

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

In the Matter of: Jack Z. Yetiv & TREIMee Corporation, Respondents.

HUDALJ 02-001-CMP
Decided: September 2, 2003

Jack Z. Yetiv, Esq.
For the Respondents

Stanley Fields, Esq.
For the Government

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

STATEMENT OF THE CASE

This proceeding arises out of action taken on June 11, 2002, pursuant to §1735f-15 of the National Housing Act (12 U.S.C. §1735f-15) and 24 C.F.R. Part 30 by the Director, Departmental Enforcement Center, U.S. Department of Housing and Urban Development (“the Department” or “HUD” or “the Government”). On that date HUD sent a prepenalty notice to Respondents Jack Z. Yetiv (“Yetiv”) and TREIMee Corporation (“Corporation”) stating that the Department proposed to seek the imposition of civil money penalties against them for violations of 12 U.S.C. §1735f-15 and 24 C.F.R. Part 30. After receiving a response from Respondents, the Government issued a Complaint against Respondents on July 22, 2002. The Complaint alleged that Respondent Corporation failed to file annual financial reports covering the operation of Park on Westview Apartments, a 212-unit, multi-family housing project (“Project”) in Houston, Texas, with a mortgage insured by HUD.

On October 22, 2002, the Department initiated this proceeding by filing the Complaint, along with Respondents’ response and request for hearing, with the Chief Docket Clerk of the Office of Administrative Law Judges. On January 2, 2003, the

Department filed a motion for summary judgment. The motion was granted in part and denied in part on April 29, 2003, for the reasons set out in the Order on Motions for Summary Judgment attached as Appendix A. The Order also denied a motion for summary judgment filed by Respondents and concluded, among other things, that Respondent Corporation had violated 12 U.S.C. §1735f-15(c) and a regulatory agreement entered into by the parties in 1997. On May 20, 2003, a hearing was held in San Francisco, California.¹

Pursuant to court order based on an agreement between the parties reached at the close of the hearing, the parties filed post-hearing briefs on June 20, 2003. However, on June 23, 2003, without seeking permission from the court, Respondents filed what they called a “replacement” brief that included responses to the Government’s brief of June 20, 2003. On the same day, the Government filed a motion to strike the Respondents’ replacement brief, and Respondents filed a response to the Government’s motion.

The Government’s motion will be granted. At the close of the hearing the parties were given two options: they could file briefs simultaneously or they could follow a staggered briefing schedule with the Government filing its brief first, followed by a brief from Respondents, ending with a responsive brief by the Government. Respondents chose the simultaneous briefing option, and the Government agreed. When Respondents filed the second brief on June 23, 2003, they violated their agreement and the court’s order. Such conduct smacks of sharp practice and will not be condoned. Respondents’ so-called “replacement” brief has not been considered.

¹There is no merit to Respondents’ complaint—first made at the hearing—that the hearing was not held within the 90-day period following the filing of the Complaint with the Chief Docket Clerk, as stipulated by 24 C.F.R. §26.44. The hearing was originally scheduled to begin on January 14, 2003, within the 90-day period, but was postponed pursuant to agreement reached with the parties during a telephone conference on January 7, 2003. During that conference Respondent Yetiv pointed out that he had a right to file a response to the Government’s pending motion for summary judgment and contended that he could not do so without first attempting to complete discovery. To accommodate Respondent Yetiv’s requests, the hearing was postponed until March 18, 2003, beyond the 90-day period. It was postponed again on March 5, 2003, when it became apparent that the court needed the assistance of further briefing from the Department to address a novel jurisdictional defense posed by Respondents in their opposition to the Government’s motion for summary judgment.

Furthermore, Respondents have not demonstrated that they have suffered any prejudice because the hearing was held outside the 90-day period contemplated by the regulations.

FINDINGS OF FACT

1. On July 1, 1997, a representative of the Secretary and Respondent Yetiv, acting in his capacity as President of Respondent Corporation, signed a regulatory agreement. (GX. 13)² The regulatory agreement provides, in part, that

In consideration of the endorsement for insurance by the Secretary of [a mortgage note of \$2,625,000] . . . and in order to comply with the requirements of the National Housing Act, as amended, and the Regulations adopted by the Secretary pursuant thereto, Owners [Respondent Corporation] agree for themselves, their successors, heirs and assigns, that in connection with the mortgaged property and the project operated thereon and so long as the contract of mortgage insurance continues in effect . . .

7. Owners shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition. . . .

[9](c) The mortgaged property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents, and other papers relating thereto shall at all times be maintained in reasonable condition for proper audit and subject to examination and inspection at any reasonable time by the Secretary or his duly authorized agents. Owners shall keep copies of all written contracts or other instruments which affect the mortgaged property, all or any of which may be subject to inspection and examination by the Secretary or his duly authorized agents. . . .

[9](e) Within sixty (60) days following the end of each fiscal year the Secretary shall be furnished with a complete annual financial report based upon an examination of the books and records of mortgagor prepared in accordance with the requirements of the Secretary, prepared and certified to by an officer or responsible Owner and, when required by the Secretary, prepared and certified by a Certified Public Accountant, or other person acceptable to the Secretary.

²The following abbreviations are used in this decision: "TR." refers to the hearing transcript; "GX." and "RX." refer, respectively, to the Government's and Respondents' exhibits.

[9](f) At request of the Secretary, his agents, employees, or attorneys, the Owners shall furnish monthly occupancy reports and shall give specific answers to questions upon which information is desired from time to time relative to income, assets, liabilities, contracts, operation, and condition of the property and the status of the insured mortgage. . . .

15. Owners warrant that they have not, and will not, execute any other agreement with provisions contradictory of, or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other requirements in conflict therewith.³

2. Respondent Yetiv read, discussed with others, and understood the terms of the regulatory agreement before he signed it. (TR. 229-30)

3. At all times material herein Respondent Yetiv was the President, sole shareholder, and operating officer of Respondent Corporation. (TR. 295; RX. BI)

4. The mortgagee of the Project was Prudential Huntoon Paige Associates, Ltd. (“Prudential”). (GX. 13)

5. By letter dated January 5, 2001, Respondent Yetiv replied to a letter sent to him by HUD dated December 26, 2000, addressing building deficiencies that had been observed by a HUD inspector. Respondent Yetiv wrote in part:

Finally, I would like to request that you provide to me the SOURCE of your authority, if any, to (a) inspect my property

³The duties imposed by paragraph 7 of the regulatory agreement parallel the duties imposed by 12 U.S.C. §1735f-15(c)(B)(xiii).

The duties imposed by paragraph 9(c) of the regulatory agreement parallel the duties imposed by 12 U.S.C. §1735f-15(c)(B)(viii).

The duties imposed by paragraph 9(e) of the regulatory agreement parallel the duties imposed by 12 U.S.C. §1735f-15(c)(B)(x).

The duties imposed by paragraph 9(f) of the regulatory agreement parallel the duties imposed by 12 U.S.C. §1735f-15(c)(B)(xi) and (xv).

without my being there, and without making reasonable arrangements to allow me to be there (b) tell me what I must or must not do on my property. Although I have not recently reviewed my closing paperwork, I sure don't remember signing away my right to run my property as I see fit. In fact, it is precisely for that reason—my refusal to have HUD tell me how to run my property—that I have chosen to not participate in the Section 8 program in the 10 years that I have owned apartments in Houston. Based on everything I have read about HUD, they can barely run their own properties, so it would be strange for HUD or its inspectors to tell me how to run mine. . . .

So unless you can show me a convincing legal basis for your power to micro-manage my property, I see no reason to subject myself to that.

As I noted above, I do not recall handing over the management to HUD when I signed up for this loan. If I am incorrect in this belief, please send me or fax me the document which I signed and which gives you the power to tell me how to run my property. [RX. AE; emphasis in original]

6. By letter dated February 5, 2001, HUD reminded Respondents of the annual financial report requirement in the regulatory agreement and notified them that the required reports had not been received for the years 1997, 1998, and 1999. (GX. 6; TR. 244-45)

7. Respondents were notified in 2001 that audited financial reports must be filed electronically. (TR. 284)

8. By letter dated January 15, 2002, the Director of HUD's Enforcement Center notified Respondents that the Government was considering seeking civil money penalties for their failure to file required annual financial reports. (RX. A; Exhibit 5, Government's Motion for Summary Judgment)

9. In a letter dated February 1, 2002, addressed to the Director of HUD's Enforcement Center, Respondent Yetiv stated in part:

I was frankly amazed to receive your letter—by FedEx, no less, at government expense—threatening me with fines up to \$110,000 for failing to submit financial statements for the years 1997 thru 2000.

I find several aspects of your communication amazing:

1. Without any previous communications from HUD regarding these financial statements, all of a sudden I get a letter by FedEx, signed personally by the **DIRECTOR** of HUD in Washington, DC. I find this incredible, and I believe it is no coincidence. . . .

A simple check by HUD would have revealed the following undisputed facts: (1) Park on Westview has never missed a loan payment, (2) in fact, in the past 6 months, Park on Westview has made additional PRINCIPAL REDUCTION payments of over ONE MILLION DOLLARS, ONE-HALF MILLION dollars of which were cashed by the lender. Note that these payments were *in addition* to the regular monthly payments I've made, (3) the escrow balance held by the lender on this loan is approximately \$400,000—nearly \$2,000 per unit, providing additional (and excessive) security, and (4) a simple inquiry of property values would reveal that the loan-to-value ratio on this property today is approximately 30%. . . .

I might add that any company that can pay off \$2 million in debt in less than 6 months must have pretty decent financials. . . . [RX. BB; emphasis in original]

10. In a letter dated April 30, 2002, addressed to the Director of HUD's satellite office in Forth Worth, Texas, Respondent Yetiv stated in part:

I continue to be amazed at the kinds of letters I receive from HUD. You folks would make Franz Kafka proud, given his fame for the "Theater of the Absurd."

Now, let me see here. According to your March 27 letter, I'm supposed to "terminate the current contract between Park on Westview and TREIMee Corp." Gee, folks, TREIMee Corp., of which I'm sole shareholder and officer, OWNS the Park on Westview. So, I guess you're ordering me to fire myself from running my own property, the financial performance of which—good or bad—directly affects my own **personal** income. This is a property I bought from the RTC after one of your undoubtedly "approved" management companies ran it into the ground.

I'm supposed to fire myself despite the following facts: . . .

2. I attempted to pay off this property by sending a check for nearly \$1.8 million. The check was refused by the lender.

3. I'm in the midst of replacing, down to the decking, all the roofs on the property OUT OF CASH FLOW. Including painting and other upgrades, this represents nearly \$500,000 in improvements in 2001 and 2002. . . .

By the way, I'm assuming that in ordering this management change, you will PERSONALLY guarantee that the amount of income that I receive from this property—ie, that is left over every month after paying all ordinary expenses, an amount which runs about \$40,000 to \$50,000 per month—will not decrease under the new management agent, right? Yeah, right. . . .

However, I think it is not coincidental that this tremendous interest in seeing my 1997 financials (what a JOKE!) is all of a sudden occurring in 2002, just as my multimillion dollar class-action lawsuit against the mortgagee (Prudential) is moving into high gear. Frankly, I believe there has been collusion between HUD and Prudential. Therefore, I would like to take your deposition in connection with this case. Please advise me what dates you have available for a deposition in the next several weeks. . .

[RX. BD; emphasis
in original]

11. In a letter dated June 17, 2002, responding to a letter from HUD, Respondent Yetiv stated in part:

I am in receipt of your May 21, 2002, missive demanding that I submit to you 16 documents that according to you “must” be available for the “Comprehensive Management Review” that you have unilaterally scheduled for June 18.

I offer the following responses:

1. I do not recall ever signing a document with HUD stating that I was going to become its servant, and do things at the drop of a hat just because HUD demands them. Please send to me ASAP the document which I signed that says that I was willing to provide to you the 16 items you demand, at any time you demanded it. Apparently, you confuse my property with your subsidized HUD properties. I have never wanted to take Section 8 or have anything to do with HUD precisely because I do not wish to be subject to the sort of demands you make in your letter. Many of the items you request are confidential, and frankly none of your business (eg. employee salaries and benefits, service contracts, budget, etc). . . . [RX. I; emphasis in original]

12. Respondent Corporation failed to file with the Secretary annual financial reports covering the operation of Park on Westview Apartments for fiscal years 1997, 1998, 1999, 2000, and 2001. (*See Appendix A*)

13. Respondent Corporation sold the Project to a limited partnership owned by Respondent Yetiv on January 1, 2003, the day after paying off the loan on December 31, 2002. Respondent Corporation is no longer a functioning business. (TR. 278-81, 289-90)

14. Respondent Corporation paid off the loan from Prudential for the purpose of terminating the regulatory agreement with the Secretary and avoiding scrutiny of its operations by the Government. (TR. 232, 284)

15. Mortgagors whose mortgages are insured by HUD are required to submit annual financial reports so that the Department can discharge its regulatory duties to

oversee the operation of HUD-insured projects and protect the Government's insurance fund by monitoring the financial health of mortgaged projects. (TR. 35; Appendix A; GX. 1, pp. 6-7, 90)⁴

SUBSIDIARY FINDINGS AND DISCUSSION

The Secretary Has Jurisdiction to Impose Civil Money Penalties

Respondents have repeatedly and profoundly mischaracterized the nature of this case. Their assertions to the contrary notwithstanding, this is *not* a breach of contract action in which the Government is acting in the manner of a private party. This is a regulatory action brought by the United States Government acting in its sovereign capacity for the purpose of imposing money penalties for violations of a civil law, namely specific provisions of the National Housing Act of 1934, as amended in 1989 and 1997 (12 U.S.C. §1735f-15(c))("the Act" or "the statute"). The Secretary's jurisdiction to impose civil money penalties derives from that statute, not from the contract (the regulatory agreement) signed by Respondent Yetiv on behalf of Respondent Corporation in 1997.

As explained in the Order on Motions for Summary Judgment, the 1989 amendments to the Act conferred jurisdiction on the Secretary to impose civil money penalties on certain corporate mortgagors, and the 1997 amendments gave the Secretary explicit jurisdiction to make officers and directors of such corporate mortgagors personally liable for civil money penalties. During the course of arranging for a HUD-guaranteed mortgage, mortgagors sign a variety of documents, including a regulatory agreement. That document is a factual condition-precedent to the exercise of the Secretary's authority to impose civil money penalties because a party will not become

⁴Citing the Order on Motions for Summary Judgment, Respondents mistakenly argue that the Government failed to introduce any evidence demonstrating a material violation. The Order contains a discussion of the factors that must be considered to determine whether a violation is material. One of those factors is "Injury to the Public Interest or the Federal Government from the Respondent's Violation." The first sentence in the discussion regarding this factor reads: "The Government submitted no documentary or testimonial evidence to support this factor of the materiality analysis, and instead cited HUD handbook 4370.1 and *In re Crestwood Terrace Partnership*, HUDALJ 00-002-CMP, January 30, 2001." (Appendix A, p. 8.) The word "specific" was omitted from this sentence. It should read in pertinent part: "The Government submitted no *specific* documentary or testimonial evidence" Although HUD handbooks do not address the facts of this specific case, they constitute documentary evidence of the policies and procedures of the Department. The Government therefore submitted probative evidence in support of its motion for summary judgment. That evidence supports finding of fact 15. above, and demonstrates that the violations were material.

a mortgagor subject to civil money penalties without signing a regulatory agreement; but the statute, not the regulatory agreement, is the source of the Secretary's power to impose civil money penalties. In fact, inasmuch as the regulatory agreement is silent about civil money penalties, it would be impossible for that document to confer jurisdiction on the Secretary to impose civil money penalties. All of Respondents' jurisdictional arguments ignore the statute from which the Secretary's jurisdiction derives and instead rest on interpretations of the regulatory agreement. Those arguments are therefore fallacious.

The 1997 amendments to the Act became effective on December 6, 2001. (*See* Appendix A, pp. 2-3.) Respondent Corporation failed in 2002 to file its annual financial report for 2001 as required by the Act. The failure to file an annual financial report for fiscal year 2001 was an action taken knowingly that materially violated both the regulatory agreement with the Secretary that Respondent Yetiv had entered into on behalf of the corporation in 1997 as well as the Act, specifically 12 U.S.C. §§1735f-15(c)(1)(A) and (B)(x). (Pub L. 105-65, Oct. 27, 1997)(*See* Appendix A, p. 19.) Because Respondent Yetiv was the President of Respondent Corporation in 2001 and 2002, the Secretary has jurisdiction under the 1997 amendments to the Act to impose civil money penalties upon him as an officer of Respondent Corporation for the corporation's failure to file a financial report covering fiscal year 2001. The Government has chosen not to seek to pierce the corporate veil and impose penalties on Respondent Yetiv personally for the corporation's failure to file financial reports covering fiscal years 1997, 1998, 1999, and 2000.

Personal Liability for Civil Money Penalties Is Imposed by Statute not Contract

Respondent Yetiv complains that the regulatory agreement exempts him from personal liability for a failure to comply with its terms, citing paragraph 17 of the agreement which reads as follows:

The following Owners: All present and future officers, directors and stockholders do not assume personal liability for payments due under the note and mortgage, or for the payments to the reserve for replacements, or for matters not under their control, provided that said Owners shall remain liable under this Agreement only with respect to the matters hereinafter stated; namely:

- (a) for funds or property of the project coming into their hands which, by the provisions hereof, they are not entitled to retain; and
- (b) for their own acts and deeds or acts and deeds of others which they have authorized in violation of the provisions hereof.

Contrary to Respondent Yetiv's argument, this language expressly exempts him

from personal liability for only the following: (1) payments due under the note and mortgage; (2) payments to the reserve for replacements; and (3) matters not under his control. Paragraph 17 explicitly provides that Respondent Yetiv is liable for his “own acts and deeds . . . in violation of the provisions” of the regulatory agreement. The corporation under his direction, management, and control violated the regulatory agreement, and the statute makes him personally liable for civil money penalties based on the corporation’s violation of both the regulatory agreement and the statute, as explained above. Respondent Yetiv’s argument that he did not agree to become liable for civil money penalties is erroneous on its face. He is liable for civil money penalties by operation of law, not contract.

Respondent Yetiv mistakenly argues that imposing civil money penalties upon him personally would violate the *ex post facto* prohibitions in the Constitution because at the time he signed the regulatory agreement, the law did not authorize imposition of penalties on officers of corporate mortgagors. The *ex post facto* prohibitions in the

Constitution are not implicated in this proceeding because the violation for which Respondent Yetiv will be held personally accountable occurred *after* the authorizing statute became effective.

Respondent Yetiv also argues that it would be unfair to impose civil money penalties on him personally because if he had known that he was going to become personally liable for such penalties, he would not have entered into the regulatory agreement. In other words, Respondent Yetiv argues, in effect, that imposing penalties on him personally would give an unfairly retroactive impact to the statute. That argument also falls wide of the mark. The Supreme Court has repeatedly addressed this type of complaint. For example, in *Landgraf v. USI Film Products*, 511 U.S. 244, 269, n. 24 (1994), the Court stated:

Even uncontroversially prospective statutes [such as the 1997 amendments to the National Housing Act] may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards. See Fuller 60 ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever"). Moreover, a statute "is not made retroactive merely because it draws upon antecedent facts for its operation." *Cox v. Hart*, 260 U.S. 427, 435, 67 L.Ed. 332, 43 S.Ct. 154 (1922). See *Reynolds v. United States*, 292 U.S. 443, 444-449, 78 L.Ed. 1353, 54 S.Ct. 800 (1934); *Chicago & Alton R. Co. v. Tranbarger*, 238 U.S. 67, 73, 59 L.Ed. 1204, 35 S.Ct. 678 (1915).

No credit may be given to Respondent Yetiv's contention that prosecuting him personally is unfair.

Respondents' Offer to Submit Unaudited Financial Reports Did Not Satisfy the Law

Respondent Yetiv contends that in 2002 he offered HUD the financial reports that he had used to prepare tax returns over the years, but HUD refused to accept them because they were unaudited. He argues that the reports would have complied with the regulatory agreement because in the words of the regulatory agreement, they were "prepared and certified to by an officer or responsible Owner." Respondent Yetiv's argument ignores three other provisions in the regulatory agreement, which state that the

reports must be filed at “the end of each fiscal year,” must be “prepared in accordance with the requirements of the Secretary . . . and, when required by the Secretary, prepared and certified by a Certified Public Accountant, or other person acceptable to the Secretary.” The Secretary required that the reports be audited. Because the reports that Respondent Yetiv offered were unaudited, they were not acceptable.

Furthermore, if the Secretary had accepted unaudited reports, the Secretary would have acted contrary to law. The statute explicitly requires submission of audited reports, as shown by the following provision that sets out the violation:

Failure to furnish the Secretary, by the expiration of the 60-day period beginning on the 1st 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 of the mortgagor, unless the Secretary has approved an extension of the 60-day period in writing . . . [12 U.S.C. §1735f-15(c)(1)(J) (Pub. L. 101-235, Dec. 15, 1989); 12 U.S.C. §1735f-15(c)(1)(B)(x) (Pub. L. 105-65, Oct. 27, 1997). Emphasis supplied]

There is, therefore, no merit to Respondents’ contention that Respondent Yetiv’s belated offer of unaudited financial reports satisfied Respondents’ obligations under the regulatory agreement and the statute.

This Prosecution Is Not Arbitrary and Capricious

This court has concluded that Respondent Corporation failed to file with HUD annual financial reports covering the operation of Park on Westview Apartments for fiscal years 1997, 1998, 1999, 2000, and 2001, in violation of 12 U.S.C. §1735f-15(c). That conclusion is supported by substantial evidence of record as explained herein and in Appendix A. Respondents’ argument that this prosecution is arbitrary and capricious amounts to nothing more than their argument regarding selective prosecution flying under a different banner, an argument that has no merit for the reasons explained in Appendix A.

Respondents’ Request for Reconsideration Is Meritless

Respondents request reconsideration of the grant of partial summary judgment, arguing that the judgment cannot stand because, contrary to the requirements of paragraph 11 of the regulatory agreement, HUD failed to notify Respondents by certified mail of

their failure to file annual financial reports before bringing this prosecution. Paragraph 11 of the regulatory agreement reads in pertinent part:

Upon a violation of any of the above provisions of this Agreement by Owners [including the requirement to file annual financial reports in paragraph 9(e)], the Secretary may give written notice thereof, to Owners, by registered or certified mail, addressed to the addresses stated in this Agreement, or such other addresses as may subsequently, upon appropriate written notice thereof to the Secretary, be designated by the Owners as their legal business address. If such violation is not corrected to the satisfaction of the Secretary within thirty (30) days after the date such notice is mailed or within such further time as the Secretary determines is necessary to correct the violation, without further notice the Secretary may declare a default under this Agreement effective on the date of such declaration of default and upon such default the Secretary may . . . [take any of several enumerated actions to protect the Government's interests].

This language shows that the registered or certified mail requirement in the regulatory agreement applies only to default actions. The Secretary did not declare a default based on Respondents' failures to file annual financial reports, and this case is not an action based on default. The regulatory agreement therefore did not require HUD to notify Respondents by registered or certified mail of their failure to file annual reports as a condition precedent to the maintenance of this action. Although the record shows that the Department has had problems with addresses on occasion, the preponderance of the evidence demonstrates that, even if Respondents did not receive some of the other mailed notices as they claim, they did in fact receive a letter from HUD dated February 5, 2001, reiterating the annual financial report requirement and indicating that none had been received for the years 1997, 1998, and 1999. Respondents' suggestions made at various places in the record that they did not receive this notice are not credible.⁵

Determination of an Appropriate Civil Money Penalty

As shown above and in Appendix A, Respondents knowingly and materially violated the Act and a regulatory agreement. To determine the amount of appropriate civil money penalties, 12 U.S.C. §15f-(d)(3) and 24 C.F.R §30.80 require consideration of the following factors:

⁵Respondent Yetiv also admits to having received a notice in 2001 that financial reports were to be filed electronically. (TR. 284)

1. The Gravity of the Offense

Respondent Yetiv testified that more than one HUD official told him that in the past HUD has not sought civil money penalties against a project with a HUD-insured loan for failing to submit audited financial reports if the project pays off the loan. (TR. 286-87) HUD has not disputed this testimony. The court invited the Government to address Respondent Yetiv's testimony in the context of a discussion regarding the gravity of the offense. The Government has declined to do so. Nothing can be made of that declination because, as a general proposition, the Government need not explain why one case is prosecuted and another is not. The Supreme Court has "ruled that an agency's decision not to undertake enforcement action 'is a decision generally committed to an agency's absolute discretion,' and is therefore presumptively unreviewable." *Kisser v. Cisneros*, 14 F.3d. 615, 620 (D.C. Cir. 1994) quoting *Heckler v. Chaney*, 470 U.S. 821 at 831 (1985). The presumption of unreviewability may be rebutted under four circumstances: (1) where Congress has provided meaningful standards for the agency to follow in the exercise of its discretion (470 U.S. at 833); (2) where the agency has refused to act in the mistaken belief that it lacks jurisdiction (*Id.* at 833 n. 2); (3) where the agency has "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities" (*Id.* at 833 n. 2); and (4) where "a colorable claim is made . . . that the agency's refusal to institute proceedings violated [a plaintiff's] constitutional rights" (*Id.* at 838). Because none of these circumstances applies to the case at bar, the Secretary's decision to prosecute Respondents for civil money penalties while apparently not prosecuting other similar cases is not reviewable.

The violations found in this case are sufficiently grave to merit the imposition of civil money penalties for the reasons explained below, particularly factors 4, 5, 7, and 8.

2. Any History of Prior Offenses

The record contains no evidence that Respondents have previously violated the Act.

3. The Ability to Pay the Penalty

Respondents introduced into the record letters written by Respondent Yetiv and addressed to HUD officials that estop Respondents from denying that they are able to pay the civil penalty imposed by this case. For example, according to Respondent Yetiv, Park on Westview Apartments provided him with personal income of \$40,000 to \$50,000 per month after payment of ordinary project operating expenses. (RX. BD) Furthermore, Respondent Yetiv asserted that the company paid off \$2 million in debt in six months, paid for nearly \$500,000 in repairs out of cash flow during 2001 and 2002, and had a

loan-to-value ratio of approximately 30 percent on February 1, 2002. (RX. BB, BD) On that date the principal of the mortgage on the property was approximately \$1,800,000. (RX. BF) Therefore, in Respondent Yetiv's estimation, the Project was worth approximately \$6,000,000 in February 2002. This evidence demonstrates an ability to pay a civil money penalty.

4. The Injury to the Public

HUD insured a mortgage of \$2,625,000 on Park on Westview Apartments. If Respondent Corporation had defaulted on the loan, HUD would have been required to reimburse the lender for any losses caused by the default. To protect its interests, the Department required the mortgagor to timely file annual financial reports with HUD. Because the reports were not filed over a period of five years, the Department was unable throughout that period to monitor the Project to ensure that the Department's insurance fund was not in jeopardy of suffering severe losses. Respondent Yetiv's assertions regarding the financial health of Respondent Corporation did not satisfy the obligations imposed by statute and by contract on Respondent Corporation to file audited financial statements with HUD each fiscal year. Those assertions amounted to nothing more than self-serving cries of "trust me."

That Respondent Corporation apparently made timely mortgage payments does not prove that the Project was financially viable over the long term. Absent audited financial reports, the Government could not determine whether the Project was likely to cause losses in the future. As noted in Appendix A, that the insurance fund in fact lost no money only works to limit the size of an appropriate civil penalty; the absence of a monetary loss to the fund does not make a penalty unjustified, Respondents' protests to the contrary notwithstanding.

The Government has not claimed that Respondents' violations caused a money loss to HUD's insurance fund. Therefore, Respondents' extensive, repetitious, and impassioned arguments based on HUD's alleged refusal to require the lender to accept a pay-off of the loan are irrelevant. This case is about potential, not actual, harm to the insurance fund and actual harm to HUD's regulatory enforcement program.

5. Any Benefits Received by the Violator

Respondents benefitted economically from the violations in an amount at least equal to the total costs that they would have incurred if the financial reports had been prepared and submitted to HUD as required. To prove this amount, the Government submitted into the record a survey of the financial audit costs for fiscal years 2001 and

2002 reported by 14 Houston-area, multi-family projects with between 100 and 300 units. (GX. 8) (Park on Westview Apartments had 212 units in Houston.) The audit costs reported to HUD ranged from \$6,000 to \$24,631 and averaged \$9,118. However, HUD's chart of accounts directs that the account number used by the projects to report their audit costs should also be used to report the cost of preparing tax returns. (GX. 2, p. 25) Because the Government did not demonstrate the average cost of preparing tax returns for these projects, the evidentiary record, standing alone, does not show what portion of the \$9,118 average may be fairly attributed to the cost of preparing audited financial reports. Nevertheless, case precedent provides useful guidance. In the case of *In re Crestwood Terrace Partnership*, HUDALJ 00-002-CMP, January 30, 2001, the administrative law judge relied on hearing testimony to find that the cost of preparing an audited financial report for a 106-unit, multi-family project in Gaithersburg, Maryland (a project half the size of Respondents'), would have been between \$7,500 and \$10,000. *Id.* p. 7. This finding supports a conclusion in the instant case that more than half of the \$9,118 average reported by the Houston-area projects may be fairly attributed to the average cost of preparing audited financial reports. At hearing, Respondent Yetiv claimed that an unidentified accountant told him that the required audited reports could be prepared for \$1,000 to \$1,500. (TR. 245-46) No credit can be given to that uncorroborated, hearsay claim.

Although the law requires an analysis of the benefits Respondents received as a result of their violations, Respondents attempt to turn the law on its head and argue that HUD must be analyzed to determine how much HUD benefitted by insuring the Prudential loan to Respondent Corporation. They argue that not only did HUD lose nothing as a result of Respondents' conduct, the agency gained by insuring Prudential's loan to Respondents, whereas Respondents gained nothing and lost much as a consequence of associating with HUD. Their argument tries to make much of the fact that the corporation paid insurance premiums into HUD's insurance fund and the fact that the mortgage was paid off early. Those facts are wholly irrelevant to a determination of an appropriate civil money penalty. The issue is what benefits Respondents received by violating the statute, not what benefits Respondents believe the Government received from Respondents.

Because Respondents failed to submit the required financial reports and the loan has now been paid off, it is impossible to determine objectively what the risks of loss were to the insurance fund during the life of the mortgage. As noted above, that

Respondent Corporation apparently never failed to make a mortgage payment does not mean that the insurance fund never faced a risk of loss at the hands of Respondents. A corporation can make timely debt payments right up until the day it declares bankruptcy.

6. The Extent of Potential Benefit to Other Persons

The record reveals no evidence of potential benefit to other persons as a result of Respondents' violations.

7. Deterrence of Future Violations

Mortgagors with mortgages insured by HUD must not form the belief that they can fail to comply with statutory, regulatory, and contractual obligations without suffering significant penalties. The penalties assessed must be greater than the benefits enjoyed from non-compliance with the law; otherwise mortgagors may be tempted to believe that it "pays" to violate the law, and the penalties will have no deterrent value.

Respondent Yetiv testified under oath that he read and understood the regulatory agreement before he signed it in 1997. That agreement clearly gave the Secretary, among other things, the right to inspect the property and copies of all written contracts or other instruments that affected the mortgaged property at any reasonable time (paragraph 9(c)). The agreement also required Respondents to file annual financial reports (paragraph 9(e)) and answer "questions upon which information is desired from time to time relative to income, assets, liabilities, contracts, operation, and condition of the property and the status of the insured mortgage." (paragraph 9(f)) But when the Secretary's agents inspected the property, asked questions, and reminded Respondent Yetiv to file the required annual financial reports, he responded with cries of righteous outrage, claiming that he was not HUD's "servant," that the Government had no right to interfere with his "right to run my property as I see fit," and that HUD was asking for information that was "confidential, and frankly none of your business" To Respondent Yetiv, HUD's request that he file the financial reports that he had agreed in 1997 to file was a "JOKE!"

Given Respondent Yetiv's sworn testimony that he understood the regulatory agreement before he signed it, one conclusion is inescapable: His repeated demands for a copy of the document that he had signed that gave HUD its authority were disingenuous. He had signed the regulatory agreement. It is inconceivable that a businessman like Respondent Yetiv, with more than 10 years' experience, multiple rental properties, and two (now three) higher academic degrees, would not have retained a copy of all of the papers, including the regulatory agreement, that he signed when the Prudential loan was consummated. This court finds that Respondent Yetiv knew very well in 2001 and 2002

that HUD had authority to do what it was trying to do. His contemptuous responses and intransigence in the face of HUD's lawful requests require imposition of the severest possible penalty consistent with all of the circumstances. That portion of the penalty ordered below that is based on Respondents' failure to file annual reports during 2001 and 2002 is intended in significant part to deter others with mortgages insured by HUD from failing to cooperate with the agency when reminded of the obligations imposed upon them by statute and contract.

8. The Degree of Respondents' Culpability

As noted above, Respondent Yetiv readily concedes that he read and understood the terms of the regulatory agreement before he signed it. (TR. 229) But he claims that he was induced to sign the regulatory agreement and participate in HUD's insured mortgage program on the strength of statements made by a loan broker who was a business acquaintance of a friend of his. (TR. 227) Respondent Yetiv asserts that the loan broker told him that HUD does not regularly enforce the terms of the agreement which "are simply there in case of financial default." (Declaration in support of opposition to Government's motion for summary judgment) According to Respondent Yetiv, he did not "knowingly" violate the regulatory agreement because he did not have actual knowledge that HUD enforced it.⁶ (TR. 229) This argument is fatally flawed on multiple grounds: (1) The reported statement of the loan broker is uncorroborated hearsay; (2) The loan broker was not an employee or agent of the Secretary and hence was incapable of binding the Secretary under any circumstances (TR. 241); (3) Respondents' attempt to rely on the reported statement to explain Respondent Yetiv's state of mind at the time he signed the regulatory agreement violates the parol evidence rule, a rule that Respondents cite elsewhere in argument against the Government; (4) The notion that a violation was not committed knowingly if the violator thought he would not get caught and punished has no support in law (and is also an astonishing argument for a lawyer to make in defense of his own conduct); and (5) Respondent Yetiv's argument compels the conclusion that at the time he entered into the regulatory agreement with the Government on behalf of Respondent Corporation, he did not intend to comply with it. In short, Respondent Yetiv signed a contract with the Government in bad faith.

Respondent Corporation is wholly owned and operated by Respondent Yetiv. No one other than Respondent Yetiv is responsible, in fact, for the violations found in this

⁶ The Act defines "knowingly" as follows: "The term 'knowingly' means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section." 12 U.S.C. §1735f-15(h).

case. His unmitigated culpability requires imposition of the severest possible penalties consistent with all of the relevant circumstances.

9. Any Injury to Tenants

The record contains no record of actual injury to tenants, although there is evidence that the Project suffered from several maintenance deficiencies that posed safety hazards to the tenants. (GX. 4, 5) Because Respondents failed to submit the required financial reports to HUD, the Department was deprived of an important tool that, among other things, could have been used to determine whether Respondents had spent adequate funds on maintenance to ensure tenants' health and safety, and whether sufficient reserves had been put aside to guarantee proper physical maintenance of the Project throughout the life of the mortgage.

Conclusions Regarding an Appropriate Penalty

For the reasons discussed above, Respondents will be ordered to pay civil money penalties totaling \$70,000 for their failure to file audited financial reports covering the operations of Respondent Corporation for fiscal years 1997, 1998, 1999, 2000, and 2001, as follows: For fiscal years 1997, 1998, and 1999, Respondent Corporation will be ordered to pay a penalty of \$10,000 for each violation, or \$30,000. More than half of the amount of these penalties is intended to deprive Respondent Corporation of the economic benefits gained by failing to submit the required reports. For fiscal years 2000 and 2001, the penalty will be doubled to \$20,000 for each violation in light of Respondent Yetiv's failure to cooperate with the Government. Although Respondent Yetiv is in fact solely responsible for all five of the violations found in this case, for purposes of civil money penalties he is being held personally accountable only for the last violation because the statute does not explicitly authorize the imposition of civil money penalties upon an officer of a corporate mortgagor for the earlier violations.⁷

⁷ Respondents' arguments not expressly addressed herein have been carefully considered and found meritless.

Due to the press of other court business, this Initial Decision and Order has been issued outside the period contemplated by the regulations.

ORDER

It is hereby **ORDERED** that:

1. The Government's motion to strike Respondents' replacement brief filed June 23, 2003, is granted;
2. The Chief Docket Clerk shall remove from the record Respondents' replacement brief filed June 23, 2003, and return it to Respondents;
3. Respondents' amended counterclaim and motion to reconsider the Order on Motions for Summary Judgment of April 29, 2003, are denied;
4. Within 10 days of the date on which this Initial Decision and Order become final, Respondent TREIMee Corporation shall pay a civil money penalty of \$50,000 to the Secretary of the U.S. Department of Housing and Urban Development;
5. Within 10 days of the date on which this Initial Decision and Order become final, Respondent TREIMee Corporation and Respondent Jack Z. Yetiv shall pay, jointly and severally, a civil money penalty of \$20,000 to the Secretary of the U.S. Department of Housing and Urban Development; and
6. This Initial Decision and Order shall become final within 30 days of issuance unless appealed to the Secretary within that time pursuant to 24 C.F.R. §26.50.

Done this 2nd day of September, 2003.

THOMAS C. HEINZ
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION issued by THOMAS C. HEINZ, Administrative Law Judge, HUDALJ 02-001-CMP, were sent to the following parties on this 2nd day of September, 2003, in the manner indicated:

Chief Docket Clerk

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