UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. MARIO MENENDEZ, Defendant.	CASE NO. CV 11-06313 MMM (JCGx) ORDER RE: CIVIL PENALTY JUDGMENT

On August 1, 2011, the United States commenced this action against Mario Menendez seeking civil penalties under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). The government alleges that Menendez engaged in a scheme to defraud the U.S. Department of Housing and Urban Development.[1] On April 30, 2012, the government moved for summary judgment on its claim; it sought only an order that Menendez was liable for civil penalties under FIRREA.[2] The motion did not seek to have the court determine the amount

[1]Complaint for Civil Money Penalties ("Complaint"), Docket No. 1 (Aug. 1, 2011).

[2]Motion for Summary Judgment ("Motion"), Docket No. 18 (Apr. 30, 2012); Memorandum of Plaintiff United States Regarding Motion for Summary Judgment as to Liability

of the civil penalties to be assessed.[3] Menendez filed a notice of non-opposition to the motion on June 8, 2012.[4] Accordingly, on June 15, 2012, the court granted the motion for summary judgment,[5] and directed the parties to file supplemental briefs regarding the appropriate amount of the penalty to be imposed on Menendez.[6] The government filed its brief on November 15, 2012.[7] Menendez filed a brief on February 4, 2013.[8]

I. FACTUAL BACKGROUND

A. Facts Supporting the Government's Motion for Summary Judgment

Because Menendez filed a notice of non-opposition to the government's motion for summary judgment, the court assumes that "the material facts as claimed and adequately supported" by the government in its motion "are admitted to exist without controversy." CA CD L.R. 56-3; *Faulkner v. Dominguez*, No. CV 08-07706 DDP, 2010 WL 342600, *1 (C.D. Cal. Jan. 28, 2010).

The government's motion for summary judgment asserted that Menendez had executed a scheme to defraud JP Morgan Chase NA ("Chase") in violation of 18 U.S.C. § 1344(1) ("bank

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for Civil Penalty ("Reply"), Docket No. 20 (Jun. 11, 2012).

[3]Motion at 2 ("In the event this motion is granted plaintiff intends to file a subsequent motion for a determination of the amount of the penalty that should be imposed.").

[4]Notice of No Opposition to Plaintiff's Motion for Summary Judgment for Civil Liability Only ("Non-Opposition"), Docket No. 19 (June 8, 2012).

[5]Order Granting Motion for Summary Judgment, Docket No. 21 (June 15, 2012).

[6]Court Order Vacating Dismissal, Setting Hearing re Penalty to be Imposed on Defendant, Docket No. 31 (Nov. 6, 2012).

[7]Motion for Order for Entry of Civil Penalty Judgment ("Gov't Br."), Docket No. 32 (Nov. 16, 2012).

[8]Opposition to Motion to Impose Civil Sanctions ("Menendez Br."), Docket No. 38 (Feb. 4, 2013).

fraud").[9] Menendez was a licensed real estate sales person at the time of the events in question.[10] He executed the fraudulent scheme through two companies he owned: Tax Plus, Inc. ("Tax Plus") and Pegaso Real Estate ("Pegaso").[11]

In January 2002, Menendez, acting as a broker for Pegaso, submitted a "hardship package" to Chase on behalf of the owner of a property located at 8956 Larkspur Drive, Fontana.[12] At the time, Chase held a deed of trust on the property that secured a $133,685.52 loan.[13] The package Menendez submitted to Chase included an application to participate in the U.S. Department of Housing And Urban Development's ("HUD") pre-foreclosure sale program, which permits homeowners who cannot afford their mortgage loans to complete a short sale of their property;[14] a home ownership counseling certificate; a hardship letter from the borrower; a financial statement for the borrower; and income documentation.[15] Menendez also submitted a Pre-Foreclosure Sale Program Closing Worksheet (a HUD form) that he signed as broker for the homeowner.[16] The Worksheet contained the following certification: "By signing, the Agent/Broker certifies that there are no hidden terms or special understandings with the buyer, seller, appraiser, closing agent or mortgagee."[17] This certification was false because there was an understanding between Menendez

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[9]Proposed Findings of Fact, Docket No. 18-5 (Apr. 30, 2012), ¶ 4.

[10]*Id.*, ¶ 2(a).

[11]*Id.*, ¶ 2(b); *id.*, ¶ 2(c).

[12]*Id.*, ¶ 6.

[13]*Id.*, ¶ 5.

[14]When there is a short sale of a property encumbered by a mortgage guaranteed by the Federal Housing Administration ("FHA"), the FHA pays the lender the difference between the outstanding principal, unpaid interest, and foreclosure costs and the amount received by the lender through the short sale.

[15]Proposed Findings of Fact, ¶ 6.

[16]*Id.*

[17]*Id.*

and Tax Plus, the buyer, that the property would be resold the same day at a significant markup.[18]

In July 2002, Menendez, acting through Pegaso, sent a proposed purchase agreement to Chase.[19] The contract provided that the Larkspur property would be sold to Tax Plus for $121,000, with Chase receiving sale proceeds of $111,972.41.[20] Menendez also submitted an appraisal that valued the property at $132,000 as of April 18, 2002.[21] Chase approved the short sale on July 16, 2002.[22]

On July 19, 2002, Tax Plus sold the property for $172,000 to "C.T.," an individual.[23] C.T. purchased the property pursuant to an agreement signed on July 15, 2002.[24] C.T. obtained a new loan guaranteed by FHA in the amount of $169,342 to fund the purchase.[25] The C.T. loan package included an appraisal (by a different appraiser) that valued the property at $172,000.[26] Tax Plus received $38,506.05 at closing.[27]

The government's motion for summary judgment asserted that the Pre-Foreclosure Sale Program Closing Worksheet Menendez submitted to Chase and HUD was a false statement that falsely certified there were no hidden understandings between the buyer and the seller, when in fact the following hidden understandings existed: (1) acting through Tax Plus, Menendez was the buyer of the property; and (2) Menendez had already identified a purchaser for the property,

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[18] *Id.*

[19] *Id.*, ¶ 7

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*, ¶ 5; *id.*, ¶ 8.

[24] *Id.*, ¶ 8.

[25] *Id.*

[26] *Id.*

[27] *Id.*, ¶ 9.

enabling him to resell it for a $40,000 profit.[28]

B. Facts Relating to the Penalty to Be Imposed on Menendez

1. Facts Adduced by the Government

Although the facts adduced by the government in support of its motion for summary judgment concerned a single fraudulent real estate transaction, the government's proof of the amount of loss caused by Menendez indicates that there were in fact 27 such fraudulent transactions. The government proffers the declaration of James Hoogoian, a HUD auditor; attached to the declaration is a "loss analysis" spreadsheet.[29] The spreadsheet details 27 real estate transactions purportedly involved in Menendez's fraud scheme.[30] Hoogoian prepared the spreadsheet.[31] Based on the analysis set forth therein, he concludes that the losses suffered by HUD on insured mortgages as a result of Menendez's conduct total $1,098,734.[32]

According to Hoogoian's declaration, HUD agents reviewed HUD program databases to identify properties purchased and resold by Menendez,[33] obtained documents concerning the properties from banks with which Menendez communicated during the pre-foreclosure process,[34] and obtained additional documents concerning the properties from loan files sent by HUD to banks and other lenders for properties resold by Menendez.[35] Menendez objects to Hoogoian's declaration on the grounds that Hoogoian lacks personal knowledge of the facts set forth in his

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[28]Proposed Conclusions of Law, Docket No. 18-5 (Apr. 30, 2012), ¶¶ 7-9.

[29]Hoogoian Decl., Exh. A (Loss Analysis).

[30]*Id.*

[31]Hoogoian Decl., ¶ 5.

[32]*Id.*

[33]*Id.*, ¶¶ 1-2.

[34]*Id.*, ¶ 3.

[35]*Id.*, ¶ 4.

declaration.[36] Hoogoian does not state that he personally participated in or supervised HUD's investigation of Menendez. Nor does his declaration otherwise establish a foundation for his statements concerning the investigation of Menendez's activities. The court agrees, therefore, that the government has failed to show that Hoogoian has personal knowledge of the matters described in paragraphs 2-4 of his declaration. Menendez's objection to those portions of the declaration is therefore sustained. See *Norita v. N. Mariana Islands*, 331 F.3d 690, 697-98 (9th Cir. 2003) ("None of the plaintiffs' affidavits, however, establishes that the affiant had personal knowledge of the purported improper reductions in pay. Without this foundation, these allegations would be inadmissible at trial. . . . [I]t is impossible to evaluate potential hearsay implications of these statements without the required personal knowledge foundation; the plaintiffs could have learned this information from being present when the purported improper reductions in pay occurred, by reading business records, by speaking with the officers in question, or even by double hearsay," citing FED.R.EVID 602); *Wu v. Boeing Co.*, No. SACV 11–1039 DOC, 2012 WL 3627510, *4 (C.D. Cal. Aug. 22, 2012) ("Neher's Declaration . . . is excluded under Federal Rule of Evidence 602 for lack of personal knowledge and under Rule 802 as hearsay because Neher states only he 'was told' about the meetings or that he '[was] informed' about their nature, not that he participated in or witnessed them through any of his senses"); *L.H. v. Schwarzenegger*, 519 F.Supp.2d 1072, 1078-79 (E.D. Cal. 2007) ("The declaration from Allen Wilcher that defendants offer in support of their opposition to summary judgment is . . . flawed. Although Mr. Wilcher identified himself as a Parole Agent III at California Department of Corrections and Rehabilitation, a position he has held since 1997, he . . . has not declared that his statements are based on his personal knowledge and observations"). Cf. *United States v. $191,910 in U.S. Currency*, 788 F.Supp. 1090, 1097 (N.D. Cal. 1992) ("[N]one of Agent Buckwalter's assertions

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[36]Evidentiary Objections to the Declaration of James Hoogoian Filed in Support of Motion to Impose Civil Penalties, Docket No. 39 (Feb. 4, 2013). Menendez also objects to Hoogoian's declaration on the ground that it purports to offer expert opinion without establishing a proper basis for his alleged expertise. (*Id.* at 2). The court has reviewed the declaration and has not found any statements purporting to offer an expert opinion. This objection is therefore overruled.

in the declaration concerning Morgan are based upon personal knowledge, but are instead hearsay statements in which the declarant is usually unidentified. Although hearsay is admissible to prove probable cause in civil forfeiture proceedings, . . . such hearsay statements must provide a factual basis to explain the circumstances from which the declarant drew his conclusions. Agent Buckwalter's declaration provides no factual basis to support any of the hearsay statements offered, and often does not even identify who is making the assertions. As noted above, mere conclusory statements, even hearsay ones, are not sufficient to oppose a motion for summary judgment").

Menendez also objects to the spreadsheet summarizing HUD's losses on the basis that it lacks foundation.[37] The court has reviewed Hoogoian's declaration and the spreadsheet, and finds that neither document identifies the source of the underlying information summarized in the spreadsheet or demonstrates that Hoogoian has personal knowledge of the information. The court concludes, consequently, that the government has also failed to lay adequate foundation for the spreadsheet. Menendez's objection to the spreadsheet is therefore sustained. See *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dihmantec*, 529 F.3d 371, 382 (7th Cir. 2008) ("Exhibits 10 and 11 are charts that Judson Atkinson prepared that summarize allegedly fraudulent transfers from LMC and CIC to third parties. . . . The admission of a summary under Fed.R.Evid. 1006 requires a proper foundation as to the admissibility of the material that is summarized and a showing that the summary is accurate. Judson Atkinson did not address these requirements. It did not establish the admissibility of the records on which the summaries were allegedly based or authenticate the summaries in any way . . . [so] the district court acted within its discretion by striking them," citing *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 403 (7th Cir.1981) ("Before a summary is admitted, the proponent must lay a proper foundation as to the admissibility of the material that is summarized and show that the summary is accurate")); see also *Duhn Oil Tool v. Cooper Cameron Corp.*, 757 F.Supp.2d 1006, 1012 (E.D. Cal. 2010) ("Mr. Tobin has not laid the foundation to admit this information as a business record under Rule 803(6),

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[37] *Id.* at 3.

Federal Rules of Evidence. Cameron's response changes nothing. If Cameron is presenting a compilation, summary, or abstract of business records, it must lay the proper foundation. Duhn's objections to Mr. Tobin's declaration are sustained"). Compare *Oculus Innovative Sciences, Inc. v. Prodinnv, S.A. de C.V.*, No. C–08–04707 MMC, 2010 WL 4774659, *4 (N.D. Cal. Nov. 16, 2010) (a declaration laid sufficient foundation for a spreadsheet submitted as proof of losses, where the declarant stated that he had reviewed data contained in the company's records, including data provided to him by the Director of Finance and Administration; where the declarant attested to the accuracy of the data; where he stated that he had received reports containing the data monthly; and where he noted that the same data was used to prepare filings with the Securities and Exchange Commission).

The government has also proffered a financial statement Menendez submitted to the government.[38] The statement details Menendez's assets, monthly income and expenses, as well as other information concerning his current financial condition.[39] Neither party disputes the accuracy or authenticity of the financial statement. The court will therefore consider it in assessing the appropriate civil penalty to be imposed on Menendez.

2. Facts Adduced by Menendez

Menendez requests that the court take judicial notice of two documents: (1) his Chapter 7 bankruptcy petition; and (2) the notice of discharge he received from the bankruptcy court.[40]

The court may consider matters that can be judicially noticed under Rule 201 of the Federal Rules of Evidence. FED.R.EVID. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1075

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[38]Notice of Filing of Financial Statement of Defendant Mario Menendez, Docket No. 37 (Jan. 14, 2013), Exh. C (Financial Statement).

[39]*Id.*

[40]Request for Judicial Notice, Docket No. 40 (Feb. 4, 2013).

(9th Cir. 2010) ("Courts may take judicial notice of facts whose existence is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

The court can take judicial notice of court filings and other matters of public record. *Reyn's Pasta Bella, LLC v. Visa USA, Inc*. 442 F.3d 741, 746 n. 6 (9th Cir.2006). As court documents are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," the documents filed in Menendez's bankruptcy proceedings are proper subjects of judicial notice under Rule 201. See *United States ex rel Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (a court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue," quoting *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979)); *Retired Employees Ass'n of Orange County, Inc. v. County of Orange*, 632 F.Supp.2d 983, 985 (C.D. Cal. 2009) (taking judicial notice of a bankruptcy court order under Rule 201); *Rosal v. First Fed. Bank of California*, 671 F.Supp.2d 1111, 1120-21 (N.D. Cal. 2009) (taking judicial notice of plaintiff's bankruptcy petition, an order granting a motion for relief from automatic stay, and the bankruptcy court's order of dismissal). Menendez's request for judicial notice is therefore granted.

II. DISCUSSION

A. Legal Standard Governing Civil Penalties Under FIRREA

A person who violates FIRREA is "subject to a civil penalty in an amount assessed by the court in a civil action[.]" 12 U.S.C. § 1833a(a). Generally, the amount of the civil penalty may not exceed $1,000,000, except in the case of continuing violations, in which event the amount of the civil penalty may not exceed the lesser of $1,000,000 per day or $5,000,000. *Id.*, § 1833a(b)(1)-(2). If a defendant derives pecuniary gain from the FIRREA violation, however, or if the violation results in pecuniary loss to a person other than the defendant, the amount of civil penalty may exceed the general cap set forth in § 1833a(b)(1)-(2), but may not exceed the amount of the pecuniary gain or loss caused by the defendant. *Id.*, § 1833a(b)(3).

The statute does not appear to set a minimum civil penalty. The government represents

that there are no reported decisions discussing the amount of the civil penalty that should be imposed under § 1833a,[41] and the court's research has discovered none.

B. Factors Considered in Assessing the Amount of Civil Penalty

As stated, there appears to be no case law outlining the factors that the court should consider in assessing a civil penalty pursuant to § 1833a. The court therefore looks for guidance to the factors courts apply in other contexts involving the assessment of civil penalties. See *Fed. Election Comm'n v. Furgatch*, 859 F.2d 1256, 1259 (9th Cir. 1989) ("Because there are very few cases discussing the factors which should guide a court's discretion in imposing a civil penalty under [the Federal Election Campaign Act], we seek guidance from cases that deal with the imposition of discretionary civil penalties under other federal statutes"); see also *City of New York v. Milhelm Attea & Bros., Inc.*, No. 06–CV–3620, 2012 WL 3579568, *29-30 (E.D.N.Y. Aug. 17, 2012) ("[W]hile the [Contraband Cigarette Trafficking Act] is certainly a rare example of a statute allowing for civil penalties but omitting any specific guidance to the court imposing them, it does not appear to be the only one. . . . Accordingly, courts have developed doctrines for guiding the discretion of trial judges in imposing civil penalties, where little guidance is provided by the governing statute").

In other contexts in which the statute imposing a civil penalty does not mandate consideration of particular factors, most courts have considered (1) the good or bad faith of the defendant and the degree of his scienter; (2) the injury to the public, and whether the defendant's conduct created substantial loss or the risk of substantial loss to other persons; (3) the egregiousness of the violation; (4) the isolated or repeated nature of the violation; and (5) the defendant's financial condition and ability to pay. *Furgatch*, 859 F.2d at 1259 ("[I]n determining the amount of the penalty, a district court should consider (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; and (4) the necessity of vindicating the authority of the responsible federal agency," citing *United States v. Danube Carpet Mills, Inc.*, 737 F.2d 988, 993 (11th Cir.1984)); *City of New York*, 2012 WL 3579568 at *29

[41]Gov't Br. at 7.

("The Second Circuit has directed that, where the statute does not mandate consideration of any particular factors, '[a] district court may properly consider a number of factors in determining the size of a civil penalty, including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay,'" quoting *Advance Pharms., Inc. v. United States*, 391 F.3d 377, 399 (2d Cir. 2004)); *SEC v. Gowrish*, No. C 09–05883 SI, 2011 WL 2790482, *9 (N.D. Cal. July 14, 2011) (adopting the factors set forth in *S.E.C. v. Happ*, 392 F.3d 12, 32 (1st Cir. 2004), to determine the appropriate amount of a civil penalty in an insider trading case); *S.E.C. v. Earthly Mineral Solutions, Inc.*, No. 2:07–CV–1057 JCM, 2011 WL 1103349, *5 (D. Nev. Mar. 23, 2011) (enumerating factors to consider in assessing a civil penalty for securities violations, citing *S.E.C. v. Opulentica, LLC*, 479 F.Supp.2d 319, 331 (S.D.N.Y. 2007); *S.E.C. v. Coates*, 137 F.Supp.2d 413, 428–29 (S.D.N.Y. 2001)); *United States ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 501 F.Supp.2d 51, 56, 56 n.5 (D.D.C. 2007) ("Though there is no defined set of criteria by which to assess the proper amount of civil penalties against the defendant [under the False Claims Act, 31 U.S.C. § 3729(a)], the Court finds that an approach considering the totality of the circumstances, including such factors as the seriousness of the misconduct, the scienter of the defendants, and the amount of damages suffered by the United States as a result of the misconduct is the most appropriate. . . . [V]arious other district courts have utilized to one degree or another each of these factors in assessing the proper civil penalty amount," citing *Hays v. Hoffman*, 325 F.3d 982, 994 (8th Cir. 2003) (considering the seriousness of the misconduct and the harm it caused in determining the amount of a civil penalty)); *United States v. Rogan*, 459 F.Supp.2d 692, 727 (N.D. Ill. 2006) (same); *United States ex rel. Ervin v. Hamilton Sec. Grp.*, 370 F.Supp.2d 18, 50 (D.D.C. 2005)); *Orfanos v. DHHS*, 896 F.Supp. 23, 27 (D.D.C. 1995) (outlining the factors to be considered in assessing a civil penalty for violation of the Program Fraud Civil Remedies Act). Because the factors listed above are generally accepted as appropriate considerations in determining the amount of a civil penalty, the court will employ them in this case.

The government argues that the court should not take Menendez's financial condition into account in setting the amount of the civil penalty in this case, because § 1833a does not direct it

to do so. It also argues that consideration of a defendant's financial condition absolves impecunious defendants of liability. As the cases cited above demonstrate, however, courts regularly take the defendant's financial condition and ability to pay into account when imposing a civil penalty, even if the statute that prescribes the penalty does not mandate that they did so. Indeed, other courts have specifically rejected the argument the government advances here. See, e.g., *S.E.C. v. Gunn*, Civil Action No. 3:08–CV–1013–G, 2010 WL 3359465, *10 (N.D. Tex. Aug. 25, 2010) (The defendant's net worth and corresponding ability to pay has proven to be one of the most important factors that district courts consider when determining how much of a civil penalty to assess in an insider-trading case," citing *S.E.C. v. Pardue*, 367 F.Supp.2d 773, 777 (E.D. Pa. 2005) (rejecting the Commission's argument that a defendant's "impecuniousness should have no effect on the Court's determination" of what civil penalty to assess because ignoring the defendant's present financial condition would entail "doing considerable misjustice")). Other district courts have managed to consider the financial state of defendants without absolving them entirely of liability. See, e.g., *id.* at *10 n. 3. The court can similarly consider Menendez's financial condition without waiving the civil penalty altogether.

The court also finds it appropriate to look to factors that other courts have implicitly considered in assessing civil penalties under § 1833a. In *United States v. Moser*, 168 F.R.D. 171 (M.D. Pa. 1996), the court considered the appropriate amount of civil penalty to be imposed on two defendants that attempted to use worthless money orders to satisfy debts owed to three banks. The banks were required to expend significant funds responding to defendants' attempted fraud. The court nonetheless found the government's initial request for a $9,000,000 penalty excessive, and ultimately entered a $10,000 default judgment against defendants, noting that, under the federal sentencing guidelines, the criminal fine range for the same conduct was $1,000 to $10,000. *Id.* at 174. The court adopts the *Moser* court's approach and considers the criminal fine that would be available for Menendez's conduct.

In *United States v. Stemberger*, No. C 98–1807 CRB, 1998 WL 822995 (N.D. Cal. Nov. 16, 1998), the court assessed a civil penalty under FIRREA against defendants who knowingly submitted false tax returns in order to qualify for a $261,000 mortgage loan. *Id.* at *1. As in

Moser, defendant failed to appear or respond to the court's order to show cause, and the court entered a default judgment against him. Accepting the factual allegations in the complaint as true, the court found that the appropriate penalty was $52,000. It reasoned that the penalty was "well within the applicable penalty range" under FIRREA, and concluded that "a penalty of twenty percent of the amount of the loan obtained by making false statements [was] an appropriate remedy." *Id.* Adopting the approach in *Stemberger*, the court will likewise consider the penalty range available under § 1883a, and the amount of money Menendez attempted to obtain through fraud.

C. Consideration of the Relevant Factors

The government requests that the court impose a civil penalty of $1,098,734.[42] Menendez argues that the amount requested by the government is excessive, and requests that the court deny the government's motion or impose a "substantially reduced" penalty.[43] The court assesses these competing requests by applying the various factors courts have found to be relevant and by cross-checking against the criminal fine range and the amount of money Menendez attempted to obtain through fraud.

1. Menendez's Good or Bad Faith and the Degree of His Scienter

The government's summary judgment motion asserted that Menendez knowingly executed a scheme to defraud a financial institution. See 18 U.S.C. § 1344(1) (making it a crime to "*knowingly* execute[ ] . . . a scheme or artifice . . . to defraud a financial institution . . . by means of false or fraudulent pretenses" (emphasis added)). It argued that Menendez submitted a Pre-Foreclosure Sale Program Closing Worksheet to Chase that he knew was false, representing that there were no hidden understandings between the buyer and the seller when he knew that he was the actual buyer of the property, and that he had already arranged a resale that would net him $40,000.[44] By filing a notice of non-opposition to the motion, Menendez admitted these facts.

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[42]Gov't Br. at 10.

[43]Menendez Br. at 6.

[44]Proposed Findings of Fact, ¶ 6; Proposed Conclusions of Law, ¶¶ 7-9.

CA CD L.R. 56-3; *Faulkner*, 2010 WL 342600 at *1. The admitted facts demonstrate that Menendez acted with intent to defraud. This degree of scienter in carrying out the scheme thus weighs in favor of a higher civil penalty.

2. The Injury to the Public and Loss to Other Persons

The government has adduced no evidence of a loss to Chase.[45] For the reasons stated, moreover, the court declines to consider the spreadsheet that purportedly represents HUD's losses in determining what penalty to impose in this case. Nonetheless, the facts asserted by the government in its summary judgment motion, and admitted by Menendez, are sufficient to show that HUD suffered a loss equal to the difference between the outstanding principal, unpaid interest, and foreclosure costs, on the one hand, and the amount it received through the short sale, on the other.[46] Although the government has not provided an exact calculation of that amount,[47] the court concludes that the fact HUD suffered a loss weighs in favor of a higher penalty.

3. The Egregiousness of the Violation

The admitted facts demonstrate that Menendez acted with a high degree of scienter. In carrying out the scheme to defraud Chase, moreover, he abused his role as a licensed real estate sales person. Cf. *Gowrish*, 2011 WL 2790482 at *9 (concluding that the "egregiousness of the violation" weighed in favor of imposing a civil penalty where defendant had abused a position of trust). These facts demonstrate that his violation of the bank fraud statute was serious. On the other hand, the facts do not suggest that Menendez's conduct regarding the Larkspur property was

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[45]See Motion at 13 (noting that loss to the bank is not an element of bank fraud under § 1344(1)).

[46]See Motion at 2.

[47]The government's spreadsheet indicates that the amount of loss to HUD resulting from the transaction described in the government's motion for summary judgment was $33,157, and the amount of lost proceeds to the unidentified "Borrower" was $20,843. (See Loss Analysis.) As stated, however, the government has not laid adequate foundation for the calculations set forth in the Loss Analysis spreadsheet. It has not explained how it calculated the amount of loss claimed, nor has it identified the source of the underlying information used to arrive at those numbers.

extraordinarily predatory, wide-ranging, or crippling to HUD. Accordingly, the court concludes that a penalty amount that reflects the egregiousness of Menendez's conduct should be substantial, but not overly punitive. Cf. *S.E.C. v. Hilsenrath*, No. C 03–03252 WHA, 2009 WL 1855283, *3 (N.D. Cal. June 29, 2009) (noting, in determining whether to order that an officer be barred from acting as an officer or director of an issuer, that "[w]ith regard to the 'egregiousness' of the underlying securities law violation, this order finds that the first prong does not weigh in favor of or against a bar. While plaintiff argues that these actions were over a three-year period, Hilsenrath has only admitted to one particular misleading report . . . and plaintiff did not pursue its claims for any other year. The actions only indirectly affected investors. . . . [H]owever, . . . Hilsenrath used his position of the highest authority in the company to mislead the public as to the company's true financial state in 1998. Given these competing considerations, this order finds the first prong mostly neutral in the analysis").

4. The Isolated or Repeated Nature of the Violation

Although the government has alleged that Menendez committed multiple violations, its motion for summary judgment adduced evidence of a single instance of bank fraud. Because there is no admissible evidence of repeated violations before the court, this factor weighs in favor of a lighter penalty.[48] See *id.*; see also *Gowrish*, 2011 WL 2790482 at *5 (finding the factor of recurrence or isolation neutral, where defendant committed three violations within a six month period); *S.E.C. v. Mellert*, No. C03-0619 MHP, 2006 WL 927743, *1 (N.D. Cal. Mar. 29, 2006) (the fact that defendant's conduct was "essentially an isolated incident" weighed against the imposition of a civil penalty).

[48]Because the government has not shown that it is admissible, and because the government's motion for summary judgment did not claim repeated violations, the court declines to consider the government's spreadsheet suggesting that Menendez was involved in 27 fraudulent transactions.

5. Menendez's Financial Condition and Ability to Pay

Menendez's financial statement shows that he has limited assets and income. Judicially noticeable documents demonstrate, moreover, that he filed for bankruptcy,[49] that he received a discharge from the bankruptcy court, and that there were no significant assets for the trustee to distribute.[50] Menendez's financial condition, therefore, weighs against a heavy penalty.

6. The Criminal Fine That Could Be Levied for this Conduct

Section 1344(1), the criminal statute Menendez violated, provides for a fine of no more than $1,000,000. Taking into account the criminal fine that would be available for Menendez's conduct, therefore, the court finds that the government's request for a civil penalty that is nearly $100,000 in excess of $1,000,000 is excessive.

The government argues that had Menendez been indicted and prosecuted for the fraud scheme that is the subject of this civil action, he would have been required to make restitution in the full amount of HUD's loss. See 18 U.S.C. § 3663A; *United States v. Rizk*, 660 F.3d 1125, 1137 (9th Cir. 2011). While this may be true, there is no admissible evidence that HUD suffered a loss in the amount of $1,098,734; the only admissible evidence concerns Menendez's conduct vis-á-vis the Larkspur property, which ultimately sold for approximately $40,000 more than HUD received. Consequently, a comparison with the criminal fine/restitution range weighs against imposing the amount of penalty requested by the government.[51]

7. The Amount Menendez Sought to Profit Through His Fraud

The admitted facts indicate that Menendez netted $40,000 through his fraud. The government has adduced no evidence of other profits. This factor therefore suggests that the $1,098,734 requested by the government is excessive.

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[49]RJN, Exh. A.

[50]RJN, Exh. B.

[51]The likely criminal fine range under the federal sentencing guidelines also indicates that the amount of penalty requested by the government is excessive. While the court cannot be certain of the precise guideline range that would have applied, the facts suggest that the applicable fine range would have been $20-30,000 under U.S.S.G. § 5E1.2.

8. The Penalty Range Available Under § 1833a

FIRREA provides that the amount of civil penalty "generally" should not exceed $1,000,000 except in the case of continuing violations. If a defendant derives pecuniary gain from the FIRREA violation, or if the violation results in pecuniary loss to a person other than the defendant, the amount of civil penalty may exceed the general cap set forth in § 1833a(b)(1)-(2), but it may not exceed the amount of the pecuniary gain or loss caused by the defendant. 12 § 1833a(b)(3).

The government's motion for summary judgment was not supported by evidence that Menendez engaged in a continuing violation. It demonstrated, moreover, that Menendez's pecuniary gain on the Larkspur transaction was at most $40,000. The government has adduced no admissible evidence that Menendez's conduct caused Chase or HUD to suffer a loss exceeding $1,000,000. Under the statute, therefore, the court is precluded from imposing the civil penalty requested by the government. Even if the statute granted the court the discretion to impose the civil penalty the government requests, the court would find that the "general" penalty range set forth in § 1833a weighs against the imposition of a civil penalty in excess of $1,000,000. Compare *Stemberger*, 1998 WL 822995 at *1 (noting that the penalty assessed was "well within the applicable [$1,000,000] penalty range" set forth in FIRREA).

9. The Appropriate Amount of Penalty in Light of the Relevant Factors

Because the government did not, in support of its motion for summary judgment, adduce evidence that Menendez engaged in a continuing violation or caused loss exceeding $1,000,000 to any person, and because the government failed to adduce admissible evidence of a continuing violation or loss exceeding $1,000,000 in the context of this proceeding, the court is statutorily barred from granting its request for a penalty of $1,098,734. 12 U.S.C. § 1833(b).

The following factors weigh against the imposition of a civil penalty approaching the maximum amount permitted by FIRREA: (1) the admissible evidence shows that Menendez earned a profit of approximately $40,000 on the Larkspur transaction; and (2) had Menendez had been criminally convicted of bank fraud, the maximum fine the court could have imposed would have been $1,000,000, and the likely fine under the sentencing guidelines would have been in the $20-

30,000 range. The following factors suggest the court should not impose a civil penalty, or should impose a light penalty: (1) Menendez's conduct was not extraordinarily egregious; (2) the admissible evidence does not show that he engaged in repeated violations; and (3) Menendez has limited assets and income. On the other hand, the following factors weigh in favor of imposing a substantial civil penalty: (1) Menendez acted with intent to defraud, and abused his role and license as a real estate broker; (2) he caused pecuniary injury to HUD; and (3) he profited from his conduct.

Taking into account all factors, the court concludes that a civil penalty of $40,000 is appropriate. It is well within the range permitted by FIRREA, is comparable to the criminal fine that would have been assessed, and is proportionate to the profit Menendez made as a result of his admittedly fraudulent conduct.

III. CONCLUSION

For the reasons stated, the court imposes a civil penalty of $40,000.

DATED: March 6, 2013

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE