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

In the Matter of:	)	
Prime Venture Realty Associates, LLC,	)	Docket No. HUDALJ-10-F-003-CMP-1
Respondent	)	

INITIAL DECISION

Before: Barbara A. Gunning[1]
Administrative Law Judge
U.S. Environmental Protection Agency

Issued: March 31, 2011

Appearances:

For the Government:

Joseph J. Kim, Esquire
Office of General Counsel
Department of Housing and Urban Development
1250 Maryland Avenue SW
Portals Building, Suite 200
Washington, DC 20024

For Respondent:

Uly Campbell, Managing Member
Prime Venture Realty Associates, LLC
2713 Park Meadow Drive
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[1] 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.

I. PROCEDURAL HISTORY

The United States Department of Housing and Urban Development ("the Government" or "HUD"), through its Office of General Counsel, Departmental Enforcement Center ("DEC"), filed a Prepenalty Notice Non-Filer ("Non-Filer Notice") dated August 25, 2008, in which HUD alleges that Respondent Prime Venture Realty Associates, LLC ("Respondent") failed to file "annual financial reports" for fiscal years 2006 and 2007 as required by Respondent's Housing Assistance Plan Contract ("HAP Contract") for its property, the Elizabeth Arms Apartments ("Elizabeth Arms"). The Non-Filer Notice stated that HUD could impose upon Respondent a civil money penalty up to $25,000 for each violation. Respondent was given 30 days to respond.

On June 15, 2009, HUD, again through the DEC, filed a Prepenalty Notice for Civil Money Penalties ("CMP Notice") informing Respondent that HUD possessed evidence indicating Respondent's failure to file "annual audited financial reports" for the fiscal years 2005, 2006, 2007, and 2008.[2] Respondent was again given 30 days to respond.

On October 15, 2009, HUD issued a Complaint for Civil Money Penalties ("Complaint") seeking civil money penalties pursuant to 42 U.S.C. § 1437z-1 and 24 C.F.R. part 30 based upon Respondent's alleged failure to submit annual audited financial reports for the Elizabeth Arms. HUD Administrative Law Judge ("ALJ") J. Jeremiah Mahoney issued a Notice of Hearing and Order dated December 3, 2009, ordering Respondent to file a more definite response to the Complaint and scheduling a hearing to commence on March 11, 2010. The case was subsequently transferred to HUD ALJ Alexander Fernandez, who issued a notice modifying the Notice of Hearing and Order and postponing the hearing until March 30, 2010.

On December 30, 2009, HUD filed a Motion to Compel Answer to Complaint for Civil Money Penalties. ALJ Fernandez subsequently issued an Order Compelling Respondent to Answer directing Respondent to answer on or before January 26, 2010. On February 2, 2010, HUD moved for a Default Order citing Respondent's failure to respond to the Order to Compel. Again, ALJ Fernandez issued an Order directing Respondent to answer the Complaint on

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[2] I note that the term "audited" is not included in the Non-Filer Notice, but rather makes its first appearance in the CMP Notice filed in 2009.

or before February 26, 2010. Respondent, appearing *pro se*, through its Managing Member, Mr. Uly Campbell, filed a narrative response on February 22, 2010, in which it admits that it did not file audited financial reports for 2005, 2006, 2007, and 2008. In its Answer, Respondent also argued that its failure was not knowing and disputed the appropriateness of the proposed penalty.

ALJ Fernandez issued a Notice of Disqualification on February 23, 2010. This matter was subsequently transferred to ALJ Mahoney by Notice dated March 20, 2010. On March 25, 2010, the parties submitted a Joint Motion Seeking Appointment of Settlement Judge. On April 5, 2010, ALJ Susan Biro, Chief Administrative Law Judge of the U.S. Environmental Protection Agency, designated ALJ Spencer Nissen as settlement judge for this matter. After several months of unsuccessful negotiations, ALJ Nissen terminated the settlement process and on July 8, 2010, Chief ALJ Biro reassigned the case to the undersigned for hearing.

The undersigned issued a Second Amended Notice of Hearing and Order dated July 13, 2010, postponing the hearing until November 17, 2010. On July 19, 2010, HUD submitted a Motion for Partial Summary Judgment on the issue of liability. In support of its Motion, HUD argued that Respondent had admitted liability in its Answer when it acknowledged that it did not timely file annual audited financial reports for the fiscal years 2005-2008. Consequently, HUD concluded, there was no genuine dispute that Respondent consequently breached the HAP Contract that it assumed when it purchased the Elizabeth Arms. On August 18, 2010, HUD's Motion for Partial Summary Judgment was denied.

Meanwhile, on August 9, 2010, this Tribunal received a copy of HUD's Request for Production of Documents in which the Government sought various financial and real estate records from Respondent. Citing Respondent's failure to respond to the Request for Production of Documents, HUD filed a Motion to Compel Discovery on September 1, 2010, seeking this Tribunal's assistance in eliciting responsive documents from Respondent. On September 21, 2010, the undersigned issued an Order granting HUD's Motion to Compel and instructing the parties to submit exhibits and witness lists by September 30, 2010, noting that failure to comply may waive that party's right to call any witnesses at hearing, except for impeachment or rebuttal. On September 30, 2010, Respondent informed this Tribunal that it would present no witnesses.

On October 6, 2010, HUD submitted a Renewed Motion for Partial Summary Judgment and Sanctions. In its Renewed Motion,

HUD closely tracked its original arguments made in the initial Motion for Summary Judgment. Finding that HUD had not met its burden to establish the absence of any genuine issue of material fact, the undersigned issued an Order, dated October 29, 2010, denying HUD's renewed motion for summary judgment but granting its request that Respondent be precluded from presenting any witnesses or exhibits at hearing.

The hearing in this matter was held on November 17, 2010.[3] Mr. Campbell appeared *pro se* on behalf of Respondent. HUD attorney Joseph Kim, and fact witnesses Crystal Cervone, Brandt Witte, and James Beaudette, appeared for the Government. The hearing took place at the Stetson University College of Law, Tampa Law Center, 2nd Floor Courtroom, where the undersigned presided. In addition to the witnesses' testimony, six documents were offered by HUD and admitted into evidence as Complainant's Exhibits 1-6 (abbreviated as CX 1, CX 2, etc.).

Respondent proffered two documentary exhibits and one real evidence exhibit despite this Tribunal's previous order precluding Respondent from offering evidence at hearing. Respondent's Exhibit 2 (RX 2), the Original HAP Contract dated August 17, 1983, was nevertheless admitted over HUD's objection because HUD relies on this document in the Complaint and is charged with knowledge of its own contracts. Tr. 52 at 15-19; 86 at 19-23; 90-91 at 21-5. The remaining proffered exhibits were rejected but included in the record along with an offer of proof by Respondent.

By Order dated December 15, 2010, the parties were given leave to file post-hearing briefs on or before January 19, 2011. On January 18, 2011, HUD submitted the Government's Post-Hearing Brief ("HUD PH Br.") Respondent, through Mr. Campbell, submitted a three-page, narrative document entitled Post-Hearing Briefs dated January 19, 2011 ("R PH Br.").

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[3] The corrected transcript of the hearing was received by the undersigned on December 8, 2010. Citations to the transcript page and line numbers will be in the following format: "Tr. [pg#] at [ln#]." Where an entire page or range of pages is cited generally, only the page number will appear.

II. FINDINGS OF FACT & CONCLUSIONS OF LAW

1. Respondent Prime Venture Realty Associates, LLC, is a Florida limited liability corporation. Respondent is owned and operated by its Managing Member, Mr. Uly Campbell. Compl. ¶ 2; CX 1 at 1.

2. On July 11, 2005, Mr. Campbell entered into a Real Estate Purchase and Sale Agreement on behalf of Respondent to buy the Elizabeth Arms Apartments ("the Elizabeth Arms") from RSG Elizabeth Arms Apartments, LLC, (the "Seller"). The sale closed in December of 2005. CX 1 at 1; Compl. ¶ 8.

3. The Elizabeth Arms is a 55-unit, multifamily property located in Tampa, Florida. Compl. ¶ 2; Tr. 17 at 11-16.

4. On October 11, 2005, Mr. Campbell and Ronald Glas, Managing Member of the Seller, executed an Assignment, Assumption and Amendment Agreement of Section 8 Housing Assistance Payments Contracts ("HAP Assignment") in which Mr. Campbell, on behalf of Respondent, agreed to assume all obligations under "the HAP Contract." CX 1 at 1.

5. This HAP Assignment was also signed by Ferdinand Juluke, Director of HUD's Multifamily Housing Division in the Jacksonville Field Office. CX 1 at 5.

6. As of December 2005, Respondent has been an "owner" of a property receiving project-based assistance under Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f. Compl. ¶ 2; Tr. 17 at 5-22.

7. Respondent received a total of approximately $1.3 million in financial assistance from HUD in the form of rent subsidies for low-income tenants under the Section 8 Program between December 2005 and February 2010. Tr. 19 at 19-25.

8. The HAP Assignment states:

   Effective as of the date of this Agreement, the Buyer [Respondent] agrees to assume and to be bound by said 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.

   CX 1 at 1. The HAP Assignment did not define "annual financial statement."

9. Respondent assumed the responsibilities and duties under the HAP Contract when it executed the HAP Assignment. Compl. ¶ 10; CX 1 at 3.

10. The HAP Assignment further provided that:

> The Owner shall comply with the Uniform Financial Reporting Standards of 24 CFR Part 5, Subpart 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.

CX 1 at 2. The HAP Assignment did not identify "related directives."

11. The original HAP Contract[4] makes no reference to annual financial statements, but does state:

> The Owner shall supply HUD with any information and reports pertinent to the Contract as reasonably may be required from time to time by HUD.

RX 2 at 4 (Section 21).

12. Respondent did not file annual audited financial statements for the fiscal years 2005, 2006, 2007, or 2008. Compl. ¶¶ 14, 15, 17, and 19; Ans. ¶¶ 6.B and 7.

13. Based on the record established at hearing, Respondent was not required to file annual audited financial statements for the fiscal years 2005, 2006, 2007, or 2008. Thus, Respondent is found not liable under 42 U.S.C. § 1437z-1 for civil penalties under Counts 1-4.

III. STATUTORY AND REGULATORY BACKGROUND

Through Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*, Congress authorized HUD to provide financial assistance to housing projects that serve low-income

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[4] Although HUD was unable to locate the original HAP Contract to which the HAP Assignment and the Complaint referred, Tr. 44 at 15-23, Mr. Campbell produced a copy of the original HAP Contract, which was dated August 1983 and signed by the previous owner of the Elizabeth Arms Apartments and HUD. RX 2 at 6.

residents. In exchange for this financial assistance, project owners agree to rent out their units to eligible persons at below-market rates. In order to receive financial assistance from HUD, eligible project owners must execute a HAP Contract that sets forth the rights and obligations of each party.

Project owners with HAP Contracts are required to comply with the applicable Uniform Financial Reporting Standards ("the UFRS") as set forth in 24 C.F.R. § 5.801 *et seq*. The UFRS apply to, among others, "[o]wners of housing assisted under any Section 8 project-based housing assistance payments program." 24 C.F.R. § 5.801(a)(3). Under the regulations, such owners are required to:

> provide to HUD, on an annual basis, such financial information as required by HUD. This financial information must be:
>
> (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 . . .; and
>
> (3) Submitted in such form and substance as prescribed by HUD.

24 C.F.R. § 5.801(b)(1)-(3).

Section 29 of the United States Housing Act of 1937, 42 U.S.C. § 1437z-1, authorizes HUD to seek civil money penalties against any owner of a Section 8 property that knowingly and materially breaches its HAP Contract. 42 U.S.C. § 1437z-1(b)(2). The statute sets a maximum penalty of $25,000 for each violation. 42 U.S.C. § 1437z-1(b)(3). The Government must prove Respondent's liability by a preponderance of the evidence in order to prevail, and Respondent must prove any affirmative defenses and/or mitigating factors by the same standard. 24 C.F.R. § 26.45(e).

IV. ARGUMENTS OF THE PARTIES

As noted above, the parties presented legal arguments in their pleadings and prehearing exchanges that raised the issue of

whether failure to file annual audited financial statements was a cognizable violation of the HAP Contract or the incorporated regulatory provisions of the underlying statute, the National Housing Act of 1937, and its implementing regulations. The parties further addressed this issue in their briefs and at hearing. Their respective arguments are summarized as follows.

A. HUD's Arguments

The Government argues that Respondent failed to submit annual audited financial reports for fiscal years 2005, 2006, 2007, and 2008, for the Elizabeth Arms property despite being the owner of a project receiving financial assistance from HUD under a HAP Contract. HUD PH Br. at 1; Compl. ¶¶ 37, 43, 49, and 55. HUD argues that this failure was both knowing and material and, as a result, Respondent is liable for civil penalties. *Id.* citing 42 U.S.C. § 1437z-1(b).[5]

Citing the HAP Assignment Agreement, signed by Mr. Campbell on behalf of the Respondent, HUD argues that the UFRS referenced therein require Respondent "to submit annual audited financial reports." HUD PH Br. at 2. Mr. Brant Witte, a Housing Program Manager with HUD, testified that HUD's UFRS require HUD-assisted project owners "to submit financial information to HUD in a form and manner prescribed by HUD." *Id.* at 2, citing Tr. 45-46. According to HUD, the "form and manner" language authorized the creation of the "Financial Assessment Subsystem ('FAS[]'), which was created to accept project owners' financial submissions electronically and accepts only audited financial statements from profit motivated entities such as Respondent." *Id.*, citing Tr. 46-48.

HUD asserts that the FAS User Guide, a portion of which was admitted into evidence as CX 2, operates as the "supplemental guidance" that further defines the UFRS. In HUD's view, the User Guide explicitly prescribes the "form and substance" of the "financial information" contemplated and required by 24 C.F.R. § 5.801(b). *See* Gov't Renewed Mot. Partial Summ. Jdgmt. at 5; HUD PH Br. at 2. Relying on testimony from Ms. Crystal Cervone, the HUD Project Manager previously assigned to work with Respondent during the relevant time period, HUD argues that Respondent never submitted any audited annual financial statements. HUD PH Br. at

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[5] Section 1437z-1(b) specifically provides that "[t]he Secretary may impose civil money penalty under this section on . . . any owner or a property receiving project-based assistance under section 8."

2, citing Tr. 21 at 16-19.

Citing the HAP Assignment, HUD concludes that because Mr. Campbell had an opportunity to review the HAP Assignment and signed the document, any subsequent violation of the HAP Assignment or HAP Contract was a knowing violation. HUD PH Br. at 2-3. Citing various testimony from its three witnesses, HUD concludes that because the annual audited financial statements allow HUD to oversee the financial conditions of assisted properties and provide an important layer of verification, the failure to file the annual audited financial statements is a material violation. *Id.* at 3, citing Tr. 16, 45, 48, 69.

B. Respondent's Arguments

Respondent, through Mr. Campbell, candidly concedes that it did not file annual audited financial reports. Ans. ¶¶ 7, 10-13. Contrary to HUD's assertion, however, Respondent does not concede that it was required to do so. *See* Memo. in Support of Govt's Renewed Mot. Partial Sum. Jdgmt. and Sanction at 7, n2, citing Ans. ¶ 6B. While Respondent admits that it "did not review the regulations on which [HUD] is relying in bringing this action," Ans. ¶ 2, it argues that:[6]

1. it "was not specifically notified of the requirement that audited financial reports be filed," Ans. ¶ 1, and its "failure to provide the audited financial reports was initially unknowing" and was "not willful," Ans. ¶ 7,

2. it "furnished some financial information" in the form of profit and loss statements when it was instructed to file an annual audited financial statement, Ans. ¶ 5; Tr. 91-92,

3. HUD's repeated tardiness in providing rent subsidies caused Respondent's financial hardship (subsequently consuming the funds that otherwise would have been available to pay for audited financial statements),[7] Ans. ¶ 6B, and

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[6] Because Respondent did not call any witnesses or file any substantive motions before or during the hearing, its arguments must be found in its Answer, its Post-Hearing Brief, and in the cross-examination of HUD's witnesses.

[7] While the Answer appears to raise a "Failure of Secretary" defense, 42 U.S.C. § 1437z-1(a)(2), Respondent did not pursue this theory by motion or at hearing and thus I do not address it.

4. when it contacted HUD's Headquarters Officer, a HUD representative stated that because Respondent received less than $500,000 per year in support, no annual audited financial statement was required, Ans. ¶ 6B; R's PH Br. at 2.

V. DISCUSSION

The Complaint alleges in four separate counts that Respondent is liable for its failure to file an audited financial report in a timely and acceptable manner for each of the fiscal years of 2005, 2006, 2007, and 2008. Compl. at 8-12. The Complaint further alleges that:

> Respondent knew it was required to file audited financial reports in the time and manner prescribed by [HUD] because [Respondent] executed the HAP Assignment Agreement with HUD, which specified that the Respondent was required to comply with HUD's financial reporting requirements.

Compl. ¶¶ 34, 40, 46, and 52.

As previously stated, the standard of proof that applies to the present proceeding can be found in 24 C.F.R. § 26.45(e). HUD bears the burden of proving its *prima facie* case of establishing liability by a preponderance of the evidence. *Id.* Only upon successful dispatch of this requirement does the burden shift to Respondent to rebut the Government's case and prove any affirmative defenses. Respondent is not obliged to disprove liability if the Government fails to establish its *prima facie* case in the first instance. In any administrative proceeding, I am bound by the facts and evidence in the record before me. *See* 5 U.S.C. § 556(e). In this proceeding, the procedural rules are particularly explicit: "[t]he ALJ shall issue an initial decision based only on the record." 24 C.F.R. § 26.50(a).

At hearing, HUD called three witnesses and introduced six documentary exhibits into evidence. Over HUD's objection, one document was received into evidence from Respondent.[8] HUD

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[8] As explained above, Respondent was previously precluded from introducing witnesses or exhibits at hearing due to its failure to comply with several orders by the undersigned setting

presented credible witnesses and produced relevant documents that militate against a finding that the administrative enforcement action was frivolous. Specifically, HUD offered credible testimony explaining the policy need for an annual audited financial statement. *See* Tr. 16-17. Nevertheless, HUD did not prove the complete jurisdictional basis for the allegations contained in the Complaint.

A. The Duty to File Annual Audited Financial Statements

HUD's authority to bring this action arises under the statutory provisions found at 42 U.S.C § 1437z-1. Those provisions authorize HUD to seek civil money penalties against an owner of property receiving project-based assistance under Section 8 of the Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*, for knowing and material violations of the owner's HAP Contract. There is no dispute that Respondent received project-based assistance under Section 8 during the time period at issue in this matter. Thus, to carry its burden of production, HUD must demonstrate by a preponderance of the evidence that Respondent was bound by a HAP Contract and that Respondent knowingly and materially violated that HAP Contract. 42 U.S.C. § 1437z-1(b)(3).

The original HAP Contract, the document Respondent is actually alleged to have violated, contains very little in the way of relevant, helpful language. The only provision related to the allegations in this case appears as Section 21, entitled "Reports and Access to Premises and Records." RX 2 at 4. That section provides, in relevant part:

> The Owner shall supply HUD with any information and reports pertinent to the Contract as reasonably may be required from time to time by HUD.

Id. As Ms. Cervone testified at hearing, the provisions on which HUD relies in bringing this action are not found in the original HAP Contract but were made part of the contractual relationship between HUD and Respondent when they were added to the HAP Assignment Agreement.[9] Tr. 18 at 20-25.

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forth discovery requirements and compelling discovery. However, because HUD was charged with knowledge of its own contracts, a copy of the HAP Contract, RX 2, was admitted. Tr. 86 at 19-23.

[9] There is no real dispute that the HAP Assignment duly incorporates the provisions of the original HAP Contract.

The relevant provisions of the HAP Assignment, aside from incorporating the HAP Contract by reference, state that:

1. HUD and the Buyer "mutually desire to amend the HAP Contract to . . . require Financial Reporting in accordance with 24 CFR Subpart H;"

2. the Respondent agrees to be "responsible for filing the annual financial statement (AFS) from the date of this agreement through the end of the Buyer's [Respondent's] fiscal year[,]" and

3. "comply with the Uniform Financial Reporting Standards of 24 CFR Part 5, Subpart H, including any changes in the regulation and related directives."

CX 1 at 1. The HAP Assignment by its own terms does not contemplate a requirement that Respondent file *audited* financial statements on an annual basis, nor does it define "AFS" as identified in item 1 directly above. The HAP Assignment does, however, bind Respondent to adhere to 24 C.F.R. part 5, subpart H,[10] and "related directives."

The UFRS, in turn, set forth several requirements for the submission of "financial information" at 24 C.F.R. § 5.801(b)(1)-(3). Specifically, the regulations provide that the "financial information" must be:

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 such other electronic format designated by HUD . . . ; and

3. Submitted in such form and substance as prescribed by HUD.

24 C.F.R. § 5.801(b). The regulations do not define what further guidance should be used to interpret the GAAP requirement, nor do they state which directives set forth the "form and substance" requirements contemplated in paragraph 3. And in any event there are no direct allegations in the Complaint that Respondent did not meet GAAP or that it failed to use the internet to submit information. Moreover, the regulations do not use the term

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[10] 24 C.F.R. part 5, subpart H, consists solely of 24 C.F.R. § 5.801.

"audited annual financial statement" in any form. Thus, the only apparent provision at issue is the vague requirement that Respondent submit "financial information [ ] in such form and substance as prescribed by HUD." 24 C.F.R. § 5.801(b)(3).

At hearing, Mr. Brandt Witte identified CX 2 as Chapter 1 of Release No. 7.0.0.0 of the Industry User Guide for the Financial Assessment Subsystem - Multifamily Housing (FASSUB) ("the User Guide"). According to Mr. Witte, the User Guide corresponds to the Financial Assessment Subsystem ("FAS"), which "accepts financial statement information through the internet [and] validates the financial information and assesses the financial information." Tr. 46 at 7-14. Mr. Witte further testified:

> [FAS is] a web-based platform, so the owner has to get a user ID and a password, and then they can call it up using that, and the templates pop up. Depending on what information they put in, they submit the financial statement information.

Tr. 46 at 17-21.[11]

The questioning continued:

[Tr. 47 at 19]

Q: I see. Now, do you know, after having reviewed the FAS User Guide, what type of information is required from a profit-motivated project owner?

A: Yes, I do.

Q: What kind?

A: An audited financial statement.

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[11] Mr. Witte continued, stating: "[a]nd then there is the FAS User Guide, and there's a number of other documents too that provide information on how to use the system." Tr. 47 at 5-7. According to this testimony, and as the stated purpose and name of the User Guide suggests, the User Guide is a reference manual designed to illustrate the proper *use* of the internet-based FAS. CX 2 at 1-1 (physical page 5). The testimony does not demonstrate that the User Guide sets forth binding requirements on owners as to the form and substance of the annual financial information mentioned in the UFRS.

Q: And where does it say that?

[Tr. 48]

A: It says it in this Chapter 1, the Introduction. I think it's Section 1-1. It says, "Audited AFS in accordance with Handbook IG 2000.04 for profit-motivated/limited distribution entity."

Tr. 47 at 19-24; 48 at 1-4. Upon questioning from the undersigned, Counsel for HUD stated that Mr. Witte was being offered as a fact witness only. Tr. 48 at 5-8.

I note that Mr. Witte's testimony in this instance is not entirely accurate. There is no reference on page 1-1 to any Handbook IG 2000.04. Page 1-1 of the User Guide does offer an overview of the FAS and notes that the purpose of the FAS is, in part, to "submit annual financial statement (AFS) data via the Internet." CX 2 at 1-1 (physical page 5). Again, there is no mention of auditing on page 1-1.

The phrase "Handbook IG 2000.04" does appear in CX 2, but only as a line item reference in the table of contents referring to Appendices A and B, CX 2 at iii (physical page 4), and on page 1-2 as one of the eleven different types of recognized AFS data submissions. CX 2 at 1-2 to 1-3 (physical pages 6-7). There is no Handbook in the record, nor any testimony about its scope, authority, or content. The total sum of "additional guidance" documents in the record is Chapter 1 of the 2007 User Guide.

The importance of this fact must be emphasized. Prior to hearing, HUD filed two, consecutive motions for summary judgment. Both motions were denied for failure to meet the *prima facie* burden of proof and failure to submit documentary evidence of the "supplementary guidance" on which HUD relied in bringing the action. 24 C.F.R. § 5.801(b). In its second motion for summary judgment, HUD submitted the same exhibits that it produced at hearing, including Chapter 1 of the 2007 User Guide. The adverse rulings on these motions put HUD on notice that this evidence was insufficient. HUD never submitted any Handbook IG 2000.04 or similar document.[12] Therefore, I must assume that it is not

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[12] In its Renewed Motion for Partial Summary Judgment and Sanctions ("Renewed MSJ"), submitted on October 6, 2010, HUD includes as Exhibit 4 a partial document that it refers to as "HUD Handbook 4370.1, Rev-2." However, by its own terms, "[t]his Handbook does not advise owners or accountants how to prepare

available or does not support HUD's position.

Upon specific questioning, Mr. Witte admitted that the portion of the User Guide offered into evidence was dated June 22, 2007. Tr. 57 at 3-5. However, Mr. Witte stated that he did not know the effective date of the document, nor whether it applies retroactively.[13] *Id.* at 6-10. Upon redirect by Counsel for HUD, Mr. Witte further testified that he is unaware of any prior versions of the User Guide, nor is he aware of "any sort of guidance on the use of the FAS system prior to [June 22, 2007]." Tr. 59 at 3-11.

While the User Guide's Release Number of 7.0.0.0 suggests that earlier versions may have existed, there is no evidence before me that they contained a requirement to file an annual audited financial statement. The User Guide specifically employs the present progressive tense ("(HUD) is developing") when introducing the document. CX 2 at 1-1.[14] More importantly, however, HUD's own witness is not aware of any prior version and

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financial statements." Renewed MSJ ex. 4 at 1-1. Therefore, the absence of a relevant Handbook persists.

[13] Mr. Witte did state on redirect that before the FAS was created, profit-motivated owners were required to submit audited financial information. Tr. 59 at 19-23. But this bare assertion is as persuasive as Mr. Campbell's claim that in 2007, upon referral by Ms. Cervone, he was told by a HUD representative in Washington that no annual audited financial statement was required because he didn't receive more than $500,000 in yearly revenue. R's PH Br. at 2. In this case, the statutes and regulations along with documentary evidence of official guidance documents must control.

[14] Even the language preceding the reference to the Handbook IG 2000.04 uses the term "currently," further suggesting an anticipated temporal shift in the system. The stated purpose of the User Guide underscores this notion. The User Guide states: "[FASSUB] is a secure, web-based system that allows industry users to access and submit annual financial statement (AFS) data via the Internet. Since the requirements for the system are complex, the full functionality of the system is being implemented in phases. This document is being updated to reflect changes implemented with the June 22, 2007 release of FASSUB." CX 2 at 1-1. Such language leads me to believe that the FASSUB supporting annual audited financial statement data submissions may not have been implemented until 2007.

only CX 2 is part of the record.

Thus, HUD relies solely on the testimony of Mr. Witte and the contents of CX 2 as the factual basis for concluding that Respondent is *required* to submit *annual*, *audited* financial statements for the fiscal years 2005 - 2008.

On this issue, Mr. Witte testified as follows:

> Q: Now, the paragraph that you interpreted as meaning that an audited financial statement is required, could you read that paragraph into the record, please?
>
> A: The paragraph just before the numbers?
>
> Q: Yes.
>
> A: "Each submission type has constituent data elements or accounts that must be completed and validated prior to acceptance of the AFS data submission for the project. Currently, FASSUB supports the following types of AFS data submissions: 1. Audited AFS in accordance with Handbook IG 2000.04 for profit-motivated/limited distribution entity."
>
> Q: And that is the sentence that you're relying on.
>
> A: Yes.
>
> Q: Okay. What does the sentence or phrase "Currently, FASSUB supports the following types of AFS data submissions [mean]?"
>
> A: Those are the different types of financial submissions that the system will accept, and it goes through -
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> Q: The word "supports" in your mind means "requires."
>
> A: Yes.

Tr. 57-58.

"Supports" is not defined in Section 8 of the National Housing Act of 1937, nor has the undersigned been provided with any relevant case law that might shed additional light on the issue. I therefore consider the ordinary denotation and connotation of the term "supports." *See Williams v. Taylor*, 529

U.S. 420, 431 (2000) ("[w]e give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import" (internal quotation marks omitted)).[15]

The verb "supports," in its ordinary sense means "to bear, endure . . . advocate, endorse, vote for . . . to serve as verification, corroboration, or substantiation of . . . sustain, prop, bolster. . . ." Webster's Third New International Dictionary 2297 (2002) (hereinafter "Webster's"). Webster's also defines "support" to include "supply[ing] with the means of maintenance," *Id.*, which is a parallel definition to that which appears in Black's Law Dictionary. Black's Law Dictionary (9th ed. 2009) ("support, n. (14c) 1. Sustenance or maintenance . . . child support . . . family support").

By contrast, the word "require" is defined as follows: "to ask for authoritatively or imperatively . . . insist upon usu[ally] with certainty or urgency . . . to demand as necessary or essential . . . to impose a compulsion or command upon (as a person) to do something." Webster's 1929.

With these concepts in mind, I turn to whether the term "supports" as found in the User Guide could reasonably be interpreted as a legal requirement. There is no overlap in the divergent concepts contemplated by each term, which militates against a finding of synonymity. In fact, the class of words associated with "supports" can most accurately be described as nonmandatory, reactive, or passive, whereas the word "require" and its ilk are concerned with imperatives, necessities, and commands. I find that it strains reason to treat the term "supports" as a statement of requirement. Moreover, I find that a computer interface, such as FASSUB, that "supports" a certain submission format cannot, standing alone, create a legal obligation to submit an annual audited financial statement, especially when there are potential civil penalties at issue.

HUD offers no arguments in support of a contrary reading of the term "supports." Therefore, I conclude that the User Guide, produced at hearing, and the testimony thereupon are not persuasive in establishing that Respondent was required to file audited annual financial statements. Rather, all the evidence adduced at hearing points to the receptiveness of the Government

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[15] Although the term "supports" in this case appears in an agency publication as opposed to a federal statute, contemplating the ordinary meaning of the word is still a helpful pursuit.

to electronically submitted annual audited financial statements, but an owner's failure to submit such statements does not violate the relevant regulations or the "other directives" in the record.

B. Violations of the HAP Contract

The Complaint's four counts are firmly rooted in the notion that a failure to file "audited financial report[s] . . . constitutes a knowing and material breach of [the] HAP Contract and provides grounds for imposing a civil money penalty against" Respondent. Compl. ¶¶ 37, 43, 49, and 55. Thus, any finding of liability can be derived only from a finding that the filing of annual audited financial reports was, in itself, a mandatory requirement for which the HAP Assignment and the underlying HAP Contract could act as a binding agreement on the Respondent. Finding an absence of support for this assertion in the record, I must conclude that HUD has not established Respondent's liability in this matter.

Even assuming, *arguendo*, that HUD were able to demonstrate through record evidence that the requirement applied, it is not clear that the violation could reasonably be construed as "knowing" or that the penalty as proposed is reasonable based on the facts.

1. Fair Notice of the Requirement to File an Annual Audited Financial Statement

Where the Agency can prove that a breach of a HAP Contract has occurred, Section 1437z-1(b)(2) requires proof that the breach was "knowing," as defined in Section 1437z-1(h)(2), before liability attaches. 42 U.S.C. §§ 1437z-1(b)(2) & (h)(2). In prehearing motions and over the course of the hearing itself, the parties asserted competing positions on the issue of whether Respondent's alleged violations were "knowing" and whether Respondent had "notice" of the regulatory requirements. Compl. ¶ 28; Ans. ¶¶ 1-3; C's Renewed MSJ at 8; Tr. 10 at 11, 96 at 18; HUD PH Br. at 2-3; R's PH Br. at 2. Initially, I note that there is some tension in HUD's position that Respondent's failure to submit an annual audited financial statements for 2005-2008 was a "knowing" violation of the HAP Contract.

On one hand, HUD asserts that the "specific notice of the financial reporting requirement" was communicated to the Respondent "via the HAP Assignment Agreement," and "[f]urther, general notice of the requirement was provided through statutes and regulations, as well as directives and handbooks issued by HUD." Compl. ¶ 28. On the other hand, Mr. Campbell was quite

clear in asserting that he was not aware of any such requirement despite his past experience managing other properties receiving financial assistance from HUD for which no annual audited financial statements had been required. Ans. ¶ 3; Tr. 95 at 18-20; R's PH Br. at 2.

As HUD notes in its motions for summary judgment, however, the Government has no separate duty to notify an owner of the specific requirements contained in a HAP Contract in order for that contract to be binding on the owner. *See* Gov't Mot. Partial Summ. Jdgmt. at 6-7; Gov't Renewed Mot. Partial Summ. Jdgmt. at 8-9. HUD goes on to argue that "a financial reporting requirement contained in a regulatory agreement, and nothing more, provides actual notice to the parties." *Id.* at 8, citing *HUD v. Crestwood Terrace P'ship*, HUDALJ 00-002-CMP, 2001 WL 36012000, (ALJ Jan. 30, 2001); *Sundial Care Center, Inc., et al.*, HUDALJ 08-055-CMP, 2009 WL 6869730 (ALJ Mar. 25, 2009). While HUD's citations may be accurate, they do not address the issue of regulatory "fair notice."

In *General Electric Company v. EPA*, the D.C. Circuit articulated the basic contours of a "fair notice" inquiry, stating:

> [W]e must ask ourselves whether the regulated party received, or should have received, notice of the Agency's interpretation in the most obvious way of all: by reading the regulations. If by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

Gen. Elec. Co. v. EPA ("*General Electric*"), 53 F.3d 1324, 1329 (D.C. Cir. 1995).

Therefore, any inquiry consistent with *General Electric* must focus on whether Respondent could have determined with "ascertainable certainty" the requirement that it file an annual audited financial statement for fiscal years 2005 - 2008. Based on a review of the relevant statutes and regulations, it would be fair to conclude that notice of the annual audited financial statement requirement does not reside therein. As to the unidentified "directives and handbooks" mentioned in the Complaint, there was no evidence produced at hearing that any particular guidance document was identified in the regulations,

the HAP Contract, or the HAP Assignment such that an "ordinary person exercising ordinary common sense can sufficiently understand and comply with [the regulations]." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, et al.*, 413 U.S. 548, 579 (1973).

At hearing, even HUD's own witness on this issue, Mr. Witte, could not state whether there was any particular precursor to the User Guide dated June 22, 2007, or whether it applied retroactively, which casts doubt on the notion that an owner such as Respondent, either when it signed the HAP Assignment or thereafter, could reasonably ascertain from reading the regulations that it was required to abide by the User Guide, and, if so, which specific requirement applied. Again, I note that the User Guide is a reference manual designed to illustrate the proper use of the internet-based FASSUB.

In any event, finding that HUD has failed to prove its *prima facie* case, I need not reach a full consideration of the issue of fair notice.

2. Appropriateness of the Proposed Penalty

The Government proposes a total penalty of $77,100 for the four counts contained in the Complaint. Compl. ¶ 64. According to the Complaint and Mr. James Beaudette, Deputy Director of the Departmental Enforcement Center and HUD's primary penalty witness, HUD considered the relevant factors identified in 24 C.F.R. § 30.80 and determined that Respondent's alleged violations warranted the maximum amount ($25,000) for each of the years 2006, 2007, and 2008. Tr. 73 at 12-21. Because Respondent did not become the owner of Elizabeth Arms until December 2005, HUD determined that $2,100 was an appropriate penalty for Respondent's failure to submit an annual audited financial statement for 2005. Tr. 73-74.

There are at least two problems associated with this proposed penalty that would warrant a reduction even if, assuming *arguendo*, the 2007 User Guide could reasonably be construed as requiring an annual audited financial statement from Respondent. First, even if the key phrase "supports" could be construed as stating a mandatory requirement on Respondent, there is no evidence in the record that the requirement to file an annual audited financial statement existed before 2007. Thus, any

penalty proposed for 2005 or 2006[16] would be without merit.

Second, Mr. Beaudette testified at length as to the physical condition of the Elizabeth Arms as suggested by the Real Estate Assessment Center Physical Inspection Scores ("REAC Scores") obtained by HUD in 2005, 2007 and 2008. Tr. 69-74; CX 5. According to Mr. Beaudette, the individual charged with overseeing the penalty calculation process, the proposed penalty of $77,100 was based in substantial part on the lower REAC Scores assigned to the Elizabeth Arms after 2005. Tr. 69 at 7-10; Tr. 73 at 12-21; Tr. 78-79.

There are no allegations contained in the Complaint related to the physical condition of the property or the failure of the Respondent to provide decent, safe and sanitary accommodations to its tenants. There are also no allegations of low REAC Scores. Rather, the only allegations relate to the filing of the annual audited financial statements. To the extent that a proposed penalty is based on facts or theories of liability not alleged in the Complaint, that portion is based on impermissible considerations and should be eliminated.[17]

VI. ORDER

For the reasons set forth above, Respondent is found not liable for any of the Counts alleged in the Complaint. Accordingly, the Complaint is hereby dismissed.

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[16] The deadline for the 2006 annual audited financial statement was March 31, 2007, three months before the 2007 User Guide was published.

[17] In the Complaint, HUD does delineate its consideration of the regulatory penalty factors found at 24 C.F.R. § 30.80. Compl. ¶ 31(a)-(k). These subparagraphs appropriately track the factual allegations of the Complaint. By contrast, Mr. Beaudette's testimony suggests that the physical condition of the property, as represented by the REAC Scores, was not simply a potential, subsequent concern that might be correlated with repeated failures to provide accurate financial information, but rather was an equal *causative* factor calculated into the proposed penalty for, at least, the gravity, injury to the public, injury to tenants, and culpability considerations.

Any party may request, in writing, review of this Initial Decision by the Secretary of the Department of Housing and Urban Development within thirty (30) days after it is issued. 24 C.F.R. § 26.50(b). Requests for Secretarial review, and briefs in support, should be sent to the address below through mail, delivery, facsimile, or electronic submission in accordance with Sections 26.50 and 26.52. 24 C.F.R. §§ 26.50(b), 26.52.

U.S. Department of Housing and Urban Development
Attention: Carole Wilson
1250 Maryland Avenue, S.W., Portals Bldg., Suite 200
Washington, DC 20024

This Initial Decision "shall not become effective unless it becomes or is incorporated into final agency action in accordance with ¶¶ 26.50(c) or 26.52(l)." 24 C.F.R. § 26.50(a).

Barbara A. Gunning
Administrative Law Judge

Dated: March 31, 2011
Washington, DC

In the matter of *U.S. Department of Housing and Urban Development, Plaintiff, v. Prime Venture Realty Associates, Respondent.*
Docket No. HUDALJ-10-F-003-CMP/1

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Initial Decision,** dated March 31, 2011, issued by Barbara Gunning, Administrative Law Judge, were sent to the following parties on this 31st day of March 2011, in the manner indicated.

Mary Angeles
Legal Staff Assistant

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Dated: March 31, 2011
Washington, DC