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

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| In the Matter of | : | |
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| **KB Home Mortgage Company - I,** | : | HUDOA No. 08-H-CH-JJ68 |
| | : | Claim No. 720705563 |
| Petitioner | : | |
| | : | |

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For the Secretary

## DECISION AND ORDER

Petitioner, KB Home Mortgage Company ("KBHMC"), was notified that, pursuant to 31 U.S.C. §§ 3716 and 3720A, the Secretary of the U.S. Department of Housing and Urban Development ("HUD") intended to seek administrative offset of any federal payments due to Petitioner in satisfaction of a delinquent and legally enforceable debt allegedly owed to HUD.

Petitioner made a request for a hearing concerning the existence, amount or enforceability of the debt allegedly owed to HUD. The administrative judges of this Office have been designated to conduct a hearing to determine whether the debt allegedly owed to HUD is legally enforceable. 24 C.F.R. §§ 17.152 and 17.153. As a result of Petitioner's hearing request, referral of the debt to the U.S. Department of the Treasury for administrative offset was temporarily stayed by this Office on July 25, 2008.

## Background

Petitioner, as a mortgage broker, entered into an agreement with HUD to serve as a direct endorsement mortgage lender, and to originate loans for the Federal Housing Administration ("FHA"). (Secretary's Statement ("Sec'y Stat."), filed November 6,

2008, ¶ 3.) Under Title II of the National Housing Act, 12 U.S.C. § 1707, *et. seq.*, such FHA loans are insured against nonpayment by HUD. (*Id.*)

On or about October 3, 2002, Petitioner originated a loan ("Loan") in the amount of $165,189.00, which was secured by real property located at 216 Copeland Dr., Cedar Hill, TX. (Sec'y Stat., ¶ 2, Ex. A.)

A 2006 review by HUD's lender monitoring team found that Petitioner had engaged in non-compliant lending activities in regards to the Loan, and found that Petitioner's activities exposed HUD to an unacceptable level of risk. (Sec'y Stat., ¶ 4, Ex. B., Declaration of Michael DeMarco, Director, Insurance Operations Center, HUD Financial Operations Center ("DeMarco Decl."), ¶ 4.) Consequently, on June 23, 2006, Petitioner and HUD executed an indemnification agreement ("Agreement") whereby Petitioner agreed to indemnify HUD for any loss HUD may incur as insurer of the Loan. (Sec'y Stat., ¶ 4, Ex. B., DeMarco Decl., ¶ 4.)

On March 1, 2003, the Loan went into default. (Sec'y Stat., ¶ 7, Ex. B., DeMarco Decl., ¶ 5.) HUD paid insurance claims on the Loan on March 29, 2004 and May 2, 2004, and subsequently sold the property on August 16, 2004 for $117,850.00. (Sec'y Stat., ¶ 8, Ex. B., DeMarco Decl., ¶ 5, attached Ex. C, p.4.) HUD calculated its loss as follows:

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| Part A Claim Payment | $174,913.29 |
| Part B Claim Payment | $8,761.09 |
| Taxes | $3,138.93 |
| Maintenance and Operation | $5,718.60 |
| Sales Expenses | $6,829.72 |
| Less Sales Price | ($117,850.00) |
| Amount Repaid to HUD | ($2,222.94) |
| Total Loss/Total Due HUD | $79,288.69 |

(Sec'y Stat., Ex. B., DeMarco Decl., ¶ 6, attached Ex. C.)

Because the sale did not provide enough funds to cover all of HUD's loss, HUD sought indemnification from Petitioner for HUD's remaining loss. (Sec'y Stat., Ex. B., DeMarco Decl., ¶ 7.) Two Demand for Payment letters ("Demand Notice") were sent to Petitioner on July 2, 2007, followed by a Notice of Intent on September 17, 2007. (Sec'y Stat., ¶¶ 15-16, Ex. B., DeMarco Decl., ¶ 7.) On November 29, 2007, this debt was referred to the U.S. Department of the Treasury's TOP (Treasury Offset Program)/Cross Servicing Program for collection. (Sec'y Stat., Ex. B., DeMarco Decl., ¶ 8.) On March 28, 2008, Petitioner remitted to HUD the original amount billed of $79,288.69. (Sec'y Stat., ¶ 11, Ex. D, Ex. B., DeMarco Decl., ¶ 8.) This amount however "did not include the interest, fees, penalties, and administrative costs that had since been assessed." (Sec'y Stat., Ex. B., DeMarco Decl., ¶ 8.)

The Secretary alleges that Petitioner is delinquent in paying a portion of HUD's claim under the Indemnification Agreement and that Petitioner is indebted to the Secretary in the following amounts:

(a) $24,764.55 as the unpaid principal balance as of July 20, 2008;
(b) $577.78 as the unpaid interest on the principal balance at 4.0% per annum through October 30, 2008;
(c) $1,515.59 as the unpaid penalties on the principal balance through October 30, 2008;
(d) $141.33 as the unpaid administrative costs through October 30, 2008;
(e) interest on the principal balance at 4.0% per annum from November 1, 2008 until paid; and
(f) U.S. Department of the Treasury fees, penalties and administrative costs, as assessed from November 1, 2008, until paid.

(Sec'y Stat., ¶ 10, Ex. B, DeMarco Decl., ¶ 8.)

## Discussion

The Deficit Reduction Act of 1984, 31 U.S.C. § 3720A, provides Federal agencies with a remedy for the collection of debts owed to the United States Government. Petitioner bears the initial burden of submitting evidence to prove that the debt is not past-due or legally enforceable. 24 C.F.R. § 17.152(b); *Juan Velazquez*, HUDBCA No. 02-C-CH-CC049 (September 25, 2003).

Petitioner does not dispute the validity of the original debt amount of $79,288.69, an amount already paid by Petitioner. Rather, Petitioner appeals the interest, penalties, and fees that have been assessed against the original debt amount since the date when HUD mailed the original demand for payment notice. Petitioner claims: 1) there is no proof the Secretary ever sent the demand for payment notice; 2) the demand for payment notice was improperly addressed and thus never received by Petitioner; and 3) all contractual obligations in the above-referenced claim have already been satisfied.

First, Petitioner asserts that the Secretary "has not provided any documentation, such as a return receipt or other evidence of mailing, to demonstrate that it in fact *sent* the Demand for Payment on July 2, 2007...." (Pet'r Stat., p.2. (emphasis added.) Other than Petitioner's allegation, he has provided nothing more in support of his position. The Secretary has provided, nonetheless, a copy of one of the two Demands for Payment letters mailed to Petitioner that was date-stamped on July 2, 2007. (Sec'y Resp., Ex. B.) Neither of the letters were returned to HUD by the post office. (Sec'y Stat., ¶ 13, Ex. B., DeMarco Decl., ¶ 7.) The Director of HUD's Financial Operations Center, in charge of HUD's debt collection activities, further substantiated that the Demand Notice was sent to Petitioner on July 2, 2007 to 10990 Wilshire Blvd., Suite 900, Los Angeles, CA, 90024, the same address identified earlier by Petitioner as the address for KBHMC's home office. (Sec'y Stat., Ex. B., DeMarco Decl., ¶ 7.) Petitioner's mere allegation that the Secretary never sent the Demand Notice for payment is insufficient in refuting the documentary evidence provided by the Secretary.

Furthermore, 31 C.F.R. § 901.2(c) provides that "agencies should exercise care to ensure that demand letters are mailed or hand-delivered on the same day that they are dated." Under § 901.2(c), HUD is required to send a notice of demand for payment, but not by certified mail or return receipt. As the burden of proof lies with Petitioner to prove that the Demand Notice was never sent, I find that Petitioner has failed to meet his burden of proof, and thus further find that the notice of demand for payment was sent on July 2, 2007 as proven by the Secretary.

Second, Petitioner argues that the Demand Notice was improperly addressed, and thus not received, so he cannot be held liable for the penalties resulting from its non-receipt. (Pet'r Hr'g Req., ¶ 2; Pet'r Stat., p.2.) Petitioner asserts that he did not occupy Suite 900 as of the date of the Demand Notice. (Pet'r Resp.) Petitioner also contends that it was not under a duty to update its address with HUD since it ended mortgage origination and surrendered its FHA approval in 2005.[1] (Pet'r Stat., p.2.) As support, Petitioner provides merely an allegation that "while the Company continues to maintain offices within the building located at 10990 Wilshire BLVD., he does not, and did not on July 2, 2007, occupy space in Suite 900 of that building." (Id.)

This Office has held that a "Notice of Intent is effective upon dispatch, if properly and reasonably addressed." *Shirley Robinson*, HUDOA No. 08-H-CH-JJ43 (September 25, 2008), *citing Kenneth Holden*, HUDBCA No. 89-3781-K293 (June 6, 1989) (emphasis added.). This Office also has concluded that the same reasonable standard, established in *Kenneth Holden* and *Shirley Robinson*, can similarly be applied to demands for payment alleged to be improperly addressed.

In this case the Secretary states, that "HUD addressed the Demand Notice to its address of record for KBHMC at 10990 Wilshire Boulevard, Suite 900, Los Angeles, CA 90024." (Sec'y Resp., p.2., Ex. A, ¶ 7, Ex. B.) The address relied upon by HUD was Petitioner's address at the time of the Agreement on June 23, 2006, just over one year before the mailing of the Demand Notice on July 2, 2007. (*See* Sec'y Stat., Ex. C; Sec'y Resp., attach.) Given the close temporal proximity between the dates of the Agreement and the Demand Notice, and given the absence of an address update from Petitioner, it was reasonable for HUD to rely upon the address at Suite 900 as the current address. Petitioner also provided his own verification of address by submitting to this Office his Hearing Request, along with an attachment dated as recent as March, 2008 bearing the same address Petitioner denies as his own, 10990 Wilshire Boulevard, Suite 900, Los Angeles, CA 90024. Further, Petitioner has only *alleged* he was not located at Suite 900, without any further evidence to prove that Suite 900 at 10990 Wilshire Boulevard was in fact the wrong address. The Secretary has provided, on the other hand, sufficient evidence to prove that the notice sent to Petitioner was properly addressed. Thus I find that the address relied upon by the Secretary for sending Petitioner's demand for payment notice was properly and reasonably addressed.

[1] Despite Petitioner's assertion, the record reflects that Petitioner did inform HUD of a new address on the 6th floor of the same building on November 14, 2007, four months after the date of the Demand Notices. (Pet'r Hr'g Req., ¶ 5.)

Petitioner adds further that HUD "has not provided any documentation, such as a return receipt or other evidence of mailing, to demonstrate that ...the Company *received* the Demand. . . . Had the Company received either the July 2, 2007 Demand for Payment or any subsequent notice regarding the Demand for Payment, KBHMC would have promptly paid the claim amount pursuant to the...indemnification agreement." (Pet'r Stat., p.2. (emphasis added.) Petitioner bases this claim on the premise that the address was incorrect, which has been disproved. However, Petitioner again cites no governing regulation or statute in support of his allegation that the Secretary is required to verify Petitioner's receipt of the demand for payment notice.

But, the Secretary states that the Agreement itself provides that HUD will *send* an invoice or bill to Petitioner for payment. (Sec'y Stat., Ex. C at (1)(d). (emphasis added.) Upon further review of the Agreement signed by Petitioner, this Office notes that Section 1(d) specifically states "the mortgagee shall pay HUD the amount of HUD's Investment in accordance with the terms of an invoice or bill the Department *sends* to the Mortgagee." (emphasis added.). There is no other language within the Agreement that provides instruction for either mailing and delivering a demand for payment, or verifying receipt by Petitioner of such notice.

Additionally, neither the HUD regulations governing collection of claims by the Government nor the Department of the Treasury regulations governing administrative collection of claims states specific mailing or delivery requirements for demands for payment. *See* 24 C.F.R. § 17.72(a) ("Appropriate written demands shall be made upon the debtor which shall include information relating to the consequences of his failure to cooperate."); 31 C.F.R. § 901.2(c) ("Agencies should exercise care to ensure that demand letters are mailed or hand-delivered on the same day that they are dated."). Even the HUD Handbook 4740.2-1(D), REV-3 provides "as a standard practice, demand letters are mailed in envelopes that request that the U.S. Postal Service provide address correction information if the address used is incorrect." Further, this Office has previously held that there is no requirement that a debtor actually receive a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings in order to be enforceable. *Carol Lynn Hancock*, HUDBCA No. 07-A-NY-AWG17 (September 25, 2008). In *Hancock*, this Office held that the applicable federal regulations did not require actual receipt to establish its sufficiency. *Hancock*, at p. 4 (applying 31 C.F.R. § 285.11(e) (requiring HUD to mail a notice of intent "by first class mail, to the debtor's last known address")).

The Secretary reiterates that "[t]here is no requirement that Petitioner actually receive the notice." (Secretary's Response to Order dated January 5, 2009 ("Sec'y Resp."), filed February 20, 2009, p.4, *citing Gay Lee Marriot*, HUDBCA No. 87-2534-H67 (March 22, 1988); *Beckie Thompson*, HUDBCA 04-D-CH-EE015 (April 29, 2005).) However the cases cited by the Secretary are not necessarily similar to the case at hand. In *Gay Lee Marriot* and *Beckie Thompson* the notices of sale of collateral from a private lender were governed by applicable state laws. In those cases, the administrative judge held that actual receipt is not required for a Notice of Sale of collateral by a private lender under specific Washington and Texas state laws. The present case does not involve a notice of sale of collateral, but instead involves a demand for payment by a federal agency for a federal debt to which state laws do not apply.

Nevertheless, the applicable federal regulations governing the notice requirements for the demand for payment only require that demand for payment letters must be *mailed.* (31 C.F.R. § 901.2(c). There is no other requirement within the governing regulations that receipt of notice is required to establish the sufficiency of notice of a demand for payment. Therefore, I find that Petitioner's assertion that the interest, penalties, and fees are unenforceable because the Demand Notice was improperly addressed and thus never received fails as a matter of law.

Finally, Petitioner argues that "KBHMC has satisfied all of its contractual obligations in the above-referenced claim and should not now be required to pay additional monies." (Pet'r Resp., p.1) Pursuant to the Agreement, Petitioner's contractual obligation to indemnify HUD extended "through and up to" July 2011. (Sec'y Stat., Ex. C at 1.) The Agreement states that Petitioner would be required to indemnify HUD "in accordance with the terms of an invoice or bill the Department sends" to Petitioner. (Sec'y Stat., Ex. C at 1(d).) Furthermore, regardless of Petitioner's standing as a HUD-approved lender, Petitioner remains bound by the ongoing obligations under the Agreement and is not relieved of his obligation to pay any additional monies as alleged, including interest, penalties, and fees. Without sufficient documentary evidence, Petitioner's claims alleging the Demand Notice was never sent or never received both fail against the weight of evidence provided, as a rebuttal, by the Secretary. Therefore, I find that Petitioner has not satisfied all of his contractual obligations and thus remains legally obligated to pay any additional monies owed by Petitioner, as claimed by the Secretary.

## ORDER

For the reasons set forth above, I find that the debt which is the subject of this proceeding is legally enforceable against Petitioner in the amount claimed by the Secretary. The Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative offset is **VACATED**.

It is hereby **ORDERED** that the Secretary is authorized to refer this matter to the U.S. Department of the Treasury for administrative offset of any payment due Petitioner.

/s/

Vanessa L. Hall
Administrative Judge

March 20, 2009