

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	
)	AWG Docket No. 11-0185
David Farkas)	
)	
Petitioner)	Decision and Order

1. The hearing by telephone was held on August 16, 2011. Mr. David Farkas, also known as David A. Farkas, the Petitioner (“Petitioner Farkas”), participated, represented by Kassandra McQuillen, Esq. Present with Petitioner Farkas in addition was his wife Kim Farkas.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (“USDA Rural Development”) and is represented by Mary E. Kimball. Also participating on behalf of USDA Rural Development was Mr. Gene Elkin. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Issues

3. The principal issue is whether Petitioner Farkas owes to USDA Rural Development a balance of **\$93,448.41** (as of April 13, 2011) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* for a loan made on August 3, 2004, by Wells Fargo Bank, N.A., for a home in California, the balance of which is now unsecured (“the debt”). A further issue is whether USDA Rural Development will be required to re-pay to Petitioner Farkas, monies already collected (\$9,379.00, which yielded \$9,362.00 net) based on the *Guarantee*.

Summary of the Facts Presented

4. USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List, were filed March 21, 2011 and are admitted into evidence, together with the Additional Narrative & Exhibits filed June 17, 2011, together with the testimony of Mr. Gene Elkin and Ms. Mary Kimball. Both parties filed post-hearing briefs: *see also* Respondent's Reply filed September 6, 2011, which also included Exhibits, which are also admitted into evidence.
5. Petitioner Farkas' Consumer Debtor Financial Statement and pay stub(s) were filed on August 16, 2011 and are admitted into evidence, together with his testimony, together with his Hearing Request with the attached letter over the signature of his attorney, Kassandra McQuillen, Esq., dated December 3, 2010. *See also* Kassandra McQuillen's letter and brief entitled "Opposition to Wage Garnishment Order" both dated and filed June 15, 2011; and Petitioner's Brief Opposing Validity of Debt after Wage Garnishment Hearing, filed August 30, 2011 (post-hearing brief).
6. The amount Petitioner Farkas borrowed from Wells Fargo Bank, N.A., was \$167,999.00 on August 3, 2004. RX 1. The due date of the last payment made was July 1, 2008. RX 3, p. 3. Foreclosure was initiated on November 24, 2008. By the time principal and interest and protective advances and lender expenses and the like were added together, Wells Fargo Bank, N.A. was seeking more than \$187,000.00, less the proceeds from sale of the home. RX 3, RX 4. The home sold for \$76,000.00 on November 17, 2009. RX 4, RX 5, RX 6. USDA Rural Development paid Wells Fargo Bank, N.A. \$102,810.41 on February 10, 2010. RX 3, p. 7, RX 4, Narrative. Thus \$102,810.41, the amount USDA Rural Development paid to Wells Fargo Bank, N.A., is the amount USDA Rural Development seeks to recover from Petitioner Farkas under the ***Guarantee***. RX 2, esp. p. 2.
7. No additional interest has accrued since February 10, 2010. A payment of \$9,362.00 made in 2011 (from a \$9,379.00 Federal income tax refund) reduced the balance sought by USDA Rural Development to **\$93,448.41**. RX 8, Narrative.
8. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$93,448.41** would increase the current balance by \$26,165.55, to \$119,613.96. *See* USDA Rural Development Exhibits, esp. RX 8.
9. The ***Guarantee***, when Petitioner Farkas signed the ***Guarantee*** on June 17, 2004, identified Mountain Mortgage as the lender. RX 2. The ***Guarantee*** was signed by the "Lender's Authorized Representative," Lawrence Law, also on June 17, 2004. [Lawrence Law worked for Mountain Mortgage.]
10. The ***Guarantee*** establishes an **independent** obligation of Petitioner Farkas, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the

lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 2, p. 2.

11. Petitioner Farkas signed the *Guarantee*, and he is responsible under the language of the foregoing paragraph, despite his testimony that he did not know he would be personally liable; that his obligations under the *Guarantee* were not adequately explained to him.

12. About six weeks after Petitioner Farkas signed the *Guarantee*, numerous alterations were made to the *Guarantee* that were not initialed by Petitioner Farkas and were likely not brought to the attention of Petitioner Farkas. These changes were likely made on July 29, 2004, in preparation for Wells Fargo Bank, N.A. making the \$167,999.00 loan on August 3, 2004. RX 1. From my examination of the photocopy of the document (RX 2), I find that "D Williams" added "7-29-04" and her signature to the right of the Lender's Authorized Representative Signature line (where Lawrence Law had previously signed). Some of the other changes made, in what is probably D Williams' handwriting, include:

Lender ID No.

Wells Fargo

Lender Name ~~Mountain Mortgage~~

Lender Contact Person ~~Becca~~ **Diane Williams**

Lender Phone Number ~~661-822-1122~~ **559-436-6660**

Lender Fax Number ~~661-822-1175~~ **559-431-5963**

13. USDA Rural Development states that changing the name and contact information on the *Guarantee* (Form RD 1980-21) was not a material alteration, and that Petitioner Farkas was not adversely affected. Brief filed September 6, 2011, p. 2. More importantly, USDA Rural Development states:

The Request for a Single Family Housing Loan Guarantee, Form RD 1980-21, was between David and Kim Farkas and USDA. David and Kim Farkas signed a promise to reimburse USDA if a loss claim was paid. When David and Kim Farkas signed a note with Wells Fargo it was guaranteed by USDA in case of default.

14. I agree that the language of the *Guarantee* recited in paragraph 10 of this Decision was a contract between Petitioner Farkas and USDA.

15. The *Guarantee* was also USDA Rural Development's inducement to the lender to make the loan; the *Guarantee* was a contract between the lender and USDA. I agree that Wells Fargo Bank, N.A. could accept applications filed through its agents; perhaps Mountain Mortgage was the agent of Wells Fargo Bank, N.A.¹ Perhaps Lawrence Law was the Lender's Authorized Representative when he signed the *Guarantee* on June 17, 2004.²

16. The contract between the lender and USDA here, was between Wells Fargo Bank, N.A. and USDA, as confirmed by RX-15. The *Guarantee* contained numerous alterations of which Petitioner Farkas was likely not apprised; else I would expect to see his initials on the changes, or some other acknowledgment.

17. Other alterations not initialed by Petitioner Farkas, in addition to those alterations detailed in paragraph 12 of this Decision, include:

6. The current annual income for the household is: \$ ~~57,504~~ **66876**

7. The current adjusted income for the household is: \$ _____ [**\$65916** inserted]

8. TOTAL DEBT ratio ~~43.304~~ PITI ratio ~~26.756~~ **38.75 / 24.34**

9. We propose to loan \$ _____ [**\$167,999** inserted³] for 30 years at 6.75 % per annum with payments of \$1089.64 per month.

18. USDA Rural Development states that the changes to the *Guarantee* (Form RD 1980-21) were minor and to the benefit of the borrower, and that his Form W-2 Wage and Tax Statement for 2003 showed he earned \$66,661.81 which showed he earned more than originally stated on the form. RX 16.

¹ If so, Wells Fargo's information would likely have been placed on the *Guarantee* in the first place, would it not?

² If so, why was the signature of D Williams added on July 29, 2004, together with all the alterations to the Lender's Name and contact information? The Lender ID No. never was completed.

³ This number looks like it was inserted over white-out; it's difficult to tell from the photocopy in the record file. This was **only a one dollar change**, though.

19. I agree that the 2003 W-2 from GE Wind Energy, LLC shows Petitioner Farkas' wages to be \$66,661.81. I do not know just how the \$66,876 figure and the \$65,916 figure (which were likely added to the *Guarantee* on July 29, 2004), were calculated.

20. The final alterations to the *Guarantee* not initialed by Petitioner Farkas, in addition to those alterations detailed in paragraphs 12 and 17 of this Decision, include:

Purpose	Amount
<u>Purchase of home</u>	\$ <u>162,000</u>
<u>closing costs (partial)</u>	\$ <u>6,000 5999</u>
Total Loan =	<u>168,000 167,999</u>

21. The alterations to the *Guarantee* would not matter to a typical borrower, and I am not persuaded that the alterations made any difference to Petitioner Farkas. The closing costs went down one dollar, making the loan amount go down one dollar. The interest rate stayed the same (6.75%); the monthly payment amount stayed the same (\$1,089.64). Clearly Petitioner Farkas was not harmed in any way by the alterations. The lender, Wells Fargo Bank, N.A., made the loan on those terms: \$167,999.00 loan amount, interest at 6.750%, monthly payments of \$1,089.64. RX 1. When Petitioner Farkas signed the Fixed Rate Note on August 3, 2004, he was clearly aware of exactly those terms. Those terms are exactly what Petitioner Farkas had agreed to on June 17, 2004, except that the loan is for one dollar less, and the lender is Wells Fargo instead of Mountain Mortgage. I am not persuaded that that makes any practical difference to Petitioner Farkas. There certainly is no evidence of fraud or misleading or of any detriment to Petitioner Farkas. The *Guarantee* was altered, but it was not falsified. There is no evidence of negligent servicing.

22. Petitioner Farkas, through counsel, initially maintained that Wells Fargo's loss claim was invalid because Wells Fargo never serviced the loan. *See* Hearing Request and counsel's letter, both dated December 3, 2010, and Opposition to Wage Garnishment Order and counsel's letter, both filed June 15, 2011. Upon review of the Additional Narrative and Exhibits filed June 17, 2011, however, Petitioner Farkas, through counsel, indicated during the hearing that this theory was no longer being pursued.

23. Petitioner Farkas can withstand garnishment at 15% of his current disposable pay without financial hardship. 31 C.F.R. § 285.11. *See* the Consumer Debtor Financial Statement and accompanying documents filed August 16, 2011. Nevertheless, to permit Petitioner Farkas with counsel ample time to pursue his appeal to U.S. District Court, if he so decides; or to consult with a lawyer with bankruptcy expertise, if he so chooses, **no** garnishment is authorized through **October 2012**.

24. Beginning **November 2012**, garnishment up to 15% of Petitioner Farkas' disposable pay is authorized. 31 C.F.R. § 285.11.

Discussion

25. Petitioner Farkas, you may want to negotiate the disposition of the debt with Treasury's collection agency. Petitioner Farkas, this will require **you** to telephone Treasury's collection agency after you receive this Decision. Petitioner Farkas, you may request that you be permitted to compromise the debt for an amount you are able to pay, to settle the claim for less. The toll-free number for you to call is **1-888-826-3127**. You may wish to include your attorney (and your wife) in the telephone call.

Findings, Analysis and Conclusions

26. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Farkas and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

27. Petitioner Farkas owes the debt described in paragraphs 6 through 22.

28. **No** garnishment is authorized through **October 2012**. Beginning **November 2012**, garnishment up to 15% of Petitioner Farkas' disposable pay is authorized. 31 C.F.R. § 285.11.

29. Repayment of the debt may also occur through *offset* of Petitioner Farkas' **income tax refunds** or other **Federal monies** payable to the order of Mr. Farkas.

Order

30. Until the debt is repaid, Petitioner Farkas shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

31. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through **October 2012**; beginning **November 2012**, garnishment up to 15% of Petitioner Farkas' disposable pay is authorized. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 28th day of September 2011

s/ Jill S. Clifton

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building Room 1031
1400 Independence Avenue, SW
Washington DC 20250-9203
202-720-4443
Fax: 202-720-9776