



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

In the Matter of:

HomeOwners Mortgage of America Inc.,

Petitioner

HUDOA No. 09-H-NY-KK28
Claim No. 7-20706032-0A

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For the Secretary

DECISION AND ORDER

Petitioner was notified that, pursuant to 31 U.S.C. § 3716, the Secretary of the U.S. Department of Housing and Urban Development (“HUD”) intended to seek administrative offset of any Federal payments due to Petitioner in satisfaction of a delinquent and legally enforceable debt allegedly owed to HUD. The alleged debt is an amount that the Secretary claims is due under an indemnification agreement executed by Petitioner.

On June 23, 2009, Petitioner made a timely request for a hearing concerning the existence, amount, or enforceability of the debt allegedly owed to HUD. The Office of Appeals has jurisdiction to determine whether Petitioner’s debt is past due and legally enforceable pursuant to 24 C.F.R. § 17.170(b). The administrative judges of the Office of Appeals have been designated to conduct a hearing to determine whether the debt allegedly owed to HUD is legally enforceable. 24 C.F.R. §§ 17.152 and 17.153. The Office of Appeals is authorized to conduct hearings to determine whether certain debts allegedly owed to HUD are legally enforceable. (24 C.F.R. § 17.152(c)). As a result of

Petitioner's request, this Office temporarily stayed referral of the debt to the U.S. Department of Treasury for offset on August 17, 2009. (Notice of Docketing, Order and Stay of Referral ("Notice"), dated August 17, 2009.)

Background

In the case of mortgagors, Nancy Ramirez and Franklin Fernandez ("Ramirez/Fernandez" or the "Ramirez/Fernandez loan"), identified as FHA Case No. 105-2731466, Petitioner underwrote their mortgage, which was funded¹ on June 14, 2006. By July 1, 2007, the mortgage was in default. (Sec'y Stat., ¶ 4, Ex A., Declaration of Michael C. DeMarco ("DeMarco Declaration") Director, Insurance Operations Division, HUD Financial Operations Center, ¶ 6.)

Ramirez/Fernandez failed to cure the default; consequently, insurance benefits were paid by HUD on May 5, 2008 and July 6, 2008, to Chase Home Finance, LLC² in the amount of \$182,608.86 and \$7,461.81, respectively. (Sec'y Stat., ¶ 7, Ex A., DeMarco Decl., ¶¶ 6-7.)

HUD subsequently sold the property at a loss on October 21, 2008. HUD's loss aggregates \$72,821.18. (Sec'y Stat., ¶ 8, Ex A., DeMarco Decl., ¶¶ 6-7.) Since the sale of the property did not provide sufficient funds to cover all of HUD's loss, HUD sought indemnification from the Petitioner for HUD's remaining loss. (*Id.*, ¶8.)

HUD has computed the Department's loss on this case as follows:

Partial Settlement (Part A Claim Payment)	\$ 182,608.86
Final Settlement (Part B Claim Payment)	\$ 7,461.81
Maintenance and Operation	\$ 5,106.63
Taxes	\$ 1,162.69
Sales Expenses	\$ 10,381.19
Sales Price	\$ (133,900.19)
Total Loss on Sale of Property	\$ 72,821.18

(DeMarco Decl., ¶7, Ex. D.)

Also in 2008, HUD's Quality Assurance Division ("QAD")/Lender Monitoring Team conducted a review of Petitioner's mortgage finance operation to determine whether Petitioner, a HUD-authorized Direct Endorsement mortgage lender, complied with HUD's rules and regulations when underwriting and issuing HUD/FHA-insured mortgages. (Secretary's Statement ("Sec'y Stat."), filed September 23, 2009, ¶ 2, Ex. A., DeMarco Decl., ¶ 4.) During its review, QAD found that Petitioner failed to adhere to

¹ HomeOwners Mortgage of America, Inc. underwrote the Ramirez/Fernandez loan, but the loan was funded by its loan correspondent, Seminole Lending, Inc. ("Seminole").

² Although HomeOwners Mortgage of America's loan correspondent, Seminole, funded the Ramirez/Fernandez loan, at the time of default, the note and mortgage were held by Chase Home Finance, LLC.

prudent lending practices engaging in non-compliant lending activities which exposed HUD to an unacceptable level of risk. (Sec'y Stat., ¶ 3, Ex A., DeMarco Decl., ¶ 4.)

To resolve the QAD's findings that Petitioner exposed HUD to an unacceptable level of risk in its underwriting of the Ramirez/Fernandez loan, Petitioner entered into an Indemnification Agreement with HUD dated February 12, 2008. (Sec'y Stat., ¶ 5, Ex A., DeMarco Decl., ¶ 4.) The lender ID number on the Indemnification Agreement is 23492-0000-8 which is the Lender ID number of the loan correspondent, Seminole Lending Inc. (DeMarco Decl., ¶ 4.)

In the Indemnification Agreement, Petitioner agreed to "[I]ndemnify HUD for losses which have been or may be incurred related to the FHA-insured mortgages identified by FHA Case Number on Attachment A, which are in default, or go into default, through and up to five years from each loan's date of endorsement..." The Ramirez/Fernandez loan is listed by name and FHA case number on Attachment A of the Indemnification Agreement. (Sec'y Stat., ¶ 6.) Pursuant to the terms of the Indemnification Agreement, HUD sought indemnification from Petitioner in the amount of \$72,821.18. [HUD's aggregate loss on the sale of the property (Sec'y Stat., ¶ 9, Ex A., DeMarco Decl., ¶ 8.) Petitioner failed to make payment as agreed in the Indemnification Agreement and is currently in default. (Sec'y Stat., ¶ 10, Ex A., DeMarco Decl., ¶ 8.)

The Secretary has filed a Statement, with documentary evidence, in support of his position that Petitioner is indebted to HUD in a specific amount. Petitioner is justly indebted to HUD in the following amounts:

- (a) \$72,821.18 as the unpaid principal balance as of July 31, 2009;
- (b) \$1,517.25 as the unpaid interest on the principal balance as 5% per annum through July 31, 2009;
- (c) \$4,460.31 as unpaid penalties as of July 31, 2009;
- (d) \$35.33 as unpaid administrative costs as of July 31, 2009; and
- (e) interest on said principal balance from August 1, 2009 at 5% per annum until paid.

(Sec'y Stat., ¶ 11, Ex A., DeMarco Decl., ¶ 8.)

A Due Process Notice/Notice of Intent to "seek offset of federal payments due Petitioner" was sent to Petitioner on May 25, 2009. (Sec'y Stat., ¶ 12, Ex A., DeMarco Decl., ¶ 9.)

Discussion

31 U.S.C. § 3716 provides federal agencies with a remedy for collecting debts owed to the United States Government. In this case, HUD seeks debt collection from Petitioner by means of administrative offset of any federal payments due to Petitioner. Petitioner contends that: (1) Petitioner, as Mortgagee 13083-0000-2, is not a party to the Agreement; (2) Petitioner, through its president, was wrongfully coerced into signing the Indemnity Agreement; (3) the Indemnity Agreement is invalid because Petitioner

received no consideration for signing it; and, (4) HUD should not be allowed to shift its cost of doing business to Petitioner. (Petitioner's Petition to Nullify Indemnity Agreement or to Modify Amount Owed ("Pet'r. Petition"), filed August 27, 2009.)

I. PETITIONER AS MORTGAGEE 13083-000-2 IS NOT A PARTY TO THE AGREEMENT

First, Petitioner claims that the indemnity agreement is unenforceable because Petitioner, as mortgagee 13083-000-2, is not a party to the Agreement. (Pet'r. Petition at p. 3.) As support, Petitioner cites to Builder's Supply Corporation v. Taylor, et. al., 164 Ga. App. 127, 296 S.E. 2nd 417 (1982) in which the court held that "failure to identify the debtor renders a contract unenforceable." (Pet'r. Petition at p. 3.) Petitioner contends "the agreement at issue applies to the entity assigned mortgage number 23492-0000-8 and that Petitioner was never assigned mortgage number 23492-0000-8." (*Id.*) Petitioner also contends "HUD was obviously confused regarding the identity of Petitioner and that although the Demand and Notice letters were correctly addressed they were sent to Seminole a/k/a Homeowners. (*Id.*) Petitioner finally contends "there is no indemnity agreement for FHA case number 105-2731466 which applies to mortgage number 13083-0000-2. As a result, the Agreement does not obligate Petitioner in any way." (*Id.*)

The Secretary claims, on the other hand, that the Indemnification Agreement is legally enforceable and "[f]or Petitioner to now claim that HomeOwners Mortgage of America, Inc. is not [a] party to the Indemnification Agreement is wholly disingenuous." (Sec'y Stat., ¶ 16.) The Secretary also claims "the only error in the agreement between Petitioner and HUD is the inclusion of the FHA identification number of Petitioner's loan correspondent, Seminole. The inclusion of an erroneous FHA number in the Indemnification Agreement was merely scrivener's error; a mistake." (Sec'y Stat., ¶¶ 17-18.)

As support, the Secretary cites to *Nguyen v. Talisman Roswell, L.L.C.* in which the court states:

The cardinal rule of contract construction is to ascertain the intent of the parties. To this end the whole instrument, together with its circumstances, must be considered. In ascertaining that intent, parole evidence may be offered to prove that a written term in a contract was a mistake.

262 Ga. App. 480, 482, 585 S.E.2d 911, 912 (Ga. Ct. App. 2003).

The Secretary states that an Indemnification Agreement was sought and obtained from Petitioner based on Petitioner's failure to underwrite the Ramirez/Fernandez loan in accordance with prudent leading practices. (Sec'y Stat., ¶ 15; Ex. A, DeMarco Decl., ¶ 4.) Other than the inclusion of the erroneous FHA number for the Petitioner's loan correspondent, "Petitioner is identified in the Indemnification Agreement as HomeOwners Mortgage of America, Inc. ("HomeOwners")." (Sec'y Stat. ¶ 16.)

HomeOwners is again identified on the signature line of the Indemnification Agreement. (Id.) The president of HomeOwners signed the Indemnification Agreement under the corporation's name. (Id.) Finally, Attachment A of the Indemnification Agreement identifies HomeOwners along with the names of the debtors whose loans HomeOwners was responsible for underwriting. (Id.) The Secretary submits that "Except for the FHA number, Seminole is not otherwise identified or even mentioned in the Agreement, and thus such reference was again "merely a scrivener's error; a mistake.'" (Sec'y Stat., ¶ 17, ¶ 18.)

The Secretary admits that "Indeed, it was a mutual mistake that neither Petitioner nor HUD even noticed until now." (Sec'y Stat., ¶ 18.) The Secretary adds, however, "If Petitioner knew of the discrepancy in the agreement at the time of execution and failed to request its correction, Petitioner arguably waived its right to use the discrepancy as a means of avoiding liability." (Sec'y Stat., ¶ 19.) As support, the Secretary again relies upon Nguyen, in which the court held "A waiver of rights under a contract may be express or implied from acts or conduct. When a contract is continued in spite of a known excuse, the defense there upon is lost and the injured party is himself liable if he subsequently fails to perform." 262 Ga. App. 480, 482, 585 S.E. 2d 911, 913 (Ga. Ct. App. 2003). The Secretary concludes that under Georgia law, where the intent of the parties is otherwise clear, to the extent that the inclusion of an erroneous FHA number does not address a material term of the contract, it should not serve to void a contract. *Benedict v. Snead, et al.*, 271 Ga. 585, 586, 519 S.E.2d 905, 906 (Ga. 1999).

In this case, Petitioner's claim that the Indemnification Agreement is void, because the inclusion of the erroneous FHA number was a mistake, is neither persuasive nor supported by the evidence presented or the existing law. The case upon which Petitioner relies, *Builder's Supply Corporation v. Taylor, et. al.*, 164 Ga. App. 127, 296 S.E. 2nd 417 (1982), is not precisely on point. In *Builder's* there was an omission of the name of the principal debtor to a guarantee contract that the defendants had signed. The court in *Builder's* held that "while parol evidence may be admitted to explain ambiguities in the description, it can not be admitted to supply a description which is entirely wanting in the writing," and further, it held that "there was no ambiguity in the description of the subject matter of the agreement because it was simply not described." 164 Ga. App. At 128, 296 S.E. 2nd at 418.

Unlike the Petitioner in *Builder's*, the Petitioner in this case is identified throughout the Indemnification Agreement. The Petitioner also signed the Agreement in the instant case. In *Builder's*, there was no signature or any identification marks to show that the debtor was a party to that contract. Further, in the instant case, there is an alleged ambiguity, while in *Builder's* there was an omission. As a result, the rules of contract interpretation and construction, instead, should be applied in this case.

Generally, the cardinal rule of contract construction is to ascertain the intent of the parties. Grange Mutual Casualty Co. v. Snipes, 298 Ga. App. 405, 407, 680 S.E.2d 438, 441 (Ct. App. 2009). The intention of the parties controls and should be given effect regardless of mere literal repugnancies in different clauses of the agreement. Benedict, 271 Ga. at 586, 519 S.E.2d at 907. In discerning the parties' intent the whole instrument

should be considered together, along with the surrounding circumstances. Grange, 298 Ga. App. at 408, 680 S.E.2d at 441.

Where a mistake is alleged, “parol evidence may also be offered to prove that a written term in a contract was a mistake.” Nguyen v. Talisman Roswell, L.L.C., 262 Ga. App. 480, 482, 585 S.E.2d 911, 912 (Ga. Ct. App. 2003). In this case, the parol evidence offered by the Secretary substantiates that HUD sought and obtained an Indemnification Agreement from Petitioner based on Petitioner’s failure to underwrite the Ramirez/Fernandez loan in accordance with prudent leading practices. (Sec’y Stat., ¶ 15; Ex. A, DeMarco Declaration, Director, ¶ 4.) Petitioner is identified in the Indemnification Agreement as HomeOwners Mortgage of America, Inc. (“HomeOwners”). (Sec’y Stat. ¶ 16.) HomeOwners is again identified on the signature line of the Indemnification Agreement. (Id.) The president of HomeOwners signed the Indemnification Agreement under the corporation’s name. (Id.) Finally, Attachment A of the Indemnification Agreement identifies HomeOwners along with the names of the debtors whose loan HomeOwners was responsible for underwriting. (Id.)

Additionally, where ambiguity is alleged, “ambiguous contracts are to be construed by the court unless an ambiguity remains after application of applicable rules of construction.” Benedict, 271 Ga. 585, 586, 519 S.E.2d 905, 906 (1999). In Benedict v. Snead, the purchaser and seller entered into a contract for the purchase of a cottage in St. Simon’s Island. The contract set a closing date of “on or *before before* April 15, 1998.” (emphasis in original) *Id.* On April 17 the sellers’ realtor advised the purchaser that the Agreement had expired, and thereafter, on April 20, the Purchaser sent the closing attorney \$5,000 as a partial payment towards the purchase but the Sellers refused payment. The purchaser filed suit for specific performance on the grounds that the contract itself does not provide April 15 as a closing date, and that “on or *before before*” April 15 must be construed as no later than midnight of April 14. (emphasis in original). *Id.* Thus, the Purchaser argued that “by the Sellers agreeing to purchase on April 15, rather than April 14, they, in effect, waived the original provision making time of the essence, and entered into a quasi-new agreement for a subsequent closing date which was not contractually essential.” *Id.*

Relying on Tillman v. J.E. Webb & Co., 17 Ga. App. 620, 87 S.E. 904 (1916), the court in Benedict applied the principles of contract interpretation to construe the ambiguity arising from the duplication of the word “before” in the original contract. Benedict, at p. 586. One of those rules is that a scrivener’s error should not be permitted to defeat the clear intention of the parties, as otherwise evidenced by the entirety of the contract. (Id.) The court concluded that: “Considering the contract as a whole, it is apparent that the addition of the typewritten “before” constitutes no more than an advertent and superfluous error on the part of the drafter.” The court further concluded, based on Gaulding v. Baker, 9 Ga. App. 578, 71 S.E. 1018 (1911), that “Any mistake in a contract, consisting of some unintentional act or omission, and manifestly a mere clerical error, in no sense changes the contract or the relations of the parties thereto, is relievable at law...”

Similarly, in this case, the principles of contract interpretation shall be applied to construe the ambiguity arising from the inclusion of the erroneous FHA number for Petitioner's loan correspondent. Upon review and consideration of the Indemnification Agreement as a whole, it is apparent that the inclusion of the erroneous FHA number was an unintentional act, a mere clerical error. The record reflects that the FHA ID number (23492-0000-8) was in fact corrected to reflect the accurate FHA ID (13083-000-2). (See Sec'y Stat., Ex. A., DeMarco Decl., Ex. B). Nonetheless, the existence of the erroneous FHA number for Petitioner's loan correspondent does not materially change the terms of the contract or change the contractual relations of the parties in the case at hand.

Therefore, consistent with the reasoning set forth in *Nguyen* and *Benedict*, I find that the intent of the parties was to form an Indemnification Agreement between them, and the inclusion of an erroneous FHA number does not sufficiently address a material term of the contract enough to render the contract void. As such, the Indemnification Agreement is valid and legally enforceable, and Petitioner remains legally obligated to comply with the terms of the Agreement.

II. PETITIONER WRONGFULLY COERCED INTO SIGNING AGREEMENT

Second, Petitioner claims that the Indemnification Agreement should be nullified because Petitioner's president was wrongfully coerced into signing the indemnity agreement. (Pet'r. Petition at p. 4.) Citing *Chouinard v. Chouinard*, 568 F. 2d 430 (5th Cir.(Ga.) Feb 27, 1978), Petitioner contends that "a contract is voidable where undue or unjust advantage has been taken of a person's economic necessity or distress to coerce him into making agreement." According to Petitioner, it is well-established in Georgia law that Section 13-5-6 of the Georgia Code Annotated provides "[s]ince the free assent of the parties is essential to a valid contract, duress... by which the free will of the party is restrained, and ... consent induced, renders the contract voidable at the election of the injured party." (Id.) Petitioner concludes that, in this case, coercion and duress existed because "Petitioner believed [her] ability to continue to do business would be jeopardized by her refusal to sign the Agreement, and that "[b]ased solely on this fear, Ms. Callicott reluctantly agreed to sign the Agreement." (Pet'r. Petition, p. 4, Attached Affidavit.)

While Petitioner has alleged being coerced or forced to sign the Indemnification under duress, Petitioner has failed to submit documentary evidence that establishes the existence of duress or coercion in this case. In order to establish the existence of duress sufficient enough to void the contract in this case, Petitioner would have to produce evidence that would prove that at the time of the signing of the contract, Petitioner was confronted by acts that consisted of "threats of bodily or other harm, or other means amounting to coercion, or tending to coerce the will of another, and actually inducing him to an act contrary to his free will." *Tidwell v. Critz*, 248 Ga. 201, 282 (1872). Such evidence does not exist in this case. Petitioner has failed to provide any evidence to show that coercion exists and show how HUD officials threatened Petitioner's president with harm or other means of coercion or duress at the time the Indemnification Agreement was signed.

In addition, Petitioner also alleges duress by stating that due to HUD's undue influence and power to coerce, "HUD was in a position of power over Petitioner in that HUD licensed Petitioner to underwrite FHA/HUD insured loans...HUD held the power to deprive Petitioner of its license and effectively put Petitioner out of business...HUD used its power over Petitioner to coerce Ms. Callicott [the president] into signing the Agreement and effectively assuming HUD's responsibility to insure the loan." While HUD has the power to license Petitioner to underwrite FHA/HUD insured loans, and also has the power to withdraw Petitioner's license to originate HUD/FHA-insured mortgages, these acts, alone, do not constitute duress or coercion.

In *Transamerica Consumer Receivable Funding, Inc. v. Warhawk Invs., Inc.*, et al., 842 F.Supp. 536 (Ga. M.D. Val. Div. 1994), guarantors raised duress as an affirmative defense to the enforcement of a settlement and forbearance contract that the guarantors claimed they were forced to sign with the threat of filing a civil law suit to collect the accelerated loan. The guarantors argued that, according to Section 13-5-6 of the Georgia Code Annotated, "duress, accomplished through threats which restrain the free will of the party and induce his consent, renders a contract voidable." However, the court in *Transamerica*, citing *Cannon v. Kitchens*, 240 Ga. 239, 240, 240 S.E.2d 78, 80 (1977), noted that "an act must be *wrongful* to constitute duress, and it is not duress to threaten to do what one has a legal right to do. The threat to bring a civil proceeding against a person is not duress in a legal sense." (emphasis added); *See also Fields v. Thompson*, 164 Ga.App. 331, 333, 297 S.E.2d 100, 101 (1982) (held that threats lender made over the phone that "he would get his money or sue for it" did not constitute duress because the lender had a legal right to collect the money owed.) Relying upon *Cannon* and *Fields*, the court in *Transamerica* concluded that threats to bring a civil suit to collect an accelerated loan did not constitute duress because the lender had a legal right to file a civil law suit to collect its debt.

Likewise, in this case, even if HUD threatened to terminate its relationship with Petitioner based on the claim that "her ability to continue to do business would be jeopardized by her refusal to sign the Agreement," these acts alone are not wrongful and would not be considered duress or coercion. Consistent with the reasoning in *Transamerica*, if Petitioner failed to comply with the terms of the Indemnification Agreement... HUD would be pursuing what it has a legal right to do according to the terms of the Indemnification Agreement, and that is to seek indemnification for HUD's loss pursuant to the terms of that Agreement. Since Petitioner has failed to submit evidence that would otherwise establish that the Indemnification Agreement is void due to the actions claimed by Petitioner as threatening actions, I find Petitioner's claim of duress or coercion fails for lack of proof. *See Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996) (this Office held that assertions without evidence are insufficient to show that the debt claimed by the Secretary is not past due or enforceable.)

III. INDEMNITY AGREEMENT INVALID WITHOUT CONSIDERATION

Third, Petitioner claims the Indemnity Agreement is invalid because there was no consideration. Petitioner states “HUD promises nothing in exchange for Petitioner[’s] promise to indemnify.” (Pet’r. Petition at p. 5.) Petitioner further contends that “Since Petitioner received no consideration in exchange for entering the Agreement and the Agreement promised no consideration on its face, it should be deemed invalid for lack of consideration.” (Id.) Petitioner relies upon Section 13-3-40 of the Georgia Code Annotated which provides “a consideration is essential to a contract which the law will enforce.” (Id.) As further support, Petitioner cites to Camp, Dresser, & McKee, Inc. v. Paul N. Howard Co., 721 So. 2d 1254 (1998) by concluding that this “this principal [sic] holds true for indemnity agreements.” Petitioner provided a copy of the Indemnification Agreement itself as a basis for contending that “The agreement, which was drafted by HUD, placed no obligation on HUD and that there is no language incorporating the Agreement into any prior agreement.” (Id.) As a result, Petitioner concludes “the Agreement [should be] interpreted on its own merits.” (Id.)

The Secretary, on the other hand, states that “Petitioner was well aware of the consequences for exposing HUD to increased risk by failing to underwrite HUD/FHA-insured mortgages in accordance with HUD’s requirements.” Sec’y Stat., ¶ 32.) The Secretary further states that, according to HUD Handbook 4000.4, REV-1, CHG-2, ¶¶ 5-9: “As a HUD Direct Endorsement mortgagee, Petitioner is required to comply with the requirements of the Direct Endorsement Program. Failure to comply with those requirements by exposing the HUD/FHA insurance fund to unnecessary risk will result in a referral to the Mortgagee Review Board and may result in withdrawal by the Board of the mortgagee’s basic HUD approval.” (Sec’y Stat., ¶ 30.)

The Secretary adds that “as an alternative, HUD “may request that the mortgagee enter into an Indemnification Agreement with [HUD] *in lieu of referring the matter to the Mortgagee Review Board.*” (emphasis in original.) (Sec’y Stat., ¶ 31.) The Secretary referenced, as evidence, Petitioner’s own Affidavit in which Petitioner’s president, Teri H. Callicott, acknowledges that “in deciding whether to execute an Indemnification Agreement with HUD it took into consideration the possibility of losing its approval to originate HUD/FHA-insured mortgages.” (Sec’y Stat., ¶ 32.) The Secretary contends that this evidence shows “Petitioner clearly understood that by executing the Indemnification Agreement it no longer faced the threat of referral to the Mortgagee Review Board. This is the consideration bargained for by Petitioner. This is the consideration that Petitioner received.” (Sec’y Stat., ¶ 33.)

The Secretary further supported its position by relying on *Pepsi Cola Bottling Co.*, 248 Ga. 114, 116, 281 S.E. 2d 579, 581 (Ga. 1981), in which the court held that “any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by, or charge imposed upon him to whom it is made, is sufficient consideration.” The Secretary also relied upon *Wolfe v. Breman*, 69 Ga. App. 813, 816, 26 S.E. 2d 633, 636 (Ga. Ct. App. 1943.), in which the court held that “forbearance to prosecute a legal claim, and the compromise of a doubtful right, are both sufficient considerations to support a contract.” Based upon the reasoning set forth in *Pepsi Cola*

Bottling Co. and *Wolfe*, the Secretary argued that consideration was bargained for and received by Petitioner because HUD's forbearance to prosecute a legal claim, alone, is sufficient consideration to support a contract.

As the record reflects, Petitioner was aware of the consequences for exposing HUD to an increased risk by failing to underwrite HUD/FHA-insured mortgages in accordance with HUD's requirements. Even Petitioner, through its president, acknowledges that, in deciding whether to execute an Indemnification Agreement with HUD, she took into consideration the possibility of losing Petitioner's approval to originate HUD/FHA insured mortgages. (Pet'r. Petition at p 4, Ex. 7, Attached Affidavit.) Thus Petitioner, by admission, clearly understood that by signing the Indemnification Agreement it would no longer face the threat of referral to the Mortgagee Review Board, and the signing of the Indemnification Agreement in lieu of a referral to the Mortgagee Review Board became the consideration bargained for and received by Petitioner.

As such, Petitioner has not submitted evidence sufficient enough to refute that produced by the Secretary, and thus, Petitioner's claim that no consideration exist fails for lack of proof.

IV. HUD SHOULD NOT BE ALLOWED TO TRANSFER ITS COST FOR DOING BUSINESS TO PETITIONER

Fourth, Petitioner believes that HUD is "attempting to transfer the risk inherent to its business to Petitioner... Because HUD's business, and not Petitioner's, is to insure home loans, HUD should be required to bear the loss in this case." (Id.) Petitioner claims that HUD was negligent in reselling the property for \$133,900.00 when the original home loan was at least \$182,608.86. (Pet'r. Petition at pp. 5-6.) Petitioner states: "By all indications, HUD made no effort to [sale] the home for a reasonable amount...the low selling price was not Petitioner's fault and they should not be required to bear the burden of poor market conditions and HUD's refusal to more aggressively market the property." (Pet'r. Petition at p. 6.) But, Petitioner "cites no legal authority that would have precluded the sale of the property for the sales price obtained by HUD." *Crest Mortgage Company*, HUDBCA No. 04-A-CH-EE021, at 5 (October 29, 2004).

The Secretary states, on the other hand, that since: "Ramirez/Fernandez failed to cure the default; consequently, insurance benefits were paid by HUD on May 5, 2008 and July 6, 2008, to Chase Home Finance, LLC in the amount of \$182, 608.86 and \$\$7,461.81 respectively." (Sec'y Stat. ¶ 7.) The Secretary acknowledges that "as an insurer of mortgages, HUD/FHA naturally assumes the risk that a certain percentage of mortgages underwritten using prudent underwriting standards will nonetheless go into default. (Sec'y Stat., ¶ 34.) However, the Secretary argues that "no where in HUD's rules or regulations does HUD agree to assume an even greater risk of default caused by the negligent acts of a mortgagee in the Direct Endorsement program." (Sec'y Stat., ¶ 35.)

While the provisions of the Indemnification Agreement are controlling in this matter, this Office notes that the Indemnification Agreement is void of any provision that requires HUD to sell the property for an amount which would ensure a minimal loss to Petitioner. Nonetheless, "it is well established that HUD may sell property for less than its appraised value as 'the result of a business decision consistent with applicable HUD policy and regulation.'" See *Turner-Young Investment Company*, HUDBCA 04-K-CH-EE040, at 4 (April 28, 2005), citing *Crest Mortgage Company* at 5. In *Crest Mortgage Company*, Petitioner also argued that the sales price was inappropriate and sold for lower than the appraised value. *Crest Mortgage* at 5. The administrative judge in *Crest Mortgage* sustained the Secretary's business decision to do so, and stated: "The Secretary has provided evidence that the sale of the property was the result of a business decision consistent with applicable HUD policy and regulation. That decision making process considered the costs of holding the property and the risk of letting it sit vacant." *Id.* Likewise, in this case, HUD sold the property that is the subject of the alleged debt as a result of a business decision in order to avoid an even greater risk of loss to HUD caused by the negligent acts of the Petitioner. Therefore, I find, consistent with the reasoning in *Crest Mortgage Company* and *Turner-Young Investment Company*, that HUD's sale of the subject property was reasonable and that the sales price was the proper basis for computing HUD's loss.

In the instant case, Petitioner has failed to meet his burden of proof that the Indemnification Agreement is unenforceable because Petitioner has failed to prove: (1) Petitioner, as Mortgagee 13083-0000-2, is not a party to the Agreement; (2) Petitioner, through its president, was wrongfully coerced into signing the Indemnity Agreement; (3) the Indemnity Agreement is invalid because Petitioner received no consideration for signing it; and, (4) HUD should not be allowed to shift its cost of doing business to Petitioner.

Financial institutions doing business with HUD often elect to enter into indemnification agreements with the Department in lieu of having allegations of non-compliant lending activities referred to the Department's Mortgagee Review Board for a review and a determination on whether an administrative sanction is warranted and should be imposed. The Mortgagee Review Board is empowered to impose, where appropriate, administrative sanctions such as probation, debarment, or suspension. See HUD Handbook, 4000.4 Rev-1 Chg-2, Chap. 5, Program Management, § 5-8, Indemnification Agreements). It is reasonable for HUD to expect to be indemnified in the amount of the actual loss sustained as a result of Petitioner's negligence. It seems apparent that Petitioner acted in its own best interest when it elected to execute the Indemnification Agreement. It seems equally apparent that Petitioner should be bound by the terms of that Indemnification Agreement as a matter of law.

ORDER

For the reasons set forth above, I find that the debt which is the subject of this proceeding is legally enforceable against Petitioner in the amount claimed by the

Secretary. The Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative offset is **VACATED**. It is hereby

ORDERED that the Secretary is hereby authorized to refer this matter to the U.S. Department of the Treasury for collection of this outstanding obligation by means of administrative offset to the extent authorized by law.

/s/ original

Vanessa L. Hall
Administrative Judge

March 31, 2010