UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	)	
Sovereign Asset Management, LLC,	)	HUDALJ 10-F-014-CMP-4
Respondent.	)	

DEFAULT JUDGMENT AND ORDER

I. Procedural Background

The Secretary of the United States Department of Housing and Urban Development ("HUD") instituted this action by filing a Complaint for Civil Money Penalties ("Complaint"), dated December 9, 2009, against Sovereign Asset Management, LLC ("Respondent"), in its capacity as management agent of Infill I Apartments ("the Project"), a multifamily housing project receiving HUD funds through Section 8 of the United States Housing Act of 1937. The Complaint alleges that Infill Associates of Connecticut, LLC ("Infill"), the owner of the Project, violated its Housing Assistance Payments Contract with HUD by failing to submit timely audited Annual Financial Reports for the Project's fiscal years ending on June 30, 2006, June 30, 2007 and June 30, 2008. The Complaint alleges that Respondent has an identity of interest with Infill, and therefore alleges three counts of violation of the National Housing Act, 42 U.S.C. § 1437z-1(b)(2), seeking a civil monetary penalty of $65,000 therefor.

Further, the Complaint states in pertinent part in Paragraphs 42, 43 and 46 that --

> 42. Respondent may submit a written request for a hearing before an administrative law judge to HUD and the Office of Administrative Law Judges no later than fifteen (15) days following receipt of a complaint, as required by statute. * * * *.
>
> 43. If the Respondent desires a hearing, it shall also serve upon HUD and file with the Office of Administrative Law Judges a written answer to the complaint within thirty (30) days of receipt of the complaint, unless such time is extended by the administrative law judge for good cause.
>
> * * * *

> 46. If both a request for hearing and answer are not submitted by the Respondent by the dates required, then HUD will file a Motion for Default Judgment, pursuant to 24 CFR § 26.41. If a default judgment is issued, it shall constitute an admission of all facts alleged in the Department's complaint and a waiver of Respondent's right to a hearing on such allegations.

HUD's Office of Administrative Law Judges (OALJ) notified Respondent, in a letter dated December 15, 2009, that if it wanted to contest the imposition of the penalties, it "must submit a request for a hearing no later than 15 days following your receipt of the Complaint," that if it has requested a hearing on time it has "a total of 30 days from your receipt of the Complaint to file a written answer" and that "you may submit to this Office a request for an extension of time beyond this 30-day period . . . ."

Respondent submitted a Request for Hearing, dated December 22, 2009, to the Office of Administrative Law Judges, which stamped it as received on January 11, 2010.

On January 28, 2010, HUD served on Respondent a Motion for Default Judgment ("Motion"), pursuant to 24 C.F.R. §§ 26.41, and 30.90(c), on grounds that Respondent failed to submit a response to the Complaint. The Motion requests that a default decision be issued against Respondent for Civil Money Penalties in the amount of $65,000.

On February 24, 2010, HUD Administrative Law Judge Alexander Fernandez sent the parties a Notice of Disqualification, to which Complainant responded with a request that the case be reassigned. In a letter dated March 10, 2010, the Director of the HUD OALJ reassigned the case to the United States Environmental Protection Agency's Office of Administrative Law Judges.[1] The undersigned was officially designated to preside over this case on March 11, 2010.

To date, no answer to the Complaint has been filed, and no response to Complainant's Motion has been filed.

II. Applicable Procedural Rules

The rules governing proceedings on complaints issued by HUD for civil monetary penalties are 30 C.F.R. Parts 26 and 30 (Rules). The Rules at Part 30 provide in pertinent part that "[i]f the respondent desires a hearing before an administrative law judge, the respondent shall submit a request for hearing to HUD and the Office of Administrative Law Judges no later than 15 days following receipt of the complaint, as required by statute." 24 C.F.R. § 30.90(a).

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[1] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before HUD pursuant to an Interagency Agreement effective for a period beginning March 4, 2010.

The Rules provide further that "[i]n any case in which respondent has requested a hearing, the respondent shall serve upon HUD and file with the Office of Administrative Law Judges a written answer to the complaint within 30 days of receipt of the complaint, unless such time is extended by the administrative law judge for good cause." 24 C.F.R. § 30.90(b). The Rules also provide that "[i]f no response is submitted, then HUD may file a motion for default judgment, together with a copy of the complaint, in accordance with [the Rules at Part 26]. 24 C.F.R. § 30.90(c). In turn, Part 26 provides as follows:

> § 26.41 Default.
>
> (a) General. The respondent may be found in default, upon motion, for failure to file a timely response to the Government's complaint. The motion shall include a copy of the complaint and a proposed default order, and shall be served upon all parties. The respondent shall have 10 days from such service to respond to the motion.
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> (b) Default order. The ALJ shall issue a decision on the motion within 15 days after the expiration of the time for filing a response to the default motion. If a default order is issued, it shall constitute the final agency action.
>
> (c) Effect of default. A default shall constitute an admission of all facts alleged in the Government's complaint and a waiver of respondent's right to a hearing on such allegations. The penalty proposed in the complaint shall be set forth in the default order and shall be immediately due and payable by respondent without further proceedings.

24 C.F.R. § 26.41.

III. Motion for Default

The Motion states that Respondent was served with the Complaint on December 11, 2009, and therefore had until December 27 to request a hearing. The Motion asserts that Respondent did not file a request for hearing until January 11, 2010, "thereby allowing HUD to file this Motion for Default Judgment, pursuant to 24 CFR §§ 30.90(c) and 26.41." Attached to the Motion is the Declaration of Nilda Gallegos, dated January 28, 2010, records custodian for filings in Civil Money Penalties cases brought by HUD. Ms. Gallegos states in her Declaration that the package containing the Complaint addressed to Respondent was delivered on December 11, 2009, as evidenced by the UPS Tracking Summary attached to her Declaration as Exhibit B, and that, other than Respondent's request for hearing, she has not received a response to the Complaint or any other pleading or correspondence from Respondent.

The Request for Hearing was dated December 22, 2009, and it is possible that the holidays caused some delay in filing, but the case file does not include a postmark indicating

when it was mailed to HUD. Nevertheless, to date, Respondent has not filed any answer to the Complaint. A question that arises is whether a request for hearing constitutes a "response" within the meaning of 24 C.F.R. § 30.90(c) and § 26.41, which authorize a motion for default and finding of default when no "response" is filed. The term "response" is defined in 24 C.F.R. § 26.29 as "the written response to a complaint, admitting or denying the allegations in the complaint and setting forth any affirmative defenses and mitigating factors or extenuating circumstances." Moreover, if a request for hearing without any subsequent answer constituted such a response, then HUD would be precluded indefinitely from filing a motion for default where a request for hearing is filed but no answer is filed, which is an absurd result. Therefore, it is concluded that a failure to file a timely "answer' under 24 C.F.R. § 30.90(b), even where a request for hearing is filed, is a sufficient basis for a finding of default. It is particularly appropriate to find Respondent in default where so much time has elapsed since the answer to the Complaint was due.

It is concluded that Respondent is in default for its failure to file an answer to the Complaint within the time limits set out in 24 C.F.R. § 30.90(b). Respondent's default constitutes an admission of all facts alleged in the Complaint and a waiver of its right to a hearing on such allegations 24 C.F.R. §§ 26.41.

Accordingly, HUD's Motion for Default Judgment is granted, based upon the entire record and the following Findings of Fact and Conclusions of Law.

IV. Findings of Fact

1. Respondent is the identity of interest limited liability company management agent for Infill, the owner of the Project. Complaint ¶ 2.

2. David Mesite has an ownership interest in both Infill and Respondent. Complaint ¶ 11.

3. On or about April 20, 2006, David Mesite, on behalf of Infill executed an *Assignment, Assumption and Amendment Agreement, Section 8 Housing Assistance Payments Contract* ("Assumption Agreement") with HUD and William Hirshson d/b/a Infill Associates, by which Mr. Hirshson irrevocable assigned his interest in Housing Assistance Payments ("HAP") Contract No. CT 26-E000-015, for HAP units in the Project to Infill. Complaint ¶ 11.

4. At paragraph 2 of the Assumption Agreement, Infill agreed that, "[e]ffective as of the date of this Agreement, the Buyer agrees to assume and be bound by the HAP Contract as modified herein, and is responsible for filing the Annual Financial Statement (AFS) from the date of this Agreement through the end of the Buyer's fiscal year."Complaint ¶ 11.

5. In addition, Infill assumed financial reporting requirements for subsequent years. Under paragraph 4 of the Assumption Agreement, Part II of the HAP Contract was amended to include

the "Financial Reporting Standards." Housing Assistance Payment Contracts were modified by amendment to incorporate financial reporting requirements, requiring as follows:

> Financial Reporting Standards. The Owner shall comply with the Uniform Financial Reporting Standards of 24 CFR part 5, Supart H, including any changes in the regulation and related Directives. This obligation shall apply during the current term of the HAP contract and for each successive renewal term.

Complaint ¶¶ 6, 11.

6. The Uniform Financial Reporting Standards, set forth at 24 CFR Part 5, Subpart H, require an owner to submit annual financial reports to HUD no later than 90 days after the end of the fiscal year, or within an extended time if an extension of time is granted by the Secretary. 24 C.F.R. § 5.801. Under this provision, Infill was required to submit Annual Financial Reports ("AFRs") to HUD no later than 90 days after the end of its fiscal year, or any extended time granted by the Secretary. Complaint ¶ 7, 13.

7. HAP Contract No. CT 26-E000-015 had just been renewed by HUD and Mr. Hirshson, effective September 1, 2005, for an additional five-year term. Therefore, based upon the Assumption Agreement, Infill assumed responsibility for the filing of AFSs from April 20, 2006 through August 31, 2010. Complaint ¶ 14.

8. Infill's fiscal year ends on June 30. Therefore, AFRs were due on or before September 30th of the same year. Complaint ¶ 15.

9. Infill filed its AFR for fiscal year 2006 more than two years late. Complaint ¶ 16.

10. Infill did not file AFRs for fiscal years 2007 and 2008. Complaint ¶ 16.

11. Respondent knew that it was required to have Infill file an AFR in the time and manner prescribed by the Secretary because Infill's owner executed the Amendment Agreement on or about April 20. 2006, which specified that Infill was required to file these reports to remain in compliance with HUD requirements.

V. Conclusions of Law

1. Infill's failures to timely furnish the Secretary with AFRs are violations of Part II of the HAP Contract. Complaint ¶ 16.

2. Respondent, as the identity of interest limited liability company management agent for Infill, the owner of the Project, is an "agent employed to manage the property that has an identity of interest with the owner . . . of a property receiving project-based assistance under Section 8 of the

United States Housing Act of 1937 (42 U.S.C. 1427f)," and may be subject to a civil money penalty under 24 C.F.R. § 30.68(b) for any knowing and material breach of a housing assistance payments contract.

3. Respondent's failure to timely furnish the Secretary with a complete audited AFR for the Infill I Apartment's fiscal year ending on June 30, 2006 is a violation of 42 U.S.C. § 1437z-1(b)(2). Complaint ¶ 28.

4. Respondent's failure to timely furnish the Secretary with a complete audited AFR for the Infill I Apartment's fiscal year ending on June 30, 2007 is a violation of 42 U.S.C. § 1437z-1(b)(2). Complaint ¶ 33.

5. Respondent's failure to timely furnish the Secretary with a complete audited AFR for the Infill I Apartment's fiscal year ending on June 30, 2008 is a violation of 42 U.S.C. § 1437z-1(b)(2). Complaint ¶ 38.

6. Since HUD gave specific instruction of the AFR to Respondent and Infill, in the HAP Contract Amendment Agreement, their violations of the requirement of this requirement were "knowing." 24 C.F.R. § 30.10; Complaint ¶¶ 23, 29, 34,39.

7. HUD made annual financial reporting an express requirement of Infill's Amendment Agreement, and these financial reports are a necessary element of HUD's assessment of the health of subsidized housing, and to ensure that no unauthorized or improper expenditures have been made that could jeopardize the project and its provision of decent, safe and sanitary housing for its resident. A project owner's failure to file these reports influences HUD by diverting manpower to assessment and enforcement, thus making a violation of this requirement "material." 24 C.F.R. § 30.10; Complaint ¶¶ 25, 30, 35, 40.

8. Infill's knowing and material failures to submit audited AFRs, as mandated by the HAP Contract, are grounds for the imposition of Civil Money Penalties against Respondent, Infill's identity of interest management agent, pursuant to 24 C.F.R. § 30.68 and 42 U.S.C. § 1437z-1(b)(2), which provides that "A penalty may be imposed under this section or a knowing and material breach of a housing assistance payments contract." Complaint ¶¶ 17, 31, 36, 41.

VI. The Penalty

In determining the amount of penalty, "consideration should be given to such factors as the gravity of the offense, any history of prior offenses . . ., ability to pay the penalty, injury to the tenants, injury to the public, benefits received, deterrence of future violations, and such other factors as the Secretary may determine in regulations to be appropriate." 42 U.S.C. § 1437z-1(c)(3); 24 C.F.R. § 30.80. The maximum penalty for each violation is $25,000, under 24 C.F.R. § 30.68(c). In the Complaint, HUD included an analysis of these factors as applied to the facts of

this case, and proposed a penalty of $15,000 for Count 1 regarding failure to file the AFR for fiscal year 2006, and a penalty of $25,000 for each of Counts 2 and 3 regarding failure to file the AFR for fiscal years 2007 and 2008, for a total penalty of $65,000.

Upon a finding of default, "[t]he penalty proposed in the complaint shall be set forth in the default order and shall be immediately due and payable by respondent without further proceedings." 24 C.F.R. §§ 26.41. Accordingly, the $65,000 penalty proposed by HUD in the Complaint is imposed herein on Respondent.

ORDER

1. For failing to respond to the Complaint in a timely manner as indicated above, and upon motion filed, Respondent is deemed to have admitted all the allegations in the Complaint, waived its right to a hearing on those allegations, and is hereby found in **DEFAULT**.

2. Pursuant to 42 U.S.C. § 1437z-1(b) and (c), Respondent is found liable for a knowing and material breach of a housing assistance payments contract as alleged in each of the three Counts of the Complaint.

3. For these violations, Respondent shall pay to the Secretary of HUD a Civil Money Penalty in the amount of Sixty-Five Thousand Dollars ($ 65,000), such amount due and payable immediately without further proceedings. 24 C.F.R. § 26.41(c).

4. This order shall constitute a final agency action in accordance with 24 C.F.R. § 26.41(b).

Susan L. Biro
Chief Administrative Law Judge
United States Environmental Protection Agency

Dated: April 6, 2010
Washington, D.C.

Pursuant to 24 C.F.R. § 26.41(b) this Default Order constitutes "the final agency action." In accordance with 12 U.S.C. § 1735f-15(e) review of this Order may be had by filing within 20 days of entry of this Order a petition with the appropriate United States Court of Appeals.