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

U. S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, Complainant, vs. PROFESSIONAL AMERICAN MORTGAGE INSTITUTE, INC., Respondent.	HUDALJ No. 06-033-PF OGC Case No. 06-3351-PF

ORDER
GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

The U. S. Department of Housing and Urban Development ("the Government" or "HUD") filed a Complaint against Respondent, Professional American Mortgage Institute ("PAMI"), which alleged that PAMI, through its employee Mark Cohen ("Cohen"), submitted or caused to be submitted, a false claim to HUD in connection with an FHA-insured property located in North Miami, Florida in FHA case #092-7183335 in violation of the Program Fraud Civil Remedies Act of 1986 ("PFCRA"), 31 U. S. C. §§ 3801-3812, as implemented by 24 C.F.R. Part 28. HUD paid the claim for $202,066.78 in May 2001. HUD seeks a civil money penalty from Respondent of $5,500 plus an assessment of twice the amount of the claim that HUD paid, less an amount recovered on the sale of the property and restitution previously paid in connection with the property, for a total award of $117,304.28. Cohen was convicted in the United States District Court for the District of Miami for conspiring with others to commit the fraudulent acts alleged in this case. HUD contends that PAMI is liable for the criminal acts of Cohen, a loan officer working for PAMI, because Cohen's criminal acts were committed within the scope of his employment as a loan officer for PAMI.

The Government moves this Court for an Order of Partial Summary Judgment. It contends that there are no genuine issue of material fact concerning PAMI's liability and

that the only remaining issue to be determined is the amount of penalty and assessment that should be awarded to the Government. Respondent opposes the Motion, asserting that there are issues of material fact, the primary one being whether the actions of Cohen were within the scope of his employment with PAMI which would render PAMI liable for the actions of Cohen. PAMI counters that it is entitled to summary judgment because the Complaint was filed after the statute of limitations had run. Accordingly, it prayed that the Government's motion for partial summary judgment be denied and, in the alternative, that summary judgment be entered in favor of PAMI.

After careful consideration of the motions and the arguments of both parties, I conclude that the Government's motion for partial summary judgment must be denied. PAMI's motion for dismissal based on the running of the statute of limitations must also be denied. However, PAMI's motion for summary judgment on the basis that PAMI is not liable to HUD in this case because the employee, Cohen, acted outside the scope of his employment with PAMI has merit. Accordingly, PAMI's motion to dismiss on that basis will be Granted.

FACTUAL BACKGROUND

Mark Cohen and the conspiracy:

Cohen was employed by PAMI as a loan officer. He was loan officer for FHA-approved loan #092-7183335. G's Ex. 3. FHA Loan #092-7183335 was originated on September 11, 1997, and endorsed by HUD on November 21, 1997. The borrower, Anibal Georges, later defaulted on the loan and on May 5, 2000 a claim was submitted to HUD for the amount of $101,033.39. G's Ex. 1. HUD paid the claim on FHA loan #092-7183335. G's Ex. 1.

By Superceding Indictment ("SI"), Cohen and two co-conspirators, Bruce Hollander and Jean Lindon, were charged in the U. S. District Court for the Southern District of Florida with 13 counts of criminal code violations relevant to this case, including conspiracy, five counts of wire fraud, six counts of false statements to HUD, and money laundering. On September 20, 2001, Cohen pled guilty in the same court to a count in the indictment alleging that he participated in a conspiracy to defraud HUD that involved the submission of a false Uniform Residential Loan Application ("URLA") and a false gift letter in support of the borrower's application for FHA-insured loan #092-7183335. G's Exs. 4,5,6. He signed a written plea agreement which charged that he conspired to commit mail fraud, wire fraud, and the making of false statements to HUD as alleged in the indictment, in violation of Title 18, U. S. Code § 371. See G's Ex. 5. He was sentenced on December 11, 2001.

The indictment, and Cohen's subsequent admission, shows that he was a mortgage loan officer who did business with at least seven mortgage lenders, including PAMI. SI §8. While acting as a mortgage loan officer, Cohen conspired with several other persons, including Eric Silverman, Bruce Hollander and Jean Lindor, to defraud the lenders involved and HUD and to unlawfully enrich themselves by obtaining money from the lenders with whom Cohen worked. The scheme was to obtain mortgage funding from lenders and to obtain mortgage insurance from HUD by submitting and causing to be submitted false documentation in support of mortgage applications, inducing the lenders to fund, and HUD to insure, mortgages exceeding $11,100,000 to at least 120 borrowers. One of the borrowers - Anibal Georges - was sponsored by PAMI in FHA-loan #092-7183335.

The indictment alleged, and by his plea Cohen admitted, that it was part of the conspiracy that Eric Silverman incorporated a business - American Redevelopment Corporation ("ARC") - to act as a real estate investment company to purchase single family homes that would immediately be resold, or "flipped," at inflated prices. The homes would be sold to borrowers who were assisted in qualifying for mortgage loans by the conspirators - Cohen, Silverman, Hollander and Lindor - through the use of "false and fictitious means." As part of the conspiracy, ARC utilized the services of Lindor and others to recruit borrowers. ARC placed ads in local publications seeking borrowers. The conspirators promised the borrowers that they could purchase a house for a $1,000 down payment and monthly mortgage payments comparable to their monthly rental payments. Cohen, Lindor, and others interviewed the borrowers as to their financial status in order to determine the price range of the houses that they would be offered. Cohen reviewed the borrower's financial information to determine what false and fictitious documentation was necessary for the potential borrower to qualify for a FHA-insured mortgage loan. It was further part of the conspiracy that a member of the conspiracy, acting as the real estate agent for ARC, would show borrowers homes based on a price range provided to him by Cohen. When the borrower selected a home, the co-conspirator negotiated a purchase/sale contract with the homeowner on behalf of ARC. At the direction of Cohen, the price was inflated by approximately $14,000 (average). The borrower signed a purchase/sales contract for the home reflecting ARC as the seller.

Cohen, Hollander, Lindor, Silverman and others created,and caused to be created, false and fraudulent documents which Cohen placed in the borrowers' loan files so that they would appear to qualify for an FHA-insured mortgage loan. These documents included verification of employment forms, letters of alternative credit, letters documenting gifts from borrowers' relatives, IRS Forms W-2, Uniform Residential Loan Application ("URLA") forms, and pay stubs.

Cohen also created or caused to be created, false businesses which he used as employers on borrowers' applications. He also created, or caused to be created, false telephone numbers and voice mail boxes for these businesses to make them appear legitimate. His co-conspirator, Lindor, falsely represented himself as a part of management of the fictitious businesses and verbally verified the employment of the borrowers. They also utilized the services of Hollander as an attorney and closing agent who provided title commitments that were false and fictitious as to the true owner of record, and failed to list that a warranty deed had to be issued from the actual seller to ARC. By doing so, Hollander knowingly concealed information from the lender and allowed ARC to sell properties it did not own.

To make good on its promise of purchasing a home for only $1,000 out-of-pocket, ARC provided the funds for cash gift donations, misrepresenting the funds as gifts from relatives. Silverman, Lindor and other co-conspirators would go to various banks and deposit ARC funds into the accounts of borrowers' friends and relatives, and then would have the funds withdrawn in the form of cashier's checks and used them to represent gift donations at closing. At the closing, Hollander would falsely sign and cause to be signed, the HUD-1 and the addendum to the HUD-1, knowing that the borrowers' financial contribution was coming from the seller - ARC - and not from the borrower or his relatives and set forth on the HUD-1. Hollander would then issue a check at closing reimbursing either Silverman or ARC for payment of the gift funds.

In the Anibal Georges' transaction at issue, FHA loan #092-7183335, Hollander issued a false title commitment for submission to the lender. Days later he signed a check issued to Silverman in the amount of $4,540 which was used at closing as "gift funds" for Georges. The transfer of funds for closing was done by wire from a location outside of Florida. Immediately after closing, Silverman obtained a cashier's check in the amount of $4,540 reflecting the "gift to A. Georges."

The application was processed by Cohen, as an employee of PAMI. The Complaint alleges that PAMI, a loan correspondent, submitted a complete URLA and documents prepared by Cohen to its sponsor, Corinthian Mortgage. Corinthian closed the loan and submitted the loan package to HUD for endorsement.

During a routine audit of cases, Corinthian discovered the false documents in the Georges' case. HUD received notice of the false documents and began an investigation in August 1998. See G's Ex. 8. By January 1999 HUD had become aware of the scheme employed by Cohen and others in the processing of the Georges' application. The HUD auditor concluded, after investigation, that Mr. Georges' income was falsified and a "gift" was provided by the seller to qualify him for the FHA loan. Due to the false documents, HUD over-insured the mortgage (because of the inflated price of the property) which put

HUD in a very risky position. It was also determined that had Mr. Georges' income not been falsified, he would not have qualified for the loan.

Foreclosure proceedings against the property were started in February 1999. G's Ex. 5. In 1999, Corinthian sold the loan at issue to GMAC Mortgage Corporation who became the holder and servicer of the loan. See G's Ex. 7. A certificate of title was issued by the Clerk of Court on February 1, 2000. G's Ex. 6. It was not until May 5, 2000 that the conveyance to HUD actually occurred. G's Ex. 7.

The Indictment also shows that Cohen, Hollander and Lindor took their business to some seven other mortgage servicing companies and used the same criminal scheme with them to defraud HUD, and involved more than 120 borrowers and more than $11,000,000 in mortgages. *See* SI ¶¶8 and 25.

Professional American Mortgage Institute, Inc. ("PAMI")

PAMI is a Florida corporation engage in the business of procuring mortgages. During the period of 1996 until 1998, PAMI was authorized to solicit and process mortgages from numerous lenders to be guaranteed by HUD. In some instances, PAMI became the placing company and at other times it would process loans through other agencies including Corinthian Mortgage Corporation.

Sometime in 1996, PAMI was introduced to Cohen, a licensed Florida mortgage broker. He was later employed by PAMI to act as a loan officer for the purpose of developing new loans.

It is not alleged by the Government, and there is no evidence to support finding that PAMI was aware that Cohen was engaged in any activities other than those that were a part of his duties as a loan officer. Nor is there any evidence that PAMI was aware that Cohen was part of a conspiracy in a business scheme with others to prepare false financial information for a borrower, or arrange to lend the borrower funds to close on a property, or in many instances to actually acquire the property and resell it to the borrower in a "flip" transaction, all of which Cohen admitted to in his plea before the U. S. District Court. And, there is no evidence that PAMI was aware that Cohen was acting as a loan officer for other mortgage companies during the time that he was employed by PAMI.

The Standard for Summary Judgment

Summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Rule 56(c) of the Federal Rules of Civil Procedure. If the record, viewed in the light most favorable to the nonmoving party reveals that there is no genuine issue as to any material fact, the moving party is entitled to summary judgment. *Anderson v. Liberty Lobby*, 477 U. S. 242 (1986). The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U. S. 317, 323 (1986). Once the moving party makes its initial showing, however, the nonmoving party must demonstrate "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

To preclude summary judgment, the nonmoving party cannot satisfy this burden by resting on mere allegations, but instead must present "affirmative evidence showing a genuine issue for trial." *Anderson*, 477 U. S. at 256. The nonmoving party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. To determine whether the nonmoving party has raised a genuine issue of material fact, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his/her favor. If the evidence offered by the nonmovant is merely colorable, not significantly probative, or is not enough to lead a fair-minded factfinder to find for the nonmoving party, the motion for summary judgment should be granted. *Coleman v. General Motors Acceptance Corporation et al,* 196 F.R. D. 315, 2000 U. S. Dist. LEXIS 13236 (Aug. 29, 2000), *citing Gaines v. Runyon*, 107 F. 3d 1171, 1174-75 (6th Cir. 1997); *Street v. J. C. Bradford & Co.*, 886 F. 2d 1472, 1479 (6th Cir. 1989) and *Anderson*, 477 U. S. 242, 249 (1986). *See also Mays v. Buckeye Rural Electric Cooperative, Inc.*, 277 F. 3d 873, 875,(6th Cir. 2002); *Greer v. Bank One*, 2002 WL 2032221 (7th Cir. 2002); and *Rowe v. Union Planters Bank*, 289 F 3d 533 (8th Cir. 2002).

The Government argues that there is no genuine issue as to any material fact in this case and that all the facts support finding that Cohen was an employee of PAMI at the time of his fraudulent actions and that his fraudulent actions were committed within the scope of his employment with PAMI. PAMI argues that whether Cohen was acting within or without the scope of his employment with PAMI is a question of material fact and thus the case is not ripe for summary judgment and a hearing on such issue is required. The Government countered that the resolution of the question of whether Cohen acted within the scope of his employment with PAMI is a legal determination and does not present a question of fact.

I conclude that the question of whether Cohen acted within the scope of his employment based on the facts in this case is a factual determination and is a genuine material issue for resolution. *See Parsons v. Weinstein Enterprises, Inc.,* 387 So. 2d 1044 (Fla. 1980); *City of Miami v. Simpson,* 172 So. 2d 435 (Fla. 1965); and *Dieas v. Associates Loan Co.*, 99 So. 2d 279 (Fla. 1957). However, in this administrative forum, I am the factfinder. I further conclude that the facts that are not in dispute are sufficient to allow a determination on the issue without the necessity of a hearing. Accordingly, I deny PAMI's request to schedule a hearing in this case and will issue a ruling based on the record before me on the motion for partial summary judgment.

Respondent's contention that the statute of limitations was not met on the basis that a notice of hearing has yet to be entered in the case presents a more difficult question. Pursuant to the statute, commencement of the hearing shall occur upon issuance of written notice by the presiding officer, as described therein. Respondent correctly notes that a notice of hearing has not yet been issued, well after the six-year expiration of the statute on May 4, 2006. However, I conclude that this motion, too, must be denied.

The Government filed the Complaint on April 24, 2006 - seven business days prior to the expiration of the statutory time limit. The Government's action is clearly last-minute, considering that it had six years to bring such an action. By filing the case so late, it took the risk that the court would not take action within the time required by the statute. However, as the Government correctly points out, I have previously ruled that five business days was adequate time for me to issue a notice of hearing[1], and I conclude that it was so in this case. I hasten to state, however, that such might not always be the case, depending on my case load, my availability and other duties I face at the time of the filing of the Complaint.

In this case, failure to issue a notice of hearing has been the result of decisons made, and actions taken, or not taken, by this tribunal. Rather than issue a notice of hearing immediately upon being assigned the case, I, on April 28, 2006 prior to the running of the statute, took action to resolve an issue raised in Respondent's Answer to the Complaint regarding jurisdiction by this tribunal. Then prior to my ruling on that issue, the Government filed the instant motion for partial summary judgment. Respondent's response to the motion raised again the issue of jurisdiction based on the running of the statute of limitations. Under these circumstances, the failure to meet the technical requirements of the statute cannot be attributable to HUD. I conclude that the circumstances warrant tolling the statute of limitations until such time as this tribunal issues a notice of hearing, which notice should be *nunc pro tunc* to April 28, 2006. *See HUD v. Goorman, et al*, HUDALJ No. 06-015-PF. Accordingly, Respondent's motion to dismiss the Complaint for lack of jurisdiction on the basis of failure to comply with the statute of limitations is Denied.

I turn now to the issue of whether PAMI, as employer of Mark Cohen, is liable to HUD for the false claim that was submitted for payment in the Georges' case.

See HUD v. Goorman, et al, HUDALJ No. 06-015-PF (2006).

ANALYSIS

I will first address Respondent's contention that the case should be dismissed based on lack of jurisdiction due to the running of the statute of limitation. That motion was raised in Respondent's Answer to the Complaint and raised again in its opposition to the Motion for Partial SummaryJudgment. The motion will be denied.

I. Statute of Limitations

Title 31 U.S.C §3808 provides that a hearing on the matters brought pursuant to the PFCRA must be commenced "within 6 years after the date on which such claim or statement is made, presented, or submitted." 31 U.S.C §§ 3803(d)(2)(A)(B) provide that the allegations shall be referred to a presiding officer for the commencement of a hearing, and that the presiding officer "shall commence such hearing" by mailing by registered or certified mail, or by delivery of a notice which includes written notice of the time, place and nature of the hearing, the legal authority and jurisdiction under which the hearing is to be held; and the matters of facts and law to be asserted. *See* 31 U.S.C §§ 3803 (g)(2)(A).

PAMI argues that the Complaint must be dismissed because HUD became aware of the false claims more than 6 years prior to the filing of the Complaint on April 24, 2000. It asserts that the fraudulently created documents and statements related to them were discovered and made known to HUD in August 1998. It also argues that, even considering that the Complain filed on April 24, 2000, was within the six-year filing period allowed under the statute, the case must be dismissed because the statute calls for the commencement of a hearing within the six-year period and clearly no hearing was held prior to May 4, 2006 when, at the latest, the six-year period expired. Finally, it notes that a notice of hearing was not issued within the six- years period as required by 31 U. S. C. § 3803(d)(2)(A)(B).

The Government responds that the Complaint was filed within the six-year period, i.e. on April 24, 2006, (seven business days before the statutory period expired), and that the failure to commence the hearing before the expiration of the statutory period (May 4, 2006) cannot be attributed to the Government.

I find that the Complaint was timely filed. HUD is seeking recovery under PFCRA for a *claim*, as opposed to a false statement; therefore, the cause of action cannot arise until a claim (for payment) was made to HUD. In this case, GMAC presented a claim to HUD for payment under the mortgage insurance agreement on May 5, 2000. G's Ex. 1. The Complaint was filed on April 24, 2006, before the expiration of the six-year limitation.

II. Vicarious Liability of PAMI

HUD contends that Cohen caused the creation and submission of false documents in support of a loan which was subsequently endorsed by HUD for FHA insurance. After the borrower defaulted on the loan, HUD paid the insurance claim. Because Cohen was a loan officer and agent for PAMI, liability for Cohen's fraudulent conduct is properly imputed to PAMI. It contends that Cohen was acting within the scope of his employment with PAMI, thus PAMI is liable for the civil money penalty and assessment requested in the Complaint. The evidence shows that Cohen signed the FHA loan application in question (Georges) as loan officer and representative for PAMI. *See* G's Ex. 3.

In answer to the Complaint and the Motion for Partial Summary Judgment, PAMI asserts that Cohen was not an agent of PAMI when he was involved in the Georges' transaction because his conduct fell outside the scope of his employment with PAMI. It contends that PAMI could not have expected the course of conduct engaged in by Cohen, a Florida licensed mortgage broker, acting in conspiracy with others. That PAMI did not authorize Cohen to prepare any loan documents that were not in strict compliance with HUD guidelines and that any action taken by Cohen was for his own business benefit and not for the benefit of PAMI. Also that PAMI would not have any knowledge that the income verification was false because it was prepared by Cohen and his associates who did not have any involvement with PAMI. *See* Respondent's Affidavit of Roni Oz in Opposition to Motion for Summary Judgment. Further, PAMI contends that PAMI did not have any participation in the approval and or closing of the loan in the Georges' transaction, that all documents were prepared and sent to Corinthian for final processing and closing. Because of all these factors, PAMI argues that it cannot be held vicariously liable for the false claim in this case.

Although the Government relies on their position that Cohen's actions in creating the false documentation for the borrower in question were taken within the scope of his employment with PAMI, it provides little or no factual and/or legal analysis to support that position. HUD's argument is that under the doctrines of *respondeat superior* and *vicarious liability* a finding that Cohen acted within the scope of employment with PAMI is required strictly on the basis that Cohen committed the acts while an employee of PAMI. It argues that the other considerations raised by PAMI are irrelevant to the issue.

After considering the evidence of record and the arguments of the parties, I find that Cohen acted outside the scope of his employment with PAMI in this case, and therefore that he was not acting as an agent of PAMI in creating the fraudulent documentation in the Georges' case.

Scope of Employment:

The Government relies on "well-established common law agency doctrine" that indicates that principals are liable for the acts of their agents who act within the scope of their agency. It states that the fact that the acts were fraudulent and criminal does not break the agency. It refers to "settled precepts of Florida" law that "a principal is liable to third parties for the fraudulent acts of its agents *if those acts were committed within the scope of the agents' employment and authority*,"[2](Emphasis added.) It also cites to the Restatement of the Law, Second, Agency (Sec. 261 comment a (1958)) for that same general proposition. These references are barely useful. The issue in this case goes beyond the general principal of vicarious liability and/or respondeat superior and requires a resolution of the factual/legal issue of whether Cohen's acts were, in fact, committed within the scope of his employment with PAMI. The determination on the issue must turn upon the facts and circumstances of each case. *See Reece v. Ebersbach*, 9 So. 2d 805, at 806. And, the fact that Cohen's loan officer functions were within the scope of his employment with PAMI, as argued by HUD, is not dispositive on the issue.

I agree with HUD that the Restatement of the Law of agency should be sought for guidance in making the determination in this case. Restatements are highly regarded distillations of common law and are considered persuasive authority by many courts. The Florida courts have applied the Restatement in their rulings. *See City of Miami v. Simpson*, 172 So. 2d 435 (1965), *Parsons v. Weinstein Enterprises, Inc.* 387 So. 2d 1044 (1980) and *Dieas v. Associates Loan Company*, 99 So. 2d 279 (1957). Although HUD has referenced the Restatement (Second), I have turned to the Restatement of the Law Third, Agency, (August 2006) ("Restatement"), for the most current statement on the subject.

Section 7.07 of the Restatement discusses the basic doctrine of respondeat superior and vicarious liability and addresses when an employee's tortious conduct occurs within the scope of employment for purposes of subjecting the employer to liability. It discusses when an employee is acting within or without the scope of employment.

§ 7.07 Employee Acting Within Scope of Employment

> (1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.
>
> (2) An employee acts within the scope of employment when performing work assigned by the employer or engaging

> in a course of conduct subject to the employer's control.
> *An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.(*Emphasis added.*)*
>
> (3) For purposes of this section,
>
> (a) an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance or work, and
>
> (b) the fact that work is performed gratuitously does not relieve a principal of liability.

Thus, to be determined in this case is whether Cohen's actions took place "within an independent course of conduct not intended (by him) to serve any purpose" of PAMI. In comment (b) to Section 7.07, it states that the character, extreme nature, or other circumstances accompanying an employee's actions may demonstrate that the employee's conduct is independent of performing work assigned by the employer and intended solely to further the employee's own purposes. Such is the case before us. Nothing in the evidence suggests that Cohen intended the fraudulent scheme he and his co-conspirators concocted to further any purpose of PAMI. Quite the contrary, the facts of this broad-based conspiracy show convincing evidence that he was on a course, independent of PAMI's work, designed to serve solely his own self-enriching purposes. The scheme was massively devious. His conduct was of an extreme and outrageous nature. All of his fraudulent activities were intended to serve the purpose of the conspiracy, which was to create money-making opportunities for him and his co-horts. And, he not only engaged in such fraudulent and criminal conduct while working for PAMI, he admitted to doing the same while a loan officer for other lenders. In total, 120 borrowers and 14 lenders were affected. SI ¶8.

Cohen's conduct in soliciting an application from, and processing the Georges' application, was a part of the conspirators' scheme. That PAMI, unknowing of Cohen's fraudulent conduct, may have received a loan origination fee, paid at closing, does not detract from the conclusion that Cohen was on a course of conduct which was not intended by him to serve any purpose of PAMI. The loan origination fee, if received, was incidental to, and a necessary by-product of, the conspiracy to make money for themselves. PAMI did not receive, and Cohen did not intend for PAMI to receive, any of the "excess" money that came from the "flipping" of the property, which funds were the fruit of the conspiracy. The fact that he conspired with others about whom PAMI had no knowledge and over whose actions PAMI had no control is more evidence of his independent course. PAMI, itself, was a victim of the conspiracy and the fraudulent activities of the conspiracy. PAMI's statement that Cohen and his co-conspirators "set up a procedure to fraudulently process false loans to HUD and then went looking for unsuspecting mortgage correspondents to process the loans" seems an accurate characterization of the scheme based on the record.

I find that Cohen was acting outside the scope of his employment with PAMI in committing the fraudulent transactions in the Georges' case.[3]

Considering the evidence in a light most favorable to the nonmoving party (HUD), I conclude that the Government has failed to establish that Cohen was acting within the scope of his employment with PAMI at the time that he committed the fraudulent activities which are the bases for the Complaint. Accordingly, it has failed to establish the vicarious liability of PAMI for Cohen's fraudulent actions, and its motion for partial summary judgment must be Denied. PAMI is not liable to HUD under the PCFRA for a false claim to HUD on FHA loan #092-71833335. Accordingly, Respondent's counter motion will be Granted. So ORDERED.

Constance T. O'Bryant

CONSTANCE T. O'BRYANT
Administrative Law Judge

Dated: October 13, 2006

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[3]The result would be the same under Restatement (Second) of Agency. Section 228(2) of the Restatement (Second) provides that conduct of a servant is not within the scope of employment if it is different in kind from that authorized by the master, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master. (Note: the Restatement (Third) of Agency does not use the terms master and servant, it uses the terms employer and employee.) Here, the facts show that Cohen's actions were extremely different in kind from those authorized by PAMI, and it is clear that Cohen's conduct was not actuated, in any way, by a purpose to serve the interests of PAMI. *See also Dieas v. Associates Loan Company*, 99 So. 2d 279 (Supreme Court of Fla. 1957), where the court stated that "the liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do," at 281, and *City of Miami v. Simpson*, 172 So. 2d 435 (Fla. 1965) "we point out that a city is not liable for every wrong committed by a city employee. The limitations applicable to the liability of private employers are likewise applicable to municipalities. The liability of the master can arise in such instances only when the act of the servant is done within the real or apparent scope of the master's business. The master's liability dos not arise when the servant steps aside from his employment to commit the tort or does the wrongful act to accomplish some purpose of his own. If the tort is activated by a purpose to serve the master or principal, then he is liable, otherwise he is not." Again, Cohen's involvement in the conspiracy, with others who had no relationship to PAMI, and not limited to PAMI, shows that he stepped aside from his employment with PAMI to engage in an independent venture solely to enrich himself and his co-conspirators.