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

In the Matter of: **JOHN E. TURNER,** Petitioner.	HUDOHA 13-VH-0188-AG-082 Claim No. 721002370 September 30, 2014

DECISION AND ORDER UPON RECONSIDERATION

On June 16, 2014, this Court issued its initial Decision and Order (Decision) in the above-captioned proceeding. The Court determined that the Secretary did not have the authority to issue the wage garnishment order due to non-compliance with the notice provisions under 31 C.F.R. § 285.11(e) (1). It was also determined by the Court that the Secretary shall not be prejudiced from initiating administrative wage garnishment proceedings by providing proper notice to Petitioner as required by 31 C.F.R. § 285.11(e). The Court then ordered the Secretary not to refer this matter to the U.S. Department of the Treasury for administrative wage garnishment of any payment due to Petitioner. In addition, the Secretary was further ordered to refund Petitioner the wages garnished on October 7, 2013 and October 21, 2013, in the amounts of $218.03 and $183.52, respectfully, it appearing that these amounts were improperly withheld due to the Secretary's non-compliance with the notice provisions in 31 C.F.R. § 285.11(e)(1). The stay of referral for Petitioner's debt to the U.S. Department of the Treasury currently remains in place indefinitely.

On July 15, 2014, the Secretary, through counsel, timely filed a *Motion for Reconsideration* (*Motion*) of the Court's Decision and Order. Petitioner timely filed his *Response to Secretary's Motion* (*Response*) to the Secretary's *Motion* on July 25, 2014. The Secretary's *Motion* is hereby **GRANTED**.

APPLICABLE LAW

The purpose of reconsideration is not to afford a party the opportunity to reassert contentions that have been fully considered and determined by this Office. See Mortgage Capital of America, Inc., supra; Louisiana Housing Finance Agency, HUDBCA No. 02-D-CH-CC006, (March 1, 2004); Paul Dolman, supra; Charles Waltman, HUDBCA No. 97-A-NY-W196 (September 21, 1999); Seyedahma Mirhosseini, (Mr./Mrs.), HUDBCA No. 95-A-SE-S615 (January 13, 1995). Instead, a request for reconsideration is within the discretion of the administrative judge and will generally only be granted for compelling reasons, e.g., newly discovered material evidence, clear error of fact or law, or evidence that the debt has become

legally unenforceable since the issuance of the initial decision. See Lawrence Syrovatka, HUDOA No. 07-A-CH-HH10 (January 8, 2009); Mortgage Capital of America, Inc., HUDBCA No. 04-D-NY-EEO32 (September 19, 2005); Anthony Mesker, HUDBCA No. 94-C-CH-S379 (May 10, 1995).

DISCUSSION

In this case, the Secretary states that, "Seemingly based upon the Petitioner's statements and/or documents, and the Court's finding that 'there is no evidence in the record to suggest that...it was reasonable to mail the Notice of Intent to the Dove Trail address,' the Court determined that the Secretary failed to send a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings ("Notice of Intent") to Petitioner at his last known address, as required by 31 C.F.R. 285.11(e)(1)." The Secretary contends, more specifically, that: 1) the Notice of Intent issued to Petitioner was reasonable and proper because it was mailed to Petitioner's last known address; 2) the evidence Petitioner filed with the Court was not received by the Secretary until after the *Decision* was issued on June 16, 2014, and as a result the Secretary was not provided the opportunity to respond; and, 3) HUD should be allowed to resume collection of Petitioner's debt by means of administrative wage garnishment because the subject debt is legally enforceable.

As a preliminary matter, the Court will address the issue of insufficient notice to Petitioner. The Secretary claims that "based upon information that HUD had as of the date it sent the August 20, 2013 Notice of Intent, it was reasonable for HUD to rely on [the] last known address information contained in Petitioner's credit report, and the Notice of Intent was proper." *Motion* at p. 3. The Secretary produced, as evidence: 1) a Supplemental Declaration of Brian Dillon,[1] dated June 19, 2014, along with copies of Petitioner's Notice of Intent, Request for Hearing, Partial Claims Promissory Note, and returned mail receipt indicating "Return to Sender Not Deliverable as Addressed Unable to Forward;" 2) a copy of a Credit Report for Petitioner with certain written notations on the face of the Report; 3) copies of Debt Collection Management Services (DCMS) Case Remarks/History Reports from 2008 and 2013; and, 4) a copy of an email from Petitioner dated October 25, 2013.

Petitioner stated, on the other hand, that "I never received a letter as stated in the certified letter to my employer. I would like a copy of that and the address it was mailed to." *Hearing Request*, Attached Letter. Petitioner also provided, as support, a copy of the returned mail that was addressed to him at "805 Dove Trail, Springta." *Id.* The envelope was clearly stamped "Return to Sender, Not Deliverable as Addressed, Unable to Forward," but the envelope on its face reflected an address that was incomplete and undiscernable. In the absence of evidence from the Secretary to rebut the allegations of Petitioner, the Court was left to make its determination based on what was available in the record and provided by Petitioner. Relying on the evidence presented, the Court concluded that Petitioner's claim of insufficient notice was warranted, and determined that the mailing of the Notice of Intent to the wrong address, and not to Petitioner's actual last known address, was insufficient because it was not mailed to the proper address.

[1] Brian Dillon is the Director of the Asset Recovery Division of HUD's Financial Operations Center.

The Secretary maintains, on reconsideration, that notice to Petitioner was reasonable and proper in this case. Citing Melissa S. Madrid, HUDOA No. 10-M-NY-AWG72 (Nov. 2, 2010) and In re Diane Sweet, HUDOA No 10-H-NY-AWG72 (August 25, 2010), the Secretary contends that "reliance upon the Petitioner's address information contained in the Report was reasonable and the Secretary satisfied the notice requirements set forth at 31 C.F.R. 285.11(e)(1) by mailing the Notice of Intent to Petitioner's last known address as determined through official records." The Secretary adds that according to In re Kenneth Holden, HUDBCA No. 89-3781-K293 (June 6, 1989), "the Office of Hearings and Appeals has held that 'a Notice of Intent is effective u[p]on dispatch, if properly and reasonably addressed and that actual receipt is not required by the statute'...Further, a Notice of Intent is properly and reasonably addressed if it is sent to Petitoner's last known address."

According to the evidence now presented by the Secretary, the last known address for Petitioner was in fact "805 Dove Trl, Springtown, TX 76082-2163." This address was obtained from Petitioner's credit report, and more specifically "from Petitioner's Experian credit bureau information, provided as part of a CBCInnovis Social Search Report('Report') dated August 16, 2013." *Motion*, Ex. 1, Supplemental Declaration of Brian Dillon, ¶ 5, and Ex. A. In a Debt Management Collection Services (DMCS) History Report provided by the Secretary, entry dated September 24, 2013, Petitioner was reported as providing a change of address by stating that "his address *is now* 607 Park Creek Avenue, Forney, Texas, 75126" and that "805 Dove Trail, Springtown TX 76082...was his girlfriend's address." (Emphasis added.) *Motion*, Ex. B. This request for an address change preceded an email from Petitioner, dated October 25, 2013, in which Petitioner admitted that he actually got married in July 2013 and claimed for tax purposes, a person named Kelley Turner as a member of his household, the same individual who, according to the evidence, was presumed to be Petitioner's girlfriend and resident of 805 Dove Trail, Springtown TX 76082. *Motion*, Ex. 1, ¶ 6 and Ex. C. So, Petitioner claimed on the one hand that "he never lived at 805 Dove Trail, Springtown, TX 76082-2163," yet on the other hand, provided to HUD an address change from the same address at which he claimed he never lived. *Id.*; *Hearing Request*.

The Court agrees with the Secretary that it was reasonable to rely on the last known address of 805 Dove Trail, Springtown, TX 76082-2163 as reflected in the official records. While the Secretary may have intended for the Notice of Intent to be mailed to the last known address as provided, it was instead mailed to an address that was incomplete and incorrect, seemingly due to a scrivener's error.

Herein lies the parallel between In re Shirley Robinson, HUDAO 08-H-CH-JJ43 (Sept. 25, 2008) and the case at hand. The Court found in Shirley Robinson that the Secretary's notice was not proper because it was not sent to an address known to belong to the Petitioner. Here, the Secretary argues that the Shirley Robinson decision "turned on the fact that, although the Secretary reasonably relied on the petitioner's credit report for a last known address, the address where the Secretary actually sent the notice was listed neither in the credit report nor in other records, but rather was sent to an address that was apparently a scrivener's error." Shirley Robinson at 4. That is exactly what happened in the case at bar. The Secretary reasonably relied on what was thought to be the last known address of Petitioner, 805 Dove Trail, Springtown TX 76082, an address listed in Petitioner's credit report and other official records, when in fact the

Notice of Intent was actually mailed to an address that did not exist because it was an incorrect address primarily due to what is presumed to be a scrivener's error, exactly as was the case in Shirley Robinson. Due to the scrivener's error, the Secretary was informed in the Court's *Decision* that he "shall not be prejudiced from initiating administrative wage garnishment proceedings by providing proper notice to Petitioner as required by 31 C.F.R. § 285.11(e). *Decision* at 5.

In this case, the Secretary has presented evidence that now proves that proper notice was provided to Petitioner pursuant to 31 C.F.R. § 285.11(e). Such evidence has successfully convinced the Court that reasonable notice was given to Petitioner at the time the Notice of Intent was issued. In addition, Petitioner's last known address was further substantiated by Petitioner himself when he acknowledged the last known address as his own before he requested of HUD to change that address for HUD's records and for tax purposes. *Motion*, Ex. B. The Secretary moreover established that Petitioner was well aware he was legally obligated to pay the subject debt based on the subsequent communications reflected in DCMS records, emails, and fax communications that transpired between Petitioner and HUD, all of which post-dated the Notice of Intent and have been reviewed and determined by this Court to be credible.

However, Petitioner counters the Secretary's position with a recurring theme of inconsistencies that puts into question the credibility of Petitioner's allegations. While Petitioner re-alleges that he "did not reside at the 805 Dove Trail address at anytime," he at the same time admitted that, in 2013, he had "received numerous documents in which I replied to as quickly as possible." *Response* at 1. This occurred during the same period Petitioner was presumed to be living at the last known address he claimed he never resided. Petitioner also claimed that the last known address was not his address, yet he requested a change of address from that same address that he previously maintained was not his own. *Motion*, Ex. B. Petitioner then claimed not only had he never used the address at 805 Dove Trail, Springtown, Texas, but that he never "*had any mail forwarded to that address at anytime.*" (emphasis added.); *Response* at 1; *Motion*, Ex. C. Yet, the records otherwise prove that Petitioner's credit report reflected this address as Petitioner's place of residence and that Petitioner used this same address for HUD's records and for tax purposes. In the absence of evidence from Petitioner that potentially could reconcile these blatant inconsistencies, the Court is left to rely on the evidence that is available for its review and that is the evidence presented by the Secretary.

Based on the new material evidence provided by the Secretary, the Court finds, upon reconsideration, that Petitioner not only received sufficient notice regarding the subject debt, but the Court also finds that such evidence was corroborated by Petitioner's own admission that he resided at the address claimed by the Secretary to be Petitioner's last known address.

Next, the Secretary claims that the evidence Petitioner filed with the Court was not received by the Secretary until after the *Decision* was issued on June 16, 2014, and as a result, the Secretary was not provided the opportunity to respond. More specifically, the Secretary states that "any documentary evidence that Petitioner submitted to the Court in support of his Hearing Request was not sent to HUD until June 18, 2014, two days after the Decision was issued, and upon the request of HUD counsel. HUD was not provided with an opportunity to

respond to Petitioner's evidence before it filed its Secretary's Statement on November 6, 2013 or at any time before the Decision was made." *Motion* at 1.

The Notice of Docketing (Notice) issued on September 26, 2013 states that "Copies of all documents filed shall be served on all parties of record at the same time that the originals are filed with the Docket Clerk" and that "Service to all parties of record must be made in the same form filing is made to the Docket Clerk or to the Court in general (e.g. if a party emails a document to the Judge, Clerk, Docket Clerk, etc., that party must serve the remaining parties by email as well.)" Notice, ¶ 3. As a practice it is the responsibility of the respective parties to ensure that the copies of the documents they file with the Court are also received by opposing counsel. Occasionally, as a courtesy, the Court's clerk may provide a copy of opposing counsel's evidence upon the request of a party to the case, but this task is not the responsibility of the Court's Clerk. Such was the case here wherein the Court's Clerk, as a courtesy and upon the Secretary's request, provided a copy of Petitioner's supporting November 17, 2013 documentation two days after the *Decision* was issued on June 16, 2014.

In the *Hearing Request* that was received by the Court and by the Secretary, the Petitioner specifically stated "(*see enclosures*) mailing evidence supporting this case." (emphasis added.); *Hearing Request*. It is unclear why the Secretary waited until the *Motion* was filed to notify the Court that Petitioner had failed to provide a copy of the documentary evidence in support of Petitioner's *Hearing Request* filed last year. Nonetheless, it is evident that the Secretary had ample opportunity to notify the Court about Petitioner's non-compliance to the Court's Notice of Docketing in which both parties were ordered to provide copies of documentary evidence to opposing counsel regarding their respective positions. The Court cannot ensure that parties comply with an order issued by the Court when such non-compliance is unknown to the Court. When preparing to make a decision, the Court considers the record before it to be complete and all parties to be in full compliance, fully notified, and fully informed, unless otherwise notified. As a result, this issue is without merit.

Finally, the Secretary claims that HUD should be allowed to resume collection of Petitioner's debt by means of administrative wage garnishment because the subject debt is legally enforceable. As support the Secretary provided a copy of the Partial Claims Promissory Note signed by Petitioner in which Petitioner agreed to pay the subject debt upon default. *Motion*, Ex. G.

Petitioner now raises, on reconsideration, that:

> My wages were garnished for several months causing me financial and personal hardship. I also sent all evidence, divorce decree, statements, ect. [sic] to the court and complied with all the requests from the court. If there is a ruling of reconsideration[,] I would like an investigation to take place as to why my notice was sent to an address I have never used?? Why was I improperly garnished?? Why was the divorce decree and all other evidence not considered.
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> *Response* at 1, 2.

Petitioner further states that "The loan in question was not my debt. It was a debt on a home awarded to my ex-wife. All responsibility to the property in question was solely awarded to her. She foreclosed on it several years after it was awarded to her in the divorce decree." *Response* at 2. Petitioner failed to introduce evidence in support of his financial hardship claim. But, as support for his claim that he was not responsible for the subject debt, Petitioner did provide a copy of the divorce decree for the Court's review of its terms. The Court has determined upon review that there was no language in the divorce decree that showed that Petitioner had been released from his legal obligation to pay the subject debt.

This Office has consistently maintained that co-signers of a loan are jointly and severally liable to the obligation, and as a result, "a creditor may sue the parties to such obligation separately or together." Mary Jane Lyons Hardy, HUDBCA No. 87-1982-G314, at 3 (July 15, 1987). As such, "the Secretary may proceed against any co-signer for the full amount of the debt" because each co-signer is jointly and severally liable for the obligation. Hedieh Rezai, HUDBCA No. 04-A-NY-EE016 (May 10, 2004). In addition, the Secretary's right to collect the alleged debt in this case emanates from the terms of the Note. Bruce R. Smith, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). For Petitioner not to be held liable for the subject debt, he must submit evidence of either (1) a written release from HUD showing that Petitioner is no longer liable for the debt; or (2) evidence of valid or valuable consideration paid to HUD to release him from his legal obligation. Franklin Harper, HUDBCA No. 01-D-CH-AWG41 (March 23, 2005) (citing Jo Dean Wilson, HUDBCA No. 03-A-CH-AWG09 (January 30, 2003)); William Holland, HUDBCA No. 00-A-NY-AA83 (October 12, 2000); Ann Zamir (Schultz), HUDBCA No. 99-A-NY-Y155 (October 4, 1999); Valerie L. Karpanai, HUDBCA No. 87-2518-H51 (January 27, 1988); Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (December 22, 1986); and Jesus E. and Rita de los Santos, HUDBCA No. 86-1255-F262 (February 28, 1986).

In the instant case, Petitioner has failed to produce evidence of a written release from his legal obligation to pay the subject debt, or evidence of valuable consideration paid to HUD in satisfaction of the debt that would otherwise render the subject debt unenforceable. While Petitioner may be divorced from his ex-spouse, neither the Secretary nor the lender was a party to the divorce decree provided by Petitioner.

As a recourse, Petitioner may seek to enforce, in the state or local court, the divorce decree that was granted against his ex-spouse so that the Petitioner may recover from his ex-spouse monies paid to HUD by him in satisfaction of this legal obligation. See Michael York, HUDBCA No. 09-H-CH-AWG36, dated June 26, 2009, at 3.

In the meantime, without proof of a written release or proof of full satisfaction of the debt owed, Petitioner remains legally obligated to pay the subject debt as a co-signor on the Note and, as a result, the subject debt is legally enforceable against Petitioner.

Finally, the Secretary requests that upon reconsideration, the Court find that "HUD was authorized to issue the wage garnishment order, that HUD be allowed to resume collection [of] Petitioner's debt pursuant to such order, and to retain any funds already collected thereunder." *Motion* at 3. The Secretary has successfully proven that HUD was authorized to issue a wage

garnishment order in this case because Petitioner was reasonably notified and the debt was legally enforceable against Petitioner. Petitioner has failed to produce sufficient and credible evidence that otherwise provides a basis for not deciding in favor of the Secretary in this case.

Upon due consideration of the Secretary's *Motion for Reconsideration,* the *Decision and Order* in John Turner, HUDOHA 13-VH-0188-AG-082 (June 16, 2014), is hereby

REVERSED and **MODIFIED** to reinstate, as of the date of this *Decision and Order Upon Reconsideration*, the Secretary's authority to collect the subject debt by means of administrative wage garnishment. It is hereby

ORDERED that the Order imposing the Stay of Referral of this matter to the U.S. Department of the Treasury for administrative wage garnishment is **VACATED.** It is hereby

FURTHER ORDERED that the Secretary shall resume collection of Petitioner's debt by means of administrative wage garnishment as the subject debt has been determined to be legally enforceable against Petitioner.

Vanessa L. Hall
Administrative Judge

Review of determination by hearing officers. This *Decision and Order upon Reconsideration* shall be the final agency decision in accordance with 31 C.F.R. § 285.11(f) (12) (2012).