APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-71187

Agency No. 18-AF-0227-CM-002

[Filed: April 21, 2021]

EGAE, LLC et al.,	)
	)
Petitioners,	)
	)
v.	)
	)
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)
	)
Respondent.	)

MEMORANDUM [*]

On Petition for Review of an
Order of the Secretary of Housing
and Urban Development

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Submitted April 16, 2021[**]
Seattle, Washington

Before: GRABER and CALLAHAN, Circuit Judges, and SELNA, Senior District Judge[***]

Petitioners EGAE, LLC and Marlow Family Exempt Perpetual Trust petition for review of the order of the Secretary of Housing and Urban Development ("HUD") affirming the Administrative Law Judge's ("ALJ") order imposing civil money penalties on Petitioners for violating 12 U.S.C. § 1735f-15. We have jurisdiction under 12 U.S.C. § 1735f-15(e). We review under 5 U.S.C. § 706, and we deny the petition.

Petitioners' argument that the ALJ should have considered whether HUD's denial of Petitioners' request to use a master lease precluded the award of civil money penalties pursuant to § 1735f-15(a) is forfeited because it is raised for the first time on appeal. *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006). Similarly, Petitioners forfeited the argument that HUD's actions violated the Regulatory Agreement's covenants of good faith and fair dealing because it was not raised until the reply brief. *Bazuaye v. I.N.S.*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam).

The ALJ properly consulted relevant factors, listed in 24 C.F.R. § 30.80, to determine that Petitioners'

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. 34(a)(2).

[***] The Honorable James V. Selna, United States Senior District Judge for the Central District of California, sitting by designation.

failure to submit annual financial reports was "material" under 24 C.F.R. § 30.10, and the ALJ appropriately disregarded irrelevant factors. *Yetiv v. U.S. Dep't of Hous. & Urban Dev.*, 503 F.3d 1087, 1091 (2007). The ALJ permissibly found materiality due to one factor, gravity of the offense. *See id.*, & n.3 (affirming following consideration of one factor). Although both the statute and the regulation expressly allow the agency to consider the factors also for other purposes, 12 U.S.C. § 1735f-15(d)(3), 24 C.F.R. § 30.80(k), those passages do not prohibit the agency from considering the factors for the purpose of determining materiality. *Cf. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider."). The ALJ "considered the relevant factors and articulated a rational connection between the factors found and the choices made." *Protect Our Cmtys. Found. v. LaCounte*, 939 F.3d 1029, 1034 (9th Cir. 2019) (quoting *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004)).

Substantial evidence supports the ALJ's decision to grant HUD the maximum amount in civil money penalties. Several factors supported the ALJ's decision, such as the inability of HUD to monitor the project, the injury to the public, and the financial benefit that Petitioners received. We are unpersuaded by Petitioners' argument that the record "*compel[s]* a reasonable finder of fact to reach a contrary result." *Gebhart v. SEC*, 595 F.3d 1034, 1043 (9th Cir. 2010) (internal quotation marks omitted).

Substantial evidence supports the ALJ's finding that Petitioners had the ability to pay the maximum amount of civil money penalties. Ample evidence suggested that Petitioners had millions of dollars in equity, and Petitioners presented no documentary evidence of their inability to pay.

Nor is there a basis for Petitioners' argument that their rights under the Equal Protection Clause and the Takings Clause were violated. Since this is an appeal of the ALJ's decision to grant HUD civil money penalties against Petitioners, any issues stemming solely from HUD's denial of Petitioners' request to use a master lease are not properly before us. As Petitioners' constitutional arguments solely relate to the denial of the master lease, they cannot form the basis for reversal of the ALJ's ruling.

PETITION DENIED.

APPENDIX B

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY

HUDOHA 18-AF-0227-CM-002

[Filed: April 7, 2020]

In the Matter of:	)
	)
EGAE, LLC, and Marlow Family Exempt, Perpetual Trust	)
	)
Respondents.	)
	)

ORDER ON SECRETARIAL REVIEW

On February 20, 2020, EGAE, LLC, and Marlow Family Exempt Perpetual Trust (collectively, "Respondents") filed an Appeal for Secretarial Review ("Appeal") of the Initial Decision and Order ("Decision") issued by Judge Alexander Fernandez ("ALJ") on January 23, 2020, which imposed civil money penalties in the amount of $222,954.00 on the Respondents for the failure to file audited financial statements from 2013 to 2017. The ALJ found adequate evidence existed to support the imposition of the penalties sought by the Department of Housing and Urban Development ("HUD"). The ALJ found that Respondents' failure to file audited financial statements for 2013-2017

constituted violations of its obligations under the Regulatory Agreement. ALJ further found that Respondents were wholly culpable and had not demonstrated an inability to pay. Accordingly, the ALJ found that the imposition of the maximum allowable penalty was warranted for each violation.

Respondents' Appeal claimed that HUD violated Respondent's constitutional rights and requested that the Decision be set aside. HUD filed an Opposition Brief on March 10, 2020, arguing that no constitutional rights were violated and the Decision should be completely upheld. Upon review of the entire record of this proceeding, including the briefs filed with the ALJ and the Secretary, and based on an analysis of the applicable law, I hereby DENY the Respondents' Appeal in its entirety and AFFIRM the ALJ' s Decision.

PROCEDURAL HISTORY

On August 22, 2018, HUD filed an administrative complaint against Respondents for their failure to file audited, annual financial statements (or "reports") for fiscal years 2013, 2014, 2015, 2016, and 2017, for their HUD insured multi-family property known as McKinley Tower Apartments. HUD sought civil money penalties against the Respondents in the amount of $222,954.00 pursuant to 12 U.S.C. § 1735f-15 and 24 C.F.R. Part 30.

On November 7, 2018, HUD filed a Motion for Summary Judgment requesting that the Court make a finding that the Respondents were jointly and severally liable for a civil money penalty of $222,954.00 for failing to file audited, annual financial reports for the

years 2013-2017. On June 28, 2019, the Court issued an Order Granting Partial Summary Judgment in favor of HUD finding that the Respondents failed to file audited, annual financial statements for fiscal years 2013-2017, and that their failure was both knowing and material. The Court ruled that HUD met its burden to prove that there exists no issue of material fact and that Respondents are liable for violations of the Civil Money Penalty statute. The Court determined that questions of fact remained with regard to the appropriate amount of penalties based on the Court's consideration of factors set forth in 24 C.F.R. § 30.80.

A hearing on the matter regarding the appropriate amount of civil money penalties occurred on July 30-31, 2019, in Anchorage, Alaska. The Government and the Respondents filed Post Hearing Briefs on October 10, 2019. The Government filed its Response Brief to refute the facts and arguments presented by the Respondents on October 24, 2019, and Respondents replied on October 25, 2019. The Court's Decision was issued on January 23, 2020.

CONCLUSION

After reviewing the entire record, I affirm the ALJ's Decision and adopt the findings and legal decisions therein. Therefore, the Respondent's Appeal is hereby DENIED.

IT IS SO ORDERED.

Dated this 7 day of April, 2020.

/s/ Andrew Hughes
Andrew Hughes
Secretarial Designee

APPENDIX C

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

18-AF-0227-CM-002

[Filed: January 23, 2020]

In the Matter of:	)
	)
EGAE, LLC, and MARLOW FAMILY EXEMPT PERPETUAL TRUST,	)
	)
Respondents.	)
	)

Appearances:

Mary C. Merchant, Esq.
Sakeena M. Adams, Esq.
United States Department of Housing and Urban Development

Marc A. Marlow
EGAE, LLC and Marlow Family Exempt Perpetual Trust
Pro Se

Before: Alexander **FERNÁNDEZ,** United States Administrative Law Judge

INITIAL DECISION AND ORDER

The United States Department of Housing and Urban Development ("HUD" or "Government") filed a *Complaint for Civil Money Penalties* against EGAE, LLC ("Respondent EGAE") and Marlow Family Exempt Perpetual Trust ("Respondent Family Trust") (collectively "Respondents"). The *Complaint* seeks $222,954 in civil money penalties, pursuant to 12 U.S.C. § 1735f-15 and 24 C.F.R. Part 30, for Respondent EGAE's failure to submit timely audited financial reports for fiscal years 2013-2017. Respondents filed an *Answer* admitting that the audited financial reports were not filed but denying liability. Respondents also described, at length, circumstances surrounding the devaluation of Historic Tax Credit proceeds, which Respondents attribute to HUD.

On June 28, 2019, the Court issued the *Order Granting Partial Summary Judgment,* wherein the Court found that undisputed material facts exist and support a finding that Respondents were liable for failing to timely file five years of audited financial reports.[1] However, the Court declined to impose the civil money penalties sought by HUD on summary judgment, because Respondents raised issues of material fact that must be considered by the Court pursuant to 24 C.F.R. § 30.80. Instead, the Court ordered that the matter should proceed to a hearing so

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[1] The Court's findings of fact and rulings on summary judgment are incorporated into this *Initial Decision.* A copy of the *Order Granting Partial Summary Judgment* is also attached.

that the Court could compile a complete record for consideration of the civil money penalties that would be imposed.

The hearing was held on July 30-31, 2019 in Anchorage, Alaska. The following witnesses testified at the hearing: Sean Gallagher, who was the production chief in HUD's Seattle Field Office; Gwendolyn Callaher, Branch Chief for HUD's Resolution Specialist Team in San Francisco; Jerry Cramer, Enforcement Analyst for HUD's Fort Worth Department Enforcement Center; Hope Phile, Settlement Office Director for HUD's Fort Worth Department Enforcement Center; and Marc Marlow, Manager for Respondent EGAE.

FACTUAL FINDINGS

Respondent EGAE is a "for profit" company formed under the laws of Alaska. Respondent EGAE owns the project known as McKinley Tower Apartments. McKinley Tower Apartments ("the Property") consists of 100 units in a building located in Anchorage, Alaska. Respondent Family Trust is the sole member of EGAE, LLC, and Mark Marlow is the manager of EGAE, LLC.

In 2005, Respondent EGAE took out a loan from CW Capital, LLC in the original principal amount of $8,067,000, which was secured by the Property. Repayment of the loan was insured by HUD pursuant to Section 221(d)(4) of the National Housing Act, 12 U.S.C. § 1715(d)(4). In exchange for receiving the benefits of the loan insured by the Secretary, on March 8, 2005, Respondent EGAE entered into a Regulatory Agreement for Multifamily Housing Projects

("Regulatory Agreement") with HUD. The Regulatory Agreement requires, in pertinent part, that Respondent EGAE submit annual financial reports to HUD at the end of each fiscal year.

Since 2009, the McKinley Tower project has been referred to HUD's Department Enforcement Center ten times for alleged noncompliance with the Regulatory Agreement. Between 2008 and 2012, HUD's records show a history of unauthorized loans being disbursed to the owner, unauthorized disbursements of project funds, an underfunded security deposit account, and payments being made to identity-of-interest firms owned by Mr. Marlow that were in excess of market rates. The Department Enforcement Center and Mr. Marlow entered into a settlement agreement to resolve these issues.

In 2012, Respondent EGAE spent over $20,000 for the project's annual financial statements. Respondent EGAE had surplus cash of $91,643, and profits (before depreciation) of $212,888. After 2012, Respondent EGAE stopped sending audited financial statements to HUD. For fiscal years 2013, 2014, 2015, 2016, and 2017, the annual financial statements for the Property were due by the end of March the following year.[2]

HUD sent Respondent EGAE a series of pre-penalty notices reminding Respondent EGAE of the possible penalty for failing to file audited financial statements and requiring a response. In response, Respondent

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[2] The financial statements were due on March 31, 2014, March 31, 2015, March 30, 2016, March 31, 2017, and March 31, 2018, respectively.

EGAE would either inform HUD that an accounting firm had been engaged to complete the audits or that Respondent EGAE intended to pay off the HUD-insured loan through a refinance thereby releasing Respondent EGAE of its obligations to comply with the Regulatory Agreement. Respondent EGAE never raised the issue of its ability to pay a civil penalty for its failure to file audited financial statements even though each pre-penalty notice specifically cited that factor as a possible affirmative defense or argument in mitigation.

Respondent EGAE defaulted on its loan, which was assigned to HUD requiring HUD to pay over 6.4 million dollars. At the end of 2017, Respondent EGAE had a total equity amount of $5,641,894.21. Respondent Family Trust currently has a 51 percent interest in an office building adjacent to the project. The office building is valued at $13 million dollars. The office building receives around $113,500 per month in rent, but pays $82,000 per month for its mortgage.

LEGAL CONCLUSIONS ON SUMMARY JUDGMENT

On summary judgment, the Court found that Respondents are liable for violations of the Civil Money Penalty statute for failing to file audited financial statements for fiscal years 2013, 2014, 2015, 2016, and 2017. The Court also noted that the scope of this case was limited to a determination of whether Respondents violated the Civil Money Penalty Act and, if so, the amount of the civil money penalties to be imposed.

CIVIL MONEY PENALTY

Having concluded that Respondent EGAE's actions subject Respondents to civil money penalties, the Court must consider whether the requested penalty amounts are appropriate. HUD regulations specify that the Court weigh the following aggravating and mitigating factors in determining the penalty amount:

> (a) The gravity of the offense;
> (b) Any history of prior offenses;
> (c) The ability to pay the penalty, which ability shall be presumed unless specifically raised as an affirmative defense or mitigating factor by the respondent;
> (d) The injury to the public;
> (e) Any benefits received by the violator;
> (f) The extent of potential benefit to other persons;
> (g) Deterrence of future violations;
> (h) The degree of the violator's culpability;
> ... and
> (j) Such other matters as justice may require.

24 C.F.R. § 30.80.

Each factor must be considered, although not every factor will apply directly to every charge. In re Sundial Care Center, HUDALJ 08-055-CMP, 2009 HUD ALJ LEXIS 21 (HUDALJ Mar. 25, 2009). However, a particularly compelling factor may be enough to support the imposition of a maximum penalty. In re Yetiv, HUDALJ 02-001-CMP, 2003 WL 2596134, *11 (HUD ALJ Sept. 2, 2003).

After considering the penalty factors, the Government elected to pursue the maximum penalties for each violation resulting from Respondent EGAE's failure to file audited financial statements. The rationale for these penalties was laid out in detail in the Government's *Post-Hearing Brief,* as well as in the *Complaint* itself.

In response, Respondents repeatedly argue that HUD's denial of their master lease proposal in 2006 was made in error and resulted in $2,466,416.80 in damage to Respondents, which outweighs any amount of civil money penalties that can be imposed. For that reason, Respondents claim they should not be required to pay any amount to HUD for the failure to file audited financial statements.[3]

1. Gravity of the offense

The failure to file audited annual statements is extremely serious. In re Premier Invs. I. Inc., HUDALJ 06-022-CMP, 2007 HUD ALJ LEXIS 61, *13 (HUDALJ Jun. 29, 2007). Risks to the insurance fund may arise from unauthorized distributions and misuse of project funds by HUD-insured mortgagors, which may go undetected where audits are not available. In re Entercare. Inc., HUDALJ 01-061-CMP, 2002 HUD ALJ

[3] Respondents also request that HUD be ordered to amend Respondent EGAE's note and outlines the new terms of the note that should be imposed. The Court's purview in this case is limited to a determination of whether a violation of the Civil Money Penalty statute occurred and, if so, the amount of any civil money penalty to be imposed. The Court does not have the authority to order the remedy requested by Respondents.

LEXIS 27, *15 (HUDALJ Dec. 31, 2002); In re Lord Commons Apartments, HUDALJ 05-060-CMP, 2007 HUD ALJ LEXIS 59, *18 (HUDALJ Jul. 20, 2007).

HUD witnesses testified that the purpose of audited financial statements is to give HUD an assessment of where the project is financially, and how money is being distributed. A repeated failure to file audited financial statements is of great concern, because HUD cannot get a picture of the finances of a project and access the risk of a project is extended.

Mr. Cramer specifically discussed HUD's concerns regarding unauthorized disbursements being made by the Project that were disclosed before Respondent EGAE ceased filing audited financial statements. Mr. Cramer testified that, "we believe that had we gotten the financial statement, we may have been able to catch some of the problems and possibly even prevented the loan from being assigned to HUD."

As noted *supra,* the FHA-insured mortgage became delinquent and was ultimately assigned to HUD requiring HUD to pay over 6.4 million dollars from its insurance fund. These facts support the imposition of the maximum penalty. See Premier Invs. I, Inc., 2007 HUD ALJ LEXIS 61 at *14 ("Unauthorized distributions and mortgage delinquencies are the very violations the annual audit review process was intended to prevent.").

2. History of prior offenses

There is no evidence in the record that Respondents have a history of prior offenses.

3. Ability to pay the penalty

On summary judgment, the Court noted that Respondents presented no evidence that they were unable to pay the penalty sought by HUD in this case. However, the Court declined to grant summary judgment on this factor without giving Respondents, who were proceeding *prose,* another opportunity to present evidence in support of this claim.

Respondents have the burden to establish that they are not able to pay the amount of penalty sought. Premier Invs. I, Inc., 2007 HUD ALJ LEXIS 61 at * 15. And, a claim of inability to pay must be supported by documentary evidence. Grier v. United States HUD, 418 U.S. App. D.C. 185, 191 (2015) ("An ability to pay is presumed unless a party raises it as an affirmative defense and provides documentary evidence.")

At the hearing, Respondents reiterated their position that HUD's error caused Respondents to be unable to maximize the value of the Historic Tax Credit, and cost Respondents over $400,000 in cash. Respondents claim they are unable to pay the penalty for this reason. However, instead of presenting documents, such as financial records and evidence of liabilities, Respondents focused on HUD's denial of the use of a Master Lease in 2006. Even if Respondents' allegation that HUD caused a $400,000 loss to Respondents is true, it is insufficient to demonstrate an inability to pay without additional information as to Respondents' financial standing. See Premier Invs. I, Inc., 2007 HUD ALJ LEXIS 61 at *20 (finding that the existence of a $153,000 judgement against the

respondents "does not argue against the [maximum penalty sought by HUD]").

Without documentary evidence of Respondents' inability to pay, the Court presumes Respondents are able to pay the penalty sought by HUD. Moreover, at the hearing, HUD presented documentary evidence that, based on the most recent financial records obtained from Respondents in discovery, Respondent EGAE had a total equity amount of $5,641,894.21. Mr. Marlow also testified that Respondent Family Trust currently has a 51 percent interest in an office building adjacent to the project. The office building is valued at $13 million dollars. The office building receives around $113,500 per month in rent, but pays $82,000 per month for its mortgage. HUD's unchallenged evidence supports a finding that that Respondents are able to pay the maximum penalty sought by HUD. See Sundial Care Center, Inc., 2009 HUD ALJ LEXIS 21 at *51 (taking into consideration the respondents' interest in land, which had a value that exceeded the penalty sought by HUD).

4. Injury to the public

"In considering the factor of injury to the public, an assessment of the harm caused to the integrity of HUD's programs and the costs of enforcement and litigation should be made." Premier Invs. I, Inc., 2007 HUD ALJ LEXIS 61 at *15. And, "damage to the integrity of HUD programs, exhibited by an inability to accurately assess risk to its insurance fund occurs when Respondents fail to submit audited financial statements." Id.

As noted *supra,* Respondents' failure to file audited financial statements deprived HUD of the opportunity to assess the projects finances. HUD was, therefore, without crucial information to assess the risk to its insurance fund. However, this is not a concrete loss to HUD and the public. The fact that HUD had the flexibility to wait for years in hopes that Respondent EGAE would file audited financial statements suggests that receipt of the reports, though undoubtedly required, was not as urgent as HUD suggests. Moreover, HUD's claim that the $6.4 million-dollar payout from its insurance fund may have been avoidable is speculation.[4]

Still, HUD presented records demonstrating the efforts made by HUD staff to obtain Respondent EGAE's compliance with their obligations under the Regulatory Agreement. Documents in the record demonstrate numerous communications among HUD field offices, HUD's Enforcement Center, and Mr. Marlow. The time and resources expended to gain Respondent EGAE's compliance constitute an injury to the public. Id.

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[4] HUD presented evidence that the multifamily insurance fund is funded by insurance premiums by mortgagors doing business with the department. HUD may reinvest money from the fund into other programs such as those that provide housing. Evidence that the violations caused a loss to the insurance fund would support a finding of injury to the public. Entercare. Inc., HUDALJ 01-061-CMP, 2002 HUD ALJ LEXIS 27 at *15.

5. Benefits received by the violator

HUD claims Respondents benefited by not incurring the costs for audited financial statements. HUD's records show that Respondent EGAE spent an average of $20,000 a year on audits. Respondents do not dispute this. Therefore, by failing to conduct five audits, Respondents had a windfall of about $100,000. See Lord Commons Apartments, 2007 HUD ALJ LEXIS 59 at *20 ("Respondents benefitted economically from the violations in an amount at least equal to the total costs that they would have incurred if the audited financial reports had been prepared and submitted to HUD as required.")

HUD also suggest that Respondents may have benefited from unauthorized distributions during the period that the financial statements were not filed. HUD presented evidence that in 2010 and 2011, unauthorized distributions totaling $286,354 were paid to affiliates of Respondents. HUD notes that it is unable to determine whether this practice continued, because Respondent EGAE ceased filing audited financial statements after HUD raised the issue of the unauthorized distributions.

There is no evidence in the record that Respondents were able to secrete a continued practice of making unauthorized distributions for their benefit by refusing to file audited financial statements. Therefore, the Court cannot reach a determination that Respondents benefited in this regard. See U.S. Dep't of Hous. & Urban Dev. v. Crestwood Terrace P'ship, HUDALJ 00-002-CMP, 2001 HUD ALJ LEXIS 66, *15 (HUDALJ Jan. 30, 2001) (declining to speculate as to whether

unauthorized disbursements may have benefitted the respondent when audited reports are not available to confirm such claims).

6. Extent of potential benefit to other persons

HUD acknowledges that it is impossible to determine the potential benefit to others in this case without the audited financial statements that would reveal any such benefit.

7. Deterrence of future violations

"Deterrence is a permissible and socially useful goal. Any penalty will theoretically provide deterrence." Sundial Care Center, Inc., 2009 HUD ALJ LEXIS 21 at *52-53 (taking into consideration the respondents' interest in land, which had a value that exceeded the penalty sought by HUD). However, for a penalty to be effective in deterring future violations, the penalty imposed must be substantially greater than the cost of compliance to encourage compliance within the industry. Crestwood Terrace P'ship, 2001 HUD ALJ LEXIS 66 at * 15.

Here, HUD presented evidence that each audited financial statement would cost Respondent EGAE roughly $20,000. For the each of the five audited financial statements between 2013 and 2017 that Respondent EGAE failed to file, HUD seeks penalties between $42,500 and $48,144.[5] Therefore, the penalty

[5] For violations taking place between February 19, 2013 and August 15, 2016, the maximum civil money penalty the Secretary may impose for each violation is $42,500. 12 U.S.C. § 1735f-15(c); 24 C.F.R. § 30.45; and 78 Fed. Reg. 4057 (Jan. 18, 2013). For

HUD seeks is more than double the amount it would have cost for Respondent EGAE's compliance and is adequate for deterring future violations.

8. Degree of the violator's culpability

Respondents' *Answer* alleges, "The negative impact of being shorted the Historical Tax Credit proceeds cannot be overstated. The financial stresses imposed on the project are directly related to the audits being late." And, in an October 15, 2018 meeting, Mr. Marlow told HUD that the historic tax credit issue had negatively impacted his project.

"The responsibility for insuring that annual financial statements are filed in a timely and acceptable manner lies squarely with [the persons], who executed the agreement on behalf of [the respondent company]. Lord Commons Apartments, 2007 HUD ALJ LEXIS 59 at *22.

There is no evidence in the record that Respondents were unable to pay for the audits. In fact, HUD presented evidence that in 2012, Respondent EGAE had surplus cash of $91,643, and profits (before depreciation) of $212,888. Based on this evidence, the Court reasonably concludes that Respondents had the

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violations taking place between August 16, 2016 and June 28, 2017, the maximum civil money penalty the Secretary may impose for each violation is $47,340. 12 U.S.C. § 1735f-15(c); 24 C.F.R. § 30.45; and 81 Fed. Reg. 38931 (June 15, 2016). For violations taldng place on or after June 29, 2017, the Secretary may impose a civil money penalty of up to $48,114 for each violation. 12 U.S.C. § 1735f-15(c); 24 C.F.R. § 30.45; and 82 Fed. Reg. 24521 (May 30, 2017).

means to pay for the 2013. And, Respondents have not produced evidence to the contrary.

In addition, HUD has produced evidence that it made repeated attempts to obtain Respondents' compliance. For instance, HUD sent several pre-penalty notices to Respondent EGAE before ultimately filing the *Complaint*. In response, Mr. Marlow would assure HUD that the audits would be done or that the loan would be refinanced eliminating Respondent EGAE's obligations under the regulatory agreement. However, Mr. Marlow never claimed the audits had not been performed due to a lack of funds. Accordingly, the Court finds that Respondents are wholly culpable for the violations.

9. Other matters as justice may require

Respondents claim HUD's denial of their master lease was an error that resulted in $2,466,416.80 in damages. Respondent EGAE claims it was unfairly treated, because there is no evidence that HUD had ever denied a master lease proposal other than Respondents'. In support, Respondents cite to a Mortgagee Letter issued by HUD outlining its policy for authorizing the use of Master Leases to maximize the benefits of tax credits including Federal and State Historic Tax Credits. Respondents also presented an e-mail from a developer who was able to utilize the master lease structure on a project that closed with HUD on September 8, 2009.

HUD acknowledges that Respondent EGAE was denied the use of a master lease structure. And, HUD does not dispute Respondents' claim that the denial

resulted in the diminishment of the value of the historic tax credits Respondents expected. Instead, HUD notes that, at the time Respondents sought approval of the master lease structure, there was not yet a policy for authorizing the use of master leases. For that reason, HUD staff was required to reject proposals for master leases until HUD could develop a policy to which such proposals could conform.

Respondents' evidence demonstrates unfortunate circumstances that may have resulted in financial losses to Respondent EGAE. However, there is no evidence that Respondent EGAE's project was treated differently than other similarly situated projects. Although Respondents claim HUD did not deny other proposals to use master.leases, Respondents fail to produce evidence that, when their proposal for a master lease was denied by HUD, HUD was authorizing the use of master leases in other projects. At the hearing, Mr. Gallagher testified credibly that HUD's practice was to deny proposals for master leases until HUD could create a policy for the use of such leases. In addition, Mr. Gallagher noted that the mortgagee letter publishing HUD's policy for master leases was effective October 19, 2009, and there was no indication that it could be applied retroactively.

The timing of Respondent EGAE's request for approval of its master lease proposal is unfortunate. Even Mr. Gallagher noted that had the request been made in the fall of 2009, Respondent EGAE's proposal likely would have been approved if it satisfied HUD's requirements. Still, there is no evidence that Respondents were unfairly treated. On the contrary,

the record demonstrates that HUD had a practice of denying master lease proposals until HUD could formulate policy on the issue. Therefore, this factor neither aggravates nor mitigates the civil money penalties to be imposed.

Conclusion

Based on the foregoing, the Court finds adequate evidence exists supporting the imposition of the penalties sought by HUD. Respondent EGAE's failure to file audited financial statements for 2013-2017 constitute violations of its obligations under the Regulatory Agreement. Such violations caused injury to the public while Respondents received a windfall of about $100,000. Respondents are wholly culpable and have not demonstrated an inability to pay. Accordingly, the imposition of the maximum allowable penalty is warranted for each violation.

It is hereby **ORDERED** that Respondents, jointly and severally, shall pay in full $ 222,954 in civil money penalties to the HUD Secretary.

These penalties are immediately clue and payable by Respondents without further proceedings, except as described below. Respondents are prohibited from using Project income to pay these penalties. 12 U.S.C. § 1735f-15(d)(5); 24 C.F.R. § 30.45(h); 24 C.F.R. § 30.68(d).

So **ORDERED,**

/s/ Alexander Fernández
Alexander Fernández
Administrative Law Judge

Attachments: *Order Granting Partial Summary Judgment,* issued June 28, 2019.

Notice of appeal rights. The appeal procedure is set forth in detail at 24 C.F.R. §§ 26.50, 26.52. This *Initial Decision and Order* may be appealed by any party to the HUD Secretary by petition for review. Any petition for review must be received by the Secretary within 30 days after the date of this *Initial Decision and Order*. An appeal petition shall be accompanied by a written brief, not to exceed 15 pages, specifically identifying

APPENDIX D

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

18-AF-0227-CM-002

[Filed: June 28, 2019]

In the Matter of:	)
	)
EGAE, LLC, and MARLOW FAMILY EXEMPT PERPETUAL TRUST,	)
	)
Respondents.	)
	)

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Currently before this Court is the *United States Department of Housing and Urban Development's Motion for Summary Judgment* ("Motion") filed on November 7, 2018. In the *Motion,* the United States Department of Housing and Urban Development ("HUD") requests that the Court make a finding that EGAE, LLC and Marlow Family Exempt Perpetual Trust (collectively "Respondents") are jointly and severally liable for a civil penalty of $ 222,954 for failing to file audited, annual financial reports for the years 2013, 2014, 2015, 2016, and 2017.

On November 29, 2019, Respondents filed a *Cross-Motion for Summary Judgment* ("Cross-Motion"). In addition, on December 14, 2019, Respondents filed their *Opposition to the U.S. Department of Housing and Urban Development's Motion for Summary Judgment* ("Opposition"). HUD filed a timely response to the *Cross-Motion* on December 13, 2019.

Applicable Law

Standard of Review. Pursuant to 24 C.F.R. § 26.32(1), this Court is authorized to "decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact." The Court may exercise its discretion in application of Rule 56 of the Federal Rules of Civil Procedure. 24 C.F.R. § 26.40(f)(2).

Summary judgment is proper where no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 248 (1986); Fed. R. Civ. P. 56(a). A "genuine" issue exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 249. Additionally, a fact is not "material" unless it affects the outcome of the suit. Id.

Summary judgment is a "drastic device" because, when exercised, it diminishes a party's ability to present its case. Selva & Sons. Inc. v. Nina Footwear. Inc., 705 F.2d 1316, 1323 (Fed. Cir. 1983). Accordingly, the moving party bears the burden of demonstrating the absence of any material issues of fact. See Anderson, 477 U.S. at 256. Rule 56 provides that when

a party asserts that a fact cannot be genuinely disputed, that party must: (i) cite to materials in the record; or (ii) show the cited materials do not establish the presence of a genuine dispute. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, the Court's function is not to resolve any questions of material fact, but to ascertain whether any such questions exist. *In re* Beta Dev. Co., HUDBCA No. 01-D-100-D1, at *12 (February 21, 2002). Therefore, when the moving party has carried its burden under Rule 56(c), the nonmoving party may not rest upon mere allegations or denials, but must come forward with "specific facts showing that there is a *genuine* issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (emphasis added) (citing Fed. R. Civ. P. 56(e)).

Civil Money Penalties. The Civil Money Penalty statute, 12 U.S.C. § 1735f-15, authorizes HUD to impose civil penalties against mortgagors who "knowingly and materially" commit certain enumerated violations. Id. at § 1735f-15(b)(1). One such violation is the failure to provide HUD with annual financial statements. Id. at § 1735f-15(c)(1)(B)(x); 24 C.F.R. § 30.45(c). Each such violation may result in a maximum civil money penalty of $ 42,500. 24 C.F.R § 30.55(g). The Secretary, however, may approve an extension to submit financial statements where the mortgagor demonstrates that failure to comply is due to events beyond the control of the mortgagor. Id. at § 17.35f-15(c)

Undisputed Material Facts

Respondent EGAE, LLC is a "for profit" company formed under the laws of Alaska. Respondent EGAE, LLC owns the project known as McKinley Tower Apartments. McKinley Tower Apartments ("the Property") consists of 100 units in a building located in Anchorage, Alaska. Respondent Marlow Family Exempt Perpetual Trust is the sole member of EGAE, LLC, and Mark Marlow is the manager of EGAE, LLC.

In 2005, Respondent EGAE, LLC took out a loan from CW Capital, LLC in the original principal amount of $8,067,000, which was secured by the Property.[1] Repayment of the loan was insured by HUD pursuant to Section 221(d)(4) of the National Housing Act, 12 U.S.C. § 1715(d)(4). In exchange for receiving the benefits of the loan insured by the Secretary, on March 8, 2005, Respondent EGAE entered into a Regulatory Agreement for Multifamily Housing Projects ("Regulatory Agreement") with HUD. The Regulatory Agreement requires, in pertinent part, that Respondent EGAE, LLC submit annual financial reports to HUD at the end of each fiscal year. For fiscal years 2013, 2014, 2015, 2016, and 2017, the annual financial statements for McKinley Tower Apartments were due by the end of March the following year.[2] To date, Respondent

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[1] The loan is currently held by Walker and Dunlap, LLC. The outstanding principal balance on the loan as of October 21, 2018 was $6,929,475.86.

[2] The financial statements were due on March 31, 2014, March 31, 2015, March 30, 2016, March 31, 2017, and March 31, 2018, respectively.

EGAE, LLC have failed to file the requisite annual financial statements for fiscal years 2013 through 2017. And, as of October 21, 2018, the HUD-insured loan for the Property has a past due amount of $ 482,806.35.

Discussion

HUD moves for summary judgment in its favor and requests a civil penalty assessment of $ 222,954 against Respondents. In support, HUD claims there is no dispute that Respondents failed to file annual financial reports for fiscal years 2013-2017, or that undisputed facts support a maximum assessment.

In response, Respondents claim that a material fact remains in dispute. Specifically, Respondents allege in their *Opposition* and *Cross-Motion* that HUD erred in the handling of the project by not allowing a Historic Tax Credit investor to affiliate with the project, resulting in an over $ 400,000 loss to Respondents.

I. HUD's Motion for Summary Judgment

HUD claims the standard for summary judgment is met and it is entitled to judgment as a matter of law because the undisputed facts in this case show that Respondents are liable for the knowing and material breach of the Regulatory Agreement.

"The moving party has the initial burden of identifying for the court the portions of the record that it believes demonstrate the absence of any genuine issue of material fact." Cooper v. N. Am. Philips Corp., No. J87-027 Civil, 1989 U.S. Dist. LEXIS 14104, at *7 (D. Alaska Nov. 17, 1989) (citing T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th

Cir. 1987)). As noted *supra,* a mortgagor may be liable for a civil money penalty for knowingly and materially committing a violation enumerated by the Civil Money Penalty statute. 12 U.S.C. § 1735f-15. A violation of the statute includes the failure to provide HUD with audited, annual financial statements. Id. at § 1735f-15(c)(1)(B)(x); 24 C.F.R. § 30.45(c).

The basis for the civil money penalties being sought is Respondents' failure to file audited, annual financial reports to HUD for fiscal years 2013-2017. There is no dispute that Respondents failed to file the financial reports at issue. Respondents stated in their *Answer* to the *Complaint,* "Respondent admits that the audits are late and denies liability associated with the late audits." Accordingly, the Court finds that Respondents failed to file the financial reports, which constitute violations under the Civil Money Penalty statute.

HUD claims Respondents are subject to a civil money penalty for each violation, because Respondents knowingly committed the violations. A mortgagor acts "knowingly" if it has actual knowledge of, acts with deliberate ignorance of, or acts with "reckless disregard for" the prohibited conduct. 12 U.S.C. § 1735f-15(h); see also OLA Props., Inc. v. United States HUD, 336 F. App'x 419, 422 (5th Cir. 2009) (noting that a mortgagor's failure to familiarize itself with its obligations does not excuse its failure to meet them).

In both the *Complaint* and its *Motion,* HUD notes that the annual financial statement requirement is stated in the Regulatory Agreement that Marc Marlow executed on behalf of Respondent EGAE. In the *Motion,* HUD claims that it repeatedly advised Respondents

that they were required to submit the financial reports. In a sworn affidavit submitted with the *Motion,* a HUD employee stated that "multiple efforts were made by my office to obtain compliance from EGAE, LLC and Marlow Family Exempt Perpetual Trust . . . During the last five years, my staff has had numerous telephone conversations with Mr. Marlow, the representative of Respondents, in an effort to achieve compliance with the requirement to file annual audited financial statements." HUD also submitted a letter from Mr. Marlow, written on behalf of EGAE, LLC acknowledging that HUD advised him to perform the audits as soon as possible. Moreover, there is evidence that EGAE last submitted an audited annual financial report for fiscal year 2012 demonstrating that Respondents understood the requirement set forth in the Regulatory Agreement. Accordingly, the Court finds that there is no dispute that Respondents knowingly failed to file financial reports for fiscal years 2013-2017.

HUD also claims Respondents' violations for failing to file financial statements were material. "Material or Materiality" is "having the natural tendency or potential to influence, or when considering the totality of the circumstances, in some significant respect or to some significant degree." 24 C.F.R. § 30.10. A determination of "materiality" of a violation "requires a consideration of the eight regulatory factors found in 24 C.F.R. § 30.80." Premier Investments. I. Inc., & Reed, HUDALJ 06-022-CMP, at 5 (H.U.D.A.L.J. June 29, 2007), *available at* https://www.hud.gov/sites/documents/DOC_20279.pdf. And, although some factors, such as ability to pay, are not logically related to

materiality, others, such as injury to the public and economic benefit to the mortgagor, are logically related to materiality of failure to provide audited annual financial statements. *In re* Parkside Dev. Corp., et al., 2012 HUD ALJ LEXIS 16, at *33 (citing Yetiv v. HUD, 503 F.3d 1087, 1090-91 (9th Cir. 2007)). However, not every factor must be present. Rather, the existence of one factor is sufficient to find materiality. Id.

HUD has demonstrated that Respondents' failure to file is a grave offense. See 24 C.F.R. § 30.80 (listing "gravity of the offense" as a factor to be considered). Respondents' failure to file its financial reports deprived HUD of its ability to monitor the project's financial status. See HUD Handbook 4370.1, Rev-2, Section 1-4B (explaining that audited annual financial statements are important to protect the FHA Insurance Fund.).[3] Respondents admitted repeatedly that the project has experienced financial harm and damage. This fact further underscores the importance of HUD's access to audited annual financial reports in order to provide solutions to current financial problems. Therefore, Respondents' failure to provide HUD with

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[3] HUD Handbook 4370.1, Rev-2, Section 1-4B further explains that:

> Specifically, when projects with HUD-insured loans fail to make their payments, the mortgagee may decide to assign the mortgage to the Secretary of HUD resulting in the use of Federal funds to pay the mortgagee the balance due on the FHA-insured loan. By monitoring a project's physical and financial status and providing solutions to current and anticipated physical and financial problems, HUD can help protect the FHA insurance fund.

five years' worth of financial reports is a grave offense and constitutes a material violation.

Although Respondents oppose the *Motion* and claim there exists an issue of material fact, Respondents do not dispute HUD's assertion that Respondents' failures to file the financial reports were "knowing and material." Accordingly, the Court finds that HUD has demonstrated that there is no dispute that Respondents knowingly and materially failed to file their annual, audited financial statements for fiscal years 2013-2017. See United States v. CNA Fin. Corp., 381 F. Supp. 2d 1088, 1091 (D. Alaska 2005) ("In response to a properly supported motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue for trial.").

II. Respondent's Opposition and Cross-Motion for Summary Judgment

In the *Opposition,* Respondents claim summary judgment in HUD's favor is not appropriate because there exists an issue of material fact. The fact Respondents claim is in dispute is the alleged error by HUD employees to not allow Respondent to "fully leverage its mortgage funds by not allowing its Historic Tax Credit investor to affiliate with the project via a 'Master Lease,' sometimes know [sic] as a 'Synthetic Lease.'" Respondents allege this error "caused the project financial harm and has led to the circumstances that have frustrated the Respondents [sic] ability to perform under the Regulatory Agreement." This

argument is also the basis for Respondents' *Cross-Motion*.[4]

Once the moving party carries its burden, the responding party may not rely on the allegations in the pleadings to preclude summary judgment. Cooper v. N. Am. Philips Corp., No. J87-027 Civil, 1989 U.S. Dist. LEXIS 14104, at *7 (D. Alaska Nov. 17, 1989). Instead, Fed. R. Civ. P. 56(e) requires the responding party to set forth, by affidavit or as otherwise provided, "specific facts showing that there is a genuine issue for trial." Id. (quoting T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)). And, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. at 248.

Respondents' argument that HUD's error resulted in the circumstances that led to its failure to file financial reports is not material. Assuming, *arguendo,* that this fact was proven, Respondents still could not escape liability under the Civil Money Penalty statute. The statute provides that the Secretary may impose a

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[4] Respondents' *Cross-Motion* seeks a remedy that is not available in this proceeding. Namely, Respondents request that the Court "order an A7 streamline refinance be immediately implemented for EGAE, LLC . . . that the A7 loan be set back to the original loan amount of $ 8,067,000." Respondents further request that the Court order "the excess funds be set aside as a rent reserve with the servicer." The Court's purview in this case is limited to a determination of whether a violation of the Civil Money Penalty statute occurred and, if so, the amount of any civil money penalty to be imposed.

civil money penalty for knowingly and materially failing to submit annual financial reports. 12 U.S.C. § 1735f-15(c)(1)(B)(x). That HUD may have caused the project financial harm resulting in Respondents' inability to file the required reports does not negate the Court's finding that Respondents knew they were in violation of the Regulatory Agreement and that their violation was material. At best, Respondents' argument may be relevant to the Court's determination of the amount of a civil money penalty to be imposed. See 24 C.F.R. § 30.80 (requiring the Court to consider certain factors including the ability to pay the penalty and the degree of the violator's culpability). Accordingly, Respondents have not demonstrated that there exists an issue as to a material fact or that summary judgment in their favor is warranted. See Weston v. Noble, 19 F.R.D. 416, 420 (D. Alaska Oct. 10, 1956) ("A question of fact which is immaterial does not preclude summary judgment.").

Based on the foregoing, the Court concludes that there is no dispute as to the material facts that Respondents failed to file audited, annual financial statements to HUD for fiscal years 2013-2017, and that their failure was both knowing and material. Accordingly, Respondents are liable for violating the Civil Money Penalty statute for each fiscal year that an audited, annual financial statement was not submitted, and they are subject to penalties not to exceed $ 222,954.

III. Civil Money Penalties

HUD seeks total civil money penalties in the amount of $222,954 from Respondents, which is the

maximum amount that can be assessed. The Court is required to consider the factors set forth in 24 C.F.R. § 30.80 when determining the amount of a penalty, if any. These factors include, but are not limited to, the ability to pay the penalty, the degree of a violator's culpability, and "such other matters as justice may require." 24 C.F.R. § 30.80(c), (h), and (j).

Here, Respondents have raised issues as to their ability to pay and whether HUD is also culpable. For instance, Respondents repeatedly state that the project has suffered financial harm due to the alleged error made by HUD. Specifically, Respondents allege HUD's error in not allowing Bank of America to buy Respondents' Historic Tax Credit cost Respondents over $ 400,000 in cash. Respondents claim they are unable to pay the penalty sought by HUD for this reason. In addition, Respondents claim HUD's actions resulted in the circumstances surrounding Respondents' failure to file their financial statements as required.

The ability to pay a penalty is presumed unless specifically raised by the respondent, who has the burden of proof. 24 C.F.R. § 30.80(c); Grier v. United States HUD, 797 F.3d 1049, 1055 (2015) (declining to disturb the Secretary's decision to impose a $ 1,260,000 penalty because Respondents failed to present evidence that they could not pay the penalty requested by HUD).

HUD filed evidence that EGAE's most recent financial report indicated a positive surplus cash of $ 91,643. HUD also provided documents demonstrating that in each of the last three financial statements provided by EGAE, the project had a profit before

depreciation of at least $ 200,000. HUD claims this demonstrates that Respondents could have used project funds to pay for the expense of preparing audited annual financial reports to comply with their obligation under the Regulatory Agreement. Moreover, HUD claims this proves Respondents have the ability to pay the penalty sought by HUD.

Respondents, however, present no evidence in support of their claim that they are unable to pay the penalty sought by HUD in this case. For this reason, the Court is inclined to grant summary judgment on this issue in HUD's favor. See Alaska State Snowmobile Ass'n, Inc. v. Babbitt, 79 F. Supp. 2d 1116, 1124 (D. Alaska 1999) ("[T]he non-moving party may not rest upon mere allegations or denials, but must show that there is *sufficient evidence* supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.") (emphasis added). However, the Court recognizes that Respondents are proceeding *pro se* and declines to take such action without being satisfied that Respondents understand their responsibility to demonstrate that sufficient evidence exists to prove their argument regarding this issue. Moreover, there may be other factors in dispute and the Court would benefit from a complete record concerning the amount of any civil money penalties to be imposed. Accordingly, summary judgment as to the amount of civil money penalties to be imposed is **DENIED**.

Conclusion

HUD met its burden to prove that there exists no issue of material fact and that Respondents are liable

for violations of the Civil Money Penalty statute. However, questions of fact remain with regard to the appropriate amount of penalties based on the Court's consideration of the factors set forth in 24 C.F.R. § 30.80. Accordingly, HUD's *Summary Judgment Motion* is **GRANTED** as to liability, and **DENIED** as to the amount of civil penalties.

The Court's *Second Notice of Hearing and Order* dated February 8, 2019, remains in effect. A hearing limited to the issue of the amount of civil money penalties to be imposed shall proceed as scheduled. The parties will be permitted to present evidence relevant to *any* of the factors set forth in 24 C.F.R. § 30.80 for the Court's consideration.

So **ORDERED,**

/s/ Alexander Fernández
Alexander Fernández
Administrative Law Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-71187

HUD No. 18-AF-0227-CM-002
Department of Housing & Urban Development

[Filed: July 1, 2021]

EGAE, LLC; MARLOW FAMILY EXEMPT PERPETUAL TRUST,	)
Petitioners,	)
v.	)
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)
Respondent.	)

ORDER

Before: GRABER and CALLAHAN, Circuit Judges, and SELNA,[*] District Judge.

[*] The Honorable James V. Selna, United States District Judge for the Central District of California, sitting by designation.

The panel judges have voted to deny Petitioners' petition for panel rehearing. Judges Graber and Callahan have voted to deny the petition for rehearing en banc, and Judge Selna has so recommended.

The full court has been advised of Petitioners' petition for rehearing en banc, and no judge of the court has requested a vote on it.

Petitioners' petition for panel rehearing and rehearing en banc, Docket No. 49, is DENIED.

APPENDIX F

Email Exhibit 1

[Filed: August 27, 2020]

Marc Marlow

From: Marcel L. Wisznia <mwisznia@wisznia.com>
Sent: Monday, June 03, 2019 8:51 AM
To: Marc Marlow
Subject: Maritime Building LLC

Mark, please allow me to give you an overview of a HUD 221d4 project in we previously completed New Orleans.

Project Name:	Maritime Building LLC
Description:	A 11-story, 130,000 s.f. historic structure converted from an office building into a mixed-use development with 105 market-rate apartments
Hud Closing Date:	September 8, 2009
Equity Sources:	Federal Historic Tax Credits State Historic Tax Credits Federal New Markets Tax Credits Cash
Structure:	2-tier, master lease
Federal Historic Investor:	Chevron Oil Company

Terms:	$1.05 for each $1.00 of qualified rehabilitation expenses (QREs) earned $0.03 annual preferred return for five years $0.15 Put

It is my understanding that this project was the first HUD 221d4 closing that utilized the 2-tiered structure. We worked diligently for well over a year to gain HUD's approval on this new business structure, which had numerous financial advantages to this development. Two immediate gains were the value of the Federal Historic Tax Credits. In a single-tier structure, the tax credit investor offered only $0.90 per QRE. The 2-tier structure gave the project $0.15 per QRE more. Additionally, with a 2-tier structure the basis of the building remained as-is. In a single tier structure, the basis is reduced by the Historic Tax Credits invested.

Please let me know if you need me to elaborate more fully on any of the above.

Marcel Wisznia
800 Common Street, Suite 200
New Orleans, Louisiana 70112

504.581.1948 tel
504.581.1954 fax
504.231.4598 mobile

mwisznia@wisznia.com
www.wisznia. com

APPENDIX G

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AUTHENTICATION

[Filed: August 27, 2020]

I, Bill Daley, Regional Counsel, Office of General Counsel, Region VI, do hereby certify that I am authorized to cause the seal of the Department of Housing and Urban Development to be affixed to such documents as may require its application and to certify that a copy of any book, record or paper or other document is a true copy of that in the files or records of the Department.

I do hereby certify and attest that the following documents, attached hereto, is a true and correct copy of the documents contained in the files of the Department:

Letter dated May 31, 2017, to Ms. File from Marc Marlow, regarding: Project Name: McKinley Tower Apartments; Letter requesting an appeal for assistance with bringing McKinley Tower back into compliance; consisting of 2 pages.

In witness whereof, I have signed my name and caused the seal of the Department of Housing and Urban Development to be affixed this 16th Day of July 2019.

7/16/19	/s/
Date	Attesting Officer

Authority delegated by the Secretary of the Department of Housing and Urban Development and published in the Federal Register 80 Fed. Reg. 62088, 62089 (2015).

EGAE, LLC

337 E 4th Avenue, Suite 1 * Anchorage, Alaska 99501 * Ph: 907-258-7000 • Fax: 907-277-0623 * Cell: 907-229-8176

May 31, 2017

RE: Project Name; McKinley Tower Apartments
FHA Project No.: 176335040

Dear Ms. File,

This reply is an appeal for assistance with resolving the bind we find ourselves in. The genesis of our conundrum is the reality that we have competing expectations from the same Federal Government. Our attitude is that we very much want to comply with all the rules of our HUD mortgage, but we've had requirements from the National Park Service Historic Tax Credit Program and the Internal Revenue Service relative to the Historic Tax Credits that allowed the McKinley Tower Apartments to actually be built in the first place. Now that the Historic Tax Credits have been fully vested and utilized by the tax credit investor we would very much appreciate your help in bringing McKinley Tower Apartments back into compliance. Moreover it is our desire and hope to put and keep McKinley Tower Apartments back into a compliant standing.

I was in communication with your office two years ago and one of your colleagues was trying to line up a tax credit expert within HUD to help us work through the issues, but in the end I was told that the person they

had in mind had left HUD and that no one was available to help us.

The McKinley Tower Apartments building was originally built in 1952. When I bought the shell of the building I was told by HUD that I had to get a determination from the State Historic Preservation Office (SHPO) before our 221 D 4 mortgage could be processed. The SHPO office here in Alaska determined that the building was a Historic building so I had to get a "Part I" and a "Part II" from the National Park Service. We were required to change our plans to comply with the SHPO design requirements, and the Historic Tax Credits were sold to a national bank. Along with receiving the tax credit proceeds are requirements that do not line up exactly with HUD requirements relative to paying the tax credit investor a percentage of the net operating income, because the IRS requires that the tax credit investor, technically be a partner of the project during the compliance period.

Ms File at this point the tax credit compliance period is over and there will be no further competing requirements to balance. In my humble and contrite opinion the way forward with HUD should not include a punitive component. It just does not seem exactly fair or helpful to me; rather I would covet HUD's help and guidance in coming back into compliance.

As a first step I would like to come to Texas and sit down with you to talk about solutions. The property tax waiver that the local government gave us is now over so the property must begin paying property taxes this year. It would be in HUD's interest and in the property's interest to quickly move from our 221 D4 to

the A-7 program. Doing so would cover the entire property tax requirement going forward. Additionally the project does not have to pay a pre payment penalty to move to the A-7 program as our mortgage has been in place for ten years.

I am not knowledgeable enough to dispute your sightings of the HUD regulations, nor would I want to, rather I'd appreciate being allowed to come to Texas and figure out how to move forward.

When the project was first opened there was a HUD office in Anchorage. The folks who worked at HUD in the Anchorage office were very proud of their role in bringing this building back to life. After ten years of successful operations, 120 timely payments and happy tenants, I want to complete our success by being back in your good graces.

Sincerely,

/s/ Marc A. Marlow
Marc A. Marlow

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AUTHENTICATION

I, Bill Daley, Regional Counsel, Office of General Counsel, Region VI, do hereby certify that I am authorized to cause the seal of the Department of Housing and Urban Development to be affixed to such documents as may require its application and to certify that a copy of any book, record or paper or other document is a true copy of that in the files or records of the Department.

I do hereby certify and attest that the following documents, attached hereto, is a true and correct copy of the documents contained in the files of the Department:

Letter dated March 14, 2016, to Ms. Mylene Suarez from Marc Marlow, regarding: McKinley Tower Apartments; 17635040; received in the Departmental Enforcement Center on March 15, 2018 in response to Pre-Penalty Notices dated March 3, 2016; consisting of 1 page.

In witness whereof, I have signed my name and caused the seal of the Department of Housing and Urban Development to be affixed this 16th Day of July 2019.

7/16/19	/s/
Date	Attesting Officer

Authority delegated by the Secretary of the Department of Housing and Urban Development and published in the Federal Register 80 Fed. Reg. 62088, 62089 (2015).

Marc Marlow

337 East 4th Avenue #1 * Anchorage, Alaska 99501
* Ph: 907-229-8176 * Fax: 907-277-0623 *

March 14, 2016

Ms. Mylene Suarez
819 Taylor Street, Suite 13A47
Fort Worth, TX 76102

RE: McKinley Tower Apartments; 17635040

Dear Ms. Suarez,

We have received the letter dated March 3rd, 2016 regarding McKinley Tower Apartments.

We are grateful that our 221 D 4 mortgage allowed us to develop the property known as McKinley Tower Apartments, however we have always had difficulty because HUD has been unable to help us balance the requirements of the Historic Tax Credit process and the HUD rules. The Historic Tax Credit program is a program offered by the U.S. National Park Service. We had to use the Historic Tax Credits in order to have enough capital to accomplish the cost to refurbish the building.

I sent the attached letter dated May 4, 2015 to ask for help in figuring everything out, but Mr. Cooper called me and said that his tax credit expert was unavailable. I've never received a reply to the letter.

Anyway at this point we'd like to pay off the remaining balance of our loan and move on. I've also attached a "prepayment" approval. Please confirm that I can use

this to pay off Walker Dunlop for the mortgage. We'd like to pay off the mortgage on or about April 27, 2016.

Warmest Regards,

/s/ Marc A. Marlow
Marc A. Marlow

October 19, 2009

MORTGAGEE LETTER 2009-40

TO: **ALL FHA-APPROVED MORTGAGEES**

SUBJECT: **Policy and Procedures on Multifamily Mortgage Insurance Applications Involving Master Lease Structuring to facilitate the use of Tax Credits**

Purpose

In March 2008, the Department continued its effort to facilitate the use of FHA-insured loans with tax credits, by issuing an initial set of policies and procedures for processing applications involving the use of Master Leases. This Mortgagee Letter represents the Department's final policy and procedures for such applications, after considering the comments received from HUD field offices and the industry with respect to the initial issuance. Further, the processing changes described in Mortgagee Letter 2008-19, titled "Streamlined Processing of Multifamily Mortgage Insurance Applications Involving Low Income Housing Tax Credits," are available for use with Master Lease transactions, with respect to historic tax credits, but at this time there is no regulatory authority to reduce the cash escrow requirements for proceeds from the syndication of new market tax credits. A waiver to allow the reduction of new market tax credit cash escrow requirements may be granted by the FHA Commissioner if it is determined that doing so would

be in the best interest of the Department and the public.

Background

Master Leases are used to maximize the benefits of the following tax credit sources: Federal Historic Tax Credits, Federal New Market Tax Credits, State Historic Tax Credits, State New Market Tax Credits, and Federal Low Income Housing Tax Credits. Master Leases are advantageous to investors and developers participating in these programs by providing maximum leverage for project financing and premium pricing for equity, while reducing the need for additional debt.

A Master Lease, also known as a Sandwich Lease or Credit Pass Through, is used by developers of multifamily projects to maximize the realization of tax credit equity and distribute benefits among various investors. Typically, these leases permit a combination of investments by one or more investors under one or more tax credit programs. The Master Lease structure differs from the more traditional ownership structure in that project assets and revenues under a Master Lease strncture pass through a number of tiers and, in doing so, come under the control of entities other than the Mortgagor. HUD's goal is to allow this type of structuring without compromising appropriate regulatory oversight and controls. While complicated, these transactions must include basic obligations imposed on the Master Tenant to pay the Mortgagor/Lessor rent that equals or exceeds the amount necessary to satisfy all financial obligations required under the FHA-Insured Mortgage and to operate the property in accordance with all HUD

directives, regulations and contracts. To ensure compliance with such regulatory and administrative oversight and control, in addition to the Mortgagor/Lessor, the Master Tenant and all Master Sub-lessees (not individual residential and commercial tenants) will execute HUD Regulatory Agreements and submit financial reports to HUD. See attachment 1 for a sample Master Lease ownership structure.

The Hub and applicable Program Center (PC) will be responsible for reviewing and approving requests to utilize Master Lease ownership structures in accordance with the requirements of this Mortgagee Letter. Hubs and PCs may not waive any requirements of this Letter. Any proposed waivers must be sent to Headquarters (HQ) for review and approval and must include a recommendation from the Hub Director in the proposed project's jurisdiction.

Applicable Programs

The Department recognizes that the utilization of Master Lease structuring may provide significant additional leveraging of funds and otherwise facilitate the development of historic and affordable workforce housing. At this time, the Department is prepared to accept this type of ownership structure under the following programs:

Section 221 (d)(4) Mortgage Insurance for Multifamily Housing
Section 220, Mortgage Insurance for Rehabilitation and Neighborhood Conservation
Section 231, Mortgage Insurance for Rental Housing

for the Elderly
Section 223f, Existing Multifamily Rental Housing

The Department will not accept applications with this type of ownership structure under any other program.

Due to programmatic complexities, until further notice, Master Leases should not be used for projects assisted by a Section 8 housing assistance payment contract or in conjunction with a Section 236 de-coupling.

Section A. Programmatic Requirements

In addition to current insurance program requirements, each of the following are conditions for approval of an application with a Master Lease structure:

1. The Master Tenant and Master Sub-lessees will be single purpose entities. The Master Tenant and Master Sub-lessees may not engage in any other businesses or activity, including the operation of any other rental project, or incur any liability or obligation except as may be permitted by HUD in connection with the project. At this time, Statutory Trusts or Delaware Statutory Trusts are not eligible entities.

2. The Master Tenant and Master Sub-lessees will execute the standard HUD regulatory agreement as amended by the applicable rider ("Regulatory Agreement(s)"), in the form attached to this Mortgagee Letter as Attachment 2, to address various ownership

and operational responsibilities with respect to the mortgaged property.

3. The management agents at the various levels will execute HUD's management certifications. The Master Tenant and Master Sub-lessees will file management certifications and management profiles. HUD will be able to terminate a management agreement, if warranted, in accordance with the terms and conditions contained in the management certification and without Lender consent, to protect its mortgage insurance interests. The management agreements will incorporate the standard termination language required in Section 9 (a) of the management certifications.

4. Net rentable commercial area as a percentage of gross floor area and income will be determined in accordance with section 3-4 of the MAP Guide or for TAP applications, paragraph 3-7 of the Basic Underwriting Handbook, 4425.1 Rev-2.

5. The Master Lease and all Sub-leases (sometimes collectively referred to herein as "Leases") shall be subordinate to the FHA-Insured Mortgage and be subject to approval by HUD prior to execution. The Leases (including any proposed post endorsement modifications or amendments thereto) must be reviewed and approved by the Field Counsel and the Loan Underwriter in the Hub or PC where the application is being

reviewed. In addition to ensuring generally that the Leases conform to the specific FHA loan program and the HUD's customary and usual rules and requirements, the Leases must (a) incorporate by reference the applicable Regulatory Agreement, and HUD's rules, regulations and directives (the "HUD Obligations"); (b) contain an agreement to perform or comply with the HUD Obligations, the failure of which will be a default under the Lease; (c) contain provisions that prohibit modifications without the prior written consent of HUD; (d) allow for the termination by HUD, at HUD's election, in the event that the FHA-Insured Mortgage is assigned to HUD; and (e) provided that in the event of any conflict between the documents that evidence, secure or otherwise are executed in connection with the FHA-Insured Mortgage or with any applicable HUD rule, regulation or requirement (collectively, the "HUD Documents and Requirements"), and any other documents associated with the transaction, the HUD Documents and Requirements shall be controlling in all respects.

5. In addition to the foregoing, the Leases must include an obligation to pay all rent due under the respective Lease to the mortgagee of the FHA-Insured Mortgage, as directed by HUD, in the event of a default under a document that evidences, secures or

otherwise is executed in connection with the FHA-Insured Mortgage ("FHA Loan Document"). If requested timely by Mortgagor/Lessor and included in the documentation for the transaction, HUD will agree to allow an amendment to the FHA-Insured Mortgage authorizing that the mortgagee or HUD will endeavor to give notice of a default under an FHA Loan Document to the Master Tenant contemporaneously with the giving of notice to the Mortgagor/Lessor, and accept of a cure of such default, during any notice period provided under the FHA Loan document, from the Master Tenant on behalf of the Mortgagor/Lessor. Any such cure must occur prior to the assignment to HUD of the FHA-Insured Mortgage, and will be limited to one opportunity to cure during each 12 month time period.

6. Surplus cash determinations will be made in accordance with the Regulatory Agreements and related directives based upon the mortgagor's and each lessee's submission of audited financial statements. Surplus cash determinations (including, without limitation, net operating income) will be made as if the entire project is owned and operated by one single purpose entity. For there to be a permitted distribution of surplus cash, there cannot be any defaults then existing under the FHA-Insured Mortgage, or which through the passage of

time and/or giving of notice would exist, and all parties otherwise must be in compliance with their respective Regulatory Agreement.

7. All financial operations and reporting are governed by HUD requirements and related HUD directives, as required by 24 CFR, Part 5, Subpart H.

8. The rent paid by the Master Tenant must equal or exceed the monthly principal and interest payments due on the insured first mortgage and all required escrows and reserves.

9. All business agreements are to be disclosed to and are subject to approval by HUD during loan underwriting (including, for example, inter-company and intra-company loans and advances, investor or outsider loans other than the FHA-Insured Mortgage, investor controls over operations including controls or rights to control activities, actions and deliverables that affect or are linked to regulatory or contractual compliance or performance, etc.). The firm commitment will incorporate any conditions imposed by HUD with respect to such agreements.

10. Any proposed payments (fees, income, etc.) to the Mortgagor, Master Tenant, Master Sublessees, syndicator and developer must be disclosed to and be subject to approval by HUD at the time of loan underwriting, and thereafter be reflected on the annual

financial statement filings and on any required monthly reporting to HUD. If payments are made while any party is in non-compliance, enforcement action will be taken against all principals in the organization, subject to the notice and cure provisions in above subsection 5.

11. Any cost for oversight by the tax credit allocating agency will be paid from non-project funds or surplus cash.

12. Consistent with the parties' obligations under the Regulatory Agreements, and without limiting Subsection 5 above, all Leases must prohibit assignments or subleases (except to the end-users of the commercial spaces and apartment residents), unless previously approved by HUD in writing.

Section B. Firm Commitment Exhibits and Processing

The Hub/PC Director should conduct a pre-application meeting prior to the submission of a formal application for mortgage insurance. In addition to the exhibits required by MAP or TAP, the following information should be submitted with the firm commitment application to facilitate a review of each transaction:

1. All layers of financing, applicable loan/financing documents, commitments or term sheets for all financing sources (other than the FHA-Insured Mortgage), including the loan amount and key terms.

If the Mortgagor/Lessor obtains bridge loan financing which is secured by future syndication proceeds, a letter from the lending institution should be submitted which:

a. Details all conditions under which the loan will be made.
b. Certifies that the loan is not secured by the project and that the lending institution has no claim, and will not later assert any claim, against the mortgaged property, mortgage proceeds, any reserve or deposit made with the mortgage transaction, or against the rents or other income from the mortgaged property for payment of any part of the loan transaction.

2. Full disclosure of the name and financial interest of:

   a. All principals, as defined in 24 CFR 200.215(e), of the Mortgagor, Master Tenant and Master Sub-lessees;

   b. The general contracting firm

3. Certifications are provided from the following entities (collectively, "Program Participant(s)"), disclosing all relationships between parties to the transaction (which certifications, including those designated as a Program participant, must remain true and

correct at the time of the initial endorsement):

a. All principals of the sponsor/mortgagor
b. Mortgagee
c. General Contractor
d. Management Agent
e. Syndicator
f. Developer
g. Master Tenant
h. Master Residential Tenant
i. Master Commercial Tenant
j. Party making bridge loan, if any

4. A Sources and Uses statement of total development costs and Form HUD-2880, Applicant/Recipient Disclosure/Update Report.

5. Certifications from Mortgagor/Lessor, Master Tenant, Master Sub-lessees and investor(s) that HUD has been given full disclosure of all details of the transaction structure, including the information required in Section A above with respect to business agreements and payments.

6. A narrative describing the lease agreements between the Mortgagor/Lessor and Master Tenant, and the Master Tenant and Master sub-lessees, detailing the collection and flow of funds from the Master Sub-lessee to the Master Tenant and from the Master Tenant to the Mortgagor/Lessor.

7. A market study establishing demand for any proposed commercial space. The market study prepared to establish demand in conjunction with applicants' award of New Market Credits may be submitted to satisfy this requirement.

8. Previous Participation Certification, HUD Form 2530, for each of the principals of the Mortgagor/Lessor, Master Tenant and all Master Sub-Lessees (the "Principal(s)"), the acceptability of which is a condition precedent to the issuance of the Firm Commitment. In the event that prior to initial endorsement HUD approves a change to any of the Principals, such approval will be conditioned upon, among other things, the receipt and acceptable review of a Previous Participation Certification for the proposed Principal.

    a. For LIHTC transactions, the existing policy requiring HUD-2530 clearance to be granted prior to the issuance of the Firm Commitment is modified as per Mortgagee Letter 2008-19.

    b. Investors in transactions involving LIHTC may opt not to apply for previous participation clearance and instead file a Limited Liability Corporate Investor (LLCI) certification.

9. The Mortgagor/Lessor, Master Tenant, and Master Sub-Lessees are all subject to the

standard underwriting requirements found in Chapter 8 of the MAP Guide or in the Underwriting Handbook 4470.1, REV-2, Mortgage Credit Analysis for Project Mortgage Insurance.

10. As with non- Master Lease applications, Initial Operating Deficit escrows ("IOD(s)") will be required for all applications proposing a Master Lease ownership structure. For applications involving both residential and commercial components, separate IODs will be established for each. The IOD for each component will be determined based upon anticipated lease-up periods and estimated timeframes required to achieve operating income sufficient to fully satisfy all project operating expenses and mortgage obligations. This determination will be made based upon existing residential and commercial market conditions, and will be the greater of 6 months of total estimated project expenses or the amount of cash needed to reach sustaining occupancy, based on projected absorption rates, plus an additional 60 days of operating expenses.

    a. The IODs may be used to meet shortfalls experienced after commencement of amortization of the FHA-Insured Mortgage. The IODs will be maintained for the longer of 24 months after final endorsement or 3 months after the breakeven point of operations, which shall

be demonstrated through the submission of certified project operating statements pro-rated between residential and commercial operations. The escrow of each component may be released independently if each operating statement demonstrates breakeven operations.

b. In addition, for any IOD to be released, there must be compliance with all Regulatory Agreements, including without limitation all financial reporting requirements (e.g. audited financial statements, monthly accounting reports, etc.) and the project must have received a score of 60 or above on its most recent REAC PASS inspection. In the event that the project has not achieved a 60 or above, but has satisfied the 24 month or breakeven test, the IOD will be transferred to the project reserve for replacement account for use in addressing the project's physical needs.

Section C. Actions Prior to Initial Endorsement

Prior to closing, HUD's Office of General Counsel should review and approve all proposed closing documents to ensure compliance with all firm commitment obligations and Special Conditions. In addition, the following documents will be reviewed by the Hub/PC and or Field Counsel therein:

1. A final detailed Sources and Uses statement of total development costs, reflecting any revisions to hard and soft costs as reflected on the firm commitment, HUD-92264. If any funding sources have changed, a revised HUD-2880 is also required.

2. The following Forms will be revised to more clearly reflect the lease stmcture and HUD requirements:

   Form HUD-92433, Mortgagor's Certificate -To include language that clearly states that the Master Tenant and Sub-lessees must report lease payments during the construction period as rental income.

   Form HUD-3305, Agreement and Certification- To include language that clarifies that the Mortgagor reports all receipts and disbursements from the date of first occupancy, and that all receipts and disbursements are reported during the rehabilitation period for substantial rehabilitation cases. The Agreement and Certification will also require cost certification reporting and compliance requirements for the Master Tenant and all Sub-lessees, unless the financing includes low income housing tax credit equity and an FHA-Insured Mortgage to "actual cost" ratio of less than 80 percent.

3. Evidence that the FHA-Insured Mortgage is in first lien position with respect to all project collateral.

4. All documents (including the Leases) should include conflict language giving the HUD documents supremacy over other documents. Documents may not include indemnification provisions, waivers of jury trials or arbitration provisions, except as otherwise permitted by outstanding HUD guidance.

5. At and as of closing, the Mortgagor, Master Tenant, Master Sub-lessees and investor(s) will reaffirm and certify that the information required in Section A above with respect to business agreements and payments remains true and correct. This would include any changes to disclosures of relationships discussed in Section B, which are subject to HUD's written approval. Without limiting anything contained herein, HUD will rely on all such transaction certifications, each of which may carry criminal sanctions/liability in the event they are false.

6. Each Master Lease or Master Sub-Lease (or memorandum or other notice thereof) shall be recorded in the appropriate real estate records. The Regulatory Agreement executed by each Master Tenant or Master Sub-Lessee shall likewise be recorded. These recorded documents shall be included in Schedule B, Part II of the title insurance policy insuring the mortgage. In those jurisdictions where

the recording of one or more of these documents would result in the imposition of a substantial tax, in lieu of recording the Lease(s) that result in the imposition of the tax, provisions shall be added to the Mortgagor's Regulatory Agreement stating that any Master Tenant and Master Sub-Lessee shall be required to execute, and be bound by, a regulatory agreement in form and substance satisfactory to HUD. Costs associated with complying with this requirement are considered a mortgageable expense.

Section D. Cost Certification and Final Endorsement

The Mortgagor/Lessor, the Master Tenant and all Master Sub-lessees will be required to cost certify the actual costs of the project unless the property contains Low Income Housing Tax Credit (LIHTC) equities and has an FHA-Insured Mortgage loan to cost ratio determined at the time of issuance of the Firm Commitment to be less than 80%. Master Lease projects containing LIHTC equities will follow procedures described in paragraph 3 of this section. For all other projects, the cost certification must contain a certification signed by an authorized agent of each entity, audited by a CPA or IPA, and contain a Schedule of Tax Credit/Syndication Proceeds that includes the following:

a. The amount of syndication proceeds received from the investing partner to date.

b. Purposes for which syndication proceeds received as of the cut-off date were used.
c. Dates, terms, and conditions under which future investor contributions are to be made.

1. Total income of the Mortgagor/Lessor, including lease payments, is recognized during the construction/rehabilitation period. In accordance with HUD Cost Certification requirements, any income received by the Mortgagor/Lessor, Master Tenant and Master Sub-lessees must be applied to reduce the FHA-Insured Mortgage amount. The Mortgagor/Lessor, Master Tenant and Master Sub-lessees are required to submit a certified operating statement which reflects the income collected and expenses incurred in accordance with the lease agreements and all documents required by HUD.

2. A final Sources and Uses Statement is included in the cost certification report as supplemental information. The final statement shall be reviewed to determine actual sources and uses. If the statement indicates that funding sources have exceeded actual uses, a mortgage reduction shall be applied accordingly.

3. If LIHTCs are included in the project development costs and the Secretary determines at the time of Firm Commitment issuance that the ratio of loan proceeds to the actual cost of such projects is less than 80

percent, the mortgagor will not be required to certify actual costs to HUD. For example, in cost programs such as 221(d)(4) and 220, when the "Maximum Insurable Mortgage" derived utilizing Form HUD 92264-A is less than 80 percent of the Total Estimated Replacement Cost of Project derived under section G. of Form HUD-92264, the mortgagor will not be required to certify actual cost to HUD.

For projects that are exempt from providing a cost certification, when the project reaches 100% substantial completion, as deemed by the HUD Inspector, the Mortgagee will be notified of the substantial completion date.

The Mortgagor of projects exempt from providing a cost certification must account for all operating income during construction and ending three months prior to the originally scheduled date of the first principal payment under the mortgage. Therefore, an income and expense statement must be submitted covering the period from first occupancy (if occupancy occurred during construction) or from the date of substantial completion (as deemed by the HUD Inspector) up through the period ending three months prior to the date of the first principal payment under the mortgage as originally scheduled. The statement must be submitted to HUD, at least 30 days prior to the date scheduled for Final Endorsement.

If the income and expenses statement evidence receipt of income ("Excess Funds") during this period, the mortgagor will be required to deposit the Excess Funds into the reserve fund for replacement established under the Regulatory Agreement, unless the HFA has notified HUD that the funds must be used in another manner to be in compliance with IRC Section 42, low-income housing tax credit requirements.

If during construction the project experiences significant cost overruns that result in the mortgagor requesting a mortgage increase, the mortgagor will be required to justify and support such request with documentation satisfactory to HUD that provides a suitable basis for a mortgage increase.

Section E. Multifamily Housing Hub/Program Center (PC) Responsibilities

The Hub/PC is responsible for reviewing the submission to ensure that all applicable conditions have been satisfied and may approve requests to utilize master lease ownership structures in accordance with the requirements of this Mortgagee Letter. Hubs and PCs may not waive any requirements of this Mortgagee Letter. Any proposed waivers must be sent to HQ for review and approval and must include a recommendation from the appropriate Hub Director.

David H. Stevens,
Assistant Secretary for Housing – Federal Housing Commissioner

Attachments:

Attachment 1-Sample Master Lease Ownership Structure
Attachment 2- HUD Regulatory Agreement Riders

- Rider 1
- Rider 2
- Rider 3
- Rider 4

APPENDIX H

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AUTHENTICATION

[Filed: August 27, 2020]

I, Bill Daley, Regional Counsel, Office of General Counsel, Region VI, do hereby certify that I am authorized to cause the seal of the Department of Housing and Urban Development to be affixed to such documents as may require its application and to certify that a copy of any book, record or paper or other document is a true copy of that in the files or records of the Department.

I do hereby certify and attest that the following documents, attached hereto, is a true and correct copy of the documents contained in the files of the Department:

> Regulatory Agreement for Multifamily Housing Project Number 176-35043; Mortgagee CWCapital, LLC; between EGAE, LLC, an Alaska limited liability company, and the Secretary of Housing and Urban Development, dated March 8, 2005; Amount of Mortgage Note $8,067,000.00, together with Exhibit A, Legal Description; recorded March 8, 2005 in the Recording District of Anchorage; Document Number 2005-014354-0; consisting of 10 pages.

In witness whereof, I have signed my name and caused the seal of the Department of Housing and

Urban Development to be affixed this 20th Day of November 2018.

11/20/18	/s/
Date	Attesting Officer

Authority delegated by the Secretary of the Department of Housing and Urban Development and published in the Federal Register 80 Fed. Reg. 62088, 62089 (2015).

To be recorded In Anchorage Recording District

After Recorded Mail to:
United States Department of Housing and Urban Development
Anchorage Field Office
3000 C Street, Ste. 401
Anchorage, AK 99503
Attn: Gary A. Nemec
F2103

Recording Dist: 301 - Anchorage
3/8/2005 10:10 AM Pages 1 of 10

Regulatory Agreement for Multifamily Housing Projects

U.S. Department of Housing And Urban Development
Office of Housing
Federal Housing Commissioner

Under Sections 207, 220, 221(d)(4), 231 and 232, Except Nonprofits

Project Number: **176-35043**	Mortgagee **CW/Capital LLC**
Amount of Mortgage Note **$8,067,000.00**	Date **as of 3/8/2005**

Mortgage Recorded State: Alaska Book	~~County~~ Recording District: Anchorage Page 2005-014348-0	Date 3/8/2005	Originally endorsed for insurance under Section **221(d)(4) of the National Housing Act, as amended.**

This Agreement entered into ~~this~~ as of the 8+ day of March, 2005 between EGAE, LLC, an Alaska limited liability company whose address is 2702 Denali St., Anchorage, AK 99503,

~~their~~ its successors, heirs, and assigns (jointly and severally, hereinafter referred to as Owners) and the undersigned Secretary of Housing and Urban Development and his successors (hereinafter referred to as Secretary).

In consideration of the endorsement for insurance by the Secretary of the above described note or in consideration of the consent of the Secretary to the transfer of the mortgaged property or the sale and conveyance of the mortgaged property by the Secretary, 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 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, and during such further period of time as the Secretary shall be the owner, holder or reinsurer of the mortgage, or during any time the Secretary is obligated to insure a mortgage on the mortgaged property.

1. Owners, except as limited by paragraph 17 hereof, assume and agree to make promptly all payments due under the note and mortgage.

2. (a) Owners shall establish or continue to maintain a reserve fund for replacements by the allocation to such reserve fund in a separate account with the mortgagee or in a safe and responsible depository designated by the mortgagee, concurrently with the beginning of payments towards amortization of the principal of the mortgage insured or held by the Secretary of an amount equal to $2,689.00 per month, unless a different date or amount is approved in writing by the Secretary.

   Such fund, whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America shall at all times be under the control of the mortgagee. Disbursements from such fund, whether for the purpose of effecting replacement of structural elements and mechanical equipment of the project or for any other purpose, may be made only after receiving the consent in writing of the Secretary. In the event that the owner is unable to make a mortgage note payment on the due date and that payment

cannot be made prior to the due day of the next such installment or when the mortgagee has agreed to forgo making an election to assign the mortgage to the Secretary based on a monetary default, or to withdraw an election already made, the Secretary is authorized to instruct the mortgagee to withdraw funds from the reserve fund for replacements to be applied to the mortgage payment in order to prevent of cure the default. In addition, in the event of a default in the terms of the mortgage, pursuant to which the loan has been accelerated, the Secretary may apply or authorize the application of the balance in such fund to the amount due on the mortgage debt as accelerated.

(b) Where Owners are acquiring a project already subject to an insured mortgage, the reserve fund for replacements to be established will be equal to the amount due to be in such fund under existing agreements or charter provisions at the time Owners acquire such project, and payments hereunder shall begin with the first payment due on the mortgage after acquisition, unless some other method of establishing and maintaining the fund is approved in writing by the Secretary.

3. Real property covered by the mortgage and this agreement is described in ~~Schedule~~ Exhibit A attached hereto.

(This paragraph 4 is not applicable to cases insured under Section 232.)

4. (a) Owners shall make dwelling accommodation and services of the project available to occupants at charges not exceeding those established in accordance with a rental schedule approved in writing by the Secretary, for any project subject to regulation of rent by the Secretary. Accommodations shall not be rented for a period of less than thirty (30) days, or, unless the mortgage is insured under Section 231, for more than three years. Commercial facilities shall be rented for such use and upon such terms as approved by the Secretary. Subleasing of dwelling accommodations, except for subleases of single dwelling accommodations by the tenant thereof, shall be prohibited without prior written approval of Owners and the Secretary and any lease shall so provide. Upon discovery of any unapproved sublease, Owners shall immediately demand cancellation and notify the Secretary thereof.

(b) Upon prior written approval by the Secretary, Owners may charge to and receive from any tenant such amounts as from time to time may be mutually agreed upon between the tenant and the Owners for any facilities and/or services which may be furnished by the Owners or others to such tenant upon his request, in addition to the facilities and services included in the approved rental schedule. Approval of charges for facilities and services is not required for any project not subject to regulation of rent by the Secretary.

(c) For any project subject to regulation of rent by the Secretary, the Secretary will at any time entertain a written request for a rent increase properly supported by substantiating evidence and within a reasonable time shall:

(i) Approve a rental schedule that is necessary to compensate for any net increase, occurring since the last approved rental schedule, in taxes (other than incomes taxes) and operating and maintenance cost over which Owners have no effective control or;

(ii) Deny the increase stating the reasons therefor.

5. (a) If the mortgage is originally a Secretary-held purchase money mortgage, or is originally endorsed for insurance under any Section other than Sections 231 or 232 and is not designed primarily for occupancy by elderly persons, Owners shall not be in selecting tenants discriminate against any person or persons by reason of the fact that there are children in the family.

(b) If the mortgage is originally endorsed for insurance under Section 221, Owners shall in selecting tenants give to displaced persons or families an absolute preference or priority of occupancy which shall be accomplished as follows.

(1) For a period of sixty (60) days from the date of original offering, unless a shorter period of time is approved in writing by the

Secretary, all units shall be held for such preferred applicants, after which time any remaining unrented units may be rented to non-preferred applicants;

(2) Thereafter, and on a continuing basis, such preferred applicants shall be given preference over nonpreferred applicants in their placement on a waiting list to be maintained by the Owners; and

(3) Through such further provisions agreed to in writing by the parties.

(c) Without the prior written approval of the Secretary not more than 25% of the number of units in a project insured under Section 231 shall be occupied by persons other than elderly persons.

(d) All advertising or efforts to rent a project insured under Section 231 shall reflect a bona fide effort of the Owners to obtain occupancy by elderly persons.

6. Owners shall not without the prior written approval of the Secretary:

(a) Convey, transfer, or encumber any of the mortgaged property, or permit the conveyance, transfer or encumbrance of such property.

(b) Assign, transfer, dispose of, or encumber any personal property of the project, including rents, or pay out any funds except from surplus cash,

except for reasonable operating expenses and necessary repairs.

(c) Convey, assign, or transfer any beneficial interest in any trust holding title to the property, or the interest of any general partner in a partnership owning the property, or any right to manage or receive the rents and profits from the mortgaged property.

(d) Remodel, add to, reconstruct, or demolish any part of the mortgaged property or subtract from any real or personal property of the project.

(e) Make, or receive and retain, any distribution of assets or any income of any kind of the project except surplus cash and except on the following conditions:

(1) All distributions shall be made only as of and after the end of a semiannual or annual fiscal period, and only as permitted by the law of the applicable jurisdiction;

(2) No distribution shall be made from borrowed funds, prior to the completion of the project or when there is any default under this Agreement or under the note or mortgage;

(3) Any distribution of any funds of the project, which the party receiving such funds is not entitled to retain hereunder, shall be held in trust separate and apart from any other funds; and

(4) There shall have been compliance with all outstanding notices of requirements for proper maintenance of the project.

(f) Engage, except for natural persons, in any other business or activity, including the operation of any other rental project, or incur any liability or obligation not in connection with the project.

(g) Require, as a condition of the occupancy or leasing of any unit in the project, any consideration or deposit other the the prepayment of the first month's rent plus a security deposit in an amount not in excess if one month's rent to guarantee the performance of the covenants of the lease. Any funds collected as security deposits shall be kept separate and apart from all other funds of the project in a trust account the amount of which shall at all times equal or exceed the aggregate of all outstanding obligations under said account.

(h) Permit the use of the dwelling accommodations or nursing facilities of the project for any purpose except the use which was originally intended, or permit commercial use greater than that originally approved by the Secretary.

7. Owners shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition. In the event all or any of the buildings covered by the mortgage shall be

destroyed or damaged by fire or other casualty, the money derived from any insurance on the property shall be applied in accordance with the terms or the mortgage.

8. Owners shall not file any petition in bankruptcy or for a receiver or in insolvency or for reorganization or composition, or make any assignment for the benefit of creditors or to a trustee for creditors, or permit an adjudication in bankruptcy or the taking possession of the mortgaged property or any part thereof by a receiver or the seizure and sale of the mortgaged property or any part thereof under judicial process or pursuant to any power of sale, and fail to have such adverse actions set aside within forty-five (45) days.

9. (a) Any management contract entered into by Owners or any of them involving the project shall contain a provision that, in the event of default hereunder, it shall be subject to termination without penalty upon written request by the Secretary. Upon such request Owners shall immediately arrange to terminate the contract within a period of not more than thirty (30) days and shall make arrangements satisfactory to the Secretary for continuing proper management of the project.

(b) Payment for services, supplies, or materials shall not exceed the amount ordinarily paid for such services, supplies, or materials in the area where the services are rendered or the supplies or materials furnished.

(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.

(d) The books and accounts of the operations of the mortgaged property and of the project shall be kept in accordance with the requirements of the Secretary.

(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.

(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.

(g) All rents and other receipts of the project shall be deposited in the name of the project in a financial institution, whose deposits are insured by an agency of the Federal Government. Such funds shall be withdrawn only in accordance with the provisions of this Agreement for expenses of the project or for distributions of surplus cash as permitted by paragraph 6(e) above. Any Owner receiving funds of the project other than by such distribution of surplus cash shall immediately deposit such funds in the project bank account and failing so to do in violation of this Agreement shall hold such funds in trust. Any Owner receiving property of the project in violation of this Agreement shall hold such funds in trust. At such time as the Owners shall have lost control and/or possession of the project, all funds held in trust shall be delivered to the mortgagee to the extent that the mortgage indebtedness has not been satisfied.

(h) If the mortgage is insured under Section 232:

(1) The Owners or lessees shall at all times maintain in full force and effect from the state or other licensing authority such licence as may be required to operate the project as a nursing home and shall not lease all or part of the project except on terms approved by the Secretary.

(2) The Owners shall suitably equip the project for nursing home operations.

(3) The Owners shall execute a Security Agreement and Financing Statement (or other form of chattel lien) upon all items of equipment, except as the Secretary may exempt, which are not incorporated as security for the insured mortgage. The Security Agreement and Financing Statement shall constitute a first lien upon such equipment and shall run in favor of the mortgagee as additional security for the insured mortgage.

(i) If the mortgage is insured under Section 231, Owners or lessees shall at all times maintain in full force and effect from the state or other licensing authority such license as may be required to operate the project as housing for the elderly.

10. Owners will comply with the provisions of any Federal, State, or local law prohibiting discrimination in housing on the grounds of race, color, religion or creed, sex, or national origin, including Title VIII of the Civil Rights Act of 1968 (Public Law 90-284; 82 Stat. 73), as amended, Executive Order 11063, and all requirements imposed by or pursuant to the regulations of the Department of Housing and Urban Development implementing these authorities (including 24 CFR Parts 100, 107 and 110, and Subparts I and M of Part 200).

11. Upon a violation of any of the above provisions of this Agreement by Owners, 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:

(a) (i) If the Secretary holds the note - declare the whole of said indebtedness immediately due and payable and then proceed with the foreclosure of the mortgage;

(ii) If said note is not held by the Secretary - notify the holder of the note of such default and request holder to declare a default under the note and mortgage, and holder after receiving such notice and request, but not otherwise, at its option, may declare the whole indebtedness due, and thereupon proceed with foreclosure of the mortgage, or assign the note and mortgage to the Secretary as provided in the Regulations;

(b) Collect all rents and charges in connection with the operation of the project and use such collections to pay the Owners' obligations under this Agreement and under the note and mortgage and the necessary expenses of preserving the property and operating the project.

(c) Take possession of the project, bring any action necessary to enforce any rights of the Owners growing out of the project in accordance with the terms of this Agreement until such time as the Secretary in his discretion determines that the Owners are again in a position to operate the project in accordance with the terms of this Agreement and in compliance with the requirements of the note and mortgage.

(d) Apply to any court, State of Federal, for specific performance of this Agreement, for an injunction against any violation of the Agreement, for the appointment of a receiver to take over an operate the project in accordance with the terms of the Agreement, or for such other relief as may be appropriate, since the injury to the Secretary arising from a default under any of the terms of this Agreement would be irreparable and the amount of damage would be difficult to ascertain.

12. As security for the payment due under this Agreement to the reserve fund for replacements, and to secure the Secretary because of his liability under the endorsement of the note for

insurance, and as security for the other obligations under this Agreement, the Owners respectively assign, pledge and mortgage to the Secretary their rights to the rents, profits, income and charges of whatsoever sort which they may receive or be entitled to receive from the operation of the mortgaged property, subject, however, to any assignment of rents in the insured mortgage referred to herein. Until a default is declared under this Agreement, however, permission is granted to Owners to collect and retain under the provisions of this Agreement such rents, profits, income, and charges, but upon default this permission is terminated as to all rents due or collected thereafter.

13. As used in this Agreement the term:

(a) "Mortgage" includes "Deed of Trust", "Chattel Mortgage", "Security Instrument", and any other security for the note identified herein, and endorsed for insurance or held by the Secretary;

(b) "Mortgagee" refers to the holder of the mortgage identified herein, its successors and assigns;

(c) "Owners" refers to the persons named in the first paragraph hereof and designated as Owners, their successors, heirs and assigns;

(d) "Mortgaged Property" includes all property, real, personal or mixed, covered by the mortgage or mortgages and security agreement or security

agreements securing the note endorsed for insurance or held by the Secretary;

(e) "Project" includes the mortgaged property and all its other assets of whatsoever nature or wheresoever situate, used in or owned by the business conducted on said mortgaged property, which business is providing housing and other activities as are incidental thereto;

(f) "Surplus Cash" means any cash remaining after:

(1) the payment of:

(i) All sums due or currently required to be paid under the terms of any mortgage or note insured or held by the Secretary;

(ii) All amounts required to be deposited in the reserve fund for replacement;

(iii) All obligations of the project other than the insured mortgage unless funds for payment are set aside or deferment of payment has been approved by the Secretary; and

(2) the segregation of:

(i) An amount equal to the aggregate of all special funds required to be maintained by the project; and

(ii) All tenant security deposits held.

(g) "Distribution" means any withdrawal or taking of cash or any assets of the project,

including the segregation of cash or assets for subsequent withdrawal within the limitations of Paragraph 6(e) hereof, and excluding payment for reasonable expenses incident to the operation and maintenance of the project.

(h) "Default" means a default declared by the Secretary when a violation of this Agreement is not corrected to his satisfaction within the time allowed by this Agreement or such further time as may be allowed by the Secretary after written notice;

(i) "Section" refers to a Section of the National Housing Act, as amended.

(j) "Displaced persons or families" shall mean a family or families, or a person, displaced from an urban renewal area, or as the result of government action, or as a result of a major disaster as determined by the President pursuant to the Disaster Relief Act of 1970.

(k) "Elderly person" means any person, married or single, who is sixty-two years of age or over.

14. This instrument shall bind, and the benefits shall inure to, the respective Owners, their heirs, legal representatives, executors, administrators, successors in office or interest, and assigns, and to the Secretary and his successors so long as the contract of mortgage insurance continues in effect, and during such further time as the Secretary shall be the owner, holder, or reinsurer of the mortgage, or obligated to reinsure the 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.

16. The invalidity of any clause, part or provisions of this Agreement shall not affect the validity ~~or~~ of the remaining portions thereof.

17. The following Owners: EGAE, LLC, its members and managers, present and future 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.

18. **Multiple Counterparts. This Agreement may be executed in counterparts, each of which will be an original, but which, taken together, will constitute one and the same Agreement.**

(To be executed with formalities for recording a deed to real estate.)

Regulatory Agreement for Multifamily Housing Projects between EGAE, LLC and the Secretary of Housing and Urban Development

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first set forth above.

EGAE, LLC;
an Alaska limited liability company

By: /s/ Marc Marlow
Marc Marlow, Manager

STATE OF ALASKA)
) ss
THIRD JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this 4th of March. 2005, before me, the undersigned, appeared Marc Marlow, who acknowledged being the Manager of EGAE, LLC, an Alaska limited liability company, and voluntarily signing and sealing the foregoing instrument on behalf of said limited liability company, and being authorized so to do.

[Notary Signature]

Regulatory Agreement for Multifamily Housing Projects between EGAE, LLC and the Secretary of Housing and Urban Development

SECRETARY OF HOUSING AND URBAN DEVELOPMENT Acting by and through the FEDERAL HOUSING COMMISSIONER

By: /s/ Renee D. Greenman
Name: Renee D. Greenman
Title: Northwest/Alaska Multifamily Hub

STATE OF _____)
) ss:
COUNTY OF _____)

On this 1st day of March, 2005, before me, Patricia R. West, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Renee D. Greenman, known to me to be the duly appointed Authorized Agent and the person who executed and acknowledged execution and delivery of the aforesaid instrument for and on behalf of the Secretary of Housing and Urban Development, for the purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Notary Signature]

THIS INSTRUMENT WAS PREPARED BY:

Geoffrey M. White
Vorys, Sater, Seymour & Pease LLP
Suite 2000, Atrium Two
221 E. Fourth Street
Cincinnati, Ohio 45201

EXHIBIT A

Legal Description

Unit A of McKINLEY TOWER, a planned community, as shown on the Floor Plans filed under Plat No. 2005-26, Records of the Anchorage Recording District, Third Judicial District, State of Alaska, and as described in the Declaration of McKinley Tower, recorded on the 8 day of March, 2005 at Reception No. 2005-014348, Anchorage Recording District, Third Judicial District, State of Alaska.

APPENDIX I

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT OFFICE OF HEARINGS AND APPEALS

No. 18-AF-0227-CM-002

Volume 1

[Filed: August 27, 2020]

In the Matter of:	)
	)
EGAE, LLC, Marlow Family Exempt Perpetual Trust,	)
	)
Respondents.	)
	)

222 West 7th Avenue
Anchorage, Alaska

Tuesday, July 30, 2019

The HEARING in the above-entitled matter was convened at 9:00 a.m., pursuant to notice.

BEFORE:

JUDGE ALEXANDER FERNANDEZ

[p.2]

APPEARANCES:

On behalf of Agency:

MARY MERCHANT, ESQUIRE
SAKEENA ADAMS, ESQUIRE
Government Counsel
United States Department of Housing
and Urban Development
819 Taylor Street, Room 13A47
Fort Worth, Texas 76012
(817) 978-9561

On behalf of Respondents:

MARC MARLOW, PRO SE
Household of Marc Marlow
337 East 4th Avenue, Unit 1
Anchorage, Alaska 99501
(907) 227-1694

* * * * *

[p.3]

C O N T E N T S

AGENCY EXHIBITS: MARKED/RECEIVED 21

No. 1 - March 8, 2005, Regulatory Agreement for Multifamily Housing Projects

No. 2 - March 8, 2005, Deed of Trust Note

No. 3 - March 8, 2005, Mortgage Deed of Trust

No. 4 - December 9, 2004, Previous Participation Certification

No. 5 - September 14, 2007, Previous Participation Certification

No. 6 - Printout, Annual Financial Statement Submission History

No. 7 - June 6, 2018, Pre-Penalty Notice Letter, HUD Enforcement Center to EGAE, LLC

No. 8 - June 6, 2018, Pre-Penalty Notice Letter, HUD Enforcement Center to Marlow Family Exempt Perpetual Trust

[p.4]

AGENCY EXHIBITS (CONT'D): MARKED/RECEIVED

No. 9 - August 13, 2018, REAC Inspection

No. 10 - July 18, 2018, Letter, Marlow to File

No. 11 - May 5, 2017, Pre-Penalty Notice Letter, HUD Enforcement Center to EGAE, LLC

No. 12 - June 16, 2016, Pre-Penalty Notice Letter, HUD Enforcement Center to Marlow

No. 13 - June 16, 2016, Pre-Penalty Notice Letter, HUD Enforcement Center to EGAE, LLC

No. 14 - March 3, 2016, Pre-Penalty Notice Letter, HUD Enforcement Center to Marlow

No. 15 - November 30, 2015, Pre-Penalty Notice Letter, HUD Enforcement Center to Marlow

No. 16 - iREMS Property History

No. 17 - iREMS Problem Statements

No. 18 - September 27, 2017, Management Review Summary 18

No. 19 - 2010 Computation of Surplus Cash, McKinley Tower Apartments

No. 20 - 2010 Cash Flow Statement, McKinley Tower Apartments

No. 21 - 2011 Statement of Profit and Loss, McKinley Tower Apartments

* * *

[p.13]

Those issues, Your Honor, have no bearing on this -- this offense that the respondents have committed in not filing five years of audited financial reports, which have deprived the government of any ability to intervene, to take action, and to prevent where we are today.

Where we are today, Your Honor, the government has paid $6.4 million to the lender in this case as partial settlement of the lender's claim. The

government has lived up to its commitment to pay off this loan when the respondents defaulted.

What have the respondents done, they have failed to file audits repeatedly. There has been a record of complete disregard for HUD's rules.

Justice -- I submit, Your Honor, that justice requires an award of penalties to the government for the amount sought, the $220 approximately.

JUDGE FERNANDEZ: That may very well be

[p.14]

the case, but what I'm hearing is an argument that goes to weight, not an argument that goes to admission; right. What you're asking me to do is to balance it, not -- to not consider it.

So what I'm hearing is it may have some impact just not as great as -- just not as great of an impact as Mr. Marlow would have me believe that it would have.

MS. ADAMS: The relevant evidence, Your Honor, in Rule 401 of the Federal Rules of Civil Procedure --

JUDGE FERNANDEZ: You read it, I like that.

MS. ADAMS: -- speaks to relevant evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

I submit, Your Honor, that tax credits, again issues surrounding the closing of the loan, have no probable

value to this case, would not make any of the factors in existence -- would not

[p.15]

prove the existence of any of the factors which the Court has to consider today to determine the amount of the penalty.

JUDGE FERNANDEZ: What's the regulatory cite for the last factor? Honestly I can't find it right now.

MS. ADAMS: That would be -- the factors, Your Honor?

JUDGE FERNANDEZ: Yeah.

MS. ADAMS: Would be -- it's 24 C.F.R. Part 30.80, factors in determining the amount of the settlement of penalty.

JUDGE FERNANDEZ: Is there anything else you'd like to argue?

MS. ADAMS: No, Your Honor.

JUDGE FERNANDEZ: Mr. Marlow.

MR. MARLOW: I object to the motion. I object to the motion, Your Honor. I believe the diminished value of the tax credits because of an action, or inaction, taken by HUD has everything to do with where we are today. It is the genesis of where we are today.

[p.16]

If you disallow me to point out the relevant factors surrounding the genesis of this loan and why the audits

aren't -- aren't filed, you will deprive yourself of all the variables that contributed to where we are today.

In the Administrative Procedures Act, U.S.C. 5, Section 706, you have broad authority to rule. All of their -- all of their findings and all of their conclusions are null and void, just wipe them out, because they came from something that was not right in the first place, so I object to Ms. Adams' motion.

JUDGE FERNANDEZ: Let's back up for a second. So what their argument is they're saying, look, you already decided on liability. You said that the fact that he hasn't filed these reports, he's already responsible for that, which they're right, I have. Hold on. Just hear me out for a second.

What we're here to determine is how much in terms of a penalty respondent should pay, if any, right, because that's in essence what I'm

[p.17]

here to determine. Then they told me there are factors that you have to consider under 30.80, which is true, and we heard what the list of those factors are.

What the government is arguing is that the fact, or not the fact, of the surrounding circumstances regarding the -- and I want to get it right, so I actually wrote it down. The diminished value of the housing tax credit, that bears nothing on whether or not a civil penalty or what amount of a civil penalty should be accessed. Tie it into that for me.

MR. MARLOW: If as a borrower, I close a loan with every expectation that I can -- that I can recoup to myself money from a tax credit that another arm of the federal government is offering or incentivizing me to refurbish a building and I have every expectation -- because every other loan in the world that use historic tax credits enjoy that outcome and I close my loan in 2005. I'm already pregnant.

A year later I am told that I don't get

[p.18]

to enjoy the same benefit that every other project that earned federal historic tax credits would get to enjoy, I think that has relevance on everything that we're doing here today, whether or not it's even valid in the first place for -- for them to bring a claim to me at all, why they didn't try to fix that in the very beginning of the situation.

The issue of why the audits were filed in 2007, '08, '09, '10, '11, and '12 is simply the gravity of the problem we have here today or the way it's grown was masked in the early years because of a benefit that I negotiated with the Municipality of Anchorage eliminating the need to pay property taxes and so -- and the building was full, you know, the economy was riding high, everything was going along just fine.

JUDGE FERNANDEZ: Let me stop you, because you're not under oath, so it's not really testimony up until you're under oath. So what you're saying is that there's a difference between '07, '08, '09, and '10 ones than the '13, '14, 22 '15, '16, and '17 ones, which you would develop if

[p.19]

you're given an opportunity?

MR. MARLOW: I'm not saying there's a difference --

JUDGE FERNANDEZ: In terms of why you filed them.

MR. MARLOW: That's correct. They all should have been filed. I'm just saying as a borrower -- as an individual trying to avail himself to the benefits that the federal government as a -- as a society affords to people that -- because the government wants to see affordable housing built, as that individual, I tried to avail myself to everything that could prove to my benefit and have every expectation to acquire it.

Once that was taken away from me, then I had a couple of choices. I could just go over in the corner and cry or I could fight or I could just knuckle down and try to deal with it and, you know, keep up -- keep up with the requirements of the regulatory and statutory rules in the loan that I signed in 2005.

[p.20]

JUDGE FERNANDEZ: Mr. Marlow, I understand your argument. Thank you.

The government's motion is denied on the basis of relevance. I'm not sure what the probative value of the evidence sought to be and introduced is. But on the basis of relevance, the government's motion is denied. Mr. Marlow will be able to put the evidence in.

Is there another preliminary matter?

MS. ADAMS: Yes, Your Honor.

MS. MERCHANT: Your Honor, the government requests permission to admit all 40 exhibits as an official domestic public record under seal.

JUDGE FERNANDEZ: Under seal?

MS. MERCHANT: Yes.

JUDGE FERNANDEZ: Why do we want them under seal?

MS. MERCHANT: Your Honor, because we put them -- we have a seal on each of them.

JUDGE FERNANDEZ: You don't mean like seal to the public, you mean

* * *

[p.25]

HUD received no financial -- no audited financial data after that point. HUD was ultimately unable to intervene to prevent where we are today. And where we are, the government has payed 6.4 million to the lender, because the defendant -- the respondent in the case defaulted on its loan.

The government has fulfilled its bargain. The respondents have failed miserably to fulfill their bargain. Thank you, Your Honor.

JUDGE FERNANDEZ: Thank you, Counsel. Now, Mr. Marlow, you can make an opening statement at this time or sometimes people prefer to hold onto the opening statement until it's their turn to present their case. Whichever one you want to do is fine with me.

MR. MARLOW: I would prefer the latter.

JUDGE FERNANDEZ: Your first witness.

MS. MERCHANT: Our first witness is Sean Gallagher. May I go out and retrieve him?

JUDGE FERNANDEZ: Of course.

Whereupon,

SEAN GALLAGHER

[p.26]

was called as a witness, and having been first duly sworn, was examined and testified as follows:

JUDGE FERNANDEZ: You may be seated. Your witness.

DIRECT EXAMINATION

BY MS. MERCHANT:

Q For the record, would you please state your name?

A Sean Gallagher.

Q What is your current position, Mr. Gallagher?

A I'm an account executive for Office of Health Care Programs, which is part of HUD's office --

JUDGE FERNANDEZ: Mr. Gallagher.

THE WITNESS: Yes.

JUDGE FERNANDEZ: I'm old. You need to speak up.

THE WITNESS: Okay.

JUDGE FERNANDEZ: That does not work.

THE WITNESS: Does not work. Do you want me to repeat myself, Your Honor?

[p.27]

JUDGE FERNANDEZ: No, that's good.

BY MS. MERCHANT:

Q How long have you worked with HUD, Mr. Gallagher?

A Thirty years and six months.

Q In 2004, where did you work?

A I worked in the Seattle field office.

Q What position did you have in that office?

A I was a production chief.

JUDGE FERNANDEZ: Pull him through this, because otherwise we're going to be here forever.

BY MS. MERCHANT:

Q In general, how many projects have you reviewed and been involved in?

A During what time?

Q Your career as a production chief.

A Probably 180 to 220.

Q Do you remember McKinley Tower 20 Apartments?

A Yes, I remember it well.

Q Just briefly, why do you remember

[p.28]

A A number of reasons. The project was a project that we had been doing a lot of marketing and outreach in the Alaska area in 2000, 2001, and '02. We knew the McKay building at that time. It was called McKay building. Well, it was considered an eyesore downtown -- into downtown. It was basically a shell of a building and there had been a lot of talk about redevelopment of it, but nothing had really happened, so --

Q Thank you. In the fall of 2003, approximately, did you receive a -- or did you enter into discussions with Mr. Marlow and the respondent for an FHA loan?

A My office did and I was involved in that -- those conversations, yes.

Q What was the first -- in brief terms, what was the first step for this?

A The first step was actually a general feasibility scoping proposal introductory conversations with the lender about would this even be feasible, would it fit within the box of

* * *

APPENDIX J

Transcript Excerpts
July 31, 2019

[Filed: August 27, 2020]

* * *

[p.5]

yesterday, we think the court would benefit from additional testimony in this case. Mr. Marlow has indicated in his pre-hearing statement that the focus of his testimony will be, as we indicated, irrelevant issue of the tax credits. However, Mr. Marlow also has information on the factors that would be relevant to the court. For that reason, we submit that we reopen our case and call him as a witness and not be limited in cross-examination to what he testifies to.

JUDGE FERNANDEZ: Did you list another witness?

MS. MERCHANT: Yes. We listed any witnesses that would be called by the respondent.

JUDGE FERNANDEZ: I do seem to recall that. Mr. Marlow, do you have any objection to being called at this time?

MR. MARLOW: I would prefer to present what I had prepared, because you told me yesterday that they would have the opportunity to question me after I had

to say what I had to say. And I don't know why they can't do the whole thing at

[p.6]

the same time.

JUDGE FERNANDEZ: They can if I say it's okay. Let me explain to you a procedural nicety of litigation.

If they don't call you in their case-in-chief like they're trying to do now, they waive their right to ask you questions about anything that you do not bring up in your case when you present it.

Do you understand that?

MR. MARLOW: I do understand that.

JUDGE FERNANDEZ: So if you tell me that it's okay for them to ask you questions about things that you don't bring up, then I don't have to worry about deciding whether or not they can call you up now and I can just say you can ask him about whatever it is you want as long as it's within legally permissible bounds once he talks about what he wants to talk about.

MR. MARLOW: Well, I would prefer the latter if it's okay with you.

JUDGE FERNANDEZ: I'm good either way.

[p.7]

MR. MARLOW: Okay.

JUDGE FERNANDEZ: All right. Well, you heard what he had to say. Within the scope of whatever is

allowable, I'm going to let you ask him questions after he finishes testifying.

MS. MERCHANT: Thank you, Your Honor. That would be fine with the government.

JUDGE FERNANDEZ: So ordered. Anything else?

MS. MERCHANT: No, Your Honor. Not at this time.

JUDGE FERNANDEZ: All right, Mr. Marlow. Yes?

MR. MARLOW: Were we going to allow the other people to come in the courtroom?

JUDGE FERNANDEZ: I ordered that. They're back there.

MR. MARLOW: Oh, I thought you were talking about Ms. Phile and Jerry.

JUDGE FERNANDEZ: So whoever wants to show up.

MS. MERCHANT: They're on their way.

[p.8]

JUDGE FERNANDEZ: Okay. All right. So Mr. Marlow, you know what? You don't have to sit in the witness box. You can stand up at the podium if you want. I just need you to raise your right hand for me.

Whereupon,

MARC MARLOW

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT TESTIMONY

MR. MARLOW: Good morning, Your Honor, and may it please the court. The uncompleted, extensive, and time-consuming audits are not completed because of HUD's continual denial from and improper taking of $400,000 of property -- of my property ultimately resulting in my inability to afford to complete the audits.

HUD erred in 2006 by denying me the use of a master lease to close my historic tax credits and forcing me against my will into a tier one closing, resulting in losses in excess of $400,000 to my property and person. HUD admitted their

[p.9]

error in a 2009 letter entitled Mortgage Letter 2009-40 where they stated that master leases are what HUD should be allowing to every developer using historic tax credits.

JUDGE FERNANDEZ: Do I have that as an exhibit?

MR. MARLOW: You will in a moment.

JUDGE FERNANDEZ: Okay. It's not one of the ones that's already marked?

MR. MARLOW: It is.

JUDGE FERNANDEZ: Then just tell me what number it is so I have it clean on the record.

MR. MARLOW: It's number three.

JUDGE FERNANDEZ: Got it.

MR. MARLOW: HUD's denial prevented me from collecting what was rightfully owed constituting an improper and unlawful taking of roughly $400,000 under the 5th and 14th Amendments of the U.S. Constitution.

As a result of HUD's unlawful taking, and as HUD continues to deny me my property, the snowball effect of crunch cash flow has

[p.10]

irreparably harmed my livelihood, ultimately resulting in the expensive audits at hand not being completed in a timely fashion. Therefore, I respectfully request that Your Honor find for me, credit in my HUD loan with the amount owed to me plus interest, reset the mortgage, and right this 13-year wrong.

If HUD is successful in this hearing, Your Honor, HUD will not only be denying me the $400,000 plus interest owed to me; they will further damage my property and risk by moving to sell my note, ultimately resulting in a further $9 million loss adding insult to injury. The Federal Government should not be allowed to take my livelihood in this fashion. This would be the antithesis of our country's constitutional principles.

Your Honor, the first exhibit I'd like to draw your attention to is my cost certification audit marked number one.

JUDGE FERNANDEZ: Okay. That's Respondent's Exhibit 1?

[p.11]

MR. MARLOW: Yes. It is required if a project wants to sell historic tax credits. It is used for the purpose of calculating the historic tax credits available to a project. In the first column, the $50 million number, that's the total investment in this project. The second column is the qualified expenditures. The IRS and the law doesn't allow you to collect tax credits on the cost of acquiring the site and things like that. Just the restoration costs associated with the property that is being restored. And then the gross tax credit number is 20 percent of that number. Okay. And then parking garage is over here in the third column. So it's the sum of the two at the bottom.

As you can see, it is a total investment of approximately $15 million. That is my basis. Simple arithmetic shows that the $15,984,539 minus $8,000,067, which is my original loan amount, equals $7,917,539. That number represents my original investment on my equity more or less. Moreover, my equity has grown over the last 13

[p.12]

years by another $1.1 million in the amount of principal I have paid down on my original loan.

It is important to understand why I had to commission the audit in the first place. In 1966, Congress passed a law called the National Historic Preservation Act. Within the act, each state in the

union must establish a state historic preservation office, a SHPO. In 1976, Congress passed the Tax Reform Act of 1976. Within this act, Congress established an incentive for the marketplace to aggressively embrace the goal set forth in the National Historic Preservation Act. Congress's passing of the Tax Reform Act of 1976 was the genesis of the Historic Tax Credit Program.

The Historic Tax Credit Program in accordance with the Tax Reform Act of 1976 provides that developers are paid the fair market value of the tax credits. HUD unfairly and impurely denied ne the fair market value of my historic tax credits.

In 2004, during the process of applying

[p.13]

for my 221(d)(4) HUD mortgage, I was instructed to take my design drawings Alaska's SHPO and get a no action letter to assure the underwriters that in using my federally insured mortgage proceeds, no national treasures would be damaged or lost. I figured the letter would be easy to acquire. The building I was trying to renovate wasn't built until 1952, hardly historic to my uniformed mind. And it had been an embarrassing hole on the east end of downtown Anchorage for the 22 years immediately preceding 2004.

Well, I was wrong. The folk sat the SHPO called me about a week later to let me know that my project was historically significant, and if I wanted to proceed with my mortgage application, I had to change my design to restore and preserve the original look of the building. The director of the Alaska SHPO office could tell that

I was crestfallen, so she quickly assured me that by complying, I would be able to cover the cost and more with the sale of the historic tax credits that I would be creating as a result of

[p.14]

complying.

With no real choice, I complied. I hired a historic architectural consultant out of Washington, D.C., and a historic tax credit consultant from California. We changed the design, created very accurate budgets, and I closed the 221(d)(4) mortgage in March of 2005, which was a construction and long-term loan in one. There was construction interest built into the budget and during the construction period the loan was additionally secured by the general contractor's bond and insurance policies.

Now, the next steps are very critical. One cannot sell historic tax credits until a cost certification audit is done. One cannot ac quire a cost certification audit until the construction is essentially done. Moreover, the historic tax credit transaction must occur before the building receives a certificate of occupancy from the local authority. If tenants move into the building before the historic tax credits are sold, the historic tax credits become ineligible for sale.

[p.15]

During the late spring of 2006, we got ready to close our historic tax credit transaction like virtually every other project selling historic tax credits does with a master lease arrangement. HUD said no, greatly

diminishing the value of my historic tax credits. In 2006, I held roughly $2.4 million in historic tax credits. When HUD forced me to use the tier one, my yield was 85 cents on the dollar. I received about $2 million for my $2.4 million in credits.

However, had HUD allowed me to use a master lease, I would have and should have received nearly $2.5 million. The difference in my case exceeded $400,000. Because tenants cannot move into the building and the building cannot generate revenue until the historic tax credit transition is closed, there is a very narrow window when the historic tax credits must be closed.

Despite my righteous expectations to use a master lease to close my historic tax credits as virtually every other historic tax credit

[p.16]

transaction does, HUD forced me to use the tier one. This was an error by HUD. In fact, I am only aware of one other case which nearly resulted in a developer having to use a tier one structure. Therefore, there are no HUD cases for me to rely on.

In that other case, HUD attempted to force a man named Marcel Wisznia from New Orleans, Louisiana, in a similar circumstance to mine, to close his tax credits utilizing a tier one structure instead of a master lease. Mr. Wisznia fought HUD for a year to ensure that he received the fair market value of his rightfully owned tax credit property. In fact, upon final closing, Mr. Wisznia actually received $1.05 per credit.

I would like to direct your attention to Exhibit 2, which is an email from Mr. Wisznia outlining the details of the result with HUD.

Your Honor, HUD made a mistake interpreting and executing the law in my case, a mistake that cost me nearly half a million dollars. HUD admitted their error in a letter in

[p.17]

2009 which I mentioned before, which is Exhibit 3. If you'd please refer to that.

In the letter, HUD states, and I quote, "Master leases are used to maximize the benefits of the following tax credit sources. Federal historic tax credits, federal new market tax credit, state historic tax credits, state new market tax credits, and federal low income housing tax credits. Master leases are advantageous to investors and developers participating in these programs by providing maximum leverage for project financing and premium pricing for equity, while reducing the need for additional debt."

In the mortgage letter of 2009-40, HUD admits master leases are the standard for historic tax credits. Stating on the second page, and I quote, "The Deparmtent recognizes that the utilization of master lease structuring may provide significant additional leveraging of funds and otherwise facilitate the development of historic and affordable housing."

HUD admits that the master lease is the

[p.18]

standard for my type of development. Again, as far as I know, my project is the only project that was forced to close with a single tier. Mr. Wisznia would have been the second but he fought HUD until they agreed. Mr. Wisznia didn't get an order because it never went to court, leaving me with no case law. However, his case is proof that HUD recognizes their mistake and the mortgage letter 2009-40 issued just months after HUD conceded the point to Mr. Wisznia further demonstrates my cause.

I didn't have the luxury of debating the point as my loan had closed a year earlier as a construction and a long- term loan. By the late spring of 2006, I was running out of construction interest and I had tenants ready to move in. I was trapped. Beginning in the late 1970s, every person selling federally-authorized historic tax credits was able to sell their historic tax credits at maximum value with a master lease except those persons selling historic tax credits utilizing a HUD mortgage. The exception in my

[p.19]

case is a violation of my equal protection rights guaranteed in the 14th Amendment to the Constitution.

Further, HUD's denial of property without due process of law constitutes a denial of my due process rights guaranteed under the 5th Amendment. Under Bolling v. Sharpe, the liberty protected by the 5th Amendment due process clause contains within the clause prohibitions denying to any person equal

protection of the laws, and this applies in that case to the Federal Government. That case says that that concept applies to the Federal Government.

The law stands squarely that property interests in existence cannot be simply taken away by agency action or inaction. One of the best parallels that I could find that demonstrates HUD's violation is Windsor v. U.S., a Supreme Court case. I'll spare you the reading of the citations, but the basis of the case are that a woman named Windsor was married to another woman in New York. When Windsor's wife died, the IRS

[p.20]

denied Windsor her spousal estate tax break. Windsor paid her IRS bill, then sued seeking a refund. Because the IRS's actions were found to be unlawful, the IRS was ordered to pay Windsor a $363,000 Federal Estate Tax Refund plus $45,000 in interest. Similar to Mrs. Windsor, I was denied the full value of a tax credit accrued to me because of HUD's error. A tax credit authorized by the Federal Government. The law was misinterpreted and misimplied in only my circumstance. And HUD admitted it was misinterpreted in the 2009 mortgage letter as before you.

Among a myriad of other wonderful things, one of the most wonderful things about our system is that it considers the rights of individuals precious. Even one individual. My right to sell my historic tax credits for the fair market value was denied because HUD unreasonably delayed incorporating provisions of a Tax

Reform Act of 1976 until the 2009 letter was issued, a delay of 33 years.

[p.21]

Furthermore, my right to my property was improperly taken because of HUD's failure in direct contradiction of due process and equal protection clauses of the 5th and 14th Amendments.

JUDGE FERNANDEZ: Mr. Marlow, I'm going to stop you just for one second.

Counsel, is there anyone available that can tell me why the master lease wasn't used?

Not you? HUD's position. No, not right now. There will be?

MS. MERCHANT: Yes, Your Honor.

JUDGE FERNANDEZ: All right. Go on.

MS. MERCHANT: Yes.

JUDGE FERNANDEZ: Okay.

MR. MARLOW: Additionally, HUD's denial in this instance is the very definition of arbitrary and capricious. A direct violation of the Administrative Procedures Act U.S.C. 5, Section 701-708. Became every other developer was afforded the fair market value except me.

Furthermore, adding insult to injury, HUD's continual denial of my property and their

[p.22]

disinterest in correcting this error over the last 13 years is an act of bad faith.

JUDGE FERNANDEZ: No, Mr. Marlow, why has HUD told you that the master lease wasn't used?

MR. MARLOW: They just said no. I wasn't given an explanation apart from the testimony yesterday from Mr. Gallagher. He just said that he took it up to the top in Washington and they said no because they hadn't figured it yet.

JUDGE FERNANDEZ: Okay.

MR. MARLOW: Okay. After the recent order granting a partial summary judgment was issued, Ms. Merchant and the other folks at HUD called me in a last ditch effort to negotiate a settlement. Some on the call tried to hide their glee about the order with little success. I made it clear that I was not interested in any settlement they were offering. I shared that I was encouraged for the first time in 13 years because an independent arbitrator was going to

[p.23]

hear my long-held complaints, an arbitrator that HUD was accountable to.

During the call, I was threatened with HUD marching down to the U.S. Attorney's office with the Civil Money Penalty in hand that they already banked in their mind and asked for a writ of execution. I didn't see the order as a win for them or a defeat for me, just a proper reflection of what already had been agreed to.

Your Honor, I feel like U.S.C. 5, Section 706 was written for a circumstance just like mine. Respectfully, Section 706 of the Administrative Procedure Act gives you the authority to, and I quote, "Compel agency action unlawfully withheld or unreasonably delayed."

HUD's unreasonable delay denied me the full market value of my historic tax credits. Further, U.S.C. 5, Section 706, specifically gives you the power to, and I quote, "Hold unlawful and set aside agency action, findings, and conclusions found to be (a) arbitrary, capricious, and abuse of power or otherwise not in accordance with the

[p.24]

law; and (b) contrary to constitutional right, power, privilege, or immunity."

I have been treated unequally, a violation of my rights guaranteed by the Constitution. HUD's illegal decree, not allowing me to close my historic tax credits with a master lease was arbitrary and capricious and it violated my 5th and 14th Amendment rights.

If you agree, and I pray that you do, you, sir, have the authority to set aside all of HUD's actions and findings because they are all a result of HUD's original, unconstitutional, arbitrary, capricious, flawed and illegal decision.

Before we can explore what a correction should look like, we must first establish a starting point. To establish a starting point, we must point out that there is one other error that was made in closing my loan. That is at closing, HUD and the underwriters did not

establish a specific reserve account for property taxes. Most likely the reason they did not is because I had

[p.25]

negotiated a 10-year package of property tax exemption and deferrals with the Municipality of Anchorage. The result of the negotiation was that the project was not obligated to pay property taxes until the tax year of 2017. I am now in my sixth decade. I know all too well how fast 10 years goes by. HUD should have established a property tax fund within the surfacing parameters of 2005. In the late spring of 2017, I received a call from the servicer stating that they were going to use my next several payments to pay the 2017 property taxes. I pushed back and pointed out that we had a reserve fund with $300,000, and that the taxes should be paid from there. I was informed that they could not and that those reserve funds were for other things. So my loan went into default because the servicer used my payments to pay property taxes. To my mind, the fair point to start is the unpaid balance of the loan on July 1, 2017, the last month my payment was used properly. The number is exactly $6,993,749.18.

[p.26]

Your Honor, if the facts lead you to agree that it was wrong for HUD to deny me the right to avail myself to the benefit virtually every other historic tax credit seller enjoyed, you are not going to unleash a run on U.S. Treasury. This is a rare occurrence, a very rare occurrence. Moreover, my loan is insured. Any correction you order will not burden the taxpayers. Any

correction you order is already covered by me and the other payers of mortgage insurance premiums. From this point, the right and proper thing to do is to amend the loan amount and the interest rate to mitigate the injury to me.

First, we should deduct from the starting point the loss value of the historic tax credit, adjust it for the time value of money at six percent, the rate the government has established for matters such as this. I wish it could be calculated at the rate that it reflects my actual cost but I don't think that's allowed.

So, $423,950 at six percent from that

[p.27]

time to this comes to $936,954.40. After deducting this from the unpaid balance previously stated, the balance would be $6,056,794.78. Then, but for the flawed decision, I would not had to have paid $159,980 in 2013 plus the $16,000 in attorney fees to defend the HUD action. So 175,980 at six percent from that time to this comes to $255,810.25, leaving an unpaid balance of $5,800,984.53. Then, but for HUD's flawed decision, I would have lowered my interest with an 87 from 6.3 to 3.2 percent in September of 2016, which is the month that my defeasance penalty fell to zero. It's descending from the time you close your loan. The difference in interest paid adds to $782,515.15. After deducting, it leads an unpaid balance of $5,018,469.38.

Finally, because of the flawed decision, HUD's prohibiting the project from paying Bank of America on the terms of the historic tax credit purchase, we are

obligated to pay the Bank of America $491,137. After deducting it leaves an unpaid balance of $4,527,332.38.

[p.28]

So in my mind, the amount it attempts to pinpoint where we'd be but for HUD's errors is $4,527,332.38. I have prepared a draft order for Your Honor to consider which directs HUD to amend my note to that number with interest applied going forward at 3.2 percent.

Further, the order directs HUD to assign my note to Housing Healthcare Finance, LLC, for servicing. Further, the order advises the parties that their relationship is effectively being restarted over, rebooted. Moreover, all things that happened before the order are moot. We are at a new beginning.

Finally, the order cautions against any behavior that might be perceived as rancorous or retaliatory.

Your Honor, HUD cannot fix this problem. They need you to fix this problem. I spoke to three HUD employees in Fort Worth, which was testified to yesterday, Ms. File, Ms. Adams and Ms. Merchant, who told me that even if they wanted to solve my problem they could not. If any HUD

[p.29]

employee held a glimmer of empathy for my specific case, and I believe there have been or -- that there are or have been a few, they could not fix the problem. Ms. File testified to that yesterday. According to them, they do not have the authority.

I believe there is an unspoken, built-in disincentive to try to fix things at HUD. All HUD employees have a fear that getting out of line will be personally damaging to them so they won't or can't. They need you to fix it with your power so that they can in unison claim that you, the man that they are accountable to, ordered the fix. Deferring to you to fix the problem keeps them out of the crosshairs of their peers. Deferring to you takes agency politics out of the problem. Deferring to you is safe. If deferring to you is the safe thing for HUD employees, and at the same time the right thing, then let it be.

Your Honor, HUD will seek further damage to my property interests by selling my note, which will result in unlawful taking of another $9

[p.30]

million of my property. Your Honor, McKinley Apartments is my family's livelihood. HUD, acting in bad faith and contrary to the law and the Constitution, will ultimately forfeit all my property and way of life. I pray you find in my favor.

In 2006, forcing me into a tier one and denying me my tier two closing put me in survival mode and that is where I remain. On that day with one email, HUD diminished the value of my historic tax credits by $423,950. In so doing, HUD denied me my due process and equal protection rights under the law. They admitted it in the 2009 letter. HUD's decision was arbitrary and capricious and an unreadable delay and denied me my constitutional rights to property without due process or just compensation.

I am entitled to a remedy in this court. Your Honor, I am not an attorney. I do not even have a college degree. But it seems to me that a plain reading of the law informs that HUD has unlawfully taken my property and now seeks to take

[p.31]

even more of my property. The way I see it, I am only in the predicament I'm in because HUD denied me my property in the first place. It took one Mr. Marcel Wisznia from New Orleans standing up to HUD to get a favorable result. I pray you find for me and right this wrong by ordering a remedy. Find for me today, grant me my property, deny HUD's claim, and at long last, grant me justice. That is my piece. Thank you.

JUDGE FERNANDEZ: Thank you, Mr. Marlow. Any questions?

MS. MERCHANT: Yes, Your Honor.

JUDGE FERNANDEZ: Mr. Marlow, why don't you have a seat.

MR. MARLOW: Okay. Can I get some water first?

JUDGE FERNANDEZ: Of course.

CROSS-EXAMINATION

BY MS. MERCHANT:

Q Just a couple things. Mr. Marlow?

A Yes.

Q Could you look at your exhibits, Exhibit

[p.32]

2?

A Yes.

Q That's the email from Mr. Wisznia. Can you tell us what date Mr. Wisznia closed his property?

A I believe it was in 2009. I'm not sure exactly the date. Maybe it's September 8 according to the email.

Q All right. And in looking back at Mortgagee Letter 2009-4, that was your Exhibit 3.

A Yes.

COURT REPORTER: Can we go off record for a minute and I'll check my recording.

Off record 10:33.

(Recess)

BY MS. MERCHANT:

Q So when did Mr. Wisznia say he closed?

A According to his email, in September of 2009.

Q All right. When was the Mortgagee Letter 2009-4? What was the date on that? That's Exhibit 3?

* * *

APPENDIX K

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT OFFICE OF HEARINGS AND APPEALS

HUDOHA No. 18-AF-0227-CM-002
HUDOGC No. 18-001-CMP

[Filed: August 27, 2020]

In the Matter of:	)
	)
EGAE, LLC, and	)
Marlow Family Exempt Perpetual Trust	)
	)
Respondents.	)
	)

JOINT STIPULATIONS OF FACTS

1. Respondent EGAE, LLC. is a "for profit" company formed under the laws of Alaska.

2. Respondent Marlow Family Exempt Perpetual Trust is the sole member of EGAE, LLC.

3. Respondent EGAE, LLC owns the Project known as McKinley Tower Apartments.

4. Marc Marlow is the manager of EGAE, LLC.

5. McKinley Tower Apartments ("the Property") was initially closed as a vertical planned use

development consisting of 100 units on floors 5 through 14 of a building located at 337 East Fourth Avenue, Anchorage, Alaska.

6. EGAE, LLC took out a loan from CW Capital, LLC in the amount of $8,067,000.00, which was secured by the Property. ("the FHA insured loan")

7. Repayment of the mortgage loan was insured by HUD pursuant to Section 221(d)(4) of the National Housing Act.

8. The initial closing of the FHA insured loan occurred on March 8, 2005, in Anchorage, Alaska.

9. HUD requires properly owners which obtain FHA insured loans to enter into a regulatory agreement which governs the way the owner can manage and operate the project.

10. EGAE, LLC and HUD entered into a Regulatory Agreement dated March 8, 2005, which was signed by Marc Marlow on behalf of EGAE, LLC, in his capacity as Manager of EGAE, LLC.

11. During the initial closing on March 8, 2005, Marc Marlow, on behalf of EGAE, LLC, signed a Deed of Trust Note and a Mortgage Deed of Trust.

12. After the initial closing the Respondents proceeded to renovate McKinley Tower Apartments.

13. The Federal Historic Preservation Tax Incentives Program, commonly referred to as Historic Tax Credits, is administered by the National Parks Service, a division of the Interior Department.

14. On or about March 31, 2006, Marc Marlow informed HUD that he had secured Historic Tax Credits for McKinley Tower Apartments. At that same time, Mr. Marlow informed HUD that he wanted to use a master lease, also known as a two-tier lease, to implement the use of the Historic Tax Credits.

15. On or about April 10, 2006, HUD informed the Respondents and their representatives that they could not use a master lease. The Respondents and their representatives were also informed that HUD had not yet established a policy and procedure for the use of master leases.

16. In July 2006, the Respondents amended the ownership organizational documents and added one or more members to the ownership structure. These changes necessitated the eventual conversion of McKinley Tower Apartments from a vertical planned use development to a condominium regime.

17. In 2007, HUD approved the conversion of McKinley Tower Apartments to a condominium regime.

18. On or about March 27, 2008, the final closing of the FHA insured was held for McKinley Tower Apartments.

19. On or about October 19, 2009, HUD issued Mortgagee Letter 2009-40 which set out the policies and procedures for processing applications for FHA insured loans involving the use of master leases. In addition, the Mortgagee Letter contained a sample Master Lease Ownership Structure and HUD Regulatory Agreement Riders.

20. Respondents filed audited financial reports for McKinley Tower Apartments for 2010, 2011, and 2012.

APPROVED:

/s/ Mary C. Merchant
Mary C. Merchant
Government Counsel
Dept. of Housing & Urban Development
819 Taylor Street, Room 13A47
Fort Worth, Texas 76102
Tel: (817) 978-9561; Fax: (817) 978-5563

/s/ Marc Marlow
Marc Marlow
Representative for EGAE, LLC and
Marlow Family Exempt Perpetual Trust

APPENDIX L

EMAIL

[Filed: August 27, 2020]

Marc Marlow

From: Fernandez, Alexander <Alexander.Fernandez@hud.gov>
Sent: Friday, July 19, 2019 1:30 PM
To: marlow@mdcak.net; Merchant, Mary C
Cc: Tijerina, Patrisha L; Adams, Sakeena M; Wu, Sandra J
Subject: Order Requiring Answer on Respondents' Motion to Compel

On July 19, 2019, Respondents EGA, LLC and Marlow Family Exempt Perpetual Family Trust filed a *Motion to Compel* seeking to "compel HUD to re-schedule the management review meeting for McKinley Tower Apartments (currently scheduled for July 29th, 2019 at 10:30 a.m. GMT) to a later, and mutually convenient date."

In support of their *Motion* (actually seeking to *enjoin* HUD) Respondents offer that they have tried to negotiate a different date with HUD to no avail. They also offer that they need the time to prepare for their hearing. Respondents have attached a copy of an email from HUD purporting to demonstrate that HUD officials were "well aware" of the hearing's date and time and scheduled the management review on July

29th, regardless. The email also shows that Respondents made their request to reschedule on May 10, 2019.

Apparently, somebody thought that scheduling a Management Review for July 29th was a good idea.

It is hereby ordered:

1. HUD will provide sworn affidavits hy the HUD officials involved explaining, in detail: 1) why no other dates are available; 2) how the July 29111 date came to be chosen; 3) who was involved in the choosing of the date; and, 4) what efforts, if any at all were made to accommodate Respondents' May 10, 2019, request.
2. HUD will provide an accounting of how often in the last 5 years Management Review dates are changed either for HUD's convenience or for the convenience of any other impacted person.
3. The above must be filed by Tuesday, July 23, 2019 at Noon ET.

Should HUD be amenable to rescheduling the Management Review meeting "to a later, and mutually convenient date," without necessitating a review by this Court, all that is required by the aforementioned deadline is a NOTICE OF MANAGEMENT REVIEW POSTPONEMENT, along with a representation that every effort will be made to reschedule to a mutually convenient date after Respondents' hearing.

So ORDERED,

Judge Fernandez

APPENDIX M

[Filed: August 27, 2020]

EGAE, LLC
Dba McKinley Tower Apartments
337 E 4th Ave., Ste 1 • Anchorage, Alaska 99501
Phone: (907) 277-0185

October 24, 2018

Office of Hearings and Appeals
451 7th Street S.W., Room B-133
Washington, DC 20410

RE: Answer to Complaint;
McKinley Tower Apartments FHA Number 176-35040

To: Honorable Judge Alexander Fernandez

From: Marc A. Marlow, Manager EGAE, LLC

(a) The Complaint alleges that project audits for years 2013 through 2017.

1.) Respondent admits that the audits are late and denies liability associated with the late audits.

(b) The Respondent will show that HUD's own deficient performance significantly reduced the value of the Respondent's Historic Tax Credits. Specifically Sean Gallagher, the HUD project lead and Steve Ringgold, HUD attorney, knew or should have know the

negative and long lasting effects of denying the Respondent the ability to harvest the maximum value of their Historic Tax Credits. Moreover how HUD's deficient performance, through unintended consequences, set up circumstances that, among other negative effects, have caused the audits to be late. (Please see "Tab A" attached)

(c) No Civil Money Penalties should be imposed. (Please see "Tab B" attached)

(d) The Respondents representative is:

Marc A. Marlow
337 East 4th #1
Anchorage, AK 99501
907-229-8176

TAB A

Defense

The **COMPLAINT FOR CIVIL MONEY PENALTIES** was filed for failure to timely submit audited financial statements for the fiscal years 2013, 2014, 2015, 2016, and 2017. The fact that the audits have not been filed is not in dispute. The reason they have not been filed, from the perspective of Respondent, is important and relevant.

As such the Respondent alleges, and will demonstrate, that HUD personnel, specifically Sean Gallagher, project lead and Steve Ringgold, HUD attorney made an error, which denied the Respondent to maximize the value of their Historic Tax Credits which denied Respondent $423,949.00 in HTC sale proceeds. Historic Tax Credits are sold after construction is finished and the certification of eligible costs has been established. CohnReznick audited the final construction and development cost of the project to confirm the eligible costs. The quantity of Historic Tax Credits for a project is 20% of the eligible costs. (Please see "Tab 1 a")

The project 221 D 4 loan closed in March of 2005, and the construction was begun. The Historic Tax Credit closing must occur before the building is put into service, established by the local authority issuing a Certificate of Occupancy. The Historic Tax Credit closing was ready in July of 2006. The National Park Service established the HTC program in 1976. (Please see "Tab 1 b") The National Park Service in cooperation with the private sector and the Internal Revenue Service have been engaged in closing HTC transactions

since that time. In the case of McKinley Tower Apartments the Bank of America purchased the HTC. Banks cannot use the depreciation created by the eligible project so the industry uses a "Two Tier" synthetic lease to affiliate the HTC purchaser or investor to the eligible project. Using the "Two-Tier" model the purchaser does not have to directly own any LLC interests of the project. The HTC purchaser must affiliate themselves with the project during the 60 month compliance period, the period the investor uses the HTC they purchased.

In July of 2006 the industry typical "Two Tier" synthetic lease was submitted to HUD (Please see "Tab 1 c") to approve the HTC transaction. The Certificate of Occupancy was ready to be issued, but could not be issued until the HTC transaction closed. The 221 D 4 loan was ready to convert from a construction loan to the long term loan and there were tenants lined up and ready to move into the building.

At this late date, when the HTC needed to close, HUD or its representatives incorrectly rejected the "Two-Tier" synthetic lease and forced the use of a "Single-Tier" closing (Please see "Tab 1 d"). The "single-tier closing forces the HTC purchaser to take physical ownership of a portion of the project LLC interests, which increase the purchasers cost to be affiliated with the project, thus lowering the value of the HTC proceeds. HUD action lowered the value of the project HTC from $1.02 per credit to $.85 per credit, shorting the project $423,949.00. This avoidable unintended consequence caused by HUD was devastating and long lasting. The Respondent cannot find within HUD

historical documents a prohibition of using a "Two-Tier" arrangement to utilize HTC, in fact HUD issued Letter 2009-40 (please see "Tab 1 e") embracing the "Two-Tier" model.

The negative impact of being shorted the HTC proceeds cannot be overstated. The financial stresses imposed on the project are directly related to the audits being late.

This is not the first time the Respondent has alerted HUD to this problem. The Respondent asked HUD to correct the action in 2006 before closing, asked other Seattle HUD personnel to help fix this problem when they arrived at the project for the grand opening. And asked HUD for help, Renee Greenman's team, in 2011 when the project was flagged for unauthorized disbursements. The Respondent asked the Enforcement Center for help beginning in 2014. The message is always that HUD is not able to take steps to mitigate the effects of the HTC shortage.

The Respondent's hope is that in this forum, with an independent adjudicator free of the influence of co-workers or supervisors, a non-punitive solution, for both parties can be found. There are solutions that would not cost HUD or the Respondent money and would lower the risk profile of the project. Such a solution could be used to solve the problem, thus righting the wrong outlined above.

APPENDIX N

[Filed: August 27, 2020]

30.80 Factors in determining amount of civil money penalty

(a) The late audits is a serious event, however HUD actions are at the root of the cause.
(b) There has been one other offense, again financial, and again HUD actions are the cause.
(c) Neither the project nor the Trust has the ability to pay a penalty in large part because of denial of HTC proceeds.
(d) If HUD action results in Respondent losing the project the public will be harmed by a claim on the mortgage insurance, moreover the deferred property taxes would become due, which would harm the public.
(e) No benefit was received by the Respondent, only injury.
(f) No benefit has accrued to other persons.
(g) The fact that the building has been successfully operated for twelve years with no complaint, but for these two, which Respondent alleges HUD is at fault, would be a good measure.
(h) The Respondent is not culpable; HUD's own actions are the root of the cause.
(i) This item does not apply.
(j) All features alleged in defense.
(k) All beneficiaries of the Trust are members of the Confederated Tribes of the Coos, Lower

Umpqua, and Siuslaw Indians, but apart from that fact this item does not apply.

Conclusion: No penalty should be imposed.

APPENDIX O

[SEAL]

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Fort Worth Satellite Office, CVS6
Fritz G. Lanham Federal Building, Suite 13A47
819 Taylor Street, Fort Worth, TX 76102
TELEPHONE: (817) 978-9500;
FAX (817) 978-9504

August 22,2018

VIA UPS

EGAE, LLC
Marlow Family Exempt Perpetual Trust
Attn.: Marc Marlow
337 East 4th Avenue, Suite 1
Anchorage, AK 99501

SUBJECT: Determination to seek a Civil Money Penalty
Project Name: McKinley Tower Apartments
Location of Project: Anchorage, AK
Project Owner: EGAE, LLC
FHA Number: 176-35040
iREMS Number: 800220358

Dear Mr. Marlow:

This letter is to notify you that the U.S. Department of Housing and Urban Development has determined to

seek civil money penalties against EGAE, LLC. and the Marlow Family Exempt Perpetual Trust for the failure to timely submit audited financial statements for the fiscal years 2013, 2014, 2015, 2016, and 2017. Accordingly, pursuant to 24 C.F.R. § 30.85(b), enclosed please find a **COMPLAINT FOR CIVIL MONEY PENALTIES.**

If you desire a hearing in this matter before an Administrative Law Judge, you must submit a written request to me at the address in the above letterhead and to the Office of Hearings and Appeal within 15 days of receipt of the complaint. See 24 C.F.R §30.90. The address for the Office of Hearings and Appeals is:

If sent by U.S. Postal Service mail:

Office of Hearings and Appeals
451 7th Street S.W., Room B-133
Washington, D.C. 20410

If sent by courier or other delivery service:

Office of Hearings and Appeals
409 3rd Street S.W., Suite 201
Washington, D.C. 20024

If you request a hearing, you must also serve upon HUD and file with the Office of Hearings and Appeal a written answer to the Complaint within 30 days of receipt of the Complaint. See 24C.F.r §§26.41 and 30.90. The answer must include:

(a) The admission or denial of each allegation of liability made in the Complaint;

(b) Any defense on which respondents intend to rely;
(c) Any reasons why the civil money penalty is not warranted or should be less than the amount sought in the Complaint, based on the factors listed at 24 C.F.R §30.80; and
(d) The name, address, and telephone number of the person who will act as Respondent's representative, if any.

If you do not respond within 15 days of receipt of the enclosed Complaint, HUD will pursue a Motion for Default Judgement against EAGE, LLC. and the Marlow Family Exempt Perpetual Trust, pursuant to 24 C.F.R. §§26.41 and 30.90.

Sincerely,

/s/ Mary C. Merchant
Mary C. Merchant
Government Counsel
Department of Housing and Urban Development

Enclosures