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In the Matter of:

JOE S. HERREN & SHELTER  
SOLUTIONS, INC.,

Respondents

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HUDBCA No. 01-C-105-D6

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For the Government

FINDINGS OF FACT AND RECOMMENDED DECISION

By Administrative Judge Jean S. Cooper

September 27, 2001

Statement of Jurisdiction

On May 14, 2001, the United States Department of Housing and Urban Development (HUD) Board of Contract Appeals received the request of Respondents Joe S. Herren (Herren), and Shelter Solutions, Inc., (SSI) for a hearing on the Limited Denial of Participation (LDP) imposed on them by Charles E. Gardner, Director of HUD's Atlanta Homeownership Center (HOC). The administrative judges of the HUD Board of Contract Appeals are authorized to serve as hearing officers and to issue findings of fact and a recommended decision for consideration by the HUD official who imposed the LDP. 24 C.F.R. §§ 24.105, 24.314(b) (2),

and 24.713(b). The findings of fact and recommended decision set forth below are based on the administrative record (AR), the written submissions of the parties to this proceeding, the hearing transcript, and documentary evidence introduced at the hearing.

### Statement of the Case

By letter dated March 28, 2001, Charles E. Gardner, Director of HUD's Atlanta HOC, imposed an LDP on Herren and SSI as participants, contractors, and/or principals in HUD programs. The LDP prohibits Herren and SSI from participating in all single-family housing programs administered by the Assistant Secretary of Housing/FHA Commissioner within the geographic jurisdiction of the Atlanta HOC for a period of one year.

The stated basis for the LDP is that Herren, as President of SSI, knew or should have known that Gary Travis (Travis), a branch manager and loan originator for National City Mortgage Company, doing business as Accubanc Mortgage Corporation (Accubanc), had originated numerous Federal Housing Administration (FHA) single-family insured mortgage loans for SSI, at the same time as Travis was serving SSI as a member of its Board of Directors, Treasurer, and Chief Financial Officer. The LDP notice states that these multiple capacities in which Travis served created an inherent conflict of interest in the origination of these loans, and violated HUD regulations, directives, and standards. The LDP notice further states that, in connection with these loan transactions, Herren and SSI knew or should have known of, and/or participated and collaborated in the following violations, identified in the LDP notice as reasons "a.)" through "g.)":

- a.) Travis' multiple positions at SSI and Accubanc made his participation in the decision making process at both SSI and Accubanc "a business practice that clearly does not conform to generally accepted practices of prudent mortgagees," demonstrated irresponsibility, and violated 24 C.F.R. § 202.5(j)(4);
- b.) Travis' receipt of Accubanc "commissions, bonuses, overrides, and/or performance recognition awards and receipt from SSI of other consideration resulting directly or indirectly from the purchase of these properties (for example, fees received by SSI under lease/purchase agreements or the Home SOS program and subsequently disbursed to Travis as gifts, interest, office expenses, professional fees, or otherwise)"

violated 24 C.F.R. § 202.5(1) and HUD Handbook 4060.1 REV-1 § 2-24(A) (3);

- c.) Travis' "active participation in the management, operation, and control of SSI as board member, Treasurer, and Chief Financial Officer demonstrates Travis' failure to be employed exclusively by Accubanc at all times and conduct only the business affairs of Accubanc during normal business hours," in violation of HUD Handbook 4060.1 REV-1 § 2-14;
- d.) Travis' "identification as branch manager" for the Accubanc branches in Marietta, Georgia and Clearwater, Florida, "and originating multiple loans out of these branches as well as a third branch in Dallas, Texas, violates the additional requirement of HUD Handbook 4060.1 REV-1 § 2-14 that branch managers must be located at the branch office they manage and cannot operate or be the manager of more than one branch office at the same time;"
- e.) As a board member of SSI, Travis' "receipt of compensation for origination of SSI loans through Accubanc was a personal benefit derived from SSI's participation as a mortgagor under FHA's programs" and violated the requirement of HUD Mortgagee Letter 96-52 for "a voluntary board whose members do not personally benefit." In addition, as board member, Treasurer and Chief Financial Officer, Travis "had a financial interest in and benefit from the purchase of SSI properties through compensation for loan originations by Accubanc," in violation of HUD Mortgagee Letters 96-52 and 00-08, Amendment 2, and Travis' certification dated January 13, 2000;
- f.) Travis' "multiple roles" for SSI and Accubanc "prevented SSI from acting on its own behalf, put SSI under the influence and control" of Accubanc, and "provided FHA-insured financing without arms length transactions between SSI's officers and board member and the lender" in violation of HUD Mortgagee Letters 96-52, at pages 3-4, and 00-08, Attachment 6;
- g.) As the loan originator for numerous Accubanc loans to SSI, Travis knew that Accubanc did not have documentation required by Mortgagee Letters 96-52 (pages 4-6) and 00-08, Attachment 6, "to determine SSI's financial capacity, its stability, or its proper case management. Complete year-end financial statements and most recent 90-day year-to-date

certified financial statements were not submitted and could not have been analyzed for each loan, as required. Consequently, since all of the answers to the questions listed in Mortgagee Letters 96-52 and 00-08 would have been no, "Travis knew that the loans originated by SSI should not have been submitted or approved," and Herren and SSI "also knew these requirements were not met."

The LDP notice concludes that the alleged violations described in reasons a.) through g.) constitute cause for an LDP pursuant to 24 C.F.R. §§ 24.705(a)(2), (4), (8), (9), and (10).

Herren and SSI requested a conference on the LDP, in accordance with 24 C.F.R. § 24.712. A conference was held on April 20, 2001, by N. Daniel Rogers, III, of the Atlanta Homeownership Center. By letter dated May 9, 2001, Gardiner affirmed the LDP for all of the reasons cited in the LDP except reasons b.) and d.) Herren and SSI thereafter requested a hearing on the LDP pursuant to 24 C.F.R. § 24.713.

The hearing was held on June 22, 2001. The Board received the complete transcript of the hearing by July 9, 2001.

#### Findings of Fact

1. SSI is a non-profit charitable organization that provides housing for low and moderate income families. It has certificates of authority to do business as a non-profit corporation in Georgia, Florida, New Jersey, New Hampshire, Massachusetts, Minnesota, Texas, Ohio, Virginia and the District of Columbia. It was incorporated in Georgia in June, 1990, as a non-profit corporation to provide affordable housing in suburban areas of Atlanta, Georgia, with the goal of eventually becoming a national housing assistance organization. Its main purpose is to help as many families as possible own their homes. (Exhibit R-2, Tabs 3, 4, 10, 13; Tr. Vol. 2, p. 161.)
2. In 1994, SSI received approval to participate in HUD programs as a non-profit mortgagor, which gave SSI access to FHA financing to purchase and renovate houses, including houses owned by HUD, and then sell those properties to low and moderate income families. Approximately 600 properties have been purchased by SSI with FHA financing. Under SSI's program, which it calls the Supervised Ownership Service (SOS), buyers who make the down payment but do not qualify for loan financing, move into the homes purchased by SSI, make the payments, and SSI gives them 36 months to assume

the mortgage. SSI's SOS program constitutes the bulk of its business. (Exh. R-2, Tab 4; Tr. Vol. 2, p. 162-164, 167.)

3. SSI has to apply every two years to the various HUD HOCs around the country for recertification of its right to participate in HUD's programs as a non-profit mortgagor within each HOC's jurisdiction. In 2000, it applied for recertification to the Atlanta HOC, but its application was denied for lack of audited financial reports. Although other HUD HOCs had approved SSI's 2000 recertification application, that approval was withdrawn after the Atlanta HOC did not recertify SSI. SSI has not been certified to participate in HUD programs as a non-profit mortgagor since February, 2000. (Ex. R-2, Tab 1; Tr. Vol. 2, p. 175-176, 211, 217.)
4. Joe Herren is the President of SSI. He has been in the real estate business for over 30 years, and he is a licensed real estate broker. As President of SSI, Herren acts as its chief executive officer, and supervises the day-to-day business of SSI. Pursuant to a resolution dated June 10, 1994, Herren was authorized by the SSI Board of Directors to act on behalf of SSI to purchase and sell real estate, and to obligate SSI for mortgage and other indebtedness. He made all of the decisions for SSI on what properties to buy, what properties to sell, the sale price of properties, and where to get financing for the purchase of properties. SSI used approximately 24 different mortgagees as sources of financing for its purchase of properties. (AR Tab 2A; Exh. R-2, Tab 10, 12, 13; Tr. Vol. 2, p. 36-37, 161, 164, 178, 260-261.)
5. SSI directors are volunteers and do not receive payment from SSI for performing their duties as directors. HUD encourages real estate professionals to serve on non-profit boards. Herren particularly wanted a director with experience in HUD's FHA programs. Travis, a local mortgage banker, joined SSI's Board of Directors on June 12, 1993. Travis had substantial experience with FHA lending programs as a loan officer with various companies, and at the time he joined SSI's Board of Directors, he owned his own lending company. In 1998, Travis went to work for Accubanc as Branch Manager of its Marietta, Georgia branch office. (AR Tab 3A; Tr. Vol. 2, p. 69, 166-167, 170, 250-251.)
6. Travis was elected Treasurer of SSI. The duties of the Treasurer are listed in SSI's bylaws, including the duty to compile the financial records of SSI, have custody of all funds and securities of SSI, to receive, deposit, and disburse those funds, and "cause full and true accounts of

all receipts and disbursements to be kept." Travis performed none of the Treasurer's duties listed in SSI's bylaws. Those tasks were all performed by SSI staff members or SSI's outside accountant. SSI has no officer position entitled "Chief Financial Officer," and Travis never held such a position. Travis attended board meetings about four times a year, voted on corporate actions at those meetings, and generally advised SSI about real estate programs. He also verified the progress of rehabilitation on three properties. All work Travis did for SSI was on his own time, and was not done during his working hours as a loan officer or branch manager. (Ex. R-2, Tab 10; Tr. Vol. 2, p. 170-172, 174, 251-252, 256.)

7. Herren had asked Travis to originate FHA loans for SSI, but Travis had never worked for a lender that would consider loans for non-profit organizations until he joined Accubanc in 1998. Travis inquired in writing to Steve Atwood, an Executive Vice-President of Accubanc, whether Accubanc would be willing to make loans to SSI. Travis provided an information package to Atwood about SSI, including the fact that Travis served on SSI's Board of Directors. Based upon the information Travis provided, Accubanc agreed to consider making loans to SSI as a non-profit organization. Travis was notified of this decision by Marty Burkhardt in Accubanc's Quality Control Office. Travis asked Atwood whether he would have to resign from SSI's Board of Directors. Atwood did not direct Travis to resign from SSI as a condition of Accubanc's willingness to consider loan applications from SSI. Travis was still uncomfortable with what he saw as an appearance of a conflict of interest between his roles at SSI and Accubanc if SSI were to bring its loan business to Accubanc. Travis was apparently concerned that the real estate sales community would not bring its business to Accubanc if it perceived Travis' activities on behalf of SSI to be a conflict of interest. Travis expressed his reservations to Herren, who made inquiries about how to deal with Travis' concerns. (AR Part I, Tab 3F; Tr. Vol. 2, p. 184-185, 258-259.)
8. Herren consulted Herb Cohn, the Executive Director of a HUD-approved non-profit organization, about the appearance of conflict of interest raised by Travis. Cohn told Herren that his non-profit organization had a lender and an appraiser on its board, and that they had used a "recusal" as a way to cure any appearance of conflict of interest. Herren also consulted with the local judges familiar with corporate governance how to do a recusal. Neither Herren nor Travis called or wrote HUD for advice. Herren believed that his conversation with Cohn and the two judges gave him

sufficient guidance to deal with any problem that might exist if Travis stayed active as a director of SSI while originating its loan applications at Accubanc. (Tr. Vol. 2, p. 202-206, 227, 261, 277, 312-315.)

9. On November 13, 1998, the Board of Directors of SSI passed Travis' motion that he "recuse himself from all decisions involving loans made to Shelter by any mortgage company with which Gary O. Travis is affiliated." At the same meeting, the SSI Board of Directors passed a motion that another director recuse himself from all decisions involving the sale of insurance policies to SSI by State Farm, that director's employer. (AR, Part II - Tab C.)
10. Starting in late 1998, Accubanc accepted and approved a number of loan applications from SSI. In each case, Herren made the decision to apply to Accubanc for the loan, and Travis was the loan officer who originated the loan. Travis was paid the regular commission rate by Accubanc for those loans. Even if another loan officer at the Marietta, Georgia branch of Accubanc had originated those loans, Travis would have received an override, which is a payment percentage for those loans, because he was the branch manager. (Exh. R-5; Tr. Vol. 2, p. 253.)
11. SSI did not get a special loan rate from Accubanc, but Herren preferred going to Accubanc for loans because Accubanc was offering loans to all of its customers at a lower loan rate than other lenders in the area who would make loans to non-profit organizations. Accubanc was able to do this because it is a large national lending organization that participates in Ginnie Mae mortgage pools, and sells loans quickly through pooling. (Exh. R-5; Tr. Vol. 2, p. 253, 270-272.)
12. Between late 1998 and early 2000, Travis originated between 106 and 158 loans at Accubanc on behalf of SSI. He estimates that he received approximately \$70,000 in commissions for all of the loans he originated for SSI. To originate a loan, Travis would conduct the loan application interview, and fill out and sign the loan application form on behalf of Accubanc. He would then order credit reports and appraisals, and direct the collection of bank statements, tax returns, and current financial statements. Travis played no role in evaluating SSI's financial information or determining its sufficiency. The application and the collected credit information would be sent to Accubanc's Columbia, Maryland office for loan processing, underwriting and approval of each loan originated by Travis. It is Accubanc's policy to require that a loan application

be taken from any customer that requests it, but the decision on whether or not to approve each application is made in Accubanc's Columbia office by the underwriters. (AR Tab 2A; Exh. R-5; Tr. Vol. 2, p. 273, 288.)

13. In late 1999, Gail Knowlson, Director of Program Support in HUD's Atlanta HOC, who was conducting recertification of non-profit organizations for the Atlanta HOC, contacted Herren by telephone to ask him if Travis was on SSI's Board of Directors and if Travis was originating loans for SSI. Herren answered "yes" to both questions, and Knowlson made no comment to Herren about either answer. (Tr. Vol. 1, p. 31-32; Tr. Vol. 2, p. 174-175.)
14. In January, 2000, all SSI Board members, including Travis, were asked to sign an identical certification for the Atlanta HOC, the language of which had been provided by Knowlson. The certification signed by each SSI board member states as follows: "I certify that I have not individually gained profit from transactions performed by Shelter Solutions, Inc., its subsidiaries or affiliates." Herren thought the certification language dictated by Knowlson meant that none of the SSI board members were profiting from the sale of homes by SSI. Travis concluded the same, and signed the notarized certification on January 13, 2000. (AR, Tab 1D; Tr. Vol. 2, p. 192-193.)
15. Herren signed a certification for HUD's Atlanta HOC, dated March 27, 2000, as the President of SSI. That certification states as follows:

Shelter Solutions, Inc. certifies that the members of its Board of Directors serve in a voluntary capacity and receive no compensation, other than reimbursement for expenses, for the services (on the Board of Directors) and the nonprofit agency operates in a manner so that no part of its net earnings is passed on to any individual, corporation or other entity. (AR, Tab 3B).
16. SSI moved its headquarters from Georgia to Florida in August, 2000. Travis and another SSI board member resigned from SSI's Board of Directors on September 20, 2000, effective October 1, 2000, because of the inconvenience of traveling to Florida to participate in future SSI board meetings. (AR, Tab 3A; Exh. R-2, Tab 1; Tr. Vol. 2, p. 164, 183, 221, 276.)
17. Mortgagee Letters 96-52 and 00-08, both addressed to mortgagees, set out technical financial evaluation criteria



and questions for mortgagee underwriters to use in deciding whether a non-profit application for a mortgage should be approved, including the effect of proposed mortgage debt on the financial condition and obligations of the non-profit applicant. Nora Kittrell, an accountant in the Atlanta HOC, determined in February, 2001, that SSI was carrying too much mortgage debt and should not have been approved by SSI or other mortgagees for new mortgages. None of the SSI loans are in default. (Exh. G-1; Tr. Vol.2, p. 197-198.)

### Discussion

An LDP is a discretionary administrative sanction that is imposed in the best interest of the Government. 24 C.F.R. § 24.700. Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. The term "responsible" as used in the context of administrative sanctions such as LDPs, debarments and suspensions, is a term of art which includes not only the ability to perform satisfactorily, but the honesty and integrity of the participant. 48 Comp. Gen. 769 (1969).

The test for whether a sanction is warranted is present responsibility, although lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957), Stanko Packing v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980). The Government bears the evidentiary burden of demonstrating by adequate evidence that cause for Respondents' LDP exists, that the LDP is in the public interest, and that the LDP was not imposed for punitive purposes. 24 C.F.R. § 24.705. Adequate evidence is defined in the regulations applicable to an LDP as "information sufficient to support a belief that a particular act or omission had occurred." 24 C.F.R. § 24.105(a). It is likened to the probable cause necessary for an arrest, search warrant, or a preliminary hearing. Horne Bros. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1971). It is not a rigorous level of proof. However, in a hearing in which witnesses testify under oath or affirmation, and are subject to cross-examination, evidence is tested and evaluated to determine its probative value, to assure that it is sufficient to support a belief that a particular act or omission has occurred.

SSI was a "participant" in a primary covered transaction, and Herren, as the President of SSI, is a "principal" as defined at 24 C.F.R. § 24.105. Therefore, if cause for the LDP is established, both SSI and Herren are subject to the sanction.

Herren and SSI state that they are not mortgage lenders, have no responsibility for actions taken by a lender, and also

have no reason to know of or be bound by regulations and program requirements applicable to lenders. They further state that they did not knowingly violate any HUD regulation, rule, or program requirement by applying to Accubanc for loans during the time when Travis served on SSI's board, and that the recusal action taken by SSI's board showed an intent to act responsibly to cure any appearance of a conflict of interest. Respondents deny that Travis was paid anything by them for his services as a board member. They further deny that Travis actually performed any services as Treasurer or Chief Financial Officer of SSI, or that Travis had any special knowledge about SSI's financial status because of the titles he held in SSI. They deny that Travis was an employee of SSI at any time, or that he performed work for SSI during his working hours at Accubanc. Respondents also deny that Travis or Accubanc had influence and control over SSI by virtue of Travis' roles at SSI and Accubanc, or that SSI received special treatment or consideration as a loan applicant from Travis and Accubanc.

There is no factual dispute that Travis received his regular commissions from Accubanc for originating the SSI loans that Herren brought to Accubanc. All but one of the Government's reasons for imposing the LDP on Herren and SSI flow from that single fact. Furthermore, the reasons for the LDP against Herren and SSI are written in such a way that Travis' actions, rather than that of Herren or SSI, are the focus of each stated reason.

Reason "a.)" for the LDP alleges that Travis' actions constituted a business practice "that clearly does not conform to generally accepted practices of prudent mortgagees," and was therefore in violation of 24 C.F.R. § 202.5(j)(4). The regulation cited by HUD is part of the "general approval standards" section of the HUD regulations applicable to "Approval of Lending Institutions and Mortgagees." I find that this regulation is inapplicable to Herren and to SSI, who are not mortgagees. There is no evidence that they were charged with knowing what HUD requires of approved mortgagees, nor was there any reason for them to know of HUD's mortgagee approval requirements. The cited regulation simply has no applicability to Herren or SSI, directly or indirectly.

The Department has failed to establish cause for the LDP based on reason "a.)" cited in the LDP notice.

Reason "c.)" for the LDP states that Travis' active participation in the management, operation, and control of SSI as board member, Treasurer, and Chief Financial Officer demonstrates Travis' failure to be employed exclusively by Accubanc at all times and to conduct only the business affairs of Accubanc during

normal business hours, in violation of HUD Handbook 4060.1 REV-1 § 2-14. Mortgagee Approval Handbook 4060.1 REV-1 §2.14 provides, in pertinent part, that "all employees of the mortgagee ... must be employed exclusively by the mortgagee at all times and conduct only the business affairs of the mortgagee during normal business hours."

The evidence in the record does not support the factual allegations of the charge. Travis never performed any duties as either Treasurer or "Chief Financial Officer," a position that did not exist at SSI. Furthermore, Travis' other duties as a board member were minimal, at best, and took place after working hours. The only facts mustered to support this reason for the LDP was that Travis drove past three SSI properties under rehabilitation on his way home from work to verify the progress of the rehabilitation, and one time he made a similar visit to a property on his lunch hour. None of these minor activities interfered in any way with Travis serving full-time in his position at Accubanc, nor does this demonstrate that he was an employee of SSI at any time.

This reason for the LDP of Herren and SSI, even if it were proven factually, has no relationship to either Herren or SSI that would be a ground for a sanction against them. The HUD handbook cited in the LDP notice applies to mortgagees, not to mortgagors, and is an inappropriate and inapplicable reason for the LDP of either Herren or SSI. The Department has failed to establish cause for the LDP based on reason "c.)" cited in the LDP notice.

Reason "e.)" for the LDP states that Travis' receipt of compensation for origination of SSI loans through Accubanc was a personal benefit to Travis derived from SSI's participation as a mortgagor under FHA's programs, and violated the requirement in HUD Mortgagee Letter 96-52 for a "voluntary board whose members do not personally benefit." It further states that Travis had a financial interest in and benefited from the purchase of SSI properties because he received compensation from Accubanc for originating those loans. HUD alleges that these acts were in violation of HUD Mortgagee Letters 96-52 and 00-08, Attachment 2, and also in violation of Travis' certification dated January 13, 2000.

Mortgagee Letter 96-52, dated September 19, 1996, is directed to "All Approved Mortgagees." It states that HUD encourages non-profit organizations to be "active partners with FHA in developing affordable housing." The Mortgagee Letter sets out the basic requirements for a non-profit organization to be eligible as a mortgagor under FHA's programs and obtain the same insured financing percentage as owner-occupants. The non-profit

agency must be a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1986, it must "have a voluntary board whose members do not personally benefit," and it must have two years experience as a housing provider. The meaning of "personally benefit," a broad, ambiguous phrase, is clarified to a certain extent under the "Program Administration" section of Mortgagee Letter 96-52. It states that "beneficiaries of the affordable housing program itself may not be members of its board, employees or others with an identity of interest to the nonprofit. Lenders may not approve a situation where such individuals are permitted to purchase or rent housing made available through the nonprofit (sic) using FHA insured mortgage financing."

SSI clearly understood that a "voluntary board" is not paid for its board services, and there is no evidence that SSI paid its board members for board member services. Furthermore, there is no evidence that SSI distributed any profits from the sale of property to its board members, or that SSI board members purchased or rented properties in the SOS program. Based on the evidence in the record, there was nothing false in the certification signed by Herren for SSI. Rather, HUD cites Travis' certification as proof that what Travis did as an Accubanc loan officer, i.e. originating loans for SSI, not only made Travis' certification false, but attributes Travis' alleged wrongdoing to SSI and Herren, as well.

Travis' certification used wording provided by HUD, not Travis, Herren, or anyone else at SSI. It stated that Travis had not "individually gained profit from transactions performed by Shelter Solutions, Inc., its subsidiaries or affiliates." The key phrase in the certification is "gained profit." To Travis and Herren, this meant that Travis did not receive any part of the net profit from the sale of properties by SSI. Every SSI Board member signed the same certification. Travis received commissions and overrides in lieu of a set salary from Accubanc for doing his job. A payment of a regular commission by a mortgagee for originating a loan is not "profit" if that word is given its normal and customary usage as "the excess of revenues over expenditures in a business transaction." Black's Law Dictionary, Seventh Edition (1999). However, profit can also mean "advantage, benefit, gain." Random House Webster's Unabridged Dictionary, Second Edition. If HUD meant to prohibit what Travis did, it had a duty to say so in plain understandable English, not euphemisms or ambiguous phrases. Herren's interpretation of Travis' certification was reasonable, particularly because the certification addressed Travis' actions as an SSI board member, not as a loan officer.

The contra preferentum rule of contract and regulatory construction requires that ambiguities are to be construed against the drafter, so long as the non-drafter's interpretation is reasonable. It is irrelevant whether the drafter's construction is also reasonable. B. B. Anderson Construction Co. v. United States, 1 Ct. Cl. 169 (1983); Carroll P. Kisser, HUDBCA No. 91-5688-D9 (Aug. 28, 1991). Nowhere is the prohibition claimed by HUD clearly stated. I find Herren's and Travis' construction of Travis' certification to be reasonable, and as such, it was not "violated" when Travis originated SSI's loan applications at Accubanc. While HUD's construction is not unreasonable, it requires a very broad reading, and is certainly no more reasonable than that of Herren and Travis. This is the essence of ambiguity.

There is no evidence that Respondents knew that HUD had a policy that would have forbidden Travis to originate loans for SSI while he served on its board, or that Respondents acted to deliberately violate such a policy. Furthermore, the Government has failed to prove that Herren had "reason to know" that HUD forbade Travis from originating SSI's loans while Travis served on SSI's Board of Directors. Because HUD never gave Respondents a clear directive on this, not in Mortgagee Letters, not in any HUD handbook, and not in any regulation, it was reasonable that Herren did not know that HUD viewed such conduct as a conflict of interest. Herren's inquiries to Herb Cohn and to the local judges would have bolstered the reasonableness of his conclusions, in the absence of notifications and advisories from HUD, as would the fact that Accubanc senior management permitted Travis to continue to serve on SSI's board while originating SSI loans at Accubanc. See Novicki v. Cook, 743 F. Supp. 11 (D.D.C. 1991). In the context of the inquiries and steps Herren did take, the fact that Herren did not also check with HUD did not make his actions unreasonable or lacking in responsibility.

Mortgagee Letter 00-08 is dated March 3, 2000, when SSI was no longer an approved non-profit, and SSI could no longer apply for any loans to which Mortgagee Letter 00-08 would apply. I therefore find the citation to that Mortgagee Letter to be inapplicable to this case.

I find that HUD has failed to establish that Herren either knew or reasonably should have known that HUD considered Travis' loan originations for SSI to be either a conflict of interest for Travis or an unallowable action for an SSI board member.

Reason "f.)" for the LDP of Herren alleges that Travis' multiple roles for SSI and Accubanc prevented SSI from acting on its own behalf, put SSI under the influence and control of Accubanc, and provided FHA-insured financing without arm's length

transactions between SSI's officers and Board members and Accubanc, in violations of HUD Mortgagee Letters 96-52 and 00-08, Attachment 6.

There is no evidence at all in the record to support the factual allegations of control of SSI by Travis and Accubanc, or the lack of arm's length transactions. Herren made the decisions for SSI on what properties to purchase and sell, and where to apply for loan financing. He went to Accubanc for its lower loan rates, but those loan rates were offered to the community at large, not just to SSI. Travis did not actually perform any of the functions of either a Treasurer or Chief Financial Officer for SSI. Travis had no greater information about SSI than any other board member, and he certainly exerted no control over SSI at any time. Likewise, because of the "recusal" motion, Travis was taken out of any decision-making at SSI regarding where SSI would apply for loans. Thus, there was insulation from influence by Travis in any of his roles at all times. Furthermore, Herren and SSI acted responsibly in enacting the "recusal" firewall at SSI that ensured this protection. Because the basic facts underlying this reason for the LDP are wholly unsupported by the evidence in the record, this reason in the LDP notice fails for lack of proof.

Reason "g.)" for the LDP states that Travis, Herren and SSI knew that Accubanc did not have documentation required by Mortgagee Letters 96-52 and 00-08, Attachment 6 "to determine SSI's financial capacity, its stability, or its proper case management" because certified financial statements had not been provided by SSI, and that the answers to the questions listed in Mortgagee Letters 96-52 and 00-08 would have been "No."

Mortgagee Letters are directed to mortgagees, not mortgagors. The discussion of financial documentation, evaluation of that documentation, and the questions set out in the two Mortgagee Letters are directed at the underwriters employed by mortgagees to apply, not loan officers or non-profit mortgagors. If Accubanc's underwriters improperly approved some of SSI's loan applications because SSI was financially overburdened by obligations arising out of mortgages that had already been, then HUD should hold Accubanc and its underwriters responsible. The financial information that supported each SSI loan application was information that the underwriter had the expertise and training to evaluate, not Herren, SSI or even Travis.

Not only did many lenders in addition to Accubanc approve SSI's loan applications, but other HUD HOCs had approved SSI's reapplications for approval in 2000 before the Atlanta HOC refused to do so. Each of these applications had the allegedly

deficient financial statements in them, and contained a current list of mortgages for which SSI was responsible at the time of the application. The record is also clear that not a single one of those loans is in default. In any event, it is both inappropriate and punitive to hold a non-profit mortgagor and its President responsible for alleged underwriting errors of a mortgagee. I find as a matter of fact and law that this is not an appropriate reason for an LDP of either Herren or SSI.

The purpose of an LDP is to protect the public and the Department. This LDP was imposed on Herren and SSI more than one year after SSI was refused re-certification by the Atlanta HOC to participate as a non-profit in HUD-FHA programs, and six months after Travis had resigned as a member of SSI's Board of Directors. It is difficult to understand the necessity of the sanctions under these circumstances, even if HUD had proved factual allegations that would support appropriate reasons for sanctioning Herren and SSI.

The Government's case against Herren and SSI was based on a very brief investigation that confirmed only that Travis had originated loans for SSI while he was serving on SSI's board. The rest was conjecture and supposition. The Atlanta HOC assumed that its written policy statements in Mortgagee Letters, handbooks, and regulations clearly and unequivocally prohibited Travis from originating loans for SSI while serving on its board, and that Herren and Travis knowingly violated that prohibition. The factual allegations made by HUD were unsupported on any of the reasons for the LDP except reason "e.)". Furthermore, mitigating evidence for reason "e.)" was ample, but it was never really considered by HUD at any point as mitigation. In fact, the Atlanta HOC viewed Travis' recusal, which actually provided protection from improper influence, as evidence of lack of responsibility, contending that Herrin, SSI, and Travis all knew it was wrong for Travis to originate SSI's loans. I strongly disagree on this interpretation of the relevant facts. I find them to be compelling mitigation.

#### Conclusion

Based on the record in this case considered as a whole, I find there to be inadequate evidence to support the reasons for the LDP, and I further find that the legal bases cited for the sanction are either inapplicable or unproven.

Recommended Decision

I recommend that the LDP of Joe S. Herren and Shelter Solutions, Inc. be terminated immediately because it is not supported by adequate evidence or in accordance with law.

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Jean S. Cooper  
Administrative Judge