

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

In the Matter of:

Felicity Harmony Limited  
Partnership, and  
Preservation Homes, Inc.,  
General Partner,  
  
Respondents.

HUDALJ No. 07-037-CMP

Decided: May 15, 2007

L.P. Cooper, Jr., Esquire  
For the Government

Felicity Harmony Limited Partnership,  
Respondent

Preservation Homes, Inc., General Partner,  
Respondent

Before Arthur A. Liberty,  
Chief Administrative Law Judge

**DEFAULT DECISION AND ORDER**

On March 19, 2007, the U.S. Department of Housing and Urban Development (“the Government” or “HUD”) served letters on Felicity Harmony Limited Partnership and Preservation Homes, Inc., General Partner (“Respondents”), through the president of Preservation Homes, Inc., Keith E. Butler, notifying them of the Government’s intent to seek civil money penalties, and including copies of the Complaint for Civil Money Penalties the Government intended to file. Copies of these documents were sent to both the New York and New Orleans addresses for Respondents, and were accepted on March 21, 2007. The notice letters stated, “You must submit a *written* response to the Complaint within 15 days of its receipt” (pursuant to 24 CFR 30.90(a)) (emphasis added) and “If you do not respond within 15 days, the Complaint will be filed . . . along with a

Motion for a Default Judgment against you . . . .” (pursuant to 24 CFR 26.39 and 30.90). An officer of Preservation Homes, Inc., did call the government in response to the complaint, but Respondents did not respond in writing to the Government, and still have not responded in writing.

Therefore, on April 23, 2007, the Government filed with this Court the Complaint for Civil Money Penalties against Respondents, seeking civil money penalties in the amount of \$65,000 for failure to timely and properly submit audited financial reports for Felicity Limited Apartments (“the Project”) in 2004 and 2005. The Government stated that these actions by Respondents violated requirements set forth in the Project’s Regulatory Agreement, 24 CFR 5.801, and the applicable regulations at 24 CFR Part 30. At the same time, the Government also filed a Motion for Default Judgment (pursuant to 24 CFR 30.85(b) and 30.90(b)), based on Respondents’ failure to respond to the Complaint.

In the 21 days since the Government filed the Complaint and Motion, Respondents have also not filed any sort of response to either document with this Court. Therefore, the Motion for Default Judgment is ripe for decision.

### **FINDINGS OF FACT**

1. Respondents are the owner and general partner, respectively, of Felicity Harmony Apartments (“the Project”), located in New Orleans. Respondent Felicity Harmony Limited Partnership (“Respondent Felicity”), owns the Project and Respondent Preservation Homes, Inc., (“Respondent Preservation Homes”) is its General Partner. The Project is a multi-family housing property financed with a loan insured against default by HUD under Section 222(d)(4) of the National Housing Act, 12 U.S.C. §§ 1701 *et seq.* Complaint ¶ 2.

2. In exchange for receiving benefits of a loan insured by HUD, Respondent Felicity executed a Regulatory Agreement with the Government on December 29, 1988. Complaint ¶ 11. In the Regulatory Agreement, Respondents agreed to certain controls over the management and operation of the Project.

3. Paragraph 9(e) of the Regulatory Agreement requires Respondents to provide HUD with an audited financial statement, prepared in accordance with the requirements of HUD, within 60 days after the completion of the fiscal year.

Complaint ¶ 12. Title 24 CFR 5.801(c)(2) extends the time to file an audited financial statement to 90 days after the completion of the fiscal year.

4. The Project's fiscal year ends on December 31. Complaint ¶ 13. The Project's audited financial statement is therefore due on March 31 each year, 90 days after the end of the fiscal year. The Project's 2004 audited financial statement was due by March 31, 2005, and its 2005 audited financial statement was due by March 31, 2006. Complaint ¶¶ 16, 17.

5. However, Respondents failed to properly submit audited annual financial reports to HUD for 2004 and 2005. Complaint ¶ 18.

6. Respondents' failure to timely provide the audited financial statements for fiscal years 2004 and 2005 to HUD in a proper manner violates paragraph 9(e) of the Regulatory Agreement, as modified by 24 CFR 5.801(c)(2). Complaint ¶ 19.

7. Respondents' officers had actual knowledge of the specific requirements that financial statements must be filed within ninety (90) days following the end of each fiscal year, and that the statements were to be certified to by an officer or responsible owner. These were expressly provided in the terms of the Regulatory Agreement. Also, Respondent was obligated to keep informed of the Secretary's requirements, and thus knew or should have known of the Handbook provision that the financial statements be certified to by an independent public accountant or other person acceptable to the Secretary, and that the audited financial statements be filed electronically.

8. Respondents' failure to timely and properly file audited financial statements was a material violation.

9. On June 23, 2006, the Government provided written notice to Respondent Felicity that it was considering seeking a civil money penalty against them for their failure to properly file the required annual financial reports for fiscal years 2004 and 2005. Complaint ¶¶ 20. The notice provided Respondent Felicity 30 days in which to submit a written response. Complaint ¶ 22.

10. On August 17, 2006, the Government provided written notice to Respondent Preservation Homes that it was considering seeking a civil money

penalty against them for their failure to properly file the required annual financial reports for fiscal years 2004 and 2005. Complaint ¶ 21. The notice provided Respondent Preservation Homes 30 days in which to submit a written response. Complaint ¶ 22.

11. Respondent Felicity received the notice on June 26, 2006, and Respondent Preservation Homes received the notice on August 21, 2006. Complaint, ¶ 22. On March 28, 2007, Keith Butler, president of Respondent Preservation Homes, spoke telephonically with government counsel, regarding the complaint. Declaration of L.P. Cooper, Jr., ¶ 3. Respondents did not provide a written response to either notice. Complaint ¶ 23.

12. On March 19, 2007, the Government provided Respondents with final written notice that it had decided to seek civil money penalties against the Respondents for the failure to timely submit proper annual financial reports for fiscal years 2004 and 2005. Attached to the letter was a copy of the Complaint filed in the instant case. Respondents signed for receipt of these notices on March 21, 2007. G. Exh. to the Complaint, ##1, 2.

13. Respondents were notified that they had 15 days in which to submit a written response to the Complaint, pursuant to 24 CFR 30.90(a), and that such response would be considered a request for a hearing before an ALJ. Respondents were also notified that if they did not respond in writing within the 15 days, the Complaint would be filed before this office, along with a Motion for Default Judgment, pursuant to 24 CFR 26.39 and 30.90. G. Exh. to Motion for Default Judgment, #1.

14. Respondents did not submit a written response within the 15 days. The Government duly filed its Complaint and Motion for Default Judgment with this office on April 23, 2007. Respondents still have not submitted a written response to the Complaint, either to the Government or to this office.

## DISCUSSION

The regulations governing the imposition of civil money penalties are found at 24 CFR Parts 26 and 30 (2004). Upon the filing of a complaint for civil money penalties, the Office of Administrative Law Judges ("OALJ") has jurisdiction over the matter pursuant to 24 CFR 26.29, 26.37, and 30.90(b).

The civil money penalty process is commenced when the Government submits a pre-penalty notice to the respondents, informing the respondents that the Government is considering seeking a civil money penalty, the specific violations alleged, the maximum civil money penalty that may be imposed, the opportunity to reply in writing within 30 days after receipt of the notice, and, that failure to respond within the 30-day period may cause the Government to issue a complaint under 24 CFR 30.85 without consideration of any information that the respondent may wish to provide. 24 CFR 30.70. The respondents are also informed that their written response will constitute a request for a hearing before the OALJ.

In the instant case, the Government submitted final pre-penalty notices to the Respondents in July and August 2006. The letters themselves set forth all the required information above except the amount of the civil money penalty being sought, or the maximum available. However, the Complaint for Civil Money Penalties attached to the pre-penalty notices did set forth the maximum civil money penalties involved. The Respondents therefore did have full pre-penalty notice and full notice of the contents of the Complaint.

Nonetheless, the Respondents have never submitted any response to the Complaint. Therefore, I find the Respondents in default. As a result, the Respondents are deemed to have admitted the facts as set forth above, and to have committed the violations as alleged therein.

Because the Respondents are deemed to have committed the violations as set forth in the facts, they may be subject to a civil money penalty. The Government may impose a civil money penalty on the Mortgagor of a property that includes five or more living units and that has a mortgage insured, coinsured, or held pursuant to the National Housing Act (*see* 12 U.S.C. §1735 f-15(c)(1)(A)(I)), for the

(b) Failure to furnish the Secretary, by the expiration of the 90-day period beginning on the 1<sup>st</sup> day after the completion of each fiscal year, with a complete annual financial report based upon an examination of the books and records of the mortgagor prepared and certified to by an independent public accountant or a certified public accountant and certified to by an officer or the mortgagor, unless the Secretary has approved an extension of the 90-day period in writing.

12 U.S.C. §§1735f-15(c)(1)(B)(x).

Having previously found that the Respondents knowingly violated its Regulatory Agreement with HUD, I turn now to the issue of whether Respondents' failure to properly furnish the Secretary with an audited financial report was a "material" failure.

"Materially" is defined in HUD's civil money penalty regulations at 24 C.F.R. §30.10 as meaning "in some significant respect or to some significant degree." The Secretary of HUD has stated how the materiality issue should be determined. In his Order on Secretarial Review, *In the Matter of Associate Trust Financial Services, HUDALJ 96-008-CMP*, September 15, 1997, the Secretary ordered that in civil money penalty cases materiality is to be determined by application of a "totality of the circumstances" standard, which is to be determined in turn by consideration of the eight regulatory factors at 24 C.F.R. §30.80 -- factors required to be considered in determining the amount of civil money penalty. In this regard, I share the concern of my colleague about the logic of deciding whether to impose a civil money penalty by considering the factors used to determine the size of a penalty if a penalty were to be imposed. *See American Rental Management Company, et al.* (HUDALJ 99-01-CMP, May 26, 2000.) Nevertheless, the Secretary's Order in *Associate Trust* constrains me to do just that, and I do so below.

There are eight factors which are required to be considered under the regulations at 24 C.F.R. §30.80. Pursuant to the Order of the Secretary in *Associate Trust* the record need not contain sufficient evidence to satisfy all of the factors -- a finding on one will support a finding of materiality. On that basis, materiality is easily established in Respondents' case.

The eight factors required to be considered under 24 C.F.R. §30.80 are: gravity of the offense; history of prior offenses; ability to pay the penalty; injury to the public; benefits received; potential benefit to others; deterrence of future violations; and degree of culpability. As to these, two of the factors stand out as clearly shown by the evidence -- a history of prior violations and deterrence. As discussed below, Respondents have a significant prior history of similar violations. Further, the goal of deterrence will be served by finding liability and imposing a penalty in the case. Similarly situated Respondents must be put on notice that

failing to comply with the requirements of a regulatory agreement with HUD will be costly to them.

Accordingly, I find that Respondents' failure to timely and properly file an audited financial statement as required by its regulatory agreement with HUD in each of the two years was a "material" failure under 12 U.S.C. §1735f-15(c)(1)(B)(x). I, therefore, find that Respondents knowingly and materially committed the violations as alleged in the Complaint.

For violations occurring after January 7, 2002, the Government may also impose a civil money penalty against a general partner of a partnership mortgagor for failure of the mortgagor to furnish the Secretary with the required audited financial report. See 12 U.S.C. §§1735f-15(c)(1)(A)(ii), (A)(iii) and (B)(x); 24 CFR 30.45(c)(2) and (3) (2002) (added by 66 Fed. Reg. 63,436 at 63,441-42 (December 6, 2001)).

Respondent Felicity is the mortgagor for the Project, which is a multi-family housing complex and has a mortgage financed with a loan insured against default under the National Housing Act. Furthermore, Respondent Felicity knowingly and materially violated 12 U.S.C. §§1735f-15(c)(1)(B)(x). Therefore, the Government may impose a civil money penalty against Respondent Felicity if the appropriate factors for consideration are met, as set forth at 24 CFR 30.80.

The Secretary may also impose a civil money penalty against Respondent Preservation Homes, as the general partner of Respondent Felicity, a partnership mortgagor, for the same violations, as they occurred after January 7, 2002. Again, the appropriate factors for consideration must be met.

The amount of civil money penalty the Secretary may award varies by time period. For violations, or portions of continuing violations, that occur on or after April 16, 2003, the Secretary may impose a civil money penalty in the amount of \$32,500 for each offense.

### **CIVIL MONEY PENALTY FACTORS**

The following factors must be considered prior to determining whether to impose a civil money penalty against Respondents, and prior to determining the amount of any such civil money penalty: 1) the gravity of the violation; 2)

Respondents' history of prior violations; 3) Respondents' ability to pay a penalty; 4) the injury to the public from the violation; 5) the benefits received by Respondents; 6) the extent of potential benefit to other persons; 7) deterrence of future violations; 8) the degree of Respondents' culpability; 9) any injury to tenants; and 10) other matters as justice may require. *See* 24 CFR 30.80.

The Government considers this type of violation to be extremely serious. In the case of late financial reports, the HUD insurance fund is potentially placed at risk because, without the financial reports, HUD is unable to determine if the project's funds are being used appropriately, whether the project is at risk of default (thus requiring the Government to pay a mortgage insurance claim), whether the tenants are having their tenant and habitation needs met, and other pertinent issues. The danger is increased in a case of a mortgagor who has failed to file proper, audited annual financial statements in the past, as Respondents have done.

The potential injury to both the tenants and the public from these violations is clear. The tenants are injured if the project does not have the funds to be kept in good repair and operating appropriately, and if the Government is unable to exercise timely oversight or correction because it does not have the financial data in a timely manner. The public is injured if the Government has to expend funds to keep the project in good repair and operating appropriately, to ascertain the extent of the unauthorized disbursements or lack of funds for the project, or if the mortgagor defaults and the Government must pay an insurance claim on the mortgage.

A Default Judgment was entered against Respondent Felicity by this forum on June 7, 2001, and Respondent Felicity was ordered to pay a civil money penalty of \$27,500. *See* HUDALJ 01-035-CMP. On August 12, 2002, Judgment was entered in Louisiana Federal District Court against Respondents, in the amount of \$27,500, for failure to file audited financial statements. *See United States v. Felicity Harmony LP and Preservation Homes, Inc.*, Civil Action No. 02-1647 (E.D. La. 2002).

There is no evidence of Respondents' ability or inability to pay a penalty, or of the extent of potential benefit to other persons. The Respondents benefited by having time in which the Government did not have financial data from which to



exercise oversight of the project or track financial activity and disbursement of funds.

The only evidence of Respondents' culpability put forth by the Government is that the Respondents signed the Regulatory Agreement and thus knew of the requirements contained therein. However, the Government also shows that Respondents failed to file timely financial reports in fiscal years 1998 - 2001 as well, and that they entered into a settlement agreement thereafter, in which they promised to provide, and did provide, appropriate financial statements for those years. This, combined with the subsequent judgments against Respondents for failure to file proper financial reports, makes it clear that Respondents should have known all of the requirements for proper and timely submission of financial statements. The fact that Respondents continued to fail to submit such statements in the years following indicates a high degree of culpability and knowledge.

Respondents' failure to submit appropriate financial reports was knowing and material. Respondents were aware of the Regulatory Agreement's requirement to submit timely financial reports, and Respondents had failed to submit financial reports in the past, with sanctions from the Government. Because the financial reports are so critical to the Government's ability to exercise oversight of HUD-insured projects, failure to file such reports is a material violation.

The Government indicates that it believes the imposition of civil money penalties in this case will help deter both the Respondents and other insured mortgagors and general partners from engaging in either type of violation in the future, sending a message to mortgagors and general partners that neither untimely filing nor unauthorized disbursement of funds are acceptable practices, and that violators will be penalized financially.

### **CONCLUSION & ORDER**

I find that Respondents knowingly and materially committed violations pursuant to 12 U.S.C § 1735f-15(c)(1)(B)(x) by failing to timely file audited financial statements for fiscal years 2004 and 2005.

I find that the Government's request for civil money penalties against the Respondents, jointly and severally, in the amount of \$32,500 for Respondents' failure to submit a proper financial statement in fiscal year 2004; and in the amount

of \$32,500 for Respondents' failure to file a timely audited financial report for fiscal year 2005, is appropriate.

The Government's Motion for Default Judgment is GRANTED. Respondents shall, jointly and severally, pay to the Secretary of HUD the total civil money penalty of \$65,000, which is immediately due and payable by Respondents without further proceedings.

This Order shall constitute the final agency action, pursuant to 24 CFR 26.39.

**So ORDERED.**



---

Arthur A. Liberty  
Chief Administrative Law Judge

Dated: May 15, 2007