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

In the Matter of: **George and Terri Silver**, Petitioners.	18-AM-0230-AO-064 7-210133980A August 10, 2021

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a *Request for Hearing* ("*Hearing Request*") filed on or about August 30, 2018, by George and Terri Silver ("Petitioners") concerning the existence, amount, or enforceability of the payment schedule of the debt allegedly owed to the U.S. Department of Housing and Urban Development ("HUD" or "the Secretary"). The Debt Collection Improvement Act of 1996 authorizes federal agencies to use administrative offset as a mechanism for the collection of debts owed to the United States government. *See* 31 U.S.C. §§ 3716, 3720A.

The Office of Hearing and Appeals has jurisdiction to determine whether Petitioners' debt is past due and legally enforceable pursuant to 24 C.F.R. §§ 17.61 *et. seq*. The administrative judges of this Court, in accordance with the procedures set forth in 24 C.F.R. §§ 17.69 and 17.73, have been designated to conduct a hearing to determine, by a preponderance of the evidence, whether the alleged debt is past due and legally enforceable.

PROCEDURAL BACKGROUND

Pursuant to 24 C.F.R. § 17.81(a), on September 11, 2018, this Court stayed the issuance of an administrative offset order until the issuance of this written decision. (*See Notice of Docketing, Order and Stay of Referral* ("*Notice of Docketing*") at 2). On or around September 18, 2018, Petitioners filed a *Statement* ("*Petr's. Stat.*") and documentary evidence in support of his position. On December 21, 2018, the Secretary filed his *Statement* ("*Sec'y. Stat.*"), along with documentary evidence in support of his position. Subsequently, on January 4, 2019, Petitioners filed a *Response to the Secretary's Statement* ("*Petr.'s Resp.*") with additional documentary evidence in support of their position.

FINDINGS OF FACT

In or about January 2014, the HUD-insured mortgage on Petitioners' home was in default and Petitioners were threatened with foreclosure. (*See Sec'y. Stat.*, ¶ 2; *Sec'y. Stat.*, Ex.A, Declaration of Brian Dillon ("Dillon Decl."), ¶ 4). To provide foreclosure relief, HUD advanced

funds to Petitioners' primary lender to bring the loan current, and Petitioners entered into a loan modification agreement wherein the primary lender ("Chase") agreed to modify the terms of the primary mortgage. (*See Petr's. Stat.* at 1 & 17; *Petr.'s Resp.* at 1-3, ¶¶ 2-4 & ¶ 20, and at 6). In exchange for HUD's advancement of funds, on January 29, 2014, Petitioners executed a Subordinate Note ("Note") in the amount of $66,386.74 in favor of the Secretary. (*See Sec'y. Stat.*, Ex. B, Note, ¶ 2; *see also Petr's. Stat.* at 4).

Paragraph 4(A) of the Note cites specific events that make the debt become due and payable. One of those events is the payment in full of the primary note. (*See Sec'y. Stat.*, ¶ 5; *Dillon Decl.*, ¶ 4; *Sec'y. Stat.*, Ex. B, Note, ¶¶ 4(A)(i); *see also Petr's. Stat.* at 4, ¶¶ 4(A)(i)). On or about February 15, 2018, Petitioners sold their home. Petitioners allege they were advised by Apple Tower Title, the title company hired to do the closing on the home, that all the debts and loans attached to the home were paid off in full. (*See Petr's. Stat.* at 1 & 20; *Petr.'s Resp.* at 1, ¶ 7, and at 2-3, ¶¶ 18-22 & ¶ 31). Upon payment in full of the primary note, Petitioners were to make payment to HUD on the Note at the "Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, SW, Washington, DC 20410 or any such other place as [HUD] may designate in writing by notice to Borrower." (*See Sec'y. Stat.*, ¶ 7; Note, ¶ 4(B); *see also Petr.'s Stat.* at 4, ¶ 4(B)).

Petitioners failed to make payment on the Note at the place and in the amount specified above. Consequently, the Secretary alleges that Petitioners' debt to HUD is delinquent. (*See Sec'y. Stat.*, ¶ 8; *Dillon Decl*., ¶ 5). The Secretary has made efforts to collect this debt from Petitioners by sending a *Notice of Intent to Collect by Treasury Offset* ("*Notice*") dated July 16, 2018 to Petitioners. (*See Sec'y. Stat.*, ¶ 10; *Dillon Decl*., ¶ 6; *see also Petr.'s Resp.* at 2, ¶ 10). However, there is still no evidence Petitioners have paid off the Note. Therefore, the Secretary asserts that Petitioners are justly indebted to the Secretary in the following amounts:

a) $66,386.74 as the unpaid principal balance as of November 30, 2018;

b) $331.80 as the unpaid interest on the principal balance at 1% per annum through November 30, 2018;

c) $4,031.81 as the unpaid penalties and administrative costs through November 30, 2018; and

d) interest on said principal balance from December 1, 2018 at 1% per annum until paid.

(*See Sec'y. Stat.*, ¶ 9; *Dillon Decl*., ¶ 5).

DISCUSSION

31 U.S.C. § 3720A provides federal agencies with administrative offset of federal payments as a remedy for the collection of debts owed to the United States government. 31 U.S.C. § 3716 authorizes executive agencies such as HUD to collect debts owed to the United States Government through means including administrative offset. Pursuant to 24 C.F.R. §

17.69(b)-(c), Petitioners must show by a preponderance of the evidence that all or part of the alleged debt is either not past due or not legally enforceable.

As evidence of Petitioners' indebtedness, the Secretary has filed S*ecretary's Statement That Petitioner's Debt is Past Due and Legally Enforceable* (*see Sec'y. Stat*.); a sworn declaration by Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center (*see Dillon Decl*.); and a copy of the Note (*see Sec'y. Stat.*, Ex. B). Accordingly, the Court finds that the Secretary has met his initial burden of proof.

"A petitioner has the burden of producing evidence which demonstrates that the claimed debt is not past-due or legally enforceable." *See Michael Cook*, HUDBCA No. 87- 2782-H307 (Aug. 11, 1988). In the case at bar, Petitioners claim they should not be held responsible for the subject debt because they (1) were advised by Apple Tower Title that "all debts and loans on the [home] property were paid in full" (*see Petr.'s Resp.* at 1-3, ¶¶ 7-8 & ¶¶ 18-21); (2) have "a letter from Chase with the account number for the Subordinate loan showing paid in full" and a "Satisfaction of Mortgage from Chase advis[ing] that the full amount of the loan including the subordinate mortgage was paid in full" (*see Petr.'s Resp.* at 1-2, ¶ 8, ¶ 11, & ¶ 18); and (3) were "NEVER directed by HUD, Chase, or the Title company to mail any type of payment [to HUD]." (*See Petr.'s Resp.* at 1, ¶ 7).

Petitioners introduced, as support for their position, copies of their January 29, 2014 Subordinate Mortgage (*see Petr.'s Stat*., Ex. A); July 29, 2014 FHA Home Affordable Modification Agreement (*see Petr.'s Stat*., Ex. B); June 11, 2018 Satisfaction of Mortgage statement (*see Petr.'s Stat*., Ex. C); November 26, 2008 original mortgage (*see Petr.'s Stat*., Ex. D); and February 1, 2018 Chase Mortgage Payoff statement (*see Petr.'s Stat.* at 25).

Petitioners' claim that they were, mistakenly, advised by Apple Title Tower that they paid HUD as part of Petitioners' home closing is insufficient evidence to establish that the Note is not past due or is unenforceable against Petitioners. *See Nancy Brignoni*, HUDOA No. 10-H-NY-AWGl 1 (April 26, 2011). The Secretary's right to collect the alleged debt in this case emanates from the terms of the Note, not from the representations made by a mortgage company or title company. *See Bruce R. Smith*, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). Accordingly, although Apple Tower Title informed Petitioners that "all debts were paid in full," without any documentation evidencing Petitioners paid the subject debt to HUD, Petitioners still owe payment on the Note. (*See Petr.'s Resp.* at 1-3, ¶¶ 7-8 & ¶¶ 18-21).

Here, the June 11, 2018 Satisfaction of Mortgage statement, introduced by Petitioners to prove that the subject debt to HUD was paid in full, shows instead that the primary mortgage of $164,969.58 owed to Chase was paid off. There is no evidence in the Satisfaction of Mortgage statement to suggest the subject debt owed to HUD totaling $66,386.74 was paid off, and only Chase signed the Satisfaction of Mortgage statement, not HUD. Furthermore, although the primary and subordinate mortgages have the same identification number, the mortgages are separate and require two separate releases. Accordingly, the Chase Mortgage Payoff statement submitted by Petitioners evidences only that Petitioners paid off their primary note with Chase in the sum of $164,969.58. (*See Petr.'s Stat.* at 12-14).

For Petitioners not to be held liable for the full amount of the debt, Petitioners must produce either a release in writing explicitly relieving Petitioners' obligation under the terms of the Note or produce "valuable consideration accepted by the lender" that indicates HUD's intent to release. *See Cecil F. and Lucille Overby*, HUDBCA No. 87-1917-G250 (Dec. 22, 1986). Petitioners have failed to produce either in this case. The evidence submitted by Petitioners merely demonstrates that Petitioners have paid off their primary mortgage with Chase and that Petitioners were provided erroneous information by their title company upon which they relied as binding.

The Note signed by Petitioners when they modified their original home mortgage clearly states under the heading "Borrower's Promise to Pay" that "[i]n return for a loan received from Lender, Borrower promises to pay the principal sum of … $66,386.74," and "Lender" is defined under the heading "Parties" as "the Secretary of Housing and Urban Development." (*See Sec'y. Stat*., ¶ 22; Note, ¶¶ 1-2 (emphasis added); *see also Petr.'s Stat*. at 4, ¶¶ 1-2). Because Petitioners agreed in the Note to pay the subject debt, the onus falls on Petitioners, not on Chase or Apple Tower Title, to ensure that the subject debt was satisfied.

Finally, although Petitioners maintain they were "NEVER directed by HUD, Chase, or the Title company to mail any type of payment [to HUD]" (*see Petr.'s Resp.* 1, ¶ 7), the terms of the Note signed by Petitioners in exchange for a subordinate mortgage with HUD clearly state under the heading "Manner of Payment," subheading "Place," that "Payment shall be made at the Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, SW, Washington, DC 20410 or any such other place as the Lender may designate in writing by notice to the Borrower." (*See* Note, ¶ 4(B); *see also Petr.'s Stat*., ¶ 4(B)) (emphasis added).

This Court has consistently maintained that "assertions without evidence are insufficient to show that the debt claimed by the Secretary is not past due and legally enforceable." *See Sara Hedden*, HUDOA No. 09-H-NY-AWG95 (July 8, 2009), *quoting Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996). In this case, Petitioners failed to introduce into evidence proof of a written release, directly from HUD, that effectively discharged Petitioners from the debt associated with the subordinate note. Hence, the Court finds that the Petitioners' claim fails for lack of proof and, as a result, the subject debt remains past due and enforceable.

ORDER

For the reasons set forth above, I find the debt that is the subject of this proceeding to be legally enforceable against Petitioners in the amount claimed by the Secretary. It is

ORDERED that the Order imposing the Stay of Referral of this matter to the U.S. Department of the Treasury for administrative offset is **VACATED**. It is

FURTHER ORDERED that the Secretary is authorized to refer this matter to the U.S. Department of the Treasury for administrative offset of any federal payment due to Petitioners.

SO ORDERED,

H. Alexander Manuel
Administrative Judge

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