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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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OFFICE OF GENERAL COUNSEL

Subject Cost

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MAR 9 1978

Ms. Andrea Sheridan Ordin, Esq.
United States Attorney
Central District of California
United States Court House
312 No. Spring Street
Los Angeles, California 90012

Attention: Mr. Hugh W. Blanchard
Assistant U.S. Attorney

Dear Ms. Ordin:

Subject: Claim Against
Claim No. 77-2294, VA File: 345/02, USDA Ariz.
File: 77-1524

This is in response to your letter of January 11, 1978, concerning the validity of the subject claim. _____ purchased property in Arizona from the Veterans Administration (VA) in November 1966, and executed a note and mortgage securing payment to the VA in the amount of $14,025. In November 1976, the sold the property to a who apparently declined to assume the loan. The then moved to California. On November 11, 1976, in reponse to a request from the agent, the VA stated that the amount due on the loan was $7,150.35 plus interest as of November 9, 1976. This statement was incorrect. The amount actually due on the loan was $11,603.70 plus interest. The sale of the property was then completed, based on the erroneous premise that only $7,150.35 was due on the loan. Satisfaction of VA's mortgage on this property was issued and recorded and VA subsequently discovered its error. The question is whether the Government has a valid claim against for $4,412.40, the difference between what was in fact due on the loan and the amount quoted by the Government.

In your letter, you questioned whether a claim against would be barred by the Court's decision in United States v. _____ 523 F. 2d 1070 (9th Cir. 1975). In _____ the Government sued for a claimed deficiency resulting from a foreclosure sale following a default on a direct loan made by the VA. The sale did not bring the full amount due and VA claimed the deficiency. The issue

presented to the court in that case was whether California's law prohibiting a deficiency judgment applied. Paragraph 34 of the deed, standard in most such transactions, had been stricken. Paragraph 34 reads:

> "Title 38, United States Code and the Regulations issued thereunder shall govern the rights, duties and liabilities of the parties hereto, and any provisions of this or other instruments executed in connection with said indebtedness which are inconsistent with said Title or Regulations are hereby amended and supplemented to conform thereto."

Further, the note and deed of trust specifically provided that California's law was controlling. Emphasizing the deletion of paragraph 34, the Court held the Government bound by California law and denied a deficiency judgment.

The Court's decision in _____ does not, in our opinion, preclude the claim against the _____. The mortgage executed by the _____ contained a clause identical to paragraph 34 of the Stewart's deed, quoted above. There is no reference, however, to State law in the _____ mortgage agreement. Under Federal law, the Government can apparently obtain a deficiency judgment. _____ v. _____, 293 F. Supp. 871 (N.D.Cal. 1968), aff'd 441 F.2d 1171 (9th Cir. 1971). Further, even if State law were to control in this case, the appropriate State law would seem to be that of Arizona, where the property was located and which allows a deficiency judgment. See Ariz. Rev. Stat. §§ 33-722, 33-727 (1974).

In addition, the Government's claim in this case is different from the deficiency action brought in _____. In _____, the Government initiated its claim after first foreclosing on its mortgage. California's statute prohibiting deficiency judgments was enacted to protect debtors upon foreclosure of their property. In this case, _____ sold their property and apparently received an additional $4,412.40 in profit because of the Government's mistake. Thus, the instant situation would not seem to fall within the scope of the Assistant Attorney General's instructions to your office not to prosecute claims similar to Stewart.

In our opinion, the Government has a valid claim against the _____ for the amount of the mistake. It is well established that the release or satisfaction of a mortgage is not conclusive evidence of extinguishment of the debt involved. 5 Tiffany, The Law of Real Property § 1493, at 539-40 (3rd ed. 1939).

In First National Bank of Fairbanks v. , 488 P.2d 1026 (Alas. 1971), the Supreme Court of Alaska was faced with similar facts. The issue there was whether the execution by a bank of the satisfaction and discharge of a mortgage was conclusive evidence of the discharge of indebtedness, or whether the bank should have been allowed to present evidence of lack of intent to discharge the note along with the mortgage. The satisfaction and discharge stated in relevant part:

> "THIS IS TO CERTIFY THAT the foregoing described mortgage * * * has been satisfied, the note thereby secured paid * * *." (Emphasis supplied.)

Id. at 1027. The Bank asserted that this document as worded was "filed in error." The court quoted v. 43 Idaho 327, 251 P. 757 (1926):

> "If the release of the note * * * was unintentional and made by mistake, the note was not, as a matter of fact, released and the rights of the plaintiff renounced thereby." 251 P. at 760.

The Court then concluded that a trial should have been held in order that the Bank might show that the statement in the satisfaction and discharge which indicated payment was executed by mistake. In the instant case, we believe the Government should be permitted to show that the release of the mortgage was based on mistake and should therefore not operate as a discharge of the underlying debt.

An argument by the that the Government is estopped from suing on the note because of its erroneous statement concerning the amount due on the loan would not appear supportable. The courts have traditionally been reluctant to apply the doctrine of estoppel against the Federal Government or one of its agencies, and have generally held that the Government is not subject to the same rules of estoppel as are private parties. See United States v. California, 332 U.S. 19, 39-40 (1947); v. United States, 163 F. Supp. 907, 915 (E.D. Wash. 1958). No officer or agent of the Government has the authority to waive contractual rights which have accrued to the United States or to modify existing contracts to the detriment of the Government without additional legal consideration or a compensating benefit flowing to the Government. See Bausch & Lomb Optical Company v. United States, 78 Ct. Cl. 584, 607 (1934), cert. denied 292 U.S. 645.

In any event, the necessary elements of an estoppel are not present in this case. The essential elements of estoppel have been set forth as follows:

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> "In order to constitute an equitable estoppel there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relief on or acted on it to his prejudice." United States v. _____, 137 F. Supp. 24, 28 (D.N.D. 1956).

When the made payments to the VA, a card accompanied the payments which showed the principal balance then owing. The _____ thus cannot claim that they did not know the amount due on the loan. In this regard, the court said in United States v. _____, supra at 28-29 that:

> "Estoppel cannot be invoked by one who knew the facts or was negligent in not knowing them. Where facts were equally known to both parties, or are facts which the one invoking estoppel ought, in the exercise of reasonable prudence, to know, there can be no estoppel. * * * Where the facts are equally known to both parties, there can be no estoppel; where both parties have equal means of ascertaining the facts, then, too, there can be no estoppel. * * * To constitute an equitable estoppel there must exist a false representation or concealment of facts made with knowledge, actual or constructive, and the party to whom it was made must have been without knowledge or means of knowledge of the real facts."

In view of the foregoing, it is our opinion that a valid claim in the amount of $4,412.40 exists against

For your information, a search of our records has disclosed no other pending claims by or against

Sincerely yours,

Rollee H. Efros

Mrs. Rollee H. Efros
Assistant General Counsel

cc:Mr. Normand Birtcher
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