UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY

United States Department of Housing and Urban Development, Petitioner,	)	HUDOHA 18-AF-0078-PF-006
v.	)	April 1, 2020
Team USA Mortgage, LLC, Respondent.	)	

For the Petitioner: Geoffrey L. Patton, Esq.; Joel A. Foreman, Esq.; Joseph J. Kim, Esq.

For the Respondent: Jesse R. Johnston, Esq. at Dickinson, Mackaman, Tyler & Hagen, P.C.

REMAND ORDER ON SECRETARIAL REVIEW

On February 11, 2019, the U.S. Department of Housing and Urban Development ("HUD" or "Petitioner") submitted a brief appealing the December 6, 2018, Corrected Initial Decision and Order ("Initial Decision") issued by Administrative Law Judge Alexander Fernández ("ALJ"). In the Initial Decision, the Court held Team USA ("Respondent") vicariously liable under the Program Fraud Civil Remedies Act ("PFCRA") and imposed penalties and assessments totaling $42,000.00. The ALJ made this award determination based on his consideration of several aggravating and mitigating factors presented by the parties. Petitioner appealed the Initial Decision to the Secretary and on March 12, 2019, an Order on Secretarial Review ("Secretarial Order") was issued affirming the ALJ's finding that held Respondent vicariously liable for its employee's fraudulent conduct and remanding the case to the ALJ to (1) obtain more evidence with respect to Respondent personnel's prior criminal convictions; and (2) recalculate the penalty and assessment based on any new evidence that is admitted.

In adherence to the Secretarial Order, the Court held a limited hearing on remand and on February 3, 2020, issued a second order, *Initial Decision and Order on Remand* ("Remand Decision"), in consideration of the additional evidence presented. The Remand Decision determined that the evidence of prior bad acts of Dan Boler, previous Team USA owner, did not demonstrate that there was a culture of permissiveness at Team USA and Team USA implemented a quality control plan and routinely took measures to detect and prevent fraud. The Court also reduced the assessment previously awarded and maintained its original determination that Team USA's culpability was low.

On March 4, 2020, HUD submitted a *Notice of Second Appeal and Brief in Support* ("Second Appeal"), appealing the Remand Decision arguing that the Court's findings were not supported by the record and requesting the Secretary reverse the Remand Decision and issue an order awarding the full assessment and civil penalty originally sought. On March 23, 2020, Respondent submitted Team USA's Brief in Opposition to HUD's Second Appeal ("Opposition to Second Appeal") agreeing with the ALJ's Remand Decision and arguing that Petitioner did not present any additional evidence concerning Respondent's quality control or review of early payment defaults. On March 27, 2020, Petitioner submitted *Government's Response to Team USA's Brief in Opposition to HUD's Second Appeal* ("Government's Response Brief") arguing that Team USA's assertions in its Opposition to Second Appeal regarding their ability to pay were outside the scope of the Secretary's remand, thus the Court should not have considered them.[1] On March 30, 2020, Respondent submitted *Team USA Mortgage, LLC's Resistance to HUD's Motion for Leave to File Reply* ("Resistance to HUD's Motion for Leave") arguing that if the Secretary accepts HUD's "outside of the scope" argument in the Government's Response Brief, then he should also strike and disregard every fact, claim, argument, or conclusion proffered by HUD that is not directly related to evidence produced at the hearing on remand.[2]

Upon review of the entire record of this proceeding, the Second Appeal is **AFFIRMED IN PART AND DENIED IN PART**. The Remand Decision is **AFFIRMED IN PART AND MODIFIED IN PART** for the reasons set forth below.

BACKGROUND

The Program Fraud Civil Remedies Act, enacted in 1986 and codified at 31 U.S.C. § 3801 et seq., 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 or has reason to know to be false, fictitious, or fraudulent, or know 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). HUD regulations at 24 C.F.R. Part 28 mirror the PFCRA statute in providing a procedure for the agency to impose civil liability against persons who make, submit, or present false, fictitious, or fraudulent claims to the agency. See 24 C.F.R. § 28.10(a)(1).

In the instant case, Petitioner brought a PFCRA action based on false claims submitted to the Federal Housing Administration ("FHA") under its Single-Family Insurance Program, established in accordance with Section 203(b) of the National Housing Act (12 U.S.C. § 1709(b)). Under the program, homebuyers may obtain FHA mortgages from HUD-approved lenders to purchase houses with low down payments. FHA mortgage insurance provides lenders with protection against losses if the homeowners default on their mortgage loans. The lenders bear less risk because FHA will pay a claim to them in the event of a homeowner's default. In this case, FHA insured a loan originated by Respondent around January 2010, that subsequently went into default in July 2010, prompting the mortgagee to submit two FHA insurance claims for

[1] This brief is accepted pursuant to the Secretary's authority under 24 C.F.R. § 26.52(d).
[2] This brief is also accepted pursuant to the Secretary's authority under 24 C.F.R. § 26.52(d).

payment on the defaulted loan. Petitioner paid out $191,472.90 in insurance benefits while selling the subject property for $66,000.00.

The fraud at issue in this case was performed by Patrick Oketch, a loan officer and branch manager for Team USA. Ralph Killing, a loan officer working at the same branch office managed by Mr. Oketch, was also a party involved in this case since his name and signature appeared on many of the documents in the loan file for the subject mortgage. In the instant case, Mr. Oketch committed fraud by altering a borrower's bank statements and providing her with the down payment to close on the subject loan. The borrower would not have qualified for the loan had these actions not been taken by Mr. Oketch. At the first hearing, former Team USA owner, Dan Boler and current owner, Bryan Root, testified about Team USA's policies and practices. During Petitioner's cross-examination of Mr. Boler at the hearing, Counsel attempted to question Mr. Boler about his prior felony conviction. Respondent objected pursuant to Rule 404 of the Federal Rules of Evidence, arguing that character evidence cannot be admitted to show a person or entity's propensity for bad acts. Petitioner 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." The Court sustained Respondent's objection, finding that Petitioner had not laid a foundation for the evidence of Mr. Boler's prior felony conviction. Petitioner then made an offer of proof stating his intent to present testimony regarding Mr. Boler's felony conviction, as well as, the felony conviction of Mr. Killing. The hearing continued to completion without this evidence being admitted.

The Initial Decision held Respondent vicariously liable under PFCRA and imposed penalties and assessments totaling $42,000.00, derived from consideration of several aggravating and mitigating factors presented by the parties. Petitioner appealed requesting the Secretary find that (1) Respondent was vicariously liable because Mr. Oketch acted within the scope of his employment instead of because he acted under apparent authority; (2) Petitioner's proffered evidence should have been admitted; (3) the factors based upon Petitioner's level of culpability should be reconsidered; and (4) the case should be remanded for recalculation of the appropriate judgment, including the excluded evidence.

On March 12, 2019, the Secretarial Order was issued affirming the Court's holding that Mr. Oketch was not acting within the scope of his employment; however, still holding Respondent liable for the actions of Mr. Oketch under the doctrine of apparent authority. The case was also remanded for 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, in light of evidence that may be admitted into the record regarding prior criminal convictions that would go toward aggravating and mitigating factors.

On August 27, 2019, the Court held a limited hearing where Petitioner presented testimony from Mr. Boler and Mr. Root.[3] In the Remand Decision, the ALJ determined that the evidence of prior bad acts did not demonstrate that there was a culture of permissiveness at Team

[3] Prior to the limited hearing, Petitioner filed a *Motion for Admission of Documentary Evidence* asking the Court to admit evidence with respect to Dan Boler's criminal conviction and Ralph Killing's prior felony conviction. However, Petitioner presented no further evidence or testimony pertaining to Mr. Killing at the hearing. Remand Order at 6-7.

USA, but instead that Team USA implemented a quality control plan and routinely took measures to detect and prevent fraud. Additionally, the Court reduced the assessment previously awarded and maintained its original determination that Team USA's culpability was low.

Under HUD's implementing regulations of PFCRA, a civil penalty of up to $7,500 may be imposed upon any person who is found liable under the regulation. 24 C.F.R. § 28.10 (2012). Additionally, if the government paid the claim, the person is subject to an assessment of not more than twice its amount. 24 C.F.R. § 28.10(a)(6). The ALJ is tasked with determining the appropriate amount of civil penalties and assessments by considering whether any mitigating or aggravating factors are present, including the eighteen listed at 24 C.F.R. § 28.40(b). Petitioner has the burden of proving any aggravating factors and Respondent has the burden of proving any mitigating factors. 24 C.F.R. § 26.45(e). Here, Petitioner sought the maximum civil penalty of $7,500.00 and an assessment of $233,634.70. In the Initial Decision, the Court awarded a penalty of $2,000.00 and an assessment of $40,000.00 based on the evidence presented for the eighteen aggravating and mitigating factors. After consideration of the additional evidence introduced at the limited hearing, the Court reduced its original judgment amount and awarded a penalty of $2,000.00 and an assessment of $35,000.00.

DISCUSSION

I. The Prior Criminal Evidence Does Not Demonstrate a "Culture of Permissiveness."

In Petitioner's *Post Hearing Brief on Remand* ("Post Hearing Brief") and Second Appeal, Petitioner argued that testimony from Dan Boler regarding his prior criminal history helps demonstrate a "culture of permissiveness" at Team USA that constitutes an aggravating factor under 24 C.F.R. § 28.40(b)(3). See Post Hearing Brief at 3-4; Second Appeal at 8-10. Specifically, Petitioner asserted that Mr. Boler's criminal acts of personally and knowingly originating mortgages that included undisclosed kickbacks to the buyer, constituting fraud, was "essentially no different from Mr. Oketch's act of providing the borrower with her required down payment." Post Hearing Brief at 4-5; Second Appeal at 9, fn. 9. Additionally, to support its position, Petitioner cited Mr. Boler's "cavalier" attitude while testifying at the hearing and viewed this as being indicative of his attitude regarding the culture of Team USA. Post Hearing Brief at 5. Lastly, Petitioner also considered Mr. Boler's testimony at the hearing as an attempt to absolve himself of any responsibility for his own criminal conduct. Id.

Pursuant to 24 C.F.R. § 26.47, the Court "shall admit any relevant oral or documentary evidence that is not privileged." The Federal Rules of Evidence provide guidance to the ALJ when making evidentiary rulings in administrative hearings. Relevant evidence is evidence that is probative of a material fact. See Fed. R. Evid. 401. 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). Even if evidence is relevant, it may not be admissible if found to be highly prejudicial. 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. See Fed. R. Evid. 404. However, such evidence may be admissible

for another purpose, such as motive, opportunity, intent, knowledge, identity, and so forth. Fed. R. Evid. 404(b)(2). Here, the Court determined that the evidence of Mr. Boler's prior criminal convictions was relevant, but that Petitioner failed to lay a foundation to introduce the evidence for a permissible purpose under Rule 404. Remand Decision at 8-9. Despite this determination, the ALJ allowed admission of the evidence since "the risk of prejudice is low in a bench trial." Id. at 10.

The Court determined that the mere fact that Mr. Boler had previously committed fraud did not create a culture of permissiveness at Team USA. Remand Decision at 13. To support its ruling, the Court distinguished Mr. Boler's conduct from that of Mr. Oketch in emphasizing that Mr. Oketch's behavior was intentional, completed with knowledge that it was illegal, was carried out in a covert manner, and served his own personal interest. Remand Decision at 11. In contrast, Mr. Boler's conduct was completed without knowledge that it was illegal, he did not conceal his actions, and the only benefit he received was business from the transactions (no portion of the illegal aspect of the deal, such as kickbacks). Id. at 11-12. Additionally, the Court determined that even if Mr. Boler's misconduct was similar to Mr. Oketch's, this would not alone establish a relationship between the two instances of fraud since "[Mr.] Boler was not the ringleader or a personal beneficiary of the fraudulent transactions, but simply a participant caught up in a dubious scheme..." Id. The Court went even further to characterize Mr. Boler's action of willingly choosing to withdraw from the situation when he became skeptical of its legality as "commendable." Id. Consequently, the Court determined that the facts presented were insufficient to prove a link between Mr. Boler's prior crime and Mr. Oketch's fraud.

Petitioner did not present any direct evidence at the hearing or in its Second Appeal to demonstrate that the employees at Team USA, specifically Mr. Oketch, were aware of Mr. Boler's prior conviction. The prior criminal evidence of Mr. Boler that Petitioner did present at the hearing did not adequately demonstrate a culture of permissiveness by Team USA. The inference Petitioner has attempted to put forth that because Mr. Boler previously committed fraudulent crimes that this conduct somehow encouraged Mr. Oketch's fraudulent acts and created a culture of permissiveness at his next business venture is untenable. As uncovered during the limited hearing, Mr. Boler's testimony directly challenges Petitioner's claim that Mr. Boler's prior conviction and fraudulent actions at Team Access likely caused him to exhibit this same or similar culture at Team USA. Mr. Boler stated in his testimony that his intentions when opening Team USA was to change his atmosphere and environment by cutting himself off from the fraudulent rebate scheme and the people involved in it at Team Access. Remand Decision at 6; 2Tr. at 37, 10-22; 38, 1-15. Additionally, Mr. Boler testified that he did not initially inform his employees or colleagues at Team USA about his involvement in questionable transactions at Team Access, his former company. 2Tr. at 46, 13-22. It was not until around 2010, three years after opening Team USA, that he shared some information[4] with current owner, Mr. Root. 2Tr. at 50, 10 - 52, 16.

In consideration of this additional evidence, I find that Petitioner's assertion that Team USA was on notice of Mr. Boler's prior criminal acts and that these acts created an environment

[4] Mr. Boler disclosed to Mr. Root, prior to selling Team USA to him, that he had been contacted by investigators about mortgages involving rebates on investment properties. At the hearing, Mr. Boler was unsure of how much detail he provided to Mr. Root regarding the investigation.

of noncompliance and culture of permissive fraudulent behavior on the part of the employees is unsupported. The evidence does not clearly demonstrate that employees at Team USA, particularly the employee at issue here, Mr. Oketch, were aware of Mr. Boler's past fraudulent acts or that Mr. Boler's past actions caused him to create a culture of permissiveness at Team USA. Therefore, the Court's determination that Petitioner did not present adequate evidence to demonstrate a culture of permissiveness is affirmed.

II. Respondent Failed to Adhere to Quality Control Plan.

The standard for calculating penalties and assessments in PFCRA cases is set forth in 24 C.F.R. § 28.40(b). In determining an appropriate amount of civil penalties and assessments, the ALJ, and upon appeal, the Secretary shall consider and state in his or her opinion any mitigating and aggravating factors. Id. There are eighteen factors the ALJ and the Secretary or designee should consider. Id. The ALJ considered each of these factors and the parties' arguments when issuing his Initial Decision and Remand Decision. Initial Decision at 19-25; Remand Decision at 17-18. However, at the limited hearing, Petitioner only raised arguments with respect to aggravating factors (11) and (16). The arguments set forth by Petitioner, as noted by the Court, have no linkage to the evidence regarding Mr. Boler's criminal conviction, which was the only evidence the Secretarial Order instructed the Court to obtain. Remand Decision at 12-13. Nonetheless, since the Court allowed this additional information to be presented and altered its previous award based on it, I will make a determination on these factors.

Factor 11

Factor 11 requires Petitioner to prove that misconduct of the employees or agents should be imputed to the Respondent and the extent to which the Respondent's practices fostered or attempted to preclude the misconduct. 24 C.F.R. § 28.40(b)(11). As an aggravating factor, Petitioner must provide sufficient evidence to prove that this factor should be considered in determining the penalty and assessment for Respondent. HUD requires that all FHA approved mortgagees implement and continuously have in place a Quality Control Plan for the origination and/or servicing of insured mortgages as a condition of receiving and maintaining FHA approval. HUD Handbook 4060.1 REV-2, 7-1. The quality control function must be independent of the origination and servicing functions. Id. at REV-2, 7-2(B). In adherence to the Quality Control Plan, mortgagees must review all loans going into default within the first six payments. Id. at REV-2, 7-6(D).

The Court determined that Petitioner did not provide adequate evidence to demonstrate that Respondent failed to conduct meaningful quality control or exhibited a "head-in-the-sand" attitude that must be deterred. Remand Decision at 16. In the Court's discussion of quality control efforts, the ALJ began by listing various measures Respondent took to prevent fraud with respect to its own employees and how they originate loans.[5] The ALJ also described in detail the

[5] Measures included conducting background checks on all employees before hiring them, periodically evaluating the employees' work, requiring Mr. Oketch to send all 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, and requiring employees to obtain written verification of borrower's employment, among other things.

ten-page Quality Control Plan submitted by Respondent and acknowledged by HUD that was implemented to ensure Team USA's compliance with all FHA requirements. Remand Decision at 13.[6] At the April 2018 hearing, Mr. Boler also testified that this plan was implemented by the company's manager, Deb Peterson. Id. at 14. Additionally, the ALJ noted that at the hearing, Respondent produced a copy of its Quality Control Plan from the Mr. Oketch era, shared testimony that it reviewed 10% of its closed files at the time, and produced the loan file for the subject loan, which contained documents such as credit reports and verifications of employment. Id.

Moreover, the Court opposed Petitioner's claim that Respondent violated FHA regulations by its indifferent attitude with respect to the performance of its loans and unwillingness to seek potential problems. Id. at 15. The Court stated that Petitioner did not establish in its argument that the FHA imposes a loan tracking requirement on approved lenders or that Respondent violated it. Id. The ALJ further stated that "it was 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." Id.

Petitioner argued that Respondent's failure to conduct an Early Payment Default (EPD) review – required of all approved lenders – speaks to how Team USA ran its operations during the relevant period and thus serves as an aggravating factor. Second Appeal at 4, 12-13. Petitioner also stated that Respondent's failure to produce any documentary evidence rebutting this inference serves as strong circumstantial evidence that this one incident of failure to comply was not an isolated incident, but representative of Team USA's quality control processes as a whole. Id. at 4. Additionally, Petitioner argued that the testimony from HUD's Senior Housing Specialist[7] along with Mr. Root's testimony demonstrated that Team USA's failure to track its loan portfolio for EPDs was not an "understandable mistake" as suggested by the Court, but deeply reckless. Second Appeal at 5-6. Petitioner also argued that its position was further supported by Mr. Root's testimony that he was unaware of any other instance of fraud in the company's history and that this raised an inference that Team USA's process was ineffective. Second Appeal at 7. Lastly, to support its position of the necessity of tracking, Petitioner cited to Mr. Root's testimony stating that "all the procedures that were supposed to file due [sic] at that time were followed" and that the Oketch loan "would get by our process now…But, before the loan closed we probably wouldn't catch it." Second Appeal at 12, 1 Tr. 332, 9-12.

In Respondent's Opposition to Second Appeal, it challenged Petitioner's argument that Respondent did not present sufficient evidence to demonstrate it implemented appropriate quality control procedures. See Second Opp'n Br. at 8. Respondent cited to the Secretarial

[6] The plan required Team USA to review 10% of all closed loans randomly selected and to periodically target certain suspect categories of loans for review. The plan also required Team USA to review any loan that became 60 days past due within the first 6 payment period.

[7] Petitioner provided testimony from a Senior Housing Specialist who stated that FHA-approved lenders are obligated to track EPDs with respect to HUD Handbook 4060.1 REV-2, 7-6(D) and that Team USA failed to adhere to these requirements.

Order[8] and the ALJ's Remand Order[9] in support of its position. Id. Additionally, Respondent affirmed the ALJ's position that even though Respondent failed to review the EPD in this case, in accordance with the Handbook, "that fact did not warrant any additional assessment, because Team USA's degree of culpability was low." Id. at 9. Lastly, Respondent argued that "HUD fail[ed] to cite any evidence that counters the testimony and documentary evidence submitted by Team USA." Id. at 11.

Petitioner's argument that Respondent's failure to review the EPD loan in this case and its practice of waiting to be informed of EPDs is valid in demonstrating Respondent's lack of proactiveness to preclude the fraudulent behavior carried out by its former employee, Mr. Oketch. In fact, in this actual case, Respondent's practice – waiting to be informed of EPDs – caused it to violate its FHA requirement of reviewing the loan at issue that went into default within the first six payments. HUD Handbook 4060.1 REV-2, 7-6(D). While review of the loan would not have prevented the fraudulent act in this case, it would have at least brought the fraudulent conduct to the Respondent's attention sooner for it to revise or create additional safeguards to avoid this from happening again. As acknowledged by all parties to this case and the presiding ALJ, Respondent had devised a detailed Quality Control Plan and appears to have implemented the majority of its provisions. However, Respondent's current practice of how it detects and addresses EPDs does show a lack of proactiveness.

Respondent's witnesses testified that it is the company's practice to rely on other parties to notify it of problems with its loans. See 1 Tr. 355, 5-19. This is a problematic position for a lender to take when it must adhere to an FHA requirement that it complete a review of *all* loans going into default within the first six payments. If the lender does not track new loans and instead waits for others to alert it of a triggering event, there is a high probability, as shown with this case, that the lender will at some point, unbeknownst to it, be in violation of this FHA requirement. Admittedly, the initial reading of provision 7-6(D) of HUD's Handbook does not clearly appear to impose a tracking requirement for new loans. However, Petitioner's arguments advanced and testimony from a Housing Specialist provide further clarification on how this requirement is intended to be met by its lenders.[10] Lastly, Petitioner's reference to Mr. Root's testimony at trial[11] further supports Petitioner's argument of the importance for lenders to be proactive and track loans after origination and review EPDs in order to have a better chance at catching any potential fraud that may have occurred during the origination process. While Respondent's violation of the FHA requirement to review EPDs in this case would not have prevented the fraud that occurred, it would have alerted it to implement some additional measures in its Quality Control Plan (origination process), in an effort to preclude this from happening again. Therefore, in light of this evidence, the Court should have viewed this as an aggravating factor increasing the penalty amount.

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[8] See Secretarial Order at 11. It was originally determined, prior to the additional arguments raised by Petitioner in its Second Appeal, that Team USA presented evidence that it acted with due care and took various measures to prevent fraud. Specific actions taken by Team USA were also listed.

[9] See Remand Decision at 12-13.

[10] Provision 7-6(D) requiring lenders to review all loans going into default within the first six payments impliedly also requires lenders to track its loans within that period of time to know when a default occurs for it to review the loan.

[11] Mr. Root testified to the difficulty of detecting fraud during loan origination and how unlikely it would have been in this case for Respondent to catch Mr. Oketch's fraudulent behavior. 1 Tr. 350, 2-25.

Factor 16

Factor 16, an aggravating factor, requires Petitioner to prove that there is a need to deter Respondent and others from engaging in the same or similar misconduct. 24 C.F.R. § 28.40(b)(16). In its Remand Decision, the Court acknowledged the importance deterrence makes in dissuading FHA lenders from committing fraud. Remand Decision at 16. However, the ALJ in making his final decision, also recognized that deterrence becomes a less significant factor when the conduct for which the FHA lender is being held liable was very difficult to prevent. Id. The ALJ referenced several quality control measures that had been taken by Respondent prior to the April 2018 hearing demonstrating that Respondent had attempted to take steps to catch fraud sooner based on the illegal activity in this case. Remand Decision at 14. Mr. Root testified that some of the additional measures taken involved re-running credit reports, obtaining verification of deposits and income, monitoring employee communications more closely, and requiring all documents be electronically submitted so the company could maintain a record of submissions. Id.

In its appeal, Petitioner argued that the evidence it presented supports a need for deterrence and that from the testimony given, the most effective method of getting the message across is to impose a significant judgment against the Respondent. Second Appeal at 13. To support its position, Petitioner referenced testimony given by Mr. Root at the initial hearing where he discussed that he felt no responsibility for Mr. Oketch's fraud and expressed disinterest in modifying its policies or procedures to prevent another instance of employee fraud. Second Appeal at 13; 1 Tr. 350, 2 - 351, 9. Petitioner also proffered a global argument that deterrence is needed in this case to send a message to other HUD-approved lenders that program noncompliance does not go unpunished. Second Appeal at 13.

In the Initial Decision, the Court previously relied on factor (16) when assessing a penalty. Initial Decision at 24. The ALJ explained that because Team USA was ultimately responsible for the conduct of its loan officers in originating loans and that the facts in this case – Mr. Oketch's name appearing both on the sales contract and documentation in the loan file – should have raised a red flag when Team USA processed the loan, it warranted a penalty and assessment as a deterrent. Id. In considering the additional arguments posed by Petitioner at the limited hearing, the Court chose not to increase the original assessment. I affirm this position. The testimonial evidence Petitioner cited and argument it advocated for using this case as an example to other lenders are not compelling enough to justify an increase in the previous assessment determined by the Court based on this factor. Furthermore, Respondent has also made improvements to its practices since the fraud at issue here occurred, acknowledging the importance of preventing future cases of undetected fraud.

III. Respondent Proved Further Evidence of Its Inability to Pay.

In the Remand Decision, the ALJ justified its reduction of his initial award based on factor (17), Team USA's ability to pay. Remand Decision at 19. In his decision, the ALJ stated, [i]t 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." Id. In response to the Court's

determination, Petitioner argued that neither party had an opportunity at the limited hearing to address whether the continuation of litigation affected Team USA's ability to pay and that the Court's justification for its reduction was mere speculation. Second Appeal at 10. Additionally, Petitioner argued that there is no evidence in the record showing any change in Team USA's finances since the Initial Decision. Id. However, in Respondent's Opposition to Second Appeal, it stated that evidence was presented to show its financial status had changed and cited to a motion and affidavit[12] it submitted concerning venue on April 20, 2019. Second Opp'n Br. at 14. In the affidavit, Mr. Root stated that Team USA's financial status had worsened since the original trial, the net loss of the company had decreased, and the costs associated with the hearing on remand would result in additional costs. Id. In the Government's Response Brief, it countered Respondent's argument stating that the evidence presented to support its inability to pay was outside the scope of remand, neither Respondent nor the Court used this evidence to argue for an assessment reduction, and Respondent's efforts now are post hoc rationalization. Gov't Response Br. at 2-3. In its Resistance to HUD's Motion for Leave, Respondent refutes the Government's "outside of the scope" argument by asserting that any evidence presented by the Government not concerning Mr. Boler's criminal history was also outside of the scope, and therefore should not have been considered. Resistance to HUD's Motion at 2.

The Secretarial Order instructed the Court to recalculate the penalty and assessment based on the new monetary starting point provided. In recalculating the final award amount, it was reasonable for the ALJ to reconsider each of the eighteen factors that may have been affected since his Initial Decision. In this case, the ALJ's further reduction of the award amount with respect to Respondent's ability to pay was reasonable in light of the evidence Respondent provided in the affidavit by Mr. Root detailing the financial status of the company and how much its value had decreased since the start of the case. Since this information was submitted after the Secretarial Order was issued and is part of the record, it was appropriate for the Court to take it into consideration when making his final determination of the assessment and penalty. Therefore, we affirm the Court's decision to further reduce the penalty and assessment with respect to factor (17), Respondent's ability to pay.

IV. Conclusion

Under PFCRA, Petitioner may be awarded an assessment of twice the amount of the paid claim. 31 U.S.C. § 38.02(a)(1)(D); 24 C.F.R. § 28.40(b) (2012). Additionally, PFCRA allows a civil penalty of up to $7,500 to be imposed upon any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that person knows or has reason to know: (1) is false, fictitious, or fraudulent; or (2) includes or is supported by a written statement which asserts a material fact which is false, fictitious, or fraudulent. 24 C.F.R. § 28.10. The appropriate amount of penalties and assessments shall be based on the ALJ's and the Secretary or designee's consideration of the evidence in support of several mitigating and aggravating factors. Id. at 28.40(b); 31 U.S.C. § 38.02(a)(1)(D).

Petitioner has sought an assessment of $233,634.70 and a civil penalty of $7,500.00 in consideration of evidence presented to support the application of several aggravating factors. Second Appeal at 11-14. Respondent also presented evidence in support of several mitigating

[12] *Team USA Mortgage, LLC's Motion Concerning Hearing Venue and Affidavit of Bryan Root.*

factors. First Opp'n Br. at 13-15. In the Remand Decision, the Court, as instructed in the Secretarial Order, started the assessment calculation at $233,634.70 and the penalty calculation at $7,500.00. However, he noted that substantial mitigating factors were present to justify reducing the amounts. Remand Decision at 20. He reiterated the same considerations from his Initial Decision that included the fact that this case involved one instance of fraud; there was no evidence that Team USA ever engaged in similar misconduct; Team USA raised legitimate concerns about its ability to continue its business (now exacerbated by this proceeding) if the proposed penalty and assessment were imposed; and the ALJ's determination that Team USA's culpability was low. Id. Therefore, the Court determined that a penalty of $2,000.00 and an assessment of $35,000.00 were appropriate.

I affirm the Court's consideration of all eighteen factors, with the exception of factor (11). Based on the discussion above for factor (11), I believe the Court should have increased the penalty and assessment imposed upon Respondent due to its practice of not proactively tracking loans during the first six payments to ensure its compliance of FHA regulation. See HUD Handbook 4060.1 REV-2, 7-6(D). Therefore, in consideration of Petitioner's arguments in support of aggravating factors, Respondent's arguments in support of mitigating factors, and the Court's determination, I find that a penalty of $3,000.00 and an assessment of $60,000.00 are awarded to the Petitioner.

Upon review of the entire record of this proceeding, the Second Appeal is **AFFIRMED IN PART AND DENIED IN PART**. The Remand Decision is **AFFIRMED IN PART AND MODIFIED IN PART** as described above.

IT IS SO ORDERED.

Dated this 1 day of April, 2020

Andrew Hughes
Secretarial Designee