

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:

**MARK DAVID VIAU
A/K/A MARK PADILLA VIAU
A/K/A MARK PADILLA, and
FUNDING MATRIX, LLC,**

Respondents.

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Docket No. 10-3813-DB

DEBARRING OFFICIAL'S DETERMINATION

Introduction and Background

By Notice of Proposed Debarment dated November 01, 2011 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondents MARK DAVID VIAU and FUNDING MATRIX, LLC of their proposed debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a period of three years from the date of the final determination of this action. The Notice further advised Respondent VIAU that his proposed debarment was in accordance with the procedures set forth in 2 CFR parts 180 and 2424 and was based upon his conviction for "making false claims on a Class Member Election of Benefits form involving bulletproof vests purchased by HUD and sought reimbursement in the amount of \$3,650.00." Additionally, Respondent was advised that as a principal of Funding Matrix, a real estate investment company, he was involved in covered transactions, and is subject to the debarment regulations. In a separate Notice of even date, Funding Matrix was advised also of its proposed debarment for three years because it was Respondent's affiliate.

A telephonic hearing was held on May 8, 2012¹, before the Debarring Official's Designee, Mortimer F. Coward. Respondent appeared *pro se*. Terri Roman, Esq. appeared on behalf of HUD.

¹ This matter originally was set for hearing on March 27, 2012. By e-mail dated March 8, 2012, Respondent requested a 60-day extension to file his response, which, pursuant to the scheduling order of January 12, 2012, was due no later than March 15, 2012. In his request, Respondent stated that he had "secured the services of [counsel] from the Federal Law Enforcement Officers Association (FLEOA) to represent [him.]." The Government opposed Respondent's request for a 60-day extension. In an Order issued March 27, 2012, the Debarring Official's Designee granted Respondent a 30-day extension to file his response to the Notice of Proposed Debarment no later than April 25, 2012, with the hearing set for May 8, 2012. Respondent did not file a response and no attorney has entered his/her appearance on Respondent's behalf.

Summary

I have decided, pursuant to 2 C.F.R. part 180, to debar Respondents from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a period of three years from the date of this Determination. My decision is based on the administrative record in this matter, which includes the following information:

1. The Notices of Proposed Debarment dated November 01, 2011.
2. A letter from Respondent Viau dated November 11, 2011, addressed to the Debarring Official and the Debarring Official's Designee, with an accompanying letter from the Department of Justice, Office of Professional Responsibility dated September 6, 2011, requesting that this debarment action "be suspended" pending an investigation by the Department of Justice (requested by Respondent) of the conduct of two Assistant United States Attorneys who prosecuted his criminal case.
3. An e-mail dated May 8, 2008, from Respondent Viau, raising the issue of mitigating factors in connection with his disability, with an attachment from Dr. Bernard I. Grosser dated August 10, 2009, setting forth his findings with respect to the neuropsychological evaluation of Respondent Dr. Grosser performed on May 20, 2009, at the behest of the Department of Labor (DOL), following Dr. Grosser's initial report of July 30, 2008, to DOL.²
4. The Government's Pre-Hearing Brief in Support of Three-Year Debarment filed February 21, 2012 (with accompanying exhibits and attachments).

Government Counsel's Arguments

Government counsel recites that Respondent was a special agent in HUD's Office of Inspector General (OIG). In October 2004, while still in HUD's employ, Respondent formed and registered a company, his co-respondent, Funding Matrix, LLC (Matrix). Respondent served as the resident agent and manager of Matrix, and was the signatory on Matrix's bank account. Respondent devised a scheme to defraud Second Chance Body Armor, a company that had settled a suit which alleged that it had sold defective body armor to law-enforcement agencies, including HUD OIG. Second Chance agreed, pursuant to the settlement, to establish a fund to reimburse purchasers the purchase price of the bullet-proof vests. Respondent applied via the internet, on behalf of Matrix, for reimbursement for the purchase price of five bullet-proof vests that had been purchased by HUD's OIG. Respondent knew that neither he nor Matrix had purchased the vests, thus neither was entitled to the reimbursement for which he applied. Matrix received a reimbursement check of \$3,650.00 from Second Chance Armor, which Respondent deposited into Matrix's credit union account. Respondent then moved the funds to another account at the same institution held by him and his wife. In December 2008, Respondent

² Although the e-mail was submitted after the hearing was adjourned and the record closed, the Debarring Official's Designee admitted the e-mail into the record, notwithstanding that Respondent had not filed a motion for leave to submit the e-mail as part of the record. The Debarring Official's Designee included the e-mail and its attachments in the record in the absence of any opposition from the Government with respect to its admission, in the interest of justice, and pursuant to the authority in 2 C.F.R. § 180.835.

was indicted on four counts, including mail fraud in violation of 18 U.S.C. 1341. In February 2011, pursuant to a plea agreement, Respondent pleaded guilty to one count of mail fraud in connection with the scheme described here.

Counsel reviews the “standard for debarment” under 2 C.F.R. §§ 180.125, 180.800(a)(1) and (4), 180.905, and 180.825, and argues that Respondent and his co-respondent, Matrix, are subject to HUD’s debarment regulations. Respondent is subject to the regulations as a person who “has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction.” 2 C.F.R. § 180.130. See also 2 C.F.R. §§ 180.980 (“participant”), 180.985 (“person”), 180.200 (“covered transaction”), and 180.970 (“nonprocurement transactions”). Counsel adds that Respondent, “as an individual who fraudulently obtained a refund due to the United States, he has been involved in covered transaction(s).”

Counsel next argues that the Government has established cause for debarment and met its burden of proof by virtue of Respondent’s conviction for mail fraud. 2 C.F.R. § 180.850. Further, Respondent’s conviction is cause for debarment under 2 C.F.R. §§ 180.800(a)(1) (“fraud”) and (3) (“theft, making false statements, making false claims”). Counsel further contends that Respondent’s conviction is also cause for debarment under 2 C.F.R. § 180.800(a)(4) (“any other offense indicating a lack of business integrity or business honesty that seriously and directly affects present responsibility”).

Respondent’s cause for debarment, counsel adds, provides cause for debarment of co-respondent Matrix, as Respondent’s affiliate. Counsel details the relationship between Respondent and Matrix, including Respondent’s management of, and signatory authority on Matrix’s bank account and Respondent’s withdrawal of funds from Matrix’s account for deposit into Respondent’s personal account. See 2 C.F.R. §§ 180.625(b) and 180.905.

In support of the Government’s position that Respondent’s misconduct warrants his debarment, counsel argues that Respondent “demonstrated a willingness to commit fraud [that showed] a disturbing lack of honesty, integrity and responsibility [thus Respondent] cannot be relied upon by HUD to act with the candor and probity necessary to participate in federal government programs.” See Government’s Pre-Hearing Brief in Support of Three-Year Debarment at 8-9, and the cases cited therein. Counsel also refers to Respondent’s service in HUD OIG and his involvement in investigations and prosecutions of cases involving mortgage fraud and the making of false statements. Counsel further notes that as a HUD employee, Respondent “enjoyed the trust of the Federal Government; yet he was willing to betray that trust by seeking reimbursements that were not rightfully his.” In this regard, counsel reviews the aggravating and mitigating factors at 2 C.F.R. § 180.860 and determines that the “aggravating factors weigh heavily in favor of” Respondent’s debarment. Counsel concludes that, by virtue of Respondent’s conviction for mail fraud he has demonstrated that he is not presently responsible, and debarment is warranted pursuant to 2 C.F.R. §§ 180.800(a)(1), (3), and (4). Counsel adds that Funding Matrix also should be debarred for three years, pursuant to 2 C.F.R. §§ 180.625 and 180.905, based on Respondent’s control over Funding Matrix, LLC, which, as counsel contends, is Respondent’s affiliate.

Respondent's Arguments

Respondent testified that he was advised by his counsel that HUD has no jurisdiction over him in this matter; thus, he was appearing at the hearing as a matter of principle. Respondent added that the whole process is moot and that there would be no effect on him if he is debarred. According to Respondent, his misconduct resulted in no harm to the Government – the only harm that his actions caused was to the vendor of the vests. Respondent added that his failure to find the receipt evidencing his purchase of the bulletproof vests was the reason he was indicted on 17 counts. Respondent argued that he “had to fold since he was up against the government.”

Respondent asserted that it was a tenuous argument for the government to say that his conviction for stealing bulletproof vests from a vendor caused HUD harm. Respondent further argued that the matter of his seeking reimbursement from the vendor of the bulletproof vests which he did not purchase is moot, and that the matter is closed because of his plea agreement. Respondent also testified that he was no longer dealing with the debarment matter and there was “no demonstrated harm to the government.” As Respondent sees it, he is being held to a higher level of scrutiny than officials who have committed worse criminal acts. Respondent concluded that the federal government did not have jurisdiction over him to debar him.

After the close of the hearing, Respondent submitted an e-mail in which he argued that “contrary to the Government’s assertion there are mitigating factors in [his] case.” Respondent referred to his injury while working as a HUD OIG agent, which resulted in his disability retirement. Respondent wrote that he suffered a significant brain injury which “inhibited [his] ability to find the “RECEIPT” that the Government insisted [he] present for [his] privately purchased Bulletproof Vests.” (Emphasis in original). In Respondent’s e-mail, he characterized the government’s conduct in his criminal case as “terrible,” and referred to his letter to DOJ complaining of the actions of the prosecutors in his criminal matter. Respondent also submitted for consideration a letter from Bernard I. Grosser, M.D., a psychiatrist appointed by the Department of Labor to evaluate Respondent’s condition in May 2009, following an earlier evaluation in July 2008. Among other things, Dr. Grosser concluded that he “can unequivocally state that the claimant’s condition is caused/aggravated by the work incident . . . [and that] something very significant occurred in this person’s [i.e., Respondent’s] brain.”

Findings of Fact

1. Respondent is a former special agent with the HUD OIG.
2. Respondent was awarded a disability retirement as a result of a work-related injury on January 23, 2006.
3. Respondent formed Funding Matrix in 2004 while employed at HUD.
4. Respondent, among other things, acted as the manager of Funding Matrix, communicated with other parties on behalf of Funding Matrix, and was a signatory on its bank account.
5. Respondent executed real estate purchase contracts on behalf of Funding Matrix.

6. While still in HUD's employ, Respondent engaged in a scheme in which he applied between July 2005 and September 2005, on behalf of Funding Matrix, for reimbursement of \$3,650.00 for five defective bulletproof vests.
7. Respondent knew that neither he nor his co-respondent, Funding Matrix, had purchased the vests.
8. The vests had been purchased by HUD, Respondent's employer.
9. Reimbursement was made from a \$29 million fund created in settlement of a lawsuit filed on behalf of law enforcement officers and others, including HUD OIG agents.
10. Respondent, on two occasions in 2005, submitted Class Member Election of Benefits forms, once via the internet and the second time using the U.S. mail, to claim reimbursement from the Settlement Fund.
11. In April 2006, a check for \$3,650.00 was mailed to Respondent and deposited in the account of Funding Matrix.
12. Respondent, on the same day the deposit to Funding Matrix was made, transferred the funds to an account in his and his wife's name.
13. Respondent represented and certified in signed documents, including the mortgage covering the property he purchased with the proceeds of the loan, that the property would be a secondary home and not used as rental property.
14. Respondent, however, notwithstanding his written agreement not to use the second home as rental property, entered into an agreement with a third party to rent the home on his behalf.
15. Respondent was actively involved in the operation of Funding Matrix between October 2004 and October 2005, including signing real estate contracts on behalf of Funding Matrix, thereby effectively establishing Funding Matrix as a real estate company.
16. Respondent signed his OGE Form 450 (Executive Branch Confidential Financial Disclosure Report) on October 7, 2005, certifying that he held no "Outside Positions" outside the U.S. Government.
17. Respondent also completed the Supplement to the OGE Form 450 in which he certified that he did not participate in the conduct of a business dealing with real estate.
18. On October 20, 2004, prior to Respondent's certifying the OGE forms on October 7, 2005, the articles of incorporation for Funding Matrix were filed and approved, and on August 2, 2005, Respondent filled out a Registration Information Change Form designating him as registered agent and manager of Funding Matrix.
19. Respondent was indicted in a Second Superseding Indictment that charged him with 17 counts, including making false statements, bank fraud, and mail fraud.
20. Respondent entered into a plea agreement in which he pleaded guilty to one count of mail fraud.
21. Respondent was sentenced to probation for 36 months and ordered to make restitution of \$3,650.00.

Conclusions

Based on the above Findings of Fact, I have made the following conclusions:

1. Respondent is subject to the debarment regulations because he managed a real estate company, Funding Matrix, LLC, which “has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction.” 2 C.F.R. § 180.130.
2. Respondent was a “participant,” defined as “any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant.” 2 C.F.R. § 180.980.
3. A “covered transaction is a nonprocurement or procurement transaction that is subject to the prohibitions of this part.” *See* 2 C.F.R. 180.200.
4. Respondent also was a “principal” as he was a person “within a participant with management or supervisory responsibilities related to a covered transaction.” 2 C.F.R. § 180.995.
5. Funding Matrix became involved in a nonprocurement transaction through Respondent’s actions in applying as the agent of Funding Matrix for reimbursement from the Settlement Fund.³
6. Additionally, Respondent used Funding Matrix as a real estate company which he controlled.
7. Respondent’s submission of the Class Member Election of Benefits forms for reimbursement from the Settlement Fund and his application for mortgage loans were covered transactions.
8. Respondent’s conviction for mail fraud provides cause for his debarment. 2 C.F.R. § 180.800.
9. The government has met its burden of proof based on Respondent’s conviction. 2 C.F.R. § 180.850.
10. Respondent has submitted as mitigating factors to be considered under 2 C.F.R. § 180.860, his work-related injury and its effect on his mental health. Dr. Grosser, in his evaluation, has indicated that Respondent suffers from the work-related injury. Dr. Grosser, however, does not make a connection between the injury and Respondent’s misconduct, which, it must be noted, preceded the injury. As the facts show, Respondent’s misconduct began in 2005 with his false certification of the SF450 and its Supplement. Also on December 1, 2005, Respondent used the U.S. mail to submit the false Class Member Election of Benefits forms, the offense which resulted in his guilty plea and conviction. As stated above, see ¶ 2 of the Findings of Fact, Respondent’s injury occurred on January 23, 2006, several months after Respondent engaged in his fraudulent activities related to the reimbursement claim and an even longer time after Respondent had established his co-respondent, Funding Matrix.
11. The chronology of events, as set forth in the immediately preceding paragraph, militates against Respondent’s attempt to establish a causal relationship between his work-related injury of January 23, 2006, and his misconduct in December 2005 and other related actions, referenced above, that preceded his criminal conduct.

³ “*Nonprocurement transaction* means any transaction, regardless of type (except procurement contracts) ... ” *See* 2 C.F.R. § 180.970 (a).

12. Respondent has offered no other mitigating factors for consideration in this decision.⁴ The Debarring Official, while giving some weight as a mitigating factor to the amount of elapsed time since Respondent's wrongful conduct occurred, does not believe that the passage of time is a sufficiently mitigating factor in the instant matter. See ¶ 14 below.
13. The aggravating factors identified by the Government in its brief at pp. 10 through 12 far outweigh any mitigating factors, such as they are, that could be advanced in support of Respondent's case. Among the aggravating factors that were considered were the financial harm caused to the settlement fund by Respondent's fraudulent claim, Respondent's planning and execution of the fraudulent scheme, and Respondent's use of Funding Matrix, a separate legal entity, to further his ends.
14. Respondent's lack of remorse for his fraudulent actions, rejection of HUD's jurisdiction over him in this matter, and his persistence in raising the unpersuasive argument that his lost receipt⁵, if found, would exonerate him (because the receipt presumably would prove that he purchased the vests at issue) evidence that he is not presently responsible. See 2 C.F.R. §§ 180.125(a) and 180.825.
15. The regulation at 2 C.F.R. § 180.905 states, in part, that "[persons]⁶ are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other." The unrefuted evidence demonstrates Respondent organized and registered Funding Matrix, was a signatory on its bank account, acted as its manager, and in other capacities, that it is indisputable Funding Matrix was Respondent's affiliate.
16. Section 180.625 provides at paragraph (b) that "any affiliate of a participant may be included in a suspension or debarment action" provided the affiliate is named in the notice of proposed debarment and "the affiliate is [given] an opportunity to contest the action." The cited regulatory requirements, as the facts show, were all satisfied in the case of Funding Matrix. Accordingly, Funding Matrix is without doubt an affiliate of Respondent's, and thus, like Respondent, subject to debarment.
17. Respondents' actions set forth above, and in the record as a whole, raise grave doubts with respect to his business integrity and personal honesty.
18. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.

⁴ The Debarring Official recognizes that, under the plea agreement, Respondent accepted responsibility for his actions. See para. 4 of the Plea Agreement, Gov't Ex. 2.

⁵ Respondent advanced this argument during his criminal proceedings, thus he had sufficient time since then to garner some other proof of his payment for the vests, including his cancelled check, a letter from the seller of the vests certifying his purchase, a copy of the electronic payment, if payment was made electronically, etc.

⁶ Pursuant to 2 C.F.R. § 180.985, "*Person* means any individual, corporation, partnership, association, unit of government, or legal entity, however organized."

Determination

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 C.F.R. §§ 180.870(b)(2)(i) through (b)(2)(4), to debar Respondents MARK DAVID VIAU and FUNDING MATRIX, LLC for a period of three years from the date of this Determination. Respondents' "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: 6/26/12



Craig T. Clemmensen
Debarring Official

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2012, a true copy of the DEBARRING OFFICIAL'S DETERMINATION was served in the manner indicated.



Deborah Valenzuela
Debarment Docket Clerk
Departmental Enforcement Center (Operations)

HAND-CARRIED

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CERTIFIED MAIL and EMAIL

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