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

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Petitioner, v. TEAM USA MORTGAGE, LLC, Respondent.	18-AF-0078-PF-006 February 3, 2020

INITIAL DECISION AND ORDER ON REMAND

This matter arises from a *Complaint* filed by the U.S. Department of Housing and Urban Development ("HUD") against Team USA Mortgage, LLC ("Team USA" or "Respondent") under the Program Fraud Civil Remedies Act ("PFCRA"), 31 U.S.C. §§ 3801-3812, as implemented by 24 C.F.R. part 28.

The Court previously held a full evidentiary hearing in 2018 and issued an *Initial Decision and Order* on December 6, 2018, finding Team USA liable under PFCRA and imposing a civil penalty and assessment totaling $42,000.00. HUD appealed that decision to the Secretary of HUD. On March 12, 2019, the Secretary issued an *Order on Secretarial Review* remanding the matter to this Court for reconsideration of an evidentiary ruling made at hearing and recalculation of the penalty and assessment.

After holding a limited hearing on remand and giving the parties the opportunity to submit new evidence and argument in accordance with the *Order on Secretarial Review*, the Court now issues this decision on remand.

RELEVANT LEGAL PRINCIPLES

The Program Fraud Civil Remedies Act ("PFCRA") provides federal executive branch agencies with a civil administrative remedy for false claims. The statute imposes civil liability on any person who makes, presents, or submits, (or causes to be made, presented, or submitted), a claim that the person knows to be false, fictitious, or fraudulent, or knows to include or be supported by a written statement which asserts a false, fictitious, or fraudulent material fact. 31 U.S.C. § 3802(a)(1); see 24 C.F.R. § 28.10(a)(1). Hearings are conducted before an Administrative Law Judge of this Court in accordance with PFCRA, the Administrative

Procedure Act (5 U.S.C. §§ 500 *et seq.*), and HUD's implementing regulations in 24 C.F.R. parts 26 and 28. See 31 U.S.C. § 3803; 24 C.F.R. § 28.1.

A person found to be liable under PFCRA is subject to a civil penalty of not more than $7,500.00 for each false, fraudulent, or fictitious claim made prior to February 19, 2013. 31 U.S.C. § 3802(a)(1); 24 C.F.R. § 28.10(a)(1) (2012); see 72 Fed. Reg. 5586, 5586 (Feb. 6, 2007). In addition, if the government actually paid the claim, the person is subject to an assessment of not more than twice its amount. 31 U.S.C. § 3802(a)(1), (3); 24 C.F.R. § 28.10(a)(6). In determining the appropriate amount of civil penalties and assessments, the judge must consider whether any mitigating or aggravating factors are present, including the eighteen factors listed in 24 C.F.R. § 28.40(b). HUD has the burden of proving any aggravating factors by a preponderance of the evidence, and the respondent has the burden of proving any mitigating factors by a preponderance of the evidence. 31 U.S.C. § 3803(f); 24 C.F.R. § 26.45(e).

BACKGROUND

I. The *Complaint* and Underlying Fraud

The fraud at issue in this case relates to a single-family mortgage that was originated by the Respondent mortgage broker, Team USA, in or around January 2010 and insured by HUD's Federal Housing Administration ("FHA") under the National Housing Act, 12 U.S.C. §§ 1701 *et seq.*[1] The loan went into early default in July 2010. In 2012, the mortgage holder conveyed title to the underlying property to HUD and submitted two FHA insurance claims under 12 U.S.C. § 1710. HUD ultimately paid out $191,472.90 in insurance benefits while selling the subject property for just $66,000.00.

Meanwhile, in conjunction with several other federal agencies, HUD had been investigating whether the Team USA loan officer who had originated the subject loan, Patrick Oketch, had engaged in fraud. Although Oketch has never been charged with a crime in connection with the subject loan,[2] he admitted to HUD investigators that he had falsified the borrower's bank statements and provided her with the funds to close on the loan because she did not actually have enough money to cover the down payment.

On December 18, 2017, in an effort to recoup its loss on the subject loan, HUD filed its *Complaint* under PFCRA, initiating the instant proceeding. HUD sought to hold Team USA liable for fraud for causing the submission and payment of FHA insurance claims for a mortgage loan that was not actually eligible for such insurance. HUD asked the Court to order Team USA

[1] The loan was originated and insured pursuant to the FHA's mortgage insurance program for single-family homes under section 203 of the National Housing Act. 12 U.S.C. § 1709; see 24 C.F.R. part 203. Mortgagees must obtain and maintain approval from HUD to participate in this program and must ensure that their loans meet all program eligibility requirements. See 12 U.S.C. § 1709(b); 24 C.F.R. parts 202 & 203. In exchange, HUD protects participating lenders against the risk of default by committing to pay insurance benefits to any entity holding a valid insurance contract, which is incontestable in the hands of an approved financial institution or mortgagee. See 12 U.S.C. §§ 1709(e), 1710.

[2] Oketch did, however, plead guilty in November 2015 to the federal crime of money laundering conspiracy stemming from his involvement in other mortgage transactions prior to his employment with Team USA.

to pay a civil penalty of $7,500.00 and an assessment of $233,634.70, for a total award of $241,134.70 under PFCRA.

II. The April 2018 Hearing and Evidentiary Ruling

The Court held a full evidentiary hearing on April 24-25, 2018. HUD proceeded on the theory that Oketch had engaged in fraud when he originated the subject loan and that Team USA was vicariously liable for Oketch's wrongdoing because he was acting within the scope of his employment, or, alternately, with apparent authority when he committed the fraud.[3] Team USA maintained that Oketch's conduct did not proximately cause the submission of the fraudulent insurance claims and that the company could not be held vicariously liable for Oketch's actions.

During the hearing, counsel for HUD attempted to question witness Dan Boler, former owner of Team USA, about a prior felony conviction on cross-examination. Team USA objected to this line of questioning pursuant to Rule 404 of the Federal Rules of Evidence, which limits the use of character evidence to show a person or entity's propensity for bad acts. See Fed. R. Evid. 404. HUD argued that the evidence it sought to admit would be relevant to show Team USA's corporate culture and to rebut the company's representations that it ran a "clean shop."

After consideration, the Court sustained Team USA's objection, finding that HUD had not laid a foundation for the evidence of Boler's prior felony conviction to be used for a permissible purpose under Rule 404. HUD counsel then made an offer of proof stating his intent to present testimony regarding Boler's felony conviction, as well as the felony conviction of another Team USA employee, loan officer Ralph Killing. The hearing proceeded to completion without such evidence being admitted.

III. The Court's Decision and the Secretary's Ruling on Appeal

On December 6, 2018, the Court issued an *Initial Decision and Order* finding Respondent liable for a PFCRA violation. Specifically, the Court found that (1) the insurance claims submitted to HUD for the subject mortgage loan constituted "false claims" under PFCRA because they were supported by materially false written statements, including falsified bank statements and false certifications of eligibility for FHA insurance; (2) Oketch's misconduct proximately caused the submission of the false claims; (3) Oketch's misconduct was "knowing," within the meaning of PFCRA; and (4) Team USA was vicariously liable for the misconduct under a theory of apparent authority. After considering the eighteen penalty factors listed in 24 C.F.R. § 28.40(b), including the degree of Team USA's culpability, which the Court deemed to be low, the Court imposed a civil penalty of $2,000.00 and an assessment of $40,000.00 against Team USA.

[3] The December 2017 *Complaint* had advanced a theory of direct liability, alleging that the insurance claims constituted "false claims" because Team USA had originated the underlying FHA-insured loan at a time when it was ineligible to do so due to its purported noncompliance with certain FHA requirements. However, HUD abandoned this argument by March 26, 2018, at which time it filed a *Motion for Summary Judgment* proceeding solely on a theory of vicarious liability.

HUD appealed the *Initial Decision and Order* to the Secretary of HUD pursuant to 24 C.F.R. § 26.52. HUD argued that (1) rather than finding Team USA liable under a theory of apparent authority, the Court should have found that Oketch was acting within the scope of his employment; (2) evidence of Team USA's personnel's prior criminal convictions should have been admitted; (3) the Court should have found that Team USA's culpability was high because the company "had a permissive culture of non-compliance that enabled criminality"; and (4) the Court had not begun at the correct starting point when calculating the penalty and assessment under 24 C.F.R. § 28.40(b), which states that "ordinarily twice the amount of the claim as alleged by the government, and a significant civil penalty, should be imposed."

On March 12, 2019, the Secretary issued an *Order on Secretarial Review*. The Secretary affirmed the Court's holdings that Oketch was not acting within the scope of his employment, but that Team USA was still liable for his actions under the doctrine of apparent authority. (*Order on Secretarial Review*, pp.4-7.) The Secretary also affirmed the Court's findings regarding Team USA's culpability. (Id. at 11.) However, the Secretary remanded the matter for the Court to consider its evidentiary ruling regarding Team USA's personnel's prior criminal convictions and recalculate the penalty and assessment. (Id. at 7-11.) Specifically, the Secretary instructed the Court to:

1. Obtain more evidence and determine the relevancy of Respondent personnel's prior criminal convictions; and
2. Recalculate the penalty and assessment based on the new monetary starting point, and, if applicable, additional evidence that is admitted into the record regarding prior criminal convictions that would go towards the aggravating and mitigating factors.

(Id. at 11.)

IV. Proceedings on Remand

In light of the Secretary's instructions, on March 15, 2019, the Court issued an order directing the parties to submit offers of proof to provide more information on, and allow the Court to determine the relevancy of, Team USA's personnel's prior criminal convictions. HUD duly submitted an offer of proof indicating an intent to offer evidence regarding the prior criminal conduct of Boler and Killing, which Team USA opposed.

On April 15, 2019, the Court issued a *Notice of Hearing and Order on Remand* finding that, in light of the *Order on Secretarial Review*, the evidence proffered by HUD was relevant. The Court scheduled a hearing to take place on August 27, 2019, so that HUD could attempt to admit the proffered evidence. The Court noted that the scope of the hearing would be limited to the matters raised in the offer of proof and responsive filings.

On June 19, 2019, HUD filed a *Motion for Admission of Documentary Evidence* asking the Court to admit three documentary exhibits in advance of the hearing: (1) a December 23, 2011 Information issued in the U.S. District Court for the District of Minnesota against Boler; (2) a November 7, 2013 criminal judgment issued by the same court against Boler; and (3) a Register of Actions for Case No. 02-CR-09-13067, State of Minnesota v. Ralph Killing. In

support of its motion, HUD noted that the Court had already determined the relevance of the documents in question and that Team USA had stipulated to their authenticity. Team USA, however, maintained that HUD had failed to connect the prior criminal acts to the conduct at issue in this case or to lay a proper foundation to admit the evidence under Rule 404 of the Federal Rules of Evidence.

On July 8, 2019, the Court issued an order granting HUD's motion and admitting the proffered documentary evidence. The Court explained that Team USA's arguments went more to the weight of the evidence than to its admissibility in a bench trial, as the risk of undue prejudice or confusion is diminished when there is no jury.

On August 27, 2019, the Court held a limited hearing on remand in Des Moines, Iowa. HUD presented testimony from Boler and from Team USA's current owner, Bryan Root. The parties also made closing arguments and submitted post-hearing briefs and response briefs. The record is now closed.

FINDINGS OF FACT ON REMAND

As discussed above, Team USA has been deemed liable for fraud perpetrated by one of its loan officers, Patrick Oketch. Specifically, Oketch falsified a borrower's bank statements and provided the borrower with the necessary funds to close on a mortgage loan. This misconduct occurred in or around December 2009. The Court's prior findings of fact regarding the fraud, which were not disturbed by the Secretary on appeal, are set forth in detail in the December 6, 2018 *Initial Decision and Order* and are incorporated herein by reference.

The following facts were presented at the August 27, 2019 hearing on remand.

Dan Boler was Team USA's owner, manager, and Chief Executive Officer from 2007 to approximately September 2010. Boler had previously owned a smaller mortgage brokerage called Team Access Mortgage from about 1998 to 2007. Boler testified that, beginning in 2005, during the course of his work for Team Access, he originated mortgages for transactions in which he knew the realtor was providing "rebates" or kickbacks to the buyer, which constituted mortgage fraud.

Boler testified that he would not have participated in the scheme if he had known it was unlawful, but he was initially told that it was legal for a party to a mortgage transaction to provide a rebate to the buyer. He explained he had sought the advice of an attorney with the realtor group, who had pointed to a Minnesota law permitting any party to the transaction to receive a portion of the commission. However, after seeing "an article that had come out, or something" suggesting the arrangement may be unlawful, Boler sought further legal advice, at which time the attorney "was kind of wishy-washy" and would not clearly state that the scheme was legal. Upon realizing the scheme might be illegal, Boler voluntarily ended his participation in it in 2006 or 2007.[4] He noted that he had also realized "the market was deteriorating and these people shouldn't be buying these houses." After withdrawing from the scheme, he held a

[4] Boler acknowledged his attorney had told the U.S. District Court during sentencing that he had exited the scheme in July 2007. However, he testified that, to the best of his recollection, he had actually exited in late 2006.

meeting during which he made his Team Access employees sign a document stating that they were not permitted to facilitate any transactions involving rebates.

Thereafter, in 2007, Boler shut down Team Access and opened Team USA. He testified that one of the reasons he did so was to change his atmosphere and environment by cutting himself off from the fraudulent rebate scheme and the people involved in it, although he noted that Team Access had closed thousands of loans and only a small percentage involved fraud. When Team Access shut down, it had about ten employees on its payroll, two of whom (aside from Boler) had been involved in the rebate scheme. Boler testified that about five or six former Team Access employees came over to Team USA with him, but none of them had been involved in the rebate scheme. He also testified that one or two of those former Team Access employees may have still been working at Team USA when Oketch's misconduct (the subject of the instant proceeding) occurred, but he could not recall with specificity.

Boler served as owner and CEO of Team USA and oversaw its day-to-day operations beginning in 2007. Lon Firchau was a partial owner, as well. Bryan Root, current owner of Team USA, was also involved with the company as a recruiter during its early days.

At some point after shutting down Team Access and opening Team USA, Boler began hearing "rumblings" that the government was investigating fraudulent mortgage transactions of the type he had participated in at Team Access. He did not notify his employees or colleagues at Team USA of his involvement in the questionable transactions at Team Access, as he was still hoping "nothing would come of it" and it was "not something [he] want[ed] to bring up to people." Despite his hopes of avoiding legal repercussions, he was contacted by investigators in or around September 2010 and was formally notified that he was a target of investigation in or around summer 2011.

Around the time he was first contacted by investigators in September 2010, Boler sold his shares of Team USA to the current owner, Root, who later purchased Firchau's shares as well. Boler testified that the looming investigation was one of the factors that led to the sale, but he also needed to end his ownership of the business because he had credit problems. At the time, he informed Root that he had been contacted by investigators about mortgages involving rebates on investment properties. However, he "wanted to disclose as little as possible because I didn't know what the outcome was and it's not something you want to brag about."

Root testified he believed Boler was facing potential state sanctions, but did not realize a federal criminal investigation was underway. He first learned Boler was in criminal jeopardy four or five months after purchasing Boler's shares of Team USA, and did not learn the full details of Boler's criminal troubles until Boler was deposed in the instant PFCRA proceeding.

HUD submitted documentary evidence showing that, on December 23, 2011, the U.S. Attorney for the federal District Court for the District of Minnesota issued an Information charging Boler and one other person with conspiracy to commit mail and wire fraud under 18 U.S.C. § 1349. On November 6, 2013, Boler pled guilty to this charge and was sentenced to 45 months in prison, although he testified that he ended up serving just 21 months.

HUD also submitted a Register of Actions for Case No. 02-CR-09-13067, State of Minnesota v. Ralph Killing. The action, which was initiated on December 15, 2009, involved charges of felony identity theft, theft by swindle, and residential mortgage fraud against Killing. On October 8, 2012, Killing pled guilty to identity theft. On February 19, 2013, he was convicted of identity theft and sentenced to one day in jail and three years of supervised probation, and the other two felony charges were dismissed. The parties presented no further evidence or testimony pertaining to Killing.

DISCUSSION

This matter was remanded to the Court for reconsideration of its evidentiary ruling excluding evidence of the prior criminal convictions of Dan Boler and Ralph Killing, as well as further consideration of the penalty and assessment to be imposed upon Team USA. These items are addressed in turn below.

I. Relevance of Prior Criminal Convictions

As discussed above, during the initial April 2018 hearing, the Court sustained Team USA's objection to the introduction of evidence regarding Boler's criminal history under Rule 404 of the Federal Rules of Evidence. HUD counsel then made an offer of proof stating that he also intended to offer testimony about Killing's felony conviction. No such evidence was offered. Nonetheless, HUD appealed to the Secretary on grounds that the Court should have allowed HUD to present evidence of both Boler and Killing's prior criminal convictions to rebut Team USA's assertion that it was an upstanding loan originator and had conducted its business "by the book."

On appeal, the Secretary found that "[a]dequate details were not provided by the parties at the hearing with respect to Mr. Boler and Mr. Killing's prior criminal conduct." (*Order on Secretarial Review*, p.8.) The Secretary noted that HUD had presented new information on appeal that had not been considered by this Court, but it was still unclear whether Boler and Killing's criminal conduct had occurred while they were associated with Team USA and whether Respondent's other employees and leadership were aware of it. (Id.) The Secretary opined that "the supplemental information provided in the parties' briefs on appeal ... and additional information still unknown" should be considered in determining whether to admit the evidence of Boler and Killing's criminal convictions, which may serve as an aggravating or mitigating factor when determining the penalty and assessment. (Id.) Accordingly, the Secretary instructed the Court to "[o]btain more evidence and determine the relevancy of Respondent personnel's prior criminal convictions." (Id. at 11)

On remand, the Court admitted HUD's documentary evidence of Boler and Killing's prior criminal convictions and held a hearing to allow the parties to present testimony as to the criminal convictions. Accordingly, the Court has fulfilled the Secretary's instruction to obtain more evidence regarding the convictions. Remaining to be determined is their relevance.

Relevant evidence, which is broadly admissible in this proceeding under 24 C.F.R.

§ 26.47, is evidence that is probative of a material fact. See Fed. R. Evid. 401. As explained by the Secretary on appeal:

> Pursuant to 24 C.F.R. § 26.47, the Court "shall admit any relevant oral or documentary evidence that is not privileged." "Relevant evidence is any evidence having any tendency in reason to prove any material fact. Relevance is established by a material or logical connection between the asserted facts and the inference or result they are intended to establish." State v. Carapezza, 286 Kan. 992, 993, 191 P.3d 256 (2008).

Thus, relevant evidence must be both probative and material. Evidence that is material, even if only weakly probative, is generally admissible unless an exception applies. Once the evidence is admitted, the factfinder must further assess its *degree* of relevance, that is, the probative value or weight it carries.

A. Admissibility of the Evidence

In this case, there is little question that the criminal convictions are relevant, as the criminal history of Team USA's employees, in a vacuum, has a tendency to show whether or not the company was tolerant of criminal activity. However, at the April 2018 hearing and through a motion in limine filed prior to the hearing, Team USA raised an objection, not to the relevance of the evidence, but to its admissibility under Rule 404 of the Federal Rules of Evidence, which bars the admission of character evidence to show an entity's propensity for bad acts.

In general, relevant evidence may be excluded if its probative value is substantially outweighed by factors such as prejudice or confusion of the issues. See Fed. R. Evid. 402, 403; 24 C.F.R. § 26.47. Character evidence—including evidence of a prior crime or wrong—that is offered for the purpose of showing an entity's propensity to act in conformity with that character is considered inherently prejudicial, and therefore inadmissible, under the Federal Rules of Evidence. See Fed. R. Evid. 404; see also Old Chief v. United States, 519 U.S. 172, 180-82 (1997). Such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[5] Fed. R. Evid. 404(b)(2). However, the party seeking to admit the evidence must clearly identify the purpose for which it is being offered other than to show the defendant's conformity with a particular character, and must lay a proper foundation for the admission of the evidence by establishing its authenticity, relevance, and admissibility.

HUD argued at the April 2018 hearing that evidence of Boler's prior felony conviction would be relevant to show Team USA's corporate culture and to rebut the company's representations that it ran a clean shop. Team USA countered that characterizing it as evidence of "corporate culture" was merely another way of saying that it would be used to show that the company acted in conformity with past acts. Team USA further argued that HUD had failed to

[5] Alternatively, such evidence may be admissible to impeach a witness under Rule 609 of the Federal Rules of Evidence. HUD has not cited Rule 609 in this case.

connect its corporate culture to the wrongdoing at issue in this case, which was perpetrated by employee Patrick Oketch without the knowledge of Boler or anyone else at Team USA.

After consideration, the Court sustained Team USA's objection based on a finding that HUD had not laid a foundation for the evidence of Boler's prior felony conviction to be used for a permissible purpose under Rule 404. The Court noted that, although HUD had called Boler as a witness during its case-in-chief, it had failed to question him about his criminal history at that time or to present evidence of wrongdoing by Team USA other than the one incident at issue in this matter (the fraud perpetrated by Oketch). See United States v. Smith Grading & Paving, Inc., 760 F.2d 527, 531 (4th Cir. 1985) (explaining why it is better practice to introduce Rule 404(b) evidence during case-in-chief than during cross-examination or on rebuttal). The Court further noted that HUD had not developed evidence of Team USA's corporate culture during its case-in-chief. In the Court's view, HUD's attempt on cross-examination to use Boler's past criminal activity to infer wrongdoing amounted to a "bootstrapped argument."

HUD still has not presented evidence that Team USA ran a "dirty" shop or violated any FHA requirements, despite its persistent insinuations that this was the case. In this regard, it is worth exploring the history and evolution of HUD's claims against Team USA.

In its initial *Complaint*, HUD alleged that Oketch was an independent contractor and the sole employee at the branch office he managed; that he paid the branch office's expenses, including rent, out of his own pocket; and that he did not receive regular guidance or supervision from Team USA. If true, all of these allegations would establish violations of FHA requirements, thereby rendering Team USA ineligible to originate the subject loan. Therefore, the *Complaint* was premised on a theory of direct liability—namely, that Team USA had caused the submission of "false" insurance claims because it was not eligible to originate FHA-insured loans in the first place. However, by the time this case proceeded to hearing in April 2018, HUD had abandoned its earlier position in favor of a theory of vicarious liability. HUD had also stipulated that Oketch was a W-2 employee, not an independent contractor, and that he managed other employees at the branch office.

At hearing, after the Court issued its ruling from the bench excluding the proffered evidence of Boler's felony conviction and opined that HUD had not presented evidence of wrongdoing other than by Oketch, HUD counsel made an offer of proof in which he stated he anticipated HUD would present "testimony about violations of FHA requirements related to payment of expenses, violations of FHA requirements related to how branch managers are compensated." This suggested to the Court that HUD hoped to revive its previously abandoned accusations that Team USA had violated certain FHA requirements by failing to manage its branch offices properly. Yet evidence of such violations had not been developed during HUD's case-in-chief. In fact, in addition to HUD's stipulation that Oketch was not an independent contractor nor the sole employee of his branch office, the testimony and documentary evidence presented at trial established that two other employees worked at his branch office and indicated that Team USA properly controlled and supervised the branch office and paid all of its expenses in accordance with FHA requirements. Thus, the record shows that the *Complaint*'s allegations that Team USA mismanaged its branch office were unfounded.

HUD did not argue otherwise in its post-hearing briefs, relying solely on a theory of vicarious liability to establish that Team USA was legally responsible for Oketch's wrongdoing. However, in arguing that the maximum penalty and assessment should be imposed against Team USA, HUD raised two new allegations of violations of FHA requirements: (1) Team USA failed to review the subject loan after it went into early default, and (2) Team USA's employment agreement with Oketch included a prohibited provision that obligated him to reimburse the company if it had to buy back a loan from a sponsor lender.

The Court considered the new allegations, but concluded in its December 2018 *Initial Decision and Order* that neither of the alleged violations significantly increased Team USA's culpability. On appeal, the Secretary affirmed these conclusions. Specifically, the Secretary indicated that the alleged violations had no bearing here because "[r]eview of the loan after default would not have prevented the origination of the Subject Loan" and "the improper buyback provision in the employment agreement would have discouraged this type of behavior [Oketch's fraudulent behavior], as opposed to encouraging it." Therefore, HUD has not established that Team USA itself committed any material violations of the FHA requirements, but only that its employee, Oketch, committed fraud for which it is vicariously liable.

Considering the foregoing, the Court still believes that HUD has not laid a foundation to admit inherently prejudicial character evidence on rebuttal, and that, as was clear at the time of the initial hearing, the evidence should not come in. Nonetheless, the Court recognizes that the governing procedural rule at 24 C.F.R. § 26.47 encourages broad admission of relevant and non-privileged evidence. Also, the Federal Rules of Evidence, including Rule 404, technically do not govern this proceeding, and the risk of prejudice is low in a bench trial.

In consideration of these factors and the Secretary's ruling on appeal, the Court previously determined that the evidence regarding Boler and Killing's prior criminal convictions was relevant enough to be admitted, and has now given the parties the opportunity to present additional evidence and to flesh out their arguments regarding relevance. What remains to be determined is the weight or probative value of the new evidence. In other words, Team USA has already been deemed liable for the fraud committed by Oketch; how much does it matter that Boler and Killing also committed crimes?

B. Probative Value of the Evidence

HUD argues that the new evidence shows that "Team USA created the circumstances under which Patrick Oketch's fraud went undetected and undeterred." In determining the amount of the penalty and assessment to be imposed on Team USA, factors for consideration include the degree of Team USA's culpability; the extent to which its practices fostered or attempted to preclude Oketch's misconduct; and the need for deterrence. See 24 C.F.R. § 28.40(b)(3), (11), (16). HUD argues that the evidence of Boler's criminal history[6] helps show a "culture of permissiveness" at Team USA that constitutes an aggravating factor under 24

[6] Although HUD also presented evidence of Killing's criminal history, described above, HUD's arguments on remand do not rely on this evidence. Killing is connected to this case because he worked as a loan officer at Oketch's branch office and his signature appears on some of the paperwork for the subject loan, even though Oketch acknowledged that he himself originated it. At the April 2018 hearing, HUD investigator Steve Holdren indicated that he investigated both Oketch and Killing in relation to fraudulent mortgage transactions that occurred prior to the

C.F.R. § 28.40(b)(3). HUD further argues that the new evidence presented on remand helps demonstrate Team USA's failure to conduct any meaningful quality control, which is an aggravating factor under 24 C.F.R. § 28.40(b)(11) and (16).

Team USA counters that HUD has failed to establish a culture of fraud at Team USA, that Team USA allowed its employees to engage in illegal activities, or that any employee at the company was aware of Boler's criminal acts. Team USA points out that the hearing on remand was not held merely for the Court to delve into Boler's past unlawful conduct, but so that HUD would have an opportunity to link Boler's crime to the instant case to show that Team USA should receive more severe punishment. However, Team USA asserts that HUD has not established any link between Boler's criminal history and Oketch's misconduct. Accordingly, Team USA argues that the Court's December 2018 ruling in this matter should remain unchanged.

1. Whether the Evidence Shows a "Culture of Permissiveness"

HUD asserts that "[t]he story of Respondent's culture, particularly its failure to avert fraud, begins with Boler's prior criminal misconduct and mortgage fraud." HUD argues that Boler personally and knowingly originated mortgages that included undisclosed kickbacks to the buyer, which constitutes a fraud that is "no different from Oketch's act of providing the borrower with her required down payment." HUD further maintains that, at the hearing on remand, Boler feigned ignorance concerning the impropriety of the fraudulent transactions, demonstrated a "cavalier attitude," and repeatedly attempted to minimize his own role in the fraud.

As a preliminary matter, it is self-evident that Boler's conduct was very different from Oketch's. Oketch's misconduct included both providing the borrower with the funds to cover the down payment and using a PDF editing program to intentionally falsify her bank statements, which is an egregious act of fraud. By contrast, Boler's misconduct constituted originating loans for a realtor who provided kickbacks to the buyer. He engaged in this conduct only after being told by the realtor's attorney that a Minnesota law permitted "rebates" to the investor.

Further, Oketch acted covertly, deliberately concealing his actions even from his employer, with the intent of pushing the loan through for his own personal benefit, as he was the seller of the property. Boler, by contrast, denied affirmatively concealing anything on the loan origination forms, noting that although the realtor's commission was disclosed, there was nowhere on the forms to indicate what the realtor chose to do with it. Oketch testified that, after spending just $50,000 to buy the subject property and make repairs, he ultimately received about $160,000 from the sale and used the profits to buy another property. Boler, on the other hand, benefited from his fraudulent transactions only in that he received business from them. There is

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fraud at issue here. He also testified that, during the investigation, Oketch initially denied ever working with Killing, but later admitting doing so and using Killing's name on the paperwork for the loan at issue here in an attempt to conceal his (Oketch's) involvement in the transaction. Other than this testimony, the record contains almost no evidence relating to Killing. In particular, there is no evidence as to the specific conduct that led to Killing's criminal conviction; when it occurred; whether it occurred during his employment with Team USA; and whether anyone at the company was aware of the conduct or of the legal proceedings against Killing. The record does not even show what dates he worked for Team USA. Because the record does not support any conclusions as to how Killing's conviction is connected to Team USA or to the fraud at issue here, and because HUD has not raised any arguments in this regard, the Court will not rely on the evidence of Killing's criminal conviction.

no evidence that he accepted any portion of the kickbacks or personally profited from the transactions. He was not the ringleader of the scheme, but merely a participant. And he eventually became uncomfortable with it and voluntarily withdrew his participation, long before he knew he would face legal consequences.

But even if Boler's misconduct had been more similar to Oketch's, this would not establish a relationship between the two instances of fraud. Team USA asserts that because HUD has failed to establish a link between the two, it has instead resorted to personal attacks on Boler and Root and trying to shame Boler for his criminal conviction. There is a kernel of truth to Team USA's accusation. HUD's characterization of the facts surrounding Boler's conviction is exaggerated and self-serving. As noted, Boler was not the ringleader or a personal beneficiary of the fraudulent transactions, but simply a participant caught up in a dubious scheme, and it is commendable that when he became uneasy with it and could not obtain reassurance as to its legality from the realtor's attorney, he chose to withdraw. He explained at hearing:

> [P]eople that know me know that I'm not some kind of schemer or, like, a person that would alter documents, fake things, come up with schemes, steal people's identities. I mean, I would never do that. This was something where investors—sophisticated investors wanted to buy properties. They thought it was the greatest thing since sliced bread. And there was commercials for it all over the place. They had seminars. They were coming to me. They were like, "Oh, I could buy all these properties and I could be the next Donald Trump." So, that's—so I did—I did that and that's what I've admitted to.

As HUD suggests, at the hearing on remand, Boler did show signs of trying to downplay his blameworthiness for the fraud, testifying that he "convinced [him]self it was okay" at the time and that his "position was to do the loan ... send it away, and I was done with it." But the Court does not find this to be particularly galling or indicative of a "cavalier attitude" after-the-fact. Rather, rationalization is an ordinary human reaction that indicates feelings of guilt when called on to confront or relive a personal failing.

For these reasons, the Court does not find Boler's misconduct to be as serious or his attitude as cavalier as HUD imagines. Importantly, however, Boler is not on trial here. While it is undisputed that he committed felony fraud, this fact alone is not enough to prove a link to Oketch's fraud. HUD's naked assertions of Boler's purported careless attitude and lack of remorse also do not suffice to establish that he cultivated a "permissive" atmosphere while at the helm of Team USA.

HUD theorizes that such an atmosphere existed both because Boler brought a certain "attitude" with him to Team USA, and because Root was aware of Boler's potential criminal problems when he took over the company and knew the risks of assuming ownership under the circumstances, making his leadership "no better or worse" than Boler's. The evidence of record does not support this theory at all. As determined by this Court and affirmed by the Secretary on appeal, "[b]ased on the record, Respondent presented evidence that it acted with due care and

took various measures to prevent fraud" and "there is no evidence of intentional or knowing wrongdoing by Respondent itself." (*Order on Secretarial Review*, p.11.) HUD has not developed evidence of negligence or a culture of permissiveness at Team USA, nor that any employee was aware of Boler's supposed tolerance for criminality. HUD would instead have the Court assume that simply because Boler committed a wrong while at Team Access, a palpable aura of wrongdoing followed him to his next business venture and somehow mystically empowered, or perhaps even encouraged, his employees to commit wrongs of their own. The Court rejects this unsupported premise. The mere fact that Boler had previously committed fraud did not create a culture of permissiveness at Team USA.

2. Whether the Evidence Shows a Failure to Conduct Quality Control

HUD raises several arguments regarding quality control, none of which are linked to the new evidence regarding Boler's criminal conviction. Although HUD largely appears to be attempting to re-litigate decided issues, the Court will consider its arguments anyway, given that the record contains new evidence.

First, HUD asserts that Team USA "has not provided one shred of contemporary evidence that it conducted substantive quality control during Boler's ownership of the company." This is simply false, and the Court is at a loss as to how anyone who has actually read the record in this case could reach such a conclusion.

In the December 2018 *Initial Decision and Order*, the Court found, based on the record, that Team USA had taken various measures to prevent fraud, such as conducting background checks on all its employees (including Oketch) before hiring them; periodically evaluating its employees' work; requiring Oketch to send all the mortgages he originated to the corporate office for processing; developing and implementing a quality control plan; submitting to audits that showed the company was in compliance with HUD requirements in 2008 and 2009; providing extensive training to its employees; and requiring employees to take extra steps in the loan origination process such as obtaining written verification of the borrower's employment. The Secretary affirmed these findings on appeal. (*Order on Secretarial Review*, p.11.)

HUD acknowledges that Team USA has submitted, as Respondent's Exhibit 3, a ten-page quality control plan, the stated purpose of which is to ensure the company's compliance with all FHA requirements. The plan requires Team USA to review 10% of all closed loans, randomly selected, and to periodically target certain suspect categories of loans for review, such as, for example, loans involving properties that have been transferred within the past year or loans involving gifts or loans of funds to close. The plan also specifies that Team USA must review any loan that becomes 60 days past due within the first 6 payment periods, and if fraud is discovered, all other loans originated by the responsible employee must also be reviewed. The quality control plan thoroughly explains the review process, identifying what documents must be obtained and what information must be double-checked in the loan file. Finally, the plan also certifies Team USA's compliance with various fair lending laws and details how the company will continuously verify its compliance.

At the April 2018 hearing, Boler testified that Team USA was approved under the quality control plan in Respondent's Exhibit 3 when it became a HUD-approved lender, and the plan was implemented by the company's quality control manager, Deb Peterson. He also testified that, as a means of quality control, Team USA's loan processors were encouraged to look for red flags in the file, such as if a property had been sold recently. Further, Team USA required its loan processors to take actions "above and beyond what the actual lender needed," such as obtaining a verification of employment to ensure Team USA's information regarding the borrower's income was accurate.

Root also discussed Team USA's quality control efforts at the April 2018 hearing. He explained that he had drafted the quality control plan in Respondent's Exhibit 3 in 2007. As of 2010, Team USA was reviewing 10% of all closed files and 10% of all denied loans. The company also audited a loan whenever it received notification from the lender that the loan was nonperforming. In addition, Root testified that Team USA had implemented a borrower's survey and a requirement for written verification of employment on every file in the wake of the financial meltdown.

Root further explained how Team USA's quality control measures had evolved by the time of the hearing. He stated that, as of April 2018, the company was reviewing every file and "doing a lot more forensic reviews" that involved re-running credit reports and obtaining verification of deposits and income. Root also stated that Team USA's ability to monitor employee communications had improved and that it now required all documents to be electronically submitted so that the company could maintain a record of submissions.

During closing arguments at the hearing on remand, HUD counsel, in an ill-informed attempt at burden shifting, insisted that Team USA had produced "no verifications of deposit, no verifications of employment, no credit reports, nothing with the word 'fraud' on it." It is true that Team USA did not choose to produce random samples of files that had been audited after closing; it was not required to do so. However, as described above, the company did produce a copy of its quality control plan from the Oketch era, as well as testimony that it reviewed 10% of its closed files at the time. Team USA also produced the loan file for the subject loan, as well as a number of other files for loans originated by Oketch, which contain documents such as credit reports and verifications of employment.[7] Thus, again, it is simply false for HUD to claim that no such evidence has been produced.

HUD also claims that "Team USA's alleged quality control process has not discovered a single instance of fraud in its entire corporate history." Although HUD cites no evidentiary support for this proposition, HUD appears to be mischaracterizing certain testimony provided by Root during the hearing on remand. Specifically, Root testified that, to his knowledge, no employees other than Oketch had ever engaged in fraud related to their positions at Team USA, although Root said he had fired personnel for "improprieties ... prior to it becoming a fraudulent

[7] For example, the loan file for the subject loan, which was submitted to the record as Respondent's Exhibit 9, contains a credit report run by Oketch (at pages 64-67 of the exhibit) and a written verification of employment, including a report of payments, obtained by loan processor Laura Kopka from the borrower's employer (at pages 6-7, 14-17, and 27 of the exhibit). In addition, the loan file contains W2s, pay stubs, and an income tax return for the borrower.

issue"; that no audit of Team USA had ever shown signs of fraud or illegality; and that Oketch's misconduct was the only instance of fraud Root was aware of at Team USA. Neither Root nor Boler were asked whether or how frequently the company's quality control process had detected instances of fraud. Moreover, HUD has not presented evidence of any other fraud that needed to be detected.[8] Root's testimony implied that Team USA lacks a history or culture of fraud. It defies logic to twist his words into a suggestion that the company's quality control plan was ineffective at detecting fraud.

Team USA's witnesses testified that they were unaware of the early default in the instant case because the lender did not bring it to their attention. Based on this evidence, HUD claims that Team USA relied on other parties to notify it of problems with its loans instead of tracking their performance on its own. HUD makes much of this claim, arguing that Team USA was "indifferent" to its loans' performance and chose to bury its head in the sand rather than remaining on the lookout for potential problems.

However, HUD has not established that the FHA imposes a loan tracking requirement on approved lenders or that Team USA violated it. HUD has shown only that Team USA did not recognize that the instant mortgage had gone into early default.

As for Team USA's failure to conduct an early default review on the mortgage, the Court has already considered this FHA violation and determined that it is not a significant aggravating factor that increases the company's culpability in this case. In its December 2018 *Initial Decision and Order*, the Court explained that an after-the-fact review would not have prevented Oketch's fraud (nor would it have prevented HUD's loss, as the FHA had already endorsed the loan for insurance and was therefore bound by the insurance contract under 12 U.S.C. § 1709(e)). The Court further noted that the reason Team USA had failed to conduct a review was because it was unaware of the default. While HUD casts this as indifference or negligence, it seems more like an understandable mistake—it is not beyond reason for a mortgage broker to assume that the purchaser of its loans will notify it and seek redress in the event a loan does not perform. At any rate, the Secretary affirmed the Court's finding that Team USA's failure to review the loan in question is not an aggravating factor that increases the company's culpability in this case. (*Order on Secretarial Review*, p.11.)

HUD insists there is an especially strong need to deter Team USA's purported "head-in-the-sand" behavior in light of Root's attitude throughout these proceedings. Specifically, HUD argues that Root "made it abundantly clear that Team USA continues to feel no responsibility for Oketch's fraud, nor has any intention to modify its policies or procedures to prevent another instance of employee fraud." However, as discussed above, Root testified as to how Team USA's quality control process has evolved to the present day and described various measures taken by the company to detect fraud. In short, the record does not suggest that Team USA feels no responsibility for preventing fraud—far from it.

[8] In fact, in its closing brief filed after the April 2018 hearing, in assessing the penalty factors under 24 C.F.R. § 28.40(b)(8) and (15), HUD expressly stated "[t]here was no evidence presented that Team USA has engaged in a pattern of similar conduct" and "[t]here is no evidence in the record that Respondent has been found to have engaged in similar misconduct in any other proceeding."

On the other hand, Root did indicate that the type of fraud perpetrated by Oketch is difficult to detect and, even today, would likely go undiscovered until after closing. Root testified that, based on the documentation in the loan file, the borrower had the requisite income to qualify for the loan, but Oketch had altered her bank statements. Even if Team USA had required a verification of deposit, which no other brokers require, a bad actor could easily find another means of perpetrating the wrongdoing such as falsifying a gift letter. In Root's view, this type of fraud is only caught after the fact, and the best security against it is the mortgage transaction participants' uncertainty as to who the actual lender will be, as some lenders' underwriting processes are more stringent than others.

Based on the foregoing testimony, HUD seems to believe Root has taken a defiant stance against quality control. However, the Court finds Root's testimony reasonable, credible, and illustrative of why Team USA cannot be held directly liable for Oketch's fraud. It is difficult to stop a bad actor from deliberately committing fraud of the sort Oketch perpetrated, as the wrongdoer will usually take measures to conceal his actions. Deterrence is an important consideration, as FHA lenders should be discouraged from committing fraud and encouraged to take measures to prevent it. But deterrence becomes a less significant factor when the conduct for which the FHA lender is being held liable was very difficult to prevent.

In sum, the record does not support HUD's assertions that Team USA failed to conduct meaningful quality control or exhibited a "head-in-the-sand" attitude that must be deterred. Instead, as determined by the Court in its *Initial Decision and Order* and affirmed by the Secretary on appeal, Team USA has presented documentary evidence and testimony establishing that it developed and implemented a quality control plan and routinely took measures to detect and prevent fraud.

3. Conclusion

This case involves an incident in which a management-level employee, Oketch, deliberately falsified documents and paid a borrower's down payment in order to push a loan through, all the while taking steps to conceal his actions from his employer because he stood to personally benefit from the transaction.

Relying on new evidence showing that Team USA's owner at the time had previously committed mortgage fraud, HUD suggests that Team USA allowed Oketch's conduct to occur by cultivating a "permissive" atmosphere at its company and failing to conduct meaningful quality control. However, HUD has failed to prove either of these allegations or to establish a link between Boler's past actions and Oketch's fraud. The evidence surrounding Boler's criminal conviction in no way suggests that Team USA encouraged, condoned, or created an environment conducive to Oketch's fraud. Oketch would not have felt a need to hide his wrongful conduct if Team USA had provided an environment tolerant of this sort of behavior.

Accordingly, for all the reasons discussed above, the Court finds that although the new evidence submitted on remand is relevant, its probative value is low.

II. Reconsideration of Penalty and Assessment

In this case, HUD seeks a civil penalty of $7,500.00, which is the maximum allowed under PFCRA for a single false claim. See 31 U.S.C. § 3802(a)(1); 24 C.F.R. § 28.10(a)(1) (2012). HUD also seeks an assessment of $233,634.70, for a total award of $241,134.70.

The standard for calculating penalties and assessments in HUD PFCRA cases is set forth in 24 C.F.R. § 28.40(b), which provides as follows:

> In determining an appropriate amount of civil penalties and assessments, the ALJ and, upon appeal, the Secretary or designee, shall consider and state in his or her opinion any mitigating or aggravating circumstances. *Because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need for deterrence, ordinarily twice the amount of the claim as alleged by the government, and a significant civil penalty, should be imposed.* The amount of penalties and assessments imposed shall be based on the ALJ's and the Secretary's or designee's consideration of evidence in support of one or more of the following factors ...

24 C.F.R. § 28.40(b) (emphasis added). The regulation then lists 18 factors for consideration.

This matter was remanded in part because the Secretary found that the Court did not calculate the penalty and assessment from the appropriate monetary starting point. It did. When calculating the penalty and assessment in the December 2018 *Initial Decision and Order*, the Court first identified the monetary amounts sought by HUD and described how HUD had calculated the proposed $233,634.70 assessment. The Court then summarized HUD's supporting arguments, recognizing that HUD asserted "the maximum statutory liability is the appropriate starting point" under § 28.40(b) and expressly quoting the second sentence of the regulation (which is italicized in the block quote above).[9]

Moving on, the Court then noted that Team USA had raised a number of purported mitigating factors and that § 28.40(b) lists 18 factors for consideration, and proceeded to

[9] On appeal, HUD asserted that rather than following the guidance provided by the second sentence of § 28.40(b), the Court "engaged during the hearing in a rhetorical exercise of 'adding up' the appropriate assessment, essentially setting the default assessment value at zero and working up to a total." Under our nation's legal tradition, derived from the venerable common law system imported from England long ago in the days of muskets and tri-corner hats, one would think the parties would appreciate a court's offer to explain in advance how it may apply the totality of the regulations before it—that is, not just the regulatory starting point, but the aggravating and mitigating factors, which in this case included the amount of HUD's actual loss under § 28.40(b)(5). At any rate, as HUD recognized, the Court's discussion with counsel at hearing was purely rhetorical. When later rendering its decision in this matter, the Court began at the appropriate starting point, as indicated in the *Initial Decision and Order*. It was quite a reach for HUD counsel to interpret the Court's well-intended remarks at hearing as signaling an intent to ignore the second sentence of § 28.40(b), especially considering that this interpretation required HUD to ignore the explicit reasoning in the *Initial Decision and Order*.

separately consider each of the 18 factors and the parties' arguments therefor. After considering the 18 factors, the Court briefly summarized the key points emerging from these considerations and identified the factors it found most significant. The Court then imposed a civil penalty of $2,000.00 and an assessment of $40,000.00.

On appeal, HUD argued, first, that the Court did not start at the proper monetary amount under the second sentence of § 28.40(b). HUD further argued that the Court improperly determined that Team USA's culpability was low under § 28.40(b)(3). According to HUD, Team USA's culpability was actually high, for the following reasons: (1) the fraud was committed within the scope of Oketch's employment; (2) Team USA violated FHA requirements when it failed to review the subject mortgage after it went into early payment default and when it included a prohibited provision in its employment contract with Oketch; and (3) Boler and Killing were convicted of felonies.

In accepting HUD's argument that the Court did not begin the calculation at the appropriate monetary amount, the Secretary stated:

> I find that the Court was required at the outset to double the ... claim amount paid by HUD and then apply any mitigating factors that may be considered to reduce the assessment. Based on the foregoing, I am remanding this issue for proper recalculation of the assessment and penalty in accordance with the intent of PFCRA, using the Petitioner's $233,634.70 amount as a starting point.

(*Order on Secretarial Review*, p.10.)

With regard to Team USA's culpability, the Secretary upheld the Court's findings, including its finding that the fraud was *not* committed within the scope of Oketch's employment; that Team USA acted with due care and took various measures to prevent fraud; that there was no evidence of intentional or knowing wrongdoing by Team USA itself; and that the FHA violations cited by HUD were not significant aggravating factors. (Id. at 11.) However, in light of his instructions for the Court to reconsider the admissibility and relevance of the evidence of Boler and Killing's criminal convictions, the Secretary found that the Court must reweigh the penalty factors after deciding whether the convictions should influence the calculation. (Id.) The Secretary therefore instructed the Court to "[r]ecalculate the penalty and assessment based on the new monetary starting point, and, if applicable, additional evidence that is admitted into the record regarding prior criminal convictions that would go towards the aggravating and mitigating factors." (Id.)

Accordingly, the Court will recalculate the penalty and assessment. As in the *Initial Decision and Order*, the Court will begin the assessment calculation at $233,634.70 and the penalty calculation at $7,500.00, which are the amounts requested by HUD and the maximum amounts allowed under the statute and regulations.

Consistent with the Secretary's instructions, the Court next considers whether any mitigating factors apply that may reduce the calculation. Subsections (1) to (18) of § 28.40(b) list 18 factors that may be considered.

The Court has already fully considered most of these factors, including those listed in subsections (1) (the number of false claims), (2) (the time period over which the claims were made), (4) (the amount of money falsely claimed), (5) (the value of the government's actual loss), (6) (the relationship of the civil penalties to the loss), (7) (the impact of the misconduct on national defense, public health or safety, and public confidence in the management of government programs and operations), (8) (whether Team USA engaged in a pattern of the same or similar misconduct), (9) (whether Team USA attempted to conceal the misconduct), (10) (the degree to which Team USA involved others), (12) (whether Team USA cooperated in the investigation), (13) (whether Team USA assisted in identifying and prosecuting others), (14) the complexity of the program or transaction and Team USA's sophistication), and (15) (whether Team USA has been found guilty of similar misconduct or dishonest dealings with the government). The Court's prior evaluation of these penalty factors was not disturbed by the Secretary on appeal and is hereby incorporated by reference.

The Court also previously considered the factors in subsections (3) (Team USA's degree of culpability), (11) (the degree to which Team USA's practices fostered or attempted to preclude the misconduct), and (16) (the need for deterrence). HUD argues that the new evidence presented on remand regarding Boler's past wrongdoing justifies an increase in Team USA's culpability under subsection (3) because it shows that the company had a "culture of permissiveness." HUD also argues that Team USA has failed to conduct meaningful quality control, which justifies an increase in the penalty and assessment under subsections (11) and (16). However, the Court has already rejected these arguments. Despite HUD's presentation of evidence regarding Team USA's personnel's past criminal convictions, HUD has failed to link the evidence to the fraud at issue here. And the Court has made extensive findings as to the adequacy of Team USA's quality control efforts. Accordingly, the Court declines to modify its prior findings under subsections (3), (11), and (16), which are hereby incorporated by reference.

Subsection (17) concerns Team USA's ability to pay. The Court previously found that Team USA must maintain certain equity levels to continue in operation as a mortgage broker and that the evidence the company had presented regarding its financial state favored a reduction of the penalty and assessment to ensure that the judgment in the instant case does not drive the company out of business. These findings were not disturbed on appeal. It is reasonable to assume that HUD's protraction of this case by more than a year has imposed litigation costs upon Team USA, further impacting its ability to pay the penalty and assessment, and therefore warranting a further modest reduction.

Subsection (18) suggests that the Court may consider any other factors that may be mitigating or aggravating. The Court previously considered several "other factors" raised by the parties; these findings were not disturbed on appeal and are hereby incorporated by reference. The parties have not raised any additional "other factors" for consideration on remand.

Although the Court started the assessment calculation at $233,634.70 and the penalty calculation at $7,500.00, substantial mitigating factors are present that justify reducing these amounts. As discussed in the conclusion of the *Initial Decision and Order*, this case involves just one instance of fraud; there is no evidence that Team USA has ever engaged in similar misconduct; and Team USA has raised legitimate concerns about its ability to continue in business, now exacerbated by the litigation costs of this protracted proceeding, if the proposed penalty and assessment were to be imposed. Most significantly, Team USA's culpability is low.

After careful consideration, the Court finds that a penalty of $2,000.00 and an assessment of $35,000.00 are appropriate.

ORDER

Team USA is hereby **ORDERED** to pay HUD a civil penalty and assessment in the amount of $37,000.00.

So **ORDERED**,

Alexander Fernández
Administrative Law Judge

Notice of appeal rights. The appeal procedure is set forth in detail in 24 C.F.R. § 26.52. This order may be appealed to the Secretary of HUD by either party within 30 days after the date of this decision. The Secretary (or designee) may extend this 30-day period for good cause. If the Secretary (or designee) does not act upon the appeal within 30 days, this decision becomes final.

Service of appeal documents. Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development
Attention: Secretarial Review Clerk
451 7th Street, S.W., Room 2130
Washington, DC 20410

Facsimile: (202) 708-0019

Scanned electronic document: secretarialreview@hud.gov

Copies of appeal documents. Copies of any Petition for Review or statement in opposition shall also be served on the opposing party(s), and on the HUD Office of Hearings and Appeals.

Judicial review of final decision. Judicial review of the final agency decision in this matter is available as set forth in 31 U.S.C. § 3805.