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

The Secretary, United States Department of Housing and Urban Development, on behalf of Housing Advocates, Inc.,	)	
Charging Party,	)	**HUDALJ 10-E-170-FH/19**
v.	)	**FHEO No. 05-09-1428-8**
Kathy Parker and Deryl Gibson,	)	
Respondents.	)	

ORDER ON CHARGING PARTY'S MOTIONS TO COMPEL DISCOVERY RESPONSES, FOR RECONSIDERATION, FOR SHOW CAUSE ORDER, FOR SANCTIONS, AND FOR SUMMARY JUDGMENT, AND ORDER RESCHEDULING THE HEARING

I. Procedural Background

The Secretary of the United States Department of Housing and Urban Development ("HUD" or "Charging Party"), through the Office of the Regional Counsel, Region V, instituted this action on behalf of Housing Advocates, Inc. ("HAI" or "Complainant"), by filing a Charge of Discrimination ("Charge") dated July 9, 2010 against Kathy Parker and Deryl Gibson ("Respondents"), alleging discriminatory housing practices in violation of the Fair Housing Act, as amended, 42 U.S.C. § 3601 *et seq.* ("the Act"). Respondents, upon motion to file *instanter*, filed an Answer to the Complaint on August 31, 2010, denying the alleged violation.

Thereafter, HUD served Respondents with discovery requests and began Respondents' depositions on September 23, 2010. By Order dated September 30, 2010, the hearing in this matter was scheduled to commence on January 4, 2011, and the parties were ordered to complete discovery by October 29, 2010, and to file their prehearing statements by November 5, 2010.

On October 1, 2010, HUD filed a Motion to Compel Discovery Responses and Request for Sanctions, to which Respondents did not respond. By Order dated October 26, 2010, Respondents were instructed to submit full and complete responses to HUD's First Set of Interrogatories and Requests for Production, and were advised that they would be prohibited from introducing at hearing any evidence responsive to the Interrogatories and Requests for

Production which they did not submit by November 5, 2010. Further, such Order denied HUD's request to deem as admitted its Requests for Admission, denied HUD's request that this Tribunal deny any objections to discovery that Respondents may proffer, and provided the parties until November 19, 2010 to complete discovery.

On October 26, 2010, HUD continued the depositions of Respondents. On November 5, 2010, HUD submitted its Prehearing Statement, and a "Motion for Reconsideration of the October 26, 2010 Order on Its Motion to Compel Discovery Responses and Request for Sanctions."

Thereafter, on November 12, 2010, HUD submitted a "Second Motion to Compel Discovery Responses, Motion for Rule to Show Cause and Request for Sanctions," and a Motion for Summary Judgment, requesting judgment as a matter of law on Respondents' liability for violating the Fair Housing Act as alleged in the Charge of Discrimination.

On December 3, 2010, a document entitled "Joint Set of Stipulated Facts, Exhibits and Testimony" was received by the undersigned's office and, although purporting to be submitted by "the parties," it was only signed by HUD. Further, the stipulated facts, exhibits and testimony therein appear to be the same as those included in HUD's Prehearing Exchange. The Charging Party states in footnote 1 thereto that it maintains its request that an order be entered prohibiting Respondents from calling witnesses at hearing or introducing documentary evidence at hearing based on Respondents' failure to file a Prehearing Statement and failure to comply with the discovery requests.

On December 4, 2010, a document entitled "Respondents' Separate Facts, Exhibits and Testimony" was filed, listing some of the witnesses and exhibits listed in HUD's Prehearing Exchange and "Joint Set of Stipulated Facts, Exhibits and Testimony," and disputing three of the "Stipulated Facts" therein. On December 8, 2010, HUD filed an Objection and Motion to Strike Respondents' Separate Facts Exhibits and Testimony, explaining that Respondents had already stipulated to the facts in HUD's Prehearing Statement and the Joint Set of Stipulated Facts.

To date, Respondents have not filed any responses to HUD's pending motions, and have not filed a prehearing statement. This proceeding is governed by the Consolidated HUD Hearing Procedures for Civil Rights Matters, 24 C.F.R. Part 180 ("the Rules"), which provide that responses to motions must be filed "[w]ithin seven calendar days after a written motion is served," and that "[f]ailure to file a response within the response period constitutes *a waiver of any objection to the granting of the motion.*" 24 C.F.R. § 180.430(b)(italics added). As all of these motions were served electronically, the time period provided under the Rules for Respondents to respond to the Motion for Reconsideration expired on November 12, 2010; the time period to respond to the Motion for Summary Judgment and Second Motion to Compel expired on November 19, 2010; and the time period to respond to the Motion to Strike expired on December 15, 2010. Therefore, the motions may be granted merely on the basis that no objections were filed thereto. Nevertheless, the motions will also be considered on their merits.

II. Motion for Reconsideration

A. Charging Party's Arguments

In its Motion for Reconsideration of the October 26, 2010 Order on Its Motion to Compel Discovery Responses and Request for Sanctions ("Motion"), HUD requests that this Tribunal reconsider its October 26 Order and enter an order: (1) compelling Respondents to respond fully to HUD's First Set of Interrogatories and First Request to Produce Documents; (2) as to Respondents only, vacating the extension to November 19, 2010 of the discovery cutoff, allowing HUD to serve and receive discovery requests past the former October 29, 2010 cutoff date; (3) limiting Respondents' ability to introduce evidence withheld from HUD in discovery; (4) denying any future objections that Respondents may proffer to discovery; (5) deeming HUD's First Request for Admissions as admitted; (6) issuing sanctions consistent with 24 C.F.R. § 180.540(d); and (7) taking such action as is just, consistent with 24 C.F.R. § 180.540(d).

As stated in the Motion, HUD served Respondents with "Charging Party's First Set of Interrogatories," "Charging Party's First Request for Admissions," and "Charging Party's First Request to Produce Documents" on August 31, 2010. *See*, Motion for Reconsideration, Group Exhibit A. After Respondents failed to timely respond thereto, on September 17, 2010, HUD served Respondents with a Notice of Deposition to be held on September 23, 2010, and requested that Respondents provide at their deposition all the information requested of them in the August 31, 2010 Requests, and all documents that Respondents intend to produce at trial. Motion for Reconsideration at 3, and Exhibits D and E. The Motion states that at the deposition, Respondent Kathy Parker refused to answer any more questions before the deposition was complete, and Respondents produced responses to the Request for Admissions but did not produce the other documents requested. Motion for Reconsideration at 2-3. As a result, HUD continued the deposition on October 26, 2010, but still, Respondents only produced "some token responses" to the Request to Produce Documents and did not produce any "meaningful discovery responses." Motion for Reconsideration at 4.

HUD requests reconsideration of the prior Order "because of the additional prejudice it will incur based upon the extension of the discovery deadline to November 19, 2010, and the additional time, until November 5, 2010, Respondents have received to respond to Charging Party's discovery requests," and because Respondents still have not complied with HUD's discovery requests. Motion for Reconsideration at 5. HUD argues that in its effort to comply with the October 26th discovery deadline, it took depositions, expending government resources, under prejudicial circumstances, without benefit of first reviewing any responses to written discovery. HUD argues further that it may endure injury from the scheduling set out in the October 26th Order, requiring the prehearing statement and dispositive motions to be filed before the close of discovery. *Id* at 6-8. HUD asserts that Respondents' failures to respond adequately to the requests for discovery have impeded its ability to prepare for hearing by limiting the discovery of evidence relevant to the case.

B. Relevant Regulatory Provisions

With regard to requests to compel discovery, Rule 180.540 provides in pertinent part as follows:

> (c) In ruling on a motion under this section, the ALJ may enter an order compelling a response in accordance with the request, [or] may order sanctions in accordance with paragraph (d) of this section . . . .
>
> (d) Sanctions. If a party fails to provide or permit discovery, the ALJ may take such action as is just, including but not limited to the following:
>
> > (1) Inferring that the admission, testimony, document, or other evidence would have been adverse to the party;
> >
> > (2) Ordering that, for purposes of the adjudication, the matters regarding which the order was made or any other designated facts shall be taken to be established in accordance with the claim of the party obtaining the order;
> >
> > (3) Prohibiting the party failing to comply with the order from introducing evidence concerning, or otherwise relying upon, documents or other evidence withheld;
> >
> > (4) Ordering that the party withholding discovery not introduce into evidence, or otherwise use in the hearing, information obtained in discovery;
> >
> > (5) Permitting the requesting party to introduce secondary evidence concerning the information sought;
> >
> > (6) Striking any appropriate part of the pleadings or other submissions of the party failing to comply with such order; or
> >
> > (7) Taking such other action as may be appropriate.

29 C.F.R. § 180.540(c) and (d).

C. Discussion and Conclusions

The Rules do not refer to reconsideration of a ruling, so it is appropriate to look to federal

court practice and procedures for guidance. A court's power to reconsider an interlocutory order derives from common law. *City of L.A. v. Santa Monica Baykeeper*, 254 F.3d 882, 885-7 (9th Cir. 2001). "As long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind or modify an interlocutory order for cause seen by it to be sufficient." *Id.* (quoting *Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981)(emphasis omitted).

One of the concerns expressed by HUD in its Motion for Reconsideration is now moot. Respondents apparently did not serve HUD with any discovery requests, as no certificates of service for any discovery requests have been filed by Respondents. Therefore, the request to vacate the extension to the discovery cutoff is denied as moot.

Further, on or before November 5, 2010, Respondents failed to serve HUD with any responses to its First Set of Interrogatories, and only produced "a few documents" in response to HUD's Request to Produce Documents. Motion for Reconsideration at 4, 5, 8-9. Therefore, in accordance with the warning set forth in the October 26th Order, Respondents are prohibited from introducing evidence concerning, or otherwise relying upon, any document or other evidence responsive to the First Set of Interrogatories or Request to Produce Documents, other than the documents they provided to the Charging Party on or before November 5, 2010. Accordingly, HUD's request to limit Respondents' ability to introduce evidence concerning or relying on documents or other evidence withheld from HUD in discovery is granted.

As to the request in the Motion for Reconsideration to deem HUD's First Request for Admissions as admitted, the Rules provide that "[e]ach matter for which an admission is requested *is admitted* unless, within 15 days after service of the request, or within such time as the ALJ allows, the party to whom the request is directed serves on the requesting party a sworn written answer . . . ." 24 C.F.R. § 180.530(b)(emphasis added). Respondents submitted their responses to HUD's Requests for Admission on September 23, 2010, which is 23 days after the requests were served upon them by overnight UPS delivery. Motion for Reconsideration at 2 and Exhibit B. Respondents' attorney on September 18th requested an extension of time until September 21st to submit the responses but they were not submitted until the deposition on the 23rd. Motion to Reconsider, Exhibit C. However, considering those circumstances along with the fact that HUD had not submitted the Request for Admissions along with its October 1st motion to compel discovery and request for sanctions, as required by 24 C.F.R. § 180.540(a)(4), HUD's original motion to have the admissions deemed "admitted" was denied in the prior October 26th Order.

HUD's Motion for Reconsideration, however, includes its First Request for Admissions as sent to each Respondent. Further, upon review such Requests appear compliant with 24 C.F.R. § 180.530(a), clearly state that the Respondents are requested to serve a copy of their respective answers on HUD's attorney "within **fifteen (15) days** of the date of service of this Request for Admissions" and that "[e]ach matter for which an admission is requested is admitted unless Respondent . . . responds **within fifteen (15) days,**" and clearly refer to Section 180.530.

Motion for Reconsideration, Group Exhibit A (emphasis in original). The Certificates of Service thereto show that the discovery requests were sent by UPS Next Day Delivery and by First Class Mail to each Respondent and to their attorney on August 31, 2010. *Id.* The UPS tracking report and overnight mail request form indicate delivery of the discovery request parcel by UPS to Respondents' attorney on September 1, 2010. *Id.*, Exhibit B. The letter from Respondents' attorney, dated September 18, 2010, requesting additional time to submit responses, merely references service by mail on Respondents, and assumes that the responses were due on September 18th. *Id.*, Exhibit C. Such assumption is not valid, however, as it does not appear that the extra three days allowed under 24 C.F.R. § 180.405(d) for documents "filed by mail" applies to a discovery request, particularly where it is also served simultaneously by overnight mail. Neither Respondent served upon HUD a written answer the First Request for Admissions within 15 days after service, and therefore it is concluded, under 24 C.F.R. § 180.530(b), that each Respondent has admitted each matter for which an admission was requested in the First Request for Admissions served on that Respondent.

The discussion and conclusions below address HUD's additional requests appearing also in its Second Motion.

III. Second Motion to Compel, Motion for Rule to Show Cause and Request for Sanctions

In its "Second Motion to Compel, Motion for Rule to Show Cause and Request for Sanctions" ("Second Motion"), HUD requests an order compelling Respondents to respond to its First Request to Produce Documents and First Set of Interrogatories, to show cause why they should not be held in contempt of this Tribunal for failing to respond to discovery requests and failing to file a Prehearing Statement, and to sanction Respondents for such failures. The specific requests made by HUD on pages 8 and 9 of the Second Motion (which have not been resolved in the discussion and conclusions above) ask this Tribunal to issue an order providing as follows:

> (1) compelling Respondents to respond fully to HUD's First Set of Interrogatories and First Request to Produce Documents;
>
> (2) compelling Respondents to show cause why they should not be held in contempt for failing to the comply with the October 26 Order requiring them to submit discovery responses and a prehearing statement by November 5, 2010;
>
> (3) prohibiting Respondents from calling witnesses at hearing or introducing documentary evidence at hearing that have not been included in a prehearing statement;
>
> (4) inferring that the testimony, document or other evidence withheld would have been adverse to Respondents;

(5) permitting HUD to introduce secondary evidence concerning the discovery sought but not propounded;

(6) denying any objections that Respondents may in the future proffer to discovery;

(7) denying any objections that Respondents may in the future proffer to Charging Party's evidence or witnesses; and

(8) awarding any other relief deemed appropriate.

The basis for HUD's requests (1), (4) and (5) above – for an order compelling Respondents to submit complete responses to its discovery requests, an inference that the testimony, documents or other evidence withheld would have been adverse to Respondents, pursuant to 29 C.F.R. § 180.540(d)(1), and an order allowing HUD to introduce secondary evidence concerning the discovery sought, pursuant to 29 C.F.R § 180.540(d)(5) -- is Respondents' failure to submit responses to the discovery requests and resultant prejudice to HUD. Furthermore, as to request (5), HUD seeks to be able to prove portions of its case that it may otherwise be incapable of due to Respondents' delinquencies.

Upon consideration, it is found that the foregoing requested sanctions are warranted in the circumstances of this case, particularly since Respondents have offered no opposition to the relief sought. In addition, HUD's request to deny any objections that Respondents may in the future proffer to discovery is an appropriate sanction in this proceeding. The Rules provide that the number of interrogatories must not exceed 30, and that answers and/or objections to interrogatories or requests for production must be served within 15 days after service. 24 C.F.R. § 180.510(a) and (b), 180.525(c). Upon review of the First Set of Interrogatories and First Request to Produce Documents addressed to both Respondents, they appear reasonable and compliant with the Rules. Respondents have not challenged HUD's assertion that they have not submitted responses to the discovery requests except for "a few" documents responsive to the Request for Produce Documents. *See*, Motion for Reconsideration at 8-9. Although, given the ruling below granting HUD's Motion for Summary Judgment as to liability, some of the discovery sought may no longer be relevant, it is not equitable to require HUD to indicate which of its discovery requests are still relevant, where its resources have already been unnecessarily burdened due to Respondents' delinquencies. Accordingly, Respondents are ordered to submit full and complete responses to HUD's First Set of Interrogatories and First Request to Produce Documents on or before December 31, 2010. For any Interrogatory or Request to Produce to which Respondents do not fully respond on or before that date, an inference will be drawn that is adverse to the Respondents as to the information sought therein. No objections to any of the discovery requests will be sustained

HUD's request to bar Respondents from calling witnesses at hearing or introducing documentary evidence at hearing that has not been included in a prehearing statement, is also warranted in this case. It is the practice of the undersigned to ensure that parties submit their

proposed exhibits and summaries of testimony early in the proceeding in a prehearing statement, to ensure a full and fair hearing and to avoid delay, bad faith and sandbagging. Respondents' blatant disregard for the Rules and the Orders issued in this case, and their minimal efforts to participate herein, do not merit any special concessions.

HUD has not provided any argument in support of its request for an order to show cause as to why Respondents should not be held in contempt, but Respondents have not opposed that request either. The Rules provide that "[t]he ALJ may exclude parties or their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, [or] failure to act in good faith . . . ." 29 C.F.R. § 180.315(b). The ALJ has "all powers necessary to conduct fair, expeditious and impartial hearings, including the power to . . . regulate the course of the hearing and the conduct of persons at the hearing [and] . .. [i]mpose appropriate sanctions against any person failing to obey an order, refusing to adhere to reasonable standards of orderly and ethical conduct, or refusing to act in good faith . . . ." 29 C.F.R. § 180.205(d) and (h). However, it is not clear to the undersigned whether the delinquencies of Respondents are due to conduct of the parties themselves or to the conduct of their counsel. Accordingly, given the Respondents' repeated delays and failures to comply with orders issued and discovery requested in this proceeding, Respondents will be ordered to show cause, on or before December 31, 2010, why they should not be held in contempt of this Tribunal for failing to the comply with the October 26 Order compelling them to submit discovery responses and/or a prehearing statement by November 5, 2010.

Finally, as to HUD's request for an order denying any objections that Respondents may proffer to its evidence or witnesses, such request is too broad. To ensure that the hearing is fair and expeditious, Respondents should be able to object to testimony or witnesses on the basis of relevance, materiality, redundancy, or privilege. Therefore, this request is denied.

No other sanctions are deemed warranted at this time.

IV. Motion to Strike Respondents' Separate Facts, Exhibits and Testimony

HUD moves to strike Respondents' Separate Facts, Exhibits and Testimony on grounds that Respondents failed to file a prehearing statement, and that they previously stipulated to the facts presented in Charging Party's Joint Set of Stipulated Facts and Charging Party's November 5, Prehearing Statement. In support, HUD presents emails between its counsel and Respondents' counsel indicating Respondents' agreement, as late as December 1, 2010, to the facts set forth in HUD's Prehearing Statement. Motion to Strike, Exhibits A, B.

As legal authority for the requested sanction, HUD points to, *inter alia,* 24 C.F.R. § 180.540(d)(6), authorizing the ALJ to strike "any appropriate part of the pleadings or other submissions of the party failing to comply with such [discovery] order" for failure to provide or permit discovery, and points to 24 C.F.R. § 180.405(e) which authorizes the ALJ to refuse to

consider any motion or other document not filed in a timely fashion. HUD also argues that admitting Respondents' Separate Facts, Exhibits and Testimony would affect a substantial right of HUD pursuant to Federal Rule of Evidence 103(a)(1), which provides in pertinent part that error may not be predicated on a ruling which admits evidence unless a substantial right of the party is affected and a timely motion to strike appears of record. HUD argues that it would be prejudiced if Respondents are allowed now to submit such evidence or witnesses in their defense when they were unwilling to provide relevant information requested during discovery. HUD also points to the warning in the Notice of Hearing and Prehearing Order that "witnesses that have not been identified and documents that have not been included in the Prehearing Statement or amendments thereto may not be allowed to testify at the hearing or admitted into evidence absent extraordinary circumstances."

Respondents' Separate Facts, Exhibits and Testimony states that "Respondents will call the following witnesses at the . . . hearing" and lists the names of the Respondents and three other witnesses who were listed in HUD's Prehearing Statement, but with summaries of testimony that favor the Respondents' position in this case. The list of exhibits therein identifies six exhibits listed in HUD's Prehearing Statement, and therefore suggests that Respondents stipulate to admissibility of such exhibits. Respondents also seek to revise the Joint Set of Stipulated Facts by adding some text to three of the factual statements, namely Paragraphs 13, 17 and 28. HUD does not agree with such revisions.

Respondents' proposed revisions to the Stipulated Facts are not stipulated to, and serve no purpose. "Respondents' Separate Facts, Exhibits and Testimony" does not meet the requirements for a prehearing statement as set forth in 24 C.F.R. § 180.435 and the Notice of Hearing and Prehearing Order. Having been filed one month after the due date for prehearing statements, it is unacceptable as a partial prehearing statement, particularly when submitted without any motion for leave to file it out of time or any explanation for its untimeliness. Further, Respondents acknowledge therein (on page 2) that they did not file a prehearing statement, which suggests they do not consider it as a prehearing statement.

The presiding ALJ has a responsibility to conduct fair, expeditious, impartial and orderly proceedings, and to that end has the authority to "impose appropriate sanctions against any person failing to obey an order, refusing to adhere to reasonable standards or orderly and ethical conduct, or refusing to act in good faith," to "exercise any other powers necessary and appropriate for the purpose and conduct of the proceeding as authorized by the rules in this part," and to strike submissions of a party failing to comply with a discovery order. 24 C.F.R. §§ 180.205(h) and (j), 180.540(d)(6). Accordingly, and because the document entitled "Respondents' Separate Facts, Exhibits and Testimony" was not submitted in compliance with the Rules and with prior orders issued in this case, it is stricken from the record of this proceeding. HUD's Motion to Strike Respondent's Separate Facts, Exhibits and Testimony is therefore granted.

V. Motion for Summary Judgment

A. Relevant Provisions of the Fair Housing Act

The Fair Housing Act provides, at 42 U.S.C. § 3604(a) and (c), that it shall be unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> * * *
>
> (c) to make, print, publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, disability, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

B. Undisputed Facts - Stipulated Facts Relevant to Liability

1. Since March of 1990, Respondent Kathy Parker has been licensed real estate agent in the State of Ohio. Charge and Answer ¶ 6. In 2008, Respondents Kathy Parker and Deryl Gibson purchased a three bedroom, single- family rental property located at 4473 Parkton Drive, Warrensville Heights, Ohio 44128 ("the Property"). Joint Stipulated Facts ("Stips") ¶ 10. At all times relevant hereto, Respondents have owned the Property. Charge & Answer ¶ 5. Respondents are both African-American. Stips ¶ 9.

2. Respondent Parker manages the rental of the Property, and develops and implements the policies and practices followed at the Property. Stips ¶ 10.

3. It was Respondent Parker's policy and/or practice to only provide rental applications to those prospective tenants to whom she was interested in renting and to not schedule a later time to meet with an applicant to whom she was not interested in renting. Stips ¶ 12.

4. In 2008, along with other housing units, Respondent Kathy Parker advertised the Property for rent at $950 per month on the website www.housing cleveland.org. Stips ¶¶ 11, 13. In June and July 2008, Respondent Parker accepted Section 8 housing vouchers at the Property. Stips ¶ 13.

5. Complainant HAI is a non-profit corporation in Ohio that was formed to promote equal housing opportunities throughout Ohio so that all persons, regardless of race, religion, gender, national origin, familial status, or disability, can secure and afford housing in the neighborhood of their choice. Charge and Answer ¶ 3. In 2008, HAI coordinated a housing investigation program which included testing of the Cleveland metropolitan area rental market, to

determine whether housing providers therein, who advertised Section 8-approved housing, were engaged in discriminatory practices against minorities. Stips ¶ 14.

6. On or about June 18, 2008, Respondent Parker received a telephone message from a caller expressing an interest in the Property, and Respondent Parker returned the call and spoke to a Hispanic female. During the phone conversation, Respondent Parker scheduled an appointment with the Hispanic woman to view the Property the following day. Stips ¶ 15.

7. On or about June 19, 2008, a woman of Hispanic national origin met Respondents at the Property to view the Property, and Respondent Parker introduced Respondent Gibson to the Hispanic female. Respondent Gibson did not accompany Respondent Parker and the Hispanic female during the viewing of the Property. Stips ¶ 16, 41, 42.

8. During that June 19, 2008 contact, Respondent Parker questioned the Hispanic woman concerning her income and the Hispanic woman replied that she was unemployed and receiving Social Security. Respondent Parker questioned the Hispanic woman about the number and ages of children who would occupy the property and the Hispanic woman replied that she had two children living with her. Respondent Parker also questioned the Hispanic woman as to whether she had a Section 8 voucher. Respondent asked the Hispanic woman where she lived and the Hispanic woman replied "North Olmstead." Stips ¶ 17.

9. During that June 19, 2008 contact, the Hispanic woman expressed an interest in renting the Property and requested a rental application from Respondent Parker. Stips ¶ 18. The Hispanic woman explained to Respondent Parker that she was interested in renting the Property because she had a relative in the neighborhood. Stips ¶ 19.

10. At the end of the June 19, 2008 contact, Respondent Parker told the Hispanic woman that she would have to "think" about renting to her, and that she would call the Hispanic woman if she decided she was interested in renting to her. Respondent Parker also told the Hispanic woman that she would continue to show the Property to others in the meantime, and in fact did show the Property to prospective tenants after June 19, 2008. Stips ¶¶ 20, 38.

11. Prior to the conclusion of the June 19, 2008 contact, Respondent Parker did not confirm the Hispanic woman's contact information with her, did not provide her with a rental application, did not schedule an appointment to meet with her at a later time, and did not offer to provide her with an application at a later time, nor did she call the Hispanic woman regarding rental of the Property after June 19, 2008. Stips ¶ 21.

12. Respondent Gibson was aware of the facts in the Paragraph above. Stips ¶ 22.

13. On or about June 29, 2008, a Tester posing as a 52 year-old white American female ("Tester") with a three-bedroom Section 8 housing voucher, met Respondent Parker at the Property. During the tour of the Property, Respondent Parker asked the Tester about her employment status and who would be residing in the unit, and the Tester responded that she was

unemployed and had two children, a 13-year-old daughter and three year old grandson. At the conclusion of the tour, the Tester asked Respondent Parker for an application, and Respondent Parker indicated that she did not have an application with her, but would provide her an application the following day. Further, as she escorted the Tester outside, Respondent Parker asked the Tester what she thought of the Property, and the Tester responded that she was still undecided. At the conclusion of the tour of the Property, Respondent Parker verified the Tester's phone number. Stips ¶¶ 24, 25, 26.

14. On or about July 12, 2008, Respondent Parker rented the Property to an African-American female, Doretha Mills, a Section 8 voucher holder with two children, a 12 year old daughter and 9 year old son. In July 2008, Respondents were paid $825 in rent for the Property. Stips ¶ 28.

15. In August 2009, Respondent Parker spoke by telephone to HUD Investigator Lisa Terry concerning the Property, during which the Investigator told Respondent Parker that a complaint was filed based on Hispanic national origin. Stips ¶¶ 29, 30.

16. During an interview on October 16, 2009 with a HUD investigator, Respondent Parker stated that Respondents have never had a non-African-American prospective tenant submit an application, although she also told the HUD investigator that she had previously rented to a Hispanic male called "Jose" and a white female. She could not recall Jose's last name or the white female's name, and could not produce any applications or leases for said tenants. Stips ¶ 32.

17. During the October 16, 2009 interview, Respondent Parker admitted that, in the past, she has asked prospective tenants who are not African-American "why do you want to move to a black neighborhood?" and that she asks this question to ascertain the "longevity" of a non-African-American's potential tenancy in a "black" community. Charge and Answer ¶ 26. Also during the interview, Respondent Parker told the HUD investigator that she had "problems" with races other than African-Americans when the dominant race of the community is African-American. Respondent Parker stated that if she asked "this" question of the Hispanic woman it was to determine whether she was a "fly-by-night" situation. Stips ¶ 33.

18. Respondent Parker admitted to the HUD investigator that it is her practice when interested in a prospective tenant, to tell the tenant that she does not have an application with her, but to offer to meet the prospective at a later time, typically at the prospective tenant's home in order to see how the prospective tenant lives. Stips ¶ 34.

19. In October 2009, Respondent Parker told Investigator Terry that, in the past, she has asked rental prospects about their church attendance, in order to determine their ethics, as she considers those who attend church to have "better ethics" and a "good conscience." Stips ¶¶ 35, 36.

20. In October 2009, Respondent Parker told Investigator Lisa Terry that she told rental

prospects with four or five children, who were interested in renting a four-bedroom rental property, that she would not rent to them because they had too many kids. Stips ¶ 37. Respondent Gibson was aware that Respondent Parker told this to such prospective tenants. Stips ¶ 46.

21. During the October 16, 2009 interview, Respondent Parker told the HUD investigator that she has had problems in the past with non-African-American tenants, including non-payment of rent and tenants going to jail. Stips ¶ 39.

22. Despite request, Respondents were unable to provide leases with any non-African-American tenants that they rented to at any of their rental properties before August 2008. Stips ¶¶ 43, 44.

23. In response to the HUD complaint from which this case derives, by letter dated September 12, 2009, Respondent Parker stated, "If I asked why she would want to move to a black neighborhood it would have been to try to determine if longevity was an issue." Stips ¶ 45.

C. Undisputed Facts - Admitted by Respondents' Failure to Timely Respond

24. In 2008, it was Respondent Parker's policy and/or practice in her rental properties not to rent the Property to individuals of Hispanic national origin. Requests for Admission to Respondent Parker, ¶ 40.

25. Carmen Cedeno is the name of the Hispanic female referenced in Paragraphs 6 -11 above. Requests for Admission to Respondent Parker, ¶¶ 56, 59, 61-63. Carmen Cedeno is a tester for Complainant HAI and the housing applicant referenced in Paragraph 13 of the Charge of Discrimination. *Id.* ¶ 56.

26. Respondent Parker asked the Hispanic woman, Carmen Cedeno, why she wanted to live in a "black neighborhood" during the June 19, 2008 showing of the Property. Requests for Admission to Respondent Parker, ¶ 64.

27. Respondent Parker told the Hispanic woman, Carmen Cedeno, that it was not a "good idea" for her to rent to the Hispanic woman, Carmen Cedeno, because she might not feel "comfortable" in the area. Requests for Admission to Respondent Parker, ¶ 65.

D. Charging Party's Arguments

In its Motion for Summary Judgment ("SJ Motion"), HUD's position is that Respondents discriminated against aggrieved persons HAI and Carmen Cedeno, a tester for HAI and a *bona fide* home seeker, when Respondents made discriminatory statements to, and refused to rent a property to, Ms. Cedeno on the basis of her Hispanic national origin. The Charging Party asserts

that it has made a *prima facie* case establishing that Respondents engaged in a discriminatory housing practice, and that it is entitled to judgment as a matter of law as to Respondents' liability for violating the Fair Housing Act, 42 U.S.C. Section 3604(a) and (c).

HUD argues that Respondent Deryl Gibson is liable for the discriminatory actions of Respondent Kathy Parker on the basis that she was his agent, where he co-owned the property with her, and he stipulated in this case to the fact that she manages the rental of the property, and developed and implements the policies and practices followed at the property. SJ Motion at 14-15 and Exhibit B (HUD's Prehearing Statement) Stipulated Fact #10, and *HUD v. Ro*, Fair Housing-Fair Lending Rptr. ¶ 25, 106, 1995 WL 32736 (HUD ALJ 1995)).

Complainant HAI, with a mission to eliminate housing discrimination and ensure equal housing opportunities, has standing in this case as an "aggrieved person" under the Fair Housing Act, HUD asserts. The definition of "aggrieved person" is ". . . any person who: (a) [c]laims to have been injured by a discriminatory housing practice; or (b) [b]elieves that such person will be injured by a discriminatory housing practice that is about to occur." 24 C.F.R. § 103.9, 42 U.S.C. § 3602(i). HUD cites several cases, including *Havens v. Realty Corp. v. Coleman*, 455 U.S. 363, 373-75 (1982), for the proposition that the Act gives standing to organizational plaintiffs and testers who have suffered discrimination during a test. SJ Motion at 15-16.

The Charging Party points out that, to establish a violation of Section 3604(c), it must show that a statement was made with respect to the rental of a dwelling, and that the statement indicates discrimination based on protected class status. SJ Motion at 18. Citing several cases, HUD asserts that courts have consistently held that the test for determining whether a statement is "discriminatory" is whether it suggests to an ordinary listener that a particular protected class is preferred or "dispreferred" for the housing, regardless of whether the respondent has discriminatory intent. HUD asserts that it has met the following *prima facie* elements of a violation of Section 3604(c): Complainant HAI has standing to file the Complaint on its behalf and on behalf of Ms. Cedeno, who is a member of a protected class; Respondents made statements to Ms. Cedeno that indicated a preference, limitation, or discrimination based on Ms. Cedeno's national origin; and the statement was made with respect to the rental of the subject property. HUD points out that Respondents stipulated to the facts that they jointly own the dwelling at issue and that Respondent Kathy Parker asked the Hispanic woman about where she lived, and the Hispanic woman replied "North Olmsted." HUD asserts that Ms. Parker then asked her "Why do you want to live in a black neighborhood?" and that it was not a "good idea" to rent to her because she "might not feel comfortable in the area," or similar words to that effect, according to Ms. Cedeno's tester debriefing form. SJ Motion, Exhibit F. Acknowledging that Ms. Parker alleges instead that she said something to the effect of "What makes you want to move into this neighborhood on this side of town?," HUD argues that it nevertheless has established that Ms. Parker made a discriminatory statement. First, HUD asserts that Ms. Cedeno's version of the statement is corroborated by Ms. Parker's statements in response to the HUD Complaint and in the Answer to the Charge, "if I asked why she would want to move in a black neighborhood it would have been to determine if longevity was an issue." SJ Motion Exhibits C, D. Second, Respondents' concede in their Answer that Ms. Parker admitted, when

interviewed by the HUD investigator, that in the past she has stated "Why do you want to move to a black neighborhood?" to prospective tenants who are not African- American, and that this is asked to determine the "longevity" of a non-African-American's potential longevity as she has had "problems" with races other than African-Americans when the dominant race of the community is African-American. SJ Motion Exhibit D ¶ 26. Finally, HUD argues that even assuming Ms. Parker's version of her statement as true, it would be understood by the "ordinary listener" to indicate a preference against non-African-Americans seeking housing in a predominantly African-American community.

The Charging Party asserts that it has met the following elements of a violation of Section 3604(a): that Complainant HAI has standing to file the Complaint on its behalf and on behalf of Ms. Cedeno, who is a member of a protected class; that Ms. Cedeno attempted to apply for housing and Respondents did not inquire into her qualifications at that time; that Respondents, aware of her national origin, rejected her; and that the property was rented to someone of a different national origin from Ms. Cedeno. Respondents stipulated that the property was available for rent, and that the Hispanic woman viewed the property, expressed an interest in renting it, and requested an application. SJ Motion Exhibit B, Stipulated Fact #18. Respondents also stipulated to the following facts: that Ms. Parker told the Hispanic woman that she would have to "think" about renting to the Hispanic woman; that Ms. Parker told the Hispanic woman she would call her if she was interested in renting to her; that Ms. Parker told the Hispanic woman that she would continue to show the property to others in the meantime; and that Ms. Parker did show the property to prospective tenants afterwards. SJ Motion Exhibit B Stipulated Fact #20. Furthermore, HUD asserts, Ms. Parker treated Ms. Cedeno differently than she treated a white American tester, who was offered the opportunity to receive an application at a different time, whereas Ms. Parker did not offer to meet Ms. Cedeno at a later time to provide her with an application. SJ Motion Exhibit B, Stipulated Fact #26. Finally, HUD asserts, Respondents rented the property to an African-American female.

E. Standards for Summary Judgment

The Rules do not reference summary judgment, and therefore Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), and case law thereon, provides appropriate guidance. *See, Puerto Rico Sewer and Aqueduct Authority v. EPA,* 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148 (1995)(Rule 56 of the Federal Rules of Civil Procedure (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 to show 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). If the non-moving party "does not so respond, summary judgment, if

appropriate, shall be entered against [him]." *Id.* 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 American 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 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 (2nd ed. 1983)). Nevertheless, the burden of coming forward with the evidence in support of their respective positions remains squarely upon the litigants. *See, Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir. 1994) (noting that judges "are not archaeologists. They need not excavate masses of papers in search of revealing tidbits -- not only because the rules of procedure place the burden on the litigants, but also because their time is scarce."). 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 (3rd 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).

F. Discussion and Conclusions

1. Alleged Violation of 42 U.S.C. § 3604(a)

To establish a violation of 42 U.S.C. § 3604(a), the Charging Party must show that Respondents "refuse(d) to . . . rent after the making of a bona fide offer, or to refuse(d) to negotiate for the . . . rental of, or otherwise ma(de) unavailable or den(ied), a dwelling to any person because of . . . national origin." 42 U.S.C. § 3604(a).

To make a *prima facie* case of refusal to rent housing, the Charging Party must show that the Complainant is a member of a statutorily protected class, and that Complainant applied for or attempted to negotiate for housing, was qualified to rent housing and was rejected although the housing remained available. *Soules v. HUD*, 967 F.2d 817, 822 (2nd Cir. 1992). The undisputed facts establish that Ms. Cedeno is a tester for HAI and a member of a statutorily protected class, as a person of Hispanic national origin. Undisputed Facts 6-11, 25-27. As to Complainant HAI, an organizational complainant has standing under the Fair Housing Act on its own behalf, and on behalf of a tester, where the respondent's discriminatory practices have "perceptibly impaired" the complainant's ability to assist equal access to housing through counseling and referral

services, draining its resources to counteract discriminatory practices. *Havens v. Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). "Courts have consistently held that the Fair Housing Act permits organizational standing where . . . the . . . alleged fair housing violation purportedly leads the plaintiff organization to commit resources to efforts aimed at terminating the alleged violations." *Housing Advocates, Inc. v. Berardi & Partners, Inc.*, Case No 1:10-CV-0790, 2010 U.S. Dist. LEXIS 125388 *5-7 (N. D. Ohio, Nov, 29, 2010). It is undisputed that Complainant HAI was formed to promote equal housing opportunities throughout Ohio, and that it had a housing investigation program which tested the Cleveland metropolitan rental market, to determine whether housing providers engaged in discriminatory practices against minorities. Undisputed Fact 5. Complainant HAI recently has been held to have standing under the Fair Housing Act. *Id.* (Finding that 42 U.S.C. §§ 3602(i) and 3613(a)(1)(A), in conjunction with the Fair Housing Act's definition of "person" as including organizations, "permits groups like [HAI] to file private civil actions under the Act."). Therefore, it is concluded that Complainant HAI has standing under Section 3604, on its own behalf and on behalf of Ms. Cedeno, as aggrieved persons under the Act. *See*, 42 U.S.C. §§ 3602(d) and (i), 3612; 24 C.F.R. § 103.9 (defining "person" and "aggrieved person" and authorizing proceedings before an administrative law judge).

Inquiring by telephone about a property advertised for rent, expressing interest in it and being shown the property constitutes applying for or attempting to negotiate for housing. *Soules v. HUD*, 967 F.2d 817, 822 (2nd Cir. 1992). The undisputed facts establish that Ms. Cedeno attempted to negotiate for rental of housing from Respondents. Undisputed Facts 6, 7, 9. There is no dispute that Respondent Parker accepted Section 8 vouchers at the Property. Undisputed Facts 4, 8. The Complaint alleges, and documents submitted by HUD show, that in 2008, Carmen Cedeno was a participant of the Section 8 Housing Voucher Program and had a Section 8 voucher. Complaint ¶ 4; SJ Motion Exhibits E, F. Therefore, Ms. Cedeno was qualified to rent the Property.

The undisputed facts also reflect that Ms. Cedeno was rejected by Ms. Parker as a tenant although the Property was at the time, and remained thereafter, available for rent. Undisputed Facts 2, 3, 10, 11, 13, 14. Respondent Gibson was a co-owner of the Property and was aware of Respondent Parker's actions regarding Ms. Cedeno. Undisputed Facts 1, 12. Therefore, it is concluded that Respondents "otherwise ma(de) unavailable or den(ied), a dwelling to" Ms Cedeno "because of . . . national origin." 42 U.S.C. § 3604(a); *see also*, Undisputed Facts 13, 14, 16, 17, 18, 22, 24.

If, after the charging party makes a *prima facie* case, the respondent declines to present evidence to show that his actions were not motivated by impermissible considerations, then the complainant is entitled to relief. *Soules v. HUD*, 967 F.2d at 822. Respondents have not raised any genuine issue of fact material to liability. Accordingly, it is concluded that the Charging Party is entitled to judgment as a matter of law as to Respondents' violation of the Fair Housing Act, 42 U.S.C. § 3604(a), as alleged in the Charge of Discrimination.

2. Alleged Violation of 42 U.S.C. § 3604(c)

To establish a violation of 42 U.S.C. § 3604(c) in accordance with the alleged facts, the Charging Party must show that Respondent Kathy Parker "ma(de) (a) . . . statement . . . with respect to the . . . rental of a dwelling that indicates any preference, limitation or discrimination based on . .. national origin . . . ." 42 U.S.C. § 3604(c).

According to the undisputed facts, Respondent Kathy Parker asked the Hispanic woman, Carmen Cedeno, why she wanted to live in a "black neighborhood" during the June 19, 2008 showing of the Property, and Respondent Parker told her that it was not a "good idea" for Ms. Parker to rent to Ms. Cedeno, because she might not feel "comfortable" in the area. Undisputed Facts 26, 27; SJ Motion Exhibits E, F. There is no question that such statements, made with respect to rental of the Property, indicate preference or discrimination on the basis of national origin. To determine whether a statement "indicates" impermissible discrimination, a court asks whether a statement regarding housing "suggests to an ordinary reader [or listener] that a particular race is preferred or dispreferred for the housing in question." *Soules v. HUD*, 967 F.2d 817, 824 (2nd Cir. 1992). Even assuming *arguendo* that Respondent Parker instead said, as she indicates in her deposition, "What makes you want to move into this neighborhood on this side of town?," she admits that the neighborhood is "predominantly black," and given the context, such statement suggests to an ordinary listener that persons who are black are preferred, or that non-African-Americans are dispreferred. SJ Motion Exhibit G. Furthermore, a conclusion that Respondent made a statement to Ms. Cedeno indicating preference, limitation or discrimination based on national origin is supported by Undisputed Facts 17, 21, 22, 23, and 24.

Respondents have not raised any genuine issue of fact material as to their liability under 42 U.S.C. § 3604(c) and have declined to present evidence to show that Kathy Parker's actions were not motivated by impermissible considerations. As such, the Charging Party is entitled to relief. *Soules v. HUD*, 967 F.2d at 822. Accordingly, it is concluded that the Charging Party is entitled to judgment as a matter of law as to Respondents' violation of the Fair Housing Act, 42 U.S.C. § 3604(c), as alleged in the Charge of Discrimination.

VI. Rescheduling the Hearing

Given the rulings on the Motions as discussed above, and the lack of participation of the Respondents in this proceeding, the parties may wish to waive their right to appear at an oral evidentiary hearing and request this Tribunal make a decision based on the written record as to the remaining issue of the sanction to assess in this proceeding. Any such waiver and request must be by all parties and writing as provided in 24 C.F.R. § 180.610, and must be filed on or before **January 14, 2011.**

In the event that no such motion is filed by that date, and that this case is not fully resolved by a settlement beforehand, a hearing in this matter will be held promptly at 9:30 a.m. on **February 8, 2011**, and continuing as necessary on February 9-11, 2011.

ORDER

1. The Charging Party's request to limit Respondents' ability to introduce evidence concerning or relying on documents or other evidence withheld from HUD in discovery is **GRANTED**. Respondents are prohibited from introducing evidence concerning, or otherwise relying upon, any document or other evidence responsive to the First Set of Interrogatories or Request to Produce Documents, other than the documents they provided to the Charging Party on or before November 5, 2010.

2. The Charging Party's request to vacate the extension to the discovery cutoff is denied as moot.

3. The Charging Party's request for sanctions under 24 C.F.R. § 180.530(b) is **GRANTED**. Each Respondent has admitted each matter for which an admission was requested in the First Request for Admissions served on that Respondent.

4. The Charging Party's request to introduce secondary evidence concerning the discovery sought, pursuant to 29 C.F.R § 180.540(d)(5), is **GRANTED**.

5. The Charging Party's request to deny any objections that Respondents may proffer to the First Set of Interrogatories and First Request to Produce Documents is **GRANTED**.

6. The Charging Party's request for an order denying any objections that Respondents may proffer to Charging Party's evidence or witnesses is **DENIED**.

7. Respondents are ordered to submit full and complete responses to HUD's First Set of Interrogatories and First Request to Produce Documents **on or before December 31, 2010.** For any Interrogatory or Request to Produce to which Respondents do not fully respond on or before that date, an inference will be drawn that is adverse to the Respondents as to the information sought therein. No objections to any of the discovery requests will be sustained

8. The Charging Party's request to bar Respondents from calling witnesses at hearing or introducing documentary evidence at hearing that have not been included in a prehearing statement, is **GRANTED**.

9. The Charging Party's Motion for Order to Show Cause is **GRANTED**. Respondents are ordered to show cause, **on or before December 31, 2010**, why they should not be held in contempt of this Tribunal for failing to the comply with the October 26 Order compelling them to submit discovery responses and a prehearing statement by November 5, 2010.

10. The Charging Party's Motion to Strike Respondent's Separate Facts, Exhibits and Testimony is **GRANTED**.

11. The Charging Party's Motion for Summary Judgment is **GRANTED**. Respondents Kathy Parker and Deryl Gibson, individually and jointly, are hereby found liable for engaging in discriminatory housing practices in violation of the Fair Housing Act, 42 U.S.C. § 3604(a) and (c), as alleged in the Charge of Discrimination dated July 9, 2010.

12. The parties may, if they wish, file a joint waiver of their right to appear at a hearing and request for decision based on the written record, as to the sanction to assess for the violation of the Fair Housing Act found herein. Any such waiver and request shall be filed on or before **January 14, 2011**.

13. The hearing in this matter is **RESCHEDULED** to commence promptly at 9:30 a.m. on **February 8, 2011**, and to continue as necessary on February 9-11, 2011, at a location to be determined.

Susan L. Biro
Chief Administrative Law Judge
United States Environmental Protection Agency[1]

Dated: December 17, 2010
Washington, D.C.

[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.