

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

In the Matter of:	*	
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ROBERT S. RYAN and	*	Docket No. 09-3601-DB
DIANE M. RYAN,	*	Docket No. 09-3602-DB
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	*	
Respondents.	*	
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DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By separate Notices of Proposed Debarment dated June 30, 2009 ("Notice" or "Notices"), the Department of Housing and Urban Development ("HUD") notified Respondents ROBERT S. RYAN and DIANE M. RYAN that HUD was proposing their 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 three-year period from the date of the final determination of this action. The Notices further advised Respondents that their debarment was in accordance with the procedures set forth in 2 CFR parts 180 and 2424. In addition, the Notices informed Respondents that their proposed debarment was based on their improper conduct as employees of two HUD-insured skilled nursing facilities, Mission Oaks Manor and Ebony Lake Healthcare Center. Respondents were alleged to have improperly caused the transfer among the nursing facilities of operating funds totaling \$4,212,200.00 in violation of paragraphs 4(b), 9(a), and 9(h) of the applicable projects' Regulatory Agreements and a directive from HUD dated April 7, 2004, reiterating the Regulatory Agreements' prohibition against making these kinds of inter-project transfers. The Notices charged that Respondents' actions were cause for debarment under 2 CFR 180.800(b) and (d).

A hearing on Respondents' debarment was held in Washington, D.C. on October 7, 2009,¹ before the Debarring Official's Designee, Mortimer F. Coward. Respondents appeared pro se. Phil Kesaris, Esq. appeared on behalf of HUD.

Summary

I have decided, pursuant to 2 CFR part 180, to debar Respondents from future participation in procurement and nonprocurement transactions, as a participant, principal,

¹ The record was kept open for Respondents to file post-hearing submissions by October 20, 2009. The Government did not file any post-hearing submissions.

or contractor 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 Debarment dated June 30, 2009.
2. A letter from Respondents addressed to the Docket Clerk, Departmental Enforcement Center, dated August 3, 2009, requesting a hearing and providing information relevant to the proposed debarment.
3. Respondents' Prehearing Brief in Opposition to Debarment dated October 1, 2009.
4. Respondents' post-hearing submission received October 20, 2009 (including all attachments thereto).
5. The Government's Pre-hearing Brief in Support of Debarment filed September 8, 2009 (including all exhibits and attachments thereto).

Government Counsel's Arguments

Government counsel states that Respondents were first hired in 2002 as consultants and later in 2005 as Administrators to manage five HUD-insured nursing facilities. The nursing homes were each individually owned by a limited liability corporation of which the sole member was the Government and Educational Assistance Corporation (GEAC).² At the time of their hire in November-December 2002, Respondents were operating a consulting company. Each of the projects was covered by a Regulatory Agreement executed in November-December 2000 in which the owner agreed that, among other things, it would not, without the prior written approval of HUD, disburse project funds except for usual operating expenses and necessary repairs and that project funds would be used only for purposes of the project.

Counsel asserts that between 2001 and 2003, numerous unauthorized transfers of project funds among the projects, detailed in a HUD Notice of Regulatory Agreement Violations dated April 7, 2004, had occurred. Respondents, counsel further asserts, in their capacity as consultants to GEAC, were familiar with the April 7, 2004, violations notice, and the Regulatory Agreements' restrictions on unauthorized transfers. In a January 21, 2004, meeting with HUD staff, in which Respondent Robert Ryan inquired about "the possibility of allowing GEAC to transfer residual receipts from Ebony Lake to Eastview," though he recognized that "it violates HUD's regulations," Respondent Ryan was informed by HUD staff that they could not approve the transfer. On April 26, 2004, counsel continues, Respondent Ryan, acting as the "owner's representative" met with HUD staff to discuss the unauthorized transfers noted in the April 7, 2004, violations notice.

Counsel alleges that "within 30 days of [Respondents] being hired as GEAC employees," they engaged in a scheme which they concealed from GEAC Board of Directors to make unauthorized transfers of project funds among the projects. Counsel argues that Respondents intended to conceal the transfers because of the timing of the

² The five projects were Mission Oaks Manor, Ebony Lakes Healthcare Center, Fort Stockton Nursing Center, Eastview Nursing Center, and Lynnhaven Nursing Center each owned by a similarly named GEAC, LLC.

transfers to avoid reporting them in the periodic financial reports. Further, the transfers were not reported to GEAC's Board of Directors. GEAC's Board of Directors first became aware of the unauthorized transfers between September 28, 2007, and October 2, 2007, when they were presented with the draft financial reports for the fiscal year ending June 30, 2007. Respondents' employment was terminated in a letter dated October 5, 2007, to them from GEAC.

Counsel states that in a HUD OIG Audit Report dated March 21, 2008, the Inspector General found that Mission Oaks Manor made twelve unauthorized expenditures between June and November 2005 totaling \$197,000.00 to Ebony Lake Healthcare Center to repay prior advances that had been made to Mission Oaks Manor. The Audit Report states that the "owner may have then attempted to conceal the transfers when it instructed them to record the transfers in accounts payable rather than in an interfund transfer account." Counsel also refers to an Audit Report dated November 25, 2008, which found that Century-Ebony Lake GEAC made ninety-six unauthorized expenditures of Ebony-Lake Healthcare Center project funds totaling \$4,015,200.00 between January 2007 and September 2007. The transfers were made to Mission Oaks Manor, Fort Stockton Nursing Center, and Lynnhaven Nursing Center to repay prior advances to Ebony. Counsel refers to the Audit Reports' finding that the transfers, which were in violation of the respective Regulatory Agreements, reduced the available amount of project funds and increased the risk that the projects would not have sufficient funds to pay the mortgage, thereby putting the insurance fund at increased risk. Counsel notes that, pursuant to an agreement that settled a complaint filed by HUD for \$1,809,960.00 in civil money penalties based upon the 108 unauthorized transfers among the GEAC-owned projects totaling \$4,015,200.00,³ GEAC paid HUD \$500,000.00.

Counsel, citing 2 CFR 180.150 and 180.200, argues that Respondents are subject to HUD's debarment regulations by virtue of the positions they held with GEAC, a participant or principal in covered transactions, i.e., the HUD-insured mortgages. Also, Respondents have indicated that they may in the future be consultants or employees of healthcare providers with HUD financing that receive Medicare or Medicaid reimbursement. Counsel further argues that the 108 unauthorized transfers of projects funds in which Respondents were engaged violated "public agreements or transactions," i.e., the projects' respective Regulatory Agreements, under 2 CFR 180.800(b). The violations, counsel asserts, were willful because Respondents had "actual knowledge" that HUD prohibited the unauthorized transfer of project funds before they caused the transfers to be made.

Respondents also, according to counsel, appear to admit as much in their response to the Notice of Proposed Debarment, thus they "acted with the requisite 'willfulness' sufficient to satisfy 2 C.F.R 180.800(b)(1) and (3)."⁴ Additionally, counsel argues that the 108 violations occurred over a 15-month period and violated two separate public agreements or transactions, thereby constituting "a history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions" within the meaning of 2 CFR 180.800(b)(2). Counsel further contends that the 108 violations of the Regulatory Agreement constitute "[a]ny other cause of so serious or compelling a nature

³ The Notices indicate that the transfers totaled \$4,212,200.00.

⁴ Gov't Brief at 13.

that it affects” Respondents’ present responsibility and provides cause for their debarment pursuant to 2 CFR 180.800(d).

Additionally, counsel argues that Respondents’ conduct in causing the 108 unauthorized transfers to be made, their failure to inform GEAC and HUD of the transfers, or to seek HUD’s written approval of the transfers reflect “an egregious level of business irresponsibility.”⁵ For these reasons, counsel argues that HUD is “concerned that Respondents cannot presently be trusted to act responsibly by adhering to rules and contracts in their business dealings with the Government.”⁶ (Emphasis in original) Counsel rejects Respondents’ justification for their actions, arguing that their “arguably altruistic motivation is no excuse for intentionally disregarding HUD’s interest in the projects by continuously flaunting the Regulatory Agreements.”⁷ Counsel concludes that because Respondents are not presently responsible their debarment is in the public interest. See 2 CFR 180.125(a) and (c). For all the foregoing reasons, counsel states that a three-year debarment of Respondents is warranted.

Respondents’ Arguments

Respondents acknowledge that the unauthorized transfers of funds among the GEAC projects were “improper, not approved by HUD, and in violation of the Regulatory Agreement and other HUD rules or regulations.”⁸ Respondents state, however, that their acknowledgment of their wrongdoing is not in conflict with their right to “present mitigating circumstances” with respect to the unauthorized transfers. Respondents also add that their defense of their actions should not be “misconstrue[d] for their ongoing regrets” for causing the unauthorized transfers.⁹

Respondents argue that, contrary to the Government’s claim, it was they who advised GEAC’s legal counsel and auditors and the HUD OIG auditors of the unauthorized transfers concerning Mission Oaks. Further, after they disclosed the unauthorized transfers, Respondents state that they continued to assist the OIG auditors and worked with GEAC and its auditors and the new management firm to facilitate an effective transition of the projects. In mitigation of their actions, Respondents argue that the transferred funds were used by the projects to meet the immediate needs of the projects’ patients. According to Respondents, the transferred funds “frequently related to and coincided with timing delays in the receipt of [the projects’] Medicare and Medicaid reimbursement payments.”¹⁰

Respondents contend that were it not for the unauthorized transfers, the patients would have suffered an immediate loss of vital services and each of the projects would have been “subjected to ‘Immediate Jeopardy’ sanctions and potential closure under each facility’s Texas license and Federal Provider Agreement.”¹¹ Respondents protest that the Government’s arguments “miss the point about how nursing homes function and the frailty

⁵ *Id.* at 16.

⁶ *Id.*

⁷ *Id.*

⁸ Resp. Br. at 4.

⁹ *Id.*

¹⁰ *Id.* at 7.

¹¹ *Id.*

of the populations served” and the concerns of the Centers for Medicare and Medicaid Services (CMS) for the well-being of patients in nursing homes. Thus, Respondents say, they were “put in the position of being subject to two (2) regulators, each of whom on any given day view their rules and regulations superior to all else.”¹²

Respondents submit that the large number of transfers is partly explained by the desire to repay advances as the projects’ received their Medicare or Medicaid payments. As such, although the total amount of funds transferred exceeded \$4.0 million only a net of “about \$500,000.00 . . . went back and forth” since repayments to Ebony Lake totaled about \$3.5 million.¹³

Respondents challenge the Government’s position that their actions put the projects at financial risk. Respondents assert that had it not been for the unauthorized transfers, some of the projects would have closed years ago. Respondents argue that the “Government’s position is set forth in a vacuum without ever addressing the CMS regulatory environment or the alternative losses to the HUD insurance fund” if there were additional closures of some of the projects. Respondents reiterate that although their conduct was “inappropriate and knowingly in violation of each [project’s] Regulatory Agreement, [it] did not result in actual harm,” nor measurable and direct harm to either the Government or GNMA investors.¹⁴ As Respondents see it, “[w]hile the Government professes its actions are to protect the integrity of its programs and the solvency of its insurance fund, HUD officials refused to acknowledge that a rational economic decision could be made to permit the use of ‘excess’ funds held by Ebony Lake.” It is Respondents’ position that “[a]ny traditional lender would work with a borrower to minimize losses the lender would incur Instead of a partnership to ultimately serve the needs of those patients who resided in [GEAC nursing homes], the Government consistently quoted its own regulation and documents instead of looking for ways to allow related borrowers with a common sole member, all with HUD-insured loans, with a way to access a portion of their own funds to keep these projects open.”¹⁵

Respondents argue that their debarment would not serve the public interest. Respondents assert that they “have met a steep burden in presenting ‘substantial mitigating circumstances of the activity itself’ to support their position that debarment is not necessary to protect the Government’s or public interest.”¹⁶ Respondents believe that the Government’s rejection of alternatives to debarment they have offered, such as prohibiting Respondents for a reasonable time from managing nursing homes, means that the Government’s primary intention is to punish them.

Findings of Fact

1. Respondent Robert Ryan at all relevant times acted in the capacity of employee, administrator, consultant, or owner’s representative in his

¹² *Id.* at 8.

¹³ *Id.*

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 11-12.

¹⁶ *Id.* at 16.

association with GEAC and the five Limited Liability Companies (LLC's) of which GEAC was the sole member, including Century-Mission Oak-GEAC, LLC and Century-Ebony Lake-GEAC, LLC.

2. Respondent Diane Ryan during the same period at issue here was an employee, consultant, or administrator of GEAC or the five LLC's.
3. Each of the LLC's formed by GEAC became the mortgagor of a HUD-insured nursing facility.
4. Each of the nursing facilities was covered by a Regulatory Agreement entered into with HUD in November-December 2000 that, among other things, prohibited the transfer of the project's operating funds, except for certain enumerated purposes, without the prior written approval of HUD.
5. Respondents operated a consulting company and in November-December 2002, GEAC hired them as consultants to review the financial performance and maintain the financial integrity of the five projects.
6. HUD issued a Notice of Regulatory Agreement Violations dated April 7, 2004, which detailed a series of unauthorized transfers of funds between 2001 and 2003 among the GEAC projects.
7. Respondents in their capacity as consultants to GEAC were familiar with the Notice of Regulatory Agreement Violations issued by HUD.
8. Respondents by their own admission were familiar with the restrictions in the Regulatory Agreement with respect to unauthorized transfer of project operating funds.
9. Respondent Robert Ryan, in a meeting with Fort Worth HUD staff on January 21, 2004, inquired about the possibility of allowing GEAC to transfer residual receipts from one project, Ebony Lake Healthcare Center, to another project, Eastview Nursing Center. HUD staff informed Respondent that he should direct his inquiries to HUD Headquarters.
10. In a letter dated March 8, 2004, signed by Respondent Robert Ryan as "owner's representative" on behalf of Century-Ebony Lake-GEAC, LLC and Century-Eastview-GEAC, LLC, Respondent Ryan submitted a Funds Authorization request to the San Antonio HUD Office for the transfer of \$200, 000.00 from Ebony Lake's residual receipts to GEAC to invest in Eastview Nursing Center.
11. Respondent Robert Ryan met with HUD Fort Worth staff on April 26, 2004, to discuss the unauthorized transfers noted in the April 7, 2004, Notice of Regulatory Agreement Violations.
12. Respondents were hired as employees by GEAC in May 2005 with the title of "administrator" and given the responsibility of managing the GEAC projects.
13. Each of the projects separately compensated Respondents for their services.
14. Respondents' management of the projects and care of the patients residing in them was governed, among other things, by HUD regulations, regulations issued by the Centers for Medicare and Medicaid Services (CMS) of the Department of Health and Human Services, the Texas Health and Safety Code, and the State Operations Manual.
15. Within thirty days of being hired as employees, Respondents engaged in a scheme to make unauthorized transfers of funds among the projects.

16. GEAC's Board of Directors was unaware of these transfers and Respondents did not immediately inform the Board of their unauthorized actions.
17. The unauthorized transfers were not disclosed by Respondents in their quarterly reports to the Board.
18. In September-October 2007, the Board was given the drafts of the projects' annual audited financial reports for the fiscal year ending June 30, 2007.
19. In a letter dated October 5, 2007, from GEAC's attorney, Respondents were informed of the GEAC's Board intent to terminate their employment with the four remaining projects.
20. The HUD OIG issued two Audit Reports in 2008 that found that 108 unauthorized transfers of project funds (twelve in 2005 totaling \$197,000.00 and ninety-six in 2007 totaling \$4,015,200.00) were made among the projects.
21. In a Settlement Agreement with HUD, GEAC agreed to pay HUD \$500,000.00 in civil money penalties (CMP) to resolve a CMP action HUD had brought against GEAC and two of the LLC's.

Conclusions

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

1. GEAC and its solely owned LLC's were participants or principals in a covered transaction, the HUD-insured mortgages. *See* 2 CFR 180.200 and 180.970(a).
2. As defined in 2 CFR 180.980, a "participant" is "any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant."
3. Respondents in their roles as administrator or owner's representative acted as an agent or representative of GEAC and its wholly owned LLC's.
4. Respondents are covered by the debarment regulations at 2 CFR part 180. Specifically, 2 CFR 180.120 provides that subparts A through I of part 180 apply to a "(a) person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction."
5. Respondents were well aware, and have admitted, that their actions in causing project funds to be transferred without the prior written approval of HUD were a violation of the projects' respective Regulatory Agreements.
6. The 108 violations knowingly committed by Respondents over a period of more than a year were "so serious as to affect the integrity of" HUD's mortgage insurance program and as detailed below provide cause for their debarment. The violations also constitute "a willful failure to perform in accordance with the terms of" the projects' Regulatory Agreements, and a "willful violation of a . . . requirement applicable" to the Regulatory Agreements by Respondents' failure to seek the prior written approval of HUD for the unauthorized transfers. *See* 2 CFR 180.800(b)(1) and (3).

Additionally, the length of time during which Respondents' misconduct occurred and their failure to disclose timely the continuing violations evidence a "history of failure to perform or of unsatisfactory performance" of the Regulatory Agreements within the meaning of 2 CFR 180.800(b)(2). Respondents' misconduct created unsought risk to the projects' financial integrity, GEAC's investment in the projects, and the FHA-insurance fund and constitutes "cause of so serious or compelling a nature that it affects [Respondents'] present responsibility." See 2 CFR 180.800(d).

7. Respondents' motives and concern for their patients, though well-intentioned and even altruistic, are negated by their admission that they were well aware that their actions were improper and that they knew this even before their employment by each of the LLC's.
8. Respondents' management and care of the patients residing in the five GEAC-owned nursing homes was governed by Texas and federal requirements.
9. Texas state and MCS requirements and regulations regarding care of nursing home patients were not inconsistent with Respondents' obligations and responsibilities under the projects' Regulatory Agreements.
10. There is no evidence in the record that Respondents, during the time they caused the unauthorized transfers to be made, expressed a concern that if the transfers were not made, Respondents could be exposing themselves to legal risk if their patients' needs were not met because of a project's insolvency.
11. Respondents' actions demonstrate that they are not presently responsible.¹⁷ See also 2 CFR 180.125.
12. Factors that have been considered in mitigation of Respondents' conduct include their acceptance of responsibility and expressed regret for their misconduct and their recognition of the seriousness of their actions, the fact that there is no record of a prior history of similar misconduct, and Respondents' apparent solicitude for the welfare of the patients who were cared for in the nursing homes they managed. These mitigating factors, however, were outweighed by aggravating factors such as the actual harm caused by their misconduct, e.g., GEAC's payment of \$500,000.00 in Civil Money Penalties for the unauthorized transfers caused by Respondents. Other aggravating factors considered were the number of violations and length of time during which the violations occurred, the fact that Respondents planned and carried out the wrongdoing and were in a position of control as the administrators of the affected nursing homes, and the

¹⁷ Responsibility is a term of art in Government and is "defined to include not only the ability to perform a contract, but honesty and integrity of the contractor as well." *Roemer v. Hoffman*, 419 F. Supp 130 (D.D.C. 1976). "Responsibility . . . encompasses the projected business risk of a person doing business with the government. This includes the person's honesty, integrity, and ability to perform. The primary test for debarment is present responsibility, although a finding of present lack of responsibility can be based upon past acts." *In re: Lan Associates, Inc., et al.*, 1991 HUDDEBAR LEXIS 1, *32 (September 5, 1991), quoting, *Schlesinger v. Gates*, 249 F. 2d 111 (D.C. Cir.1957)

delay in apprising the GEAC Board of the unauthorized transfers. *See* 2 CFR 180.860.

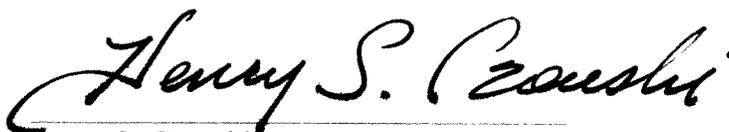
13. Based on the evidence presented in this matter, HUD has established that cause exists for Respondents' debarment by a preponderance of the evidence.
14. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
15. HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act with honesty and integrity.

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 CFR 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondents for a period of three years from the date of issuance 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: _____

12/3/08



Henry S. Czauski
Debarring Official