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

In the Matter of:		
DANIEL J. ROBERTSON, THE ROBERTSON COMPANY,	HUDBCA No. Docket No.	92-A-7583-D50 92-1850-DB
Respondents		

For the Respondents:

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For the Government:

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Washington, D.C. 20410

DETERMINATION

by Administrative Judge Jean S. Cooper
April 28, 1993

Statement of the Case

By letter dated February 23, 1992, Daniel J. Robertson ("Robertson"), was notified by Arthur J. Hill, then Assistant Secretary for Housing - Federal Housing Commissioner of the U.S. Department of Housing and Urban Development ("HUD" or "the Government") that HUD proposed to debar him and his affiliate, The Robertson Company, for a period of five years from the date of his suspension, November 21, 1991. Pending determination of debarment, Robertson and The Robertson Company (collectively "Respondents") were suspended from participation at HUD and throughout the Executive Branch of the Federal Government in primary covered transactions and lower-tier covered transactions as either participants or principals.

The basis for the proposed debarment of Respondents is Robertson's conviction for violation of 18 U.S.C. §§2 and 1010. In cases of proposed debarment based solely upon a conviction,

parties may request an opportunity to submit documentary evidence and written briefs in support of their position on the proposed debarment, in lieu of an oral hearing. 24 C.F.R §24.313(b)(2)(ii). Respondents made a timely request for a hearing, and documentary evidence and written briefs were submitted on behalf of both Respondents and the Government. This case was transferred to the undersigned for issuance of a written determination after the receipt of all written submissions.

Findings of Fact

1) From the summer of 1985 through June, 1986, Robertson was president, registered agent, and director of The Robertson Company, a Colorado corporation. In those capacities, Robertson actively participated in a fraudulent investment scheme designed to undermine and avoid HUD investment requirements for properties that would have mortgages insured by HUD. Pursuant to that scheme, Robertson solicited primarily friends and relatives to invest in a residential real estate development known as Indian Bluffs Townhomes, in the vicinity of Colorado Springs, Colorado. (Govt. Exh. 2.)

2) A written solicitation given by Robertson to potential investors stated that the investors would receive a projected profit of $306,145, and that the investors would not have to make any cash payments to cover the required down payments, but would give promissory notes back to Respondents to cover the down payments. The promissory notes were secured by deeds of trust in favor of The Robertson Company on other real property owned by the investors. In fact, Respondents had no intention of collecting payments on the promissory notes, and informed the investors prior to closing that the promissory notes would not be enforced. The sole purpose of setting up the promissory note scheme was to make it appear that the investors had made the fifteen percent down payment required by HUD to qualify for a mortgage insured by HUD. No real down payment was made by any of the investors because it was understood that no collection would be made on the promissory notes. (Govt. Exh. 2.)

3) HUD required investors in rental property to document at closing that the properties were under existing leases. Nine of the 20 properties in this category were not rented prior to closing. Robertson directed employees of The Robertson Company to forge leases for those properties. Those forged leases were submitted to HUD in the nine affected transactions to make it appear that HUD's lease requirement had been satisfied. (Govt. Exh. 2.)

4) On June 6, 1991, a Federal Grand Jury returned a 62-count indictment against Respondents, including one count of conspiracy to defraud HUD in violation of 18 U.S.C. §371. Fraudulent sales transactions involving 23 Indian Bluffs Townhomes were detailed by the Grand Jury in support of the conspiracy count. The indictment separately charged Respondents

with 58 counts of submitting false documents to HUD, in violation of 18 U.S.C. §§2 and 1010. The false documents enumerated by the Grand Jury were the closing statements (Form HUD-1), promissory notes, leases, HUD Certificates of Commitment, and false appraisals. (Govt. Exh. 1.)

5) Four months after the indictment was returned, Robertson entered into a plea agreement with the Government in which he pled guilty to a two-count information charging him with violations of 18 U.S.C. §§2 and 1010. Count One of the information charged Robertson with submitting to HUD, or aiding and abetting others to submit, false promissory notes as down payments in 20 sales transactions. The second count charged Robertson with making, and aiding and abetting others to make, nine false leases. The Robertson Company was not named as a defendant in the information. (Govt. Exh 3.)

6) The Government filed with the information and plea agreement a Prosecutor's Statement of evidence that was, in essence, a recapitulation of the specific charges in the indictment, absent the references to conspiracy and the appraisals. The Robertson Company's role in the scheme was detailed in the Prosecutor's Statement. (Govt. Exh. 2.)

7) When the plea agreement was presented to the court for consideration in sentencing, a Defendant's Statement was also attached to it, along with the Prosecutor's Statement. Defendant's Statement did not challenge the prosecutor's evidence, but stated that it was submitted in mitigation of the crimes committed by Robertson. In summary, Defendant's Statement explains that in 1982, Robertson became fascinated by the idea that HUD would permit down payments in forms other than cash so long as the down payment was a "cash equivalent." Robertson devised a financing plan utilizing this concept to allow his friends and relatives in California who had substantial equity in their California homes to purchase investor properties in Colorado, pledging that equity. This plan is essentially the one that Robertson implemented in 1985-86. In 1982, Robertson discussed the plan with an attorney who was known as a real estate specialist in Colorado Springs.

The attorney contacted the HUD Office of Regional Counsel in Denver for advice on Robertson's plan. The attorney spoke with Barbara Kirchsten, of the HUD Office of Regional Counsel, and based upon that 1982 conversation, Robertson's attorney believed that the promissory notes could be discounted to zero by Robertson, and still meet HUD requirements for a 15 percent investor down payment. However, Robertson's attorney received further communication from Kirchsten that HUD was concerned with such a plan and that there could be no antecedent agreements to discount the promissory notes. In the investor agreements for

Indian Bluffs Townhomes, there is a disclaimer about any antecedent agreement to discount the promissory notes.

Apparently, during the period from 1981 through 1986, financing plans for investors with HUD-insured mortgages became a lucrative form of investment in the Colorado Springs area, and many made use of promissory notes in lieu of cash down payments. Many of those promissory notes were discounted to as little as $100 after closing. Robertson assumed that this was fully acceptable to HUD because it was such a widespread practice, even though his attorney had been warned by Kirchsten that discounting of the promissory notes to a de minimis value would not be viewed with favor by HUD. (Govt. Exh. 2 - Attachment B.)

8. Robertson offered no explanation for his creation of the false leases, other than that he and others he trusted believed the lease requirement to be "ridiculous," and that the bogus leases were a mere formality that would allow the loans to close. Defendant's Statement avers that Robertson also was prepared to testify that he did not know that the lease requirement was a HUD requirement; and that he thought it was the mortgagee's requirement. The last two sentences of Defendant's Statement read as follows:

> Nevertheless, Mr. Robertson agrees and acknowledges that he should have known better and should have never submitted false leases to Foster Mortgage Company on HUD insured loans. These leases were false and misrepresented the true facts in the loan files, clearly constituting an offense under 18 U.S.C. 1010. (Govt. Exh. 2 - Attachment B.)

9. On December 23, 1991, Robertson was found guilty based on his guilty plea to the information. He was sentenced to six months imprisonment on the first count of the information. Sentence was suspended on the second count, and Robertson was placed on probation for five years following his release from prison. The first six months of Robertson's probation were to be served in home detention with an electronic monitoring device attached to his person. Robertson was ordered to make restitution to HUD in the amount of $130,000, to be paid over a period of years, not to extend beyond three years from Robertson's release from prison. (Govt's Exh. 4.)

10. Robertson also submitted letters written to the U.S. Probation Office attesting to his involvement in civic causes, a letter from one of his attorneys, a letter from the contractor who built Indian Bluff Townhomes, and letters from two real estate investors. None of the letters discuss Robertson's present responsibility in light of his criminal conduct and the attorney who wrote one of the letters stated that he has no

knowledge of the facts or circumstances that led to Robertson's conviction. (Resp. Exh. L.)

11. Eleven of the mortgages for properties involved in the investment scheme went into default and foreclosure. The financial loss to HUD was calculated by HUD to be $714,646.90. (Declaration of Mark F. Rinde-Thorsen, Govt. Exh. and Attachment.)

DISCUSSION

The purpose of debarment is to assure the Government that it only does business with "responsible" participants. 24 C.F.R. §24.115. The term "responsible", when used in the context of Government sanctions, is a term of art encompassing not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant. 48 Comp. Gen. 769 (1969). The test for whether debarment is warranted is present responsibility. However, a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957). Debarment may only be used to protect the public interest, and may not be used for punitive purposes. 24 C.F.R. §24.115(b). Furthermore, mitigating circumstances must be considered in determining whether debarment is warranted and the duration of the debarment, if it is necessary. 24 C.F.R. §24.300.

HUD proposes that Respondents be debarred for a period of five years from the date of their suspension, November 21, 1991, based upon Robertson's conviction for violation of 18 U.S.C. §§2 and 1010. There is no real dispute that Robertson is a "participant" and "principal" subject to debarment pursuant to 24 C.F.R. §24.105(m) and (p). As the president of The Robertson Company, he participated in covered transactions, defined to include mortgages insured by HUD, whether as a primary covered transaction or a lower-tier covered transaction. 24 C.F.R. §24.110(a)(1)(i) and (ii). He also is a "principal," as defined at 24 C.F.R. §24.105(p), because he was a participant with critical influence, substantive control, and management over covered transactions. Likewise, The Robertson Company meets these same definitions. However, The Robertson Company is named as Robertson's affiliate for purposes of this case. I find that The Robertson Company is Robertson's affiliate, as defined at 24 C.F.R. §24.105(b), because Robertson has direct control over it as its president, registered agent, and corporate director. Therefore, both Respondents are subject to debarment by HUD if cause is established for debarment, and debarment is necessary.

HUD has established cause for debarment, pursuant to 24 C.F.R. §24.305(a)(1)(3), and (4), based on Robertson's conviction for violation of 18 U.S.C. §§2 and 1010. These crimes involve fraud in a public transaction, false statements,

falsification of records, and indicate a lack of business integrity that seriously and directly affects Respondents' present responsibility. The acts for which Robertson was convicted occurred over a one-year period between mid-1985 and mid-1986. The passage of time between 1986 and 1993 is significant. However, the most recent materials filed by Respondents shed little light on their present responsibility, particularly concerning the deliberate and concerted effort to create fraudulent leases.

Robertson directed that false leases be created. He was not told to create false leases by anyone. He did it to actively mislead the mortgagee through fraudulent and false documents. Whether or not he knew that he was violating a HUD requirement is ultimately not determinative. Creation of fraudulent leases raises serious questions about Robertson's honesty and integrity. His grudging admission in his 1991 Defendant's Statement to the Court that his actions were wrong in regard to the leases seems almost an afterthought compared to his attempts to belittle the matter and distance himself from taking primary responsibility for the creation of the fraudulent leases. I find that Robertson still misses the point about the leases, and has not accepted full personal responsibility for them. On that basis alone, I cannot find that Robertson is presently responsible, despite the passage of time since he committed the acts for which he was convicted. Furthermore, I find little, if any, mitigation of the seriousness of creating false documents to induce a lender to do something. It is all the worse because this was done in the context of public transactions with public monies insuring the mortgage commitments.

Robertson's mitigation in relation to the promissory notes is initially more compelling because he sought legal counsel on the matter, and he because believed that HUD would continue to approve financing plans using promissory notes in lieu of cash down payments. However, he received a clear warning that HUD was getting very uncomfortable with severe discounting of promissory notes after closing, and he at all times refused to acknowledge HUD's legitimate interest in having investors with a <u>real</u> financial stake in the investment, rather than a bogus investment that would never be called in. In this case, Robertson assured his investors before closing that the promissory notes would never be enforced. I find that Robertson went well beyond HUD's guidelines for investments "other than cash" in down payments, and beyond the legal advice he received. In fact, he set out to evade the down payment requirement entirely, but he created a "paper trail" to make it appear that he was complying with HUD's policy in both letter and spirit. This evasion of a sensible Government policy is not the hallmark of a responsible participant. Even if the legal advice Robertson received could be stretched to appear to approve of his financing technique, he clearly went outside the ambit of the approved technique and the

spirit of the advice. Robertson was unconcerned about HUD program requirements or policies except to the extent that they might frustrate his investment scheme. His fraudulent acts facilitated the participation of investors who had little or no regard for their financial obligations, and who let many of the loans go into default. The $130,000 ordered by the Court as "restitution" did not make HUD or the public financially whole. The bill for Robertson's creative financing scheme is now being paid by the U.S. taxpayers.

I find, upon consideration of the evidence submitted in mitigation by Respondents, that it is thin and hollow justification for acts that were clearly fraudulent and clearly beyond the scope of HUD's flexible guidelines for acceptable down payments by means other than cash. Based upon the fraudulent leases alone, I would find that debarment is warranted. However, I find Robertson's disclaimers about the promissory notes, obtained only to "paper" the loan applications, to be disingenuous and troubling.

A period of debarment is generally not to exceed three years, but it is also to be commensurate with the seriousness of the causes on which the debarment is based. Where circumstances warrant, a longer period of debarment may be imposed. 24 C.F.R. §24.320(a)(1). In this case, I find the extent and venality of the fraud to still be shocking years after it occurred. HUD and the public simply cannot afford the risk of doing business with Respondents for the foreseeable future. I do not find them presently responsible.

Under the facts developed in this record, I find that the period of exclusion requested by HUD is not excessive. See, Carl W. Seitz and Academy Abstract Company, HUDBCA No. 91-5930-D66 (April 13, 1992). However, debarment is a prospective sanction, and cannot be applied retroactively. I credit the time during which Respondents have been suspended, and find that a period of debarment from this date, up to and including November 21, 1996, is necessary to protect the public. It also corresponds with the five year probation imposed on Robertson by the sentencing judge to begin after incarceration was completed. It is appropriate that The Robertson Company be debarred for an equal time because Robertson conducted his illegal activities through his affiliate.

CONCLUSION

For the foregoing reasons, Respondents Daniel J. Robertson and The Robertson Company shall be debarred up to and including November 21, 1996.

Jean S. Cooper
Administrative Judge