UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
Washington, D. C.

In the Matter of:		
HOUSING RESOURCES MANAGEMENT, INC. and Affiliates*	HUDBCA No.	90-5241-D19
	Docket No.	90-1438-DB
Respondents		

Judith Bartnoff, Esq.
Anne J. Chiaviello, Esq.
Patton, Boggs and Blow
2550 M Street, N.W.
Washington, D. C. 20037-1350

Marylea W. Byrd, Esq.
Dane M. Narode, Esq.
Rebecca Holtz, Esq.
Walter Warren, Esq.
Office of General Counsel
Department of Housing and
Urban Development
Washington, D. C. 20410

* Named affiliates: Deane Earl Ross, A. Bruce Rozet, Patrick D. Quinn, Ted Wollonciej, Richard Tell, Robert A. Kriensky, Debra Kilgore-Ernst, Clifford Gordon, National Development Services, Inc., Palisades Management Company, Management Assistance Group, Inc., United Housing Preservation Corporation, Sandstone Corporation, Williamsburg Corporation, Canterbury Corporation, Juniper Corporation, Eatongale Corporation, Broad Manor Urban Renewal, Vestry Corporation, Kingswood Corporation, Dearhill Corporation, Silverdale Corporation, Nottingham Corporation, MAGI-Cedarwood Corporation, Burbank Corporation, Palisades Management Corporation, National Investment Development Corporation, Partnership Investors Services, Inc., Partnership Placements, Inc., Cory Housing Corporation, NIDC Asset Management, Inc., NIDC Housing Corporation, NIDC HC Corporation, NIDC Managers, Inc., NIDC Capital Management, Inc., NIDC Partnership Management, Inc., Associated Financial Corporation, Wilshire Investment Corporation, Oakdale Corporation, AFC Capital Corporation, Milestone Corporation, Rockbridge Corporation, Mountbatten Corporation, Pinecone Associates, Inc., HHW of Delaware, Centurian Corporation, Cheyenne Corporation, Claremont Corporation, Geneva Corporation, Northview Corporation of Delaware and Arlington Corporation.

DETERMINATION

Statement of the Case

By letter dated January 26, 1990, Housing Resources Management, Inc. (HRM) and its named affiliates were notified by the U.S. Department of Housing and Urban Development (HUD), that they were temporarily suspended from participation in HUD programs pursuant to 24 C.F.R. §§24.405(a)(1) and (2) for irregularities of a serious nature concerning HRM's dealings with HUD, and because HRM and its affiliates are under investigation for these irregularities. In that letter, the following alleged irregularities were specified by HUD as grounds for the suspension:

1. HRM made or caused to be made requests for Section 8 assistance for vacant units at Vernon Manor and Morningstar Apartments in Tulsa, Oklahoma.

2. HRM misused Reserve for Replacement Funds at Sursum Corda Village Apartments and Tyler House in Washington, D.C. HRM also submitted false statements to HUD concerning the Reserve for Replacement accounts.

3. HRM caused a false billing invoice to be submitted by a contractor doing repair work at Morningstar and Vernon Manor Apartments.

4. HRM misused or misappropriated security deposit accounts at Vernon Manor and Morningstar Apartments. Security deposit accounts were also misused at Southgate Apartments in Watonga, Oklahoma and Cedarwood Apartments in Louisiana.

5. HRM failed to list its administrative sanctions on HUD's Previous Participation Approval applications (Form 2530).

The suspension superceded two Limited Denial of Participation actions imposed on HRM and its affiliates by the Oklahoma and District of Columbia Offices of HUD. The suspension is a temporary sanction imposed pending completion of the investigation of the alleged irregularities and such legal, debarment or Program Fraud Civil Remedies Act proceedings as may ensue.

Respondents made a timely request for a hearing on the suspension. Named affiliates Patrick Quinn, Debra Kilgore-Ernst and Robert Kriensky made requests for separate hearings in which they would be represented by separate counsel. Quinn, Ernst and Kriensky filed Motions to Dismiss on the ground that they were

not affiliates of HRM based on the way in which the Government worded its complaint. The Motions to Dismiss were granted without prejudice. The Government requested Secretarial Review, and on September 7, 1990, the Secretary reversed the decision granting the Motions to Dismiss and remanded the three cases for a determination on the merits. Quinn, Kriensky and Ernst are only named as affiliates of HRM, and are not accused of having caused any of the irregularities that are the grounds for the suspension. A review of the propriety of their suspensions will be adjudicated in separate proceedings. When the Government amended its Complaint, it omitted any references or allegations concerning named affiliates Ted Wollonciej and Clifford Gordon. HRM had represented in a Motion to Dismiss on behalf of all named affiliates, that Wollonciej and Gordon were no longer employed by HRM and had no control over HRM when the suspension was imposed. In view of those representations and the deficiencies in the Government's amended complaint, the Motion to Dismiss as to Wollonciej and Gordon is granted. Their suspensions are void ab initio. The remainder of the Motion to Dismiss had been previously denied.

A hearing [1] was held in Tulsa, Oklahoma; Washington, D.C.; and Los Angeles, California between June 11 and June 29, 1990 to determine whether there was adequate evidence to support the suspensions, and to determine whether the suspensions were necessary to protect the public interest and were in the best interest of HUD.

Findings of Fact

HRM is a corporation incorporated in the District of Columbia involved in managing real estate. It is 100% owned by Management Assistance Group, Inc. (MAGI). The Chairman of the Board of HRM is A. Bruce Rozet. The Chief Executive Officer and President is Deane Earl Ross. Robert A. Kriensky is the Senior Executive Vice-President, Patrick D. Quinn is the Executive Vice-President, Secretary and Treasurer; and Debra Kilgore-Ernst is the Executive Vice-President. MAGI is a California corporation 100% owned by Palisades Management Company (PMC). PMC is a California general partnership, with A. Bruce Rozet and Deane Earl Ross each as 50% general partners. The officers of MAGI are: A. Bruce Rozet, Chief Executive Officer and Director; Deane Earl Ross, President and Director; and Richard Tell, Executive

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[1] For purposes of citations to the record, the transcripts for the Tulsa portion of the hearing are designated as "T" hyphenated with the volume number, and cited pages following. The transcripts for the Washington, D.C. segment are designated as "DC" and the transcripts for the Los Angeles portion are designated as "LA" with the volume number hyphenated and cited pages following.

Vice-President. [2] William Harrison was the President of HRM from April, 1984 to April 1, 1989. (Respondents' Answer; LA-2 at 347.)

HRM was the management agent for Vernon Manor, Morningstar, Tyler House, Sursum Corda, Southgate, and Cedarwood. Each of those entities is an apartment housing project financed with a mortgage insured by HUD through the Federal Housing Administration (FHA). The owners of each of those projects entered into a Regulatory Agreement with HUD, and executed a Management Agreement with HRM when HRM became the management agent for the project. For those projects receiving Section 8 housing assistance payments, which are rental subsidies, the owners also entered into Housing Assistance Payments (HAP) contracts. HRM is not presently managing Vernon Manor, Morningstar, Tyler House, Sursum Corda, Southgate or Cedarwood. (Resp. Answer; Exhs. G-2, G-3, G-6, G-7, G-10, G-19, G-58, G-81.)

1. Improper Request for Section 8 Assistance for Vacant Units

The owners of Vernon Manor and Morningstar executed HAP contracts that required complete recertification of each tenant's income and allowances under Section 8 regulations. They also required the collection and maintenance of tenant security deposits. (Exhs. G-3, G-7.)

HRM entered into two Management Agreements, effective April 1, 1984, to provide management services for Vernon Manor and Morningstar. Paragraph 4 of each of the Management Agreements provides that the management agent must comply with all pertinent requirements of the Regulatory Agreement and HAP contracts, as well as the directives of the Secretary of HUD. Paragraph 10(i) of the Management Agreements for Morningstar and Vernon Manor required HRM to collect and deposit tenant security deposits into an account "separate from all other accounts and funds" with an insured financial institution, and to formally designate the account as the Security Deposit Account for the project. Pursuant to Paragraph 18(e) of the Management Agreement, HRM had to prepare a monthly Form 2505 Schedule of Rent Supplement Payments Due, and a Housing Owner's Certification and Application for Rent Supplement Payments. Paragraph 18(f) obligated HRM to promptly notify the owner of the project of any "delinquencies" by tenants, "including rental accounts." (Exhs. G-4, G-8.)

In early October, 1988, Germaine Johnston, Chief of the Loan Management Branch of the HUD Oklahoma City Office received a complaint from Jeareld Edwards, an investigator for the Oklahoma Department of Human Services, that Tamela Roberson, listed as a

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[2] Richard Tell resigned all of his corporate positions with HRM and its affiliates on June 18, 1990. His suspension was terminated on that basis by HUD.

low income tenant at Morningstar for whom HRM was receiving Section 8 rent subsidies from HUD, was not living in the subsidized unit. Edwards based his complaint on two visits to the unit. Johnston had also received two letters from Barbara Walker, a tenant at Morningstar, stating that William Gunter, supposedly a tenant at Morningstar, had not lived in the project for two years and that Gunter's apartment was being used by the HRM maintenance staff for illegal purposes. Johnston checked the monthly subsidy payment vouchers for Gunter's unit and found that HRM had listed him as a subsidized tenant. Tamela Roberson was also listed as a subsidized tenant. In October, 1988, Johnston asked James Cook, the HUD Director of Housing Management, to visit Roberson's unit to see if it was vacant. Cook reported to her that it was. The October and November vouchers from HRM for Morningstar listed Gunter and Roberson as tenants. Johnston decided to make a site visit to Morningstar on November 17, 1988. She took with her Kay Chisum, the HUD loan specialist for Morningstar in Tulsa. Jeareld Edwards accompanied Johnston and Chisum during the site visit. (T-1 at 66-74.)

Johnston, Chisum and Edwards went to the manager's office at Morningstar and asked for specific files to review. Chisum and Johnston found that there were no tenant verifications in the files. The only proof in the files that the tenants were eligible for Section 8 rent subsidies were affidavits from the tenants that they had no income. There were no leases or move-in forms in the files. Johnston, Chisum and Edwards then did a unit site inspection, accompanied by Erma Mitchell, the HRM on-site manager. Johnston concluded that four of the units they visited were vacant. These units were listed as occupied by William Gunter, Tamela Roberson, Angela Miller, and Jamesmeca Lightner. HRM had vouchered for rental subsidies for each of these tenants. (T-1 at 74-82; T-3 at 300-302.)

A. <u>Unit #2185-4 (Tamela Roberson)</u>

On November 17, 1988, apartment unit 2185-4, listed as occupied by Tamela Roberson, had no electricity and the front windows were broken out. The front door would not stay closed. There was a broken chair in the living room with some clothes and trash on the floor. Jeareld Edwards found that it looked the same as it had on his two prior visits in September and October, 1988, except that an overturned sectional sofa was gone and the door was no longer boarded up with plywood. The description given by all witnesses was that of an abandoned unit. Germaine Johnston testified that Erma Mitchell said that Roberson had moved out of the unit the weekend before. Mitchell denied making such a statement. (T-2 at 249, 253; T-1 at 76-77; T-3 at 304-305, T-8 at 879-881.)

Jeareld Edwards had notified the HRM on-site staff that he believed that Roberson's unit was not inhabited in both late

September and early October, 1988, but was essentially ignored or rebuffed on both occasions. Erma Mitchell had only met Roberson twice. The assistant manager, Linda Landrum, had moved Roberson into her unit. Mitchell first met Roberson about 2-1/2 months after she moved into Morningstar when Faye McKinney of the Tulsa Community Action Agency, brought Roberson to her office to ask Mitchell to board up Roberson's apartment while she was in a drug rehabilitation program. The drug program was a seven-day program. Mitchell saw Roberson for the second and last time when Roberson returned from the drug program a week later, and asked to have her apartment unboarded and her appliances reinstalled. (T-2 at 244-247, 250; T-8 at 843-851.)

Mitchell did a physical inspection of Roberson's unit on October 17, 1988 as part of an annual inspection check of the property. She found a number of men and women inside the unit, but Roberson was not there. Those present said Roberson had "gone to the store." Mitchell told them to have Roberson come see her when she returned because the unit was in very poor condition. Roberson never went to see Mitchell and Mitchell did not follow up with Roberson. A signature purporting to be Roberson's is on the tenant recertification form dated November 1, 1988. Mitchell was not present when it was signed. She assumed that it was signed by Tamela Roberson. Mitchell did not declare Roberson's unit vacant for purposes of Section 8 rental subsidies until November 21, 1988, after monitoring it for three days after the site visit by Johnston. (T-8 at 851-861, 879-881, 885; Exhs. R-43, R-64.)

B. Unit #2177-1 (Angela Miller)

The unit that Johnston believed was rented to Angela Miller was vacant on November 17, 1988 because Miller had recently moved to a unit in Building 2201, which was safer. Erma Mitchell told Johnston that Miller had moved to another building, but Johnston did not visit Miller's unit in Building 2201. Mitchell knew Miller well and saw her often because Miller came to Mitchell's office to pick up her mail. Miller's presence at Morningstar during the entire fall of 1988 was verified by Anna Robinson, who was the Tenant Association representative at that time. However, Miller began staying in her mother's unit at Morningstar after a shooting frightened her in September. In November, 1988, she moved into Building 2201. There is no evidence that Erma Mitchell knew that Miller was staying in her mother's unit in September, October and mid-November, rather than in unit 2177-A, for which she continued to pay subsidized rent. (T-9 at 831-836, 889; LA-3 at 603-605, 619-620.)

C. Unit #2215-3 (Jamesmeca Lightner)

Germaine Johnston testified that on November 17, 1988, the group visited unit 2215-C which was assigned to Jamesmeca

Lightner, and that the unit did not appear to be inhabited, but she had little recall of details about it other than that it had no electricity on that date and appeared vacant. Kay Chisum did not remember visiting the Lightner unit, nor did Jeareld Edwards. Erma Mitchell was positive that the group did not visit Lightner's unit because Johnston called a halt to the site visit before they reached Lightner's building.

Erma Mitchell testified that she knew Lightner for a number of reasons: Lightner was a known drug dealer; she also had been caught stealing furniture from another tenant in the late fall or early winter of 1988, and she had bright red hair that could be seen at a distance. Mitchell was sure that Lightner was living at Morningstar in the fall of 1988 because she saw Lightner and her children during that period. Anna Robinson did not know Lightner by her given name, but did know her as the drug dealer named "Princess" who sold drugs in an apartment across the hall from another tenant named Fay Buford. To Robinson's knowledge, Lightner only used the apartment to sell drugs. She was not aware that she was a tenant. However, she did see Lightner at Morningstar during the fall of 1988. (T-1 at 78-79; T-8 at 837-841, 882; LA-3 at 623-626, 644.)

D. Unit #2153A (William Gunter)

HUD had received two letters from Barbara Walker, a tenant at Morningstar, saying, among charges about drug abuse, that William Gunter, to whom the apartment across from hers was rented, had not lived in the unit for two years. (Exhs. G-14, G-15.) HRM had listed Gunter as the occupant of the unit for purposes of Section 8 rental subsidies. When Johnston made an on-site inspection of Gunter's unit, it appeared deserted. Erma Mitchell stated to Johnston that Gunter had recently been committed to a Veterans Administration hospital and that his family took away all of his furniture for safekeeping. Mitchell was positive that she had seen Gunter around Morningstar and in her office numerous times during the fall of 1988. Gunter was a tenant who paid an adjusted, subsidized rent. The rent was paid on his behalf each month by his brother, E.J. Smith, who was also on the maintenance staff of Morningstar. (T-1 at 75, 81-84; T-7 at 811-815, 825-826; LA-3 at 516, 581.)

Gunter was arrested, and confined in Eastern State Mental Hospital from January 27, 1988 to November 23, 1988 by court order. (Exhs. G-100, R-155.) The hospital had no record of his leaving the premises during that time except for a one day trip in October, 1988. The hospital did not have a fence and it was possible for patients to walk about the grounds unescorted, and even to leave the grounds undetected. (LA-3 at 660-663.) E.J. Smith testified that Gunter was constantly escaping from the hospital, hitching rides to cover the 1-1/2 to 2 hour trip to return to Morningstar, and being returned to the hospital by

Smith or other members of his family. (LA-3 at 516-126, 528-529, 532, 565, 570-571, 580.) Smith had no idea why Erma Mitchell thought Gunter was in a VA hospital. (LA-3 at 547-549.) Smith's testimony was disjointed, particularly in reference to the time periods of Gunter's "escapes" to Morningstar. I find his testimony about a family Thanksgiving reunion to be credible, largely because Gunter had been officially released from the hospital Thanksgiving week. The testimony that Gunter's furniture had been removed from the unit only shortly before the November 17 site inspection by Johnston is not convincing.

Smith and his friends used Gunter's apartment for sexual encounters and drinking parties. He denied using it for drug trafficking, but stated that a key to the unit was "floating around" Morningstar, and it could have been used by almost anyone. (LA-3 at 534-535, 539-540, 590-591.) Anna Robinson knew Gunter because she dated his cousin during the time period in question. Robinson agreed with Barbara Walker's statement in the letter Walker wrote to HUD that Gunter had not been living at Morningstar for approximately two years. She said it was "common knowledge" at Morningstar. She was sure that when he returned to Tulsa after his hospital confinement, he lived with his family, not at Morningstar. (LA-3 at 601-603, 615-617, 641-643.)

I find that, although Gunter may have been seen occasionally by HRM staff during the fall of 1988, he was not the occupant of the unit rented in his name during this period. HRM continued to accept monthly rental payments from Smith in Gunter's name during this time period, although it was apparently common knowledge at Morningstar that Gunter was incarcerated in a mental hospital during this period and his "escapes," if they occurred at all, were of short duration, and would not justify filing for rental subsidies to be paid by HUD for a "tenant" who was living, by court order, somewhere else.

E. HRM Policy in Regard to Occupancy Reports

HRM had published handbooks for its project managers to use in regard to occupancy monitoring and reporting. (Exhs. R-143, R-144.) It was HRM policy that its on-site manager conduct a daily site inspection. A site inspection did not involve entering individual units, and State law forbade such entry unless invited in after knocking. Erma Mitchell periodically conducted site inspections at Morningstar. (T-8 at 889; LA-3 at 551.) However, the social conditions at Morningstar during 1988 made the conduction of daily site inspections extremely dangerous. Morningstar was a project taken over, for all practical purposes, by drug dealers and gangs that had mass shootouts on the property in broad daylight. (T-8 at 890-894; LA-3 at 601.) The site inspections performed were probably perfunctory at best, due to the peril of walking about the property.

Daily site inspections alone would not have informed Mitchell whether any of the four units in question were occupied by their alleged tenants. Rather, receipt of monthly rental payments, transmittal of utility subsidy checks, and actual sightings of tenants on the property were more reliable indicia of whether they were in residence. (DC-4 at 29, 46-47, 60, 63.)

William Harrison, the President of HRM in 1988 and 1989, was not fully satisfied with HRM Regional Vice President Patrick Dougherty's explanation of why HRM had vouchered for Tamela Roberson's unit as long as it had. Harrison directed Carmella Glass and Brenda Thomas, HRM corporate employees with an expertise in tenant occupancy, to do a study at Morningstar to determine if Section 8 vouchering was a problem at the property. (LA-2 at 348-349.) Glass went to Morningstar and did a sampling study of tenant records. She found that utility subsidy checks (pbe checks) were not being processed, and that there were a large number of "skips" (tenants moving without notice). Glass concluded that, depending on how the date when a tenant "skipped" was calculated, HRM could owe HUD a substantial amount of money for vouchering for units after they were no longer occupied. (DC-4 at 10, 43-44, 52-54,; LA-2 at 349-350.) Thomas concurred in these findings. (LA-3 at 395-406, 419; Exh. G-97.)

Harrison was alarmed at Glass's "worst case scenario" projection of the amount of Section 8 subsidies improperly vouchered. HRM made no repayments to HUD of Section 8 subsidies based on Glass' report, but it was Harrison's opinion that "some funds" were due to HUD. In February, 1989, shortly after Glass did her study, HUD terminated all Section 8 payments to Morningstar. HRM's plan had been to "adjust" its Section 8 requests each month in the future to "repay" HUD but when the Section 8 funds were cut off, this "source of funds" was no longer available. (LA-2 at 353-354.)

Glass never put her findings in writing because she was directed not to do so by Harrison, who had been directed by Deane Ross not to have a written report prepared. (LA-2 at 353-354.) Ross was aware of what Thomas and Glass had discovered at Morningstar. Thomas spoke with him directly at least once. (LA-3 at 419, 488-489.) When HRM was moved into the same building as its parent company in January 1989, Ross and the parent company of HRM closely coordinated and controlled corporate operations at HRM. (LA-2 at 314-315.)

F. <u>HUD's Actions after the November 17, 1988 Visit</u>

Based on what Germaine Johnston observed during her November 17, 1988 site visit to Morningstar, she recommended that the HUD Office of Inspector General conduct an investigation of Section 8 billing practices by HRM. She made no further attempts to verify or test her findings before making this recommendation. Patrick

Dougherty of HRM had written an explanation to HUD of why HRM had continued to voucher for Tamela Roberson's unit as occupied until November 21, 1988, but Johnston did not find the letter to be convincing, and she did not attempt to verify any of the statements made in the letter. (T-2 at 158, 171, 227-230; Exh. R-7.) A letter drafted by Johnston requesting such an investigation was signed by Charles Ming, the HUD Manager in Oklahoma City. The letter does not make reference to William Gunter, but it does refer to Roberson, Miller, and Lightner. (Exh. R-10.) Johnston had knowledge that the Section 8 billing practices at Morningstar and Vernon Manor were still under investigation in June, 1990. This was verified by John T. Conners, HUD Deputy Inspector General. (T-1 at 104; DC-3 at 5-6.)

2. Misuse of Reserve for Replacement Funds at Sursum Corda Village Apartments and Tyler House and False Statements Concerning Reserve for Replacement Accounts

A. Sursum Corda

Sursum Corda is an apartment complex located in Washington, D.C. The Regulatory Agreement between the owner of Sursum Corda and HUD requires that a Reserve Fund for Replacements account be established under the control of the mortgagee and that no disbursements from the account could be made without the prior written consent of HUD. (Exh. G-81.) HRM was the management agent for Sursum Corda between April 1, 1987, and September 1, 1989, when it was replaced by H&E Management Associates Ltd. The Management Agreement between the owners of Sursum Corda and HRM required that HRM comply with the requirements of the Regulatory Agreement. (Exhs. G-82, R-115A.)

On November 12, 1987, Wayne Russell of HRM made an emergency request for release of $44,585.25 from the Reserve Fund for Replacements account to pay contractors and to reimburse the project operating account. HUD authorized the release of the requested funds on December 11, 1987. (Exh. G-83; Stipulations.) The following contractors and invoices were to be paid with the released funds: B.A. Coe & Company - $2,007.64; PEPCO invoice #87/141/1126 - $16,963.21; Energy Management System - $4,278.29; Johnson Controls invoice #17886420 - $3266; Boland Services invoice #540848 - $5,538.60; Boland Services invoice #543047 - $1,415.96; Boland Services invoice #43766 - $4986; and Boland Services invoice #S39710 - $6,129.55. Russell certified on November 12, 1987, that the monies released would be used for the work indicated in the request. (Exh. G-83.)

HRM received $16,963.21 from the Reserve Fund for Replacements account to pay PEPCO for electrical repairs that had been made prior to the time that HRM became the management agent for Sursum Corda. HRM never paid PEPCO the money and never returned it to the Reserve Fund for Replacements account.

(Stipulation.)

The Boland Services invoices were not paid in full by HRM for 22 months after the funds were released for their payment. Boland Services was paid $1700 on June 2, 1988, and received payments in $1,000 increments between June 10, 1988 and April 18, 1989. The Johnson Controls invoice was not paid for 21 months after funds had been released for its payment. Johnson Controls was paid $1,000 by HRM on December 15, 1988, and the remaining $2,266 due it was paid on June 13, 1989. (Resp. Answer.)

Sursum Corda was in the inventory of the HRM Eastern Region. Sam Lowery, the Regional Vice President for the Eastern Region of HRM from May 16, 1988 to May 26, 1989, was not aware that reserve funds had been released to HRM in early 1988 to pay PEPCO, Boland Services, and Johnson Controls and that these contractors had not been paid. (DC-1 at 39-40.) Debra Ernst also was unaware that the HRM Eastern Region had requested reserve funds to pay PEPCO, Boland Services and Johnson Controls in 1987. (LA-1 at 26, 30-31.) However, she was concerned about the unpaid Boland bills, and arranged a "work-out" agreement with Boland Services to pay the money due it in $1000 monthly installments starting in June, 1988. The Boland Services unpaid bills were removed from the HRM monthly reports open item section as of August 1988, and only the monthly workout payments were recorded. (Exh. R-116A, R-116B; LA-1 at 26-30.) Ernst did not find out that reserve funds had been released in January 1988 to pay Boland until an LDP was issued against HRM by the HUD District of Columbia Office in November, 1989. (LA-1 at 30.)

In March 1989, John Bush, the Large Customer Liaison for PEPCO had a meeting with Sam Lowery in which he demanded that the $16,963.21 PEPCO bill be paid by HRM. The bill was for repairs made in February, 1987 after an explosion at the power station for Sursum Corda. The explosion was allegedly caused by poor maintenance by the prior management agent. (DC-1 at 66.) Lowery was unaware of the unpaid bill prior to his meeting with Bush. (DC-11 at 46.) Lowery did not tell Debra Ernst about the PEPCO bill, although he met with her for three days in June 1988 (LA-1 at 35.) Lowery did not arrange to have the PEPCO bill put on the HRM open item accounting report after he found out about it in March, 1989, nor did he have it entered in the DEJ for Sursum Corda. (DC-1 at 64, 67.) HRM has never paid the PEPCO bill, and now claims that it should have been covered by insurance. HRM continues to refuse to pay it on that basis. (Exh. G-77.)

B. Tyler House

Tyler House is located in Washington, D.C. The Regulatory Agreement between the owner of Tyler House and HUD was essentially identical to the one for Sursum Corda. Paragraph 2 of that Agreement required the establishment of a Reserve Fund

for Replacements account that could not be used without the prior written approval of HUD. HRM became the management agent for Tyler House on May 19, 1987. The Management Agreement between HRM and the owner of Tyler House required that HRM comply with the requirements of the Regulatory Agreement. (Stipulations; Exhs. G-58, G-59.)

On March 2, 1989, HRM requested an emergency release from the Reserve Fund for Replacements account to pay Westinghouse Electric Company for repair services on the elevators at Tyler House and for security services. As part of any request for funds, the owner or management agent must sign a certification that "funds expended have been or will be used for the work indicated in this request." (Exh. G-56.) HUD denied the request for funds to pay for security services, but authorized the release of $11,190.09 to pay Westinghouse for the elevator repairs. HRM deposited the money in its corporate account, and repaid itself a portion of the $4800 in payments it had already made to pay Westinghouse on work it had performed at Tyler House in 1988. That work was reflected on the request for release of reserve funds. (LA-1 at 189-190.) HRM did not pay Westinghouse the remaining money due it for which HUD had approved the release of reserve funds. The owner of Tyler House filed for bankruptcy about a month after the reserve funds designated to pay Westinghouse were received by HRM. (Stipulations; LA-1 at 224.)

Lori Horn, the HRM corporate liaison for the Southern, Eastern and District of Columbia Regions, had directed Sam Lowery to make the reserve fund request for Tyler House because she was very concerned about the maintenance of security at the project. (LA-1 at 188.) When the reserve funds were released, Horn expected Lowery to direct the payment of the balance due to Westinghouse. She never told him to do otherwise. (LA-1 at 193.) HRM's internal financial management procedures then allowed regional vice presidents to "select" open items bills for payment. It did not mandate that bills, even those for which reserve funds had been released, be automatically paid. (DC-1 at 157.) Horn placed a hold on the restricted funds until she received oral notice from Lowery to pay the bill. Lowery had previously processed all of the paper work necessary and sent it to corporate headquarters so that Westinghouse could be paid. He did not call Horn to "activate" the payment. (DC-1 at 81.)

Rumors of the impending bankruptcy of Tyler House were rife among the HRM corporate officers in the weeks before the owner actually filed for bankruptcy. Although Lori Horn did not believe that the bankruptcy rumors caused project debts and funds to be handled differently, and she did not direct that bills not be paid in anticipation of the bankruptcy, neither she nor Sam Lowery made any attempt to have the remaining Westinghouse bills paid between April 24, 1984, when the reserve funds were released, and May 30, 1989, when Tyler House filed for bankruptcy

protection. (LA-1 at 192, 194-195, 219, 224, 226.) During the last two weeks of May, 1989, David Harbatkin, an HRM corporate official, took over Lowery's role as decision maker on what funds would be used to pay the bills incurred by Tyler House. (LA-1 at 220-221.) Harbatkin did not authorize the use of the reserve funds for the purpose for which they had been released, and told Lowery that they would not be paid because of the impending bankruptcy. (DC-1 at 76.)

Three days after the filing for bankruptcy, HRM directed that no more Tyler House bills were to be paid. HRM continued for a few more weeks as the manager of Tyler House. The trustee in bankruptcy had to give HRM permission to pay bills incurred after the bankruptcy, and HRM was told by the trustee that it should not pay any bills incurred before May 30, 1989, such as the Westinghouse bills. (LA-1 at 196, 216.)

C. HRM's Current Procedure for Handling Reserve Funds for Replacement

As of about January 1, 1990, designated HRM corporate officials such as Lori Horn act as the monitoring agent to make sure that reserve funds, if they are released in advancement of payment to a contractor, are used for the purpose for which they were released. The regional vice presidents no longer have the option of not "selecting" such bills for payment. (LA-1 at 161-166.)

After the reserve funds are released by the mortgagee to the HRM corporate office in Los Angeles, HRM corporate headquarters notifies the regional manager that the funds have been received and obtains direction from the regional manager on what to do with the funds. If the funds are not for reimbursement, but for payment to a contractor, the corporate office has checks prepared to send directly to the contractor. A written direction memo is also now prepared and is used as a checklist to make sure that payments to contractors are properly made. (LA-1 at 161-166.)

3. False Billing Invoice- Colburn Electric

Colburn Electric did most of the electrical work at Morningstar. Colburn had installed 14 meter cages, but had not been paid for the work. Morningstar still needed 13 more meter cages built. Colburn Electric refused to perform any more work until it was paid. In February, 1989, the HRM on-site staff at Morningstar tried to get Colburn to do the additional work by suggesting the use of what HRM called a "pre-invoice." As HRM used the term, a "pre-invoice" is an estimate from a vendor. (T-6 at 714-718.)

Samuel Colburn, the owner of Colburn Electric, wrote up an invoice for $8,840 for the remaining meter cages after being told

by the on-site management staff at Morningstar that the invoice would speed up payment on the remaining meter cages. (T-4 at 490; Exh. G-31.) Colburn got the impression from the on-site staff that HRM intended to present the invoice to HUD for payment, although it was never submitted to HUD for payment at any time. (T-4 at 490-491, 497.) The invoice and order number used by Colburn did not correspond to his bookkeeping system, indicating that he knew the invoice was not meant to be a billable invoice. Colburn's secretary wrote "phony invoice" on the top of Colburn's office copy so that it would not be filed with Colburn's receivables account. The copy submitted to HRM did not have "phony invoice" written on the top. Colburn never performed the electrical work reflected in the invoice. (T-4 at 492-493.) Colburn did not consider the invoice illegal or "phony." (T-4 at 491, 494.)

The $8,840 reflected on the Colburn invoice was recorded in the HRM Daily Expense Journal (DEJ) by Linda Landrum, the assistant manager at Morningstar. (T-6 at 722; Exh. R 31-A.) The invoice from Colburn should not have been entered in the DEJ, which is sent to an HRM regional supervisor for approval and then to the corporate offices in Los Angeles to enter the data in its computer for weekly accounting reports, among other purposes. Robert Allen was the HRM regional supervisor who should have caught the error in the DEJ, but he did not. The Colburn pre-invoice was listed in the accounts payable on the HRM weekly accounting report and on the August, 1989 monthly accounting report to HUD. (Exh. G-24.) It could not actually be paid without Allen's express approval because not all accounts payable were automatically paid each month and the regional supervisors selected those accounts that would be paid. Allen testified that he would not have approved the payment of the $8,400 to Colburn Electric for work because it had not been done, and, in fact, Colburn was not paid by HRM for it. (T-6 at 718-24.)

According to Allen, the Colburn invoice problem was an accounting and recordkeeping mistake, not an attempt to defraud or mislead HUD. HRM used a "manual check" system for vendors who would not do work without being paid immediately upon completion of work. In such cases, the HRM corporate office would arrange to have a check for the work manually processed, which would be given to the vendor as soon as the work was completed. The HRM manual check procedure required either a "pre-invoice" submitted by a vendor or a "C.O.D." invoice. Neither type of invoice is recorded in the DEJ. Allen testified that the Colburn invoice was a "pre-invoice" that should have been submitted to him for issuance of a manual check, not recorded in the DEJ. (T-6 at 718-724.) Debra Ernst corroborated Allen's testimony about the "pre-invoice" , "C.O.D" invoice, and manual check (also called "hand check") system used by HRM in 1988 and 1989. (LA-1 at 19-25.) When HUD took over Morningstar as mortgagee-in-possession, the $8,840 invoice dated February 28, 1989, was included in a

long list of accounts payable to Colburn Electric totalling over $20,000.00. (Exh. G-24.)

I do not find from this evidence that the Colburn Electric invoice for $8,840 was deliberately a false billing or that it was intended by either Colburn or HRM to be construed as such.

4. Misuse or Misappropriation of Tenant Security Deposit Accounts

A. Morningstar and Vernon Manor

The owners of Vernon Manor and Morningstar executed Regulatory Agreements to which HRM was bound through its Management Agreements. Paragraph 6(g) of the Regulatory Agreements required that all tenant security deposits be kept separate and apart from other project funds in a trust account that would at all time equal or exceed the aggregate of all outstanding obligations under the tenant security deposit account (Exhs. G-2, G-6.) Both projects are located in Oklahoma.

On July 31, 1989, HUD became mortgagee-in-possession (MIP) for both Morningstar and Vernon Manor. HRM was to cease being the management agent for both projects as soon as it transferred all funds and books to the new management agent for each project. The tenant security deposit funds for Morningstar and Vernon Manor were wire-transferred to the HRM corporate offices on September 8, 1989, and were placed in the general operating accounts until September 22, 1989, when they were transferred to the new management agents for Morningstar and Vernon Manor. (Exhs. R-27; G-24, G-125; LA-1 at 88-89.)

HRM had previously been put on written notice by HUD in April, 1989 that it could not underfund tenant security deposit accounts in any way. An underfunding of the tenant security deposit account would occur if there were a transfer of the security deposit funds to the operating account. The letter from HUD dated April 7, 1989, stated that such a transfer was in violation of both Paragraph 6(g) of the Regulatory Agreement and Section 115A of the Oklahoma Residential Landlord and Tenant Act of 1978. (Exh. G-23.)

The decision to commingle tenant security deposit funds with operating funds was made by Jonathan Vines, who was a Senior Vice President of HRM in 1988 and was with AFC Development from January to October, 1989. Although he initially made that decision in 1988 in connection with Southgate Apartments, his system for Southgate was also used by HRM in connection with Morningstar and Vernon Manor. (LA-2 at 283.)

Debra Ernst, Executive Vice President of HRM, stated that the purpose of transferring the tenant security deposit accounts

into the operating accounts for Morningstar and Vernon Manor was to facilitate the transfer of the funds to the new management agent, and not to commingle the funds in violation of the Regulatory Agreements or Oklahoma law. (LA-1 at 87.)

B. Southgate Apartments

In February, 1988, HUD took over Southgate Apartments as mortgagee-in-possession. The Regulatory Agreement for Southgate was different than the ones for Morningstar and Vernon Manor. It did not contain a provision specifically stating that tenant security deposits had to be placed in a separate account. However, Paragraph 14(g)(2)(ii) of the Regulatory Agreement referred to the "segregation" of tenant security deposits held in calculating residual receipts. (Exh. G-10.) Southgate was located in Watonga, Oklahoma. Title 41, Oklahoma Statutes Annotated, §115 requires that security deposits collected from a tenant must be kept in an escrow account for the tenant, and that misappropriation of security deposits is a crime.

Oklahoma Property Management (OPM) replaced HRM as the property manager of Southgate after HUD became MIP. As of March 18, 1988, no funds had been transferred. John Paul Scruggs, one of the owners of OPM, calculated that $1,691 was due in the tenant security deposit account by adding up the amounts listed on each tenant card. (T-4 at 393.) Scruggs notified Patrick Dougherty and HUD that the funds for the account had not been transferred to OPM. (Exhs. G-35, G-36.)

The February 1988 monthly accounting report for Southgate prepared by HRM shows that the security deposit account funds were transferred into the operating account controlled by HRM's corporate office. At that time, the liability for the security deposit was listed as $2,016 and the amount funded as $0. (Exh. G-27.) The audited annual financial statement for Southgate noted that the security deposit account had been emptied on January 29, 1988, in violation of the Regulatory Agreement. The audited annual financial statement shows a liability of $2040 for the tenant security deposit account. (Exh. G-26.)

On March 17, 1988, Jonathan Vines, then Senior Vice President of HRM, wrote Scruggs to resolve the transfer of Southgate funds to OPM. In paragraph 4 of that letter, Vines stated that, although Southgate had an ending cash balance of $2,086.24 as of February, 1988, HRM was only forwarding a check for $678.81 to close out the operating account, which included the security deposits at that time. Vines stated in that letter:

> The $1,407.43 difference between these two figures represents the balance of Southgate's Reserve for Replacement Account .... If you send HUD a check for $608.57 out of the money we are sending, they will (sic) a

> sufficient amount to cover the security deposit liability. (Exh. G-29.)

Scruggs had no idea what Vines was talking about in paragraph 4 of the March 17 letter. (T-4 at 410-411.) Vines further stated in the letter that HRM used the $1,407.43 to write two checks: one to HRM for $1,321.78 "to reduce the outstanding payable to us" and a second check for $85.65 for computer services.

Vines also forwarded a check to Scruggs for $1,467 to reflect Section 8 payments that HRM had been told by its bank had been deposited in HRM's account in error. Vines' letter made it clear that the $1,467 check was for Section 8 payments. Scruggs, however, deposited the check for $1,467 in the tenant security deposit account for Southgate. The check was returned for insufficient funds because the bank's notification to HRM has been made in error. At no time was the $1,467 check to be used to fund the tenant security deposit account. (Exhs. G-39, G-40, G-49; T-r at 394-397; LA-2 at 272-274.)

The tenant security deposit account for Southgate was underfunded by HRM's refusal to transfer all of the funds from that account to OPM and by HRM's use of some of those funds, commingled with operating funds, to pay money to itself. Vines' explanation was that almost $50,000 was "owed to HRM" on accounts payable and that the $1,321.78 was just a "small reduction" of those amounts. (LA-2 at 274.)

Vines, a former HUD employee who had little experience with MIP transfers, assumed that the remaining money necessary to fund the tenant security deposit account would come from the Reserve for Replacements account. He assumed that OPM would have "quick access" to the reserve funds and that OPM could make an application to recapitalize the tenant security deposit account with reserve funds. (LA-2 at 299-303.)

Vines had sent a copy of his March 17, 1988 letter to Louis Gonzales, the senior realty specialist in HUD's Oklahoma City Office. Before that, he had called Gonzales and briefly told Gonzales what HRM intended to do with the Southgate funds. Vines believed that conversation constituted not only notice to HUD, but also approval of what HRM intended to do. (LA-2 at 277, 284-286.) Gonzales did not grasp what Vines was telling him, but told him to put it in writing to OPM. Gonzales did not pay much attention to the March 17, 1988 letter to Scruggs because it was not addressed to him. (T-6 at 613, 626.)

HRM had already spent the commingled funds when the March 17, 1988 letter was written. By memo dated February 5, 1988, Vines had directed HRM comptroller Gary Best to dispose of all of the $5,150 remaining in the Southgate operating account, including the tenant security deposits, and to pay $2,900 to

Grant Thornton for an annual audit report, $820 to Management Reports, $96 to Marvin Poer and Company, $69 to Federal Express, and $1,265 to HRM. (Exh. G-96.) In that memo, Vines stated:

> I am writing a separate memo that justifies our use of the tenant security deposits to cover these operating expenses. (Exh. G-96).

Vines considered that his March 17, 1988 letter clearly stated what HRM intended to do about the Southgate funds. He stated that, because the partnership is "one and the same" with the project for purposes of assets, and the owners still owned Southgate, the funds were "available to be used by the partnership and that HUD had been "informed" that HRM essentially intended to use reserve funds to pay project bills. Vines further stated that William Harrison agreed with him on this course of action. (LA-2, at 304, 306.) Harrison knew that a Reserve for Replacements account could not be used to recapitalize a tenant security deposit account without HUD's permission, and that clear HUD approval was never given. (LA-2 at 375.)

Vines' contention that HUD approval was given for the handling of the Southgate funds is without merit. Gonzales' disinterest and silence did not in any way constitute "approval" by HUD of anything outlined by Vines concerning the Southgate funds. Tenant security deposit funds were commingled with general operating funds in derogation of state law, and were used improperly to pay project expenses.

C. Cedarwood Apartments

HRM was the property manager for Cedarwood Apartments, located in Baton Rouge, Louisiana. The Regulatory Agreement for Cedarwood and the Management Agreement applicable to HRM required that tenant security deposits be kept separate and apart from all other project funds in a trust account which would at all times equal or exceed the aggregate of all outstanding obligations under the contract. (Exhs. G-12, G-13.)

Around October 1, 1987, HRM transferred some of the tenant security deposit funds for Cedarwood to the project operating account to pay what HRM characterized as "essential operating expenses of the property." That left the security deposit account severely underfunded. (Exhs. G-41, G-45, G-46.)

On or about October 15, 1987, HUD took control of Cedarwood as mortgagee-in-possession. OPM, through Cotner Management, became the new manager of the project. On October 20, 1988, HRM sent a cashier's check for $2,040.33 to OPM, "representing the Tenant Security Deposits that were on hand as of October 17, 1988." (Exh. G-41.) The cover letter, signed by Wayne E.

Russell, Vice President of HRM, states that:

> You will note that amount is less than the $8,950 security deposit liability reflected on the detail list .... Unfortunately, it was necessary to use a portion of the Security Deposits to pay essential operating expenses of the property. (Exh. G-41.)

As of November 30, 1989, the underfunded tenant security deposit fund had a shortfall of $1,409.67. Cotner Management wrote HUD that it was suspending refunds of security deposits to tenants who were living at Cedarwood when HRM was the manager, and asked HUD for guidance on how to handle security deposit refunds for those tenants. (Exh. G-44.)

HUD had been on notice of the problem with the tenant security deposit account, among other financial problems, since at least October, 1988. Pearl Rice, a realty specialist in the HUD New Orleans Office, wrote in a memorandum of a site visit in October, 1988, that the security deposit funds may have been "misappropriated." (Exh. G-47.)

Gwendolyn Edwards, another HUD realty specialist in the HUD New Orleans Office, became involved in trying to refinance the tenant security deposit account when Debra Ernst called her to get permission to use funds from the Transfer of Physical Assets (TPA) Account, which was set up when HUD became MIP, to pay an auditor's bill, and possibly to use TPA funds to cover the shortfall in the tenant security deposit account, as well. The TPA account should have been transferred to HUD or OPM when HUD became MIP, but it had not been transferred. The TPA account was set up pursuant to a Depository Agreement and was funded by owner capital contributions to be used for repairs, or for any other purpose approved by HUD. (Stipulation; Exh. R-1, G-5-3, R-130A; LA-1, at 36-39, LA-2, at 275-278.) Ernst's conversation with Edwards took place in about June, 1989. In June, 1989, the MIP Agreement between HUD and the owner of Cedarwood was the only written agreement in effect. (Exh. G-50; LA-1, at 47.)

Edwards directed Ernst to close the TPA account for Cedarwood and to transfer the funds to HUD to cover the security deposit account shortfall. (LA-1, at 41-42, 96-97.) A check for $6,000 was sent to HUD from HRM, as agreed between Ernst and Edwards. Talmadge Varnado, Jr., Edwards supervisor, directed that it be deposited in OPM's security deposit account for Cedarwood. Ernst believed at that time that the Cedarwood tenant security deposit account had been fully recapitalized. (T-5, at 528-529.)

Cassandra Faulkner, a realty specialist in the HUD headquarters office in Washington, D.C., had written the standard MIP agreement that HUD used when it became a mortgagee-in-

possession of a project, and was apparently considered the HUD in-house expert on MIP issues. When Faulkner found out about the $6,000 check that HRM had sent to the HUD New Orleans Office, and believing the $6,000 to have come from the Cedarwood operating account, although it had not, she ordered Varnado to have OPM return the check to HUD. Faulkner considered this to be a serious violation of the MIP Agreement between HUD and the owner, and turned the matter over for investigation.

As a result of the withdrawal of the $6,000 check from the Cedarwood tenant security deposit account, the account was again undercapitalized, this time due to internal confusion within HUD as to what would have been an allowable use of the capital contribution TPA account. HRM knew nothing about the intercession of Faulkner after it sent the $6,000 check to HUD, and did not find out that the money was not used to recapitalize the Cedarwood tenant security deposit account until HUD issued a Limited Denial of Participation against HRM and cited the handling of the Cedarwood account as a ground for the sanction. (T-5, at 528-531; LA-1, at 46.)

5. Failure to List Limited Denial of Participation on Form 2530 Previous Participation Certification

A. Zion Baptist Apartments and New Hope Gardens

The HUD Oklahoma City Office had imposed a Limited Denial of Participation (LDP) on HRM, effective December 6, 1988, for a period of one year. An LDP is a limitation on the right to do business with the Department within a specific geographic region in the program or programs in which irregularities occurred. 24 C.F.R. §24.710. The HUD New Orleans Office was apparently unaware of the imposition of the sanction on HRM when it asked HRM to take over the management of two HUD-insured housing projects, Zion Baptist Apartments and New Hope Gardens. HRM agreed to manage the two projects, and took over as manager on March 3, 1989, having been authorized to do so by the New Orleans HUD Office. (Exh. R-196; LA-2 at 315-320.)

After HRM began managing Zion Baptist and New Hope Gardens, HUD requested that it fill out a HUD Form 2530 Previous Participation Certification for each of the projects. (LA-2 at 320.) A Form 2530 is required of any party seeking the approval of HUD to operate as a management agent. HRM prepared a Form 2530 for Zion Baptist and for New Hope Gardens, received by HUD on June 15, 1989, but certified by William H. Harrison as Chief Executive Officer and President of HRM on March 10, 1989. (Exhs. G-87-88.) The Certification on each Form 2530 states at Paragraph A(2)(f):

> I have not been suspended, debarred or otherwise restricted by a Department or Agency of the Federal Government or of a

> State Government from doing business with such Department or Agency.

The word "I" on the Certification is defined in the directions as meaning both the individual and the corporation for which he signs. Paragraph D of the Certification states as follows:

> Statements above (if any) to which I cannot certify have been deleted by striking through the words with a pen. I have initialed each deletion (if any) and have attached a true and accurate signed statement (if applicable) to explain the facts and circumstances which I think helps to qualify me as a responsible principal for participation in this project.

The Certifications signed by Harrison for Zion Baptist and New Hope Gardens contain no deletions, as described in Paragraph D of the Certification, and therefore certify that HRM had not been suspended, debarred or otherwise restricted from doing business with the Department. Furthermore, no signed statement was attached to the Certifications revealing the existence of the LDP or explaining why it should not be a reason to deny HRM participation as project manager. (Exhs. G-87, G-88.)

Schedule A of the Certification requires that each principal's name be listed in column 1, previous projects be listed in column 2, principals participation role and interest be listed in column 3, and defaults, mortgage relief, assignments and foreclosures be listed in column 4. (Exhs. G-87, G-88.) Developers with a large number of holdings have the option of filing a 2530 Schedule A Master List with HUD in lieu of filling out Schedule A on every Form 2530. However, entities taking advantage of the Master List option must keep the Master List up to date. (DC-2 at 75-76.) HRM elected the Master List option and directed HUD to refer to its Master List "on file." (Exhs. G-87, G-88.)

A Master List dated April 15, 1988, was the most current one filed with HUD when it received the Previous Participation Certifications for Zion Baptist and New Hope Gardens. It was signed by William Harrison for HRM. (Exh. G-90; DC-2 at 133-134.) Harrison did not prepare or review the Certifications for Zion Baptist or New Hope Gardens before he signed them. Harrison was under the impression that the Schedule A Master List was the appropriate place to list sanctions. He assumed that the LDP of HRM was listed on the Master List when he signed the Certifications. (LA-2 at 361, 363-365.) The LDP, however, was not listed on the Master List on file with HUD at the time when it received the Form 2530's for Zion Baptist and New Hope Garden (Exh. G-90.) Harrison admitted that, although HRM "tried" to prepare an updated Master List for HUD at least twice a year, it did not update it promptly after the LDP was imposed. (LA-2 at

372.)

I find that HRM failed to list its LDP on the Previous Participation Certifications for Zion Baptist and New Hope Gardens.

B. Village West I, II and III

On October 18, 1989, HRM submitted HUD Form 2530 Previous Participation Certifications for approval as manager of Village West Housing Complex, Phases I, II, and III. Robert Kriensky, Senior Executive Vice President of HRM signed the Certifications. Kriensky did not delete the phrase "or otherwise restricted" on Paragraph A(2)(f) of the Certifications. He also did not prepare a written statement revealing the LDP of HRM or give an explanation of it, as directed at Paragraph D of the Certifications. (Exh. R-133.)

Kriensky, like Harrison, was under a misconception about where a sanction should be reported on the Form 2530. He, too, believed that column 4 of the Master List was the appropriate place to list the LDP. The Oklahoma LDP was entered on the Schedule A Master List dated August 30, 1989, in column 4 (disclosure of defaults, mortgage relief, assignments and foreclosures) under Morningstar and Vernon Manor. Kriensky recalled that this Master List was attached to the Certifications he signed for Village West (LA-2 at 321-332; Exh. R-133.)

As of June, 1990, Kriensky still believed that there was a general lack of direction on how to fill out the Form 2530, that an LDP was not encompassed within the phrase "or otherwise restricted" at Paragraph A(2)(f) of the Certification, and that the LDP imposed by the HUD Oklahoma City Office was specific only to Morningstar and Vernon Manor. However, Kriensky stated that he did not intend to mislead HUD or to otherwise bury the LDP in the hundred-plus entries on the Master List by certifying as he did. (LA-2 at 323, 333.)

I find that HRM did not properly list its LDP on the Previous Participation Certifications for Village West I, II, and III.

6. HRM Corporate Relationships

HRM is wholly owned or controlled by MAGI, which is in turn, wholly owned by Palisades Management Company. MAGI wholly owns United Housing Preservation Corporation, Sandstone Corporation, Williamsburg Corporation, Canterbury Corporation, Juniper Corporation, Eatongale Corporation, Vestry Corporation, Kingswood Corporation, Dearhill Corporation, Silverdale Corporation, Nottingham Corporation, MAGI-Cedarwood Corporation and Palisades Management Corporation. Broad Manor Urban Renewal Corporation is

wholly owned by Eatongale Corporation. For each of these corporation, A. Bruce Rozet is the Chief Executive Officer and Director and Deane Earl Ross is the President and Director. (Resp. Answer.)

National Development Services Corporation and National Palisades Corporation are wholly owned by Palisades Management Corporation (PMC). National Investment Development Corporation (NIDC) is wholly owned by National Palisades Corporation. NIDC wholly owns Partnership Investor Services, Inc., now in bankruptcy, and Cory Housing Corporation. Partnership Placements, Inc. is owned by NIDC and Encino Housing Corporation. NIDC Asset Management, Inc. is owned by NIDC and National Housing Enterprise Corporation. For each of these corporations, A. Bruce Rozet is the Chief Executive Officer and Deane Earl Ross is the President. (Resp. Answer; Exh. G-92DD.)

NIDC Housing Corporation is wholly owned by NIDC Asset Management, Inc. NIDC Housing Corporation wholly owns NIDC HC Corporation. NIDC HC Corporation wholly owns NIDC Managers, Inc., NIDC Capital Management, Inc. and NIDC Partnership Management, Inc. For each of these corporations, A. Bruce Rozet is the Chief Executive Officer and Deane Earl Ross is the President. (Resp. Answer.)

Associated Financial Corporation (AFC) is owned by MAGI, Palisades Management Corporation and Louis a. Cicalese. AFC wholly owns Wilshire Investments Corporation, Oakdale Corporation, AFC Capital Corporation, Milestone Corporation, Rockbridge Corporation, Mountbatten Corporation and Pinecone Associates, Inc. For all of these corporations, A. Bruce Rozet is the Chief Executive Officer and Deane Earl Ross is the President. (Resp. Answer.)

Discussion

A suspension is defined by regulation as

> An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended." 24 C.F.R. §24.105(u).

A suspending official must use two tests in determining whether to suspend. First it must be determined that there exists adequate evidence of one or more of the causes set out in §24.405. Second, the suspending official must determine that immediate action is necessary to protect the public interest. 24 C.F.R. §24.400(b).

In assessing the adequacy of the evidence, the suspending official must consider:

> ... how much information is available, the credibility of the evidence given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result of all available evidence. 24 C.F.R. §24.410(c).

The cause for suspension cited by HUD is that it had reason to believe that HRM had committed violations of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program. 24 C.F.R. §24.405(a)(2), incorporating §24.305(b) by reference. Such violations can include willful failure to perform in accordance with the terms of one or more public agreements or transactions, a history of failure to perform or of unsatisfactory performance, and willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction. Ibid.

Misuse of Tenant Security Deposit Funds

The Government has sustained its burden of proof that HRM violated provisions of the Regulatory Agreements to which it was bound through the terms of its various Management Agreements by commingling and misusing tenant security deposits.

HRM commingled tenant security deposits with the general project accounts for Vernon Manor, Morningstar, Southgate, and Cedarwood. Three of those projects were located in Oklahoma, in which commingling is unlawful. A tenant security deposit is a trust account. It is not at any time the operating funds of a project unless a tenant defaults or otherwise forfeits the deposit. Although the security deposit funds for Morningstar and Vernon Manor were commingled for two weeks, they were eventually transferred to the new project management agent. Nonetheless, this technical commingling posed a threat to the tenant security deposit fund because once those funds lose their separate identity in trust, they may be attached for owner debts. Had Vernon Manor or Morningstar gone into bankruptcy during that period, the security deposits could have been frozen to pay debts because they had been commingled. HRM has changed the manner of transferring security deposits, and no longer commingles them to transfer funds.

The security deposit funds of Southgate and Cedarwood were improperly used to pay operating expenses and to "repay" HRM. As a result, those accounts were left underfunded. HRM placed great weight in its belief that the Cedarwood security deposit account had been recapitalized with funds from the owner's TPA capital account. However, there would have been no need to recapitalize

the security deposit account if HRM had not violated the terms of the Regulatory Agreement prohibiting the use of security deposit funds to pay operating expenses.

The Southgate fiasco is perhaps the worst example of corporate arrogance in this regard. HRM officials decided that their responsibilities to preserve or recapitalize the Southgate security deposit account, which HRM had grossly misused and mismanaged, were so negligible that HRM appropriated some of the cash balance of Southgate for itself before sending a paltry $678.81 to the new management agent to set up a tenant security deposit account. Jonathan Vines erroneously thought it was HUD's obligation to approve recapitalization of the tenant security deposit account with funds from the Reserve for Replacements account, rather than to hold HRM accountable for the misuse and misappropriation of funds that it had held in trust for the tenants of Southgate. HRM's explanation of its actions in this instance was not merely unsatisfactory; it was shocking. HRM's actions in regard to the Southgate security deposit account were willful, utterly lacking in responsibility, and harmed the integrity of HUD's management program.

Misuse of Reserve Funds at Sursum Corda and Tyler House

HRM misused and misappropriated reserve funds released for specific purposes by failing to spend the funds for the purposes for which they were released. In the case of Sursum Corda, the misuse and misappropriation of reserve funds was initially caused by lack of communication within the corporation, and an accounting system that lacked both efficiency and reliability, for all of its complexity. For whatever reasons, HRM corporate headquarters was unaware that substantial reserve funds had been released to pay vendors, but had not been used for that purpose. HRM has still not accounted for these reserve funds. The substantial sum released to pay PEPCO has neither been paid to PEPCO nor redeposited in the Reserve Fund for Replacements account. The handling of the funds released for PEPCO was improper, whether or not the owner of Sursum Corda seeks indemnification from an insurer to pay for certain repairs. The fact remains that over $16,000 is still not accounted for, and was under the control of HRM. This matter is correctly and appropriately being investigated further by the HUD Office of Inspector General.

The belated repayment of Boland Services and Johnson Controls was deplorable and a violation of the spirit, if not the letter, of the Certification that released reserve funds would be used to pay the expenses for which they were released. It was not acceptable or responsible to fail to repay vendors until almost two years after the funds had been released to pay them. The reason why Debra Ernst, Sam Lowery and Lori Horn did not know about the released reserve funds was that communications and

record-keeping within HRM were inadequate. HRM became the Bermuda Triangle for project reserve funds because of these deficiencies.

The Tyler House problem was different than Sursum Corda. Lori Horn directed Sam Lowery to make an emergency reserve fund request; he made it, it was approved, and the funds were released. Lowery prepared the paperwork and sent the necessary release forms to HRM corporate headquarters. Nonetheless, the HRM accounting system, a tribute to Rube Goldberg in its senseless complexity, required not just completed forms but oral communication to have the certified payables actually be paid. A "hold" was placed on payment of the rest of the money due Westinghouse until Sam Lowery made a telephone call to corporate headquarters to "activate" payment. It is not clear whether Lowery knew he had to make the call and decided not to do so on his own, or whether he was told not to bother by David Harbatkin.

If the funds still due Westinghouse had been paid to it when they were received by HRM in April, the bankruptcy five weeks later would not have intervened to prevent payment. A complex, inefficient, and bureaucratic internal corporate system caused HRM to violate HUD requirements that it was bound to follow. A corporation that wants to participate in Governmental programs must set up internal policies, systems and controls that facilitate, not frustrate, those program purposes. Furthermore, corporate officers must not hide behind tortured interpretations of internal corporate policy to frustrate the purposes of Government programs. Even if I give HRM the benefit of the doubt that it was not cynically dragging its feet until the bankruptcy, HRM's conduct in regard to the funds released for Westinghouse was still irresponsible.

Since January 1, 1990, after HRM faced two LDP's and this suspension, it started to change its internal procedures. Today, with HRM's revised procedures in place, the Sursum Corda problem would probably not recur. So long as HRM pays its bills promptly, neither should the Tyler House problem. Nonetheless, since the funds released remain unaccounted for, I can only conclude that they were misappropriated for unapproved expenditures.

Causing a False Invoice to be Submitted

I find that HRM did not cause Colburn Electric to submit a false invoice. The notation "phony invoice" by Colburn's secretary on Colburn's copy of the invoice did not mean that the invoice was false, per se, but was her way of indicating that the invoice should not be entered into Colburn's accounting systems. I credit the testimony that it was actually a "pre-invoice," or estimate, although HRM's use of a "pre-invoice" is another

example of its accounting arcana.

HRM never submitted the Colburn invoice for payment, and did not intend to because the work was not performed. The HRM accounting and reporting system caused the real problem, which was that the Colburn invoice was mistakenly placed in the DEJ and therefore was entered as an "open item" on the accounting report. The checks and balances intended for this system to work all failed. The accounting error was not caught by HRM, not removed from the monthly accounting report, and it appeared in the monthly accounting report as an open item when HUD took over Morningstar as mortgagee-in-possession. Because HUD sometimes pays "open items" when it is mortgagee-in-possession, it may well have paid Colburn Electric for work it had not done because of this record keeping error. HRM, however, is charged in the Government's complaint with causing the submission of a false invoice, not with keeping poor records. I find that the Government has failed to present adequate evidence to sustain this charge.

Section 8 Vouchers for Vacant Units

The Section 8 vouchers for vacant units at Morningstar is the most factually complex issue in this case. Morningstar was the site of drug wars, it was rapidly deteriorating, and tenants were leaving without notice. Erma Mitchell had to do her job as the on-site manager as best she could under these conditions. She increasingly retreated to the safety of her office and paperwork during the fall of 1988, still doing site inspections from time to time, but her contacts with tenants were more through those who came into the office than through site visits.

A will-o-the-wisp like Tamela Roberson was easily lost in the tenant picture. However, the two site visits by Jeareld Edwards, who notified the HRM staff angrily and loudly that Roberson was gone, should have put Mitchell on notice that Roberson might have "skipped." If Mitchell's testimony is accurate, Roberson had already returned from the drug program when Edwards made his first visit to Roberson's apartment the last week of September. An investigation and monitoring of Roberson's unit should have begun immediately. Edwards returned two weeks later and reported again that Roberson had gone. Mitchell had been offended by Edward's manner, and this may have caused her, in effect, to "stonewall" Edwards by refusing to check on Roberson.

When Mitchell performed her required annual inspection of Roberson's unit about ten days after Edwards' second visit, she encountered a group of people in Roberson's apartment, but not Roberson. She should not have dropped the matter in October as she did. It was certainly unreasonable that, even after the

November 17 site visit by Germaine Johnston, HRM continued to treat Roberson as a tenant for purposes of receiving Section 8 rent subsidies until November 21. The monitoring done by Mitchell after November 17 should have been done in late September or early October. Mitchell should have asked neighbors about Roberson, but apparently did not. She should have contacted Fay McKinney, Roberson's sponsor, but apparently did not. At the very least, Roberson should have been deemed a "skip" as of November 17, 1988. The inference that the Roberson unit had been vacated, drawn by Johnson and everyone else on the site visit except Mitchell, was reasonable.

I find that HRM submitted vouchers for Section 8 housing assistance payments for Tamela Roberson for a time period after its on-site management knew, or should have known, that Roberson was gone. However, I cannot determine from this record the date on which Robinson left. This is a matter presently under investigation by the HUD Office of Inspector General, and rightfully so.

I do not find that the inferences drawn by Johnston in regard to the Miller and Lightner units were reasonable. Miller had lived continuously at Morningstar during the period in question and had moved a few days before to a safer unit. Even if she was spending most of her time at her mother's apartment at Morningstar for a time, there is no evidence that Erma Mitchell knew or should have known that. Miller was a subsidized rent payer. Her rent was paid, she was seen on the property, she moved to another unit on the property. It was completely reasonable for HRM to have vouchered for Miller under such circumstances. Johnston's failure to visit Miller's new unit, once she was told about it, was a biased reaction that undermined her credibility as an objective investigator. I find that there was not adequate evidence to conclude or infer that HRM vouchered falsely for Angela Miller's unit.

Jamesmeca Lightner, who was characterized as the drug dealer "Princess," was a fully subsidized tenant at Morningstar. She paid no rent. Any tenant for which a project receives a subsidy, and particularly a full subsidy, needs to be closely monitored to make sure that the tenant is a bona fide occupant. Lightner was on the premises, known to Mitchell, known by reputation and sight to Anna Robinson. I do not credit Johnston's testimony that she visited Lightner's unit because it was not corroborated by the other witnesses on the site visit, and Erma Mitchell's testimony that they did not even go to the building in which Lightner lived was credible. I find that there was not adequate evidence to conclude or infer that HRM had falsely vouchered for Jamesmeca Lightner's unit.

William Gunter, the tenant who was incarcerated in a state mental hospital from January 27 to November 23, 1988, who escaped

periodically, was a subsidized rent payer the entire time. His guardian was his brother, E.J. Smith, a maintenance man at Morningstar. Smith paid Gunter's rent each month and was using his unit for sexual encounters and drinking parties. Mitchell gained most of her knowledge about Gunter from Smith. Nonetheless, Mitchell surely should have realized that Gunter was gone for the greater part of ten months. Gunter was well known to Mitchell, and he was a noticeable personality when he was on the premises. I am not persuaded by the testimony of either Mitchell or Smith concerning Gunter's whereabouts during the fall of 1988 prior to Thanksgiving week when Gunter was released, although their testimony in regard to Gunter may be true for time periods other than the one critical to this case. I found Anna Robinson's testimony more credible as to Gunter's place of residence and whereabouts, and Robinson had far less reason to "adjust" her testimony on this issue.

HRM followed a policy that rent paid by a subsidized rent payer was sufficient proof of residency to continue to voucher for subsidies. As a general policy, this is not unreasonable. However, if there is good reason to know that a subsidized rent payer is not present for months on end, receipt of rent is not sufficient to warrant the continuation of a rental subsidy without getting permission from HUD to continue to treat the tenant as eligible. I do not know how often William Gunter managed to escape back to Morningstar during his 10-month incarceration, nor do I know whether he returned to live there after he was released. This matter is under investigation by the HUD IG, and should be, based on the confusing evidence on the whereabouts of Mr. Gunter. Nonetheless, I find that there is adequate evidence to support a finding and an inference that HRM should not have submitted vouchers for rental subsidies for William Gunter's unit for the time period in question, despite the fact that rent was paid on behalf of Gunter during this time. Common sense should have dictated a less cavalier approach to the use of Government subsidies.

Common sense is the best test for whether or not a unit should be listed as occupied on monthly Section 8 vouchers. HUD has no guidelines that are of use in determining how much investigation must be done to voucher for a tenant as an occupant of a subsidized unit. There is no obligation to visit the actual unit each month, or even every few months. HUD only requires an annual recertification. Walking the grounds of a project may or may not provide reliable evidence that a tenant is living on the premises. Keeping an eye out for evidence of a tenant's absence for extended periods, following up on reports that a tenant has left without notice, keeping in touch with "the grapevine" for information about the residents, and promptly monitoring a situation when information indicates a problem is the proper approach to occupancy questions. A unit may not have furniture, and yet it can be occupied; it may not have operating utilities

and yet be occupied. But a lack of furniture and lack of utility use should be investigated to see whether the tenant is no longer a resident, or is just living poorly.

The "skips" were a major problem at Morningstar that was reflected in Section 8 subsidy vouchers. HRM started to determine the scope of the problem and do something to rectify it, but then a corporate directive from Deane Ross caused a retreat from this approach. The signing for "pbe" utility subsidy checks by Morningstar tenants was not a foolproof system for determining who still lived there. However, this practice was an indication that someone was still a resident of Morningstar, notwithstanding the temptation on the part of a "skipped" tenant to pick up a check even after the entitlement to it technically may have ended. HRM did not process the pbe checks for a six-month period in the summer and fall of 1988, catching up on the arrearage in 1989 after Carmella Glass highlighted the problem. Thus, HRM did not have these indicia of occupancy during the very time when it needed every type of evidence possible of who was actually in residence and who had "skipped."

The vouchering for Section 8 subsidies merits HUD's attention. The fact that Germaine Johnston concluded that one third of the units she visited were vacant was certainly adequate evidence to justify an IG investigation. While vouchering for the Gunter and Roberson units showed poor judgment on the part of the HRM on-site staff, I cannot find intent to defraud HUD in either case. Nonetheless, there is certainly adequate evidence of a problem with Section 8 vouchering at Morningstar to support the Government's charge on this issue.

Failure to Report LDP on Previous Participation Certifications

I find that HRM did not fail to report its LDP on Previous Participation Certifications with the intent to defraud or mislead HUD. HRM's handling of its 2530 Previous Participation Certifications would not be troubling were it not for it being part of a pattern of corporate arrogance and lack of any real concern for why HUD has certain requirements and procedures. It appears that no one at HRM actually read the Certification or the directions that tell how to fill it out. Many Government forms are confusing, but this one is not. If either William Harrison or Robert Kriensky had actually read the Certification before they signed it, they would have known that any sanction is to be clearly and specifically indicated by crossing out the word or phrase that describes it and attaching an explanation of the circumstances under which the sanction was imposed. A Limited Denial of Participation is a restriction on doing business with HUD. The Oklahoma LDP covered all of the areas within the jurisdiction of the Oklahoma City office. It was in no way

limited to Morningstar and Vernon Manor. If anyone at the HRM corporate office had read Schedule A, he or she would surely have realized that an LDP should not have been included in a listing of mortgage defaults, assignments and foreclosures. The column under which the LDP was listed when HRM finally got around to updating its Schedule A Master List was not the proper place to list the LDP. It had no place at all on the Schedule A Master List. It must be reported on the Certification itself.

A sanction is a critical consideration in deciding whether an applicant can participate in a new project or can continue to participate in an ongoing project. HUD personnel responsible for approving a completed Form 2530 do not look at Schedule A or a Schedule A Master List for sanctions. The way in which HRM filled out the Form 2530, with or without a "corrected" Master List, was grossly misleading, even if that was not the intent of HRM. The failure to fill out the form properly made it appear that HRM intended to obscure the LDP, and in the case of Zion Baptist and New Hope Gardens, not to reveal it at all. The New Orleans Office apparently did not know about the LDP when it asked HRM to take over the management of Zion Baptist and New Hope Gardens. HRM still had an obligation to fill out the Form 2530 correctly and completely. It is not the New Orleans Office but the Multifamily Participation Review Committee in HUD Headquarters that ultimately decides whether a manager may run a HUD-financed or insured project. The attitude of Robert Kriensky, a Senior Vice President of HRM, was inexcusable. He was condescending and combative on this issue, when the responsible response would have been an admission that the corporation erred, did not intend to create confusion, and would correct all of the 2530 Certifications immediately.

This issue, standing on its own, would not justify an immediate suspension. However, when it is viewed in the context of HRM's other actions, it adds to a body of problematic corporate responses that require investigation. I find that there was adequate evidence that HRM failed to list the LDP in any way on the Zion Baptist and New Hope Gardens Previous Participation Certifications and failed to properly list it on the Village West certifications. I also find that it failed to do so because of negligence and arrogance, not an active intent to deceive. However, that negligence and arrogance has caused programmatic problems for HUD, whether intended by HRM or not.

The Need for the Immediate Suspension of HRM

HUD knew about some of the irregularities cited as grounds for this suspension as long as a year before it imposed any sanction, yet HUD did not notify HRM about them until they were listed in the LDP's imposed by the Oklahoma City and District of Columbia offices. Some HUD personnel failed to give guidance and direction when it was sorely needed. If Louis Gonzales had paid

attention to what Jonathan Vines was telling him about Southgate, many problems could have been averted or handled better in connection with tenant security deposit accounts and reserve funds. Some HUD personnel further complicated problems that already existed, such as Cassandra Faulkner; Germaine Johnston was so bound and determined to "catch" HRM that she appointed herself the Inspector Javer of HUD, undermining her objectivity in the process.

Nonetheless, too many problems, serious and still unresolved, were created, exacerbated, and allowed to run amok by HRM. HUD's actions or reactions in response to HRM's conduct are, ultimately, beside the point. A responsible company is responsible because of its own actions, not because of the failure of the Government to point out its wrongdoing. I find that there was adequate evidence of both willful failure and a history of failure to abide by the requirements of one or more public agreements or transactions that were so serious as to affect the integrity of HUD programs. Thus, grounds for the suspension of HRM have been established 24 C.F.R. §24.405(a)(2), incorporating 24 C.F.R. §24.305(b).

Even though HRM is now revising some of its accounting and money handling practices, I find that too many of the charges that are the basis for this suspension remain unresolved, and are of such importance that HRM's suspension is necessary to protect the public interest and the interest of HUD. 24 C.F.R. §§24.400(b)(2) and 24.410(c). Therefore, HRM will remain suspended for a temporary period pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue.

Suspension of the Named Affiliates

The named affiliates of HRM fall into two categories. The first comprises the corporate or partnership entities sharing the same officers and directors who control both those entities and HRM. The second comprises individuals who hold various positions within either HRM or the company that controls HRM. An affiliate is defined at 24 C.F.R. §24.105(b) as follows:

> Persons are affiliates of each another if, directly or indirectly, either one controls or has the power to control the other, or, a third person controls or has the power both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

I find that each of the named corporate entities is an affiliate of HRM because third persons, namely A. Bruce Rozet and Deane Earl Ross, Chief Executive Officer and President, respectively of each, control or have the power to control all of them, and all of the corporate directorates interlock through these individuals. As such, these corporate entities meet the regulatory definition of an affiliate.

Individuals, rather than corporations defines as "persons," are more difficult to fit within the definition of "affiliates." Corporate officers are, by definition, "principals." See, 24 C.F.R. {§24.105(p). The Secretary of HUD, however, through his designee, has ruled that all corporate officers are "affiliates" within the regulatory definition. The Secretary went beyond that, to state that "[E]very employee, by virtue of his or her employment status alone, is an affiliate of an employer." Decision on Secretarial Review, by Elaine Dudley, Secretarial Designee, In the Matters of Patrick Quinn, Robert A. Kriensky and Debra Ernst, HUDBCA Nos. 90-5270-D42, 90-5272-D44 and 90-5273-D45 (September 7, 1990.) Applying the Secretary's interpretation of 24 C.F.R. §24.105(b), I must hold that all corporate officers of HRM are its affiliates.

The Secretarial Review Determination in Quinn, Kriensky and Ernst, supra., further states as follows:

> The regulation authorizes suspension of affiliates for the causes stated in 24 CFR 24.405. That does not, however, mean that any employee may be suspended simply because his or her employment status meets the definition of "affiliate." For that decision it is necessary to take the further step of considering the pertinent facts of the particular case, at least to the general nature of the person's position in the company.
>
> For that, the applicable standard is stated in 24 CFR 24.325(b)(2), which states:
>
> (2) Conduct imputed to individuals associated with participant. The fraudulent, criminal or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct. (Emphasis supplied, as to the last clause of this quotation.) [Emphasis and Comment are in The Decision on Secretarial Review.]

Deane Earl Ross, the President of HRM who replaced William Harrison, was instrumental in directing that Carmella Glass'

study of Section 8 vouchering problems at Morningstar not be reduced to writing. As the U.S. District Court for the District of Columbia has recently held in Novicki v. Cook, 743 F. Supp. 11 (D.D.C. July 5, 1990), a Chief Executive Officer has the duty to keep informed of corporate activities, and to exercise reasonable control and supervision over subordinate officers, citing U.S. v. Bynam, 408 U.S. 125 (1972). The court in Novicki went on to state that a CEO had the duty to seek out and remedy violations where they may occur, citing U.S. v. Park, 421 U.S. 658 (1975). Ross failed in his duty to seek out violations and remedy them; he tried to hide them instead, at least as to the Section 8 vouchering problems.

Although HRM lower level officers sometimes did not know what was going on outside of their immediate areas of responsibility, the President should have known. Ross became President of HRM in April 1, 1989, when Harrison left HRM. He was already playing an active roll controlling what happened to HRM through his position as President of HRM's parent company. According to Robert Kriensky, when HRM moved to the Santa Monica offices of the parent company in January 1989, the parent company started to closely coordinate and control what was done at HRM, in contrast to the autonomy exercised by Harrison when he was HRM President. I conclude that Deane Earl Ross, as President of both HRM and its parent company, knew, or should have known, what was happening at HRM.

The name of A. Bruce Rozet, Chairman of the Board of HRM, was not mentioned by any of the witnesses at the hearing. I find that A. Bruce Rozet, as the Chairman of the Board of HRM and the Chief Executive Officer of its parent company which exercised great control over HRM after January, 1989, was in the best position to know what was happening to HRM, if he was doing his job and exerting control over HRM through its parent company. Carl B. Mayer, Jr. and The Mayer Company, Inc., HUDBCA No. 81-544-D1 (December 1, 1981).

So many of the problems stemmed from corporate management and the centralized accounting and reporting system that the responsibility of the top two corporate officials cannot be avoided. I therefore find that A. Bruce Rozet and Deane Earl Ross are not only affiliates of HRM, but the improper conduct of the corporation must be imputed to them. Carl B. Mayer, Jr., supra; Secretarial Determination in Quinn, Kriensky and Ernst, supra. Their suspension is in the public interest. Patrick Quinn, Debra Ernst and Robert A. Kriensky have each filed separate requests for a hearing apart from HRM. Their cases will be decided separately from this case. Richard Tell is no longer a corporate officer of HRM or any of its affiliates and his suspension shall be terminated as of June 18, 1990, the date of his resignation from all of his corporate positions.

ORDER

HRM, A. Bruce Rozet, Deane Earl Ross and the named corporate affiliates shall be suspended for a temporary period pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as my ensue. The suspension of Richard Tell shall be terminated as of June 18, 1990. The suspensions of Robert Kriensky, Debra Ernst, and Patrick Quinn will be decided separately.

Jean S. Cooper
Administrative Judge

October 18, 1990