

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

In the Matter of:

**Abimbola Fowokan ,**

Petitioner.

19-AM-0031-AG-005

721013416

January 13, 2022

**DECISION AND ORDER**

This proceeding is before the Office of Hearings and Appeals upon a *Request for Hearing* (“*Hearing Request*”) filed on or about October 25, 2018, by Abimbola Fowokan (“Petitioner”) concerning the existence, amount, or enforceability of the payment schedule of a debt allegedly owed to the U.S. Department of Housing and Urban Development (“HUD” or “the Secretary”).

The Debt Collection Improvement Act of 1996 authorizes federal agencies to use administrative wage garnishment as a mechanism for the collection of debts owed to the United States government. *See* 31 U.S.C. § 3720D. The Secretary of HUD has designated the administrative judges of this Office of Hearings and Appeals to adjudicate contested cases where the Secretary seeks to collect debts by means of administrative wage garnishment. This hearing is conducted in accordance with the procedures set forth at 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.81.

**PROCEDURAL BACKGROUND**

Pursuant to 31 C.F.R. § 285.11(f)(4), on December 13, 2018, the Court stayed the issuance of an administrative wage garnishment order until the issuance of this written decision. (*See Notice of Docketing, Order, and Stay of Referral* (“*Notice of Docketing*”), 2). On February 7, 2019, the Secretary filed *Secretary’s Statement That Petitioner’s Debt is Past Due and Legally Enforceable* (“*Sec’y. Stat.*”), along with documentary evidence in support of HUD’s position. On April 2, 2019, Petitioner filed his *Statement* (“*Petr.’s Stat.*”) and documentary evidence in support of his position.

**FINDINGS OF FACT**

Petitioner is the borrower on a HUD-insured mortgage held by primary mortgage lender Bank of America. On two separate occasions, Petitioner requested a loan modification from Bank of America pursuant to Section 230(b) of the National Housing Act, 12 U.S.C. § 1715u(b), through which HUD pays partial insurance claims to mortgage lenders to induce them to help homeowners avoid foreclosure. (*See Petr.’s Stat.*, ¶ 1; *Sec’y Stat.*, ¶ 2). First, Petitioner entered

into a Loan Modification Agreement with Bank of America on or about April 25, 2012. (*See Petr.'s Stat.*, ¶ 1 & Ex. 2). At the same time, HUD provided foreclosure relief to Petitioner by advancing funds to Bank of America, and in exchange, Petitioner executed and delivered to the Secretary a subordinate note in the amount of \$53,068.03. (*See Sec'y Stat.*, ¶ 2; *Sec'y. Stat.*, Ex. 2, April 20, 2012 Subordinate Note; *see also Petr.'s Stat.*, ¶ 5; *Petr.'s Stat.*, Ex. 1). On or about November 14, 2014, in exchange for additional foreclosure relief from HUD, Petitioner executed and delivered to the Secretary a second subordinate note in the amount of \$23,804.24. (*See Sec'y. Stat.*, ¶ 2; *Sec'y. Stat.*, Ex. 3, November 5, 2014 Subordinate Note). Herein, the first and second subordinate notes are referred to as the "2012 Note" and the "2014 Note," respectively, and as "the Notes" collectively. The total sum owed under both Notes is \$76,872.27.

Paragraph 4(A) of each of the respective Notes cites specific events that make the debt become due and payable. (*See Sec'y. Stat.*, ¶ 3; *Sec'y. Stat.*, Ex. 1, *Declaration of Brian Dillon*, Director, Asset Recovery Division, HUD Financial Operations Center ("*Dillon Decl.*"), ¶ 4). One of those events is the payment in full of the primary note. (*See Sec'y. Stat.*, ¶ 3; Notes, ¶ 4(A)(i)). On or about February 1, 2018, the primary lender notified the Secretary that the primary note was paid in full. (*See Sec'y. Stat.*, ¶ 4; *Dillon Decl.*, ¶ 4). Upon payment in full of the primary note, Petitioner was to make payment to HUD on the Notes at the "Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, SW, Washington, DC 20410 or any such other place as [HUD] may designate in writing by notice to Borrower." (*See Notes*, ¶ 4(B)).

Petitioner failed to make payment on the Notes at the place and in the amount specified above. Consequently, the Secretary alleges Petitioner's debt to HUD is delinquent. (*See Sec'y. Stat.*, ¶ 5; *Dillon Decl.*, ¶ 5). The Secretary has made efforts to collect this debt from Petitioner, including by mailing a letter to Petitioner on June 18, 2018, notifying him of his indebtedness, attaching copies of the Notes, and offering to enter into a repayment plan. (*See Dillon Decl.*, ¶ 5 & Ex. A). A *Notice of Intent to Initiate Administrative Wage Garnishment Proceedings* ("*Notice*") was sent to Petitioner on or about October 10, 2018, wherein, pursuant to 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was again given an opportunity to enter into a written repayment agreement under terms acceptable to HUD (*See Sec'y. Stat.*, ¶ 7; *Dillon Decl.*, ¶¶ 6-7). However, to HUD's knowledge, Petitioner still has not repaid the Notes. Therefore, the Secretary asserts that Petitioner is justly indebted to HUD in the following amounts:

- a) \$76,872.27 as the unpaid principal balance as of November 30, 2018;
- b) \$384.18 as the unpaid interest on the principal balance at 1% per annum through November 30, 2018;
- c) \$4,627.70 as the unpaid penalties and administrative costs through November 30, 2018; and
- d) interest on said principal balance at 1% per annum until paid.

(*See Sec'y. Stat.*, ¶ 6; *Dillon Decl.*, ¶ 5).

## DISCUSSION

The Secretary bears the initial burden of proof to show the existence and amount of the alleged debt. *See* 31 C.F.R. § 285.11(f)(8)(i). Petitioner, thereafter, must show by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. *See id.* § 285.11(f)(8)(ii). Petitioner may also present evidence that the terms of the proposed repayment schedule are unlawful or would cause an undue hardship to Petitioner, or that the alleged debt is legally unenforceable. *See id.*

### I. The Secretary has met her initial burden of proof.

As evidence of Petitioner's indebtedness, the Secretary has filed *Secretary's Statement That Petitioner's Debt is Past Due and Legally Enforceable* (*see Sec'y. Stat.*); a sworn declaration by Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center (*see Dillon Decl.*); and copies of the Notes (*see Sec'y. Stat.*, Exs., 2 & 3) evidencing that Petitioner promised to repay two loans totaling \$76,872.27. Accordingly, the Court finds that the Secretary has met her initial burden of proof.

### II. Petitioner has failed to establish that the amount of the debt is incorrect.

"A petitioner has the burden of producing evidence which demonstrates that the claimed debt is not past-due or legally enforceable." *Michael Cook*, HUDBCA No. 87- 2782-H307 (Aug. 11, 1988). Here, Petitioner alleges he does not owe a debt in the full amount claimed by HUD because, in 2014, he "agreed to a Loan Modification which **modified** the existing 2012 Partial Claim with the amount set forth in the 2014 Partial Claim (\$23,804.24)." (*Petr.'s Stat.*, ¶ 13 (emphasis in original).) Thus, Petitioner acknowledges he owes a \$23,804.24 debt under the 2014 Note, but claims he does not owe any additional amounts under the 2012 Note because the earlier debt was "modified and supplanted" by the later.<sup>1</sup> (*See Petr.'s Stat.*, ¶¶ 6-11.)

Petitioner's argument lacks merit. On two separate occasions, in 2012 and 2014, Petitioner was threatened with foreclosure of his primary mortgage and requested modification of the terms of the loan by the primary lender. (*See Petr.'s Stat.*, ¶ 1; *Sec'y Stat.*, ¶ 2). Each time, HUD advanced funds to the primary lender as a means of providing foreclosure relief. In other words, HUD paid two distinct partial insurance claims under 12 U.S.C. § 1715u(b), and each time, Petitioner signed a separate subordinate note promising to repay HUD. (*See Sec'y Stat.*, ¶ 2; *Sec'y. Stat.*, Exs. 1 & 2). Thus, Petitioner incurred two separate debts.

Petitioner insists that when he entered into a Loan Modification Agreement with Bank of America in 2014, this new Agreement supplanted his 2012 Loan Modification Agreement and all its "attachments," including the 2012 Note. (*See Petr.'s Stat.*, ¶ 9). However, Petitioner has not submitted a copy of the 2014 Loan Modification Agreement. Moreover, because HUD was not a

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<sup>1</sup> In his *Hearing Request*, Petitioner also argued that "the amount of the debt violates federal laws relating to the aggregate amount of such debts, including HUD and FHA statutes." However, Petitioner did not explain the factual basis for this allegation or identify any particular federal laws or statutes he believed had been violated, and he did not pursue this argument in his later position statement. Accordingly, this argument is rejected as unsupported. Similarly, Petitioner's *Hearing Request* argued that the Notes were not properly recorded with state land records, but Petitioner has provided no factual or legal support for this argument, which is therefore rejected.

party to either of the Loan Modification Agreements—which are contracts between Petitioner and the primary lender, not between Petitioner and HUD—they have no bearing on the Notes that Petitioner executed in favor of HUD. Finally, and most importantly, the 2014 Note does not include any provision that it modifies the 2012 Note or its terms. (*See Sec’y. Stat.*, Ex. 3). Petitioner’s reference to the Notes being “modified” is an inaccurate conflation of the Notes in favor of HUD with the Loan Modification Agreements in favor of Bank of America. The 2014 Note neither replaced nor modified the 2012 Note. Rather, the two Notes represent separate, cumulative debts.

The Secretary’s right to collect the alleged debt in this case emanates from the terms of the Notes, not from any other instrument such as the primary lender’s Loan Modification Agreement. The 2012 Note signed by Petitioner when he was threatened with foreclosure clearly states under the heading “Borrower’s Promise to Pay” that “[i]n return for a loan received from Lender, Borrower promises to pay the principal sum of ... \$53,068.03...” (*See Sec’y. Stat.*, Ex. 2, April 20, 2012 Subordinate Note, ¶¶ 1-2) (emphasis added). “Lender” is defined under the heading “Parties” as “the Secretary of Housing and Urban Development.” (*See id.*, ¶ 1) (emphasis added). The 2014 Note signed by Petitioner when he was once again threatened with foreclosure also clearly states under the heading “Borrower’s Promise to Pay” that “[i]n return for a loan received from Lender, Borrower promises to pay the principal sum of ... \$23,804.24...” (*See Sec’y. Stat.*, Ex. 3, November 5, 2014 Subordinate Note, ¶ 2) (emphasis added). Again, “Lender” is defined as “the Secretary of Housing and Urban Development.” (*See id.*, ¶ 1) (emphasis added).

Petitioner asserts that he would not have signed the 2014 Note if he had realized it would “substantially increase[] his debt burden.” (*See Petr.’s Stat.*, ¶ 8). But the 2014 Note did not increase the principal amount of his mortgage. Petitioner apparently was having trouble paying the primary mortgage, and HUD’s advance of funds to the lender under 12 U.S.C. § 1715u(b) simply provided Petitioner with relief from the threat of foreclosure. To the extent Petitioner believed that, because this was the *second* time HUD was providing foreclosure relief, Petitioner would no longer be obligated to repay the amount HUD had advanced the *first* time, this was tantamount to a belief that he was receiving something for nothing, which was unreasonable.

Petitioner claims that, to the extent he misunderstood the effect of the 2014 Note, he relied on information provided by the lender and its representative, who explained the loan modification process and terms to him and gave him a package of information concerning the modification.<sup>2</sup> (*See Petr.’s Stat.*, ¶¶ 2-3, 8). In his *Hearing Request*, Petitioner also asserted that the lender and HUD failed to provide required notices and disclosures at the time the Notes were executed. But Petitioner has presented no evidence to support these allegations or to show that the lender misled him in any way. Further, even if Petitioner had established fault on the lender’s

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<sup>2</sup> In his *Hearing Request*, Petitioner asserted that HUD had not yet provided him with the entire modification package and related notes and forms. But the Secretary has submitted documentation showing that, on September 12, 2018, HUD emailed Petitioner’s attorney copies of the 2012 and 2014 Notes and associated Deeds of Trust, as well as correspondence between Petitioner and HUD. (*See Sec’y. Stat.*, ¶ 8; *Dillon Decl.*, ¶ 9; *Sec’y. Stat.*, Ex. 1-A). Any other “loan and/or modification package” and “forms related to the transactions” referenced in Petitioner’s *Hearing Request* belong to the lender, Bank of America, and are not in HUD’s possession. (*See Sec’y. Stat.*, ¶ 8; *Dillon Decl.*, ¶ 9; *Sec’y. Stat.*, Ex. 1-A; *see also Petr.’s Stat.*, ¶¶ 3-4). HUD’s failure to produce documents outside its possession during this proceeding does not impact the legal enforceability of Petitioner’s debt.

part, a misrepresentation or mistake by a third party would not relieve Petitioner of his contractual obligation to HUD under the Notes.

For Petitioner not to be held liable for the full amount of the debt, Petitioner must produce either a release in writing explicitly relieving his obligation under the terms of the Notes or proof of “valuable consideration accepted” that indicates HUD’s intent to release. *See Cecil F. and Lucille Overby*, HUDBCA No. 87-1917-G250 (Dec. 22, 1986). In this case, Petitioner has failed to introduce into evidence proof of a written release, directly from HUD, that effectively discharged Petitioner from the debt associated with the Notes. Petitioner has also failed to introduce evidence demonstrating that the Notes in favor of HUD were ever repaid. Because Petitioner agreed in the Notes to pay the subject debt, the onus falls on Petitioner to ensure that the subject debt was satisfied. Hence, the Court finds that Petitioner’s claims fail for lack of proof. The evidence establishes that Petitioner owes HUD a past-due, legally enforceable debt in the amount of \$76,872.27.

The Notice of Intent to Initiate Administrative Wage Garnishment Proceedings sent to Petitioner by the U.S. Department of the Treasury (“Treasury”) on October 10, 2018, lists the amount of the debt as \$106,328.85.<sup>3</sup> Petitioner states he disagrees with Treasury’s assessment “that penalties and interest would increase the original indebtedness from \$76,872.27 to \$106,328.85.” (*See Petr.’s Stat.*, ¶ 14). However, Petitioner’s dispute in this regard is with Treasury, not HUD. Treasury is not a party to this proceeding. The instant Decision addresses only whether a debt exists in the amount claimed by HUD and whether HUD is authorized to recoup the debt through administrative wage garnishment. *See* 31 U.S.C. § 3720D(a), (b)(5) (delineating hearing official’s jurisdiction in administrative wage garnishment matters). The HUD Secretary claims that Petitioner owes HUD a debt in the amount of \$76,872.27. The evidence supports this claim.

III. Petitioner has not established that collection of the subject debt would impose financial hardship at this time.

The Secretary proposes a debt repayment schedule of \$2,275.54 per month, or, alternatively, garnishment in an amount equal to 15% of Petitioner’s disposable income, should that information become available. Petitioner claims that “[t]he Secretary’s proposed debt repayment schedule ... grossly overestimates Petitioner’s disposable income” and that the proposed repayment plan for this debt would impose a financial hardship on him. (*See Petr.’s Stat.*, ¶ 16).

While financial hardship does not invalidate a debt or release a debtor from the obligation to pay, financial hardship factors are relevant in determining the amount of administrative garnishment that will be allowed. *See Raymond Kovalski*, HUDBCA No. 87-1681-G18 (December 8, 1986); *see also* 31 C.F.R. § 285.11(f)(2), (k)(3). In this case, “[i]n light of Petitioner’s actual gross wages and disposable income (less than \$500 per month), Petitioner

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<sup>3</sup> This figure apparently represents the amount of the debt owed to HUD, plus the fees that Treasury would charge if the full amount were collected. When a nontax debt has been delinquent for more than 180 days, HUD is required to transfer it to Treasury for centralized collection efforts under most circumstances. *See* 31 U.S.C. § 3711(g). Treasury is authorized to charge collection fees on such transferred debts pursuant to 31 U.S.C. § 3711(g)(6). *See also id.* § 3717 (authorizing penalties and interest).

proposes a monthly repayment of the 2014 Partial Claim in the amount of \$125 per month.” (*See Petr.’s Stat.*, ¶ 16). However, to the extent Petitioner is expressing interest in negotiating a settlement, this Court’s jurisdiction is limited to reviewing whether a debt exists in the amount claimed by HUD and whether the payment schedule proposed by HUD is unlawful, would cause financial hardship, or is barred by operation of law. *See* 31 C.F.R. § 285.11(f)(8). The Court is not authorized to “extend, recommend or accept any payment plan or settlement offer on behalf of the Department.” *See Edgar Joyner Sr.*, HUDBCA No. 04-A-CHEE052 (June 15, 2005).

To the extent Petitioner is arguing that the repayment schedule proposed by HUD would cause financial hardship, Petitioner was specifically ordered to file documentary evidence in support of any such claim. (*See Sec’y. Stat.*, ¶ 10; *see also* February 28, 2019 *Ruling and Order Granting Extension of Time*; March 27, 2019 *Ruling and Order Granting Extension of Time*). Petitioner failed to do so. As stated in the Hearing Request form that Petitioner filled out and signed on October 15, 2018, documentation of financial hardship generally includes a financial statement prepared on a government form, along with copies of earnings and income records and proof of expenses. Petitioner has not provided any such documentation that would allow this Court to confirm his allegations regarding his income or evaluate his claim of financial hardship.

Accordingly, at this time, the Court finds Petitioner has not met his burden to prove that repayment of the debt in the manner proposed by the Secretary would cause a financial hardship. If Petitioner wishes to explore the possibility of an agreed repayment plan, Petitioner may discuss the matter with Michael DeMarco, Director of the HUD Financial Operations Center, at 1-800-669-5152, extension 2859, or may write to the HUD Financial Operations Center at 50 Corporate Circle, Albany, NY 12203-5121. Petitioner is also entitled to seek reassessment of this financial hardship determination in the future if Petitioner experiences materially changed financial circumstances. *See* 31 C.F.R. § 285.11(k).

### ORDER

For the reasons set forth above, the Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative wage garnishment is **VACATED**. It is hereby

**ORDERED** that the Secretary is authorized to seek collection of this outstanding obligation by means of administrative wage garnishment in the amount of 15% of Petitioner's disposable pay for each pay period.

SO ORDERED,



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H. Alexander Manuel  
Administrative Judge

**Review of determination by hearing officers.** A motion for reconsideration of this Court's written decision, specifically stating the grounds relied upon, may be filed with the undersigned Judge of this Court within 20 days of the date of the written decision, and shall be granted only upon a showing of good cause.