

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA :
 :
 v. : **CRIMINAL NO. 07-155**
 :
JAY BERGER :

GUILTY PLEA MEMORANDUM

The defendant was charged in a one count information with mail fraud affecting a financial institution, in violation of 18 U.S.C. §§1341. This charge results from a scheme to defraud arising from his participation since at least April 2000 through at least December 31, 2004 in a scheme to defraud homeowners seeking to refinance their mortgages, the holders of the mortgages on those homes, the companies refinancing those homes, and the title companies which insured the titles to those properties.

I. PLEA AGREEMENT

The defendant entered into a plea agreement with the government that contains the following terms:

1. The defendant agrees to waive indictment and plead guilty to count one of the information.
2. The defendant agrees to pay the special victims/witness assessment in the amount of \$100 before the time of sentencing and shall provide a receipt from the Clerk to the government before sentencing as proof of this payment.
3. The defendant further agrees that restitution, fine, assessment, tax, interest or other payments in this case do not constitute extraordinary acceptance of responsibility or provide any basis to seek a downward departure from the applicable Sentencing Guidelines range.
4. Defendant waives any claim under the Hyde Amendment, 18 U.S.C.

§ 3006A (Statutory Note), for attorney's fees and other litigation expenses arising out of the investigation or prosecution of this matter.

5. The defendant agrees to make restitution of \$4,617,670.15 as directed by the Court.

6. At the time of sentencing, the government will:

- a. Make whatever sentencing recommendation as to imprisonment, fines, forfeiture, restitution and other matters which the government deems appropriate.
- b. Comment on the evidence and circumstances of the case; bring to the Court's attention all facts relevant to sentencing including evidence relating to dismissed counts, if any, and to the character and any criminal conduct of the defendant; address the Court regarding the nature and seriousness of the offense; respond factually to questions raised by the Court; correct factual inaccuracies in the presentence report or sentencing record; and rebut any statement of facts made by or on behalf of the defendant at sentencing.
- c. Nothing in this agreement shall limit the government in its comments in, and responses to, any post-sentencing matters.

7. The defendant understands and agrees that: (a) the status of any professional license or certification held by the defendant is not protected by this agreement and is a matter solely within the discretion of the appropriate licensing, regulatory and disciplinary authorities; and (b) the government will inform the appropriate professional licensing, regulatory and disciplinary authorities in Pennsylvania and other jurisdictions of the disposition of the criminal charges filed against the defendant in this case.

8. The defendant may not withdraw his plea because the Court declines to follow any recommendation, motion or stipulation by the parties to this agreement. No one has promised or guaranteed to the defendant what sentence the Court will impose.

9. Pursuant to USSG § 6B1.4, the parties enter into the following stipulations under the Sentencing Guidelines Manual effective November 1, 2002. It is understood and agreed that: (1) the parties are free to argue the applicability of any other provision of the Sentencing Guidelines, including offense conduct, offense characteristics, criminal history, adjustments and departures; (2) these stipulations are not binding upon either the Probation Department or the Court; and (3) the Court may make factual and legal determinations that differ

from these stipulations and that may result in an increase or decrease in the Sentencing Guidelines range and the sentence that may be imposed:

(a) \$4,617,670.15 was the fraud loss caused in furtherance of the criminal activity jointly undertaken by the defendant and co-schemers; this amount was within the scope of the defendant's agreement; this amount was reasonably foreseeable to the defendant in connection with the scheme; and the defendant's Guideline range should be calculated based on this amount pursuant to USSG §§ 1B1.3 and 2B1.1(a)(1) and (b)(1)(J).

(b) The offense involved 10 or more victims, and therefore the defendant's guideline range should be increased by 2-levels pursuant to USSG §2B1.1(b)(2)(A)(i).

(c) The defendant abused a position of private trust in a manner that significantly facilitated the commission of the offense, and therefore the defendant's Guideline range should be increased 2-levels pursuant to USSG §3B1.3.

(d) As of the date of this agreement, the defendant has demonstrated acceptance of responsibility for his offense making the defendant eligible for a 2-level downward adjustment under USSG § 3E1.1(a).

(e) As of the date of this agreement, the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying the government of his intent to plead guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, resulting in a 1-level downward adjustment under USSG § 3E1.1(b).

10. In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law. This waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.

- a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.
- b. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:

1. the defendant's sentence on any count of conviction exceeds the statutory maximum for that count;
2. the sentencing judge unreasonably departed upward pursuant to the Sentencing Guidelines;
3. the sentencing judge, exercising the Court's discretion pursuant to United States v. Booker, 125 S. Ct. 738 (2005), imposed an unreasonable sentence above the final Sentencing Guideline range determined by the Court; and/or

If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

The defendant also waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a.

11. The defendant is satisfied with the legal representation provided by the defendant's lawyer; the defendant and this lawyer have fully discussed this plea agreement; and the defendant is agreeing to plead guilty because the defendant admits that he is guilty.

12. It is agreed that the parties' guilty plea agreement contains no additional promises, agreements or understandings other than those set forth in this written guilty plea agreement, and that no additional promises, agreements or understandings will be entered into unless in writing and signed by all parties.

II. ELEMENTS OF THE OFFENSE

The mail fraud statute, 18 U.S.C. § 1341, reads in pertinent part as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises...for the purpose of executing such scheme or artifice or attempting so to do...knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be [guilty of a crime against the United States]

The elements of this offense are that the defendant:

1. Knowingly devised or participated in a scheme or artifice to defraud.
2. Did so with intent to defraud.
3. Used the mails in furtherance of the scheme.

United States v. Burks, 867 F.2d 795 (3d Cir. 1989).

Because the scheme involved a financial institution, the government must prove a fourth element:

4. A financial institution was one of the victims of the fraud.¹

III. FACTUAL BASIS FOR THE PLEA

If the defendant proceeded to trial, the government would present testimony and documents to prove the following facts:

Berger was a settlement agent, a mortgage broker and the agent for several title insurance companies. He and/or his wife owned and operated Imperial Abstract & Settlement Company, LLC and United Settlement Services, Inc., both Title Insurance Companies organized under the laws of the Commonwealth of Pennsylvania, maintaining an address of 7 Bala Avenue, Bal Cynwyd, Pennsylvania 19004. Berger's companies were designated, through signed agreements, to act as nonexclusive agents for Fidelity National Title Insurance Company of New York (Fidelity) and Stewart Title Guaranty Corporation (Stewart).

¹ An FDIC insured bank qualifies as a financial institution under this statute. See, 18 U.S.C. § 20 (1): “As used in this title, the term “financial institution” means—(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act).”

Berger was also the owner and operator of United Abstract Company (Unity), organized under the laws of the Commonwealth of Pennsylvania, maintaining an address in Bryn Mawr, Pennsylvania, which was also Berger's primary residence.

As an agent for Fidelity and Stewart, Berger or his assistants would attend closings related to loan refinancings. Lending institutions would wire money to a fiduciary trust account in Berger's name. At settlement, Berger was obligated to disburse these funds as detailed on the Hud Form 1, meaning that he had to pay off the original mortgage with monies received from the financial company or financial institution with whom the homeowner was refinancing. Any excess funds were to be distributed to the borrower. The pay-off of the existing mortgage was critical to all parties involved in the transaction. The homeowner obviously did not want to be responsible for two mortgages when he only should have had one. The new mortgage holder expected to have the first lien on the property. If the existing mortgage was not paid off, the interest the new mortgage holder had in the property was significantly diminished. The existing mortgage holder expected to have the balance owed to it paid off when the property was refinanced, because it otherwise faced the risk that the homeowner would be unable to afford to make two payments—one to the existing mortgage holder and the other to the new mortgage company. Finally, the title companies, to whom Berger owed a fiduciary duty, were financially responsible for any losses which would accrue in the event that the existing mortgage was not paid off when the new mortgage was recorded.

While Berger operated his businesses in a legitimate fashion for many of his clients, he did not do so for everyone. In at least fourteen instances between early 2000, and late 2004, Berger received the proceeds from the new mortgage when the homeowner refinanced, but

failed to pay off the existing mortgage. Instead of paying off the holder of the existing mortgage, he wrote to the existing mortgage holder, and directed that institution to change the address on file for the homeowner from the homeowner's true address to P.O. Box 344, Bala Cynwyd, PA 19004-0344, a post office box controlled by Berger, or to Berger's business, 7 Bala Ave, Suite 202, Bala Cynwyd, PA 19004-3205. Statements and correspondence from the existing mortgage institution would therefore be sent to Berger, and the homeowner would be unaware that the existing mortgage had not been paid off. Berger would keep the monies obtained from the new mortgage holder. While the homeowner would begin making payments to the new mortgage company, Berger would make payments on the old mortgage. This enabled Berger to keep almost all of the monies that were obtained from the new mortgage holder at the closing, while making the relatively minimal mortgage payments due monthly on the existing mortgage. If a homeowner accidentally discovered that first mortgage was never paid off, Berger would claim that there had been an error, and Berger would then make payments—sometimes with insufficient fund checks—to make the mortgage appear current. Frequently these payments would be made with monies he obtained by not paying off the first mortgage of a different client.

In all of the instances described below except those pertaining to Berger's own home, homeowners made mortgage payments to the new mortgage company, believing that their original mortgages had been satisfied. Berger handled the original mortgages for each homeowner as follows:

Robert M. Conn, Jr.

On April 21, 2000, Robert M. Conn, Jr. refinanced his property in Philadelphia. Checks numbered 5047 and 5225 made payable to GE Capital Mortgage Services (GE), the

existing mortgage holder, were subsequently voided. The \$62,542.61 intended for settlement of the first mortgage was never received by GE. Berger submitted a change of address request to GE, changing Conn's address from Conn's home to Berger's post office box, P.O. Box 344, Bala Cynwyd, PA 19004, which caused GE to mail monthly statements and notices to Berger rather than to Conn. Berger made payments on Conn's original mortgage with GE, as evidenced by several checks from one of Berger's accounts at Hudson United Bank, held in Berger's own name. The memo section of these checks indicates that they are for payment of Conn's mortgage with GE.

As a result of Berger's inability to continue to pay off Conn's mortgage to GE, Fidelity was obligated to pay off the balance of that mortgage—\$65,412.79.

Thomas Finnegan

On May 23, 2001, Thomas Finnegan refinanced his property in Brigantine, New Jersey. A loan payoff check made payable to Associates Home Equity Services, Inc. in the amount of \$121,032.56 was never received by that company. Berger requested that the companies servicing Finnegan's original loan change the address for Finnegan from Finnegan's home address to Berger's post office box, P.O. Box 344, Bala Cynwyd, PA 19004. Berger made monthly payments of \$1,361.80 on Finnegan's existing mortgage, by bank draft, sometimes noting on the draft that the payment was for Finnegan's loan, and also made payments by wire transfer, noting that the transfers were for loan payments, until September, 2003.

As a result of Berger's failure to pay off the existing mortgage on Finnegan's property, Stewart suffered losses of \$136,000.

Larry Borowsky (first refinancing)

On July 13, 2001, Larry Borowsky refinanced his property located in Bala Cynwyd, Pennsylvania. Instead of paying off Borowsky's existing mortgage with Chase Manhattan, Berger caused a wire transfer dated July 31, 2001, for \$380,627.45, to be sent to a bank account at Unity Bank controlled by Berger. Berger then requested that Chase change the address for Borowsky's account from Borowsky's home address to Berger's office, 7 Bala Ave, Suite 202, Bala Cynwyd, PA 1004-3205. Berger made monthly payments of approximately \$4,008.29 on Borowsky's loan by bank draft from a Hudson United Bank Account in the name of United Settlement Services, Inc.-Settlement Escrow account. Each draft was signed by Berger. The drafts contain the loan number of Borowsky's loan at Chase.

As a result of Berger's failure to pay off the existing mortgage held by Chase on the first refinancing of Borowsky's property, Fidelity suffered losses of \$369,218.22.

Larry Borowsky (second refinancing)

On April 12, 2004, Larry Borowsky, not knowing that his Chase mortgage had never been paid off, refinanced his property again. Check number 10164 in the amount of \$383,198.23 and made payable to the mortgage holder Borowsky believed was his only mortgage holder, Washington Mutual Home Loans. However, because Chase had never been paid off, Washington Mutual was really the second mortgage holder. Washington Mutual did not receive any money from this closing, however. Rather, the settlement sheet indicates that the check to Washington Mutual was voided, and that a withdrawal of \$383,198.23 was made from Berger's Imperial Abstract account. Berger submitted a change of address form to Washington Mutual, causing correspondence from Washington Mutual to come to Berger's post office box rather than

to Borowsky's home. Berger continued to make payments to Washington Mutual for a period of time, but then stopped making the payments.

In January, 2005, Borowsky received a foreclosure letter from Washington Mutual via registered mail. Borowsky then contacted Berger, who said that the loan had been paid off and that he would bring Borowsky the paperwork the next day. Berger did leave a file for Borowsky, which included two letters from Washington Mutual, dated October 12, 2004 and November 30, 2004, addressed to P.O. Box 344, Bala Cynwyd, PA 19004, an address which did not belong to Borowsky. Borowsky then called Washington Mutual, and discovered that while Borowsky thought the loan was paid off in April, 2004, that was not the case. In addition, the two checks Berger had sent Washington Mutual to pay off the mortgage had bounced.

Approximately two weeks later, Borowsky learned that his 2001 mortgage with Chase had also not been paid off. He again called Berger, who told Borowsky that he had set up automatic payments to Chase, but had lost track of the payments.

As a result of Berger's actions on the Borowsky second refinancing, Fidelity was required to make a payment of \$388,392.16 to satisfy the Washington Mutual loan.

Michelle Henderson, a representative of Washington Mutual, would testify that the mailing charged in the information was a loan payoff letter dated November 30, 2004, addressed to Larry M. Borowsky, P.O. Box 344, Bala Cynwyd, PA 19004-0344, was mailed from Washington Mutual's office in Jacksonville, Florida through the United States Postal Service. Washington Mutual is a financial institution, the deposits of which are insured by the Federal Deposit Insurance Corporation (FDIC).

Diane Silverstein

Diane Silverstein is Berger's sister in law. She refinanced two loans, an \$86,488.30 with Equicredit, and a \$194,270.94 loan with Country Wide Home Loans. Carole Fisher handled the settlement of these loans. It was her understanding that after settlement these loans would be paid off and she would begin paying on a new mortgage to a different company.

Silverstein's loans had not been paid off, however. Records show that on November 27, 2001, Diane Silverstein refinanced her property located in Villanova, Pennsylvania. Berger never paid the existing mortgage holder, Country Wide Home Loans the \$194,270.94 check made payable to them. Berger requested that IndyMac Bank, P.O. Box 4045, Kalamazoo, MI 49003-4045, the company servicing the Country Wide loan, send correspondence pertaining to that mortgage to Berger's office, 7 Bala Ave, Suite 202, Bala Cynwyd, PA 1004-3205. Berger received statements on this loan at his office until at least February 17, 2004.

Silverstein later took another loan for \$40,000 which she used to pay off her husband's medical bills. In late 2004, Silverstein found out from her credit report that the original loans on her home had not been paid off. She contacted Berger, who told her that it was probably an error in her credit report. She did not press the matter at that time. On January 4, 2005, she learned that her loans had in fact not been satisfied. She contacted Berger, who admitted that he had not paid off her first mortgages, but that he had continued to make payments on the loan balance. Berger told her that he had retained an attorney who would take care of the problem.

As a result of Berger's actions on the Silverstein refinancing, Stewart was required to make a payment of \$239,489.13 to satisfy the outstanding balance on the original mortgages.

Steven Gifis

On December 24, 2001, Steven Gifis refinanced his property located in Princeton, New Jersey. Carole Fisher handled the closing. Washington Mutual Home Loans, holder of the existing mortgage, never received the \$538,854.60 payoff check from Berger. Instead, Berger directed that correspondence pertaining to that loan be sent to his office, 7 Bala Ave, Suite 202, Bala Cynwyd, PA 1004-3205, rather than to Gifis' home. Berger made payments on the Gifis Washington Mutual loan until at least September 30, 2004. He received a statement with that date mailed to his office from Fleet Mortgage Service Center, Mount Laurel, NJ 08054 on or about that date.

In approximately December, 2004, Berger told Gifis that Berger's accounts had been seized and sent Gifis a copy of the civil suit which had been filed against Berger. When Gifis asked Berger how Berger had obtained \$4,000,000, Berger told Gifis that after a closing, Berger would have either a check or a wire which was intended to pay off the existing mortgage. Berger would deposit the check in another account that he maintained and then would send one month's payment in the same envelope that was supposed to be used to pay off the loan. That way, when his wife saw the paperwork, she would see the UPS or FedEx receipt and the bank statement would show a withdrawal of the exact amount of the closing. The diverted funds went to a bank account at United Hudson Bank, to an account that was not involved in the title work. Berger said that he used this account to make payments on various loans over the years.

Berger told Gifis that he used the diverted funds mostly to retire open loans, as he usually did not want to keep loans open more than two or three months. As long as Berger had a large volume of loan refinancings coming in to the office, this was not a problem. When the refinancing business began to dry up, he no longer had enough new loans coming in to retire the

old ones. Berger told Gifis that he had kept Gifis' loan open for so long because it was a larger loan.

Berger told Gifis that when he was in charge of his own accounts, he made the payments. Berger complained that after Berger's accounts were frozen, as a result of the disregard of the title companies toward Berger's clients, the clients were having problems.

Berger told Gifis that Fisher had received \$500,000 from the scheme, and that she had received funds from more recent refinancings because she threatened to turn him in if he did not cooperate with her. Berger had expected Fisher to use the money from refinancings for a few months, but instead she had kept loans for Patricia Simpson and Mary Ann Murphy open. According to Berger, it was Fisher's fault that Murphy's home might go into foreclosure, and that he had made payments on Simpson's loans because Simpson had threatened to go to the United States Attorneys Office.

Berger also discussed the Groelinger account with Gifis, telling Gifis that Berger had mistakenly not made the November, 2004 payment on Groelinger's original mortgage. Berger had stopped payment on the payoff check for the Groelinger mortgage because Berger was short on funds. Berger told Gifis that he would often send payoff checks to the original mortgage companies and then stop payment. By following that procedure the first mortgage company would get the check, and send the borrower a letter congratulating them on the payoff of their mortgage. Berger would then change the address to be used for the mortgage. By the time the new letter came reinstating the mortgage, the borrower would no longer be getting the correspondence from the lender.

As a result of Berger's actions on the Gifis refinancing, Stewart was required to make a payment of \$543,750.62 to satisfy the original Gifis mortgage.

Anthony Degorski

On April 11, 2002, Anthony Degorski refinanced his property located in Abington, Pennsylvania 19001. Settlement for the refinancing occurred at Fisher's home, and only Fisher and Degorski were present. Wendover Financial Services, which held the existing mortgage, never received its check for \$108,656.44. Berger submitted a change of address request form to Wendover, directing it to send statements pertaining to the Degorski loan to Berger's post office box P.O. Box 344, Bala Cynwyd, PA 19004. Berger continued to make payments on the Degorski loan until at least September 15, 2003. These payments were made either by checks drawn on Jefferson Bank and signed by Berger, or by bank draft on the United Settlement Services account controlled by Berger. Many of the drafts indicate that the payor was Degorski, but the address listed on the draft was Berger's office, although some have Degorski's home address or personal post office box.

Degorski received nine or ten statements from Wendover requesting payment of his mortgage, which surprised him since he believed it had been paid off. He received these statements sporadically during the first years after his refinancing. When he called Wendover, he was told that his loan was active. He would then call Fisher, who would tell him that she would take care of his problem. Each time he called Fisher, he would not get another statement for several months. Each time he received a statement, the process started over again.

As a result of Berger's actions on the Degorski refinancing, Fidelity was required to make a payment of \$103,932.75 to satisfy the original Degorski mortgage.

First Berger refinancing

On June 7, 2002, Berger refinanced his own home in Bryn Mawr, Pennsylvania. He never sent the payoff check for \$392,761.24 to Wells Fargo, the original mortgage holder.

Mathew Peskin

On August 21, 2002, Peskin refinanced his home in Wynnewood, Pennsylvania. Washington Mutual never received the \$265,647.73 needed to satisfy the first mortgage. Instead, it received a request to change future mailings to Peskin to P.O. Box 344, Bala Cynwyd, Pennsylvania 19004, thus causing Washington Mutual to mail monthly statements to Berger, who controlled the post office box. Berger continued to make monthly payments on Peskin's mortgage from October, 2002, through July, 2004.

In August, 2004, a Washington Mutual representative contacted Peskin and informed him that he was eligible for a lower rate on his mortgage. Peskin thought that Washington Mutual was making a sales call for new business, but the representative informed him that he already had a mortgage with Washington Mutual. Peskin thought that Washington Mutual had made an error, and asked them to look into the matter. The next day he learned that not only did he have a mortgage with Washington Mutual, but it was current, and Washington Mutual was receiving checks from him every month.

Peskin then contacted Berger, who told Peskin that there were some paperwork errors and that Berger would get it straightened out. Peskin checked the website for Washington Mutual over the next few days, and saw that his loan was no longer in the data base. Berger Paid off this loan.

Arie Oren

On or around December 19, 2003, Arie Oren completed the paperwork to refinance his property located in Narberth, Pennsylvania. Because Option One Mortgage, the original mortgage holder, wanted a \$20,000 early termination fee, Oren refused to complete the deal. Berger used the signed paperwork to obtain a new mortgage in Oren's name with EMC Mortgage Corporation. Check number 8723 in the amount of \$696,455.22 and made payable to the first mortgage holder, Option One Mortgage, was never received by Option One Mortgage. Berger sent EMC a mailing address of P.O. Box 344, Bala Cynwyd, Pennsylvania 19004, causing EMC to mail monthly statements and payoff notices to Berger.

In September, 2004, Berger told Oren that Option One had waived the payoff fee and the new mortgage could be processed. Option One never received the \$696,455.22 for the payoff of Oren's loan. Since Berger had told Oren that Oren would start to receive statements from EMC, his new mortgage company in the near future, Oren continued to make payments to Option One. After a few months, he called EMC, and a representative told him that statements had been sent to Oren's new address. The new address turned out to be the address of Berger's business, so Oren assumed it was a mistake by EMC, and just continued to pay his Option One mortgage.

In March, 2004, Oren's wife was trying to buy a building and the agent handling the sale told the Orens that the Option One mortgage had not been paid off. When Oren called Option One, he learned that their mortgage was \$14,000 in arrears and that his mailing address had been changed to Berger's office via the internet. Oren then contacted an attorney.

Records from Berger's accounts indicate that he made payments from two different accounts for several months to EMC for the Orens' mortgage at EMC.

As a result of Berger's actions, Fidelity took a loss of \$717,760.33 on this property.

Bruce Meier

Bruce Meier would testify that on February 3, 2004, he purchased a home in Pennington, New Jersey from Neil and Robin Shapiro. The intention was to buy the property from the Shapiros, and then rent it to them until they could afford to buy it back from Meier. At the closing, Berger told him that mortgages to Bank of America (\$367,900), United Mortgage (\$100,000), Yardville National Bank (\$143,018.30 and \$15,000) and a federal tax lien (\$34,600.73) were all satisfied at closing, for a total of \$660,519.03

At the end of 2004, Neil Shapiro told Meier that Shapiro wanted to sell the house, and Meier gave approval to list the home. Shapiro wanted to sell the home, and use the proceeds to pay back Meier. Meier discussed the sale with Gifis, who handed Meier an unopened FedEx envelope addressed to Meier. Inside was a foreclosure notice from the Pennsylvania Business Bank. There was also another \$300,000 loan being serviced by Litton Loan Service which had not been paid.

The documentation for this transaction was severely flawed, as in addition to the HUD 1 form which had been supplied to Meier, there was at least one additional HUD 1 form, which reflected significantly different figures. This documentation reflects that \$531,987.03 was diverted at settlement.

As a result of Berger's actions, Stewart Title took a loss of \$304,552.45, and Fidelity took a loss of \$159,952.78 on this property.

James Groelinger

On August 9, 2004, Groelinger refinanced his property in Mahwah, New Jersey. Chase Manhattan, the original mortgage holder, received a check for \$349,402.84. When Chase attempted to deposit the check, however, it could not be processed because of a stop payment order. Groelinger's mailing address had been changed to P.O. Box 344, Bala Cynwyd, Pennsylvania 19004, causing Chase to mail monthly statements to the new address. Berger made Pennsylvania payments to this address for several months.

In November, 2004, Groelinger learned that his original mortgage at Chase had been reinstated, because his payoff check had not cleared, and that his mortgage had been reopened under a new account number. Groelinger called Berger, who told Groelinger that the check he had written to satisfy the mortgage had been from the wrong account. Berger instructed Groelinger to call Chase and explain the situation, and told Groelinger that Berger would take care of the problem. Later that month the Groelingers received a foreclosure notice.

As a result of Berger's actions, Fidelity took a \$367,583.83 loss.

Mary Ann Murphy

On or about February 6, 2004, Mary Ann Murphy refinanced her property in Glenside, Pennsylvania. The closing took place at HLF's office, and only Fisher and Murphy were present. Murphy began to make payments to Countrywide Home Loans, the new mortgage holder, assuming that the first mortgage to Fairbanks Capital Corp. had been paid.

Fairbanks never received the \$202,293.98 check made payable to them. Berger made payments on Murphy's loans for a period of time, but then stopped making payments. In March, 2005, Murphy received a foreclosure notice stating that Wells Fargo Bank, which was now servicing the Fairbanks mortgage, had obtained a judgement against her for \$206,421.91, as her mortgage was in arrears. Murphy called Fisher, who sarcastically responded, "Well, I guess we'll have to write a check for \$200,000." Fisher told Murphy that she would handle the situation. Fisher did not seem either surprised or upset about the situation.

After a few days, Murphy had not heard from Fisher, and Fisher would not return Murphy's calls. Murphy went to Fisher's home, and demanded that Fisher explain the situation. Fisher told Murphy that all of Murphy's loan papers were destroyed in a flood, and told Murphy that the problem was the fault of Allied Mortgage. Fisher promised Murphy that Fisher would produce papers which would document that Murphy had paid off her first mortgage. Fisher then drafted a letter to the law firm handling the foreclosure for Murphy to sign and promised to fax it to the law firm. The law firm has no record of having received this letter.

Murphy then went to Berger, who blamed Fisher for mishandling the funds, and told Murphy that he would fix the problem by submitting a claim with the title insurance company to pay off her mortgage with Fairbanks. The problem was not resolved, and a Sheriff's sale notice was placed on Murphy's home in April, 2005.

As a result of these actions by Berger and Fisher, Fidelity took a loss of \$259,710.84. In addition, Murphy is still unable to re-finance as a result of additional liens placed on her property by Berger and Fisher.

Second Berger refinancing

On August 26, 2004, Berger again refinanced his own residence. The payoff check in the amount of \$472,931.94 was never received by Litton Loan Servicing, the first mortgage holder.

Patricia Simpson

On or about April 29, 2004, Patricia Simpson refinanced her property in Abington, Pennsylvania. The settlement occurred in Fisher's office. Only Fisher and Simpson were present. As part of the settlement, Simpson received a check for \$37,000 drawn on a United Services bank account. Simpson then began making payments on her new mortgage. In June, 2004, GMAC, which had never received the \$96,221.07 which had been obligated for payment of Simpson's original mortgage, contacted Simpson to tell her the original mortgage was in arrears. Simpson called Fisher, who told her that the loan had not closed because of some credit card debt on Simpson's record, but that Fisher would clear the issue up. In reality, Fisher had made one mortgage Pennsylvania payment on Simpson's GMAC mortgage out of one of Fisher's own accounts.

Simpson then contacted Berger, who blamed Fisher for the problem, and then told Simpson he was going to sue Fisher for the money that had been intended for the Pennsylvania payoff of the GMAC loan. Later, in September, 2004, Berger told Simpson that he was going to get a home equity loan to pay off the GMAC mortgage. Simpson told Berger she was going to the press about her problem, and Berger told Simpson that if she told the press, Berger would go out of business and would not be able to pay off her mortgage. He also told her that he did not want to submit a claim through his insurance company, because they would drop

his coverage and put him out of business. Then, starting in September, 2004, Berger made some payments on Simpson's GMAC mortgage.

In December, 2004, GMAC notified Simpson that Berger had submitted a check to pay off her mortgage, but it had bounced. Simpson notified Berger, who told her it was impossible that the check had bounced, and that he would get the mortgage up to date. Until May, 2005, Berger made some additional payments on Simpson's mortgage, but these were not sufficient to prevent foreclosure. Simpson then filed a complaint with the police.

The loss on Simpson's property is expected to be approximately \$96,221.07.

Loans from Berger to Fisher

Between March 1, 2004 and June 2, 2004, Berger made at least \$77,050.00 in "loans" to Fisher. Fisher made no payments on any of these "loans."

IV. MAXIMUM SENTENCE

The maximum penalty for mail fraud affecting a financial institution is 30 years imprisonment, a five year period of supervised release, \$1,000,000 fine and a \$100 special assessment. Full restitution of as much as \$4,617,670.15 also shall be ordered.

Supervised release may be revoked if its terms and conditions are violated. When supervised release is revoked, the original term of imprisonment may be increased by up to 5 years per count of conviction in the case of Class A felonies, 3 years per count of conviction in the case of Class B felonies, 2 years per count of conviction in the case of Class C and D felonies, and 1 year per count of conviction in the case of Class E felonies and misdemeanors. Thus, a violation of supervised release increases the possible period of incarceration and makes it possible that the defendant will have to serve the original sentence, plus a substantial additional period, without credit for time already spent on supervised release.

Respectfully submitted,

PATRICK L. MEEHAN
United States Attorney

JUDY GOLDSTEIN SMITH
Assistant United States Attorney

CERTIFICATE OF SERVICE

_____ I certify that, by hand delivery, I have served or caused to be served a copy of the foregoing upon:

Stuart Patchen, Esq.
Defender Association of Philadelphia
Federal Court Division
The Curtis Center Building
601 Walnut Street
Suite 540 West
Independence Square West
Philadelphia, PA 19106

Judy Goldstein Smith
Assistant United States Attorney

Date: July 19, 2007

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA :
 :
 v. : **CRIMINAL NO. 07-**
 :
JAY BERGER :

GUILTY PLEA AGREEMENT

Under Federal Rules of Criminal Procedure 11, the government, the defendant, and the defendant's counsel enter into the following guilty plea agreement. Any reference to the United States or the government in this agreement shall mean the Office of the United States Attorney for the Eastern District of Pennsylvania.

1. The defendant agrees to plead guilty to Count One of an information, waiving prosecution by indictment, charging him with mail fraud affecting a financial institution, in violation of 18 U.S.C. § 1341, arising from his participation since at least April 2000 through at least December 31, 2004 in a scheme to defraud homeowners seeking to refinance their mortgages, the holders of the mortgages on those homes, the companies refinancing those homes, and the title companies which insured the titles to those properties, including Robert Conn, Larry Borowsky, Diane Silverstein, Steven Gifis, Anthony Degorski, Mathew Peskin, Arie Oren, Bruce Meier, James Groelinger, Mary Ann Murphy, Patricia Simpson, GE Mortgage, Wells Fargo Bank, Chase Home Finance, Washington Mutual Home Loans, Country Wide Home Loans, Equicredit, Wendover Financial Services, Fairbanks Capital, Irwin Mortgage Corporation, Option One Mortgage, Bank of America, United Mortgage, Yardville National Bank, Litton Loan Servicing, GMAC Mortgage, Fidelity National Title Insurance Company of New York and

Stewart Title Guaranty Company of approximately \$4,617,670.15, by diverting monies received during the closing process for refinancing home loans to himself and Carol Fisher rather than using those funds to pay off the holders of the existing mortgages on those homes. The defendant further acknowledges his waiver of rights, as set forth in the attachment to this agreement.

2. The defendant agrees to pay the special victims/witness assessment in the amount of \$100 before the time of sentencing and shall provide a receipt from the Clerk to the government before sentencing as proof of this payment.

3. The defendant agrees to make restitution of approximately \$4,617,670.15 as directed by the court.

4. The defendant further agrees that restitution, fine, assessment, tax, interest or other payments in this case do not constitute extraordinary acceptance of responsibility or provide any basis to seek a downward departure from the applicable Sentencing Guidelines range.

5. Defendant waives any claim under the Hyde Amendment, 18 U.S.C. § 3006A (Statutory Note), for attorney's fees and other litigation expenses arising out of the investigation or prosecution of this matter.

6. At the time of sentencing, the government will:

- a. Make whatever sentencing recommendation as to imprisonment, fines, forfeiture, restitution and other matters which the government deems appropriate.

- b. Comment on the evidence and circumstances of the case; bring to the Court's attention all facts relevant to sentencing including evidence relating to dismissed counts, if any, and to the character and any criminal conduct of the defendant; address the Court regarding the nature and seriousness of the offense; respond factually to questions raised by the Court; correct factual inaccuracies in the presentence report or sentencing record; and rebut any statement of facts made by or on behalf of the defendant at sentencing.
- c. Nothing in this agreement shall limit the government in its comments in, and responses to, any post-sentencing matters.

7. The defendant understands, agrees and has had explained to him by counsel that the Court may impose the following statutory maximum sentence: Count One, mail fraud affecting a financial institution, 30 years imprisonment, a five year period of supervised release, a \$1,000,000 fine, and a \$100 special assessment;

Total Maximum Sentence is: 30 years imprisonment, a five year period of supervised release, \$1,000,000 fine and a \$100 special assessment. Full restitution of as much as \$4,617,670.15 also shall be ordered.

The defendant further understands that supervised release may be revoked if its terms and conditions are violated. When supervised release is revoked, the original term of imprisonment may be increased by up to 5 years per count of conviction in the case of Class A felonies, 3 years per count of conviction in the case of Class B felonies, 2 years per count of

conviction in the case of Class C and D felonies, and 1 year per count of conviction in the case of Class E felonies and misdemeanors. Thus, a violation of supervised release increases the possible period of incarceration and makes it possible that the defendant will have to serve the original sentence, plus a substantial additional period, without credit for time already spent on supervised release.

8. The defendant understands and agrees that: (a) the status of any professional license or certification held by the defendant is not protected by this agreement and is a matter solely within the discretion of the appropriate licensing, regulatory and disciplinary authorities; and (b) the government will inform the appropriate professional licensing, regulatory and disciplinary authorities in Pennsylvania and other jurisdictions of the disposition of the criminal charges filed against the defendant in this case.

9. The defendant may not withdraw his plea because the Court declines to follow any recommendation, motion or stipulation by the parties to this agreement. No one has promised or guaranteed to the defendant what sentence the Court will impose.

10. Pursuant to USSG § 6B1.4, the parties enter into the following stipulations under the Sentencing Guidelines Manual effective November 1, 2006. It is understood and agreed that: (1) the parties are free to argue the applicability of any other provision of the Sentencing Guidelines, including offense conduct, offense characteristics, criminal history, adjustments and departures; (2) these stipulations are not binding upon either the Probation Department or the Court; and (3) the Court may make factual and legal determinations that differ from these stipulations and that may result in an increase or decrease in the Sentencing Guidelines range and the sentence that may be imposed:

(a) \$4,617,670.15 was the fraud loss caused in furtherance of the criminal activity jointly undertaken by the defendant and co-schemers; this amount was within the scope of the defendant's agreement; this amount was reasonably foreseeable to the defendant in connection with the scheme; and the defendant's Guideline range should be calculated based on this amount pursuant to USSG §§ 1B1.3 and 2B1.1(a)(1) and (b)(1)(J).

(b) The offense involved 10 or more victims, and therefore the defendant's guideline range should be increased by 2-levels pursuant to USSG §2B1.1(b)(2)(A)(i).

(c) The defendant abused a position of private trust in a manner that significantly facilitated the commission of the offense, and therefore the defendant's Guideline range should be increased 2-levels pursuant to USSG §3B1.3.

(d) As of the date of this agreement, the defendant has demonstrated acceptance of responsibility for his offense making the defendant eligible for a 2-level downward adjustment under USSG § 3E1.1(a).

(e) As of the date of this agreement, the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying the government of her intent to plead guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, resulting in a 1-level downward adjustment under USSG § 3E1.1(b).

11. In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally

attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law. This waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.

- a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.
- b. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:
 1. the defendant's sentence on any count of conviction exceeds the statutory maximum for that count as set forth in paragraph 6 above;
 2. the sentencing judge unreasonably departed upward pursuant to the Sentencing Guidelines;
 3. the sentencing judge, exercising the Court's discretion pursuant to United States v. Booker, 125 S. Ct. 738 (2005), imposed an unreasonable sentence above the final Sentencing Guideline range determined by the Court;and/or

If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

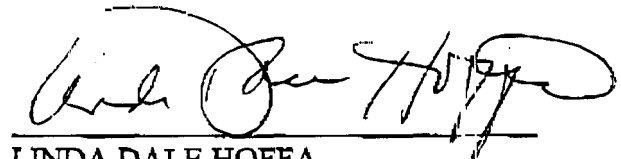
The defendant also waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a.

12. The defendant is satisfied with the legal representation provided by the defendant's lawyer; the defendant and this lawyer have fully discussed this plea agreement; and the defendant is agreeing to plead guilty because the defendant admits that he is guilty.

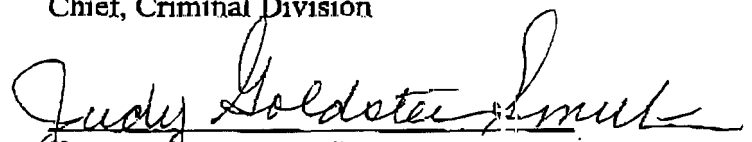
13. It is agreed that the parties' guilty plea agreement contains no additional promises, agreements or understandings other than those set forth in this written guilty plea agreement, and that no additional promises, agreements or understandings will be entered into unless in writing and signed by all parties.

PATRICK L. MEEHAN
United States Attorney


JAY BERGER
Defendant


LINDA DALE HOFFA
Assistant United States Attorney
Chief, Criminal Division


STUART PATCHEN, Esq.
Counsel for Defendant


JUDY GOLDSTEIN SMITH
Assistant United States Attorney

Date: , 2007

Attachment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 07-
 :
 JAY BERGER :

ACKNOWLEDGMENT OF RIGHTS

I hereby acknowledge that I have certain rights that I will be giving up by pleading guilty.

1. I understand that I do not have to plead guilty.
2. I may plead not guilty and insist upon a trial.
3. At that trial, I understand
 - a. that I would have the right to be tried by a jury that would be selected from the Eastern District of Pennsylvania and that along with my attorney, I would have the right to participate in the selection of that jury;
 - b. that the jury could only convict me if all twelve jurors agreed that they were convinced of my guilt beyond a reasonable doubt;
 - c. that the government would have the burden of proving my guilt beyond a reasonable doubt and that I would not have to prove anything;
 - d. that I would be presumed innocent unless and until such time as the jury was convinced beyond a reasonable doubt that the government had proven that I was guilty;
 - e. that I would have the right to be represented by a lawyer at this trial and at any appeal following the trial, and that if I could not afford to hire a lawyer, the court would appoint one for me free of charge;
 - f. that through my lawyer I would have the right to confront and cross examine the witnesses against me;
 - g. that I could testify in my own defense if I wanted to and I could subpoena witnesses to testify in my defense if I wanted to;

h. that I would not have to testify or otherwise present any defense if I did not want to and that if I did not present any evidence, the jury could not hold that against me.

4. I understand that if I plead guilty, there will be no trial and I would be giving up all of the rights listed above.


5. I understand that if I decide to enter a plea of guilty, the judge will ask me questions under oath and that if I lie in answering those questions, I could be prosecuted for the crime of perjury, that is, for lying under oath.

6. I understand that if I plead guilty, I have waived my right to appeal, except as set forth in appellate waiver provisions of my plea agreement.

7. Understanding that I have all these rights and that by pleading guilty I am giving them up, I still wish to plead guilty.



JAY BERGER
Defendant



STUART PATCHEN Esq.
Counsel for the Defendant