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

In the Matter of: **NCR Funding Inc.** Petitioner.	Case No. 13-VH-0073-AO-002 Claim No. 7-207075350A December 18, 2013

DECISION AND ORDER UPON RECONSIDERATION

On July 31, 2013, a *Decision and Order* ("Decision") was issued by this Court in the above-captioned matter.[1] The Secretary for the U.S. Department of Housing and Urban Development ("HUD" or the "Government") filed a *Motion for Reconsideration* ("*Motion*") on August 30, 2013. Petitioner NCR Funding Inc. ("Petitioner") filed its *Response* to the Secretary's *Motion* on September 12, 2013. On September 13, 2013, the Court ruled that the Secretary's *Motion* was taken under advisement. The Secretary's *Motion* is now **GRANTED** and the case is ripe for reconsideration.

STANDARD OF REVIEW

The purpose of reconsideration is not to afford a party the opportunity to reassert contentions that the Court has already considered and adjudicated. See Mortgage Capital of America, Inc., supra; Louisiana Housing Finance Agency, HUDBCA No. 02-D-CH-CC006 (March 1, 2004); Charles Waltman, HUDBCA No. 97-A-NY-W196 (September 21, 1999). However, as a general matter of law, a motion for reconsideration must be based on newly discovered evidence, a patent error such as an error in mathematical computation or a clear error of fact or law, a need for clarification of the decision, or other good cause such as evidence that the debt has become legally unenforceable since the issuance of the previous decision. See Lawrence Syrovatka, HUDOA No. 07-A-CH-HH10 (January 8, 2009); Mortgage Capital of America, Inc., HUDBCA No. 04-D-NY-EE032 (September 19, 2005); Paul Dolman, HUDBCA No. 99-A-NY-Y41 (November 4, 1999); Anthony Mesker, HUDBCA No. 94-C-CH-S379 (May 10, 1995); Appeals of Walber Const. Co., HUDBCA No. 79-385-C17 (September 02, 1982); and 24 C.F.R. § 17.69(d). In such cases, the Court, at its discretion, will reconsider a previous decision only when such compelling circumstances require it. If the ground for reconsideration will only have a collateral effect and will not result in a change in the decision, the motion will be denied. Mastic–Tar Co., Inc., ASBCA No. 7272, 1962 BCA ¶ 3429; 1962 BCA ¶ 3365.

BACKGROUND

On August 19, 2008, a home loan, originated by Petitioner and funded by Wells Fargo Home Mortgage ("Wells Fargo"), was submitted to HUD for FHA insurance pursuant to Title II of the National Housing Act. (*Decision*, p. 2). In 2009, a monitoring team from HUD conducted

[1] A corrected version of the *Decision* was issued on August 12, 2013, and August 26, 2013, respectively, due to formatting errors, but, substantively the initial *Decision* remained in full force and effect.

a review of NCR's lending activities and found that NCR had originated the subject loan in violation of HUD's requirements and that such origination activities exposed FHA to an unacceptable level of risk. (*Government's Response to Petition in Opposition to Referral*, ("*Response to Opposition*"), dated May 17, 2013, p. 2, Attachment). To avoid referral to the Mortgage Review Board, Petitioner agreed to indemnify HUD for any losses HUD may sustain in connection with the loan. Id.

The loan went into default status on December 1, 2009. Wells Fargo[2] then foreclosed against the borrower and submitted a successful full credit bid of $746,483.11 at the foreclosure sale. The bid equaled the amount of the unpaid debt. Id. Wells Fargo then conveyed the property to HUD and filed insurance claims with HUD totaling $788,624.19. Id. HUD paid the insurance claims. On June 29, 2012, HUD sold the property for $423,000. Petitioner, meanwhile, dissolved as a corporation on December 2, 2011. Petitioner denied that the Indemnification Agreement makes it liable for the outstanding $423,247.68 balance. The Government therefore sought repayment via administrative offset of Petitioner's assets.

DISCUSSION

The Government respectfully submits, for reconsideration, that "the Court erred: (1) in its determination that California's 'full credit bid rule' rendered Wells Fargo's claim invalid; and, (2) in its consideration of Petitioner's assets to determine whether enforcement of the subject debt is a practical impossibility." (*Motion*, p. 2.) The Court now examines, at its discretion, the basis for the claims of error raised by the Government.

I. Full Credit Bid Rule Rendered Wells Fargo Claim Invalid

The Government states that the Court erred in its finding that, "by operation of law, Wells Fargo's full credit bid at the foreclosure sale extinguished the debt under the subject loan." (*Motion*, p. 7-8.) While the Government agrees with the Court that the validity of the Wells Fargo claim to FHA is the central issue to this case, the Government contends that:

> [T]he Court's analysis is based on the assumption that the validity of a conveyance claim to FHA, such as the one submitted by Wells Fargo on the subject loan, hinges on whether the principal debt on the loan is still owed by the borrower at the time the conveyance claim is made to FHA. However, the validity of an FHA conveyance claim is not dependent on whether the borrower's debt remains outstanding after the foreclosure sale; nor is it dependent on the amount of the bid made by the lender at the foreclosure sale.

While the Government admits that "it may not have been sufficiently clear in its prior briefing of the issues," it is now attempting to explain, with more sufficient clarity, the procedures for determining the validity of a conveyance claim. (*Motion*, p. 1.) "As with any

[2] Wells Fargo became the holder of the loan because NCR, as a loan correspondent, was not permitted under HUD regulations to hold loans. HUD Handbook 4060.1 Rev-2 ¶¶ 2-18 and 2-29. HUD regulations define a loan correspondent as a mortgagee that has as its principal activity the origination of mortgages for sale or transfer to a sponsor mortgagee. See 24 C.F.R. § 202.8 (2008).

contract or program, the rights and responsibilities of the parties under the contract or program are determined by the terms of the contract or program at issue." (*Motion*, p. 9.) Citing 24 C.F.R. § 203.257,[3] the Government states that the contract of insurance is a conveyance claim and is governed by the federal regulations as generally set forth under 24 C.F.R. §§ 203.355-203.355–203.367. In addition, the Government provided, for the Court's review and clarification, regulatory provisions such as 24 C.F.R. § 203.355 (a)(2), 24 C.F.R. § 203.356(b), 24 C.F.R. § 203.359(b), and 24 C.F.R. §§ 203.360(a) and 203.361, all of which more specifically applied to the instant case.

Based upon a review of the governing regulations and also, in part, upon a more thorough explanation of the regulations by the Government, it is evident that the claim in this case is a conveyance claim. Here, the subject loan went into default status in December, 2009. As required by regulation, Wells Fargo acquired the title to the property through foreclosure. (*Motion*, p. 1 .) In January, 2012 Wells Fargo submitted a claim to HUD and conveyed property that served as collateral for the subject loan. (*Response to Opposition*, p. 3.) Thereafter, HUD paid Part A and Part B insurance claims in March, 2012 and April, 2012, respectively. It is this transaction that was considered a conveyance claim pursuant to 24 C.F.R. § 203.401(a).[4] 24 C.F.R. § 203.401(a) provides, in part, the formula for calculating the payment of such claims:

> The amount of the insurance benefits shall be computed by adding to the original principal balance of the mortgage ... which was unpaid *on the date of the institution of foreclosure proceedings* ... the amount of all payments made by the mortgagee and allowances for items set forth in § 203.402, less all applicable items set forth in § 203.403.

(emphasis added.) See also 24 C.F.R. §§ 203.402, 203.402(a), 203.403.

In other words, the final payment amount in a conveyance claim is:

> (The unpaid balance *on the date of instituting foreclosure proceedings*) **plus** (payments made by mortgagee AND allowances permitted under § 203.402) **minus** (deductions under § 203.403).

Petitioner maintains, on the other hand, that "the Court should consider the evidence presented by the parties and decline the Government's offer to speculate as to any possible consequences or future parties that may be impacted by the Court's Order based on the facts of this case and the law as it stands." (*Response*, p. 1.) However, no rebuttal has been offered by Petitioner against the Government's claims regarding the validity of the insurance claim and the

[3] 24 C.F.R. § 203.257 provides that once a mortgage loan is insured under FHA, the FHA Commissioner and the mortgagee are bound by the regulations set forth in 24 C.F.R. §§ 203.251-203.499.

[4] By comparison, under 24 C.F.R. § 203.401(b), the payment equation for a *non-conveyance claim* includes the amount bid *at the foreclosure sale*. (emphasis added.) Accordingly, that equation is: (unpaid balance on date of foreclosure) + (payments allowed by § 203.402) – (deductions under § 203.403) – (amount of successful bid at sale). This formula is more in keeping with the full credit bid rule. The critical phrase differentiating these two regulations is "deducting the amount bid at the sale," which appears in § 203.401(b) but not in 401(a). The phrase's omission in 401(a) confirms that a debtor's balance, or lack thereof, after a foreclosure sale has no effect on the payment amount calculation in a conveyance claim.

binding effect of the terms of the indemnification agreement. Without a rebuttal from Petitioner on this issue, the Court likewise cannot be expected to speculate what might be Petitioner's position regarding this matter.

As a result, the Court is fully persuaded that the Government's clarification of the governing regulations for conveyance claims sufficiently supports the Government's position that the FHA insurance claim in this case is valid. Therefore, the Court finds that the FHA insurance claim herein was submitted in accordance with the terms of the Indemnification Agreement, and as a result, Petitioner is legally bound to comply with the terms of that Agreement.

a. Impact of the "Full Credit Bid Rule" on Validity of Insurance Claim

The Government here contends that "while California law may stand for the proposition that a third party could avoid liability in certain circumstances where the mortgagee has already been deemed to be made whole, those cases do not stand for the proposition that California law prohibits an insurance company from voluntarily providing such coverage under the terms of a policy, which is the very coverage FHA provides." (*Motion*, p. 11.) Additionally, "[t]he mortgagee need not prove that it suffered any loss, nor is a conveyance claim calculated based on the loss, i.e., it is not relevant whether the mortgagee was deemed to be made whole under state law." (*Motion*, p. 11-12.) The Government further contends that, based upon this calculation, "the amount of the borrower's debt after the foreclosure sale, even if that amount is zero, is irrelevant" because the payment amount is determined on the date of the institution of foreclosure proceedings before any foreclosure sale occurs.[5] (*Motion*, p. 7). Finally, the Government states that "California law does not prohibit FHA from voluntarily providing coverage under the terms of the contract for insurance where full credit bids have been made; nor does California law provide that claims paid pursuant to such coverage are invalid." (*Motion*, p.12.)

In support of its position, the Government presented a more thorough analysis of applicable case law, along with an explanation of the original intent of the full credit bid rule as it might relate to this case. In short, the Government contends that "the full credit bid rule is essentially a consumer protection measure designed to protect borrowers from multiple recovery actions by lenders; it was not meant to protect non-borrowers." (*Motion*, p. 13.) The Government also stated that the Court erred in its interpretation of certain case law in which the court essentially held that the full credit rule "applied to third party non-borrowers, including insurers."[6] (*Motion*, p. 14.) The Government further states that the Court erred in its interpretation that "because the rule applies to insurers, the rule also applies to claims submitted to FHA," as an insurer. Id. The Government concludes by stating that "except for the narrow

[5] The Court notes that although this is the primary thrust of HUD's *Motion*, it made only passing mention to § 203.401(a) in its submissions prior to the *Decision*. In its *Response to Opposition*, HUD only once notes that the unpaid balance is determined as of the date of default, and that was only as a casual reference 16 pages into the its *Response*. (*Response to Opposition*., p. 16.). Nowhere in its initial filings did HUD meaningfully address the regulation's impact on the analysis. Nonetheless, the Court agrees that the *Decision* regarding this issue is inconsistent with the HUD regulations and thus such error must be corrected.

[6] See Bank of America v. Quackenbush, 56 Cal. App. 4th 1167, 1170-71 (Cal. Ct. App. 1997).

exception of claims against insurers of physical property recognized in Universal Mortgage,[7] Alliance Mortgage,[8] and others, the full credit bid rule does not affect the rights and obligations between lenders and third parties." (*Motion*, p. 16.) As support the Court instead requests that the Court reviews again the decision in Kolodge v. Boyd, and also consider the decision in Lehman Bros. Holdings v. PMC Bancorp, No. LA CV10-07207 JAK (PJWx), 2013 U.S. Dist. LEXIS 39594 (C.D. Cal. March 8, 2013).

Petitioner, on the other hand, contends that "[t]he Government suggests to the Court in its Motion that case law creates a narrow application of the full credit bid rule. Such is not the case." (*Response*, p. 1.) Relying on Cornelison v. Kornbluth, 15 Cal. 3d 590 (1975), Petitioner states that the California Supreme Court discussed "the effect of a lender's full credit bid in a non-judicial foreclosure sale" and also "recognized a lender's claim for bad faith was not precluded by the anti-deficiency statutes." (*Response*, p. 2.) According to Petitioner, the court in Cornelison concluded that, "where an indebtedness secured by a deed of trust covering real property has been satisfied by the trustee's sale of the property on foreclosure for the full amount of the underlying obligation owing to the beneficiary, the lien on the real property is extinguished." Id. As support, Petitioner presented an exhaustive analysis of state statute and case law: Cal. Civ. Code, § 2924 et. seq., Central Sav. Bank of Oakland v. Lake 201 Cal 438, 447-448 (1927), and also cited to Kolodge, Bank of America, Universal Mortgage, and Alliance Mortgage.

Upon reviewing again the relevant case law and statutory provisions, the Court has determined that while the Petitioner believes the subject debt was extinguished by Wells Fargo's full credit bid, that transaction did not effectively invalidate the mortgage insurance claim, or release Petitioner from its legal obligation to pay for HUD's loss based upon the terms of the Indemnification Agreement.

First, the insurance claim in this case is, as previously discussed, a conveyance claim that is subject to certain regulations which, by application, are very different than the legal principles involved in cases requiring the application of the "full credit bid" rule. See 24 C.F.R. §§ 203.355-203.367. Because the HUD regulations provide the basis upon which an FHA claim is, for indemnification purposes, determined to be valid, the full credit bid rule is not relevant in making that determination.

Unlike certain cases that involve the application of the full credit bid rule, this case does not involve any issues regarding the protection of a borrower against further actions simply because the borrower was made whole at foreclosure. Instead, this case involves a non-borrower who entered a contract with a mortgagee in which the mortgagee agreed to indemnify the non-borrower against any loss that resulted from the borrower's default on the subject loan. The terms of this contract (herein the indemnification agreement) were triggered once it had been established that a valid FHA claim existed. The fact that the outcome of the foreclosure sale

[7] 56 Cal. App. 4th at 1171 (court held that the lender could not recover the proceeds under the policy because the full credit bid rule operated to extinguish the lien which the insurance policy secured).

[8] 10 Cal. 4th 1226, 1238 (Cal. 1995) (court held that under the full credit bid rule, the lender is not entitled to insurance proceeds payable for prepurchase damage to the property, prepurchase net rent proceeds, or damages for waste").

gave the appearance that HUD was made whole regarding the subject debt is not relevant in this case because the legal obligations of the parties to the contract continued to remain intact and legally binding.

Having already established the validity of the FHA claim in this case as a conveyance claim, the terms of the Indemnification Agreement, along with the provisions of 24 C.F.R. §§ 203.355-203.367 and §§ 203.400-203.414,[9] immediately took effect. According to Paragraph 1(a) of the Indemnification Agreement:

> In the event of a valid claim for insurance on any of the mortgages covered by this Agreement, indemnification will be in accordance with paragraph (b), (c), (d), or (e), whichever applies. HUD's Investment includes, but is not limited to: the full amount of the insurance claim actually paid, all taxes and assessments paid or payable by HUD, all maintenance and operating expenses paid or payable by HUD (including costs of rehabilitation and preservation), loss mitigation, prorated losses from and expenses associated with the sale of a note, reasonable penalties for failure to pay amounts owed within the timeframe established on HUD invoices, interest on the amount owed at 5% per annum calculated from the date of the first bill, all sales expenses and any other expenses HUD may incur in connection with its claim disposition programs regarding FHA insured mortgages.

Petitioner apparently does not contest this fact, as it is evident that Petitioner did not address this contractual issue or discuss the relevant regulations[10] anywhere in its *Response* to the *Motion*, even though Petitioner was extended the opportunity to do so. See *Order Granting Petitioner's Motion for Extension of Time*, dated September 5, 2013. Therefore, based upon the compelling argument presented by the Government, along with supporting case law and regulations, the Court now finds that Petitioner is in fact legally obligated to abide by the terms of the existing Indemnification Agreement and pay the subject debt in the amount claimed by the Government, irrespective of the full credit bid rule.[11]

II. The Court erred in its consideration of Petitioner's assets to determine whether enforcement of the subject debt is a practical impossibility

Here, the Government contends that the Court erred by considering whether Petitioner's lack of assets renders the debt legally unenforceable. More specifically, the Court stated, according to the Government, that "one of the remaining questions for decision was 'whether the corporation's lack of assets would render enforcement of the subject debt a practical impossibility.'" (*Motion*, p. 25.) The Government generally maintains that the Court is tasked only with determining whether the debt is past due and legally enforceable, and that "practical

[9] The procedures for a conveyance claim, and the factors that comprise the amount to be paid under the valid FHA claim, can be found in listed regulations.

[10] 24 C.F.R. §§ 203.355-203.367 and §§ 203.400-203.414.

[11] Given the Court's holding today, the remaining arguments HUD presented regarding the full credit bid rule are rendered moot.

considerations, such as collectability, do not render the debt legally unenforceable." Id. Petitioner again offers no rebuttal against the Government's claim.

The Court agrees, in part, with the Government but with additional clarification. As the Court stated in the *Decision*, "[T]he obstacle to HUD's recovery is ... a practical hurdle, *not a legal one*." (emphasis added.) (*Decision*, p. 11). The Court also emphasized that "HUD may be entitled to attempt to pursue the collection of this claim as a right, but its pursuit of this claim may be a practical impossibility...." Id. Finally, although the Court concluded that "Petitioner does not owe the subject debt," it did not conclude that the debt was legally unenforceable, or that the lack of assets rendered the debt legally unenforceable. (*Decision*, p. 12.) The Court merely opined that "HUD may be entitled to attempt to pursue the collection of this claim as a right, but its pursuit of this claim may be a practical impossibility because, according to the record, Petitioner has not assets." (*Decision*, p. 11.) That statement did not mean HUD is prohibited from pursuing such a course of action that, by law, it obviously has the right to pursue. Since HUD's argument is not at odds with the Court's holding, this claim of error does not require further reconsideration by the Court.

CONCLUSION

Based upon reconsideration of the issues raised by the Government in the above-captioned matter, it is hereby

ORDERED that the *Decision and Order* issued in this matter on July 31, 2013, be **VACATED.** The Court has determined that the subject debt is in fact past due and legally enforceable in the full amount as claimed by the Government. It is

FURTHER ORDERED that the Order imposing the stay of referral of this matter to the U.S. Department of Treasury for administrative offset is **VACATED.**

Accordingly, the Secretary is authorized to seek collection of this outstanding obligation by means of administrative offset of any eligible Federal payments due to Petitioner. It is

SO ORDERED.

Vanessa L. Hall
Administrative Judge

Review of determination by hearing officers. This *Decision and Order upon Reconsideration* shall be final unless a party timely appeals the determination in accordance with 24 C.F.R. § 26.26 (2012). Any party may request, in writing, Secretarial review of the determination within 30 days after the hearing officer issues the determination, in accordance with § 26.26 of this part.