UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY

United States Department of Housing and Urban Development, Petitioner,	)	HUDOHA 18-AF-0078-PF-006
v.	)	
Team USA Mortgage, LLC, Respondent.	)	

For the Petitioner: Geoffrey L. Patton, Esq.; Joel A. Foreman, Esq.; Joseph J. Kim, Esq.

For the Respondent: Jesse R. Johnston, Esq. at Dickinson, Mackaman, Tyler & Hagen, P.C.

ORDER ON SECRETARIAL REVIEW

On February 11, 2019, the U.S. Department of Housing and Urban Development ("Petitioner") submitted a *Notice of Appeal and Brief in Support* ("Appeal"), appealing the December 6, 2018, *Corrected Initial Decision and Order* ("Decision") issued by Administrative Law Judge Alexander Fernández ("ALJ"). In the *Decision*, the ALJ held Team USA ("Respondent") vicariously liable under the Program Fraud Civil Remedies Act and imposed penalties and assessments totaling $42,000.00, derived from the ALJ's consideration of several aggravating and mitigating factors presented by the parties. Petitioner argued in its Appeal that the ALJ applied the wrong theory of vicarious liability and the assessment awarded was a significant reduction of the amount Petitioner sought, caused by legal and evidentiary errors that

led to the improper weighing of the aggravating and mitigating factors listed in 24 C.F.R. § 28.40(b). The Petitioner requested that the Secretary reverse the errors and remand the Decision for further proceedings. Respondent contended in its *Brief in Opposition to HUD's Appeal and Brief in Support* ("Opposition Brief") that the Court correctly applied the law of vicarious liability analysis; properly excluded impermissible character evidence about former Team USA personnel; and correctly considered the mitigating factors when assessing the penalties sought by Petitioner. Alternatively, Respondent argued that any assessment was improper due to the lack of culpability of Team USA.

Upon review of the entire record in this proceeding, the Appeal is **remanded** for the reasons set forth below.

BACKGROUND

The Program Fraud Civil Remedies Act ("PFCRA"), enacted in 1986 and codified at 31 U.S.C. § 3801 et seq., provides federal executive branch agencies with a civil administrative remedy for false claims. The statute imposes civil liability on any person who makes, presents, or submits (or causes to be made, presented, or submitted), a claim that the person knows or has reason to know to be false, fictitious, or fraudulent, or know to include or be supported by a written statement which asserts a false, fictitious, or fraudulent material fact. 31 U.S.C. § 3802(a)(1). The phrase "knows or has reason to know" encompasses actual knowledge, deliberate ignorance, and reckless disregard, and no proof of specific intent to defraud is required. 31 U.S.C. § 3801(a)(5). The U.S. Department of Housing and Urban Development ("HUD") regulations at 24 C.F.R. Part 28 mirror the PFCRA statute in providing a procedure for the agency to impose civil liability against persons who make, submit, or present false, fictitious, or fraudulent claims to the agency. See 24 C.F.R. § 28.10(a)(1).

In the instant case, Petitioner brought a PFCRA action based on false claims submitted to the Federal Housing Administration ("FHA"), an organizational unit of HUD, under its Single-Family Insurance Program, established in accordance with Section 203(b) of the National Housing Act (12 U.S.C. § 1709(b)). Under the program, homebuyers may obtain FHA mortgages from HUD-approved lenders to purchase houses with low down payments. FHA mortgage insurance provides lenders with protection against losses if the homeowners default on their mortgage loans. The lenders bear less risk because FHA will pay a claim to them in the event of a homeowner's default. Loans must meet certain requirements established by FHA to qualify for insurance.

For a mortgage to be eligible for FHA insurance, HUD requires, among other things, that the lender ensure that the borrower 1) makes a minimum down payment of at least 3.5 percent of the sales price or appraised value, whichever is less; and 2) has assets sufficient to cover the necessary closing costs and fees at the time of settlement. See 12 U.S.C. § 1709(b)(9)(A). The statute also prohibits borrowers from making the 3.5 percent investment using funds provided by the seller or "any other person or entity that financially benefits from the transaction." 12 U.S.C. § 1709(b)(9)(C)(i). In this case, FHA insured a loan originated by Respondent that went into default and the mortgagee submitted two FHA insurance claims for payment on the defaulted loan.

On December 18, 2017, Petitioner filed a *Complaint* with HUD's Office of Hearings and Appeals alleging that, at the time the subject mortgage was originated, Respondent's Brooklyn Center branch office was ineligible to originate FHA loans due to noncompliance with HUD requirements, rendering the subsequent FHA insurance claims "false" under PFCRA. On January 12, 2018, Respondent timely filed a hearing request and *Answer* raising twelve affirmative defenses. The Court issued a *Notice and Scheduling Order* setting the matter for hearing in April 2018.

On February 22, 2018, Petitioner filed a *Motion to Strike* nine of Respondent's affirmative defenses. On March 26, 2018, Respondent filed a motion seeking to delete the nine defenses Petitioner had asked the Court to strike. The next day, the Court issued an *Order on Motion to Amend and Motion to Strike* which deleted the nine defenses in question, granted Respondent's request to renumber the remaining defenses, and denied Respondent's request to add three additional defenses.

On March 26, 2018, Petitioner filed a *Motion for Summary Judgment*, arguing that Respondent's employee who had originated the subject loan, Patrick Oketch, had committed misconduct that caused the submission of a false or fraudulent insurance claim for which Respondent was vicariously liable.[1] Respondent filed an *Opposition and Cross-Motion for Summary Judgment*, and with the Court's permission, Petitioner filed a *Reply*. On April 20, 2018, the Court issued an *Order Denying Summary Judgment* on the basis that material facts remained in dispute.

On April 24-25, 2018, the Court held a hearing in St. Paul, Minnesota. At the beginning of the hearing, the Court excluded two of Respondent's proposed witnesses, Brenda Kallon and Deb Root, because their identities had not been disclosed to Petitioner in a timely manner, but permitted Respondent to offer late-disclosed exhibits. The Court also ruled on Petitioner's outstanding motion in limine to exclude evidence regarding mitigation of damages, which was denied, and Respondent's outstanding motion in limine to exclude evidence of prior bad acts by witness Dan Boler, which was sustained.

On December 6, 2018, the Court entered its Decision finding Respondent vicariously liable under PFCRA and imposed penalties and assessments totaling $42,000.00.

On January 4, 2019, Petitioner submitted a request for an extension of time to file an appeal of the Decision due to the lapse of HUD's appropriations. The request was granted on January 7, 2019. On February 11, 2019, Petitioner submitted its Appeal of the Decision. Petitioner argued that the Court erred in applying the law of vicarious liability when it ruled that Respondent's branch manager, Patrick Oketch, was not acting within the scope of his employment when committing the fraudulent conduct. Additionally, Petitioner argued that the Court should have allowed the admission of evidence offered of the felony convictions of Respondent's personnel when considering the aggravating and mitigating factors. Lastly, Petitioner argued that the Court misapplied the aggravating and mitigating factors when determining the appropriate penalties and assessments.

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[1] The misconduct alleged by Petitioner includes Mr. Oketch knowingly violating FHA requirements when originating the Subject Loan by altering the borrower's bank statements and providing the borrower with funds to close on the loan. Petitioner argued the loan would not have qualified had Mr. Oketch not taken these actions. Appeal at 4.

On March 1, 2019, Respondent submitted its Opposition Brief. Respondent argued that the Court correctly applied the law of vicarious liability and properly excluded impermissible character evidence regarding former Team USA personnel for lack of relevancy. Finally, Respondent contended that the Court was correct in mitigating any of the penalties and assessments sought by Petitioner, while also arguing that any assessment is improper due to the lack of culpability of Respondent in the present matter.

DISCUSSION

I. Respondent is Vicariously Liable for Mr. Oketch's Actions.

The doctrine of respondeat superior, or vicarious liability, holds an employer responsible for misconduct committed by an employee. Courts routinely have applied these concepts in the False Claims Act ("FCA") context. See United States v. Dolphin Mortg. Corp., No. 06-CV-499, 2009 U.S. Dist. LEXIS 4295, at 36 (N.D. Ill., Jan. 22, 2009). It has also been applied to violations of the PFCRA.[2] Respondeat superior applies to violations of the PFCRA and the FCA committed by an employee of a corporation who is acting within the scope of his authority and, at least in part, for the employer's benefit. See United States v. Incorporated Village of Island Park, 888 F. Supp. 419 at 438, citing Grand Union Co. v. United States, 696 F. 2d 888, 891 (11th Cir. 1983). A corporation is also liable for violations of the PFCRA and the FCA committed by an employee who acted with apparent authority, even if the acts do not benefit the corporation at all. See id. citing United States v. O'Connell, 890 F. 2d 563, 567-68 (1st Cir. 1989).

The Court held that Respondent is vicariously liable under the theory of apparent authority. Decision at 18. However, Petitioner argued in its Appeal that the Court erred in applying the law of vicarious liability when it held that Mr. Oketch's fraudulent conduct was not within the scope of his employment. Appeal at 5. Respondent argued that the Court's analysis under vicarious liability should be affirmed. Opp'n Br. at 8.

As a branch manager at Respondent's Brooklyn Center location, Mr. Oketch had the authority to originate loans on behalf of Respondent. Decision at 4. The record shows that on December 8, 2009, borrower Brenda Kallon signed an agreement with Respondent to begin the loan origination process. Id. at 7. Mr. Oketch gathered income documentation and bank statements intended to verify that Ms. Kallon held sufficient assets to close the loan. Id. Mr. Oketch admitted that the bank statements showed a minimal balance and he used a PDF editing program to alter them to increase the amounts shown from less than $200 to more than $7,000. Id. Mr. Oketch testified that he concealed this action from Respondent because he wanted the loan to close. Id. Mr. Oketch also ordered the appraisal for the subject property.[3] Id.

On December 13, 2009, Ms. Kallon executed a sales contract to purchase the subject property for $162,900 from Crane Financial, LLC ("Crane"). Id. Mr. Oketch signed the contract on behalf of Crane. Id. Mr. Oketch admitted that he was the owner and sole principal of Crane,

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[2] The False Claims Act is the sister scheme to the Program Fraud Civil Remedies Act. See Vermont Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 786 (2000). "The PFCRA was designed to operate in tandem with the FCA..." and share several key features. Id. at n. 17 (2000).

[3] The appraisal report, ordered by Mr. Oketch and dated December 30, 2009, estimated the property value at $163,000, despite acknowledging that the property had been purchased on August 28, 2008 for just $30,000.

a business he founded for the purpose of flipping homes. Id. He did not disclose his ownership interest in the subject property to Respondent. Id.

Ralph Killing's name appeared as the loan officer on many of the documents in the Respondent's loan file for the subject mortgage. Id. However, Mr. Oketch admitted at the hearing that he, not Mr. Killing, was the person who originated the mortgage. Id. Lastly, Mr. Oketch testified that he may have provided Ms. Kallon with the funds to close the loan. Id. at 8.

a. Mr. Oketch's fraudulent conduct was not within the scope of his employment.

An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment. Restatement 3d of Agency, 7.07(1). An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. Id. at 7.07(2). An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer. Id.; See Javier v. City of Milwaukee, 670 F.3d 823, 831 n. 6 (7th Cir. 2012); see also United States v. Dolphin Mortg. Corp., Case No. 06-CV-499, 2009 U.S. Dist. LEXIS 4295, at 40-41 (N.D. Ill., Jan. 22, 2009) (loan originator was acting outside the scope of her employment when she used a computer system for processing HUD loans to fraudulently complete and sign documents as an officer of Dolphin Mortgage when she was not authorized to process loans); see also St. John v. United States, 240 F.3d 671, 677 (8th Cir. S.D. 2001) citing United States v. Lushbough, 200 F.2d 717, 720 (8th Cir. 1952) (Generally, the "act of an employee done to effect some independent purpose of his own is not within the scope of his employment."). "When an employee commits a tort with the sole intention of furthering the employee's own purposes, and not any purpose of the employer, it is neither fair nor true-to-life to characterize the employee's action as that of a representative of the employer. The employee's intention severs the basis for treating the employee's act as that of the employer in the employee's interaction with the third party." Restatement 3d of Agency at 7.07, comment b. The question here is whether some of Mr. Oketch's actions to close the loan were taken within the scope of his employment with Respondent.

Petitioner argued that the evidence in the record amply demonstrates that Mr. Oketch's origination of the Subject Loan was within the scope of employment. First, Petitioner argued that Mr. Oketch was performing work assigned by his employer on the Subject Loan and that the actions he took to originate the Subject Loan were consistent with his normal job duties. Appeal at 5. Petitioner relied on Mr. Boler and Mr. Oketch's testimony that, as a branch manager, Mr. Oketch had authority to originate mortgage loans, including order credit reports, property appraisals and obtain asset documentation. Id. at 6. Second, Petitioner argued that Mr. Oketch's work was within Respondent's control. Id. For this assertion, Petitioner relied on Mr. Boler's testimony that Respondent's supervision of its employees included ensuring that employees were doing their due diligence when collecting documentation like pay stubs, W-2s, and similar documents. Id.

However, there are additional facts that clearly indicate that Mr. Oketch had a very personal and significant interest in closing the loan. Mr. Oketch, through Crane, owned the subject property. Tr. at 65, 7-14. Mr. Oketch was the sole owner of Crane and concealed his ownership interest from Respondent. Tr. at 73, 4-6. He altered the borrower's bank statements

to increase her balance to show that she had sufficient assets to close the loan and subsequently gave her the funds to close the loan. Tr. at 122-23, 24-2. Mr. Oketch concealed these fraudulent acts from Respondent because he wanted the loan to close. Tr. at 68, 15-19. Mr. Oketch was set to earn substantial proceeds from the sale of the subject property. Tr. at 122-23, 24-3.

Additionally, Petitioner argued the pertinent framework here to establish that Mr. Oketch acted within the scope of employment is whether Mr. Oketch's specific fraudulent acts were part of the work assigned to him. Appeal at 7. While this is a pertinent concern, this is not dispositive. The purpose behind his actions is also relevant. The evidence clearly reveals that Mr. Oketch was acting for his own benefit and outside the scope of employment when he engaged in the independent course of conduct that led to the fraud and it was not intended to serve any purpose of the employer. His sole purpose in engaging in the fraudulent activity was to close the loan and personally obtain the sale proceeds.

Petitioner further argued that Mr. Oketch was acting within the scope of his employment, even if, the acts he committed were prohibited by Respondent. Appeal at 7. However, Mr. Oketch's actions were outside the scope of employment not because they were forbidden, but because the actions were taken solely for Mr. Oketch's benefit. As discussed above, Mr. Oketch's actions were not motivated in any manner to serve the purpose of the Respondent. Rather, his sole intent for altering the bank statements and providing the borrower with the down-payment was to get the loan approved and closed in order to receive the proceeds from the sale. Mr. Oketch admitted that he concealed from Respondent that he falsified the borrower's [bank] statements because he had a [personal] interest in closing the loan as he would receive [as sole owner of Crane] money from selling the property. Tr. at 55, 9-13; 58-59, 15-3; 68-69, 11-14. Specifically, he received approximately $151,000. Tr. at 122-23, 24-2. Further, Mr. Oketch used the proceeds from this sale to acquire another property. Tr. at 69, 15-20. There is no indication that Mr. Oketch was motivated in any way by any potential benefit to the Respondent. He just wanted to close the loan to obtain the sale proceeds for himself. Any benefit to Respondent was merely incidental to the purpose behind the deal.[4]

Based on the foregoing, I affirm the Court's finding that Mr. Oketch's fraudulent acts were outside the scope of his employment.

b. Mr. Oketch acted with the apparent authority of Respondent.

Even if an employee is not acting within the scope of employment, an employer may still be held vicariously liable if the employee was acting with apparent authority. Courts have found that a principal may be liable for an agent's wrongdoing, even though the agent is acting wholly for himself if the agent, acting with apparent authority, commits a fraud against a third party who reasonably believed that he was entering into a bona fide transaction with the agent's principal. See United States v. Dolphin Mortg. Corp., Case No. 06-CV-499, 2009 U.S. Dist. LEXIS 4295, at 40-41 (N.D. Ill., Jan. 22, 2009); see also Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 566 (1982) (Liability is based upon the fact that the agent's position facilitates consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent to be acting in the ordinary course of the business confided in him.); see also Restatement 3d of Agency, 7.03(2)(b) (A principal is subject to vicarious liability to a third party harmed by an agent's conduct when the agent commits a tort

[4] Respondent earned $6,800 in origination and other fees at the closing. Decision at 5.

when acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal); U.S. ex rel. Bryant v. Williams Bldg. Corp., 158 F. Supp. 2d 1001, 1008 (D.S.D. 2001) (A principal is liable under the FCA for the acts of its agents committed *within the scope of their employment or with apparent authority*, "regardless of the principle's knowledge, culpability, policies, or efforts to restrain the employee's bad acts.").

In this case, from the perspective of Petitioner and Liberty, the Direct Endorsement Lender on the Subject Loan, Mr. Oketch was acting within the scope of his apparent authority as Respondent's employee and agent when he originated the loan. Mr. Oketch ordered the credit report and appraisal report in his capacity as an employee of Respondent and Respondent's name appears on both documents. Decision at 18. Mr. Oketch appended the signature of another Respondent loan officer to some of the loan documents to continue cloaking them in his apparent authority while concealing his own role in the transaction. Id. Respondent forwarded the loan file to Liberty for underwriting and endorsement. Id. On its face, the transaction appeared regular and the loan appeared to have been originated by a loan officer acting in the ordinary course of Respondent's business. Id. A third party would not have reason to believe that Mr. Oketch deviated from his assigned duties. Therefore, it was reasonable for a third party to rely on Mr. Oketch's apparent authority to originate the loan on behalf of Respondent.

Based on the foregoing, I affirm the Court's finding that Mr. Oketch was acting with apparent authority of Respondent, thereby holding Respondent vicariously liable for Mr. Oketch's fraudulent conduct in originating the Subject Loan.

II. Evidence of Respondent Personnel's Criminal Convictions May be Relevant.

The Secretary or designee shall consider only evidence contained in the record forwarded by the hearing officer. 24 C.F.R. § 26.26(j). "The Secretary or designee may affirm, modify, reverse, remand, reduce, compromise, or settle any determination made or action ordered in the initial determination or order. The Secretary or designee shall consider, and include in any final determination, such factors as may be set forth in applicable statutes or regulations." 24 C.F.R. § 26.26(l).

Pursuant to 24 C.F.R. § 26.47, the Court "shall admit any relevant oral or documentary evidence that is not privileged." "Relevant evidence is any evidence having any tendency in reason to prove any material fact. Relevance is established by a material or logical connection between the asserted facts and the inference or result they are intended to establish." State v. Carapezza, 286 Kan. 992, 993, 191 P.3d 256 (2008).

On appeal, Petitioner argued that the Court's exclusion of the criminal convictions of Respondent's personnel had no sound legal basis and was highly prejudicial to Petitioner. Appeal at 10. Petitioner asserted that the criminal conviction evidence is relevant, and its admission is supported by the Federal Rules of Evidence. Appeal at 10-12. Respondent contended that the Court did not abuse its discretion by excluding the evidence proffered by Petitioner concerning Mr. Boler's past conviction. Opp'n Br. at 9. Respondent also argued that, even if the evidence was relevant, the Court properly excluded it based on the Federal Rules of Evidence. Id.

During the hearing, the ALJ ruled to exclude the evidence Petitioner tried to present regarding the past criminal convictions of some of Respondent's employees. Tr. at 312-314. The purpose of the evidence was to counter Respondent's claim that it had effective quality control policies and processes and hiring practices. Appeal at 11. Respondent wanted to use these practices as a mitigating factor in the calculation of the assessment and penalty. After the ruling, Petitioner requested to make an offer of proof. Tr. at 316. Petitioner proffered that if allowed, the Court could "expect to hear testimony about the felony conviction of the other loan officer identified in the documents ... Ralph Killing." Tr. at 317. Additionally, Petitioner stated that there would be testimony about "violations of FHA requirements related to payment of expenses, violations of FHA requirements related to how branch managers are compensated." Id.

In its appeal, Petitioner provided additional information regarding the evidence it would have provided at hearing with respect to Mr. Boler and Mr. Killing's past criminal conduct, including Mr. Boler's conviction for conspiracy to commit mail and wire fraud for actions he took as a mortgage loan officer between 2005 and 2008 that was not considered by the ALJ.[5] Appeal at 10. Additionally, Petitioner also claimed it had a witness prepared to testify that Mr. Killing, the loan officer whose name appeared in the Subject Loan file, later pled guilty in Minnesota state court to identity theft, after being charged with identity theft, theft by swindle, and residential mortgage fraud. Id. In its Opposition Brief, Respondent also disclosed additional details, not presented at the hearing, regarding Mr. Boler's past conviction. Opp'n Br. at 9. Respondent stated that "Mr. Boler's alleged criminal conduct occurred four years before his affiliation with Respondent began. None of Mr. Boler's criminal conduct was related to his ownership with Team USA." Id.

The additional facts both parties presented in their briefs cannot be considered when making my determination on this issue because they were not presented prior to the appeal process. It is my opinion that the supplemental information provided in the parties' briefs on appeal related to the criminal convictions, that was not disclosed at the hearing, and additional information still unknown should have been considered when making the admissibility determination. Adequate details were not provided by the parties at the hearing with respect to Mr. Boler and Mr. Killing's prior criminal conduct. While it has been established that the acts occurred prior to the fraudulent conduct of Mr. Oketch, it is unclear from the record whether the actions of Mr. Boler and Mr. Killing occurred while they were employed or associated with Respondent. Additionally, the record is silent as to whether Respondent's other employees and the leadership were aware of Mr. Boler and Mr. Killing's prior criminal conduct.

After reviewing PFCRA, HUD's implementing regulations, the case record, and briefs filed on appeal, I remand this portion of the appeal for the Court to obtain additional information regarding the alleged fraudulent conduct of Mr. Boler and Mr. Killing to make a relevancy determination for admission into the record. If it is admissible into the record, the evidence will be used as either a mitigating or aggravating factor when determining the assessment and penalty.

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[5] Petitioner stated that it had documentary evidence of these facts that it intended to use to refresh Mr. Boler's recollection and then testify to them.

III. The Court Improperly Calculated the Assessment and Penalty.

Under HUD's implementing regulations of PFCRA, a civil penalty of up to $7,500 may be imposed upon any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know: (1) is false, fictitious, or fraudulent; (2) or includes or is supported by a written statement which asserts a material fact which is false, fictitious, or fraudulent. 24 C.F.R. § 28.10 (2012). Additionally, liability shall not lie if the amount of money or value of property or services claimed exceeds $150,000 as to each claim that a person submits. 24 C.F.R. § 28.10(a)(5).[6]

In determining an appropriate amount of civil penalties and assessments, the ALJ and upon appeal, the Secretary or designee, shall consider and state in his or her opinion any mitigating or aggravating circumstances. 24 C.F.R. § 28.40(b). Because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need for deterrence, ordinarily twice the amount of the claim as alleged by the government, and a significant civil penalty, should be imposed. Id.; 31 U.S.C. § 38.02(a)(1)(D). The amount of the penalties and assessments shall be based on the ALJ's and the Secretary or designee's consideration of the evidence in support of several mitigating and aggravating factors. Id.

Petitioner sought a civil penalty of $7,500 and an assessment of $233,634.70. Petitioner reached this figure by (1) reducing the $191,472.90 claim to $150,000 to account for PFCRA's jurisdictional cap; (2) multiplying the claim amount by two to seek twice the amount of the claim pursuant to 24 CFR § 28.40; (3) and subtracting the $66,000 in proceeds it earned from the sale of the property, as well as the $365.30 in restitution Mr. Oketch paid Petitioner in his related criminal case. The Court found that a penalty of $2,000 and an assessment of $40,000 were appropriate. Decision at 26.

a. The Court did not start at the appropriate monetary amount to calculate the penalty and assessment.

Congress intended the double-damages provision in FCA to play an important role in compensating the United States in cases where it has been defrauded. Wilkins v. St. Louis Hous. Auth., 198 F. Supp. 2d 1080 (E.D. Mo. 2001) citing United States v. Bornstein, 423 U.S. 303 (1976). In United States v. McLeod 721 F.2d 282 (9th Cir. 1983), the court held that the district court erred in refusing to award the government double damages. The court stated there "is no support for the proposition that a court may properly modify the False Claims Act's explicit double damage provision prescribed by Congress." Id. at 285. Similarly, PFCRA allows for an assessment of twice the amount of the paid claim. 31 U.S.C. § 38.02(a)(1)(D); 24 C.F.R. § 28.40(b).

The Court awarded an assessment in the amount of $40,000. Decision at 26. The Court found that HUD's total loss on the loan was approximately $145,000.[7] Id. at 21. The Court considered any mitigating factors and subsequently determined $40,000 as an appropriate assessment. Id. at 18-26. Petitioner contended that the starting point from which the Court was required to determine the appropriate judgment amount is found in the regulation's explicit

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[6] A group of claims submitted simultaneously as part of a single transaction shall be considered a single claim with a maximum statutory cap of $150,000.

[7] It is not clear from the Decision the exact method the Court used to determine HUD's total loss on the Subject Loan.

guidance that "ordinarily twice the amount of the claim ... and a significant penalty, should be imposed." 24 C.F.R. § 28.40(b). Petitioner asserted that the Court essentially set the default assessment value at zero and worked up to a total amount for the assessment. Appeal at 13.

In its Opposition Brief, Respondent asserted that neither the PFCRA nor its implementing regulations prescribe for a precise formula for calculating damages. Opp'n Br. at 13. Respondent cited to a PFCRA case, HUD v. Alvarez, for the premise that there is a flexible approach for calculating damages. HUD v. Alvarez, HUDALJ No. 04-025-PF (June 23, 2005). Alvarez cites to U.S. v. Halper, stating "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages..." U.S. v. Halper, 490 U.S. 435, 446 (1989). However, the premise for citing to Halper did not relate to double damages. Rather, in Alvarez, HUD was stating that its *formula* [emphasis added] comes in the form of [mitigating and aggravating] factors to be considered in determining the amount of assessment and penalties under PFCRA, listed at 24 C.F.R. § 28.40(b)(1) through (17). Alvarez at 7. The court in Alvarez calculated damages by reducing the amount of the claim to $150,000[8], which was then doubled under PFCRA to $300,000. Alvarez, supra at 7. This amount [$300,000] was then reduced by the amount recovered by the sale and restitution paid to court. Id.; see also HUD v. Short, HUDALJ 12-M-036-PF-18 (Judge granted default judgment where HUD sought imposition of a civil penalty in the amount of $7,500, plus an assessment of twice the amount of the false claim ($126,510 x 2 = $253,020)).

After review of the arguments and legal authorities, I find that the Court was required at the outset to double the $150,000[9] claim amount paid by HUD and then apply any mitigating factors that may be considered to reduce the assessment. Based on the foregoing, I am remanding this issue for proper recalculation of the assessment and penalty in accordance with the intent of PFCRA, using the Petitioner's $233,634.70 amount as a starting point.

b. The Court must recalculate the aggravating and mitigating factors.

In the Decision, the Court determined that Respondent's degree of culpability was low.[10] Decision at 25. Petitioner argued that the Court's incorrect scope of employment analysis and its failure to consider relevant and clearly admissible evidence compounded error upon error because they directly resulted in the Court's determination that Respondent's degree of culpability for the fraud was low, thereby improperly skewing the consideration of the aggravating and mitigating factors. Appeal at 12, 13. Petitioner asserted that Respondent's culpability is high based on the following reasons: (1) Mr. Oketch committed mortgage fraud within the scope of his employment; (2) Respondent violated HUD requirements, as well as its own quality control plan, when it failed to conduct a review of the Subject Loan after it went into Early Payment Default; (3) Mr. Oketch's employment agreement contained provisions that were prohibited by HUD; (4) Mr. Boler, Respondent's owner at the time of the fraud, was later convicted of mortgage fraud for actions he took prior to 2010; and (5) Mr. Killing, the

[8] The claim amount paid by HUD was $325,149.49.

[9] The claim amount here is based on the statutory cap of $150,000, as the actual claim paid by HUD exceeded this amount.

[10] One of the factors the ALJ considers in determining the amount of the penalties and assessments imposed is the degree of the respondent's culpability with respect to the misconduct. 24 C.F.R. 28.40(b)(3).

Respondent loan officer whose name appears in the Subject Loan file, was also later convicted of identity theft. Appeal at 13.

As discussed above, I have already found that Mr. Oketch was not acting within the scope of employment when he carried out his fraudulent actions. Based on the record, Respondent presented evidence that it acted with due care and took various measures to prevent fraud, including requiring Mr. Oketch to send all mortgages he originated to the corporate office for processing; its quality control plan and two audit reports showed that the company was in compliance with HUD requirements in 2008 and 2009; and it provided extensive training to its employees. Decision at 20. In addition, I agree with the Court's finding that there is no evidence of intentional or knowing wrongdoing by Respondent itself.

With respect to the aggravating factors raised, Petitioner's contention that Respondent's failure to comply with its own quality control plan when it failed to review the Subject Loan does not have any bearing here. Review of the loan after default would not have prevented the origination of the Subject Loan. Further, the improper buyback provision in the employment agreement would have discouraged this type of behavior, as opposed to encouraging it.

However, with respect to the admissibility of the criminal convictions as discussed above, I am remanding this issue for determination as to the nature, timing and relevance of the convictions to see if the convictions are admissible and should be a factor in determining the penalties and assessment. After this evidentiary determination, the mitigating and aggravating factors must be reweighed and factored into the new monetary starting point for calculating the penalties and assessments as discussed above.

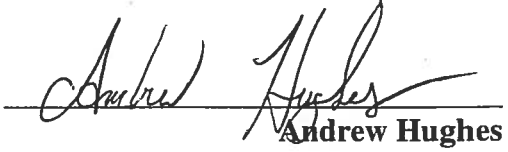
ORDER ON SECRETARIAL REVIEW

Upon review of the record of this proceeding, and based on analysis of the applicable law, I REMAND this case to the ALJ only as to the following issues:

1. Obtain more evidence and determine the relevancy of the Respondent personnel's prior criminal convictions; and
2. Recalculate the penalty and assessment based on the new monetary starting point, and, if applicable, additional evidence that is admitted into the record regarding prior criminal convictions that would go towards the aggravating and mitigating factors.

IT IS SO ORDERED.

Dated this 12th day of March, 2019



Andrew Hughes
Secretarial Designee