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

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| **In the Matter of:** | ) | |
| | ) | |
| **Frank Vivolo,** | ) | **HUDALJ 10-F-061-CMP-11** |
| | ) | |
| **Respondent.** | ) | |

# DEFAULT JUDGMENT AND ORDER

## I. Procedural Background

The Secretary of the United States Department of Housing and Urban Development ("HUD" or "Government") issued a Second Pre-Penalty Notice to Respondent Frank Vivolo on September 22, 2009, informing him that HUD was considering seeking civil money penalties for failure to submit annual audited financial reports for Riverside Apartments that he owns. Upon considering Respondent's response to the Second Pre-Penalty Notice, HUD instituted this action on February 26, 2010 by filing a Complaint for Civil Money Penalties ("Complaint" or "Compl."), against Respondent, in his capacity as sole proprietor and owner of Riverside Apartments ("the Project"), a four-unit property in Chestertown, New York, that receives project-based assistance from HUD under Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f ("Housing Act"). The Complaint alleges that Respondent violated its Housing Assistance Payments Contract ("HAP Contract") with HUD by failing to submit timely audited Annual Financial Reports for the Project's fiscal years 2005, 2006, 2007 and 2008. The Complaint alleges four counts of violation of the Housing Act, and seeks a civil money penalty of $97,750 therefor.

The Complaint states in pertinent part in Paragraphs 62, 63 and 67 that --

> 62. Respondent may submit a written request for a hearing before an administrative law judge no later than 15 days following receipt of the Complaint. This mandated period cannot be extended.
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> 63. If Respondent requests a hearing, he shall also submit a written answer to the Complaint ("Answer") within 30 days of receipt of the Complaint, unless such time is extended by the administrative law judge for good cause.
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> * * * *

> 67. If no response is submitted by Respondent, then HUD will file a motion for default judgment, pursuant to 24 CFR §§ 30.90(c), 26.41. If a default judgment is issued, it shall constitute an admission of all facts alleged in the Complaint, and Respondent waives any 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. * * * *

HUD's Office of Administrative Law Judges (OALJ) notified Respondent, in a letter dated March 1, 2010, that if he wanted to contest the imposition of the penalties, he "must submit a request for a hearing no later than 15 days following [his] receipt of the Complaint," that if he requests a hearing on time, he has "a total of 30 days from [his] receipt of the Complaint to file a written answer" and that he "may also submit to this Office a request for an extension of time beyond this 30-day period . . . ."

On April 26, 2010, HUD served on Respondent the Government's Motion for Default Order ("Motion" or "Mot."), pursuant to 24 C.F.R. §§ 26.41 and 30.90(c), on grounds that Respondent failed to submit any response to the Complaint. The Motion seeks a default judgment against Respondent for civil money penalties in the amount of $97,750.

On March 30, 2010, HUD Administrative Law Judge Alexander Fernandez sent the parties a Notice of Disqualification, and in a letter dated the same day, 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 April 5, 2010.

To date, no answer to the Complaint has been filed, and no response to the 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 "[t]he complaint shall be served on the respondent by first class mail, personal delivery, or other means." 24 C.F.R. § 30.85(d). The Rules provide further that "[i]f the respondent desires a hearing before an administrative law judge, the respondent shall submit a request for a hearing to HUD and the Office of Administrative Law Judges no later than 15 days following receipt of the

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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.

complaint, as required by statute." 24 C.F.R. § 30.90(a). Also, "[i]n any case in which the 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.
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> (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.
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> (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. Service of a motion may be made by delivery, first-class mail, overnight delivery, facsimile transmission, or electronic means, at a respondent's address of residence or principal place of business. 24 C.F.R. § 26.30(b). Service is complete when delivered to the person's office or residence. *Id.*

## III. Motion for Default

HUD mailed the Complaint via United Parcel Service Ground to Respondent at 310 N. Wisconsin Avenue, Massapequa, NY 11758 on February 24, 2010, and it was delivered on February 25, 2010. *See* Mot. ¶ 8; Mot. Exhibit 4, UPS Shipment Label; Attachment to April 7, 2010, email from Maria Whiting-Beale to Nilda M. Gallegos, UPS Shipment Receipt and Tracking Summary. The Complaint was mailed to the same address for Respondent as the Second Pre-Penalty Notice was mailed, to which Respondent responded. Mot. Exhibits 1, 2. Fifteen days from the time Respondent received the Complaint, therefore, is March 12, 2010. HUD represents that Respondent did not file a request for hearing within this fifteen day period. See, Mot. ¶ 9. To date, Respondent has not filed a request for hearing or any other written response to the Complaint.

The documents of record show that Respondent was properly served with the Complaint in accordance with the Rules. The Motion was served on Respondent in the same way as the Complaint was served, according to the Motion's Certificate of Service, and therefore was also properly served on Respondent under the Rules.

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

Accordingly, the Government's Motion for Default Order 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 sole proprietor and owner of the Project, which receives project-based assistance from HUD under Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f ("Section 8"), and pursuant to a HAP Contract. Compl. ¶ 2.

2. On or about April 11, 2005, Respondent purchased the Project from James W. Sweenie, the Project's previous owner. On or about September 9, 2005, Respondent, James W. Sweenie and HUD executed a HAP Assignment, Assumption and Amendment Agreement ("Assignment Agreement"), which provided that Respondent assumes all obligations contained in the Project's HAP Contract, and which explicitly required Respondent to comply with HUD's Uniform Financial Reporting Standards, located at 24 C.F.R. Part 5, Subpart H. Compl. ¶¶ 8-10.

3. The Uniform Financial Reporting Standards, set forth at 24 C.F.R. Part 5, Subpart H, require owners of properties assisted by HAP contracts to submit annual audited financial reports ("AFRs") to HUD no later than 90 days after the end of the fiscal year. 24 C.F.R. § 5.801(a)(3). Compl. ¶ 11.

4. The Project's fiscal year ends on December 31 of each year; therefore, AFRs for the Project are normally due on or before March 31 of the following calendar year. Compl. ¶ 12.

5. Respondent failed to submit an AFR for the Project for fiscal year 2005. Compl. ¶ 13.

6. Respondent failed to submit an AFR for the Project for fiscal year 2006. Compl. ¶ 14.

7. On December 27, 2007, HUD issued a Pre-Penalty Notice, as required by 24 C.F.R. § 30.70, that it was considering seeking a civil money penalty against Respondent for failure to file the AFRs for fiscal years 2005 and 2006. Compl ¶ 20.

8. Respondent submitted a response to the Pre-Penalty Notice by letter dated January 2, 2008, stating that he would seek to submit the AFRs by January 31, 2008. Compl. ¶ 22. Nevertheless, Respondent did not submit the AFRs for fiscal years 2005 or 2006. Compl. ¶ 23.

9. HUD extended the AFR filing deadline for all HUD-assisted multifamily projects for fiscal years ending December 31, 2007, to April 20, 2008. Compl. ¶ 15.

10. Respondent failed to submit an AFR for the Project for fiscal year 2007. Compl. ¶ 16.

11. On November 3, 2008, Respondent and HUD executed a settlement agreement wherein Respondent agreed to submit a payment of $2,250, and file the missing AFRs for fiscal years 2005, 2006 and 2007 within 120 days after the execution of the agreement. Compl. ¶ 25.

12. Respondent submitted the payment by check dated October 21, 2008, but did not submit the missing AFRs by March 3, 2009. Compl. ¶¶ 26-27.

13. HUD extended the AFR filing deadline for all HUD-assisted multifamily projects for fiscal years ending December 31, 2008, to April 20, 2009. Compl. ¶ 17.

14. Respondent failed to submit an AFR for the Project for fiscal year 2008. Compl. ¶ 18.

15. On September 22, 2009, HUD issued a second Pre-Penalty Notice that it was considering seeking a civil money penalty against Respondent for failure to file the AFRs for fiscal years 2005 through 2008. Respondent submitted a written response on October 22, 2009. Compl. ¶¶ 28, 29. Nevertheless, Respondent has not submitted any of the delinquent AFRs. Compl. ¶ 31.

## V. Conclusions of Law

1. Respondent's failures to furnish HUD with AFRs for fiscal years 2005, 2006, 2007 and 2008 are violations of Respondent's HAP Contract with HUD.

2. Respondent, as the owner of a property receiving project-based assistance under Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f, may be subject to a civil money penalty under 42 U.S.C. § 1437z-1(b)(1)(A) and C.F.R. § 30.68(b) for any knowing and material breach of a housing assistance payments contract.

3. Respondent's failure to furnish HUD with a complete audited AFR for the Project's fiscal year ending on December 31, 2005, is a violation of his HAP Contract, for which a penalty may be imposed pursuant to 42 U.S.C. § 1437z-1(b)(2).

4. Respondent's failure to furnish HUD with a complete audited AFR for the Project's fiscal year ending on December 31, 2006, is a violation of his HAP Contract, for which a penalty may be imposed pursuant to 42 U.S.C. § 1437z-1(b)(2).

5. Respondent's failure to furnish HUD with a complete audited AFR for the Project's fiscal year ending on December 31, 2007, is a violation of his HAP Contract, for which a penalty may be imposed pursuant to 42 U.S.C. § 1437z-1(b)(2).

6. Respondent's failure to furnish HUD with a complete audited AFR for the Project's fiscal year ending on December 31, 2008, is a violation of his HAP Contract, for which a penalty may be imposed pursuant to 42 U.S.C. § 1437z-1(b)(2).

7. Because HUD gave specific instructions to Respondent regarding the AFR filing requirement in the HAP Contract Amendment Agreement, Respondent's violations of HAP Contract were "knowing." 42 U.S.C. § 1437z-1(h)(2), 24 C.F.R. § 30.10.

8. Because HUD made annual financial reporting an express requirement of Respondent's HAP Contract, and HUD relies on the reports to monitor the fiscal health of the Project 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 residents, Respondent's failures to file these reports were "material" violations. 24 C.F.R. § 30.10.

9. Respondent'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 pursuant to 24 C.F.R. § 30.68(b) and 42 U.S.C. § 1437z-1(b)(2), which provides that "[a] penalty may be imposed under this section for a knowing and material breach of a housing assistance payments contract."

## VI. The Penalty

In determining the amount of a 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 42 U.S.C. § 1437z-1(b)(3) and 24 C.F.R. § 30.68(c). In the Complaint at pages 7-8, HUD included an analysis of these factors as applied to the facts of this case, and proposed a penalty of $24,250 each for Counts 1, 2 and 3 regarding failure to file the AFRs for fiscal year 2005, 2006 and 2007, and a penalty of $25,000 for Count 4 regarding failure to file the AFR for fiscal year 2008, for a total penalty of $97,950. As stated in the Complaint, the proposed penalties for Counts 1, 2 and 3 reflect the maximum allowable penalty of $25,000 minus $750 paid by Respondent on October

21, 2008 as part of the settlement agreement, for each of the three AFRs that were not submitted. Findings of Fact 11, 12.

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 $97,950 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 his right to a hearing on those allegations, and is hereby found in **DEFAULT**.

2. Pursuant to 42 U.S.C. § 1437z-1 and 24 C.F.R. § 30.68, Respondent is found to have knowingly and materially violated provisions of the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*, and its implementing rules and regulations.

3. Respondent shall pay to HUD a civil money penalty in the amount of $97,950, such amount due and payable immediately without further proceedings. 24 C.F.R. § 26.41(c).

4. This Order constitutes a final agency action in accordance with 42 U.S.C. § 1437z-1(c)(2)(A) and 24 C.F.R. § 26.41(b).

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

Dated: May 21, 2010
Washington, D.C.

**Pursuant to 42 U.S.C. § 1437z-1(c)(2)(A) and 24 C.F.R. § 26.41(b) this Default Order constitutes "the final agency action." In accordance with 42 U.S.C. § 1437z-1(d), any judicial review of this Order shall be carried out in accordance with 12 U.S.C. § 1735f-15(e), which provides for review by filing within 20 days of entry of this Order a petition with the appropriate United States Court of Appeals.**