pleaded guilty and was convicted of one count of bank fraud and sentenced to two years' imprisonment and placed on probation for two years. Execution of the sentence was suspended for the final twenty-one months and no fine was imposed because of Respondent's "exceptional efforts to reduce the losses

incurred.” *Id.* at *4. Briefly, Respondent retained and misapplied mortgage proceeds that had been pledged to secure a line of credit from a bank and directed employees to conceal these facts from the bank. Although the AJ acknowledged that “Lunday’s direction to [his] employees to conceal his crime establishes a willful and egregious act,” the AJ rejected the government’s argument to impose an indefinite debarment, and debarred Lunday for five years. *See also, In the Matter of Charles Kirkland*, HUDBCA No. 90-5285-D57, 1991 HUD BCA LEXIS 3, *4-*5 (collecting cases comparing the difference in the respective periods of debarment (generally between three years and five years) imposed by “the Department’s judicial officers” on respondents convicted of committing similar crimes which precipitated HUD’s debarment action).

10. In each of the cases cited here, the respondents argued that certain mitigating factors should be considered by the AJ in determining whether debarment was appropriate, and, if so, the length thereof. In *Defranceaux, supra*, the AJ considered the passage of time as a mitigating circumstance (“the acts that constituted the causes for debarment occurred over a few-month period . . . six years ago”) In *Strauss, supra*, the AJ, while recognizing the mitigating factors advanced by the respondent “militate[d] against the Government’s arguments that an indefinite period of debarment [was] necessary to protect the public interest,” concluded that the factors did not convince him that “no period of debarment was necessary, because they shed insufficient light on [Strauss’] responsibility in the conduct of his business affairs.” *Id.* at *17. Among the mitigating factors Strauss had raised were “his post-indictment cooperation with the Office of Independent Counsel, his expressions of remorse, the District Judge’s remarks during sentencing, and the light sentence imposed by the judge.” In terminating the indefinite debarment in *Kirkland*, the AJ considered favorably the “significant passage of time since the commission of the improper conduct” (more than ten years) and “no interim violations.” In *Winn, supra*, the AJ found Winn’s “mitigating evidence,” which included as a mitigating factor the passage of time and the “sentence imposed by the court[.] . . . [-] a relevant consideration in assessing both the need for a debarment and an appropriate period of debarment,” unconvincing. *Id.* at *19.
11. Respondent’s misconduct reflects some of the bad acts described above in “analogous decisions” in which the Board declined to impose an indefinite debarment. It is fairly inarguable that Respondent’s conduct was “egregious and willful” and constituted a “breach of the trust” the defrauded lenders “bestowed upon” him as a closing attorney.⁸ It is also beyond peradventure that Respondent’s conduct was driven by pecuniary gain⁹ and “avarice.” *Winn, supra*, at * 11. Respondent’s

⁸ Gov’t Ex. 7 at 7-3, (Respondent’s letter to the sentencing judge dated August 24, 2010.0

⁹ *Id.* Respondent confessed that he let his “own principles be influenced by the fact that [his co-conspirators] were referring a lot of business to [him].”

actions also showed little regard for the ethical standards and code of professional responsibility that govern the practice of every attorney.

12. Respondent urges the Debarring Official to consider several factors in determining his debarment. Respondent's urging is consistent with the courts' holding that all mitigating factors should be weighed when determining an appropriate period of debarment, *see, e.g., Shane v. U.S.*, 800 F.2d 334 (3d Cir. 1986 and *Roemer v. Hoffman*, 419 F. Supp. 130 (D.D.C. 1976), and with the AJs' pronouncements in some of the cases cited herein. *See also*, 2 CFR §§180.845(a) and (b) and 180.860. As mitigating factors, I considered the absence of any evidence in the record of any previous wrongdoing by Respondent, the relatively short duration of his misconduct, the absence of misconduct since the offense was committed, and his expressions of remorse. I considered the commendatory letters submitted by family members, friends, and colleagues at his sentencing hearing and attached as an exhibit to his Brief in Opposition of Indefinite Debarment, but accorded them less weight "because they shed insufficient light on Respondent's responsibility in the conduct of his business affairs." *Strauss, supra*, at * 17. Additionally, it is troubling that despite the "qualities and accomplishments" noted by in the letters, "Respondent was unable to act lawfully" *Winn, supra*, at *20, in the face of the blandishments and "bullying" from his coconspirators and the financial rewards that his association with his co-conspirators brought him. "Considering Respondent's background and extensive experience" as a practitioner and in the mortgage industry, "he clearly should have known better." *Id.* I did not consider as a mitigating factor in Respondent's favor his equal protection of the law argument because as held in *In the Matter of John E. Signorelli*, 1995 HUD BCA Lexis 8 (Sept. 20, 1995, citing *Califano v. Sanders*, 430 U.S. 99, 108 (1977) and *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir 1957), *cert. den.* 355 U.S. 939 (1958), "[a]dministrative law judges and the administrative judges of federal agency boards of contract appeals do not have the authority or jurisdiction to decide constitutional issues, as opposed to issues of regulatory law, and Respondent's constitutionally grounded arguments cannot be addressed here." *Signorelli, supra*, at *7. I also did not give Respondent credit for his argument that he suffered a financial loss as a result of defalcations of his escrow account by his cohorts in the fraudulent scheme. The Board held in *In the Matter of Harold Farrell*, HUDBCA No. 85-954-D29, 1986 HUD BCA LEXIS 26 (May 30, 1996 as amended June 9, 1986) that "[w]hether or not a debarment should be imposed essentially has nothing to do with the extent of economic loss or social anguish suffered" by the respondent. Respondent's arguments with respect to what he views as the impunity with which lenders acted in their disregard of sound mortgage underwriting principles, resulting in the current problems in the financial and mortgage industry, were not treated as mitigating factors. As Respondent well knows, HUD has no enforcement powers over lending institutions, as his arguments would suggest. Even if HUD had the power to take action against errant lending institutions, in *Kisser v. Cisneros*, 14 F. 3d 615 (D.C. Cir.

1994), the court upheld HUD's right to make "nonenforcement decisions."

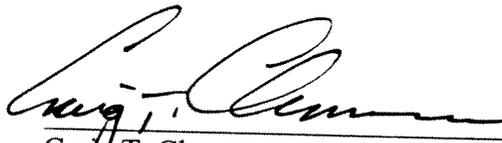
13. In summary, Respondent's "mitigating evidence does not convince me that the Department would be free from risk in dealing with Respondent in the immediate future." *Winn, supra*, at *20. The serious nature of the offenses at issue, even though committed some four years ago, raises doubts with respect to Respondent's honesty and integrity when financial gain is involved. It is well settled that "a lack of present responsibility can be inferred from past acts." *Strauss, supra*, at *14. Further, by his own admission, Respondent recognized that there were "signs of dishonest conduct [but he let his] own principles be influenced by the fact that [his coconspirators] were referring a lot of business to [him]." ¹⁰
14. For all the foregoing reasons, I conclude that Respondent's misconduct warrants his debarment for five years to protect the public interest.
15. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
16. HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act with honesty and integrity.

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 CFR §§ 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondent for a period of five years from the date of this Determination. Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: _____

6/17/11

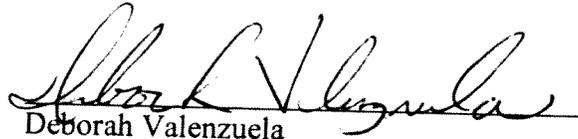


Craig T. Clemmensen
Debarring Official

¹⁰ See n.8, *supra*.

CERTIFICATE OF SERVICE

I hereby certify that on this 17TH day of June 2011, a true copy of the DEBARRING OFFICIAL'S DETERMINATION was served in the manner indicated.



Deborah Valenzuela
Debarment Docket Clerk
Departmental Enforcement Center (Operations)

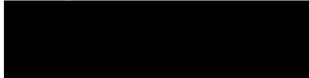
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Mortimer F. Coward, Esq.
Debarring Official's Designee

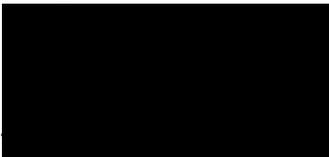
Anna I. Fabregas, Esq.
Melissa Silverman, Esq.
Government Counsel

FIRST CLASS MAIL

Joseph B. Miller



Joseph B. Miller

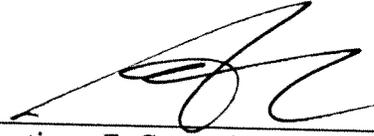


CONCURRENCE:

In the Matter of:

JOSEPH MILLER- DOCKET NO. 11-3681-DB

Dated: June 14, 2011



Mortimer F. Coward
Debarring Official's Designee