



Board of Contract Appeals
 U.S. Department of Housing and Urban Development
 Washington, D.C. 20410-0001

In the Matter of:

EMILY GUILLEN
 and **EMILY INVESTMENTS,**

Respondents

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: HUDBCA No. 91-7008-D99
: Docket No. 91-1739-DB
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 Washington, D.C. 20410

For the Government

DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER
(February 28, 1992)
Statement of the Case

By letter dated August 21, 1991, Respondents Emily Guillen and Emily Investments (EMI) were notified by the U.S. Department of Housing and Urban Development (HUD) that it proposed to debar them for a period of two years, starting August 21, 1991, from participation in primary and lower-tier transactions as either participants or principals at HUD and throughout the Executive Branch of the Federal Government. Pending determination of debarment, Respondents were temporarily suspended by HUD on the ground that "...immediate action is necessary to protect the public interest."

The stated causes for the proposed debarment and suspension involve three transactions in which Emily Guillen, doing business as Emily Investments, was the real estate broker of record for three properties purchased with mortgages insured by HUD. HUD charges Guillen "and/or your employees" with the following acts that it cites as grounds for debarment pursuant to 24 C.F.R. {§24.305(b)(d) and (f):

- a. They caused to be prepared or prepared false Federal Income Tax Returns,

b. They falsified pertinent information on the preliminary applications (for mortgage insurance),

c. They caused to be prepared or prepared false pay stubs and W-2 forms, and

d. They handcarried and falsified or caused to be falsified a verification of employment.

Respondents made a timely request for a hearing. A hearing was held on February 10-12, 1992 in Houston, Texas. This decision is rendered as a bench decision pursuant to 24 C.F.R. §26.24(d), by agreement of the parties, although issued from Washington, D.C.

Findings of Fact

1. Guillen is a licensed real estate broker in the State of Texas. She has been a licensed broker since at least early 1985. Before that, she was a real estate agent from 1980-1983 with ERA-Royalton, and also worked as a loan officer from 1983-1986. Her work experience as a loan officer was primarily with adjustable rate conventional mortgages, but she had worked with some FHA loans, and was familiar with FHA requirements for mortgages insured by HUD-FHA.

2. Guillen founded EMI in 1985. EMI was incorporated in about 1990, but from 1985 to 1990, Guillen did business as EMI. EMI is not licensed by the Texas Real Estate Commission, and all broker services provided by EMI are done under the sponsorship and supervision of Guillen, as the only licensed broker at EMI.

3. Guillen was an authorized broker for the HUD "Repo" program. Through the Repo program, HUD acquires single family properties through foreclosures on HUD-insured mortgages. HUD allows authorized real estate brokers to sell the Repo properties for HUD, and HUD pays those brokers a commission for each sale. In Texas, only a real estate broker may sell real estate, but licensed real estate agents of the broker may sell HUD Repo properties under the broker's sponsorship for each sale. HUD requires that the broker sign each Repo contract of sale.

4. To continue as an authorized broker in the Repo program, a broker is required by HUD to attend a half-day seminar on the Repo program once a year. Agents may attend such programs but are not required to do so. Guillen sent her agents to the Repo seminars, and accompanied her new agents, thus attending such seminars multiple times a year, rather than the required single annual attendance.

5. From 1987 to the beginning to 1989, Guillen had 18 agents working with her at EMI. The agents who worked at EMI

were treated as independent contractors for purposes of compensation and tax law requirements. They received commissions for sales, but were not paid salaries. In 1989, she lowered the commission that she paid such agents, and many left EMI to work at other real estate companies. Today, at EMI, there are three agents working with Guillen.

6. Guillen conducted weekly group meetings with the EMI agents to review transactions in process, to encourage higher volume of sales, and to present topics of interest to the real estate community, such as new HUD-FHA rules, regulations, and program requirements. Guillen also provided training to the agents on how to write sales contracts under different programs, and how to "prequalify" buyers to determine if there was a likelihood that they would qualify for home loans. She occasionally brought in guest speakers to address the EMI agents on such topics. Guillen personally trained and supervised all new agents at EMI. She emphasized to all EMI agents through personal training and the weekly group meetings what could not be done by agents or brokers, such as falsifying documents, handling HUD-FHA verification forms, or otherwise participating in schemes to make a buyer seem more credit-worthy than he or she really was.

7. Guillen was not present when EMI agents met with prospective purchasers, and she cannot be sure what any individual agent may have told these clients. However, Guillen instructed the agents in FHA requirements, including those for the Repo program, and assumed that the agents were following the directives she gave them, unless she discovered evidence to the contrary. Guillen would sign the Repo sales contracts brought to her by EMI agents, after checking the amounts in the contract to make sure the numbers were correct. She did not question the experienced agents about these transactions because the agents were instructed to tell her of any problems or unusual situations. If an agent did not inform Guillen of a problem or unusual situation, Guillen assumed that the agent had "prequalified" the purchaser, and that there was nothing for Guillen to be told about the transaction. Guillen would ask the agents how the transactions were progressing, but she did not ask to meet any of the purchasers, and she did check behind the agents' work without cause for suspicion.

8. EMI targeted the Hispanic market in Houston. All of the agents who worked at EMI were fluent in Spanish, except one agent. After an EMI real estate agent or broker writes up a contract of sale and it is accepted, the agent or broker then may assist purchasers in finding mortgage lenders. Guillen personally always gave purchasers a list of three or four lenders, never recommending a single lender, but she was aware that some of the EMI agents had lender preferences and probably did make specific recommendations. Guillen apparently had no

company rules that she enforced on the subject of lender referrals.

9. ██████████ Spencer was a loan officer with Horizon Savings Association (HSA), a mortgage lender authorized to originate loans insured by HUD-FHA. Guillen met Spencer when EMI first opened because some of EMI's agents knew Spencer. Although Guillen rarely used Spencer for her personal clients, Spencer had sufficient loan business involving the clients of three EMI agents to have a message box at EMI in which documents needed to close a loan could be placed for Spencer to pick them up. Guillen believed that those documents were primarily letters of explanation, but she did not look at the contents of Spencer's message box.

10. Spencer did not speak Spanish. She used the EMI agents as interpreters at the loan origination interviews and at subsequent meetings with purchaser-borrowers who only spoke Spanish. This was a common practice in Houston, and EMI agents acted as Spanish interpreters for title company representatives, as well as mortgage loan officers. In 1989, it was the custom and practice for loan officers to come to the realtor's office to take loan applications, rather than requiring the applicants to travel to the lender's office.

11. ██████████ Maldonado was a licensed real estate agent who worked at EMI for a two-year period ending in January, 1990. She left EMI for a more generous commission structure elsewhere. EMI was Maldonado's first placement as an agent. Maldonado periodically recommended that the clients contact Wanda Spencer for a mortgage loan, but she also recommended other mortgage lenders. She received on-the-job training from Guillen on how to prequalify buyers for a HUD-insured loan. She attended the sales and training meetings conducted by Guillen, and consulted Guillen about problems. Guillen never directed Maldonado to do anything illegal or dishonest, nor did Guillen ever suggest to Maldonado that illegal or dishonest conduct would be tolerated at EMI.

12. In 1989, Maldonado was the real estate agent for the sales of Repo properties to ██████████ Martinez, ██████████ Gallegos, and ██████████ Zambrano. Guillen signed each of the three sales contracts as sponsoring broker. She asked Maldonado no specific questions about any of the three transactions because Maldonado was an experienced agent, and Maldonado volunteered no information. Guillen knew none of the purchasers at the time when Maldonado presented the sales contracts for Guillen's signature. For each sale contract, Guillen, as broker, certified as follows:

The undersigned certifies that (1) neither he nor anyone authorized to act for him has declined to sell the property described herein or to make it available for inspection

or consideration by a prospective purchaser because of his race, color, religion, sex, or national origin;
 (2) he has executed and filed with HUD form 9556, Joint HUD-VA Nondiscrimination Certification (Sales Broker);
 and (3) he is in Compliance with HUD's earnest money policy as set forth in Agreement to Abide (Exhs. G-17, G-18, G-19)

There were no other broker certifications on the three sales contracts.

13. Maldonado had previously acted as agent for the Martinez's some months before, but their loan application had been rejected because they did not earn enough to qualify for the loan for which they had applied. According to [REDACTED] Martinez, Maldonado had seen the 1987 and 1988 Federal tax returns filed by the Martinez's when they brought them for the rejected loan application. In any event, Maldonado was aware of the financial profile of the Martinez's when [REDACTED] Martinez came to her again in August, 1989, asking to buy a house. She had the sales contract prepared for Guillen's signature, but she did not tell Guillen that the Martinez's had been previously rejected for a mortgage loan on a prior occasion only months previously. Guillen had no independent knowledge of that fact.

14. According to [REDACTED] Martinez, Maldonado told her to go to a tax preparer known to Maldonado, and that the tax preparer would create 1987 and 1988 Federal tax returns for the Martinez's to submit to the lender. The "new" tax returns purport to show on IRS Form 1040 that [REDACTED] Martinez had adjusted gross incomes of \$24,350 and \$26,976 in 1987 and 1988, respectively. A Schedule C for Business profit was created for Mr. Martinez for both 1987 and 1988, stating that he was a partner-owner in a business. The "new" returns were backdated to April 15, 1988 and March 15, 1989, although they were actually prepared sometime after August 30, 1989, the date of the second sales contract. (Exhs. G-5 and G-6).

15. According to answers to a questionnaire filled out by the Internal Revenue Service, the 1987 and 1988 Federal tax returns actually filed by the Martinez's were both on IRS Short Form 1040A, showing an adjusted gross income of \$11,926 in 1987 and an adjusted gross income of \$7,805 in 1988. (Exh. G-7).

16. Both [REDACTED] Martinez testified that Maldonado told them that there was "nothing wrong" with getting the "new" tax returns prepared to submit with their mortgage application. [REDACTED] Spencer was selected by the Martinez's as their loan officer, apparently suggested by Maldonado. Spencer came to EMI to take the loan application. [REDACTED] Martinez spoke good English and Maldonado did not remain in the room while Spencer did the interview. The preliminary loan application and

the formal loan application Form 92900 both contained incorrect and false information. Both forms also stated that Mr. Martinez had been self-employed as a painter for 5 years, making \$ [REDACTED] per month gross pay. In fact, Martinez had worked for his brother for less than two years as a house painter, and was an employee, not an owner, a fact that [REDACTED] Martinez testified Maldonado knew. Maldonado was sufficiently familiar with "prequalification" procedures to know that HUD required paystubs and W-2 forms to prove two years prior income of employees and two years of prior Federal income tax returns to prove prior income of applicants who are self-employed. Apparently, it was easier in this case to obtain false tax returns to support the loan application, and thus Martinez had to be presented as an owner, not as an employee. The number of dependent children was also understated on the loan application.

17. According to [REDACTED] Martinez, Maldonado told her not to tell anyone about the "new" 1987 and 1988 tax returns. Maldonado also told [REDACTED] Martinez to come to Maldonado first with any questions, and not Guillen. Maldonado had almost all of her contact with [REDACTED] Martinez and not [REDACTED] Martinez.

18. Guillen knew nothing about the creation of the "new" 1987 and 1988 tax returns, which were used to qualify the Martinez's for the mortgage loan insured by HUD-FHA. She also did not know that false information appeared on both the preliminary application and the Form 92900 concerning gross income, number of dependents, and Mr. Martinez's employment.

19. Sometime around 1990, investigators from the Office of the HUD Regional Inspector General for Audit (RIGA) confronted the Martinez's with the false tax returns that had been filed with their loan application, and took a statement from Mrs. Martinez about the events surrounding their loan application. The RIGA investigators were investigating Wanda Spencer and HSA when they came to see the Martinez's and apparently asked no questions at all about Guillen or EMI.

20. In early 1991, [REDACTED] Martinez decided to try to sell her house. She called EMI, and Guillen answered the phone. Guillen came to the Martinez's house to arrange to put their house on the market. Guillen's first meeting with the Martinez's was at that time. After Guillen went over the house selling arrangements, [REDACTED] Martinez told her that HUD investigators had come to see her about false tax returns. Guillen's response to Martinez at that time was that she was hearing about all of this for the first time and knew nothing about it.

21. Guillen stated that she was not alarmed by [REDACTED] Martinez's reference to false tax returns at the time. Guillen's only concern then was why the HUD investigators had not consulted her about the matter. As a general rule, financial documentation

is the province of the lender, not the real estate sales person. Guillen acted on that assumption when she initially concluded that the problem did not concern EMI and that she had no duty to investigate further. She decided to wait for HUD to contact her.

22. Maldonado admits that she sent Mr. and Mrs. Martinez to a tax preparer for 1987 and 1988 tax returns but claims that she believed the Martinez's had failed to file any tax returns for those years. I find Maldonado not to be a credible witness, compared to [REDACTED] Martinez in particular, and I credit [REDACTED] Martinez's testimony on Maldonado's knowing involvement in the creation and submission of false tax returns to influence HSA and HUD to approve and insure the mortgage loan for the Martinez's. While I suspect that Maldonado may have also "prepped" the Martinez's for their interview with Spencer, telling them where it would be necessary to lie, I have no reliable evidence to establish that fact.

23. On February 19, 1989, [REDACTED] Gallegos signed a sales contract to purchase a Repo home. Maldonado was their sales agent. Spencer was their loan officer. Guillen signed the sales contract as broker. She had never met the Gallegos' and neither she nor Maldonado can remember whether she asked any questions before signing the sales contract. (Exh. G-18).

24. [REDACTED] Gallegos had been with [REDACTED] Bazaar and Furniture Store for many years. He claimed that he was the owner of the store since 1983. Maldonado and RIGA investigator [REDACTED] Huang believed that he was only the store manager until sometime in late 1989, and became its owner after the loan in question was approved. He is now the owner of that business. He speaks good English, but cannot read it. [REDACTED] Gallegos paid the bills and wrote out the checks for her husband's business. At the preliminary loan interview, [REDACTED] Gallegos answered Spencer's questions, but he paid little attention to the process, and he signed all of the application forms without knowing what they said.

25. The entire loan approval package for the Gallegos loan was fraught with false and inappropriate documentation. Although Gallegos now claims that he owned his business in early 1989, he was treated in the loan package as an employee. W-2 forms and a paystub were submitted to the mortgage lender to substantiate his earnings as an employee for 1987 and 1988. The verification of Employment (VOE), signed by [REDACTED] Alvizo, the head of the Personnel Department for [REDACTED], states that [REDACTED] Gallegos was the Manager of the store, and that he was employed there since 1985, earning \$ [REDACTED] in regular pay and \$ [REDACTED] in overtime pay at a rate of \$ [REDACTED] an hour in 1988, with a very good probability of continued employment. Two W-2 forms for tax years 1987 and 1988 show annual wages of \$ [REDACTED] and [REDACTED],

respectively, for [REDACTED] Gallegos. Gallegos denied that the two W-2 forms were his. He did not receive W-2 forms as an owner-operator, and claimed that he was unaware of their existence before he was shown them sometime in 1990 by F [REDACTED] Huang. He also denied that the paycheck stub was his. The Internal Revenue Service stated in written answers on a questionnaire that the Gallegos' filed IRS Form 1040A (Short Form) in both 1987 and 1988, showing an adjusted gross income of \$0 in 1987 and an adjusted gross income of \$13.57 in 1988. (Exhs. G-8 through 11; G-18, 21, and 24.)

26. According to [REDACTED] Gallegos, his business was losing money in 1987, but by 1989 he was doing "O.K" and at present the business is doing "very well". [REDACTED] Gallegos stated that she was not aware of any financial problems in 1988 and that the only financial restrictions she felt in 1987 were due to the costs of the birth of her second child. [REDACTED] Gallegos cannot remember meeting Spencer at all. She recalls giving all of the financial information for the loan application to Maldonado, rather than Spencer, and that Maldonado gave her all of the forms to sign for the loan. She cannot remember Maldonado telling her to falsify information on the loan application. Neither of the Gallegos' knew Guillen or had any contact with her until the hearing in this case.

27. Maldonado denies that she either directed, or was aware, that the verifications and documentation for the Gallegos loan were false. However, Guillen testified credibly that Maldonado admitted to her in 1991 that Maldonado knew that the Gallegos loan application contained false documents. Maldonado did not admit to Guillen that she was responsible for the false documents. The testimony of Maldonado and the Gallegos' about their knowledge of the false information was less credible. In any event, the record is devoid of any actual or imputable contemporaneous knowledge of either Guillen or EMI that this transaction was tainted by false information.

28. On June 11, 1989, a sales contract for the purchase of a Repo property on behalf of [REDACTED] Zambrano was prepared at EMI. Guillen signed the contract as broker. (Exh. G-19.) Maldonado was the agent for the Zambranos. The Zambrano's son, [REDACTED] Zambrano, knew Maldonado and had bought his own house through her in 1988. [REDACTED] Zambrano works at [REDACTED], a family business then owned by [REDACTED] Zambrano but now owned by [REDACTED] Zambrano, the Zambrano's eldest son. [REDACTED] Zambrano (father) never owned [REDACTED], but has worked there continuously since about 1986. He earns approximately \$ [REDACTED] an hour, plus commissions for booking parties and other catering events.

29. Neither [REDACTED] nor [REDACTED] Zambrano speak or read English. [REDACTED] Spencer was the loan officer for the Zambranos. Maldonado

acted as the translator between the Zambranos and Spencer. The Zambrano loan application submitted to HSA and HUD contained fabricated documentation. [REDACTED] Zambrano testified that all family members were paid in cash and that they received neither W-2 forms nor paychecks (with or without stubs) in 1987 through 1989. Nevertheless, W-2 forms and a paycheck stub for [REDACTED] Zambrano were submitted in the Zambranos' loan application. These documents were created for the loan application. They may have, in fact, represented amounts actually earned by [REDACTED] Zambrano but they were not forms that had been prepared in the ordinary course of business in 1987, 1988, and 1989, which is what they purported to be. All of the Zambranos testified that they had no idea of the source of the mysterious W-2 forms and check stub submitted with the loan package. [REDACTED] Zambrano testified that neither Maldonado nor anyone else told him to have false income documents prepared for his father.

30. The financial information submitted with the Zambrano loan file shows earning by [REDACTED] Zambrano of \$ [REDACTED] in 1987, \$ [REDACTED] in 1988, and projected earnings in 1989 of \$ [REDACTED]. (Exhs. G-12 and G-24.) The loan application itself states that Ruben Zambrano's monthly gross income was \$ [REDACTED] in 1989. (Exh. G-25.) The Internal Revenue Service, in written answers to a questionnaire, indicated that the Zambranos filed Form 1040A (Short Form) in both 1987 and 1988, and that they showed an adjusted gross income of \$ [REDACTED] in 1987 and an adjusted gross income of \$ [REDACTED] in 1988. (Exh. G-16.)

31. Guillen had no actual or constructive knowledge that financial documentation had been created for the purpose of substantiating the Zambrano's loan application. The record is insufficient to determine who knew that the documents were fabricated for that purpose. I cannot find from this record that Maldonado knew of that fact, although I suspect that she did. The Zambranos, through their son [REDACTED], had access to W-2 forms and paychecks, although they denied having any hand in the creation of those documents. I also cannot conclude that the information on the loan application itself was false, although it is certainly different than that given to the IRS for prior years. It is equally possible that the Zambranos underreported their income to the IRS.

32. The HUD investigators who interviewed Spencer, [REDACTED] Zambrano, [REDACTED] Gallegos, and [REDACTED] Martinez had no evidence at any time that Guillen knew anything about any of the false information or created documents in the Zambrano, Gallegos, or Martinez loan application packages.

33. At EMI, all transactions were tracked and filed by the property address, not by the purchaser's names or the sales agent's name. There was no cross-filing system at EMI to match property addresses with buyers. When Guillen was notified of her

suspension and proposed debarment, she and her secretary, [REDACTED], had to go through all of the files to match the file address with the FHA numbers cited by HUD in the notice of suspension and proposed debarment. Guillen was able to find the Martinez loan and the Zambrano loan by such cross checking, but could not determine what the third transaction was about. Guillen called Maldonado, who was listed as the agent for Martinez and Zambrano, to see what she knew.

34. Maldonado had been called by the Martinez', the Zambranos, and the Gallegos' after the HUD investigators came to see each of those families. She told Guillen that the third file that Guillen could not identify was probably the one for Gallegos, because he had been questioned by the HUD investigators. This was the first time that Maldonado admitted to Guillen what she knew of the HUD investigation. Guillen testified that Maldonado also admitted to her in that conversation that Maldonado knew that Gallegos had submitted false documents to HSA and HUD. Although Maldonado denied such knowledge on her part, I find Guillen to be an honest witness and that she testified accurately about what Maldonado told her.

35. Sometime in or after December 1991, Guillen saw for the first time the signed statements given to the HUD investigators by [REDACTED] Martinez, [REDACTED] Gallegos, and [REDACTED] Zambrano. [REDACTED] Martinez' statement implicated Maldonado in the knowing creation of the false tax returns. Guillen then went to see [REDACTED] Martinez to find out what she knew. Prior to that time, Guillen was angry with Maldonado for causing her trouble, but she still believed that she and EMI were being blamed for the carelessness of HUD and HSA, not for wrongful acts of Maldonado.

36. Guillen did not know that false documents had been submitted in the three transactions, and she had no reason to suspect that had occurred. She had no trouble with Maldonado as an agent, and believed that Maldonado was not only experienced but honest. Had Guillen known that Maldonado was involved with the fabrication of false documents, she would have fired her, reported her to the Texas Real Estate Commission and reported the matter to HSA. Guillen considers her real estate work to be a profession, and she instructs her agents not to do anything illegal, unethical, or that could damage Guillen's professional reputation.

37. The Texas Real Estate Commission enforces the Texas Real Estate License Act and other statutes. The Commission issues licenses to real estate brokers and agents. It also revokes licenses, and suspends, puts on probation, and reprimands licensees, after an administrative investigation and hearing on charges of improper conduct. Under Texas law, a real estate broker is responsible only for the authorized acts of sponsored salesmen (agents). According to the Director of Enforcement of

the Commission, a broker need only use reasonable diligence to discover unauthorized or illegal acts of a salesperson (agent), and if a broker did not know of such acts because they were hidden and by reasonable diligence could not have found out about them, the Commission does not hold the broker liable for the acts of the sponsored salesperson.

However, if the Commission finds negligent supervision by the broker, it may hold the broker responsible for acts of which the broker had no knowledge. The Commission recognizes that most salespeople (agents) are independent contractors, not employees, and has no problem with IRS Revenue Rulings that limit the supervision that may be imposed on independent contractors. The Commission's tests for negligent supervision by first looking to see if there is any supervision at all, and if so, how much. The Commission expects a broker to discuss transactions with salespersons. It also looks to general meetings, guidance, training and counselling given by the broker for salespersons. The Commission does not expect a broker to sit in on meetings between salespersons and buyers. The Commission does not conclude that there is negligent supervision if a broker could not have, by reasonable diligence, discovered illegal or unauthorized acts.

38. The Veteran's Administration (VA) has debarred Guillen for two years, based upon a mistake of fact that HUD had already debarred her, which it had not. The VA then sent a letter to the Texas Real Estate Commission about its debarment of Guillen. The Commission has initiated an investigation of Guillen based on the letter from the VA. The Commission had never received a complaint against Guillen, other than the VA's letter.

DISCUSSION

The purpose of debarment is to assure the Government that it only does business with "responsible" persons and entities. 24 C.F.R. §24.115(a). The term "responsible," as used in the context of suspension and debarment, is a term of art which includes both the ability to perform a contract satisfactorily and the honesty and integrity of the participant. 48 Comp. Gen. 769 (1969). Even if cause for debarment is established by a preponderance of the evidence, existence of a cause alone does not automatically require that a debarment be imposed. The test for whether a debarment is warranted is present responsibility, although a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F.Supp. 947, 949 (D.D.C. (1980)). In deciding whether to debar a person, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. 24 C.F.R. §§24.115(d), 24.314(a), and 24.320(a). A debarment shall be used only to protect the public interest and not for purposes

of punishment. 24 C.F.R. §24.115(b).

The Government may only debar participants, principals and their affiliates, as defined in 24 C.F.R. §24.105. Real estate agents and brokers are specifically defined as principals. 24 C.F.R. §24.105(p)(11). Guillen is a principal who participated in both primary and lower-tier transactions as an approved HUD Repo broker. Although she did business in 1989 as EMI, EMI became a separate corporate entity in 1990, and is presently an affiliate of Guillen because she owns and controls it. EMI is not, and never has been, a licensed broker or agent. Both Guillen and EMI are subject to debarment and suspension by HUD as a principal and her affiliate.

The Government cites 24 C.F.R. § 24.305(b) as the first cause for Respondents' debarment. To establish that cause for debarment, the Government must prove by a preponderance of the evidence that Guillen was responsible for:

- (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.

The record is devoid of evidence of any violations of the terms of a public agreement or transaction by Emily Guillen.

The agents were not employees of Guillen; they were independent contractors. She had only so much control over them because of that distinction, even if she could, and did, "fire" them for cause by terminating their contractual relationship with her. However, the record in this case is absolutely clear that Guillen had no idea that ██████ Maldonado was involving herself in the submission of false documentation and information to induce HSA and HUD to approve mortgage loans for unqualified applicants. To Guillen, Maldonado was an experienced agents who Guillen herself had trained, and Guillen had received no complaints about Maldonado that raised doubts about Maldonado's honesty or competence.

Although I find that Maldonado actively participated in

illegal activity in the Martinez transaction, and at least knew of it and participated in it by complicity in the Gallegos transaction, I do not know what Maldonado knew or did in connection with the Zambrano loan. To make the next leap of faith from Maldonado to Guillen requires more than a mere broker-agent relationship. Respondent superior is not an appropriate legal principle to apply to debarment, which is uniquely designed to single out individuals lacking in responsibility. It is the conduct of that individual, and not their colleagues, that is the point from which responsibility is measured. The conduct of others may only be attributed to a person if that person knew or should have known of the conduct and had the power and authority to stop it. Emily Guillen had the power and authority to stop ■ Maldonado but she had no way of knowing that there was anything to stop.

Maldonado hid her deeds from Guillen, no doubt because she was well aware that Guillen would not have tolerated such conduct. Maldonado used silence to cover the fact that she was engaged in clearly improper conduct. She knew that Guillen expected experienced agents such as Maldonado to report problems to Guillen without Guillen having to drag pertinent information out by tedious, respective questions. Maldonado knew that Guillen would suspect nothing if Maldonado reported nothing. In the Martinez transaction, the mere reminder that the Martinez's had previously been turned down for a loan could have opened the door to all manner of inquiry by Guillen. Silence kept that door closed.

I am further convinced that if silence did not work, Maldonado would have lied to Guillen. Maldonado was already committed to her course of conduct, and had too much to lose by confessing knowledge of, let alone active participation in, the creation of false documents. Inquiries by Guillen would not have changed what happened, prevented the fraud on HSA and HUD, or even revealed any part of it. Guillen is an honest, responsible professional who had a dishonest agent working under her sponsorship, and that agent's dishonesty was at all times hidden.

HUD contends that even if Guillen did not know what Maldonado was doing, and even if she reasonably could not have known, she should nonetheless be debarred for negligent supervision. HUD contends that Guillen's practice of requiring experienced agents to report problems, rather than Guillen questioning them on every transaction, constitute negligent supervision per se. First, the role of the real estate agent is to sell houses, not to qualify purchasers for mortgage loans. The prequalification process is not formal, nor is it even really required. It is practical: no agent or broker wants to waste their time showing houses and submitting bids for purchasers who will not be able to go through with a transaction because they do not have sufficient financial qualifications. An agent should

only be doing enough prequalification to believe that it would not be a waste of time to proceed further. When the agent brings the sales contract, which is really a bid, to the broker for signature, the agent's duties have ended, for all practical purposes. The agents's role is limited. Any inquiries that could be made by the broker about the agent's activity would also be limited, based on the agent's limited role, unless there is cause given to inquire further.

In this case, Emily Guillen had no cause to inquire further of ■■■ Maldonado, based on Guillen's knowledge of Maldonado as an agent. Guillen's failure to closely question experienced agents when they presented a sales contract for signature was not an abrogation of her duty as a broker to provide supervision for her sponsored agents. Guillen did question her agents regularly to find out what sales they had in process, how those transactions were progressing, and if there were any problems. Maldonado herself admitted that Guillen made herself available to the agents to discuss problems and give professional guidance. The weekly staff meetings provided another important element of supervision. Those meetings were not merely used to encourage increased sales. They were also used as educational tools, communication centers, and a vehicle to imbue professional pride and ethics among the agents who were technically not Guillen's employees.

In the case of The Mayer Company, Inc. and Carl A. Mayer, Jr., HUDBCA No. 81-544-D1 (December 1, 1981), a corporate President was debarred for so isolating himself from the day to day operations of his company that he failed to discover and cure problems that would have been apparent to him had he been performing his management functions. The case of Emily Guillen is far different. Guillen was not a broker who put on blinders and covered her ears so that her agents could do anything they pleased. She was not a remote figure or an inaccessible superior to the EMI agents. Although she had a sales portfolio of her own, she did the majority of her sales work at night and was available to her agents during the day. Through her individual contacts with the agents day in, day out, and through the weekly meetings, Guillen was fulfilling her supervisory role. She paid the most attention to new agents who needed on-the-job training and guidance. Once she was sure that an agent was on solid footing and had sufficient experience, Guillen treated such agents as the licensed professionals they were. It was not inappropriate or an abandonment of Guillen's professional obligations to place the primary burden of reporting problems on the agents. Such deferences to a professional is appropriate, until there are signs of trouble. If a broker does not increase investigation and supervision once there are signs of trouble, that broker may then be a negligent supervisor, but not before. Using this test, Emily Guillen was not a negligent supervisor of the EMI agents.

The Government's case against Emily Guillen and EMI fails for lack of proof, no matter what section of the debarment regulation is cited as grounds for the sanction. The purposes of debarment would in no way be furthered by debarring Guillen, who has at all times been responsible, for the acts of a single agent out of a staff of 18. Although another broker may well have started looking into the Martinez matter when Mrs. Martinez first mentioned false tax returns, the timing and context of how Guillen first heard about the matter makes her lack of action not unreasonable or irresponsible. HUD contends that her anger is somehow an indication that she does not appreciate the seriousness of what happened. I disagree. Her continuing anger at HUD has been mostly focused on the unfairness of immediately suspending her before she had a hearing, although she has also been outraged by HUD trying to tar her with what she perceived as a loan origination problem. She now realizes what happened, but she also knows that she could not have stopped anything by conducting her business differently.

A suspension pending determination of debarment is not automatic. There is a two-part test: First, there must exist adequate evidence of one or more of the causes for suspension listed at 24 C.F.R. §24.405, and second, immediate action must be necessary to protect the public interest. 24 C.F.R. §24.400 (b). The agency is charged with the duty of assessing the adequacy of the evidence, including how much information is available, how credible it given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. 24 C.F.R. §24.400(c).

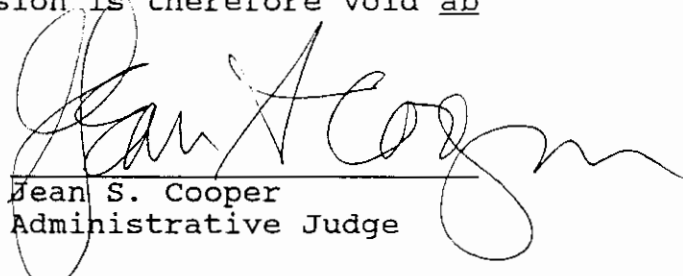
HUD had three Repo sales contracts signed by Guillen as broker. However, it also had evidence in the form of signed statements from the borrowers in each of the transactions that never mentioned Guillen at all. Although the statements were not accepted in evidence because they were found to be unreliable because of the manner in which they were taken, the investigators who took them testified that they had absolutely no evidence that Guillen was involved, or was otherwise lacking in responsibility. A single EMI agent out of a total of 18 was involved in all three transactions. That agent no longer was associated with EMI, and had not been since January 1990. I conclude that this "evidence" was not sufficient for HUD to believe that the immediate suspension of Emily Guillen and EMI was necessary to protect the public interest.

The suspension was imposed when the debarment was proposed, not before. HUD was not using the suspension to investigate Respondents further. It had already decided upon the grounds for the proposed debarment and the transactions that would be cited as evidence. HUD therefore knew that it had no evidence of Emily Guillen's present or past lack of responsibility, and with only

one agent's activities as the focus of the debarment, HUD cannot argue that it had reason to believe the problem at EMI was more widespread. The use of a suspension in this case was an abuse of discretion, and HUD did not properly apply its own regulations. Even if HUD thought that it had adequate evidence that a cause for debarment existed, which it turns out it did not, it certainly cannot claim in good faith that immediate action against Emily Guillen was needed to protect the public interest. Emily Guillen is not [REDACTED] Maldonado. HUD seems to have forgotten that critical fact when it was most important for it to draw that distinction. As a result, Guillen's business and her personal and professional reputation have been destroyed. The public has been ill-served by this.

CONCLUSION

Based upon the record considered as a whole, HUD has failed to establish by a preponderance of the evidence the cited grounds or need for the debarment of Emily Guillen and Emily Investments. It is not in the public interest that either Respondent be debarred. HUD has also failed to establish that an immediate suspension was warranted or imposed in accordance with the applicable regulation. The suspension is therefore void ab initio.



Jean S. Cooper
Administrative Judge

February 28, 1992
Washington, D.C.