UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	)	
Parkside Development Corporation,	)	**HUDALJ 11-M-016-CMP-4**
Parkside Associates, L.P., and	)	**OGC Case Number 09-041-CMF**
James L. Brown,	)	
Respondents.	)	

ORDER ON HUD'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On January 11, 2011, the Secretary of the U.S. Department of Housing and Urban Development ("HUD" and "Department") filed a Complaint for Civil Money Penalties against Parkside Development Corporation, Parkside Associates, L.P., and James L. Brown (collectively, "Respondents"), pursuant to 12 U.S.C. § 1735f-15 and the rules at 24 C.F.R. Part 30. On January 28, 2011, Respondents requested a hearing on the allegations in the Complaint. On March 9, 2011, HUD filed a First Amended Complaint for Civil Money Penalties ("First Amended Complaint"). Through the course of several rulings and procedural actions, including this case being transferred between HUD's Office of Hearings and Appeals and the undersigned's Office of Administrative Law Judges, Respondents filed an Answer on May 12, 2011. By Order dated August 15, 2011, HUD was granted leave to file the Second Amended Complaint, which alleges that Respondents failed to file audited annual financial reports ("AFRs") for the Lansdowne Apartments in Philadelphia, Pennsylvania ("Project" and "Property") for fiscals years 2005 through 2010, and seeks the imposition of a civil money penalty against Respondents, jointly and severally, in the amount of $220,000. Respondents did not file an Answer to the Second Amended Complaint. This proceeding is governed by the procedural rules at 24 C.F.R. Part 26, Subpart B (referred to herein, collectively with 24 C.F.R. Part 30, as "Rules").

I. Recent Procedural Background

On November 3, 2011, the undersigned issued a Notice of Hearing and Prehearing Order ("Prehearing Order"), which set prehearing deadlines and scheduled the hearing to begin on Wednesday, January 18, 2012.[1] The hearing was later rescheduled by Order to begin on

[1] The undersigned simultaneously issued an Order on HUD's Motion to Strike Affirmative Defenses, wherein the second sentence in paragraph 6 of the Answer was stricken.

Wednesday, January 25, 2012, in Philadelphia, Pennsylvania.

The Prehearing Order set filing deadlines, including November 23, 2011, for HUD's Prehearing Statement; December 9, 2011, for Respondents' Prehearing Statement(s); December 16, 2011, for dispositive motions and for discovery to be completed; December 20, 2011, for other motions; and January 6, 2012, for any prehearing briefs and a Joint Set of Stipulated Facts, Exhibits and Testimony. In the last paragraph of the Prehearing Order, the undersigned stated:

> **SANCTIONS**. The parties are reminded that the undersigned has authority to sanction a party that fails to comply with an order such as this one, and also has the authority to dismiss this matter or issue a decision against a party that fails to prosecute or defend the action. 24 C.F.R. § 26.34. **Specifically, if a party fails to file its Prehearing Statement, the undersigned may issue a decision against that party and may impose a civil money penalty against that party. 24 C.F.R. § 26.34(d).**

Prehearing Order at 5 (emphasis in original). The Government's Prehearing Statement and nine proposed exhibits were filed on November 22, 2011. To date, Respondents have not filed a Prehearing Statement.

On December 14, 2011, HUD filed a Motion for Partial Summary Judgment ("Motion") and Memorandum in Support ("Memo."). Therein, HUD moves for summary judgment on liability against each Respondent on the grounds that there is no genuine issue of material fact concerning whether Respondents knowingly and materially failed to submit required financial reports in violation of the National Housing Act, 12 U.S.C. § 1735f-15(c)(1)(B)(x). Memo. at 2.

The Rules provide that a party has ten days to file a response to a motion after it is served, and "[a] party failing to respond timely to a motion may be deemed to have waived any objection to the granting of the motion." 24 C.F.R. § 26.40(b). To date, no response to the Motion has been filed by any Respondent. Furthermore, HUD's counsel states in the Motion that, on November 29, 2011, she conferred with James L. Brown on behalf of the three Respondents and they do not oppose the Motion. Motion at 2. Without opposition, and because Respondents have not filed any response to the Motion, their objections, if any, are waived, and the Motion may be granted pursuant to 24 C.F.R. § 26.40(b). Nevertheless, the Motion will be considered on its merits.

II. Applicable Law

The National Housing Act provides as follows, in pertinent part:

> (A) Liable Parties. The Secretary may . . . impose a civil money penalty under this section on –

(i) any mortgagor of a property that includes 5 or more living units and that has a mortgage insured, coinsured, or held pursuant to this chapter;
(ii) any general partner of a partnership mortgagor of such property;
(iii) any officer or director of a corporate mortgagor;
(iv) an agent employed to manage the property that has an identity of interest with the mortgagor, with the general partner of a partnership mortgagor, or with any officer or director of a corporate mortgagor of such property; or
(v) any member of a limited liability company that is the mortgagor of such property or is the general partner of a limited partnership mortgagor or is a partner of a general partnership mortgagor.

(B) Violations. A penalty may be imposed under this section upon any liable party under subparagraph (A) that knowingly and materially takes any of the following actions:
* * *

(x) Failure to furnish the Secretary, by the expiration of the 90-day period beginning on the first day after the completion of each fiscal year (unless the Secretary has approved an extension . . .), with a complete annual financial report, in accordance with requirements prescribed by the Secretary, including requirements that the report be–

(I) based upon an examination of the books and records of the mortgagor;
(II) prepared and certified to by an independent public accountant or a certified public accountant (unless the Secretary has waived this requirement . . .); and
(III) certified to by the mortgagor or an authorized representative of the mortgagor.

12 U.S.C. § 1735f-15(c)(1)(A), (c)(1)(B).

As used in the above quoted statutory language, the terms "agent employed to manage the property that has an identity of interest" and "identify of interest agent" mean an entity "(1) that has management responsibility for a project; (2) in which the ownership entity, including its general partner or partners (if applicable) and its officers or directors (if applicable) has an ownership interest; and (3) over which the ownership entity exerts effective control." 12 U.S.C. § 1735f-15(k); *see* 24 C.F.R. § 30.45(a)(1).

The statutory term "knowingly" or "knowing" means "[h]aving actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under subpart B of this part or under 24 CFR part 4." 24 C.F.R. § 30.10; *see* 12 U.S.C. § 1735f-15(h). The prohibitions under Subpart B of Part 30 include the actions listed in 12 U.S.C. § 1735f-15(c)(1)(B). 24 C.F.R. § 30.45(c).

"Material or Materially" is defined in the Rules as "[h]aving the natural tendency or potential to influence, or when considering the totality of the circumstances, in some significant respect or to some significant degree." 24 C.F.R. § 30.10.

III. Findings of Fact Relevant to Liability

1. Respondent Parkside Development Corporation is the owner and mortgagor of Lansdowne Apartments in Philadelphia, Pennsylvania. ("Project" and "Property"). First Amended Complaint ¶¶ 2, 4; Answer ¶¶ 2, 4; *see* Memo., Ex. 1, Regulatory Agreement for Limited Distribution Mortgagors under Section 236 of the National Housing Act, as Amended, dated June 1970 ("Regulatory Agreement") at 6.

2. Respondent Parkside Associates, L.P., is a limited partnership, of which Parkside Development Corporation is a general partner. First Amended Complaint ¶ 3; Answer ¶ 3; Memo., Ex. 7 at 3.

3. Respondent James L. Brown is President of Parkside Development Corporation. First Amended Complaint ¶ 4; Answer ¶ 4.

4. The Lansdowne Apartments is a 19-unit multifamily housing development located in Philadelphia, Pennsylvania, insured by HUD pursuant to Section 236(j) of the National Housing Act, 12 U.S.C. § 1715z-1(j)(1). First Amended Complaint ¶ 2; Answer ¶ 2.

5. On June 9, 1970, James L. Brown, on behalf of Parkside Development Corporation, signed a Regulatory Agreement with the Secretary of Housing and Urban Development in exchange for the benefit of having the Project's mortgage of $185,600.00 insured by the Department under Section 236(j) of the National Housing Act, 12 U.S.C. § 1715z-1(j)(1). First Amended Complaint ¶¶ 13-14; Answer ¶¶ 13-14; Memo., Ex. 1 (Regulatory Agreement).

6. Paragraph 9(e) of the Regulatory Agreement states:

> Within sixty days following the end of each fiscal year the Commissioner shall be furnished with a complete annual financial report based upon an examination of the books and records of the mortgagor prepared in accordance with the requirements of the Commissioner certified to by an officer or responsible Owner and, when required by the Commissioner, prepared and certified by a Certified Public Accountant, or other person acceptable to the Commissioner.

Memo., Ex. 1 at 3.[2]

7. Parkside Development Corporation's fiscal year ends on December 31st of each year. First Amended Complaint ¶ 17; Answer ¶ 17.

8. By regulation, HUD increased, to ninety days following the end of each fiscal year, the period of time within which owners of multifamily projects with mortgages insured pursuant to Section 236 of the National Housing Act could file annual financial reports. First Amended Complaint ¶ 18; 24 C.F.R. § 5.801(c)(2).

9. Therefore, annual financial reports for the Project were due on or about March 31 every year for the preceding fiscal year, unless the date was extended by HUD. For fiscal years 2007, 2008 and 2009, HUD extended the reporting deadline by 30 days to April 30. First Amended Complaint ¶¶ 18-19; Answer ¶¶ 18-19.

10. On or about July 17, 2009, HUD mailed a written Pre-penalty Notice to Parkside Development Corporation, attention to James L. Brown, informing him of the potential of an action being brought against Parkside Development Corporation pursuant to 12 U.S.C. § 1735f-15 for failure to file annual financial reports for fiscal years 2005 through 2008. First Amended Complaint ¶ 21; Answer ¶ 21; Memo., Ex. 2, Prepenalty Notice for Civil Money Penalties dated July 16, 2009 ("July 2009 Pre-penalty Notice").

11. On or about October 17, 2010, HUD mailed a written Superseding Pre-penalty Notice (dated October 19, 2000) addressed to each of the three Respondents, informing Respondents of the potential of an action being brought against them pursuant to 12 U.S.C. § 1701q-1. First Amended Complaint ¶ 22; Answer ¶ 22; Memo., Ex. 3, Superseding Pre-penalty Notice dated October 19, 2010 ("October 2010 Pre-penalty Notice").

12. On or about February 2, 2011, HUD mailed a second written Superseding Pre-penalty Notice addressed to each of the three Respondents, informing Respondents of the potential of an action being brought against them pursuant to 12 U.S.C. § 1735f-15 for failure to file annual financial reports for fiscal years 2005 through 2009. First Amended Complaint ¶ 23; Answer ¶ 23; Memo., Ex. 4, Superseding Pre-penalty Notice dated February 2, 2011 ("February 2011 Pre-penalty Notice").

13. The July 2009 Pre-penalty Notice, October 2010 Pre-penalty Notice, and the February 2011 Pre-penalty Notice each notified the recipients of their opportunity to respond

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[2] As noted by HUD in its First Amended Complaint, "Commissioner" in this text refers to the Federal Housing Commissioner, who works "under the supervision and direction of the Secretary" within the Department of Housing and Urban Development. 42 U.S.C. § 3533(b); First Amended Complaint, n.1.

within thirty days of receiving each Notice, and how to respond. Memo., Exs. 2-4; First Amended Complaint ¶ 24; Answer ¶ 24.

14. Respondents received the July 2009 Pre-penalty Notice on or about July 21, 2009, but did not send a response to HUD. First Amended Complaint ¶ 25; Answer ¶ 25.

15. Respondents received the October 2010 Pre-penalty Notice on or about October 25, 2010. First Amended Complaint ¶ 26; Answer ¶ 26.

16. In response to the October 2010 Pre-penalty Notice, Respondents submitted a letter to HUD dated November 2, 2010. First Amended Complaint ¶ 27; Answer ¶ 27; Memo., Ex. 6 ("2010 Response Letter").

17. The 2010 Response Letter states, in part:

> [P]rior to 2005, [ ] all of our accounting requirements had been met . . . . In 2005, the regulatory agreement was changed to begin processing the accounting information via REAC . . . . [O]ur accountant at that time didn't posses the program and furthermore considered it to be too complicated and time consuming to report the data electronically.
> * * *
> [W]e were unable to find a specialist in this area of accounting to complete our reports.
> * * *
> At present, Parkside Development Corporation does not have the financial capacity to pay for the audited financial reports.
> * * *
> We do understand that the report is an important part of HUD's ability to make an accurate financial assessment of the project.
>
> Memo., Ex. 6.

18. In response to the February 2011 Pre-penalty Notice, Respondents, by their counsel, submitted a letter via e-mail to HUD on March 2, 2011. First Amended Complaint ¶ 28; Answer ¶ 28; Memo., Ex. 7 ("2011 Response Letter").

19. The 2011 Response Letter states, in part:

> Various accountants over the years have prepared financial statements on the assumption that the real property is beneficially owned by the Partnership while the Corporation retains legal title or that the Corporation is holding the Lansdowne in trust for the Partnership.
> * * *

The principal reason why the accounting work was not completed and audits submitted to the mortgagee and HUD was the fact that the Partnership [Parkside Associates, L.P.], has to spend considerable sums on repairs of various defects in the 19-unit Lansdowne, and it elected, by necessity, to effect those needed repairs rather than use available revenue to complete the financial statements.
* * *
The failure to file financial statements arose solely because the real property at issue, the Lansdowne, has significant repair needs which the Partnership under took to remedy for the safety and well being of the tenants. As a result, the partnership did not have sufficient funds to engage accountants to prepare the audited financial statements required. . . . Despite that fact, the Partnership has operated the Property according to applicable HUD rules and has, as will be demonstrated, paid costs appropriate for payment with revenues of the project.

Memo., Ex. 7 at 2, 3, 5.

20. On or about May 5, 2011, HUD mailed a Pre-penalty Notice addressed to each of the three Respondents, informing Respondents of the potential of an action being brought against them pursuant to 12 U.S.C. § 1735f-15 for failure to file an annual financial report for fiscal year 2010. Second Amended Complaint ¶ 24; Memo., Ex. 5, Pre-penalty Notice dated May 5, 2011 ("May 2011 Pre-penalty Notice").

21. The May 2011 Pre-penalty Notice notified the recipients of their opportunity to respond within thirty days of receiving the Notice, and how to respond. Memo., Ex. 5; Second Amended Complaint ¶ 25.

22. Respondents received the May 2011 Pre-penalty Notice on or about May 5, 2011, but did not send a response to HUD. Second Amended Complaint ¶ 30.

23. In their Answer to the allegations in the First Amended Complaint, Respondents stated the following:

As a result of the expenditures for repairs that were undertaken, the Lansdowne was without sufficient funds to hire accountants and auditors to prepare the various reports in the form requested by HUD.
* * *
The drain on revenues of the Lansdowne by the needed eviction proceedings and the provision of necessary social service and health assistance to tenants further drained the financial resources of the Lansdowne leaving no funds available to pay accounts [ ] and auditors needed to prepare the types of financial reports that have been required by HUD.
* * *
Respondents determined . . . they would devote Project revenues to payment of the mortgage and the extraordinary repairs needed for a building that has aged and

deteriorated, and that decisions to put the health and welfare of the tenants ahead of providing the type of financial information requested by HUD resulted in a lack of funds being available to pay for accountants and auditors to prepare the type of extensive financial statements required by HUD.

Answer ¶¶ 91, 94, 97.

24. Respondents did not answer the allegations in the Second Amended Complaint that Respondents failed to file audited annual financial reports for the Project's fiscal year 2010.

25. Respondents did not file annual financial reports as required by HUD for the Project's fiscal years 2005, 2006, 2007, 2008, 2009 and 2010. First Amended Complaint ¶ 20; Answer ¶¶ 91, 94, 97; Memo., Exs. 6-7; Second Amended Complaint ¶¶ 85-88.

IV. HUD's Motion for Partial Summary Judgment

HUD points out the undersigned's authority in 24 C.F.R. § 26.32(l) to decide cases, in part or in whole, by summary judgment when there is no disputed issue of material fact, and the authority in 24 C.F.R. § 26.34 to sanction a party for failing to comply with an order, rule, or procedure governing the proceeding, or for failing to prosecute or defend an action. Memo. at 4. Because the undisputed facts in this matter show that Respondents are liable for the knowing and material breach of the Regulatory Agreement, HUD argues, the standard for summary judgment is met and HUD is entitled to a judgment as a matter of law.[3] Memo. at 4-5.

HUD asserts that each of the facts relevant to a liability finding have been admitted by Respondents, either in their Answer or by failing to deny the allegations in HUD's complaints. Memo. at 5. Parkside Development Corporation is the owner of the Project, which is insured by HUD pursuant to the National Housing Act, 12 U.S.C. § 1715z-1(j)(1), and Parkside Associates, L.P., is the management agent of the Project and has an identity of interest with Parkside Development Corporation. *Id.* Also, Mr. Brown is the President of Parkside Development, and signed the Regulatory Agreement on its behalf. Memo. at 6; *see* Memo., Ex. 1. Civil money penalties may be imposed on each of the three Respondents, HUD argues, pursuant to 12 U.S.C. § 1735f-15(c)(1)(A)(i) (Parkside Development Corporation as mortgagor), 12 U.S.C. § 1735f-15(c)(1)(A)(iii) (James L. Brown as an officer of a corporate mortgagor), and 12 U.S.C. § 1735f-15(c)(1)(A)(iv) (Parkside Associates, L.P., as the Project's management agent that has an identity of interest with the mortgagor).

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[3] HUD refers to a "HAP contract" at least twice in the Motion (e.g., Memo. at 4, 10). It may be fairly presumed that HUD counsel intended to refer to the Regulatory Agreement at issue in this case, because HAP contracts, or Housing Assistance Payments Contracts, are different HUD instruments altogether.

Paragraph 9(e) of the Regulatory Agreement sets forth Respondents' duty to submit annual financial reports ("AFRs") in accordance with HUD requirements, HUD states. *Id.* HUD asserts that 24 C.F.R. § 5.801(b) requires that those AFRs must be as follows:

> (1) Prepared in accordance with Generally Accepted Accounting Principles as further defined by HUD in supplementary guidance;
> (2) Submitted electronically to HUD through the internet, or in other such electronic format designated by HUD, or in such non-electronic format as HUD may allow if the burden or cost of electronic reporting is determined by HUD to be excessive; and
> (3) Submitted in such form and substance as prescribed by HUD.

24 C.F.R. § 5.801(b). HUD describes an Industry Guide for the Financial Assessment Subsystem - Multifamily Housing User Guide ("Guide"), which allegedly "provides supplemental guidance on filing audited AFRs" using "HUD's automated system for collecting and assessing financial information from HUD-assisted multifamily projects," and is available to the public through the HUD website.[4] Memo. at 6; Ex. 8. The Guide, HUD states, requires profit-motivated owners of HUD-assisted multifamily projects to submit audited AFRs, not owner-certified AFRs. Memo. at 7, Ex. 8 at 1-2, 1-3. Pursuant to 24 C.F.R. § 5.801(c)(2), Parkside Development was required to submit AFRs in accordance with these requirements to HUD for the Project no later than ninety days after the end of each fiscal year, or after any additional extension, but did not do so, HUD asserts. Memo. at 7.

HUD further asserts that Parkside Development "knowingly" failed to submit the required AFRs. Memo. at 9. In support, HUD argues that Mr. Brown, on behalf of Parkside Development Corporation, executed the Regulatory Agreement that stated the duty to file AFRs, Parkside Development Corporation had filed AFRs for fiscal years prior to 2005, and in his 2010 Response Letter, Mr. Brown acknowledged the failure to file required AFRs for 2006 through 2009. *Id.*; Memo., Ex. 6. This Tribunal, HUD asserts, has previously held that a financial reporting requirement contained in a regulatory agreement, and nothing more, provides actual notice to the parties. Memo. at 9-10 (citing *U.S. Dep't of Hous. & Urban Dev. v. Crestwood Terrace P'ship*, HUDALJ 00-002-CMP (ALJ, Jan. 30, 2001); *Sundial Care Center, Inc., et al.*, HUDALJ 08-055-CMP, at 13-14 (ALJ, Mar. 25, 2009); *Lord Commons Apartments, LLC, et al.*, HUDALJ 05-060-CMP (ALJ, July 20, 2007)).

HUD also argues that Parkside Development's failure to submit the required AFRs was "material." Memo. at 10. First, the filing requirements "constitute an important aspect of HUD's monitoring responsibilities over its assisted housing portfolio," HUD states, referring to a

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[4] www.hud.gov/offices/reac/products/fass/fassmf_pdfs/chap1_introduction.pdf.

HUD Handbook 4370.1, Rev-2, Ch. 1, ¶¶ 1-4, available to the public through HUD's website.[5] Memo., Ex. 9 ("HUD Handbook"). By not submitting the reports, HUD argues, "Respondents are thwarting a significant tool that HUD uses to ensure that residents are living in safe, decent, and sanitary housing." Memo. at 11. Respondents admitted in their 2010 Response Letter that they "understand" the importance of AFRs, HUD states. *Id.*, Memo., Ex. 6. Parkside Development's failure to file AFRs is also "material" as measured by the totality of the circumstances and considering the factors in 24 C.F.R. § 30.80, HUD asserts. Memo. at 11. The gravity of Respondents' offense is demonstrated by the fact that without AFRs, HUD cannot guard against unauthorized distributions and misuses of project funds, which, if left unchecked, could deteriorate the project's physical condition, causing tenants to suffer, HUD concludes. Memo. at 11-12. In particular, HUD states, Respondents' failure to submit the reports for six consecutive years thwarts HUD's assessment of the financial health of the Project in particular. Memo. at 12.

Addressing the second factor, history of prior offenses, HUD states that Parkside Development failed to file for fiscal years 2003 and 2004 until many months after they were due. *Id.* As far as Respondents' ability to pay, HUD argues that the insured loan balance remaining, approximately $246,500, is close to being paid off because Parkside Development makes annual sales of $120,000. *Id.* Also, HUD argues, Mr. Brown has ownership interest in five properties, valued at more than $590,000, "according to publically-available records," and is employed by three different entities. *Id.* For these reasons, HUD argues Respondents have an ability to pay the penalty HUD seeks. *Id.* HUD argues that the next factor, injury to the public, is high, because HUD must spend public funds to pursue participants who fail to comply with fining requirements, and untimely filing reduces HUD's ability to act as a steward of public funds. Memo. at 13. Next, because Respondents have avoided the payment of accounting fees for the preparation of AFRs "at a time . . . when auditors' time was at a premium," they have received a benefit from noncompliance. *Id.* HUD argues next that to deter Respondents and other HUD-insured mortgagors, the penalties assessed must be greater than any actual or perceived benefit they may enjoy from not filing AFRs. Memo. at 13-14. Finally, as to Respondents' culpability, HUD argues that the responsibility to file "lies squarely with Respondents," as they executed and understood their obligations under the Regulatory Agreement. Memo. at 14. After receiving multiple notices to file the AFRs, "Respondents have shown an indifference" to their obligation and have not filed any reports for any of the fiscal years in question, HUD asserts, despite their previous filings (albeit late) for fiscal years 2003 and 2004. *Id.*

V. Standard for Summary Judgment

The Rules at Part 26 provide that a party may move for, and the presiding officer may grant, summary judgment on all or part of the claims in the Complaint "where there is no disputed issue of material fact." 24 C.F.R. §§ 26.32(l), 26.40(f)(1). Likewise, Rule 56 of the

[5] www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4370.1/43701c1HSGH.pdf.

Federal Rules of Civil Procedure ("FRCP") provides that a court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. FRCP 56(a). It is appropriate for Rule 56 and case law thereon to provide guidance for summary judgment determinations in the administrative context. *See, Puerto Rico Sewer & Aqueduct Auth. v. EPA,* 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148 (1995) (Rule 56 of the FRCP "is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment.").

The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Upon such showing, the non-moving party "may not rest upon the mere allegations or denials of his pleadings, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." FRCP 56(e). Unsupported allegations or affidavits with ultimate or conclusory facts and conclusions of law are insufficient to defeat a properly supported motion for summary judgment. *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216, *rehearing denied*, 762 F.2d 1004 (5th Cir. 1985); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

In evaluating a motion for summary judgment, the record must be viewed in a light most favorable to the non-moving party, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). Further, the record to be considered by the tribunal includes any material fact that would be admissible or usable at trial. *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993) (citing 10A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2721 at 40 (2d ed. 1983)). Nevertheless, the burden of coming forward with the evidence in support of their respective positions remains squarely upon the litigants. *See, Nw. Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir. 1994). Further, the finder of fact may draw "reasonably probable" inferences from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (citations omitted). Summary judgment is inappropriate where contradictory inferences may be drawn from the evidence or where there are unexplained gaps in materials submitted by the moving party, if pertinent to material issues of fact. *Id.; O'Donnell v. United States*, 891 F.2d 1079, 1082 (3d Cir. 1989). When ruling on a motion for summary judgment, it is the court's function to ascertain whether there is a genuine issue for an evidentiary hearing. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1985).

VI. Discussion and Conclusions of Law

In order to grant summary judgment, a determination must be made whether there are any genuine issues of fact that are material to the elements of liability for the alleged violations of the National Housing Act, 12 U.S.C. § 1735f-15(c)(1)(B)(x).

The elements of liability for a violation of the National Housing Act at 12 U.S.C. § 1735f-15(c)(1)(B)(x) are: (1) a liable party (2) failed to furnish the Secretary, by the due date of

90 days after the end of the fiscal year plus any extension, a complete annual financial report, in accordance with the requirements prescribed by the Secretary, and (3) the failure to file the annual financial report was knowing, and (4) material.

1. Liable Parties

The above Findings of Fact at paragraphs 1, 4 and 5 establish that Respondent Parkside Development Corporation is a liable party under 12 U.S.C. § 1735f-15(c)(1)(A)(i), as a mortgagor of the Lansdowne Apartments, which includes five or more living units and has a mortgage insured pursuant to the National Housing Act, 12 U.S.C. § 1715z-1(j)(1).

Findings of Fact at paragraphs 2 and 19 establish that Respondent Parkside Associates, L.P., is a liable party under 12 U.S.C. § 1735f-15(c)(1)(A)(iv), as a manager and operator of the Project that has an identity of interest with Parkside Development Corporation. *See* 12 U.S.C. § 1735f-15(k); 24 C.F.R. § 30.45(a)(1).

Paragraphs 3-5 of the Findings of Fact establish that Respondent James L. Brown is a liable party under 12 U.S.C. § 1735f-15(c)(1)(A)(iii), in his capacity as President of the mortgagor of the Project, Parkside Development Corporation.

2. Failure to File Annual Financial Reports

The Findings of Fact above establish the grounds on which six violations (one for each fiscal year 2005-2010) under 12 U.S.C. § 1735f-15(c)(1)(B)(x) are found.

As to fiscal year 2010, Respondents did not file an Answer responding to the Second Amended Complaint and thus did not deny the allegation therein that Respondents failed to file the required AFR for that period. Finding of Fact ¶ 24. While their failure to respond does not automatically result in Respondents' admission of the 2010 AFR-related allegations (see Order dated October 17, 2011, denying HUD's Motion for Default Judgment), their failure to comply with the Prehearing Order requiring such a response may result in an adverse finding. In the October 17, 2011 Order, the undersigned informed Respondents that they would have the opportunity to respond to the 2010 AFR-related allegations in their Prehearing Statement. In the Prehearing Order issued thereafter, the undersigned ordered Respondents to explain in writing any opposition to the factual allegations set forth in the Second Amended Complaint that they dispute, and submit any documents supporting their opposition to such facts. The Prehearing Order also reminded the parties that documents not submitted in their Prehearing Statements "may not be admitted into evidence." Further, the Prehearing Order warned the parties of the undersigned's authority to sanction or issue a decision against any party that does not file its Prehearing Statement. Yet no Respondent filed a Prehearing Statement.

The Rules provide that when a party fails to comply with an order, the presiding judge may issue a sanction, which "shall reasonably relate to the severity and nature of the failure or misconduct." 24 C.F.R. § 26.34. Also, the standard for summary judgment provides that when a

party "fails to properly address another party's assertion of fact," the court may "consider the fact undisputed for purposes of the motion." FRCP 56(e); *see Galindo v. Precision Am. Corp.*, 754 F.2d at 1216; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. at 888; *Griggs-Ryan v. Smith*, 904 F.2d at 115. Given Respondents' failure to respond to the allegations in the Second Amended Complaint and to the undersigned's instructions in the Prehearing Order, it is appropriate to find it undisputed that Respondents failed to file the AFR for the Project's fiscal year 2010.

As to the years 2005 through 2009, Respondent's Answer to the allegation in the First Amended Complaint that Parkside Development failed to file the required AFRs states: "Denied. HUD has alleged [two] terms which it has not defined, an 'AFR' and a 'FYE', and as a result Respondents are unable to respond to the allegations." Answer ¶ 20. The undersigned finds Respondents' assertion highly disingenuous and dubious. To begin with, both these acronyms are in fact defined on the very first page of the First Amended Complaint. Further, the term "annual financial report" or "annual audited financial reports" appears in multiple communications from both HUD and Respondents, including in the subject line of all four Pre-penalty Notices HUD sent to Respondents, as well as in Mr. Brown's 2010 Response Letter. Memo., Exs. 2-6. Next, Respondents have made many written statements that essentially acknowledge their failure to file the required AFRs. For example, Respondents did state in their Answer that "Respondents determined . . . they would devote Project revenues to payment of the mortgage and the extraordinary repairs needed," which "resulted in a lack of funds being available to pay for accountants and auditors to prepare the type of extensive financial statements required by HUD." Answer ¶ 97. Also, in their 2011 Response Letter, Respondents explained that "[t]he principal reason why the accounting work was not completed . . . was the fact that the Partnership has to spend considerable sums on repairs . . . and it elected, by necessity, to effect those needed repairs rather than use available revenue to complete the financial statements." Memo., Ex. 7 at 3. Finally, Respondents admit that "[t]he failure to file financial statements arose solely because [the Project] has significant repair needs." *Id.* at 5. In conclusion, the undersigned finds that there is no dispute that Respondents failed to file the required AFRs.

3. Knowing Failure

Because Paragraph 9(e) of the Regulatory Agreement included the duty to file audited AFRs, and Mr. Brown signed the Regulatory Agreement on behalf of Parkside Development Corporation, the failure to meet this requirement was done "knowingly" as defined in 24 C.F.R. § 30.10. Findings of Fact ¶¶ 5, 6; *Ola Properties v. U.S. Dep't of Hous. & Urban Dev.*, 336 Fed. Appx. 419, 422 (5th Cir. 2009) ("Because the regulatory agreement signed by [respondent's representative] required that the annual financial report be prepared 'in accordance with the requirements of the Secretary,' the HUD Handbook clearly states the reports must be audited, and the electronic filing requirement is found in 24 C.F.R. § 5.801(b)(2), [respondent's representative], at a minimum, acted with reckless disregard for the time and audit requirements of [the Act]."); *Premier Investments I, Inc., & Reed*, HUDALJ 06-022-CMP, at 6 (ALJ, June 29, 2007) (Order Granting Government's Motion for Summary Judgment) (finding that respondents had actual knowledge of filing requirement "based on their execution of the regulatory agreement, as modified by 24 C.F.R. § 5.5801"); *Lord Commons Apartments*, HUDALJ 05-060-

CMP, at 6 (ALJ, July 20, 2007) (Order Granting Government's Motion for Summary Judgment) (holding that managing member had actual and constructive knowledge of filing requirements because he signed the regulatory agreement and "had an obligation to keep informed of the Secretary's requirements"); *Crestwood Terrace P'Ship* at 3 (filing requirements "were expressly provided in the terms of the Regulatory Agreement" and respondent "was obligated to keep informed of the Secretary's requirements"). HUD has established that Respondents, having been established as liable parties, knowingly failed to file annual financial reports for the Project's fiscal years 2005 through 2010.

4. Material Failure

The Rules define "Material or Materially" as "[h]aving the natural tendency or potential to influence, or when considering the totality of the circumstances, in some significant respect or to some significant degree." 24 C.F.R. § 30.10. To determine the "materiality"of Respondents' violation, i.e., their failure to file AFRs, "requires a consideration of the eight regulatory factors found in 24 CFR 30.80." *Premier Investments I, Inc.*, at 5. Although some of the factors, such as ability to pay, are not logically related to materiality, others, such as injury to the public and economic benefit to the mortgagor, are logically related to materiality of failure to provide audited annual financial statements. *Yetiv v. U.S. Dep't of Hous. & Urban Dev.*, 503 F.3d 1087, 1090-91 (9th Cir. 2007). Materiality does not require that each of the penalty factors are shown, but that "one will suffice." *Am. Rental Mgmt.*, HUDALJ 99-01-CMP, at 17 (ALJ, May 26, 2000) (finding respondent "materially" took prohibited actions based on the factors of gravity, ability to pay, injury to HUD, deterrence and culpability); *Premier Investments I, Inc.*, at 9 (although each of the penalty factors in the Rules "are to be considered, only one needs to be present to establish materiality"); *Crestwood Terrace P'ship* (finding mortgagor "materially" took prohibited actions based on the benefits received and deterrence factors).

HUD has shown, through undisputed facts and uncontested assertions in its Motion, that Respondents' failures to file AFRs for fiscal years 2005 through 2010 were and are "material." Respondents failed to submit AFRs for six consecutive years, hindering HUD from assessing the financial status of a Project that has been subject to a HUD-insured mortgage since 1970. Findings of Fact ¶¶ 5, 25. Respondents admitted in their 2010 Response Letter that "the report is an important part of HUD's ability to make an accurate financial assessment of the project." Finding of Fact ¶ 17; Memo., Ex. 6. HUD has already spent considerable resources and time pursuing Respondents' compliance and payment of penalties to address the violations, having sent multiple notices to Respondents about their obligation to submit AFRs since 2009, and currently litigating this administrative proceeding. Findings of Fact ¶¶ 10-15, 20-22. Next, Respondents have admitted to using the Project's available, albeit limited funds, on repairs instead of the AFRs, which indicates that Respondents are not able to properly reserve or allocate Project funds for tasks or expenses Respondents should have reasonably anticipated. Findings of Fact ¶¶ 19, 23. Finally, HUD's argument as to Respondents' culpability, that the responsibility to file "lies squarely with Respondents" as parties to the Regulatory Agreement (or, in Parkside Associates, L.P.'s case, as sharing an identity of interest with those parties, as well as a management role with the Project), is persuasive. Findings of Fact ¶¶ 5-6, 19, 23. HUD has

therefore shown, and Respondents have not presented arguments or evidence to the contrary, that Respondents' failures to file timely AFRs were "material," as measured by the factors in 24 C.F.R. § 30.80 and a totality of the circumstances.

In sum, Respondents have not raised any genuine issue of material fact as to their liability for civil money penalties under 12 U.S.C. §§ 1735f-15(c)(1)(B)(x). Accordingly, it is concluded that HUD is entitled to judgment as a matter of law that Respondents violated their obligations under the National Housing Act, 12 U.S.C. § 1735f-15(c)(1)(B)(x), as alleged in the First and Second Amended Complaints.

ORDER

1. The Government's Motion for Partial Summary Judgment is **GRANTED**. Respondents Parkside Development Corporation, Parkside Associates, L.P., and James L. Brown are hereby found liable for six violations under the National Housing Act, 12 U.S.C. § 1735f-15(c)(1)(B)(x).

2. The issues presented at the hearing, which shall take place on January 25, 2012, will be limited to those relevant to the determination of the amount of civil money penalties to be assessed for those violations.

Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[6]

Dated: January 17, 2012
Washington, D.C.

[6] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the United States Department of Housing and Urban Development, pursuant to an Interagency Agreement in effect beginning March 4, 2010.