

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

In the Matter of:)	
)	HUDOA No. 15-AM-0032-DB-001
)	
OFORI AND ASSOCIATES, P.C.)	OGC Case No. 14-0054-DB
)	
CHARLES OFORI,)	
OTIS OFORI, and)	
CURTIS OFORI,)	
)	April 10, 2018
Respondents.)	

Appearances:

For Respondent: Amy M. Glassman, Esq.
Constantinos G. Panagopoulos, Esq.
Theodore R. Flo, Esq.
Washington, D.C.

For the Government: Ana I. Fabregas, Esq.
Brian A. Dupré
U.S. Department of Housing
and Urban Development
Washington, D.C.

INITIAL DECISION

BEFORE: H. Alexander MANUEL, Administrative Judge

This *Initial Decision* sets forth findings of fact and recommends that a two-year period of debarment be imposed upon Respondents Charles Ofori and Curtis Ofori. For Respondents Ofori and Associates, P.C., and Otis Ofori, a three-year period of debarment is recommended. This decision is based upon Respondents' actions in failing to comply with departmental regulations and policy.

STATEMENT OF JURISDICTION

On January 27, 2015, the Debarring Official for the U.S. Department of Housing and Urban Development (“HUD” or “the Government”) referred this debarment proceeding to the Office of Hearings and Appeals for fact-finding in accordance with 2 C.F.R. § 180.845(c). The Referral Order was duly docketed and set for hearing in accordance with 2 C.F.R. § 180.840. The administrative judges of this Office are authorized to serve as hearing officers for the purposes of issuing findings of fact and recommended determinations for consideration by the Debarring Official. 2 C.F.R. § 2424.842. This decision is issued upon consideration of the entire record in this case, including the exhibits and pleadings by the parties, as well as the sworn testimony and evidence adduced at the hearing, held on July 26-28, 2016.

STATEMENT OF THE CASE

Respondent Ofori & Associates, P.C. (O&A) is a professional corporation organized under the laws of the District of Columbia, and individual Respondent Charles Ofori is its president and sole shareholder. O&A was, during the relevant period, a HUD contractor that held approval from HUD’s Federal Housing Administration (FHA) to service FHA-insured loans as a nonsupervised mortgagee. Individual Respondents Otis and Curtis Ofori are an attorney and accountant, respectively, who performed work for O&A during the relevant period. Charles Ofori is the father of Otis and Curtis Ofori.

This matter is an administrative action for debarment under 2 C.F.R. Parts 180 and 2424 against O&A and the individual Respondents. Respondents O&A and Charles Ofori were initially notified of their respective proposed debarment by Notices of Proposed Debarment (NOPDs) dated July 1, 2014, which, under 24 C.F.R. § 26.13, served as the complaints in this matter. These notices were supplemented by additional NOPDs on April 13, 2015, adding Respondents Otis and Curtis Ofori. The NOPDs propose that Respondents be debarred for allegedly submitting false or misleading information to HUD.

HUD’s grounds for debarment center on a set of documents that O&A submitted to HUD on October 29, 2013, during a prior, separate proceeding before HUD’s Mortgagee Review Board, where HUD considered whether to withdraw O&A’s approval to service FHA loans. The three individual Respondents participated in the creation of the documents in question. The documents were submitted under Charles Ofori’s signature in an attempt to demonstrate that O&A was in compliance with all FHA requirements. However, HUD ultimately withdrew O&A’s FHA approval for failure to meet certain of those requirements.

HUD now alleges that the documents submitted by Respondents in that proceeding contained false or misleading information, in that they represented that a company called Ofori Lender Services (OLS) was a separate corporate entity, when, in fact, OLS was merely a trade name under which O&A did business. HUD alleges that Respondents knew or had reason to know that the documents contained false or misleading information. According to HUD, Respondents’ submission of such information is cause for debarment under 2 C.F.R. § 180.800(b) because such conduct constitutes a violation of the terms of a public agreement or

transaction so serious as to affect the integrity of an agency program. In addition, HUD contends that cause for debarment exists under § 180.800(d) because Respondents' conduct in knowingly submitting false or misleading information was of so serious or compelling a nature that it affects their present responsibility. On these grounds, HUD proposes to debar Respondents from participation in all procurement and nonprocurement transactions with the federal government for a period of seven years.

Respondents, for their part, acknowledge that OLS was not a separate corporate entity as of October 29, 2013, but maintain that their misrepresentation of OLS' status resulted from an honest mistake, not an attempt to mislead HUD. Thus, a key factual issue in this matter is whether and when Respondents genuinely believed that OLS was a separate corporate entity. Respondents further argue that their purported good faith mistake does not warrant debarment and that mitigating factors additionally weigh against debarment in this case.

A hearing in this matter was held July 26 through July 28, 2016, pursuant to 24 C.F.R. Part 26, Subpart A. The Government filed a *Post-Hearing Brief* ("GB") on October 7, 2016. Respondents filed a *Post-Hearing Brief* ("RB") on the same day. The record was closed on October 7, 2016. A stay of proceedings was imposed, *sua sponte*, from March 14, 2018 to April 3, 2018. The matter is now ripe for decision.

FACTUAL BACKGROUND

The Respondents

Respondent O&A is a professional corporation that was organized in Washington, D.C., in 1991 to provide accounting, financial, and management consulting services. (Tr. 261-62, 588, 590.) In 2002, O&A was approved to participate in the Small Business Administration's 8(a) Business Development program. (JX 7 at 2.)¹ Since 2003, O&A has acquired over ten years of experience performing contract work for federal government agencies such as the departments of Transportation, Agriculture, and Homeland Security. (Tr. 263.) As of 2013, four to five employees worked at O&A's Washington, D.C. headquarters, including Charles, Curtis, and Otis Ofori and Office Manager Adelaide Etse (who goes by the name "Hilda"), all of whom appeared as witnesses in this proceeding. (Tr. 348-49, 471.)

Respondent Charles Ofori is the founder, sole shareholder, and president of O&A. (Tr. 263.) Charles is a Certified Public Accountant (CPA) with over 20 years of experience. (Tr. 259-61.) Charles is also the father of Respondents Otis and Curtis Ofori, who are twin brothers.² (Tr. 263-64, 587.)

¹ This decision employs the following abbreviations:

JX – Joint Exhibit
GX – Government's Exhibit
RX – Respondent's Exhibit

² For ease of reference, with no disrespect intended, individual Respondents sharing this same last name will be referred to by their first names at times throughout this opinion.

Respondent Curtis Ofori has been a CPA since 2007. (Tr. 588.) He is also a Certified Governmental Financial Manager and a Project Management Professional. (Tr. 588.) Curtis obtained a Bachelor's degree in Commerce with a major in Accounting from the University of Virginia (UVA) in 2005. (Tr. 587-88.) After college, he worked for O&A as a staff accountant from 2005 to 2009, then worked for Booz Allen Hamilton for one year before attending the University of Pennsylvania's Wharton School of Business, graduating with an MBA in 2012. (Tr. 264-65, 588-92.) After business school, Curtis continued to provide what he described as business management and development services to O&A through his self-owned company, AltaSource Management. (Tr. 264-65, 594-99.) Curtis testified that AltaSource is "sort of the business development arm" of O&A and that O&A was AltaSource's sole client until about 2015. (Tr. 594:17-18, 596.)

Respondent Otis Ofori is a graduate of UVA Law School and an attorney licensed to practice in Virginia and Massachusetts. (Tr. 790.) He began working as in-house counsel for O&A in 2009 and was General Counsel in 2013. (Tr. 264, 790-92.) After leaving this position, Otis continued to provide legal services for O&A through Curtis' company, AltaSource, for which Otis works as a legal consultant. (Tr. 264, 595, 599, 791.)

The GNMA Contract

In 2005, the Government National Mortgage Association (GNMA) awarded O&A a contract to service manufactured housing loans. (Tr. 269, 450-51; JX 7 at 2.) After obtaining the GNMA contract, O&A purchased the operations of the prior contract holder, Lockheed Martin, and hired Lockheed Martin's former employees to perform the contract work in Raleigh, North Carolina. (Tr. 269-70, 451.) O&A leased office space in Raleigh and registered itself to do business in North Carolina under the trade name "Ofori Lender Services" (OLS). (JX 20; Tr. 270-71, 444-45, 451, 461.) O&A held the GNMA contract until 2014, when GNMA sold the portfolio of loans OLS had been servicing. (Tr. 271-72.)

From 2005 to 2013, the OLS operations in North Carolina were run by OLS Vice President Karen Heller, a former Lockheed Martin employee who appeared as a witness in this proceeding. (Tr. 278, 436, 450-51.) Approximately 7 to 9 employees worked in the Raleigh office, including Office Administrator Alice Shedrick, who worked there from 2005 to March 2014 and appeared as a witness in this proceeding. (Tr. 460-61, 523.) O&A paid these employees' salaries and handled OLS' payroll and revenue. (Tr. 278, 462, 501-02, 522-24.) Ms. Etse testified that OLS kept its own books, but sent them to O&A's headquarters for her to reconcile each month. (Tr. 501-02, 522.) Charles and Curtis indicated that OLS kept records only of its basic day-to-day expenses, while O&A covered acquisitions, taxes, and other expenses on OLS' behalf. (Tr. 319-20, 637, 642, 644.) Charles explained that GNMA paid O&A for the contract work performed by OLS, and O&A would send OLS funds each month to pay its basic expenses. (Tr. 319-20.)

As a requirement of the GNMA contract, O&A obtained and was required to maintain approval from the FHA to work as a non-supervised mortgagee. (Tr. 266-67.) FHA approval permits a lender to originate, underwrite, close, service, and engage in loss mitigation for FHA loans. (Tr. 53.) An FHA mortgagee must be deemed "presently responsible" and must meet all

requirements specified by HUD in order to maintain approved lender status. See 2 C.F.R. § 180.125; 24 C.F.R. § 202.5. One such requirement is the principal business activity (PBA) requirement, which mandates that non-supervised mortgagees must derive at least half of their revenues from “lending or investment of funds in real estate mortgages, or a directly related field.” See 24 C.F.R. § 202.7(a); HUD Handbook 4060.1 REV-2, § 2-27. As another example, all FHA-approved lenders must meet the minimum net worth requirements set forth in 24 C.F.R. § 202.5(n). From 2010 to 2012, Charles Ofori, in his capacity as president of O&A, signed and submitted documents to the FHA each year certifying that O&A remained in compliance with all applicable requirements for FHA-approved lenders. (Tr. 51-53, 267-69; GX 1.)

Notification of PBA Deficiency

HUD’s Mortgagee Review Board (“the Board”) is the enforcement arm of the FHA and holds authority to suspend or withdraw a lender’s FHA approval for failure to meet the requirements described above. (Tr. 44, 48.) In or around 2010, HUD flagged O&A for failure to meet the PBA requirement, but ultimately decided to accept O&A’s fiscal year 2009 recertification submissions and give the company time to pursue additional mortgage servicing business. (RX 16; Tr. 129.) At hearing, Respondents presented evidence that O&A had been trying to build up its loan servicing business since as early as 2006. (Tr. 756-61; RX 61; RX 62; RX 63; RX 64; RX 65; RX 67.) However, in September 2011, HUD again flagged O&A for failing to show satisfaction of the PBA requirement in its fiscal year 2010 recertification submission. (RX 16.)

On or before March 6, 2012, Ms. Etse, on behalf of O&A, spoke with Board employee Erika Davis³ by phone regarding the PBA requirement. (Tr. 493.) On March 6, 2012, Ms. Etse sent Ms. Davis a follow-up email⁴ stating that O&A understood “the deficiency noted on [its] FHA account,” namely, the allegation that O&A’s primary income did not derive from lender services. (JX 19 at 4.) O&A “has a subsidiary company operating as Ofori Lender Services (OLS),” Ms. Etse wrote. (JX 19 at 4; Tr. 492.) “In order to resolve the deficiency ... it is our intention to separate the two companies and have a separate EIN number for OLS so that we can meet the HUD/FHA income requirement in order to continue to provide services for HUD.” (JX 19 at 4; Tr. 492-93.)

Ms. Davis responded to Ms. Etse’s email several hours later with a message explaining that spinning off OLS into a separate company would not necessarily resolve the deficiency:

A separation of the parent and subsidiary, by acquiring a new tax ID number for Ofori Loan Services [sic], will not allow Ofori & Associates to continue as an FHA approved lender without satisfying the [PBA] requirement. Once the new entity is established with a new tax ID number, Ofori Loan Services [sic] will have to apply for its own FHA approval (it cannot maintain

³ The record occasionally refers to Ms. Davis as Ms. Young, which was her maiden name. (Tr. 315, 493.)

⁴ The March 2012 emails discussed herein are found in Joint Exhibits 15, 16, 17, 18, and 19 and Respondent’s Exhibits 2 and 3. For ease of reference, because the exhibits contain duplicative material, this decision cites only Joint Exhibits 17 and 19, which together contain a complete copy of all the messages.

the same FHA number, nor can the FHA approval be transferred to the new entity).

(Tr. 494-95; JX 19 at 3.)

On March 7, 2012, Ms. Etse forwarded the two above-referenced emails to Charles Ofori, who was out of the country on a cruise at the time. (Tr. 310, 316-17, 491, 497-99; JX 19 at 2.) Charles responded, “Hilda[.] It is never our intention to separate the company! Where did you get that idea?” (Tr. 276, 499; JX 19 at 2.) In two subsequent messages, also dated March 7, 2012, Ms. Etse first wrote, “From talking to her [Ms. Davis], she said that was allowed ... So I ran it by Otis and we sent it to her as suggested to see if that would resolve the issue.” (JX 17.) Ms. Etse further explained that she had conceived the idea of separating the company as “a solution to resolving the [PBA] issue” because “[i]f we move out OLS revenue and have it as a subsidiary company, then our revenue is just going to be lender services and we can use that as our basis for our response.” (JX 19 at 1; Tr. 499- 500.) Charles responded, “Ok[.] That makes sense! Get quick books 2010 from Karen [Heller] add payroll info and revenue and lets submit. Do a draft f/s [financial statement].” (JX 19 at 1; Tr. 277-78, 500-01.)

At hearing, Charles indicated that his email to Ms. Etse represented the extent of his instructions regarding the separation. (Tr. 319-21, 336.) He testified that he had decided to split O&A and OLS into two separate companies at that point because he genuinely believed this would allow his business to comply with the FHA regulations. (Tr. 307-18.) He did not personally undertake any tasks to effectuate the spinoff of OLS, instead entrusting these duties to his sons Otis and Curtis and relying on Ms. Etse to coordinate the effort and monitor its progress. (Tr. 321, 333-41, 344-46, 419-20.) Otis testified he was charged with handling all the legal aspects of the separation. (Tr. 814-15.) Curtis testified he was responsible for reviewing OLS’ financial statements, and also took it upon himself to prepare spinoff documentation. (Tr. 609, 622-24.) However, there is no evidence that Otis, Curtis, or anyone else began performing any tasks related to the spinoff until 2013, and Charles admitted that they were “still in the process of completing” the separation over a year and a half later in October 2013. (Tr. 288.)

Meanwhile, on April 3, 2012, Volky Garcia, in her capacity as Director of HUD’s Lender Approval and Recertification Division, had sent O&A a Notice of Deficiency alleging that O&A still was not in compliance with the PBA requirement. (JX 9.) The Notice stated that Respondents would be referred to the Board if they failed to resolve the matter. (JX 9 at 2; Tr. 54-56.)

Charles gave the Notice of Deficiency to Otis to review in his capacity as O&A’s general counsel. (Tr. 400-01.) As noted above, under the PBA requirement, lenders such as O&A must derive at least half their revenue from lending or investing in real estate mortgages, or a directly related field. After reviewing HUD’s regulations, Otis determined that more than half of O&A’s work was real estate-related and should count toward meeting this requirement. (Tr. 796-97.)

Charles and Otis expressed these views to Willie Green, Chief of HUD’s Lender Recertification Branch, in email correspondence in July 2012. (Tr. 401-10.) On July 16, Mr. Green emailed Charles a chart displaying the revenue information O&A had uploaded to HUD’s

Lender Assessment Sub-System (LASS), which showed that only 24.15% of O&A's revenue had been derived from loan servicing in fiscal year 2010. (RX 5 at 8.) Mr. Green also declined an in-person meeting with Charles and Otis on the basis that he had no authority to waive any FHA requirements. (RX 5 at 8.) Otis later sent Mr. Green a revised chart indicating that 62.57% of O&A's 2010 revenue had come from loan servicing, and asserted that revenue had been "inadvertently mischaracterized due to our staff's unfamiliarity with the LASS system." (RX 5 at 5.) On July 26, Mr. Green responded that Otis' assertion "seems unrealistic, considering Ofori is a CPA firm that has been entering data in LASS for the past seven years," and stated that HUD could not rely on the revised revenue data without an independent audit. (RX 5 at 2.)

On September 28, 2012, Otis sent Mr. Green revised audited financial statements for fiscal year 2010.⁵ (RX 5 at 1-2; Tr. 408-09.) However, by email dated October 19, 2012, Mr. Green rejected the revised documentation because the audit was not compliant with the Generally Accepted Government Auditing Standards (GAGAS). (RX 6.) He further notified O&A that the matter had been referred to the Board. (RX 6.)

Withdrawal Proceedings

On October 23, 2012, attorney Nancy Murray, in her capacity as Director and Secretary of the Board, sent O&A a Notice of Violation and Notice of Intent to Seek Civil Money Penalty ("the NOV") alleging that O&A was not in compliance with the PBA requirement and warning that the Board was considering taking administrative action. (JX 10; Tr. 44, 56-57.) O&A was given 30 days from receipt of the NOV to provide the Board with a written response. (JX 10.)

After receiving the NOV, Charles sent it to Otis for review. (Tr. 323, 793.) Otis prepared a response, which Charles signed and submitted to the Board on O&A's behalf on November 20, 2012. (JX 11; Tr. 280, 795.) The response alleged that O&A met the PBA requirement because it derived 61% of its revenue from real estate-related activities. (JX 11; Tr. 280-81.) In support of this argument, O&A submitted the revised financial statements it had previously sent Mr. Green and identified revenues generated through real estate-related activities that O&A believed should count toward the PBA requirement. (JX 11; Tr. 281, 411-12.)

Respondents testified that they began taking steps to spin off OLS into an independent company after submitting the November 20, 2012 response. Charles testified that, at the time the response was submitted, he no longer felt that a spinoff was necessary because he believed O&A was already in compliance with the PBA requirement. (Tr. 325-26.) However, he asserted that he held a meeting and discussions in early 2013 to address the possibility of separating the company as a "backup plan" in case the Board rejected the arguments O&A had raised in its November 20, 2012 submission. (Tr. 329-31, 335, 338, 346.) Similarly, Otis testified that Charles made the decision to spin off OLS, held meetings, and instructed Otis to carry out the legal separation in January 2013. (Tr. 814-15.) Otis further testified that after the meetings, he began to move forward with the separation by drafting articles of incorporation, bylaws, and an

⁵ These financial statements can be found in Joint Exhibit 11. (Tr. 410-11.)

operating agreement for OLS, although he did not file them with the state of North Carolina.⁶ (Tr. 817, 910-12.) Curtis, for his part, testified that he was charged with performing separation tasks sometime in early 2013, but he could not pinpoint an exact date when he had first spoken to his father about separating the company, instead characterizing the process as “an ongoing conversation.” (Tr. 612:24-25, 613-19.)

On April 22, 2013, the Mortgagee Review Board held a meeting during which it considered O&A’s November 20, 2012 submission. (JX 12 at 1; RX 14; Tr. 58, 67-68.) On May 10, 2013, HUD sent O&A a letter relaying the Board’s determination that O&A was not in compliance with the PBA requirement. (JX 12.) The letter explained that, while O&A had identified various sources of income generated through activities related to real estate in general, this income did not count toward the PBA requirement because it had not been generated through lending or investing in mortgages or directly related activities. (JX 12 at 2; Tr. 65-66.) HUD granted O&A until October 31, 2013, to either demonstrate compliance with the PBA requirement by submitting audited financial statements or to request a voluntary withdrawal of its FHA approval. (JX 12 at 2; Tr. 67.)

Charles received the May 10, 2013 letter and gave it to Otis to review. (Tr. 283, 806.) Charles testified that the letter prompted him to again begin entertaining the idea of spinning off OLS into a separate company. (Tr. 328-29, 414-15.) Otis testified that the letter spurred the realization that he would need to obtain a FEIN (Federal Employer Identification Number) for OLS in order to move forward with filing the articles of incorporation and bylaws, so he submitted a FEIN request through the Internal Revenue Service’s website. (Tr. 817, 877-78.) By letter dated May 17, 2013, the Internal Revenue Service assigned OLS its own FEIN separate from the identification number used by O&A.⁷ (JX 22.)

On May 22, 2013, Charles, Curtis, and Otis met with a GNMA officer named Gregory Keith, who told them they could transfer the GNMA contract from O&A to OLS via novation. (Tr. 347-48, 415-18, 887; RX 19.) According to Charles, Mr. Keith told the Oforis that they would need to resolve their issue with the FHA before transferring the contract. (Tr. 347, 416-17.) According to Otis, Mr. Keith said they would need to obtain the FHA’s approval for the transfer. (Tr. 887-88.) Charles and Otis both testified that they also attempted to meet with HUD employee Volky Garcia (who had signed the initial Notice of Deficiency) around this timeframe to further discuss the issue, but their attempts were unsuccessful. (Tr. 418, 906-09; RX 17; RX 18.)

On September 30, 2013, HUD informed O&A that GNMA intended to sell the remaining loans that O&A had been servicing and that O&A’s GNMA contract would extend, at most, for

⁶ Respondents produced copies of the purported drafts, as well as an email from Otis to Ms. Etse stating that the documents had been saved to a shared digital folder as of October 7, 2013. (RX 23; RX 25; RX 26; RX 27.) The Court cannot verify the dates on which the drafts were prepared, as they were never filed with the state. However, Charles filed a different set of articles of incorporation for OLS in 2015, after HUD had sent notice in July 2014 that it did not consider OLS to be a separate entity. (Tr. 428-29; RX 48.)

⁷ The IRS also noted that OLS had not filed tax returns dating as far back as 2006 and instructed the company to file such returns by June 1, 2013. (JX 22.) Otis testified that he gave the letter to his father without attempting to address this issue, as he was responsible for handling only legal issues, not issues pertaining to “employees, taxes, organization, [or] anything else.” (Tr. 885:7-886:9.)

an additional six months. (GX 7.) Charles testified that, as a result, he decided to shutter OLS' physical office in North Carolina by the end of 2013. (Tr. 352, 373, 390, 428.)

Meanwhile, Respondents were preparing a response to the Board purporting to provide, "by way of OLS, proof of full compliance with HUD/FHA annual recertification requirements." (JX 13 at 3.)

Otis testified that, on or about October 7, 2013, he visited the North Carolina Secretary of State's website to determine where to submit the articles of incorporation and bylaws he had drafted for OLS and to make sure the name "Ofori Lender Services" was available. (Tr. 816-19.) The website returned three results for the search term "Ofori": "Ofori & Associates, P.C.," "Ofori & Associates, P.C., Inc.," and "Ofori Lender Services, Inc.," all of which were listed as having a formation date of November 8, 2005. (RX 37; Tr. 825, 827.) According to Otis, he mistakenly took this to mean that OLS had already been incorporated in 2005. (Tr. 818-19, 825, 830.) In reaching this conclusion, he testified that he relied solely on the information appearing on the search results page without clicking on the "Ofori Lender Services" link to obtain more information regarding the listed company's owner, registered agent, operating agreement, tax status, address, or FEIN. (Tr. 830, 836-38, 878.) He explained he was not concerned that someone else may have incorporated a different company under the unique name "Ofori Lender Services," but simply assumed the website was referring to his father's company that was already doing business in North Carolina. (Tr. 834-35.) "I will readily admit I made an incorrect legal conclusion," Otis testified; "However, that is not false. That was just I looked at it and honestly I was confused and I chose to not file the documents that I already prepared." (Tr. 818:12-17.)

Curtis indicated that sometime in October 2013, Otis informed him that OLS had been incorporated and was a separate company.⁸ (Tr. 631-34, 640.) Curtis prepared three documents for submission to the Board relating to the spinoff (collectively, "the OLS Spinoff Documentation"). (Tr. 623-24.) The first was an undated letter addressed to O&A's shareholders, which asserted that, in January 2013, O&A had announced plans to spin off its loan servicing business into an independent company, OLS, whose stock would be distributed to O&A's shareholders. (JX 13 at 18.) A second undated letter was addressed to future OLS shareholders and purported to welcome them as stockholders while encouraging them to read the attached information statement. (JX 13 at 19.) The third document was an information statement dated September 30, 2013, purporting to provide stockholders with information about OLS and the distribution of its stock. (JX 13 at 20-42.)

Curtis also helped prepare and review a set of financial statements for submission to the Board. (Tr. 609, 619.) On October 1, 2013, O&A had engaged an outside accountant, Felix Lindeire of Lindeire & Company International (LCI), to perform a financial review. (GX 36; GX 37; Tr. 481-82, 604, 654-57.) Ms. Etse prepared an initial draft of financial statements for OLS spanning the eight months from January 1, 2013, to August 31, 2013, using numbers she had pulled from the QuickBooks accounting software, and sent the draft to Mr. Lindeire on

⁸ By contrast, in a deposition about a year earlier, Curtis had testified that he did not recall anyone expressly telling him that OLS was incorporated and had simply believed the business must be incorporated, as this was one of the necessary steps for the spinoff. (Tr. 647-50.) Curtis could not pinpoint the date or occasion when he first became aware that OLS was a separate entity. (Tr. 640.)

October 11, 2013.⁹ (GX 38; Tr. 474-76, 482-83, 503-05, 635-39, 658.) On October 17, 2013, Mr. Lindeire returned the financial statements with a copy of his proposed review report. (GX 39; Tr. 659-60.) Curtis subsequently reviewed and made significant revisions to the financial statements, including increasing OLS' retained earnings as of December 31, 2012, from \$164,842 to \$850,012 and making changes to line items that increased OLS' total assets from \$338,214 to \$1,023,384. (Tr. 489-90, 610, 664-66; compare GX 39 with GX 42.) On October 28, 2013, Ms. Etse sent the revised financial statements ("the OLS Financial Statements") to Mr. Lindeire, who responded with an email indicating that he had made the requested changes. (GX 42; GX 43; Tr. 489-90, 605, 666.)

Mr. Lindeire's review report itself remained unchanged. (Compare GX 39 with GX 42.) The report, which was dated October 16, 2013, concluded that LCI was "not aware" of any material modifications needed to bring the financial statements into conformity with generally accepted accounting principles, with the caveat that LCI was not expressing an opinion on the financial statements as a whole because its review was "substantially less in scope than an audit." (GX 42; Tr. 135.)

Charles reviewed both the OLS Spinoff Documentation and OLS Financial Statements before they were submitted to the Board. (Tr. 358, 626-31.) In addition, he and Otis prepared two letters for submission to the Board. The first was a cover letter drafted by Otis and signed by Charles which stated that O&A was enclosing proof of full compliance with the FHA's recertification requirements "by way of OLS."¹⁰ (JX 13 at 3; Tr. 284-85, 875-77.) The second was a one-page letter ("the Explanation Letter"), also drafted by Otis and signed by Charles, which purported to explain that OLS had become an independent company. (JX 13 at 17; Tr. 874-75.)

On October 29, 2013, O&A sent the Board an email with four documents attached: (1) the cover letter Otis had drafted; (2) the OLS Financial Statements; (3) the Explanation Letter; and (4) the OLS Spinoff Documentation. (JX 13; Tr. 68, 72-73.) Ms. Murray, who appeared as a witness in this proceeding, received the October 29, 2013 submission. (Tr. 73.) She testified that she added it to the briefing book she was preparing for the Board, which also contained copies of the NOV, the November 20, 2012 submission wherein O&A had attempted to identify revenue that met the PBA requirement, and the May 10, 2013 letter from the Board informing O&A that it was still not in compliance with the PBA requirement. (Tr. 83-84, 155, 158.)

The Board convened on December 16, 2013. (RX 53; Tr. 73.) Ms. Murray had previously sent the briefing book to the Board members, and at the meeting, she presented an oral summary of the proceedings against O&A. (RX 53; Tr. 83-84, 95-96, 98-100.) The Board voted to withdraw O&A's FHA approval. (Tr. 104-05.)

⁹ At deposition, Ms. Etse testified that she had shown the draft to Charles Ofori, who had sent it to Curtis for review, before she sent it to Mr. Lindeire; however, at hearing, Ms. Etse testified she no longer recalled when she had shown the draft to Charles and Curtis. (GX 75; Tr. 483-86, 506.) Curtis testified that he did not review the draft before it was sent to Mr. Lindeire on October 11. (Tr. 659.)

¹⁰ The letter further stated that O&A would later furnish the Board with year-end audited financial documents for OLS for 2013. Respondents never submitted the referenced documents. (JX 13 at 3; Tr. 287-92.)

HUD informed O&A of the Board's decision by Notice of Administrative Action dated February 18, 2014 ("the NOAA"). (JX 14.) The NOAA indicated that O&A's approval would be withdrawn pursuant to 12 U.S.C. § 1708(c) and 24 C.F.R. § 25.5 and § 25.6(g). (JX 14 at 3.) The NOAA further indicated that O&A's October 29, 2013 submission had failed to demonstrate compliance with the PBA requirement because it did not show that O&A derived 50% or more of its revenue from investing or lending in mortgages or a directly related field. (JX 14 at 2.) In a footnote, HUD remarked that OLS was not an FHA-approved mortgagee. (JX 14 at 2 n.1.)

Subsequently, O&A appealed the Board's decision to withdraw its FHA approval. Otis was counsel of record for O&A during the appeal. (Tr. 892, 896.) He argued, on behalf of O&A, that O&A met the PBA requirement in part because it received revenue from loan servicing through its GNMA contract. (Tr. 899.) An Administrative Law Judge (ALJ) upheld the Board's withdrawal decision in May 2014. See In re Ofori & Assocs., PC, HUDOHA 14-AF-0070-MR-006 (HUDALJ May 8, 2014), motion for relief from judgment denied (HUDALJ Mar. 1, 2016).

Current Debarment Proceedings

Ms. Murray testified that, after receiving the October 29, 2013 submission, she became aware that certain information in the submission was, in her opinion, false. (Tr. 116.) In fact, immediately after the Board had received the submission, Aaron Horenstein, a financial analyst for HUD's Office of General Counsel who appeared as a witness in this proceeding, had sent Ms. Murray an email opining that the financial statements appeared pro forma in nature and expressing skepticism about the purported spinoff of OLS. (RX 31; Tr. 145-48, 174, 253-55.)

Ms. Murray indicated that submitting false information to the Board impacts "the integrity of the entire process" because the Board, which is the only division of HUD empowered to take action against a lender for a violation of FHA requirements, relies on lenders to submit truthful information. (Tr. 122-23.) Thus, submission of false information undermines the reliability of the Board's decisionmaking by detracting from its ability to make well-founded decisions. (Tr. 123-25.)

On July 1, 2014, HUD issued Notices of Proposed Debarment (NOPDs) to Charles Ofori and O&A. (JX 1; JX 2.) On April 13, 2015, HUD issued separate NOPDs to Curtis and Otis Ofori and supplemental NOPDs to Charles and O&A setting out the allegations against Respondents in greater detail. (JX 3; JX 4; JX 5; JX 6.)

The NOPDs alleged that the documents provided to HUD in the October 29, 2013 submission were misleading or contained false information in several respects. Specifically, the NOPDs alleged that Respondents had falsely characterized OLS as an independent business entity when, in fact, OLS existed only as a name under which O&A conducted business and had never existed as a company that was legally distinguishable from O&A. The NOPDs further alleged that all four Respondents had knowingly submitted or caused to be submitted the false information because all four Respondents had participated in the creation of the October 29, 2013 submission; knew or had reason to know that the submission had been prepared for submission to HUD and the Board; and knew or had reason to know that information contained

therein was false. According to the NOPDs, Respondents' acts and omissions¹¹ constituted cause for debarment under 2 C.F.R. § 180.800(b) and (d). Each of the NOPDs stated:

Pursuant to 24 C.F.R. §§ 25.6(g), (l), (p) and (q), 202.2, 202.3, and 202.5(j)(4), the submission of false information to HUD as described above constitutes a violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program ... The submission of false information to HUD as described above is of so serious or compelling a nature that it affects your present responsibility.

(JX 1; JX 2; JX 3; JX 4; JX 5; JX 6.)

Charles testified that after receiving the initial NOPDs in July 2014, he contacted an outside attorney, who showed him for the first time that North Carolina's website indicated OLS had not been incorporated and was not a legally separate entity. (Tr. 352-54, 421.) On August 15, 2014, O&A and Charles submitted a response in support of their present responsibility arguing that the standard for debarment was not met. (JX 7.) O&A and Charles contended that Charles had made good faith efforts to gain clarification regarding HUD's requirements, and, in representing that OLS was a separate company, had simply made an honest mistake in relying on in-house counsel's erroneous advice that OLS had been incorporated in 2005. (JX 7.) O&A and Charles argued that the submission of the allegedly false information did not constitute a violation so serious as to affect the integrity of an agency proceeding and that the factors set forth in 2 C.F.R. § 180.860 supported both Respondents' present responsibility. (JX 7.)

On May 28, 2015, all four Respondents submitted a joint response to the supplemental NOPDs reiterating that they had simply made a mistake and asserting that the April 2015 NOPDs constituted an attempt to punish Respondents for defending their rights against HUD. (JX 8.) Respondents argued that they had made a sincere effort to comply with HUD's requirements and to separate OLS from O&A; that they honestly believed the separation was complete as of October 29, 2013; and that they did not intentionally submit false information to the Board. (JX 8.) They further argued that HUD's detailed allegations in the supplemental NOPDs were baseless and, in support, offered an explanation of the OLS Financial Statements, as well as counterarguments addressing the specific falsities alleged in the NOPDs. (JX 8.) Respondents asserted that HUD had intentionally delayed the issuance of the supplemental NOPDs in order to punish them, and had retaliated against them by broadening the scope of the proceedings to include Curtis and Otis and by increasing the proposed debarment period from 5 to 7 years. (JX 8.)

The matter proceeded to hearing on July 26-28, 2016. At hearing, HUD argued that the October 29, 2013 submission contained falsities and that Respondents participated in, knew of, or had reason to know of the falsities, demonstrating a disregard for the truth which showed that the Respondents were not "presently responsible" and should not be permitted to do business

¹¹ O&A was charged on the basis of its own acts. (JX 1.) Charles was charged on the basis of his own acts and omissions and the acts and omissions of O&A "which pursuant to 2 C.F.R. § 180.630 may be imputed to you." (JX 4.) Curtis was charged on the basis of his "acts and omissions as an employee and/or consultant" for O&A. (JX 5.) Otis was charged on the basis of his "acts and omissions as an employee and/or in house counsel" for O&A. (JX 6.)

with HUD. (Tr. 9-16.) Respondents, for their part, conceded that OLS was not an independent entity as of October 29, 2013, but maintained that the errors in their submission to HUD flowed from their good faith reliance on the contrary advice of O&A's in-house counsel, Otis Ofori, that OLS was a separate corporation at the time. Respondents further suggested that the evidence failed to establish a violation of a public agreement or transaction so serious as to affect an agency program or demonstrate a lack of present responsibility. (Tr. 17-27.) In support of their respective arguments, the parties presented extensive testimony regarding the contents of the October 29, 2013 submission.

It is undisputed that the submission erroneously represented that OLS had become a separate entity. For example, the notes to the OLS Financial Statements stated: "OLS was part of Ofori & Associates, PC up until December 31, 2012. As of January 1, 2013, OLS was organized as a separate entity with its own Federal Tax Identification Number." (JX 13 at 12.) Curtis had added this language when editing the OLS Financial Statements. (Tr. 680; compare GX 39 with GX 42.) He testified that he identified January 1 as the date of organization "because that is the day we wanted to recognize the income for Ofori Lender Services for tax purposes." (Tr. 684:3-5.) Charles readily admitted, "It should not have been written like that." (Tr. 365:24-25.) But he asserted that when he signed the October 29, 2013 submission, he honestly believed OLS existed as a separate legal entity based on the documents his sons had prepared, which he had reviewed but had not attempted to verify. (Tr. 350-51, 356-62.) He explained that he had relied on his sons because their knowledge of corporate spinoffs was superior to his and he trusted them to exercise due diligence. (Tr. 335-38, 353, 358-62.)

Charles also claimed that he had treated OLS as a separate company after October 2013 by filing separate corporate tax returns for OLS for the year 2013. (Tr. 384-85, 421-27; see JX 24; JX 25; JX 29.) Admittedly, however, the federal tax returns were not filed until October and November 2014, after he had received the NOPDs. (Tr. 541, 563-65; JX 24; JX 25; JX 29.) In addition, it was not until 2015 that Respondents sent the IRS a request to correct OLS' start date to 2013. (JX 27; JX 28; Tr. 572.)

Further, Charles made several statements inconsistent with his assertion that he had treated OLS as a separate company after October 2013. First, he testified that by the beginning of 2014, he had realized that additional steps were required to complete the separation of OLS from O&A, and had later decided it did not make sense "to continue the separation," (Tr. 385:13, 390:4), once it became evident that the company would lose its FHA license. (Tr. 289-91, 385-91.) Second, he conceded that O&A was still paying OLS' costs and expenses as of October 2013 and indicated that O&A continued to pay these costs and expenses, including those identified as salaries and wages on the tax returns he had filed. (Tr. 558-63, 646.)

Although the record contains voluminous documentary evidence, there is scant evidence that OLS paid any expenses or held any assets in its own name. In fact, the only documentation to this effect consists of a set of bank statements from a Coastal Federal Credit Union account held in OLS' name. (GX 13.) According to Curtis, this was an account used by OLS under O&A's FEIN. (Tr. 771.) The bank statements show that the account's balance was approximately \$12,000 as of December 31, 2012, and approximately \$18,000 as of August 31, 2013. (GX 13 at 1, 24.)

Nonetheless, the OLS Financial Statements represent that OLS had more than \$850,000 in retained earnings as of December 31, 2012, and more than \$1,000,000 in assets as of August 31, 2013. (JX 13 at 8, 10.) At hearing, both parties presented testimony regarding the financial statements and the significant revisions Curtis had made to the initial draft Ms. Etse had prepared. Specifically, Curtis had changed the Balance Sheet to increase OLS' total assets for the eight months ended August 31, 2013, from \$338,214 to \$1,023,384 by making the following line item changes: (1) he increased "accounts receivable" from \$302,906 to \$513,015; (2) he changed "deposits" to "security deposits" and increased the listed amount from \$3,671 to \$103,671; and (3) he added a line item for "investments" in the amount of \$375,061. (JX 13 at 8.) Curtis had also changed the Statement of Change in Stockholders' Equity to increase OLS' retained earnings as of December 31, 2012, from \$164,842 to \$850,012, which resulted in a corresponding increase in retained earnings listed on the 2013 Balance Sheet. (JX 13 at 8, 10.)¹²

Curtis testified that he increased the "accounts receivable" figure because QuickBooks showed that O&A owed OLS much more money than had been remitted, as OLS had been servicing loans for O&A since 2005. (Tr. 723-25, 732-33.) However, as noted above, O&A had been paying all of OLS' daily expenses during OLS' entire existence. (Tr. 319-20.) In addition to representing money owed, Curtis stated that the increase in accounts receivable was intended to reconcile items including healthcare and 401(k) expenses for employees and an approximately \$400 revision to an invoice that had not been accounted for in the draft financial statements. (Tr. 728-32.) Previously, in response to the NOPDs, Respondents had specified that the \$210,019 increase in "accounts receivable" reflected a \$14,483 downward adjustment to payroll, a \$428 upward adjustment to revenue, and a \$195,199 upward adjustment to retained earnings from 2012 attributable to the GNMA contract.¹³ (JX 8 at 9.)

Curtis testified that he increased "security deposits" to account for a \$100,000 warehouse line of credit secured by O&A on behalf of OLS so that OLS could begin growing its business. (Tr. 711-15.) However, the February 11, 2013, commitment letter from EagleBank lists O&A as the borrower and states, "This Commitment letter is not assignable." (JX 8 at 144-45; Tr. 201-04.) Curtis explained that he considered the line of credit an asset rather than a liability because O&A had obtained it by "secur[ing] it with cash that Ofori Lender Services actually had"; in other words, OLS was simply "borrowing its own money." (Tr. 741:9-12.) However, documentation produced by Respondents shows that O&A held the collateral that secured the loan. (JX 8 at 147; Tr. 204.)

Aside from the \$100,000 that Curtis added to account for the credit line, the remaining \$3,671 of the "security deposits" figure was intended to account for the security deposit for the

¹² The changes Curtis made to the financial statements can be verified by comparing GX 39, which contains a copy of the financial statements before Curtis edited them, with GX 42, which contains a copy of the final draft Curtis sent to the outside reviewer, Mr. Lindeire. The draft appearing in GX 42 is identical to the financial statements that Respondents ultimately submitted to the Board in JX 13. Respondents' initial explanations for the line item changes can be found in their joint answer to the 2015 NOPDs in JX 8. Respondents appended to JX 8 various documents purporting to support the changes. Duplicates of these documents appear in a number of separate exhibits; for ease of reference, and because JX 8 is paginated, this decision cites JX 8 wherever possible.

¹³ OLS' Statement of Income did not reflect any changes in revenue or labor costs, and the Statement of Change in Stockholders' Equity reflected a change in 2012 retained earnings that was much greater than \$195,199. (JX 13 at 9-10.) Also, as previously noted, O&A covered payroll for OLS.

lease for OLS' office space in North Carolina. The notes to the OLS Financial Statements explained, "OLS entered into an operating lease agreement for office space in 2005." (JX 13 at 14.) However, OLS was not a party to the lease, as O&A was the listed tenant. (JX 20 at 6.) Charles indicated that O&A intended to execute a sublease, but never ended up doing so because he decided to close OLS' physical office by the end of 2013 due to the loss of the GNMA contract. (Tr. 371-73.)

Curtis testified that he added the "investments" line item in the amount of \$375,061 to reflect a transfer from O&A into a Fidelity Investments account that was intended to capitalize OLS' business and account for revenue OLS had accumulated since 2005. (Tr. 743-44.) Respondents produced supporting documentation showing that O&A made a \$1.5 million wire transfer into a Fidelity account on May 29, 2013. (JX 8 at 158.) Respondents allege that they reserved \$375,061 of this amount for OLS. (JX 8 at 9.) However, Curtis admitted that the Fidelity account was held in O&A's name and no funds were ever transferred out of it. (Tr. 780.) He also testified that the purpose of adding \$375,061 in "investments" was to show that OLS' adjusted net worth was at least \$1 million such that OLS would meet the FHA's recertification requirements. (Tr. 690-91; see JX 8 at 8-9.) He explained that the FHA had recently increased its minimum net worth requirement from \$250,000 to \$1 million. (Tr. 743-44.)

Curtis testified that the \$685,170 increase in OLS' "retained earnings" for 2012 that was reflected in the Statement of Change in Stockholder's Equity was intended to capture OLS' income from 2012 and represent the capitalization of the company, although he admitted that OLS had not been in existence as of December 31, 2012. (Tr. 672-75.) He explained that "what we called the retained earnings were the earnings that Ofori Lender Services had earned since 2005 ... I may be using the word capitalization incorrectly and I apologize, but the point and what this is trying to capture is that Ofori Lender Services was due money for work that it had performed that wasn't paid by Ofori & Associates." (Tr. 676:8-10, :19-23.) In other words, the draft financial statements had failed to account for income that had been earned but not remitted, and Curtis explained he had arrived at the revised retained earnings figure by recognizing these amounts pursuant to the accrual method of accounting. (Tr. 737-38, 746-47.) He further stated that the three specific changes that had influenced retained earnings were the increases in OLS' accounts receivable, security deposits, and investments. (Tr. 745-47, 784-85.) He did not explain why security deposits such as the warehouse line of credit, which had not been obtained until February 2013, and investments such as the money reserved for OLS in the Fidelity account, which had not been wired into the account until May 2013, were rolled into OLS' retained earnings as of 2012. (See Tr. 779-80.)

In general, with regard to the OLS Financial Statements, Curtis testified, "I'll be the first one to admit after reviewing some of these, look, there were some mistakes." (Tr. 610:1-3.) But he also asserted that every change he had made was accurate and supported by company records. (Tr. 748-49.) HUD, by contrast, maintains that the changes are inconsistent with Respondents' own balance sheets produced in discovery and with Respondents' explanations concerning OLS' retained earnings and net worth. (Gov. Br. 18-19.) However, HUD did not present testimony from any accounting or financial expert to support its evaluation of the financial statements and Curtis' changes.

Otis, who helped prepare the cover letter and Explanation Letter that were included in the October 29, 2013 submission, admitted that he had made a mistake in believing OLS was a separate company at the time of the submission, but testified that he would not have intentionally submitted incorrect information to the Board. (Tr. 904-05.) He insisted his mistake was inadvertent, explaining that “[t]here was no benefit to forming the corporation incorrectly.” (Tr. 825:5-6.) He testified he had incorporated a company before, but had never handled a legal separation and did not consult with anyone outside the company to help with the spinoff of OLS. (Tr. 816.) Nonetheless, he believed he had exercised due diligence and asserted he had taken all necessary steps to ensure he was presenting truthful information to HUD. (Tr. 904-05.)

The Explanation Letter began, “Ofori & Associates, PC (Ofori) is an FHA-approved mortgagee. As an FHA-approved mortgagee, Ofori serviced loans under Ofori Lender Services (OLS), which was part of Ofori. As of this writing, OLS is now an independent company.” (JX 13 at 17.) Documents produced by Respondents during discovery and submitted to the record by HUD indicate that Charles created an initial draft of the Explanation Letter which stated, “Ofori Lender Services (OLS) which functioned as a part of a larger entity, *is becoming* an independent company.” (GX 52) (emphasis added). But Otis edited the draft sometime after October 24, 2013, to instead state that OLS “is now” an independent company. (GX 53.) When asked at hearing why he had changed this language, Otis asserted that he was confused and did not want to speculate about “a draft that probably had no relevance to me at the time.” (Tr. 872-73, 874:7-9.) When pressed to explain why he used the phrase “[a]s of this writing” in the final draft if he believed OLS had been in existence since 2005, Otis seemed to concede this was a poor choice of words, but disclaimed any intent to deceive. (Tr. 875.) Otis further admitted that, although the Explanation Letter appeared to indicate that OLS was approved by GNMA to service Title I mortgages, he had never applied for such approval for OLS. (Tr. 889-90.)

Otis also testified about the meetings he asserted his father had held in January 2013 which had allegedly spurred Otis to draft articles of incorporation, bylaws, and an operating agreement for OLS. Respondents produced three documents purporting to contain meeting minutes taken by Otis. The first document pertains to a January 7, 2013 meeting purportedly attended by Charles, Otis, Ms. Etse, and Ms. Heller. (JX 30.) The document states, in its entirety: “At the meeting held on January 7, 2013, Ofori & Associates, PC agreed on auditing Ofori Lender Services (OLS) as a completely separate entity. Ofori & Associates, PC decided to audit OLS’s financial statements separately as well as file separate tax returns for the OLS.” (JX 30.) The other two documents are printed on different letterheads, but contain identical minutes for a January 31, 2013 meeting purportedly attended by the same four people who had attended the earlier meeting, along with one other O&A employee.¹⁴ (JX 31; JX 32.) Both documents state: “At the meeting held on January 31, 2013, Ofori Lender Services agreed to spin-off from Ofori & Associates, PC and become a separate company.” (JX 31; JX 32.)

Otis indicated that he had typed up the minutes after the meetings, possibly months later, based on his contemporaneous handwritten meeting notes. (Tr. 857-58, 860-62, 867-68.) At

¹⁴ When asked why there were two different copies of the same meeting minutes, Otis testified that one was probably a draft, but asserted, “I can’t sit here right now and tell you which one I put together and therefore was the actual copy that we used because obviously letterheads are changed and I’m going back and I’m putting down notes of which I had used before.” (Tr. 869:2-6.)

hearing, he could not independently recall any details about the meetings such as how they began or ended, who was physically present (as opposed to participating via teleconference), or what topics were discussed other than what was mentioned in the minutes. (Tr. 855-60, 864-66.) However, he definitively testified that none of the attendees of the January 31 meeting were surprised to hear that OLS was planning to spin off from O&A. (Tr. 866-67.)

By contrast, Ms. Heller testified that, in her time serving as Vice President of OLS from 2005 to 2013, she was never informed of the possibility that OLS might become a separate company and never attended any meetings at which it was discussed that OLS would separate from O&A, would be audited separately, or would file separate tax returns. (Tr. 437-38, 453.) She affirmatively denied attending the purported January 7, 2013 and January 31, 2013 meetings. (Tr. 441-43, 452-53.) Ms. Shedrick, who was OLS's Office Administrator from 2005 to March 2014 and later worked for O&A, also testified that she was never informed that OLS was becoming a separate company or was spinning off. (Tr. 460-62.)

The OLS Spinoff Documentation prepared by Curtis indicated that a meeting or action by O&A's Board of Directors had taken place on January 1, 2013, rather than January 7 or 31. Specifically, the documents stated:

On January 1, 2013 Ofori announced its intention to pursue a plan to separate certain of its loan servicing businesses into a stand-alone, privately-held company. ... In furtherance of this plan, on 1/01/2013, the Ofori Board of Directors approved the distribution of all of the issued and outstanding shares of OLS' common stock ... On 1/01/2013, the distribution date,^[15] each Ofori stockholder will receive 1 share(s) of OLS' common stock for each share of Ofori's common stock held at the close of business on the record date, as described below.

(JX 13 at 38.)

Respondents did not produce any stock certificates, stock purchase agreements, or other documentation to confirm that a distribution actually occurred. (See Tr. 217-21.) Charles, who is the sole shareholder of O&A and the only member of its Board of Directors, testified that he had held a meeting but could not remember the date. (Tr. 378, 381-82.) He indicated that the referenced announcement of the separation plan may have constituted an announcement to himself as the sole shareholder. (Tr. 381-82.) He opined that the OLS Spinoff Documentation was not necessary, explaining that Curtis simply "went online and came up with some complicated document which we didn't need," (Tr. 379:2-3), and asserted he would handle the spinoff differently if faced with the same situation again. (Tr. 378-80.)

Curtis testified that he had created the OLS Spinoff Documentation to memorialize the spinoff and provide notice to Charles and HUD, although he said he now realized he could have simplified it somewhat. (Tr. 693, 696, 755-56.) He characterized the Spinoff Documentation as

¹⁵ Elsewhere, the Spinoff Documentation stated, "Ofori currently expects that the distribution will be completed in the first quarter of 2013." (JX 13 at 31.)

a “draft” created from a publicly available document he had found on the internet. (Tr. 697, 700, 755.) Curtis admitted that he had convinced his father to submit the Spinoff Documentation to the Board in part because he had spent a significant amount of time creating it. (Tr. 629.)

The OLS information statement attached to the Spinoff Documentation stated, “OLS will enter into a separation and distribution agreement with Ofori ... OLS will enter into various other agreements to effect the separation and provide a framework for its relationship with Ofori after the separation.” (JX 13 at 25.) When asked whether OLS had ever entered into such agreements with O&A, Curtis reiterated that he considered the Spinoff Documentation to be a forward-looking draft, and indicated that a separation and distribution agreement would be one of the “finalized steps” taken only after receiving FHA approval. (Tr. 700-01.) Curtis conceded making mistakes in the Spinoff Documentation, such as representing that Charles would not continue to serve as management for both O&A and OLS and listing a par value for OLS’ stock that conflicted with the figure presented in the OLS Financial Statements. (Tr. 697, 705.) But Curtis insisted that these mistakes were not intentional or willful. (Tr. 705-06.) He asserted that he had engaged in due diligence in preparing the documents, and claimed it would not have benefited Respondents to provide inaccurate information to HUD. (Tr. 770.)

DISCUSSION

As a preliminary matter, the foregoing factual background section, together with all exhibits contained in the record, are hereby incorporated into this discussion section and are made a part of these findings of fact.

Upon consideration of the entire record, Respondents’ sundry affirmative defenses of failure to state a claim for which relief may be granted, failure to plead with particularity, *res judicata*, waiver, laches, biased action taken by the government against Respondents, and related defenses are found to be without merit and are hereby dismissed. Upon further consideration, I reach the following findings.

A. Grounds for Debarment

HUD has the burden of establishing cause for debarment by a preponderance of the evidence. 2 C.F.R. § 180.855(a). Once the agency has established a cause for debarment, a respondent has the burden of “demonstrating to the satisfaction of the debarring official that [he or she is] presently responsible and that debarment is not necessary.” 2 C.F.R. § 180.855(b). Even if a cause for debarment is determined to exist, the debarring official need not impose a sanction, and may consider the seriousness of the Respondent’s acts or omissions and the mitigating or aggravating factors set forth at 2 C.F.R. § 180.860 when making a decision regarding the severity of any imposed sanction. 2 C.F.R. § 180.845(a).

Federal agencies may debar government contractors or others doing business with the Government in order to protect the fiscal integrity of government programs. The regulations at 2 C.F.R. § 180.800(b) and (d), as applied by 2 C.F.R. § 2424.10, provide that HUD contractors may be debarred for the following conduct:

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as –

- (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
- (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
- (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction; ... or

(d) Any other cause of so serious or compelling a nature that it affects [Respondents'] present responsibility.

Thus, in order to demonstrate that debarment is appropriate under § 180.800(b), the Government must demonstrate (1) a violation of the terms of a public agreement or transaction, (2) that is “willful” or systemic, and (3) that is “so serious as to effect the integrity of an agency program.” To demonstrate that debarment is appropriate under § 180.800(d), the Government need only prove that Respondents’ conduct was so serious or compelling as to affect their present responsibility.

In this case, the Government seeks to impose a seven-year debarment against Respondents for filing false incorporation documents and false financial statements. The evidence of record demonstrates that Respondents filed false and misleading documents with the Mortgage Review Board, and thereby willfully failed to comply with FHA requirements in a manner so serious as to affect the integrity of an agency program and to affect their present responsibility. See 2 C.F.R. § 180.800(b), (d). The Government has established that Respondents violated a number of HUD guidelines, applicable laws, and regulations, and have demonstrated a complete disregard for their responsibilities. As an experienced accountant, Respondent O&A’s conduct raises serious concerns that hold significant implications for the public interest. I, therefore, find that the Government has established a clear basis for the imposition of a debarment in this case, for the following reasons.

1. Respondents violated the terms of a public agreement or transaction.

As detailed above in the “Factual Background” section, the documents Respondents submitted to the Mortgage Review Board on October 29, 2013, included a cover letter, an Explanation Letter purporting to explain that OLS had become a separate legal entity, and incorporation documents and financial statements for OLS. These documents contained false and misleading information, in violation of the terms of a public agreement.

a. OLS Incorporation Documents and Explanation Letter

Respondents have admitted that the OLS incorporation documents presented to the Board on October 29, 2013, falsely represented that OLS was a legal corporation in existence on that

date. (Tr. 18, 353-54, 819, 904-05; JX 7 at 7.) Curtis prepared the incorporation documents from a template he had found online, and admitted they contained minor errors such as misstating the par value of stock and representing that Charles would not continue to serve as management for O&A after the spinoff. (Tr. 697, 700, 705.) The documents contained other, more material representations which appear to be false, as they are uncorroborated by any evidence. Namely, the documents stated that OLS' stock would be distributed to O&A's shareholders during the first quarter of 2013 and that O&A would enter into a separation and distribution agreement with OLS to effectuate the spinoff; however, there is no evidence that either of these actions was ever undertaken. (See JX 13 at 25, 38; Tr. 217-21, 700-01.)

The incorporation documents also indicated that O&A's Board of Directors had notified its "shareholders" of the spinoff after announcing its plans during a January 1, 2013 meeting. (See JX 13 at 18, 25, 31, 38.) This representation was misleading because the Board of "Directors" admittedly consisted of just one person, Charles, who was also the sole shareholder. (Tr. 378, 381-82.) Further, it is doubtful, at best, that the spinoff plans were announced during a meeting on January 1, 2013. Charles testified he had held either "a meeting" or "meetings" with Curtis and Otis at the beginning of the year, but he could not identify the date or dates of any such meetings. (Tr. 330, 335, 338.) Respondents produced copies of meeting minutes, which had not been contemporaneously recorded and were only one or two lines long each, for meetings purportedly held on January 7 and January 31, but nothing for a January 1 meeting. (JX 30; JX 31; JX 32.) Contrary to Charles' testimony, the meeting minutes indicate that Curtis did not attend either of the meetings. At hearing, Otis, who had prepared the minutes, could not provide any details about the purported meetings, nor could he satisfactorily explain why there were two different copies of minutes for the January 31 meeting. (Tr. 855-69.) The minutes indicated that Karen Heller, Vice President of OLS, had been present at both meetings, but she denied attending them. (Tr. 441-43, 452-53.) Moreover, both Ms. Heller and OLS' Office Administrator, Alice Shedrick, denied *ever* being informed that OLS was becoming a separate company. (Tr. 437-38, 453, 460-62.) On the whole, the testimony and evidence is contradictory and fails to corroborate Respondents' claim that they held a meeting or meetings in January 2013 to announce and discuss the spinoff.

Additionally, contrary to Respondents' claim that they began taking steps to separate OLS in early 2013, Charles testified that he had believed separation was unnecessary at that time. (Tr. 325-26.) This makes sense because, as of January 2013, Respondents had been involved in withdrawal proceedings before the Board for several months and had taken the official position that O&A met the PBA requirement in its own right based in large part on the revenue it derived from the GNMA contract. Although the spinoff documentation, Otis' meeting minutes, and Respondents' testimony suggests that they sought to recognize OLS as a separate entity in January 2013, it seems highly unlikely that Respondents would have actually taken any action to formally separate OLS from O&A at this time, as they would have been shunting O&A's largest source of mortgage-related income into a separate company and thereby effectively abandoning the position they had taken before the Board. The Court also doubts Otis' testimony that he drafted articles of incorporation, bylaws, and an operating agreement for OLS shortly after the purported January 2013 meetings, considering that the drafts he produced are undated and were never filed with the state. (RX 23; RX 25; RX 26; RX 27; Tr. 817, 910-12.)

There is no appreciable evidence that Respondents truly began taking steps to separate OLS from O&A until after they received the Board's May 10, 2013 letter rejecting O&A's argument that it met the PBA requirement in its own right. (JX 12.) Within two weeks after receiving the letter, Otis had applied for a FEIN for OLS and all three individual Respondents had met with a GNMA officer, Gregory Keith, to discuss how they should proceed. (JX 22; RX 19; Tr. 817, 877-78.) Mr. Keith informed Respondents that they would need to obtain FHA approval to transfer the GNMA contract to OLS, and that O&A would need to resolve its issue with the FHA first. (Tr. 347, 416-17, 887-88.) Then, in September 2013, HUD notified O&A that it would lose the GNMA contract within, at most, six months, leading Charles to make the decision to close OLS' physical office by the end of 2013. (GX 7; Tr. 352, 373, 390, 428.)

Against this backdrop, in October 2013, for the stated purpose of proving that O&A met the FHA recertification requirements "by way of OLS," Respondents submitted the OLS incorporation documents, along with an Explanation Letter stating that OLS was now an independent company. (JX 13 at 3, 17.) The Explanation Letter also indicated that OLS held GNMA approval to service Title I mortgages and had processed a portfolio of almost 4,000 loans. (JX 13 at 17.) Respondents could not have genuinely believed that OLS held GNMA approval, given that Mr. Keith had informed them several months earlier that they would need to resolve their issues with the FHA and then obtain FHA approval before transferring the GNMA contract to OLS' name. It also seems unlikely that Respondents genuinely believed OLS was separately incorporated as of October 2013 or even wanted it to become a separate entity anymore, as Charles already knew that he would be closing the OLS office by the end of the year. It seems more likely that Respondents misleadingly represented that OLS was a separate entity, without regard for the truth, as an unsuccessful last-ditch effort to forestall an administrative action by the Board against O&A.

The foregoing factual findings demonstrate not only that the Explanation Letter and OLS incorporation documents were false and misleading, but also demonstrate the elaborate nature of the misrepresentation. Respondents prepared or caused to be prepared shareholder notices and incorporation documents to be filed with the North Carolina Secretary of State's Office, all in support of the claim that OLS was an existing corporate entity. Moreover, this misrepresentation was made directly to this department's enforcement authority charged with examining compliance with agency rules. Contrary to Respondents' characterization of their actions as constituting a mere "honest mistake," I find that the misrepresentation, together with the misleading documents filed in support therewith, was part of an elaborate and recklessly undertaken plan of action. Based on the facts of record, including Respondents' own admissions, I find that Respondents "caused to be submitted" documents that falsely claimed that OLS was an independent company.

b. OLS Financial Statements

The Government alleges that the OLS financial statements filed with the Board contained certain material misrepresentations that provide further support for debarment in this case. Specifically, the Government states that OLS' retained earnings and other asset figures were

overstated, and that the financial statements essentially inflated the value of OLS' assets. (GB at 18-26.)

As discussed in detail above, Curtis Ofori, who was responsible for preparing the financial statements, had made numerous changes to the initial draft financial statements that significantly increased OLS' reported assets and retained earnings. Curtis admitted that "there were some mistakes" in the financial documents. (Tr. 610:1-3.) However, the record does not specifically delineate the financial analysis to which those mistakes relate. Curtis opined that the changes he made were fully supported by company records, although Respondents failed to produce all of these records, and stated that the apparent disparities in financial treatment of assets is explained by application of the cash versus accrual methods of accounting. (Tr. 737-38, 746-49.) He explained that he utilized the accrual method in preparing the OLS balance sheet and financial statements to reflect services rendered by OLS on the GNMA contract, on behalf of O&A since 2005, that had not been reimbursed by O&A. (Tr. 723-25, 732-33, 741, 743-44, 676.)

Under the accrual method of accounting, asset and liability values are determined based on the time they accrue rather than the time of cash receipts. 26 C.F.R. § 1.446-1(c)(1)(ii)(A). In determining the accuracy or reasonableness of the underlying assumptions supporting Curtis' accrual treatment of the asset values, the Court would be required to perform a technical, financial analysis. Ordinarily, it is improper for courts to undertake such determinations. Matters which are beyond the ken of a layperson are properly subject to expert testimony under Rule 702 of the Federal Rules of Evidence. A court may not rely on its own subjective knowledge of such matters to find a fact not properly established through expert testimony. See SEC v. Ginder, 752 F.3d 569, 575 (2d Cir. 2014) ("Generally speaking, [expert testimony] is needed when the facts and concepts of a case are beyond a layperson's understanding."); In re Mirena IUD Prods. Liability Litigation, 202 F. Supp. 3d 304, 313 (S.D.N.Y. 2016) ("[A]ll jurisdictions have a similar rule requiring expert testimony where a matter is outside the ken of an ordinary layperson.").¹⁶

Expert testimony is especially helpful in cases where the factfinder is charged with evaluating the objective reasonableness of a specific type of person's conduct, such as a reasonable lawyer or a reasonable CPA. See, e.g., Florek v. Village of Mundelein, 649 F.3d 594, 602 (7th Cir. 2011) (explaining that "it is more likely that Rule 702's line between common and specialized knowledge has been crossed" when the defendant is being held to a standard of conduct that is "defined by ... the specific," such as the standard of conduct for a reasonable police officer rather than simply a reasonable person). Courts often require expert testimony to aid a panel of jurors in factfinding, and a judge engaging in factfinding during a bench trial should similarly refrain from holding himself out as an expert on matters better suited for an

¹⁶ See, e.g., Burke v. Air Serv. Int'l, Inc., 685 F.3d 1102, 1105 (D.C. Cir. 2012) (explaining that, under D.C. law, plaintiff in negligence case "must put on expert testimony to establish what the standard of care is if the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson"); Poulnot v. District of Columbia, 608 A.2d 134, 143 (D.C. 1992) (holding that, in absence of expert testimony, it was error for trial judge to rely on his own knowledge of rate of alcohol metabolism, as this was not a matter of common knowledge). Cf. Fed. R. Evid. 201 (barring courts from relying on extra-record evidence or knowledge except as to matters that are of common knowledge within the court's jurisdiction); Maroules v. Jumbo, Inc., 452 F.3d 639, 645 (7th Cir. 2006) (refusing to make a requested finding where "[o]nly expert testimony, and not our own common sense," could support it).

expert's opinion. See Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474, 481 (3d Cir. 1979) (explaining why it is undesirable for judges to rely on their own subjective knowledge in determining questions of fact).

In this case, determination of when asset values may reasonably be said to have accrued requires the determination of a technical or professional expert. This Court is not in a position to determine whether O&A's accrual treatment of the assets designated to OLS was reasonable under the circumstances. Accordingly, I do not find that the OLS financial statements were false or inaccurate.

What is revealing about the financial statements, however, is that they were prepared as part of an elaborate process to support the falsehood that OLS was a legally-existing corporation. Whether the asset values were accurate or not, they were clearly offered to show that OLS was real, that it had been in business since 2005, that it had provided the required notices to shareholders, that proper incorporation documents were in place, that it had its own employer identification number (and was presumably paying taxes), and that it had substantial assets and bank accounts. None of this was true regardless of how the assets and liabilities were allocated as between O&A and OLS, according to the Respondents' own testimony. Therefore, Respondents' financial submissions to the Board, whether accurate or not, exacerbated the misleading character of Respondents' representations regarding OLS' corporate status.

c. Public Agreement Violated by Each Respondent

Respondents argue that their conduct in submitting false and misleading statements to the Board did not violate a term of a public agreement or transaction. Respondents cite Canales v. Paulson, No. 06-1330, 2007 WL 2071709, 2007 U.S. Dist. LEXIS 50924 (D.D.C. July 16, 2007), in support of the proposition that a violation pertaining to a misrepresentation that is unrelated to performance on a government contract is not grounds for debarment. (RB at 22.) Since the misrepresentations in this case relate to documents produced to the Board, Respondents argue that the misrepresentations did not relate to performance on a government contract.

The Court disagrees with Respondents' analysis and finds that representations made to the Board regarding a nonsupervised mortgage lender's compliance with HUD regulatory requirements do, indeed, relate to the lender's performance on a government contract. As argued by HUD, the operative public agreement, which was entered into by the parties pursuant to 24 C.F.R. § 202.3(a)(1), was HUD's agreement to accept O&A as an FHA-approved mortgagee in return for O&A's agreement to comply with all applicable regulations. (GB at 40-41.) One such regulation requires an approved mortgagee and its officers, directors, and principals to refrain from "engag[ing] in business practices that do not conform to generally accepted practices of prudent mortgagees or that demonstrate irresponsibility." 24 C.F.R. § 202.5(j)(4). Respondents' submission of misrepresentations to the Board violated this regulation, in contravention of the public agreement between HUD and O&A. See Gary D. Duggins, No. 91-5877-D34, 1991 HUD BCA LEXIS 16, at *17-18 (HUDBCA June 4, 1991) (holding that making false statements in application for FHA approval violates terms of public agreement or transaction).¹⁷

¹⁷ The case cited by Respondents, Canales v. Paulson, is inapposite. The question in that case was not whether a misrepresentation unrelated to performance on a government contract can ever serve as grounds for debarment.

Respondents assert that the Government has not demonstrated that “each Respondent” failed to perform on a term of a public agreement or transaction. (RB at 22.) In relation to this argument, Respondents raise the defense of privity, presumably claiming that Respondents Otis and Curtis, unlike Charles and O&A, were not in contractual privity with HUD. Id. (citing Feinerman v. Bernardi, 558 F. Supp. 2d. 36, 48 (D.D.C. 2008)). However, contractual privity is not a prerequisite to debarment. See 2 C.F.R. § 180.150 (permitting agencies to debar any “participant or principal in a covered transaction” for cause); Id. §§ 180.980, 180.995, 2424.995 (defining “participant” and “principal”).

Respondents further contend that they did not have “reason to know” of the violations *viz.* each other, and therefore cannot be held accountable for any such violations under 2 C.F.R. § 180.630, which permits the imputation of misconduct as between respondents. (RB at 23.) Since O&A was founded, and was, at all relevant times, wholly owned, by Charles Ofori, there can be no reasonable claim that O&A and Charles are not alter egos of one another. Accordingly, they share liability for each other’s actions. See 2 C.F.R. § 180.625(b) (permitting debarment of “affiliates,” as defined in § 180.905); John Alagha and Alagha & Assocs., No. 11-M-041-DB-1, 2013 HUD ALJ LEXIS 4, at *41-42 (HUDOA Apr. 3, 2013).

Respondents’ argument is similarly unavailing as against Otis and Curtis, but for different reasons. The Government does not rely solely upon an imputation of knowledge theory to implicate Otis and Curtis. Instead, the Government relies upon Otis and Curtis’s actions and their status, as an attorney and accountant, respectively, to establish their liability as principals and, in Otis’ case, also as a participant in the covered transactions at issue in this case. (GB at 39 (citing 2 C.F.R. § 2424.995, § 180.980, and § 180.995).) I, therefore, find that Respondents O&A, Charles, Otis, and Curtis Ofori, are all participants and/or principals who can be held accountable under 2 C.F.R. § 180.150 for violating the public agreement at issue in this case.

2. Respondents’ conduct was willful.

Violations of a public agreement or transaction must be either willful or systemic in order to justify debarment under 2 C.F.R. § 180.800(b). HUD alleges that Respondents’ conduct was willful because Respondents acted knowingly or recklessly in submitting false statements to the Board. (GB at 41.) Respondents counter that the misrepresentations at issue were not willfully committed and resulted from an “honest mistake.” (Tr. 17:23; RB at 33.) In the absence of a showing of willfulness, Respondents argue that debarment is inappropriate, or, at a minimum, that lack of willfulness should be considered as a mitigating factor in this case under 2 C.F.R. § 180.860(f). (RB at 23, 31-33.)

As a threshold matter, I find that Respondents’ false submissions to the Board involved a violation that was caused by a systemic quality control breakdown, namely, Charles Ofori’s complete reliance upon Otis and Curtis as attorney and accountant, respectively, to maintain

Rather, the District Court considered only the narrow question of whether the government’s decision to debar a woman for “making a false writing in connection with an on-going procurement” was rational when, as it turned out, the false writing in question actually was not connected to the procurement contract. Canales, 2007 U.S. Dist. LEXIS 50924, at *19-21. Under those circumstances, the Court concluded that the debarment notice could not be upheld because it was facially inaccurate. Id.

compliance with HUD program requirements for FHA-approved non-supervised lenders. Nonetheless, I will also consider whether Respondents' conduct was willful.

Respondents argue that this Court is required to distinguish between willful behavior and mere mistakes before recommending the imposition of debarment. (RB at 23, citing Benjamin J. Roscoe and Geraldine M. Roscoe, No. 93-2007-DB, 1995 HUD ALJ LEXIS 32 (HUDALJ June 26, 1995).) However, while the distinction between intentional behavior and mere mistakes is an important consideration in mitigation or extenuation of Respondents' conduct, it is not determinative of grounds for debarment, since both intentional conduct and mistakes can form the basis for a debarment action. See Alagha, 2013 HUD ALJ LEXIS 4, at *38. Further, contrary to Respondents' insistence that their false submissions represented an honest mistake, the record contains several indications that Respondents may have knowingly or even intentionally presented false information to HUD in an attempt to mislead the Board with regard to OLS' status as a separate corporation.

First, Otis testified that he was "confused" when he saw OLS listed on the North Carolina Secretary of State webpage, and simply assumed that OLS had existed as a separate entity since 2005. (Tr. 818-19, 825, 830.) But in the Explanation Letter he drafted for submission to the Board, he did not indicate that OLS had been a separate entity since 2005, and did not express any confusion as to its current status. Instead, he indicated that OLS had formerly been part of O&A and stated in no uncertain terms that OLS was now an independent company "[a]s of this writing," suggesting that this was a recent development. (JX 13 at 17.) Elsewhere in the October 29, 2013 submission, Respondents referenced a FEIN that Otis had obtained for OLS in May 2013 as evidence of OLS' separate corporate status. (Tr. 817, 877-78; JX 22; JX 13 at 12.) It is unclear why Respondents would have used this number, or why Otis would have implied in the Explanation Letter that OLS had only recently separated from O&A, if they truly believed that OLS had already been a separate corporation for the past eight years.

Further, the May 17, 2013 letter from the IRS assigning the FEIN also stated that OLS had not filed taxes dating as far back as 2006. (JX 22.) This seemingly contradicts any suggestion that OLS had been a separate entity since 2005. Otis received and reviewed the IRS letter. (Tr. 885-86.) As in-house counsel for O&A, Otis also had personal knowledge of OLS' status. He is an attorney who was educated at one of the country's most prestigious law schools. Under the circumstances, it strains credulity to imagine he would have uncritically accepted the North Carolina webpage as showing that OLS was already incorporated without obtaining a copy of the certificate of incorporation. It is difficult to believe that any attorney looking to verify a company's existence would not have sought proof of its legal status.

The Explanation Letter also erroneously suggested that OLS was approved by GNMA to service Title I mortgages. (JX 13 at 17.) Yet Otis, who had drafted the letter, admitted that he had never even applied for such approval on OLS' behalf. (Tr. 889-90.) He also testified that, based on a meeting he attended with a GNMA officer along with his father and brother on May 22, 2013, he believed Respondents needed to obtain HUD's approval before transferring the GNMA contract to OLS. (Tr. 887-88.) Thus, his testimony clearly suggests that he knew or should have known that OLS was not, in fact, approved by GNMA to service loans in its own right. His statement to the contrary in the Explanation Letter was a knowing misrepresentation,

and it is more than plausible that he intended to mislead the Board, given that he had a motive to do so – namely, he was trying to convince the Board that O&A, through OLS, met the requirements to continue servicing loans under the GNMA contract.

In addition, some of the misrepresentations in the OLS Spinoff Documentation were so egregious that it is difficult to believe they were unintentional. For example, the documents stated that OLS stock would be distributed by the end of the first quarter of 2013 and that OLS would enter into a separation and distribution agreement and various other agreements with O&A to effect the spinoff. (JX 13 at 25, 38.) The individual Respondents cannot have failed to notice, as of October 2013, that these events had not actually occurred (and, in fact, Charles apparently expressed discomfort about submitting the documents, although he ultimately allowed them to be presented to the Board under his signature). A plausible reason for Respondents to include these fabricated details would be to lend an air of formality and legitimacy to the spinoff, indicating a knowing or intentional attempt to mislead the Board.

Curtis blamed the misrepresentations in the Spinoff Documentation on the template he had pulled from the internet and suggested that he considered the documents a draft. (Tr. 697, 700-01, 755.) However, Curtis is a highly educated CPA, Certified Governmental Financial Manager, and Project Management Professional with experience working for a large accounting firm and a government contractor. (Tr. 587-92.) He should have noticed these glaring errors in the documents. He knew he was preparing them for submission to a federal agency to show O&A's qualification to perform work on behalf of the United States government and taxpayers. Under the circumstances, it is hard to believe that he would deem it appropriate to submit a draft document, apparently without making any effort to first identify and correct blatant misrepresentations; it seems more likely that he was aware the documents were misleading, but chose to submit them anyway.

Although the evidence plausibly suggests that Respondents knowingly and intentionally submitted false information to the Board, Respondents can be held liable for willful conduct even if their conduct was not knowing or intentional. The Supreme Court has stated that “where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but *reckless* ones as well.” Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 127 S. Ct. 2201, 2208 (2007) (emphasis added). This construction “reflects common law usage, which treated actions in ‘reckless disregard’ of the law as ‘willful’ violations.” Id. Thus, in a civil action such as the instant debarment proceeding, “willfulness” includes “reckless disregard.” See, e.g., Feinerman v. Bernardi, 558 F. Supp. 2d at 48 n.13 (noting that housing authority’s conduct “was at least arguably reckless and therefore ‘willful’ for purposes of 2 C.F.R. § 180.800”); Alagha, 2013 HUD ALJ LEXIS 4, at *38 (finding that conduct “undertaken with reckless disregard for [the respondents’] professional and regulatory obligations” constituted willful conduct for purposes of § 180.800).

For the reasons discussed above, Respondents acted recklessly in submitting documents to the Board containing false and misleading information. Both the Explanation Letter and the OLS Spinoff Documentation contained obvious misrepresentations. Otis and Curtis prepared these documents, and Charles signed them in his capacity as president and owner of O&A. Thus, each individual Respondent stood in a position to identify and correct the obvious

misrepresentations, and each had an obligation to do so in order to ensure the information they were submitting to the Board was accurate, truthful, and reliable. Respondents acted in reckless disregard of this obligation, making their conduct “willful” within the meaning of § 180.800(b).

Respondents formulate willfulness as “intentionally [doing] an act of an unreasonable character in disregard of a known and obvious risk that was so great as to make it highly probabl[e] that harm would follow.” (RB at 31.) Respondents argue that HUD has failed to establish a probable harm, as the only harm HUD claims to have suffered is a risk that its ability to rely on the truthfulness of persons appearing before the Board was compromised. (RB at 32.) This argument ignores the specific risk of harm created by Respondents’ conduct: the risk that the Board would be misled into believing OLS was a separate entity that met the FHA criteria, even though it was not, and would, as a result, approve an unqualified contractor to service loans on behalf of the government. Respondents’ conduct was unreasonable and created a risk of harm.

Respondents further argue that they were simply relying on the advice of their counsel, Otis, at the time they submitted false information to the Board. As a defense, reliance upon the advice of counsel typically applies in a situation where a defendant seeks an attorney’s opinion regarding the legality of a proposed action and subsequently follows the attorney’s advice in carrying out the action.¹⁸ In this case, the advice purportedly relied upon by Charles, Curtis, and O&A was that OLS was a separate company. But Otis had not been asked to provide a legal opinion as to whether OLS was a separate company. Rather, he had been delegated the task of effectuating the legal separation of the company in his capacity as an employee or representative of O&A. (Tr. 337, 419-20, 814-15.) The other Respondents did not treat his representation that OLS was separately incorporated as “advice” to be followed; instead, they seemed to view it simply as confirmation that he had completed the task he had been assigned. The advice-of-counsel defense does not seem particularly applicable in this situation, where counsel was acting as an agent rather than an advisor of the other Respondents. *Cf. United States v. Carr*, 740 F.2d 339, 347 (5th Cir. 1984) (rejecting advice-of-counsel defense where counsel was “integrally involved” in the alleged misconduct and where there was “little, if any, evidence that [counsel] was ever asked, or gave, advice in the context of an attorney-client relationship,” on grounds that defense is unavailable when counsel “is a partner in the venture, takes a share of the profits, or is ‘not a lawyer who had no interest save to give sound advice for a reasonable fee.’”).

Further, even to the extent it is applicable, advice-of-counsel does not operate as a complete defense that would absolve Respondents of liability in this case. Here, I have found that Respondents acted in reckless disregard of their obligations, but not necessarily with intent to violate those obligations. Under these circumstances, advice-of-counsel simply serves as

¹⁸ See, e.g., *United States v. West*, 392 F.3d 450, 456-57 (D.C. Cir. 2004) (“A defendant may avail himself of an advice of counsel defense only where he makes a complete disclosure to counsel, seeks advice as to the legality of the contemplated action, is advised that the action is legal, and relies on that advice in good faith.”); *CE Carlson, Inc. v. SEC*, 859 F.2d 1429, 1436 (10th Cir. 1988) (“The elements of such a defense require a showing of 1) a request for advice of counsel on the legality of a proposed action, 2) full disclosure of the relevant facts to counsel, 3) receipt of advice from counsel that the action to be taken will be legal, and 4) reliance in good faith on counsel’s advice.”); *SEC v. Goldfield Deep Mines Co.*, 758 F.2d 459, (9th Cir. 1985) (“[I]n order to establish good faith reliance on the advice of counsel, appellants must show that they (1) made a complete disclosure to counsel; (2) requested counsel’s advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good faith on that advice.”).

“evidence of good faith, a relevant consideration in evaluating [Respondents’] scienter.” Howard v. SEC, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (characterizing reliance on advice of counsel as “not really a defense at all but simply some evidence tending to support a defense based on due care or good faith”); see also United States v. Adeyinka, 205 Fed. Appx. 238, 241 (5th Cir. 2006) (“As a defense ... reliance on counsel is only relevant to establishing whether a person knows his or her actions are illegal.”); United States v. DeFries, 129 F.3d 1293, 1308 (D.C. Cir. 1997) (stating that advice-of-counsel applies to “specific intent crimes”); United States v. Stacy, 734 F. Supp. 2d 1074, 1083 (S.D. Cal. 2010) (indicating that the advice-of-counsel defense applies only to knowing or intentional acts).

The advice-of-counsel defense is intended to protect a person who, in good faith, seeks and relies on advice from a competent and disinterested legal expert, not to shield a person who blindly follows dubious or patently unsound advice. See, e.g., Robinson v. Worley, 849 F.3d 577, 586 (4th Cir. 2017) (“[T]he advice of counsel is no defense when it should have been obvious to the [defendant] that his attorney was mistaken.”); Szumigala v. Nationwide Mutual Ins. Co., 853 F.2d 274, 282 (5th Cir. 1988) (suggesting that defendants rely on questionable advice at their own risk); United States v. Scully, 170 F. Supp. 3d 439, 448 (E.D.N.Y. 2016) (stating that advice-of-counsel does not provide shelter for one who acts with “willful blindness” to facts suggesting wrongfulness of his conduct).¹⁹ Advice-of-counsel does not excuse misconduct unless the client’s reliance on the advice was reasonable. United States v. Philpot, 733 F.3d 734, 745 (7th Cir. 2013); see also United States v. Newport News Shipbuilding, Inc., 276 F. Supp. 2d 539, 565 (E.D. Va. 2003) (explaining that advice-of-counsel does not necessarily bar a finding of reckless disregard).

In this case, Otis admitted that he had never handled a legal separation and did not consult anyone outside the company for help or guidance. (Tr. 816.) In addition, he was acting as an agent of Charles and O&A, who had directed him to carry out the legal separation. To the extent he provided advice to Charles, Curtis, and O&A regarding the completion of the spinoff, it was imprudent for them to trust him as a competent and disinterested expert in this matter. The advice he allegedly provided was that OLS was a separate company as of October 2013. There were many signs that this was not true – for example, articles of incorporation had not been filed, stock had not been issued, separate OLS tax returns had not been filed, and OLS certainly was not operating independently, as O&A was still billing GNMA and paying OLS’ expenses for the work OLS performed. Charles was a seasoned businessman and Curtis, a highly educated accountant, holding numerous certifications. Both were CPAs with extensive personal knowledge of the matters at hand. (Tr. 259-63, 587-99.) Yet they did not make any inquiries or take any steps to confirm that OLS was actually a separate company.

The circumstances present serious questions as to whether Respondents acted in good faith in relying upon the legal advice rendered by Otis, *viz.* their intimate involvement in an overall effort to meet (or avoid) regulatory requirements and the need to obtain FHA approval of

¹⁹ For example, in Robinson v. Worley, the defendant raised the advice-of-counsel defense when he was accused of intentionally undervaluing an asset during a bankruptcy proceeding. The bankruptcy and district courts found that the defendant’s reliance on the advice of counsel was unreasonable given the defendant’s “extensive investment history” and “knowledge of the capitalization rate method.” 849 F.3d at 582. The Fourth Circuit affirmed, indicating that counsel’s advice had been patently inappropriate and that a sophisticated investor such as the defendant should have known better than to rely on it. Id. at 586.

OLS before any novation of the GNMA contract could be effected. But regardless of whether they acted in good faith, it was reckless and unreasonable for them to blindly rely on Otis' unsound advice without noticing whether any of the proper incorporation documents were present. The Court finds Respondents' "reliance on advice of counsel" argument to be without merit and rejects the associated implication that they did not act willfully.

3. Respondents' conduct was serious.

Respondents argue that their incorrect statement that OLS had been spun off as an independent corporation did not have a "significant or serious impact on a HUD program." (RB at 24, 34.) Related to this is Respondents' argument that HUD's consecutive, nine-month "delay" in issuing the NOPDs from October 29, 2013 to July 1, 2014, and later, on April 13, 2015, demonstrate that HUD did not believe that Respondents' violations were serious. Respondents rely upon our holding in CKJ Realty & Management, Inc., No. 98-A-111-D8, 1998 HUD BCA LEXIS 4, at *23 (HUDBCA Dec. 16, 1998), to the effect that "[a] 4-month delay between HUD's discovery of the alleged inadequate fidelity bond coverage and the issuance of [a limited denial of participation] supports the inference that there was no immediacy to curtail Respondents' participation in HUD's programs and no imminent threat to the public interest."

However, I find that CKJ Realty is not analogous to the instant case in that CKJ Realty involved a simple lapse of fidelity bond coverage. There, without additional facts to support HUD's claim of injury, the Court found that the public's interest was not seriously compromised. By contrast, in this case, the submission of untruthful information to the Board undermined the reliability of its decisionmaking function, negatively impacting "the integrity of the entire process." (Tr. 122-25.) Further, unlike in CKJ Realty, by the time the misconduct occurred in this case, HUD likely no longer felt any "immediacy to curtail" the risk to the public because proceedings were already underway to withdraw O&A's FHA license, and Respondents had already been notified that O&A would lose the GNMA contract within the next five months. (GX 7.) Thus, the immediate threat had been contained. Debarment would address only prospective risks to the public.

Respondents also place heavy reliance upon our holding in Gary M. Wasson, No. 04-030-DB, 2004 HUD ALJ LEXIS 31 (HUDALJ Aug. 5, 2004). There, the administrative law judge stated that, "[t]o be sure, a respondent may be found to lack present responsibility based on past acts; but the staler the evidence, the weaker the proof," and held that "HUD's delay in bringing a case against Respondent undermined the cause for debarment to the point that he cannot now be found to lack 'present responsibility' on the basis of events that occurred from six years, 10 months to nearly eight years ago." Id. at *42-43, 46-47; see also Roberto Soto Carreras, HUDALJ-88-1234-DB(LDP) (June 22, 1988) (finding that three years was an inordinate amount of time to delay bringing charges against a respondent based on events occurring almost seven years prior to the initiation of a temporary denial of participation). By contrast, this case involved shorter delays of just nine months.

Cf. Uzelmeier v. United States Department of Health and Human Services, where the U.S. District Court upheld an administrative law judge's decision to debar a participant even though the Department of Health and Human Services waited seven years before initiating

debarment proceedings. 541 F. Supp. 2d 241, 248-49 (D.D.C. 2008). The court in Uzelmeier indicated that the length of time between the underlying events and the debarment was “just one factor [to be] considered,” not necessarily “the dispositive factor or even the primary one.” Id. at 248 (distinguishing Roemer v. Hoffmann, 419 F. Supp. 130 (D.D.C. 1976)). The court further noted that the participant being debarred “ha[d] admitted no past wrongdoing and ha[d] not demonstrated that her present responsibility ha[d] changed or improved since the underlying incidents.” Id.

In this case, Respondents have acknowledged their submission of false information to the Board in an effort to demonstrate compliance with the Principal Business Activity (PBA) requirement. This debarment proceeding involves regulatory violations and Respondents’ attempts at amelioration that spanned a period of three to four years. Respondents were first put on notice of their non-compliance with the PBA rule by at least 2010, and filed their submissions with the Board on October 29, 2013. I find that Respondents had more than ample notice of the regulatory violations and that Respondents were timely issued the NOPDs in this case.

Moreover, the cases cited by Respondents simply did not present the same compelling circumstances as are present in this case, where an elaborate set of documents and misleading representations were presented to, and were initially relied upon by, a formal enforcement authority of a federal department. The submission of false information to the Board negatively impacts the integrity and reliability of its decisionmaking process. (See Tr. 122-25.) This process is crucial to HUD’s ability to effectively manage its FHA-approved lender program, which operates under the assumption that the lenders participating in the program will be trustworthy and honest in their dealings with the government. (See Tr. 293-95.) Accordingly, I find that Respondents’ willful misconduct was so serious as to affect the integrity of an agency program.

As Respondents concede, even if they had not willfully violated a public agreement, they could still be subject to debarment under 2 C.F.R. § 180.800(d), which permits debarment for misconduct “of so serious or compelling a nature that it affects [a respondent’s] present responsibility.” (RB at 33.) I find that the seriousness of Respondents’ misconduct also affected their present responsibility within the meaning of § 180.800(d), for the reasons discussed below.

4. Respondents have failed to establish present responsibility.

After the government has established cause for debarment, the burden shifts to the respondent to demonstrate “to the satisfaction of the debarring official that [respondent is] presently responsible and that debarment is not necessary.” 2 C.F.R. § 180.855(b).

The federal government only conducts business with responsible persons. 2 C.F.R. § 180.125(a). Compliance with this provision serves to protect the public interest by ensuring the integrity of federal programs. Id. The term “presently responsible,” as used in the context of administrative sanctions such as Limited Denials of Participation (“LDPs”), debarments, and suspensions, is a term of art that describes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant as well. William D. Muir and Metro Cmty. Dev. Corp., No. 97-A-121-D15, 1997 HUD BCA LEXIS 12, at *14 (HUDBCA Nov. 6, 1997) (citing

48 Comp. Gen. 769 (1969)). The term applies to a respondent's conduct with respect to "covered transactions," involving HUD programs. See, e.g., 2 C.F.R. § 180.200 (defining covered transactions).

Determining "present responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. Benjamin J. Roscoe and Geraldine M. Roscoe, 1995 HUD ALJ LEXIS 32, at *20 (citing Shane Meat Col., Inc. v. U.S. Dep't of Defense, 800 F.2d 334, 338 (3d Cir. 1986)). Debarments, LDPs, and suspensions are serious sanctions that should only be utilized for the purposes of protecting the public interest and may not be used as punishment. 2 C.F.R. § 180.125(c). The test for determining whether a proposed sanction is warranted is "present responsibility," although lack of present responsibility may be inferred from past acts. CKJ Realty, 1998 HUD BCA LEXIS 4, at *18; see Schlesinger v. Gates, 249 F.2d 111, 112 n.2 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980) ("[T]he central purpose of the regulations ... is to protect both the public and the integrity of the [government contracting] process from those contractors whose continued business processes become suspect as a result of prior wrongful acts.").

The essential facts surrounding Respondents' misrepresentation of OLS's status as a legally-existing corporation or limited liability company are not in dispute. Respondents each took part, though perhaps in varying degrees, in misrepresenting OLS' legal status to the Board. As Charles admitted, companies dealing with the government bear an obligation to be truthful in such dealings. (Tr. 293-95.) A responsible government contractor would have taken steps to ensure that its representations to the government were true, but Respondents failed to do so. At the hearing, some two years after they received their initial NOPDs, I found the testimony of Charles, Otis, and Curtis Ofori to be evasive, if not completely lacking in credibility.²⁰ In addition, the elaborate nature of Respondents' misrepresentations militates in favor of a finding that Respondents lack present responsibility. Although it has been held that the "passage of time diminishes the probative value of acts showing lack of present responsibility," I find that the passage of time has not improved Respondents' position with respect to being presently responsible. Gary M. Wasson, 2004 HUD ALJ LEXIS 31, at *42 (citing Lynne Borrell and Lynne Borrell & Assocs., HUDBCA No. 91-5907-D52 (Sept. 20, 1991)). Accordingly, I find that the four Respondents are not presently responsible, and are properly subject to debarment proceedings.

5. Debarment is warranted under the circumstances.

The decision to debar Respondents is within the discretion of the debarring official. 2 C.F.R. § 180.845(a). In determining whether debarment is an appropriate sanction, "[t]he debarring official bases the decision on all information contained in the official record. The record includes ... [a]ny further information and argument presented in support of, or in opposition to, the proposed debarment...." Id. § 180.845(b).

²⁰ The individual Respondents often provided equivocal and roundabout answers to simple yes-or-no questions. In fact, the Court found it necessary to instruct them on several occasions to answer opposing counsel's questions directly. (Tr. 380, 625, 803, 831.) Examples of Respondents' evasive testimony is discussed in greater detail below in my discussion of aggravating and mitigating factors.

Debarments, LDPs, and suspensions are serious sanctions. 2 C.F.R. § 180.125(c). Such sanctions have been found to be warranted in cases where: a participant, who had previously been issued an LDP, did nothing to correct the deficiency and admitted to misusing funds to the detriment of HUD, Otis Stewart Jr., No. 98-8054-DB(LDP), 2001 HUD ALJ LEXIS 76 (HUDALJ Nov. 8, 2001); an executive director of a HUD participant had a duty to discourage the participant's board members from taking actions that violated HUD regulations, but failed to do so, McKinley v. Copeland, No. 00-C-113-D14, 2001 HUD BCA LEXIS 5 (HUDBCA Nov. 29, 2001); a participant falsely certified a real estate appraisal, which was deemed a material misrepresentation even when there was a lack of intent to mislead HUD, Gabe Brooks, No. 99-A-104-D3, 2000 HUD BCA LEXIS 1 (HUDBCA Sept. 15, 2000); a loan officer falsified loan documents, forged signatures on loan documents, and made false statements for the purpose of influencing loan underwriting decisions in which HUD insured the loans, Marcus Payne, No. 99-C-103-D2, 1999 HUD BCA LEXIS 6 (HUDBCA May 17, 1999); a respondent made a misrepresentation, which, even if it was an "honest mistake, [was], nevertheless, a very serious mistake because HUD must rely upon the truthfulness of the representations made by those who participate in its program and who certify to the accuracy of their representations," William D. Muir, 1997 HUD BCA LEXIS 12, at *19; and, respondents were found to have "failed, repeatedly, to fulfill their contractual and programmatic obligations to HUD" when they entered into four sales contracts with HUD that never went to closing, M. Brett Young and Allied Hous. Grp., Ltd., No. 96-0036-DB(LDP), 1996 HUD ALJ LEXIS 49, at *16 (HUDALJ Sept. 13, 1996).

On the other hand, less onerous sanctions have been imposed in cases where a respondent made good-faith efforts to remedy a difficult and disorganized situation and bring her office into compliance with HUD regulations but was unable to do so because she lacked the staff and necessary resources, Marilee Jackson, No. 05-K-112-D7, 2005 HUD BCA LEXIS 21 (HUDBCA Oct. 13, 2005); and, a lender's remedial measures demonstrated that they were acting as responsible contractors and in good faith as they attempted to correct the deficiencies caused by their subcontractors, First Capital Home Improvements, HUDBCA No. 99-D-108-D7 (Nov. 24, 1999).

In this case, Respondent O&A has been in the accounting, financial, and management consulting business for more than 25 years. (Tr. 262.) O&A has served as an FHA-approved, nonsupervised mortgage lender since 2005. (Tr. 269; JX 7 at 2.) At all relevant times, Charles and Curtis held licenses as certified public accountants, and Otis was a licensed attorney. (Tr. 259-61, 588, 790.) None of the Respondents have been the subject of HUD enforcement action or disciplinary proceedings prior to the Board's initiation of suspension proceedings against O&A in 2012. However, as determined above, Respondents willfully committed serious misconduct that negatively impacted the integrity of HUD programs and demonstrated a lack of present responsibility. Accordingly, the Court finds that debarment is warranted.

B. Appropriate Period of Debarment

In deciding the length of a debarment, the debarring official may consider mitigating or aggravating factors, pursuant to 2 C.F.R. § 180.860. The existence or nonexistence of any single

factor is not determinative. Id. However, the debarring official must consider the length of any preceding suspension. Id. § 180.865(b).

A three-year period of debarment is generally imposed in cases involving fraud or intentional misrepresentation. In Walter C. Johnston, the Court imposed such a debarment on the Respondent after finding that he knowingly and willfully represented to HUD that cash payments had been made by the borrowers in order to accomplish the sale of properties with mortgages insured by FHA. No. 90-1499-DB, 1990 HUD ALJ LEXIS 64 (HUDALJ Sept. 26, 1990). The Court found that the respondent's "willful falsification" of terms and conditions placed public funds at risk and prevented HUD from relying on his statements in making eligibility determinations. Id. at *22, *25; see, e.g., James Myers & Tammy Myers, HUDBCA No. 96-A-105-D2 (Sept. 12, 1996); Howard Burgess, No. 95-5023-DB, 1995 HUD ALJ LEXIS 26 (HUDALJ May 10, 1995); but see John E. Signorelli, No. 86-1517-D8, 1986 HUD BCA LEXIS 17 (HUDBCA Sept. 30, 1986) (imposing a two-year period of debarment based on respondent's publication of false financial statements).

While the Respondent's intent to defraud HUD was clear in Johnston, a debarring official may still impose a three-year debarment period even if the Government cannot prove a respondent was complicit in fraudulent acts, as long as the respondent's conduct was so glaring and irresponsible as to create an environment conducive to fraud. See Kay Yarbrough, No. 92-C-7514-D33, 1992 HUD BCA LEXIS 15, at *37-41 (HUDBCA Oct. 28, 1992) (holding that even though the Government could not prove that the respondent engaged in fraud, her "absolutely appalling, lazy, and ultimately dishonest abdication of her responsibilities ... set in motion a chain of events ... where fraudulent schemes could gain a firm foothold").

In contrast, if no fraud is alleged and the respondent demonstrates an awareness of his or her errors, officials have generally imposed a debarment period of less than three years. In Renee Divins, for example, the respondent's acknowledgment of her loan processing errors led to a debarment period of 18 months, rather than the Government's proposed five-year debarment. No. 92-C-7511-D30, 1992 HUD BCA LEXIS 4 (HUDBCA June 4, 1992). The Court in that case found that the nature of the errors reflected "technical falsehoods" rather than fraud and that the respondent had "become more aware, more careful." The Court therefore determined that a shorter debarment period was warranted. Id. at *40, *43. Similarly, although the respondent in Mayer Co., Inc. & Carl A. Mayer, Jr. failed to obtain liability insurance on certain apartments and failed to make timely mortgage payments on properties owned, insured, or subsidized by HUD, the Court nevertheless noted that the Respondent became "cognizant of the deficiencies of his performance.... His growing awareness of what he should have done to avoid the contract performance problems ... mitigates somewhat the more troubling aspects of this case." No. 81-544-D1, 1981 HUD BCA LEXIS 15, at *3-7, *14-15 (HUDBCA Dec. 1, 1981). Accordingly, a one-year period of debarment was imposed. Id. at *15.

If Respondents fail to understand the seriousness of their violations, however, an official may decide to impose a two-year debarment period. For instance, the Court in Joan Galati imposed a two-year debarment on the Respondent after determining that "[s]he [was] still trying to explain away and dodge from serious irregularities in her conduct," including failure to verify information provided by borrowers. No. 88-3455-D64, 1989 HUD BCA LEXIS 21, at *11, *20

(Mar. 9, 1989); see also Stephen J. Ferry & Beth Ann Ferry, No. 90-5228-D17, 1990 HUD BCA LEXIS 13, at *17 (HUDBCA Oct. 31, 1990) (noting particularly the Respondents' attitudes during the hearing, stating that "[t]hey profess ignorance of HUD rules and regulations, quibble with them, and were generally defiant").

Likewise, even if a Respondent genuinely regrets his actions, the official must be persuaded that the Respondent actually understands why his conduct was improper. See Michael E. Ipavec, No. 95-A-128-D19, 1996 HUD BCA LEXIS 3 (HUDBCA Feb. 21, 1996) (imposing a two-year period of debarment based on Respondent's failure to grasp the seriousness of his violation, despite expressions of regret).

Section 180.860 sets forth the following aggravating and mitigating factors that the debarring official may take into consideration:

- (a) The actual or potential harm or impact that results or may result from the wrongdoing.
- (b) The frequency of incidents and/or duration of the wrongdoing.
- (c) Whether there is a pattern or prior history of wrongdoing. ...
- (d) Whether [Respondents] are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.
- (e) Whether [Respondents] have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.
- (f) Whether and to what extent [Respondents] planned, initiated, or carried out the wrongdoing.
- (g) Whether [Respondents] have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.
- (h) Whether [Respondents] have paid or agreed to pay all criminal, civil and administrative liabilities for improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.
- (i) Whether [Respondents] have cooperated fully with the government agencies during the investigation and any court or administrative action. ...
- (j) Whether the wrongdoing was pervasive within [Respondents'] organization.
- (k) The kind of positions held by the individuals involved in the wrongdoing.
- (l) Whether [Respondents'] organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.
- (m) Whether [Respondents'] principals tolerated the offense.
- (n) Whether [Respondents] brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.
- (o) Whether [Respondents] have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.
- (p) Whether [Respondents] had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

- (q) Whether [Respondents] have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.
- (r) Whether [Respondents] have had adequate time to eliminate the circumstances within [their] organization that led to the cause for debarment.
- (s) Other factors that are appropriate to the circumstances of a particular case.

2 C.F.R. § 180.860(a)-(s).

The Government argues that a number of aggravating factors exist in this case. First, the Government contends that there was potential for harm to the FHA program because HUD relies on Respondents' candor and truthfulness in meeting regulatory requirements and proceedings before the Board. (GB at 46-47.) Moreover, complete honesty and integrity of FHA-approved, nonsupervised mortgagees is mandated under the terms of the GNMA contract and FHA guidelines. See 24 C.F.R. § 202.5(j)(4) (prohibiting an FHA lender and its principals from engaging in business practices that do not conform to generally accepted practices of prudent mortgagees or that demonstrate irresponsibility); id. § 25.6(p) (indicating that violating the foregoing prohibition creates grounds for an adverse administrative action); see also 2 C.F.R. § 180.125(a) (explaining that government conducts business only with "responsible persons" to protect program integrity and public interest). Respondents, however, maintain that there was no harm, or even any potential harm to HUD. (RB at 37-38.) At hearing, the Government did not present evidence of any direct economic harm suffered by the agency, although Ms. Murray testified as to the intangible harm to the integrity of the Board's decisionmaking process. (Tr. 122-25.)

The Government appears to acknowledge that Respondents' misrepresentations relating to OLS' corporate status and financial position as of October 13, 2013, were the only violations committed by Respondents. No other evidence of exclusions or disqualifications by other agencies was presented by the Government. Thus, aggravating factors are not present under 2 C.F.R. § 180.860(b)-(e), and these factors militate in favor of mitigation.

The Government states that Respondents planned and carried out the wrongdoing, as each Respondent was responsible for either preparing, reviewing, or authorizing the documents at issue. As O&A is a closely-held, small company, each of the principals and consultants had intimate knowledge of the plans to spin off OLS as a separate company in order to come into compliance with regulatory requirements. (See Tr. 349.) Thus, their active involvement in the wrongdoing, as well as the elaborate and reckless nature of the misrepresentations, justify treatment of their conduct as an aggravating factor under 2 C.F.R. § 180.860(f). Although Respondents appear to accept responsibility for their wrongdoing, the Court is not persuaded that they recognize the seriousness of their wrongdoing. The testimony of each of the individual Respondents is found to have been clever and evasive, if not completely lacking in credibility. 2 C.F.R. § 180.860(g) is therefore found to be an aggravating factor.

In addition, the Government urges that the multiple failures of the Respondent corporation to implement appropriate standards of conduct, to ensure that the organization would not tolerate wrongdoing and that violations were not pervasive, to investigate the violations, to hold the principal violators accountable, or to make changes to eliminate the circumstances that

led to the wrongdoing warrant consideration as aggravating factors under 2 C.F.R. § 180.860(j)-(r). (See GB at 48-49.) Even for a small company, Respondents admit that they undertook the spinoff strategy without utilizing consultants who were experienced in conducting those operations. (Tr. 362, 816.) The only “reviewing” or quality-control authority was Charles, himself, who admits that he simply relied on his sons to do what needed to be done without providing explicit instructions or oversight. (Tr. 334-40, 344-46, 357-62, 419-20.) That this system was ineffective, goes without saying. It was recklessly employed and resulted in a disastrous outcome. Although Charles testified that he would “do it very differently” if faced with the same situation again, (Tr. 362:3-16), Respondents presented no substantial evidence that they have since implemented new management procedures or have brought in new quality-control experts. Accordingly, this is considered an aggravating factor, as well.

Respondents’ misrepresentations to the Board are a very serious matter. I have taken into account that the evidence shows only a single (though multi-faceted) instance of misrepresenting key facts to the Board, in violation of applicable laws and regulations. However, these are substantial aggravating factors.

I find that consideration of 2 C.F.R. § 180.860(f), “[w]hether and to what extent [Respondents] planned, initiated, or carried out the wrongdoing,” bears further discussion. Respondents’ actions indicate a lack of appreciation for the importance of several of HUD’s guidelines and requirements. From the evidence of record, I find that Respondent’s actions were reckless in nature, and therefore amounted to willful misconduct. However, since evidence of fraud or intentional misconduct requires and generally results in more severe sanctions, as indicated in the cases cited above, I find the lack of such conduct here to be a mitigating factor in this case. Thus, while Respondents’ conduct was intentional in that they presented or caused to be presented false and misleading documents to the Board, on this record, I do not find that Respondents’ conduct rises to the level of fraud against the agency.

All of the above factors were fully considered from both the perspective of the Government and Respondents. The parties did not argue that any other aggravating or mitigating factors exist under 2 C.F.R. § 180.860(s) that would support consideration of “other factors that are appropriate to the circumstances of a particular case.” I therefore do not consider this factor.

On this record, I have not found conduct that could be conclusively shown to constitute intentional misconduct on the part of Respondents. Rather, I find that Respondents’ deficiencies arose from Respondent Charles’ misplaced over-reliance upon his well-educated, but inexperienced sons. This over-reliance caused a breakdown in the quality-control system of O&A. Therefore, in determining the appropriate period of debarment, I have considered whether Respondents have demonstrated an awareness of their misconduct, warranting a one-year period of debarment, or whether they fail to appreciate the seriousness of filing false documents with the MRB, warranting a three-year period of debarment or more.

At hearing, I found the testimony of Charles, Otis, and Curtis Ofori to be evasive, if not completely lacking in credibility. See, for example, Charles’ testimony at Tr. 266-69, where he never expressly acknowledged his obligation to comply with HUD FHA regulations in performing on the GNMA contract, notwithstanding his written certification acknowledging that

he was obligated to do so, even after repeated questions from Government counsel. As another example, Curtis evaded Government counsel's repeated questioning concerning how many conversations he had with Charles regarding the spinoff and whether Charles had followed up on Curtis' progress in reviewing the financial statements. (Tr. 616-26.) Curtis also flatly refused to answer when asked multiple times whether he felt it was necessary to submit documentation to Mr. Linaire to support the changes Curtis had made to the financial statements. (Tr. 666-70.)²¹ As for Otis, the Court expressly observed that he was a "hostile witness, being evasive" at hearing. (Tr. 878, 884, 892-97.)

Perhaps most tellingly, Charles assiduously avoided answering the important question of when he first came to believe that OLS was a separate company. When asked whether he had held this belief between January 2013 (the time when the October 29, 2013 submission indicates the separation occurred) and May 2013 (the time when the Board gave O&A a deadline to show compliance with the FHA requirements), he did not provide a straight answer. (Tr. 331-34.) Later, when directly asked by Government counsel at what point in time he believed OLS was separate, he again sidestepped the question, responding, "Judge, I want to say to you that at the time that [the October 29, 2013] letter was presented and I signed it ... I really believe that we separated the company," and insisting that he would not have risked ruining his reputation by lying and that he had taught his sons "the truth shall set you free." (Tr. 350-51.) When the Court clarified that counsel was attempting to determine whether Charles held this belief before or after October 2013, Charles launched into a detailed account of what had happened after he submitted

²¹ The pertinent parts of the exchange between government counsel and Curtis proceeded as follows and are illustrative of the general evasive tenor of all three individual Respondents' testimony:

Q: And so you did not see the need to provide supporting documentation to Mr. Linaire [sic], correct?

A: That's not what I said.

Q: Okay. No, but I'm asking you ... you did not see the need to provide the supporting documentation ... ?

A: If Mr. Linaire [sic] needed any support or as he asked for the supporting changes that's how we've always done it. He would ask for the changes – he'd ask for the support, we'd give it to him. ...

Q: Okay. So my question to you was, on your own initiative, you didn't see the need to provide supporting documentation to Mr. Linaire [sic]?

[Respondents' counsel]: Objection, asked and answered. ...

Judge Manuel: Overruled. I think what happened was she asked the question and Mr. Ofori sort of sidetracked and answered what the practice would have been rather than a direct response to her question. Overrule the objection.

The Witness: Okay.

By Ms. Fabregas [Government counsel]:

Q: You did not on your own initiative see the need to send supporting documentation to validate the changes that you made?

A: Ms. Fabregas, Hilda sent this email to Felix Linaire [sic], okay? It's common practice that when Hilda sends anything, as you saw before, with the internally financial – internally prepared financials, she's the one who sends him the backup, she's the one who communicates back and forth. So, if there's anything he needed, he would have asked her for it. ...

Q: And you did not consider it important to submit the supporting documentation for the changes that you made to the financial statements, isn't that correct?

A: All the changes and support Ms. Hilda had. She's the one who communicated directly.

Judge Manuel: Mr. Ofori, she's asking whether you thought it was important to provide the financial statements, supporting financial data to support the summary.

The Witness: And what I'm saying is if he had asked for it, it would have been provided.

By Ms. Fabregas:

Q: So are you saying that you didn't think it was necessary, only if he asked for it? Is that your testimony?

A: My testimony is when you provide him the changes he can ask for anything he wants.

(Tr. 667:6-670:4.)

the documents to the Board, but again avoided pinpointing when he had first believed OLS was separate. (Tr. 352-54.)

Although I have listed only a few examples, the overall evasive quality of Charles, Curtis, and Otis’ testimony was readily apparent at hearing. In fact, at various points throughout the hearing, the Court had to instruct all three individual Respondents to answer questions directly. (Tr. 380:12-14, 625:18-21, 803:18-24, 831:16-17.) Respondents displayed a tendency to dodge questions and, when pinned down, to provide equivocal answers couched in lawyerly terms. I find that their evasiveness detracts from the overall credibility of their narrative.

The evasive testimony provided by each of the individual Respondents was troubling. And although the Court acknowledges Respondent Otis’ forthrightness in “accepting responsibility” for his mistake regarding whether OLS was a separate corporate entity, still it was his highly reckless conduct in not obtaining a certification that would have taken very little effort to ascertain, that caused the violation. As this administrative body has previously stated, “[i]t is not the quantity of transactions so flawed, but the nature of the act and the recognition of them” that bears most weight in determining the appropriate sanction. Joan Galati, 1989 HUD BCA LEXIS 21, at *20; see also Howard Burgess, 1995 HUD ALJ LEXIS 26. After considering all of the factors that militate in Respondents’ favor, as set forth in 2 C.F.R. § 180.860, I find that these factors do not outweigh the Government’s compelling interest in being able to rely upon the truth and accuracy of documents filed before the Board in HUD enforcement proceedings.

RECOMMENDATION

The Court finds that Respondents are not presently responsible and that debarment is warranted in this case. Considering the seriousness of Respondents’ acts and omissions, I recommend that periods of debarment be imposed with respect to each Respondent as follows:

Otis Ofori	- three-year debarment
Charles Ofori	- two-year debarment
Curtis Ofori	- two-year debarment
Ofori & Associates	- three-year debarment

Date: April 10, 2018

/s/

H. Alexander Manuel
Administrative Judge