

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERVIN AND ASSOCIATES, INCORPORATED,
7315 Wisconsin Avenue, Suite 1150 West,
Bethesda, Maryland 20814

Plaintiff,

CASE NUMBER 1:96CV01253

v.

JUDGE: William B. Bryant

HELEN DUNLAP,
1816 Kilbourne Place, N.W.
Washington, D.C. 20010

DECK TYPE: Civil General

DATE STAMP: 06/05/96

SERVE: Angelo Aiosa, Esquire)
United States Department)
of Housing and Urban)
Development)
450 Seventh Street, S.W.)
Room 10258)
Washington, D.C. 20410)

- and -)

UNITED STATES DEPARTMENT OF HOUSING)
AND URBAN DEVELOPMENT,)
451 Seventh Street, S.W.)
Washington, D.C. 20410)

SERVE: Eric H. Holder, Jr.)
United States Attorney for)
the District of Columbia)
555 Fourth Street, N.W.)
Washington, D.C. 20001)

- and -)

HENRY CISNEROS, as SECRETARY OF THE)
UNITED STATES DEPARTMENT OF HOUSING)
AND URBAN DEVELOPMENT,)
451 Seventh Street, S.W.)
Washington, D.C. 20410)

SERVE: Eric H. Holder, Jr.)
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555 Fourth Street, N.W.)
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 - and -)
 UNITED STATES SMALL BUSINESS)
 ADMINISTRATION,)
 409 Third Street, S.W.)
 Washington, D.C. 20410)
)
 SERVE: Philip Lader, Administrator)
 United States Small)
 Business Administration)
 409 Third Street, S.W.)
 Washington, D.C. 20410)
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 - and -)
 PHILIP LADER, as ADMINISTRATOR OF THE)
 UNITED STATES SMALL BUSINESS)
 ADMINISTRATION,)
 409 Third Street, S.W.)
 Washington, D.C. 20410)
)
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 UNITED STATES OF AMERICA,)
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 SERVE: Eric H. Holder, Jr.)
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 Defendants.)
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**COMPLAINT FOR PRELIMINARY AND PERMANENT
 INJUNCTIVE RELIEF, DECLARATORY RELIEF AND FOR MONEY DAMAGES**

Plaintiff Ervin and Associates, Incorporated, by and through
 counsel, states as and for its complaint for preliminary and

permanent injunctive relief, declaratory relief and for damages against defendants Helen Dunlap, United States Department of Housing and Urban Development, Henry Cisneros, as Secretary for the United States Department of Housing and Urban Development, the United States Small Business Administration, Philip Lader, as Administrator of the United States Small Business Administration and the United States of America, on knowledge as to itself and on information and belief as to all others, as follows:

PARTIES

1. Plaintiff ("Ervin") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 7315 Wisconsin Avenue, Suite 1150 West, Bethesda, Maryland, 20814. Plaintiff has standing, pursuant to Article III of the Constitution, to assert the legal claims contained herein to the extent that there exists: (1) a threatened or actual, distinct and palpable injury to Plaintiff; (2) a fairly traceable causal connection between that injury and the challenged conduct of Defendants; and (3) a substantial likelihood that the relief requested will redress or prevent the injury.

2. Defendant Helen Dunlap ("Dunlap") is a citizen of the State of California with her principal residence at 1816 Kilbourne Place, N.W., Washington, D.C. Plaintiff sues Dunlap in her individual capacity for violations of Plaintiff's constitutional and statutory rights as set forth below. Dunlap does not have immunity, qualified or otherwise, from Plaintiff's

claims, to the extent that Dunlap's acts were arbitrary and capricious, an abuse of discretion and clearly violated Plaintiff's established constitutional and statutory rights of which a reasonable person in Dunlap's position would have known.

3. Defendant United States Department of Housing and Urban Development ("HUD") is an executive agency of the United States of America and is located in Washington, D.C. Plaintiff seeks declaratory and injunctive relief against HUD. Plaintiff also seeks monetary damages against HUD. HUD has waived its immunity to suit pursuant to 12 U.S.C. § 1702. To the extent a monetary judgment is entered against HUD in this matter, such judgment would be payable from, inter alia, the FHA Multi-Family Insurance Fund.

4. Defendant Henry Cisneros ("Cisneros") is Secretary of HUD and his current place of business is located in Washington, D.C. Plaintiff seeks declaratory and injunctive relief against Cisneros in his official capacity as Secretary of HUD. Plaintiff also seeks monetary damages against Cisneros in his official capacity as Secretary of HUD. The Secretary's immunity is waived pursuant to the Secretary's authority to sue and be sued under 12 U.S.C. § 1702. To the extent a monetary judgment is entered against Cisneros in this matter, such judgment would be payable from, inter alia, the FHA Multi-Family Insurance Fund.

5. Defendant United States Small Business Administration ("SBA") is an executive agency of the United States of America and is located in Washington, D.C. The Small Business

Administration is being sued because it operates the 8(a) affirmative action program under the color of remediating purported past discrimination in HUD's contract procurement process. Plaintiff seeks declaratory and injunctive relief against SBA. To the extent claims against SBA merely seek declaratory and injunctive relief and not money damages, any governmental immunity is waived.

6. Defendant Philip Lader ("Lader") is the Administrator of the SBA and his current place of business is located in Washington, D.C. Plaintiff seeks declaratory and injunctive relief against Lader in his official capacity as Administrator of SBA. To the extent claims against Lader merely seek declaratory and injunctive relief and not money damages, any governmental immunity is waived.

7. Plaintiff seeks injunctive, declaratory and monetary damages as authorized by statute against Defendant the United States of America ("United States"). The United States has waived its immunity with respect to claims that seek relief other than money damages. To the extent Plaintiff has alleged certain claims against the United States arising under The Copyright Act, 11 U.S.C. § 101, et seq., the United States has waived its immunity with respect to such claims.

JURISDICTION

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (1988) because this action arises under the Constitution and the laws of the United States, including but not

limited to the First (freedom of speech) and Fifth (due process and equal protection) Amendments to the United States Constitution; Section 8(a) of the Small Business Act (15 U.S.C. § 637(a)); The Housing and Urban Development Act (12 U.S.C. § 1701, et seq.); 40 CFR 18.803; 13 CFR Part 124; the Declaratory Judgment Act, 28 U.S.C. § 2201; the Administrative Procedure Act, as amended, 5 U.S.C. §§ 701 et seq.; the Federal Acquisition Regulations, as amended, 48 CFR Ch. 24, Parts 2401 et seq.; the Freedom of Information Act, 5 U.S.C. § 552; the Prompt Payments Act, 31 U.S.C. § 3901, et seq.; the Trade Secrets Act, 18, U.S.C. § 1905, the Copyright Act, 17 U.S.C. § 101, et seq.; various federal laws regulating the sale of government assets, including, inter alia, 24 C.F.R. Parts 207, 290, 291 and 886, and applicable federal whistle blower statutes.

9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) (Supp. V 1993) .

SUMMARY OF CLAIMS^{1/}

10. HUD's Office of Multifamily Housing is out of control. Resembling (and in many respects, dwarfing) HUD scandals of years past, the conduct described in this Complaint portrays an office

^{1/} This Complaint alleges conduct by HUD, Dunlap and SBA which is complex because these Defendants have engaged in a course of conduct which is intended to appear as if it were consistent with the mission of HUD and SBA while its ulterior purpose and result is to flout the laws and regulations which were enacted to prevent the very conduct alleged herein. Consequently, this Complaint begins with a summary of Ervin's claims which distills the complicated detailed facts described in the Factual Background and summarizes the counts that Ervin asserts against these Defendants.

within an executive branch agency which has subrogated its mission on behalf of millions of lower income Americans to the personal and political whims of a few persons entrusted with its administration, reputation and legacy.

11. Despite the real fear of retaliation, Ervin has been forced to bring this action, not because it can afford to be a public watchdog or whistle blower, but because it is one of the unfortunate victims of the outrageous conduct described herein. While Ervin has no desire to "take on" executive agencies of the United States Government or to challenge the good faith of high ranking political appointees such as Dunlap, her conduct, and that of HUD and employees under her direct influence and control, has placed Ervin in the position of fighting for its economic life.

12. Reduced to its essence, this complaint is about power, money and Dunlap's close personal relationships with HUD's contractors and subcontractors. The thrust of this complaint is that Dunlap has usurped control and exercised unlawful influence over HUD's contract procurement process to confer huge procurements on her favored, hand-picked contractors and personal friends and companions, and to prevent Ervin from winning new contracts or have its existing contracts renewed or extended. Her efforts, and those of individuals at HUD under her control, are orchestrated to bypass the normal procurement processes which are intended to prevent the very abuses to which Dunlap has subjected and is subjecting Ervin and others.

13. For example, in a recent procurement for a cross-cutting task order under HUD's Financial Advisor Contract, Dunlap dictated that Cushman & Wakefield, which bid \$3 million on the task order, be declared technically unacceptable so that Dunlap's "contractor of choice," The Hamilton Securities Group, Inc. ("Hamilton"), which bid \$8 million plus incentives, could win the task order. The technical grounds for Cushman & Wakefield's disqualification were pretextual and were calculated to ensure that Hamilton, Dunlap's predetermined winner, would win the task order and thereby enable it and Dunlap to conceal prior problems and preferences in connection with Hamilton's conduct of HUD's note sales effort.

14. Dunlap's conduct also leaves no doubt that among her personal, political and social goals is to ensure that white male employees of HUD, and businesses owned and controlled by white males, such as Ervin, are brought to their knees and forced out of business. She has been known to say that "the only fitting position for a male is a secretary." By her actions, she is attempting to make this a self fulfilling prophecy.

15. The facts alleged in this Complaint demonstrate that HUD, under Dunlap, through coordinated and calculated abuses of the 8(a) program and other purported affirmative action programs within HUD, have consistently and repeatedly violated Ervin's constitutional rights by discriminating against Ervin because it is a white, male-owned firm, by illegally preferring minority and women-owned firms to the detriment of Ervin, by retaliating

against Ervin because it has exercised its free speech rights to criticize HUD and Dunlap, and by otherwise engaging in a pattern of illegal conduct designed to deprive Ervin of its rights under existing contracts, to neutralize its ability to bid for new work under new requests for proposal and to put Ervin out of business.

16. Ervin has, since its inception in 1989, been recognized as a leader in providing analysis and support to HUD and private sector businesses engaged in owning and operating multifamily housing. Ervin's expertise and ability to deliver extraordinary value to its clients, particularly HUD, is due, inter alia, to its vast and unrivaled data collection and analytical capabilities.

17. It is precisely because of Ervin's demonstrated strengths that it has become such a hated and feared target of Dunlap. Ervin is one of the few businesses in the multifamily housing industry with the experience, information and insight necessary to understand and uncover the true nature of the abuses that Dunlap's policies have and are creating at the untold expense of taxpayer dollars and to the direct detriment of Ervin.

18. Consequently, despite its long-standing status as a recognized leader in its field, since Dunlap's consolidation of power at HUD, Ervin has not only been unable to win new contracts from HUD which are well within its proven abilities, but HUD has unfairly and illegally taken from it the right to complete work squarely within the scope of its existing contracts which it had won as a result of fair competition.

19. Out of dire necessity, Ervin has had to resort to the extreme and dangerous remedy of suing the agency upon which it must rely as practically the only source of its existence. All Ervin seeks in this suit is the opportunity to compete fairly for contracts for which it is qualified, to be free of the overwhelming and unfair economic pressure to which HUD's current conduct, as engineered by Dunlap, has subjected it, to be able to finish the contracts which it has fairly won, to be compensated for its losses which have resulted from the harsh and unfair treatment it has received, to stop the retaliation and simply, to be treated no better than it has a right to expect under the United States Constitution, under the Federal Acquisition Regulations and under all laws applicable to contractors who do business with the federal government.

20. As described more fully below, HUD and Dunlap have engaged in arbitrary and capricious acts constituting gross and illegal favoritism in HUD's contracting procurement process; have displayed obvious racial, gender, and age discrimination in its procurement activities; have routinely committed violations of clear contractual obligations; have engaged in the theft of intellectual property; have participated in and encouraged insider trading in connection with massive note sales to less than arms-length purchasers; and have otherwise engaged in a campaign of retaliation against Ervin -- all in connection with HUD's administration of its multifamily and single family housing portfolios. Dunlap has taken these acts to advance her own

personal, political and social objectives and to reward those persons and entities privately or personally allied with her to the irreparable and irremediable detriment of Ervin and others.

21. As a result of an investigation by HUD's Inspector General into irregularities in HUD's multifamily loan auction program, Dunlap was recently removed from her position as Deputy Assistant Secretary for Multifamily Housing. Despite that fact, she continues to exercise enormous influence and control over HUD's Office of Multifamily Housing, its procurement practices and policies and in the interaction between HUD and SBA.

22. Notwithstanding her apparent demotion within HUD, Dunlap is still so feared that her misconduct is generally acquiesced in by her superiors and subordinates who routinely rationalize her illegalities as "That's just Helen being Helen."

Seven Governmental Sins

23. This case involves a myriad of complex factual allegations which can be grouped into seven categories of unlawful, unethical and generally outrageous conduct, as follows:

- 1) Contracting Corruption and Favoritism;
- 2) Racial, Gender and Age Discrimination;
- 3) Retaliation Through Breach of Contract;
- 4) Theft of Ervin's Intellectual Property;
- 5) Insider Trading;
- 6) Cover-Ups; and
- 7) Retaliation Through Defamation, Rumor, Innuendo, Cancellation of Existing Work and Blackballing.

Contracting Corruption and Favoritism

24. The Federal Acquisition Regulations operate under certain "guiding principles" that include "maintaining the public's trust" . . . "promoting competition" and "conducting business with integrity, fairness and openness." HUD and Dunlap have discarded these values.

25. As a result of Dunlap's unlawful conduct, countenanced by those at HUD responsible for supervising her, certain favored, handpicked contractors are reaping approximately \$100 million in taxpayer dollars under restrictive, non-competitive, or directed government contracts, to provide services that fall under Dunlap's sphere of authority or influence. These contracts, commonly known within HUD as "honey pots," have been reserved for those contractors and insiders who are favored by Dunlap and who will look the other way if she crosses the line of impropriety.

26. In furtherance of her personal, political and social agendas, Dunlap has improperly interfered with and exercised unlawful influence and control over HUD's competitive procurement process in violation of the Federal Acquisition Regulations by, inter alia:

- awarding contracts and task orders on a sole source, non-competitive basis to reward interests favored by Dunlap and to discourage white, male-owned contractors such as Ervin who are disfavored by Dunlap because of their race, age, and gender;
- modifying payment and other terms for favored contractors after contracts are awarded to eliminate hourly based pricing and to introduce huge incentive provisions;

- modifying statements of work to provide directed crosscutting services originally not intended or disclosed for the sole purpose of guaranteeing massive payouts to Dunlap's "contractor of choice" and, thereby, allowing that favored contractor to exercise a degree of control over other contractors and HUD that is not appropriate;
- continually revising existing contracts so that they illegally expand in scope and amount, thereby avoiding the otherwise mandated procurement requirements;
- providing advance, non-public information regarding unannounced Requests for Proposals or task orders to private individuals and entities favored by Dunlap and others to give them a competitive advantage in the bidding process;
- "arranging marriages" by forcing Ervin and other contractors to hire and then not be responsible to supervise certain favored subcontractors handpicked by Dunlap, for the purpose of circumventing the procurement process;
- arranging subcontracts between Dunlap's a close friend, Nancy Andrews ("Andrews"), and some of HUD's major contractors as a condition of favorable treatment by Dunlap. Andrews had no prior contractual relationship with these contractors and the subcontract awards were produced solely because of the relationship with Dunlap;
- improperly stacking source evaluation boards with individuals loyal to Dunlap, who help to ensure the selection of Dunlap's favored candidates;
- improperly causing or influencing source evaluation boards to re-score bid evaluations initially won by Ervin or other disfavored contractors so that contractors favored by Dunlap, or other political appointees at HUD, receive such awards;
- improperly using so-called "Emergency" procurements to limit the number of bidders or to direct work to those contractors favored by Dunlap, or other political appointees, to the exclusion of Ervin and others under circumstances which are clearly not emergencies;
- arbitrarily violating the intent of the protest process to ensure that favored contractor selections cannot be effectively challenged, even when HUD concedes that proper contracting procedures were not followed;

- retaliating against Ervin for criticizing Dunlap, HUD and/or the SBA and its 8(a) program and for filing bid protests;
- improperly utilizing or requiring contractors to provide personal service activities that are illegal under the Federal Acquisitions Regulations; and
- improperly utilizing contractors to lobby on legislation pending in Congress.

27. Additionally, HUD has awarded huge contracts and task orders to Ernst & Young, LLP ("E&Y"), and its real estate subsidiary, E&Y/Kenneth Leventhal ("E&Y/KL"). Based on a feature story of the CBS Evening News on May 7, 1996, E&Y contributed almost \$1 million to the Democratic Party.

28. In December 1995, John Ervin was advised by HUD's "contractor of choice" that to increase the number of assignments by HUD to Ervin, John Ervin should have lunch with Helen Dunlap, convince her of work Ervin should do, then tell her what existing contracts she can charge the work to so she can avoid the procurement process. Despite the fact that Ervin's survival was seriously at risk, John Ervin refused to follow that advice.

Racial, Gender and Age Discrimination

29. Under Dunlap's regime, white, male-owned firms are almost entirely precluded from winning new contract awards, or even to have existing contracts renewed or extended. In addition, Dunlap's animus against white males is blatantly obvious when one reviews the unlawful actions she has taken to demote or force out white middle aged HUD employees. Dunlap's clear and obvious pattern of bias against white, male-owned contractors and HUD employees is so blatant that HUD career staff

have coined the term "white boys hell" to describe the plight of employees and firms such as Ervin in the current discriminatory atmosphere under Dunlap.

30. This blatant level of discrimination is not limited to multifamily housing. The General Counsel's Office practices the same approaches directed against whites. This is particularly prevalent in employment practices, but also carries over into contracting issues.

31. In May and June of 1994, HUD advised Ervin that, because Ervin was both uniquely qualified to perform certain due diligence services and was entitled under the disposition provisions of its asset management contract to perform such services, Ervin would in fact perform such services for HUD's multifamily note sales.

32. Subsequently, HUD reversed itself, not because Ervin lacked the qualifications or the contract rights to do the work, but because, as retaliation and discrimination against Ervin, Dunlap ordered that "the work has to be performed by a minority firm."

33. Instead of allowing Ervin to perform the work it was already contractually entitled (and more qualified) to perform, HUD took this work away from Ervin and instead awarded a sole source \$15 million contract to a purportedly "disadvantaged" minority firm, Williams, Adley and Company ("Williams, Adley"), which contract was subsequently increased to \$30 million, for work to be completed over a year and a half. Based upon

documents provided by SBA, the determination of Williams, Adley as "disadvantaged" was made in 1983 about a predecessor firm in San Francisco. At the time of the award, eleven years later, however, Williams, Adley had four offices and 75 employees.

34. HUD's intentional abrogation of Ervin's existing contract rights for the stated purpose of transferring those existing rights to a minority firm is a clear violation of Ervin's contractual and constitutional rights.

35. Another example of discrimination playing a role in eroding Ervin's rights under existing contracts is the "Mark to Market" program. In the Fall of 1995, Ervin was told it would be conducting physical inspections in Nebraska under an existing physical inspection contract with HUD's Kansas City Regional office. In violation of Ervin's physical inspection contract and over the objections of Ervin and the HUD Field office, this work was instead assigned to a Section 8(a) firm which had obtained its contract under a non-competitive procurement.

36. HUD, under Dunlap's improper influence, has knowingly awarded huge noncompetitive contracts to purportedly "disadvantaged" businesses which, in fact, are fronts or conduits for clearly non-disadvantaged businesses favored by Dunlap who collect enormous subcontracting awards thereby bypassing the competitive bidding process. For example, Hamilton also received a \$5 million subcontract from HUD's sole source due diligence advisor, Williams, Adley, which Hamilton, as financial advisor, was responsible for overseeing. Not only is Hamilton on each

side of the same transaction (as both financial advisor and subcontractor), Dunlap is cynically using the guise of affirmative action to reward her "contractor of choice" by propping up a minority-owned firm as the awardee and hoping no one will see it as an illegal pass-through.

37. HUD and Dunlap, despite clear direction from the United States Supreme Court in Adarand Constructors, Inc. v. Federico Pena, ____ U.S. ____, 115 Sup. Ct. 2097, (1995) (hereafter "Adarand"), requiring a showing of a compelling need for affirmative action type programs, have proceeded with such programs to enable HUD to continue to award "sweetheart" contracts to its favored contractors. The reliance by HUD on affirmative action type programs includes the use of 8(a) set asides and extra scoring points for a contractor's use of minority and woman-owned firms. Such practices are unconstitutional under Adarand.

38. As an indication of how prevalent the discrimination is, Ervin has learned from Freedom of Information Act ("FOIA") requests to HUD that in 1995, approximately 85% of the contracts over \$50,000 issued by HUD's multifamily housing group went to minority or woman owned firms. This excludes one case where HUD, at Dunlap's direction, unlawfully tried to cancel the contracts of a white male run company but could not because HUD found that it could not perform the work it sought to take away.

39. Ervin believes that allowing work to be taken from an existing contract for the sole purpose of assigning such work to

a minority or woman owned firm is unconstitutional, even if it is rationalized under the auspices of the Section 8(a) affirmative action program or other HUD programs. Therefore, through this Complaint, Ervin challenges the Constitutionality of the Section 8(a) program and the use of extra scoring points based upon race or gender to make contract awards. (Ervin understands that HUD is now again attempting to "kill" the white male firm in question.)

40. As described more fully herein, this and other conduct by Dunlap has denied Ervin and others due process and equal protection of the law.

41. This and other conduct, as described more fully hereinbelow, violates the requirements of the Section 8(a) Statute (15 U.S.C. § 637(a)) by knowingly awarding contracts worth tens of millions of dollars to purportedly disadvantaged businesses that do not qualify as such and that, in any event, act as mere fronts for sub-contractors favored by Dunlap.

Retaliation Through Breach of Contract

42. Certain conduct described above, where assignments rightfully belonging to Ervin were diverted to minority firms for admittedly discriminatory purposes, also breached Ervin's contract rights under its Asset Management and Physical Inspection contracts with HUD. Ervin believes that Dunlap has caused HUD to strip existing contract rights away or to refuse to honor clear contractual obligations as retaliation against Ervin

for, inter alia, exercising its First Amendment rights to free speech.

43. Dunlap and HUD have retaliated against Ervin by breaching these and other existing contracts with Ervin by:

- issuing a Task Order to Hamilton, a female-controlled financial advisory firm, for the disposal of formerly coinsured properties, which work Ervin had a right to perform under its Asset Management Contract;
- refusing, through its Seattle Field Office, to honor contractual obligations to compensate Ervin for a minimum level of services as required by its Delegated Processing Contract;
- refusing to issue task orders on a timely basis under its Audited Financial Statement and Asset Management contracts, placing Ervin at significant financial risk for the purpose of intimidating Ervin;
- failing to process payments on a timely basis for completed services;
- refusing to pay interest on late payments, which is required under the Prompt Payment Act. Such delinquent interest due and owing by HUD to Ervin (assuming an 8% rate) currently exceeds \$100,000;
- notifying Ervin three days after the effective date of the contract extension that, upon direction from HUD headquarters, HUD would order only one physical inspection, instead of the 600 or so of such inspections available under the contract and that had been ordered annually in the past two years.

44. These are not mere breaches of contract but, rather, an integral part of Dunlap's campaign of retaliation against Ervin. When Ervin has protested or complained to HUD about these breaches, such complaints fall on deaf ears. Through stonewalling of FOIA requests, i.e., evasive, non-responsive incomplete or delayed protests and complaints, have become an

overwhelmingly time-consuming and expensive exercise in futility. Ervin has been placed in a position where there is no contract right too small for HUD to breach and thereby to force Ervin down the long, expensive and laborious road of chasing down its administrative remedies. Moreover, by refusing to pay Ervin amounts due under said contracts, HUD is literally choking off Ervin's ability to pay its bills, meet its payroll or otherwise stay in business. Ervin should not be forced to endure such economic pressure or go to such lengths to protect its interests in its contracts with HUD.

Theft of Ervin's Intellectual Property

45. HUD has intentionally and unlawfully appropriated significant intellectual property of Ervin in which Ervin has invested millions of its own dollars to develop, assemble and collect. HUD has done this notwithstanding that its own office of general counsel has opined that HUD has no rights to such data.

46. Although HUD had been warned and was fully aware that Ervin had created certain accounting and information storage and retrieval systems to create a competitive advantage to allow Ervin to win other contracts, HUD indiscriminately diverted such proprietary information to Ervin's competitors, including, but not limited to, The Kerry Company ("Kerry"), Hamilton, and E&Y/KL, despite express written restrictions by Ervin on HUD's right to use and distribute such information.

47. Incredibly, even after Ervin had objected to senior HUD officials, HUD continued to provide Ervin's proprietary information for use by its competitors to bid on, win and perform contracts worth tens of millions of dollars that Ervin was not even allowed to bid on or compete for. This is despite the fact that Ervin had a right under the procurement rules to compete fairly for such work and had the technical capability to win and perform such contracts. Indeed, Ervin invested in developing its technical capabilities to give it a competitive advantage over its competitors in precisely these circumstances. HUD, however, has deliberately destroyed Ervin's competitive advantage by sharing Ervin's data with Ervin's competitors.

48. In this regard, and in addition to the above, HUD has misappropriated proprietary intellectual property of Ervin by:

- utilizing Ervin's proprietary multifamily database and comparative summary reports in the note sale and due diligence processes;
- demanding that HUD be provided with substantially all of the services that were included in Ervin's original proposal to provide audited financial statement reviews for about 40% of the amount bid in that proposal. For 1994 financial statement processing alone, the difference was \$3,566,824 (\$5,991,500 originally bid less \$2,424,676 invoiced to HUD);
- requiring Ervin to provide a computerized review of over 11,000 financial statements per year for no compensation, despite the fact that HUD had not included such a requirement in the contract; and
- utilizing Ervin's file and screen layouts and processing approaches, and reverse engineering Ervin's protected processes, methods and approaches, in the creation of HUD's Data Warehouse structure.

49. In addition to the theft of Ervin's intellectual property, HUD has continuously forced Ervin to provide information on HUD's portfolio, to store thousands of financial statements, to provide support to HUD's note sales efforts, and to provide information to HUD for no compensation under the real threat by Dunlap that Ervin will lose even its current tenuous standing at HUD if it refuses to do so.

Insider Trading

50. In perhaps the single most outrageous example of mismanagement, corruption, foul play and inequitable conduct alleged herein, HUD, through its financial advisor and Dunlap, have embarked on a complex scheme to deliver huge blocks of discounted, multifamily and single family HUD-owned notes to a "tag team" of two prominent Wall Street firms with inside knowledge of, and influence over, the note sale process. One of these firms is a very large contributor to the President's reelection campaign and has had very close connections to the Administration.

51. Under HUD's single family assignment program, families who could not meet their mortgage payments because of problems such as death, illness, loss of employment, etc., could, with HUD's permission, avoid foreclosure by making reduced mortgage payments to enable them to get back on their feet. After the recovery period, full payments were required to be resumed. HUD held approximately 90,000 such loans, which are being sold in a series of sealed bid auctions.

52. Despite HUD's obligation under its own final rule "to encourage participation by small investors," HUD has made it all but impossible for a small investor to be successful. This allows Dunlap and HUD's financial advisor to direct the single family note sale auctions to a few favored Wall Street firms.

53. A single family loan sale expert who was previously a co-investment advisor to Hamilton, has gone on record with HUD about the unfairness of the single family loan sale process. They have stated the process is not fair, does not get the highest price for the taxpayer and intentionally misleads smaller participants into thinking they can win thereby wasting their time, money and resources. HUD has buried this complaint and the co-investment advisor either quit or was fired by Hamilton for raising these objections to the "company line."

54. Through the selective illegal disclosure of material inside information; the misapplication of a defective "optimization model;" misdescribing the true nature of the assets offered for sale and by prohibiting FHA refinancing opportunities, HUD has intentionally limited competition for these pools of assets. It has stifled the ability of all but the largest financial institutions who understand the process based on inside information to win to the exclusion and detriment of small investors like Ervin.

55. HUD and its financial advisor have knowingly stacked the deck against small investors to benefit the Wall Street "tag team." Responding to a clarification about whether a "winner

take all" sale of HUD-held single family mortgages was more appropriate than one that would favor two or more buyers, Hamilton stated in its best and final offer for the original financial advisor contract that "if pressure is put on HUD to run a 'small investor program' we could structure the auction this way also, but still would expect one large buyer to purchase all lots."

56. The optimization model employed by Hamilton to "select" winners is intentionally complex, and is being used by HUD and Dunlap to mask, under the guise of innovative public policy, the underlying logical flaws and inherent bias. The model was originally designed to optimize the scheduling of airline flight crews. Although the model may be appropriate for something perishable and intangible like time and space that, once past, cannot be relived, real estate assets are not perishable and can be successfully offered for sale another day. This was clearly evidenced in the second single family note sale.

57. Irrespective of any claimed underlying validity of the "optimization model," the selective disclosure of material, inside information to certain select bidders, allowing them to exploit the note sales process utilizing said model is a violation of Federal laws applicable to such sales.

58. The selective disclosure of material inside information such as the true workings of the optimization model and the true nature of the assets being sold, to certain favored parties is a violation of federal laws applicable to such sales. Where, as

here, the purchasers are also HUD advisors or are otherwise less than arms-length from HUD, there is an irreconcilable conflict of interest which confers an enormous advantage on the favored bidder and makes it impossible for a bidder like Ervin to fairly compete.

59. The structure for single family sales makes it statistically impossible for small investors to be successful because it combines a maximum limitation of 10 bids with an optimization model that disqualifies overlapping bids. Utilizing probability analysis, it would require at least 500 small bidders, each of whom would have to make the maximum of number of 10 separate random bids (a total of 5,000 bids) to obtain sufficient non-overlapping coverage for 750 pools to be competitive with the big players. Statistically and realistically, this is virtually impossible. This is evidenced by the second single family note sale where 26 bidders produced 172 bids, which was a dramatic improvement over the 6 bidders in the first sale. Not surprisingly, the second sale was won in its entirety by the "tag team."

60. Despite the fact that over 50% of the single family loans being sold are "performing," HUD's own publications continually provide disinformation that the loans being offered are non-performing. Because of the extra work and risk to resolve non-performing loans, the market for non-performing loans is much smaller than for performing loans. This, combined with overstating the number of troubled loans and providing misleading

descriptions of the groupings, has seriously limited the number of investors who might have otherwise been interested in participating to the benefit of those insiders who understand the portfolio based on inside information.

61. In an approach that is truly offensive not only to small investors, but also to mortgagors, HUD is now punishing families who successfully completed their participation in the assignment program by denying their right to refinance their mortgages with a new FHA loan. Although by HUD's own disclosures in the first two sales approximately 13,000 such families have rehabilitated their credit and have a recent history of full payments, their opportunity to refinance is being restricted by HUD. Because FHA refinancing would be an exit strategy most attractive to a small investor like Ervin, preventing it further limits the competition for this type of loan to only the favored buyers.

62. HUD is engaging in abuses of the sale of its affordable multifamily housing inventory as well. Traditionally, multifamily note sales have involved non-subsidized projects. Now, however, HUD is in the process of effectively transferring all of the economic attributes of ownership of notes secured by low income, subsidized multifamily properties, under the color of negotiated sales to state Housing Finance Agencies, to the same "tag team" of Wall Street investors discussed previously. This is in direct circumvention of HUD's own rule that provides that "HUD is not authorized to negotiated (sic) sales to private

entities". Businesses that are knowledgeable about managing affordable housing, like Ervin, are thereby precluded from participation in these sales, which is injurious to Ervin, as well as the owners, managers and sponsors of these projects and the interests of the millions of lower income Americans who reside in such multifamily housing. Additionally, HUD has improperly refused to release any proposals of the state HFA's requested by Ervin under the Freedom of Information Act with regard to such sales.

63. HUD's note sale process has been designed to operate with minimal oversight or challenges. When Judy May, who was the Government Technical Representative responsible for overseeing the financial advisor contract, objected to the "bait and switch" she saw occurring in connection with the procurement of the contract, she was promptly reassigned by Dunlap to a much less prestigious and influential position within HUD. This sent a very strong message to other HUD employees as to the fate that would await anyone who challenged Hamilton or Dunlap in the future.

Cover-Ups

64. Consistent with its mission to provide the highest level of professionalism and service to the affordable housing sector, Ervin must be a consistent, but fair, critic of HUD when Ervin believes HUD's policies or conduct are detrimental to HUD's constituents, to the affordable housing industry or to Ervin itself.

65. Ervin has also raised concerns and issues which have been politically unpopular when Ervin believes its client, HUD, is being put at risk by the action of appointed government officials.

66. Among the problems which Ervin has brought to HUD's attention are:

- the flaws in the optimization model and the conflicts of interest and other questionable aspects of the note sales process as described above;
- contracting corruption and favoritism;
- stonewalling responses to cover up corruption and other abuses of HUD's Freedom of Information Act obligations;
- Dunlap's refusal to allow "performance measurement objectives" for note sales;
- Dunlap's directing the destruction of an Ervin memorandum that criticized "early warning rankings" in use at HUD as misleading;
- the abuses of, and risks inherent in, HUD's "fast track" processing;
- suspicious underwriting on projects -- most notably Country Village, an expose, of which subsequently ran in a front page article in the Los Angeles Times, which reported that Dunlap bypassed normal underwriting precautions to allow an investment banker well connected to the Administration to take \$19 million in cash from this project while spending virtually none of the money on repairs or improvements;
- HUD's refusal to allow appropriate follow up on any but the top 100 possible equity skimming cases, despite Ervin's having prepared a list amounting to over \$50 million that represents HUD's greatest risks; and
- award of an unnecessary, directed, and possibly unlawful, crosscutting task order which will effectively allow HUD's favored contractor to

direct the efforts of a new group of such financial advisors to ensure that the prior problems and preferences do not come to light.

67. Each time Ervin has raised one or more of these issues, HUD and Dunlap have engaged in a scheme to silence Ervin, cover-up the alleged misconduct and otherwise place a politically acceptable "spin" on the rationale underlying the misconduct.

Retaliation Through Defamation, Rumor, Innuendo, Cancellation of Existing Work and Blackballing

68. HUD is Ervin's single largest client, accounting for the vast majority of the firm's business in 1995. As such, and viewing Ervin's almost complete dependence upon HUD, Ervin has agonized over how best to seek redress for the wrongs suffered at the hands of HUD and Dunlap.

69. Based upon a real fear of retribution by HUD and Dunlap, Ervin has tried to strike a balance between seeking redress and trying to protect its once thriving business that has now been put at real risk by the actions of Dunlap.

70. Dunlap has waged a subterranean campaign to discredit Ervin and put it out of business to the benefit of her selected and favored contractors. Dunlap has been able to choke-off Ervin's ability to compete for and win new HUD contracts or to renew or extend existing contracts. Additionally, while certain of Ervin's competitors are getting rich off fat "honey pot" contracts, HUD has dramatically reduced the number of projects assigned to Ervin under existing contracts with HUD, forcing Ervin to downsize and reduce its staff.

71. Among the false and malicious statements Dunlap has made, or allowed to persist at HUD and elsewhere, to discredit Ervin and to neutralize its competitive advantages, all to put Ervin out of business, are:

- "Ervin makes too much money";
- "Ervin is under I.G. (Inspector General) Investigation";
- "the GTR under Ervin's Asset Management Contract is going to jail";
- "Ervin delayed HUD's note sales";
- "Ervin is holding HUD's data hostage";
- "Ervin paid Secretary Cisneros \$167,000";
- "Ervin is going out of business"; and
- "Ervin has been blackballed."

72. Dunlap's efforts to start, encourage or reinforce such rumors, or to allow an environment in which such rumors can exist despite Ervin's apprising HUD and Dunlap of such rumors and the damage to Ervin that was being done, have severally damaged Ervin.

73. In particular, HUD's issuance of the Multifamily Asset Management Technical Assistance RFP is designed by Dunlap to put Ervin's existing asset management contract, which still has two remaining option years and the capability to accommodate all of HUD's asset management needs, at the top of Dunlap's hit list.

74. As another and most recent example of retaliation by HUD and Dunlap against Ervin, on April 1, 1996, Ervin's GTR on its asset management and annual financial statement contracts

requested that Ervin provide a list of all of its contracts with HUD Field Offices so that he could provide the list to Dunlap as part of an overall recommendation "to deal with" Ervin's concerns. Ervin believes that this request was not motivated by a desire to remediate or alleviate Ervin's concerns, but, rather, was intended by Dunlap exclusively for retaliatory purposes.

75. Similarly, on April 29, 1996, three days after the effective date of the annual extension of Ervin's Kansas City inspection contract, and after Ervin's counsel requested an opportunity to confer with HUD to discuss Ervin's claims against HUD, Ervin was advised by the contracting officer that, on direction from HUD Headquarters, HUD would assign only one such inspection to Ervin, instead of the 600 inspections that would normally have been assigned as had occurred in the past two years. A clearer pattern of retaliation against Ervin is hardly imaginable.

76. During the last two weeks of April 1996, after Ervin filed a protest on Dunlap's contracting corruption in its financial advisor procurement and the related corrective action BAFO, the extent of the invective leveled at Ervin within HUD has increased dramatically, making it abundantly clear that any attempt by Ervin to compete for any new work at HUD would be fruitless. For example, just a few weeks ago, Ervin and its Bidding Partner, GAMEX, who bid on the pending single-family asset management and disposition contract were advised that HUD had found the team to be eliminated from further consideration

"based on the evaluation of your proposal against the RFP's stated factors for award" for any one of three Demonstration Programs HUD was contemplating for the managing and investing of HUD single family properties. Given that GAMEX managed and invested 30,000 similar properties including over 23% of all RTC single family properties, been the most successful provider of single family preforeclosure services and being a HUD approved mortgage, it would have been impossible for anyone to objectively eliminate Ervin's team from further consideration on technical grounds. Instead, as has now become clear, the decision to eliminate the Ervin/GAMEX team was in retaliation against Ervin for filing protests on other solicitations.

77. Due to the extent of the damage to Ervin's reputation that has been done by Dunlap and HUD, Ervin believes it will take at least three years without further interference or retaliation to recover the reputation it enjoyed before Dunlap.

Irreparable Harm to Ervin

78. The acts alleged in this complaint took place, and continue to take place, at the expense and to the detriment of Ervin and other white males over the age of 40 who either work at HUD, or who operate companies doing business with HUD, or who have otherwise had the misfortune to have "crossed" Dunlap.

79. As described above and as more fully described below, HUD and Dunlap, in violation of Ervin's constitutional and contractual rights, have reduced work assigned under Ervin's existing contracts, choked off Ervin's ability to compete fairly

for new contracts with HUD and have indicated that they will not extend or renew existing contracts which Ervin requires in order to survive. HUD, through Dunlap, is literally forcing Ervin out of business because of its assertion of First and Fifth Amendment rights and because of HUD's and Dunlap's discriminatory and retaliatory motives. Ervin has been, and will continue to be, irreparably harmed by such actions which, if not enjoined, will literally destroy Ervin's business.

80. By this complaint, Ervin seeks injunctive and declaratory relief, specific performance, and statutory and compensatory damages against the defendants, jointly and severally, in an amount to be determined according to the proof at trial.

FACTUAL BACKGROUND

A. Ervin and Associates, Incorporated

81. Ervin was formed in July 1989, by a small group of asset managers who had directed the Nation's largest portfolio of privately-owned, low-income apartments. Faced with the loss of their jobs through corporate downsizing, they started a business that would support affordable housing on a national basis. John Ervin, a white male over the age of 40, is the sole owner of the company, but 25% of any pre-tax profits are distributed to the employees (associates) each year.

82. From an initial staff of five, Ervin grew to 42 employees which at its peak in 1995 included 17 minorities and 21 women.

83. Ervin consists of employees with wide ranging multifamily skills and expertise.

84. Ervin exclusively targeted HUD, the Resolution Trust Corporation and national non-profit housing organizations as sources of business.

85. To avoid any appearance of conflict of interest, Ervin chose not to offer services to the private sector, except where such services were mandated for the protection of HUD and the residents occupying HUD housing.

86. Consequently, Ervin is entirely dependent on its contracts and reputation with HUD for its survival.

87. Although Ervin recognized the risk of limiting its business, in effect, to a single client, it relied on the existence of the government's procurement laws which require fairness, demand due process and provide the opportunity to compete for work. Until Dunlap's regime, which began in mid-1993, Ervin never questioned the willingness of HUD to follow both the spirit and letter of those laws.

88. Throughout its history, Ervin has been extraordinarily successful in anticipating HUD's needs and developing an organization and services to meet those needs. As a result, Ervin bid on and won numerous competitive proposals issued by HUD.

89. Ervin attempts to bid on all multifamily and many single-family housing procurements offered by HUD where its wide ranging housing skills and expertise can be utilized by HUD.

Ervin's past successes in obtaining contract awards with HUD are attributable to the company's ability to offer a superior technical capability at the lowest prices. Unlike the current contracting environment, in which a contractor's personal contacts with the decision-makers at HUD determine who wins a procurement, Ervin won its contracts through fair and open competition without any political influence and without the need for any secret payoffs or deals from the contract proceeds. Additionally, the prices bid by Ervin were always very competitive.

90. Prior to early 1994, which was shortly after Dunlap's arrival at HUD, Ervin was awarded the following Multifamily service contracts through full and open competition:

Asset Management:

Overseeing or evaluating over 620 troubled multifamily loans with mortgage balances of over \$4 billion. Services include loss mitigation, compliance monitoring, identification of equity skimming, operations oversight and the protection of HUD's real estate and rent collateral. This contract is very broad in scope and provides for initial evaluation, asset management and/or disposition services for all classes of HUD's multifamily inventory.

Review of Annual Financial Statements:

Collecting and reviewing approximately 16,200 annual multifamily audited financial statements to summarize financial performance, to ascertain conformance with HUD's requirements and to identify possibilities of equity skimming.

Delegated Processing:

Reviewing and processing applications for mortgage insurance on apartment projects for six of HUD's ten

regions to help ensure that HUD does not insure loans that may be at high risk of subsequent default and assignment.

Physical Inspections:

Providing physical inspections under various contract for almost 2,000 apartment projects to ensure that they are maintained in decent, safe and sanitary condition for the residents, and that HUD's collateral is being protected.

Technical Assistance:

Assisting HUD in developing or outlining policy concerning the management and the disposition of HUD-owned or HUD-held apartment projects.

91. Ervin also provided asset management services for a portfolio of 125 low income apartment projects and assisted two national non profit organizations acquire 8 projects from the RTC for use as low income housing.

92. Ervin enjoys the reputation as a nationally recognized expert on both multifamily affordable housing and on HUD. Ervin possesses the most comprehensive database of operating information on HUD's multifamily projects and more experience with this class of housing than any other independent housing organization in the United States.

93. Prior to Dunlap's arrival at HUD, Ervin and all of its employees had developed a relationship with HUD's career staff throughout the country that was based on mutual trust and respect. As a result, Ervin was very successful in winning competitive procurements at HUD. All contract option years were exercised. Ervin never attempted to renegotiate the terms of any

contract, and never refused to perform a service that was requested by HUD.

94. Although Ervin desires to continue working for HUD, a combination of restrictive, unfair, corrupt and unlawful contracting practices, discrimination, breaches of contracts by HUD, HUD's theft of Ervin's copyrighted and other proprietary information and systems, and a concerted campaign within HUD, led by Dunlap and others closely allied with her, to disparage the business and reputation of Ervin, has placed Ervin's survival at serious and immediate risk.

95. The arbitrary reduction of its asset management contract by HUD, which work HUD is unlawfully re-procuring for the benefit of Dunlap's favored contractors, combined with other instances of retaliation, defamation, rumor, innuendo, and blackballing against Ervin has required Ervin to begin reducing its staff. Ervin fears that, if HUD's unlawful actions go unchecked, HUD will force Ervin out of business by the fall of 1996.

B. HUD's Office of Multifamily Housing

96. HUD was established in 1965 by an act of Congress to, inter alia, "achieve the best administration of the principal program of the Federal Government which provides assistance for housing and for the development of the Nation's Communities." HUD's Office of Multifamily Housing has direct responsibility over all multifamily properties including asset management, disposition and production activities for the Federal Housing

Administration. It currently oversees over 16,000 multifamily projects with over 2 million housing units and original mortgages totaling over \$50 billion.

97. Due to budgetary constraints and discrimination against white males, HUD has lost or reassigned a tremendous number of very experienced staff through regular and early retirements. As a result of these budgetary realities, and a hiring freeze policy, there is a diminishing group of experienced people to deal with the very large and increasingly troubled multifamily portfolio and an increasing number of mortgage insurance applications. Because of this, the Office of Multifamily Housing has outsourced various functions, including asset management, physical inspections, underwriting (through delegated processing), review of audited financial statements, SWAT team activities, systems development, financial advisory, and due diligence services, and other activities relating to the note sale and portfolio re-engineering initiatives of the Department. Prior to early 1994, Ervin won a number of these contracts.

C. Helen Dunlap

98. Dunlap is a Schedule C political appointee who arrived as HUD's Deputy Assistant Secretary for Multifamily Housing on June 18, 1993 with responsibility for all multifamily housing operations throughout the United States. In November 1995, she was transferred to a lesser position of Deputy Secretary for the Office of Housing Operations after an internal investigation by

HUD's Inspector General revealed alleged irregularities in the Department's multifamily auction program.

99. Before her demotion, Dunlap was in the process of implementing her own personal, political and social agenda within HUD, which required the dismantling of the existing establishment and the demotion or disenfranchisement of white middle aged males whom she perceived as either controlling HUD's multifamily operations or stood in the way of her personal, political and social agenda. Dunlap has publicly stated that, "the only fitting position for a male is as a secretary." This philosophy governs how she operates HUD.

100. Although Dunlap was officially relieved of responsibility for multifamily housing, she has retained absolute control over HUD's note sale and portfolio re-engineering activities through which HUD is transferring billions of dollars of taxpayer assets to the private sector. Additionally, despite her demotion in November 1995, through fear and intimidation she unofficially retains a firm grip on the reins of multifamily and single family power at HUD and continues to be the primary individual controlling Ervin's relationship with HUD.

101. Initially, HUD's career staff was enthusiastic about Dunlap's energetic approach to getting things done at HUD. As time passed, however, it became apparent that Dunlap was hostile toward HUD's career staff (whom she has often referred to as "idiots") and viewed any attempt by them to apply agency

procedure or procurement requirements of the FAR as obstructive of her agenda.

102. Because of her cynical views about the capabilities of HUD's career staff, particularly the white male career staff, she has informally assembled a small but well-placed group of contractors and HUD employees who are loyal to her and who will follow her lead without question. This group controls the note sales and portfolio re-engineering initiatives and all of the contracting relating to these activities.

103. From the beginning of her tenure at HUD, Dunlap closely aligned herself with Hamilton, a female owned and controlled contractor of about 20 persons headed by Austin Fitts, who is an ex-Assistant Secretary of Housing and FHA Commissioner. Hamilton has become the "contractor of choice" for Dunlap, being assigned huge contract and subcontract awards typically under less than fully competitive circumstances. As a contractor, Hamilton has been provided with a level of power and access within HUD that was previously unheard of.

104. Dunlap utilizes her select group of trusted outside contractors to perform personal service and lobbying activities, both of which are unlawful under the FAR. This practice is so widespread that the President of Hamilton is generally considered to wield more power as a contractor than she ever did as an Assistant Secretary or FHA Commissioner in the Kemp administration of HUD.

105. Subscribing to the maxim that information is power, Dunlap strictly limits and controls the flow of information to ensure that the only truth told at HUD is her truth. Quantitative factual information which might be critical of, or reflect poorly on, HUD or Dunlap is off-limits to those whom she perceives as adverse to her agenda. This is particularly true with regard to information included in annual financial statements and information related to note sales activities. She has created a massive crosscutting task order designed for the specific purpose of having her "contractor of choice" control all other financial advisors. This is a responsibility that should not be delegated and would be more appropriate to a HUD employee.

106. Dunlap's refusal to allow relevant information to slip beyond her grasp has had a detrimental impact on the ability of the Field Office staffs, who wish to avoid increases in the number of defaulted loans through improved underwriting and regulation, to do their jobs.

107. Those that do question Dunlap or members of her team experience her unrestrained wrath. In her short time at HUD, Dunlap has selectively whittled away those HUD employees, private entities and contractors like Ervin whom she believes threaten her ability to rule HUD with unrestrained power. Like Ervin, similar treatment is being accorded to a company called Dataprompt, a white male controlled company which has provided data processing services to HUD for a number of years, but is now "in HUD's sights and is targeted for elimination" because it also

told the truth. Similarly, Judy May, a HUD employee who was originally given responsibility for note sales, was transferred when she questioned Hamilton's contract extensions and expansions.

108. Contractors or HUD employees who are not selected for inclusion on Dunlap's team, or who are perceived to present a risk to her, are discarded or moved out of the way, without regard to their technical capability or ability to provide better services at lower costs to the Department.

109. Dunlap operates under the philosophy that it is easier to ask for forgiveness than for permission. She will continue to stretch the envelope of propriety until someone that is sufficiently powerful that she cannot crush or intimidate challenges her. When this occurs, she implements a spin control approach, with the concurrence of her superiors, to minimize the damage. In short, she is able to do anything she wants with regard to virtually every aspect of HUD whether within her purview or not.

110. Procurements which should be subject to full and open competition of the type which Ervin was successful in winning in the past based on technical capability and price, have been diverted by Dunlap to pre-selected contractors. Those who object to or question the rigged processes are dropped, and their livelihoods and reputations are put at risk. Even protests in GAO are routinely overcome by the submission of a statement of urgent and controlling need allowing HUD to proceed unchallenged.

here, the purchasers are also HUD advisors or are otherwise less than arms-length from HUD, there is an irreconcilable conflict of interest which confers an enormous advantage on the favored bidder and makes it impossible for a bidder like Ervin to fairly compete.

59. The structure for single family sales makes it statistically impossible for small investors to be successful because it combines a maximum limitation of 10 bids with an optimization model that disqualifies overlapping bids. Utilizing probability analysis, it would require at least 500 small bidders, each of whom would have to make the maximum of number of 10 separate random bids (a total of 5,000 bids) to obtain sufficient non-overlapping coverage for 750 pools to be competitive with the big players. Statistically and realistically, this is virtually impossible. This is evidenced by the second single family note sale where 26 bidders produced 172 bids, which was a dramatic improvement over the 6 bidders in the first sale. Not surprisingly, the second sale was won in its entirety by the "tag team."

60. Despite the fact that over 50% of the single family loans being sold are "performing," HUD's own publications continually provide disinformation that the loans being offered are non-performing. Because of the extra work and risk to resolve non-performing loans, the market for non-performing loans is much smaller than for performing loans. This, combined with overstating the number of troubled loans and providing misleading

By this suit, Ervin seeks to enjoin such unlawful and grossly inequitable misconduct on the part of HUD and Dunlap.

D. U.S. Small Business Administration

111. The U.S. Small Business Administration is the agency of the Federal Government that directs the section 8(a) program which awards contracts to "disadvantaged" minority firms, thereby restricting the ability of other firms to fairly compete for the work.

112. In light of Adarand, Ervin challenges the constitutionality of the implementation and the utilization of the 8(a) program and the use of extra bonus points in scoring proposals for meeting minority and woman quota requirements.

113. As will be demonstrated throughout this Complaint, Dunlap, through her influence at HUD, has unlawfully influenced the award of HUD contracts, and has illegally expanded existing contracts, through the improper use of section 8(a) set asides, through complicity with like-minded individuals at SBA and otherwise through intentional violations of applicable law.

114. Further, Dunlap, HUD and SBA have intentionally participated in diverting HUD and SBA contracts and other work to contractors whom Dunlap can control and who purport to meet the requirements of Section 8(a), but which, in fact, are merely fronts for large, non-qualified contractors which have close personal ties to Dunlap or the Administration. These 8(a) contractors then subcontract with Dunlap's more favored

contractors allowing them large amounts of work while bypassing the competitive process.

E. Portfolio Management

115. HUD regulates over 16,000 multifamily properties in its insured or HUD-held loan portfolio. Each loan is governed by a Regulatory Agreement which sets the standards by which the owner must operate the project.

116. HUD's statutory objective is not to own properties but only to insure and regulate those loans that it insures. If a multifamily mortgage goes into default and can not be brought current, the mortgagee typically assigns the loan to HUD in return for a substantial payment from FHA, an agency within HUD.

117. HUD is also responsible for administering the Section 8 rental assistance subsidy program which provides rental assistance to underprivileged families by paying the difference between the fair market rents and 30% of the residents' income. As a result of such payments, HUD becomes the source of most of the revenue to meet the mortgage payments on many HUD-insured mortgages.

118. Although HUD has numerous responsibilities, HUD's Office of Multifamily Housing's primary objectives are to:

- ensure that the housing is maintained in decent, safe and sanitary condition for the residents eligible to occupy it;
- ensure the cost effective and efficient operation of the properties;
- ensure that program requirements are being complied with; and

- protect the real estate and rent collateral securing the mortgages.

119. Currently, HUD's multifamily loan loss reserve, which is intended to estimate and provide for the losses HUD will incur on the loans in its portfolio, exceeds \$10 billion.

F. New Mortgage Insurance Commitments

120. HUD provides mortgage insurance to facilitate the construction, acquisition or refinancing of multifamily properties.

121. Considering the lack of guarantees, the long term, and the low down payment requirements compared to other financing sources, HUD should expect to limit the financial risk of default and assignment by utilizing prudent underwriting of mortgage insurance applications. If it does not, it can incur, and has incurred, massive losses.

122. In the 1980's, in reaction to long processing delays by HUD offices and a shortage of HUD personnel, HUD developed a coinsurance program which allowed approved mortgagees to underwrite insurance for HUD on a shared risk basis (generally HUD agreed to take 85% of the risk).

123. Unfortunately, the capital that the coinsuring lenders were required to maintain to backup their portion of the risk was very small compared to the potential for up-front fees that could be generated by aggressive underwriting. The program was a disastrous failure and resulted in significant monetary losses to HUD and the taxpayers where HUD effectively ended up with 100% of the loss on most projects. Many of these losses can be traced

back to overly aggressive appraisals and understated repair estimates. Ervin was hired in a free and open competitive procurement to help HUD resolve its failure.

124. Around 1992, facing the same resource constraints, HUD altered its underwriting approach to allow a limited number of qualified Delegated Processing contractors to underwrite multifamily loan applications, under HUD's supervision, where the contractor is paid the same amount whether the application is accepted or not. A year later it improved this process with Delegated Processing II. Ervin entered into such contracts with HUD in six out of ten HUD Regions.

125. HUD has instituted a "Fast Track" program to process mortgage insurance applications in response to industry pressure over the length of time HUD takes to process such applications. As in the 1980's, prudent underwriting precautions including overly aggressive appraisals and understated repair estimates may be being bypassed, again placing HUD assets, and ultimately, taxpayer dollars, at significant risk.

126. Under the Fast Track program, HUD uses an owner's appraiser and repair estimates to underwrite multifamily loans for mortgage insurance. This is a recipe for disaster, since, as with HUD's coinsurance program, the Fast Track program gives owners the incentive to obtain as high a loan as possible, by stretching the revenue, expense and cost estimates.

127. The Fast Track program was originally instituted in HUD's Seattle Office, and with Dunlap's support, has spread throughout the country.

128. Implementing this program has reduced or eliminated HUD's need for Delegated Processors. However, with reduced staffing levels and the loss of experienced employees, certain Field Offices cannot keep up with the processing demands and the government once again is not providing adequate and timely processing. This runs the risk of significantly increased defaults as HUD cuts corners in its underwriting to meet program requirements.

129. Ervin has recognized and informed HUD of the dangers of the Fast Track program and has even suggested solutions to the pending disaster this program threatens to create. For speaking out about the risks to HUD of its Fast Track program, Ervin has been targeted by Dunlap for economic extinction.

G. Note Sales-Conflicts of Interest

130. As a result of insurance claims paid on defaults and assignments of mortgages it had insured, in 1994, HUD possessed a portfolio of approximately 90,000 single family loans and about 2,500 multifamily loans. The unpaid principal balance of this portfolio exceeded \$10 billion. The underlying housing assets collateralizing these loans generally housed non-subsidized moderate income families.

131. In 1994, HUD instituted a program, primarily through Hamilton, designed to dispose of this portfolio of assigned loans

through public sealed bid auctions, and in certain cases, negotiated sales.

132. HUD's primary objective in making these note sales is to reduce the number of difficult projects that HUD's dwindling staff must service. Of secondary importance is the recovery of funds for the taxpayer. Under the existing structure, the objective of maintaining the nation's affordable housing supply is of little importance to Dunlap or HUD.

133. HUD's rule authorizing the note sales states that, except for negotiated sales to state and local governments, HUD will sell mortgages on a competitive basis. Additionally, it "seeks to encourage participation by small investors."

134. The sale of the \$10 billion portfolio of unsubsidized housing backed notes is perfectly appropriate and makes sense for HUD and the taxpayer. However, since these are effectively taxpayer-owned assets, HUD has an obligation to minimize losses and to ensure a fair and honest disposition process.

135. Fairness and honesty should be applied to both how and to whom the assets are sold, and to the contracting process that hires those who will help HUD execute the sales. HUD, through Dunlap, however, has rigged the procurement process to enable Dunlap's "contractor of choice" to win the coveted responsibility as HUD's "financial advisor" and to win the task orders that are issued in connection therewith.

136. Success is not defined by HUD the way success would be defined normally. HUD, under Dunlap, does not operate based on

straightforward honesty, but measures success differently. For example, under credit reform, profit earned on note sales is much more a function of how well Hamilton does in convincing the Office of Management and Budget or Congress that the value of the notes in HUD's hands is very low. The lower the value negotiated, the more profit will be able to be reported on the subsequent sale of the assets. In short, the worse advice the financial advisor provides the more successful it is. By intentionally manipulating the credit subsidy and negative credit subsidy rules, HUD and its financial have manufactured over \$600 million in additional budgetary authority for HUD.

137. Unfortunately, by manipulating the system, the more inept HUD is made to appear. Understating the real value of assets in HUD's hands results in not only a paper profit through negative credit subsidy, but effectively becomes real money that HUD can spend.

138. Additionally, HUD also creates faulty measurement results with a flawed optimization model used in its auction process because it does not recognize residual value when determining the "highest bidder." Although common sense dictates that a house with a fair market value of \$200,000 will not drop to a zero value if not sold today, HUD's optimization model does not consider this reality and assumes erroneously that, in fact, this will happen.

139. HUD has abdicated to Hamilton responsibility for negotiating with OMB and Congress on its behalf. Moreover, it is

in Hamilton's interest to reduce the true value of any asset. Thus, if incentives for HUD's financial advisor are to any extent based on the underestimated values arrived by that same advisor, there is a problem. Not only does this approach result in excessive payments, the misinformation it produces creates faulty housing decisions that impact underprivileged families. In short, downplaying the value of HUD's portfolio may become a self fulfilling prophecy.

140. Although HUD should have ensured that normal checks and balances were in place in the conduct of the note sales, HUD, by abdicating its responsibilities for protecting the taxpayers' assets to Hamilton, has eliminated the appropriate internal controls and has created massive real or potential conflicts of interest.

141. Because of this background and mind set, it has also developed and, along with Dunlap, sold the same type of Wall Street solutions as the answer to the nation's housing problems. Unfortunately, Wall Street solutions typically revolve around churning assets and earning fees for Wall Street rather than ensuring that lower income and underprivileged families have decent, safe and sanitary housing in which to live.

142. Because of the intimidation and strong arm tactics of Dunlap, the full truth and open debate about the real impact of these sales has been hidden. Without understanding the alternative truth, one cannot fully understand the reason for this lawsuit.

H. Portfolio Re-Engineering

143. The portfolio re-engineering approach (previously known as Mark-to-Market) affects the housing of approximately 800,000 low income families who, depending on how HUD's program is implemented, could be put at very serious risk of ending up homeless. Although it is up to HUD and Congress to determine policy issues, Ervin has a vested interest in ensuring that decisions are made based on honest information.

144. Because of inefficiencies and structural flaws in the Section 8 rental subsidy program, rental subsidies being paid by HUD often far exceed the fair market value of the apartments being rented, resulting in excessive program expenditures by HUD. Much of the reason for this problem is that historically, the way to make money in subsidized housing was through negotiating high rent levels with HUD offices rather than providing a superior housing value.

145. HUD is now proposing to reduce these rents to the fair market value as the subsidy contracts expire over the next 5 years (or before), thereby reducing the government's section 8 rental subsidy obligations. Almost everyone, including Ervin, agrees that this is necessary.

146. Assuming no other cost reduction initiatives, without the inflated rents, the mortgages that HUD insures on these projects will be forced into default. HUD plans to transfer blocks of these defaulted loans to trust vehicles which will then

write the loans down to what they can afford to pay in debt service.

147. Ervin has been advised that, as a result of this re-engineering effort, HUD could be required to take a \$25 billion write down on these loans.

148. Under HUD's current approach, the economic benefits that could flow from this housing and this write down would again be directed possibly on a non-competitive or limited competition negotiated basis to a small number of very large Wall Street investors to include the Goldman Sachs/BlackRock "tag team" who would acquire the ownership benefits of these loans at deep discounts, scrutinize them and produce transaction fees for themselves. The alternative might be to use the proceeds from the rents paid on this housing to protect the housing assets and the residents of this housing.

149. To date, HUD's analysis of its re-engineering initiative has not adequately considered the impact that such re-engineering efforts will have on other market rate low income housing, particularly projects financed by low income housing tax credits with which the written down HUD assets will become competitive. Because of simple supply-demand considerations, these other affordable housing projects will become less competitive and many will, themselves, be forced into default by HUD's actions creating a massive disruption to the affordable housing portfolio throughout the country.

150. Ervin has informed HUD of its analysis of the faults in this program. However, for the reasons outlined in this Complaint, Ervin has effectively been blackballed from further work with HUD by Dunlap.

I. Information Systems and Requirements

151. Under any circumstances, for HUD to accomplish all of its objectives, to evaluate its alternatives and to minimize the negative impact on people, HUD needs accurate, reliable financial information on its multifamily housing portfolio.

152. On May 15, 1996 Michael Stegman from the policy development and research group at HUD stated that "Nic Retsinas and I are absolutely committed to assist MHI to create a multifamily database of subsidized and unsubsidized units . . ." He further went on to state HUD has a \$34 million budget and is currently spending \$20 million on private sector studies.

153. The primary source of complete and accurate financial information on HUD's portfolio of multifamily assets is the required annual audited financial statements which are now processed by Ervin.

154. Although HUD had required and received these statements for many years, it was never able to create appropriate systems and processes to collect, validate, summarize, analyze, and then utilize this information.

155. It is well recognized, and the subject of numerous Inspector General and Government Accounting Office reports, that

one of HUD's most significant weaknesses is in the area of information and systems.

156. Ervin has, at its own expense, developed and implemented proprietary multifamily systems and databases that take data from these financial statements and other sources and convert that data into usable and highly valuable information.

157. Ervin made this entrepreneurial investment to sustain a business of offering valuable information to HUD, which HUD could then utilize to better manage its programs and produce an unbeatable competitive advantage for Ervin.

158. Instead of acknowledging this contribution, or allowing Ervin to use this information to evaluate HUD's portfolio, HUD has instead demanded that Ervin give HUD and Ervin's competitors all of the benefits of its entrepreneurial investment for no compensation. These competitors, who are under the control of Dunlap can then selectively utilize or misuse the information to further support Dunlap's agenda.

159. Because Ervin has refused to agree to release of the benefits of its copyrighted system, HUD and Dunlap have implemented a series of actions to retaliate against and destroy Ervin's business.

J. Seven Governmental Sins

1. Contracting Corruption and Favoritism

160. Over the past six and one-half years, Ervin and Associates, Incorporated grew to be one of HUD's most successful contractors, providing asset management, underwriting, housing,

architectural and engineering, physical inspection, audited financial statement review, and financial consulting services to HUD.

161. Until about two years ago, before Dunlap became comfortable in her position within HUD, HUD procured services from contractors by using fair, open, and competitively bid procurements, which produced the best value to the Government and the American taxpayer.

162. As has been proven repeatedly, Ervin thrives in this competitive environment, and had established a viable business based on the competitive advantages it developed and was able to provide to HUD. All of Ervin's contracts were won in fair, fully open, and competitive procurements that, as far as Ervin can tell, complied with all applicable laws and regulations. This ensured that the Government received the most advantageous offer, cost and price, and other factors considered, which is the overriding selection criteria in all RFP's issued by HUD.

163. Although Ervin has a proven track record of providing quality services and products to HUD, and has an excellent equal opportunity record, all of which are often acknowledged by the Department, HUD through Dunlap has refused to allow Ervin to compete for, let alone win, almost all of the contracts awarded by HUD in the past two years for reasons outside of Ervin's capabilities.

164. Since early 1994, HUD has changed its procurement practices considerably, subverting the entire contracting process

at HUD as a result. The normal checks and balances that exist when FAR and other procurement laws are followed are nonexistent. This has led to corruption and abuse of both office and process at HUD. See Exhibit A attached hereto for a summary of the questionable contracts awarded by HUD over the last two years.

165. The majority of the contracts which have been issued in the past few years are intended to help sell or restructure HUD's \$50 billion dollar multifamily real estate portfolio. The value of contract awards are approaching \$100 million, and are virtually all under the direction and control of Dunlap, despite her demotion in November 1995.

166. HUD has engaged in a scheme of contracting and subcontracting irregularities that has enabled Dunlap and HUD to direct the award of plum contracts to her favored contractors. Virtually all of Dunlap's and HUD's procurement methods have in some way sought to limit competitive bidding or to influence the scoring process. She has been able to control and direct the award of contracts and subcontracts through favoritism, interference, rescoring, expansion of simple small contracts into highly complex and expensive wired deals, subterfuge, "emergencies," directed contracting, forced subcontracting and other contracting irregularities.

167. Although HUD contracting practices have come under increased scrutiny, selective intimidation and spin control, combined with a reluctance on the part of HUD's own Inspector

General and the Government Accounting Office to institute a real in depth investigation, has allowed the corruption to continue.

168. In addition, existing contracts are eternally expanded far beyond both the initial authorization levels and the intentions and nature of the work originally contracted. These expansions are often far larger than the original contract amount and deprive other contractors of the right to freely compete for the new work.

169. Expanded activities are often required after a contract is awarded to include personal service and lobbying type work, both of which are prohibited by the FAR. HUD and Dunlap have engaged in a practice of letting contracts and then using them for personal service activities, including allowing HUD's financial advisor to act as Dunlap's personal staff and legislative liaison with both Congress and the Office of Management and Budget. This approach effectively provides the financial advisor with a situation where there is no real oversight.

170. HUD's RFP for a financial advisor and which allocated \$20 million for all services did not include any mention of a crosscutting task order. However, immediately after the contract award, such services were defined.

171. HUD has awarded a "crosscutting" task order, which effectively allocates massive amounts of money and responsibility to allow Dunlap's contractor of choice to oversee the work of other contractors, leaving one to question the need for HUD

employees at all. It also provides a level of control not appropriate to any contractor.

172. In the "competition" for the award of the cross-cutting task order, two of the firms receiving financial advisor contract awards submitted offers to perform the cross-cutting work. Cushman & Wakefield, a nationally recognized company in the real estate industry, submitted a bid of approximately \$3 million per annum to supply the cross-cutting services. Hamilton, Dunlap's contractor of choice, submitted a bid of \$8 million per year, plus an annual incentive amounting to 25% of this amount, effectively utilizing all of the money allocated for financial advisory services for Hamilton.

173. Because of the huge discrepancy between bids, HUD's contracting department balked at Dunlap's selection of Hamilton as the cross-cutting task order awardee, and questioned how such an award can be made. Nevertheless orders came down from Dunlap that Hamilton would be awarded the task order.

174. To justify awarding the cross-cutting task order to Hamilton, Cushman & Wakefield, who was found to be technically acceptable to be HUD's financial advisor, was then found to be technically unacceptable to be the cross-cutting task order awardee. This occurred after HUD's contracting department informed Dunlap that this was the only way Hamilton could be awarded the cross-cutting task order. This is favoritism, cronyism and corruption at its worst.

175. It is also a standard practice at HUD to rehire employees, who are affiliated with or loyal to Dunlap but who have left for personal reasons or through buy-outs, on contracting assignments, through noncompetitive purchase orders, allowing many of them to earn a higher rate than when they were HUD employees. This practice circumvents the entire process of buy-outs or staff reductions, and negates any stated desire by the Administration to downsize the government. Several ex-employees that Ervin is aware of, as well as certain contractors, have benefitted from this practice including the ex-FHA controller.

176. Other corruption and abuses engaged in by Dunlap and HUD include:

- the avoidance of truly open competition at all costs, including the posting of misleading classifications of RFP'S in the *Commerce Business Daily* to limit competition;
- conducting unwarranted "emergency" procurements;
- tampering with the decisions of Source Evaluation Boards by, among other things, mandating rescoring so politically favored contractors are assured a win;
- "blackballing" of certain contractors;
- stonewalling responses to legitimate FOIA requests;
- retaliation for protests and other truth telling;
- stripping funds from one contract to fund another, thereby avoiding the budgetary process constraints;
- parking available funds for future reallocation to others; and
- mandating subcontractors

177. These practices force legitimate contractors seeking to fairly compete for work with the Department to play on an unlevel and unfair field. Because favoritism, cronyism, and the willingness to look the other way are now the overriding contract award factors, there have been very few -- if any -- large, truly competitive procurements by HUD's Headquarters Housing Group over this time.

178. A result of HUD's and Dunlap's scandalous and corrupt contracting irregularities is the ability to cover up past transgressions. Through Dunlap's carefully designed program of fear and intimidation, the same contracting division at HUD that presided over the competitive procurements prior to 1994 has now abdicated its responsibilities to ensure that contracting is conducted fairly and in accordance with all laws and regulations, including those requiring fairness, openness, competition, and most importantly, common sense.

179. This results in corruption and scandal approaching if not dwarfing, the problems at HUD in the 1980's. When the contracting officers are not allowed to be sufficiently independent to offset the abuses of the political appointees, the potential for corruption is extensive.

180. In December 1995, John Ervin received some advice from Dunlap's contractor of choice as to how to obtain assignments. That advice was to have lunch with Helen Dunlap, convince her what you want to do, then tell her what existing contracts she can charge the work to so that she can avoid the procurement

process. Despite Ervin's survival being at very serious risk, John Ervin refuses to follow that advice and be dragged into the contracting sewer that now exists at HUD.

a. Minority, Woman or Special Relationship Set Asides and the Award of Massive Directed, Sole Source, Non-Competitive Contracts

181. The problems with HUD's contracting practices are massive. Through the Freedom of Information Act, Ervin obtained a list of all contracts or task orders over \$50,000 awarded by HUD Headquarters in 1995. Analysis of this information shows that approximately 85% of the dollar value of such contracts or task orders for 1995 were awarded to minority and woman owned firms. This excludes one case where HUD, at Dunlap's direction, unlawfully tried to cancel the contracts of a white male run company, Dataprompt, but could not because HUD found that it could not perform the work it sought to take away. (Ervin understands HUD is now again attempting to "kill" the white male firm in question.)

182. Contracts large and small, for which Ervin was well qualified to perform, and could have performed at substantially lower costs and better values to the taxpayers than what was procured, were discriminatorily awarded almost solely to women or minority owned firms. Most of these contracts were either:

- awarded based on sole source procurements to 8(a) firms despite the fact that the contract dollars far exceeded \$25,000, and the awards did not go to disadvantaged firms. One of these awards, which was taken away from Ervin to give to an 8(a) firm, was originally awarded at \$15 million and expanded to \$30 million;

- awarded on a competitive basis to a woman-owned company on the basis that it provided the best value to the government (a very low bid price calculated on an hourly basis), only to have the contract subsequently and continuously amended until it reached at least \$19 million and included massive million dollar negotiated incentives which totally bypassed the competitive bidding process or the original parameters of the solicitation;
- awarded to 8(a) firms after opening the competition only to selected 8(a) firms in the Washington D.C. area without a showing of compelling need as required by the United States Supreme Court's ruling in Adarand, which was decided while this procurement was in process;
- awarded to select firms, at least one of which is owned by a friend of HUD's General Counsel. The "competition" was limited to only a select few firms, the basis for selection of which was, according to the response to Ervin's FOIA, handpicked firms named by the General Counsel and principals at the Office of Housing; or
- awarded SWAT coordinator services to a specific contractor connected to the political appointees at HUD. This award of SWAT coordinator services was facilitated through a subcontracting arrangement forced on Ervin by Dunlap under one of Ervin's contracts, and occurred despite the fact that the work was within the scope of work of Ervin's contract, Ervin was qualified to perform the services, and Ervin had been told by HUD that it would be performing the consulting services.

b. Eternally Expanding Contracts

183. A common procurement practice utilized by Dunlap involves constantly amending existing contracts to add work and funds, and to change the contract terms in ways not contemplated in original RFP solicitations.

184. For example, Hamilton was awarded a contract in September 1993 to provide relatively limited technical services to package and sell, or refinance, HUD-owned mortgages under Section 221(g)(4) of the National Housing Act. Hamilton's BAFO

proposal for this procurement the contract authorization of ". . . only \$1 million . . . for the first 24 months . . ." The contract to Hamilton that resulted was funded in the amount of \$2,000,000 for the initial year, and \$1,000,000 for each of four option years. More importantly, it provided for payment on a straight hourly basis.

185. Through a series of contract modifications and task orders, the scope of services has been significantly expanded to include work in practically all areas in which HUD is currently involved. The contract ceiling and funding amounts have been continually increased so that it now amounts to \$19,000,000.

186. More significantly, however, is that HUD allowed the contract to be revised from an hourly contract to one that provided Hamilton with million dollar plus incentives. These "honey pots" were effectively negotiated with Dunlap on a noncompetitive basis and prevented other contractors from having the opportunity to compete for this work. An open level of competition also would have eliminated some of the abuses and the potential for insider activities that have taken place.

187. When Judy May, who was the GTR on this contract, objected to the obvious bait and switch tactics being employed, Helen Dunlap transferred her out of the way. The message was clearly sent to all other HUD employees about the consequences of challenging Dunlap or Hamilton.

188. Hamilton billed HUD millions of dollars under the first Financial Advisor contract, where one of its responsibilities was

to coordinate and oversee the duties of the due diligence contractor. In what appears to be an obvious conflict, Hamilton had also been designated as a subcontractor under the first sole source due diligence contract, in the amount of approximately \$5 million. Thus, Hamilton oversees a contractor performing due diligence services while also acting as a subcontractor to that firm. One needs only consider how a conflict between the due diligence contractor and its subcontractor would be resolved in the event of a disagreement to see why this does not make sense.

c. Advance Information on Upcoming RFP's and Task Orders

189. As part of its corrupt and scandalous methods utilized to reward favored contractors, HUD regularly provides favored contractors with prohibited, inside information on procurements or competitive task orders that HUD is contemplating or writes the RFP or task order so that only the favored contractor will be qualified. Such as in the case of the crosscutting task order under the Financial Advisor procurement. Favored contractors are utilized to "identify" HUD's needs, and then used to plan the specifications of procurements. In this process, those favored contractors are clearly provided with significant, otherwise prohibited inside information. Those contractors then are either awarded directed contracts to carry out certain tasks in advance of the real procurement or are allowed to "compete" in procurements where the deck becomes stacked against others who were not privy to the same inside information.

190. Examples of this corrupt practice include the following:

- HUD is reprocurring the SWAT contract currently being performed by the Kerry Company. One of the elements of this procurement will be the ability to identify potentially troubled projects. HUD has unlawfully provided Kerry with Ervin's proprietary data that was subject to use and distribution restrictions. This has enabled Kerry to spend months developing a system to evaluate and analyze projects, giving it an unfair competitive advantage over others, including Ervin, and an unfair opportunity to win the SWAT contract when it is re-procured.
- In procuring legal enforcement services, HUD invited a favored group selected by HUD's General Counsel and members of the Housing Division to submit bids. HUD is developing the requirements for these activities as it proceeds. Given the very short time between the solicitation and bid dates, Ervin suspects some contractors had inside knowledge that the emergency RFP was being issued.
- HUD has requested proposals from the Financial Advisor contract awardees on a "Cross-Cutting" task order. The solicitation for this task order was obviously written only for Hamilton, HUD's incumbent financial advisor. The award of this task order was predetermined by HUD, and the requirements for the task order were developed in conjunction with the predetermined awardee.
- The Financial Advisor solicitation experienced a number of delays while HUD resolved its conflicts of interest policy. Ervin strongly suspects that Hamilton, all of HUD's directed subcontractors, and all other Wall Street type firms were heavily negotiating HUD's conflicts policy, which allows HUD to basically waive any conflicts for its favored contractors. The ability to negotiate conflicts up front opens the door for significant abuse.

d. Improper Influence Over Source Evaluation Boards

191. In addition to ensuring Dunlap's power base throughout the organization, loading Source Evaluation Boards with women and minorities, or with white males who live in fear that they will

incur her wrath if they do not come to the conclusion she expects, helps ensure the continuation of this system. For example, Dunlap caused the Region 10 (Seattle) Housing director, who is known to be closely affiliated with Dunlap, to be selected as a member of the Source Evaluation Board for the financial advisor procurement. Dunlap deliberately selected a person whom she knew would be loyal to her, who would do what Dunlap wanted and whom would be fearful of betraying Dunlap if she did not do as Dunlap wished.

e. Rescoring

192. If the "right" result in a procurement is not achieved, political influence is exerted on a Source Evaluation Board to go back and raise a favored firm's evaluation score so it can be awarded a contract. Ervin understands that about one and a half years ago, Dunlap forced a Source Evaluation Board to award a contract to Aspen based on the rescoring of proposals.

193. On an initial legal services procurement, similar results occurred when the Source Evaluation Board recommended Holland & Knight for award. HUD's General Counsel forced the Board to rescore the offerors' proposals. After this rescoring, contracts were awarded to the Dewey, Ballantine law firm and two other firms, the firms who were really intended to win.

194. As recently as the first quarter of 1996, the Source Evaluation Board on the financial advisor procurement was required to rescore proposals so that CS First Boston could be awarded a fourth financial advisor contract.

195. On the due diligence set aside solicitation, Ervin has learned that at least five teams, including the team of Brown and Company as prime contractor with Ervin as subcontractor, were found by the Source Evaluation Board to be technically qualified to perform the work. Dunlap interfered with the Board and eliminated the Brown/Ervin team and one other team from consideration.

f. **Emergency Procurements - Retaliation for Protests**

196. To justify the purchase of certain services without the burden of full and open competition, HUD creates urgent and compelling needs to enable "emergency" procurements. Designating a procurement as an "emergency" enables the bypassing of normal procurement practices and safeguards and provides another avenue for HUD and Dunlap or her superiors to noncompetitively award contracts to favored contractors.

197. In June 1995, Ervin assembled a consortium of eight premier law firms to offer legal services to HUD under an RFP. The unique consortium concept proposed by Ervin would enable it to clear any conflicts of interest that a law firm might have and assist HUD in selecting the law firm best able to provide the services needed by HUD. Several months passed with no action from HUD on the Legal Services RFP.

198. In November, 1995, Ervin serendipitously learned about a HUD Legal Enforcement procurement when two separate groups within HUD called Ervin to obtain background information on how Ervin handled bankruptcies and where certain financial

information could be obtained. HUD was looking for Ervin's expertise to write the task orders under the to be awarded contract. Because of its calls to Ervin, HUD obviously recognized Ervin's expertise, and tipped its hand as to its own lack of knowledge in the enforcement area.

199. For example, under its asset management contracts with HUD, Ervin has collected over \$43 million in improper owner distributions from HUD-held or HUD-insured multifamily projects using various enforcement techniques. These funds would have gone uncollected by HUD without Ervin's efforts and assistance.

200. In addition, under its Audited Financial Statement review contract, Ervin has developed tests and reports which identify improper distributions by owners. For 1994, Ervin identified a list of owners who appear to have improperly distributed over \$50 million. It is interesting to note that, even though it was not required to provide this list to HUD, Ervin offered to do so. HUD, however, was only interested in the top 100 instances of improper distributions, while choosing to ignore the balance.

201. Prior to the information requests from HUD, Ervin was not aware of the Legal Enforcement contract because it was not publicly advertised in the *Commerce Business Daily*. In fact, Ervin initially believed this was the Legal Services RFP, the statement of work for which also provided for enforcement activities.

202. Once it learned that these procurements were totally separate, however, Ervin began to inquire into how and why a separate procurement was being conducted. The same contracting officer was involved in both the legal services and legal enforcement solicitations, eliminating the only plausible answer that one hand of HUD did not know what the other was doing. Since proposals were still being evaluated, it does not seem appropriate that Dunlap should have been involved or have been interfering in the procurement.

203. Ervin finally learned the Legal Enforcement procurement was not conducted as an open and competitive procurement. Instead, it was done on an "emergency" basis, which meant there would be no need for serious competition. Ervin was unable to obtain a rational explanation as to why a new emergency procurement was necessary in August 1995 when two months earlier HUD had obtained and was evaluating bids for legal services that should have met all of its needs. The only logical answer is that someone who was connected to the HUD political appointees erred and did not get a bid in on the Legal Services RFP.

204. Since this "emergency" procurement was obviously wrong, Ervin protested the Legal Enforcement procurement because of the lack of full and open competition and because the enforcement activities were subsumed in the services being procured under the Legal Services RFP. Ervin reasoned HUD should award the Legal Services contract in accordance with that RFP.

205. Edward Stever, the Contracting Officer on both the Legal Services and Legal Enforcement procurements, then retaliated against Ervin for filing its protest, which under the procurement rules it had every right to do. At first, Stever threateningly questioned how Ervin got on HUD's cc:mail system. When that intimidation failed and after months of supposed inaction on the Legal Services RFP, he then summarily rejected Ervin's Legal Services proposal from further consideration the day after Ervin filed its protest on the Legal Enforcement procurement. Interestingly, two members of Ervin's Legal Services consortium ultimately won the Legal Services procurement.

206. After Ervin protested the Legal Enforcement procurement, John Ervin received a phone call from the attorney for HUD's financial advisor, who also happens to be a partner in one of the law firms in Ervin's consortium and who was selected as one of the Legal Services contractors. This attorney said he had received a call from Dunlap who was very upset about the protest and wanted to know what Ervin was doing.

207. Ervin requested information from HUD on the Legal Services and Enforcement procurements, as well as a debriefing on the Legal Services solicitation, which is required to be responded to within five days. HUD stonewalled the release of any information with respect to these procurements and told Ervin that a debriefing was not available on Legal Services. Ervin is

still waiting on the various information and debriefing requested.

208. HUD issued the enforcement contract on an emergency basis to a restricted list of bidders two months after HUD had already obtained competitive bids for legal services. This contract allowed HUD to hire lawyers over the next year consisting of approximately to 40,000 hours of legal work. There is absolutely no reason why hourly legal services to do something HUD has done for years had to be accomplished with a separate emergency procurement. As discovery will prove, there never was any emergency. The emergency procurement was nothing more than an excuse to bypass the spirit and letter of the procurement laws.

209. In one of the most offensive examples of emergency procurements, HUD applied the emergency procurement excuse to the subsequent financial advisor procurement while, at the same time, acknowledging it did not follow the contracting rules and provided for corrective action. In short, HUD was able to ignore its own problem with the procurement and achieve the results it had already determined were correct.

g. The Folly of Protests

210. HUD's financial advisor procurement has been going on for over a year. In June 1995, HUD found a team assembled by Ervin to be in the competitive range for this procurement. The Ervin team and 9 other bidding teams were asked to clarify their proposals based upon the same six standard questions asked of all

offerors found to be in the competitive range. Ervin prepared its response to the six standard questions and presented them in the BAFO meeting conducted in late summer 1995. In early 1996, Ervin was notified by HUD that three other offerors, Hamilton (the incumbent financial advisor), Merrill Lynch, and Cushman & Wakefield, had each been selected for the award of a contract. Ervin has learned that a fourth award to CS First Boston was made after a politically motivated rescoring was completed to ensure that CS First Boston won a contract.

211. On information and belief, Ervin believes that its offer was improperly not selected for award. In fact, Ervin believes that HUD had predetermined who would win and was only going through formalities of a procurement to paper the file. Ervin also believes the selections were made to allow Hamilton to appear more competitive which is borne out by the subsequent treatment of the crosscutting task order.

212. When offerors in the competitive range are given the same standard questions to answer, their offers must be presumed to be equivalent. In that instance, based on the published rules for the solicitation, the government must award contracts based on price. Ervin believes that its price bid was substantially superior to the bid of some of those selected for the award. Despite Ervin's multiple requests, HUD has steadfastly refused to release the price bids of each of the 10 offerors to enable it to determine if the contract awards were justified. This

information is required to be released under the FAR and is also subject to release under the Freedom of Information Act.

213. As a result of these failures to follow the appropriate rules, another contractor and Ervin filed a protest of the procurement with HUD and the U.S. Government Accounting Office ("GAO"), as Ervin had every right to do.

214. HUD admitted that it had acted improperly when it proffered six standard questions to all of the offerors instead of providing questions based on weaknesses, errors or deficiencies in each offeror's proposal. As corrective action, HUD offered to reconduct the BAFO portion of the procurement based on specific questions to be proffered to each offeror.

215. While it had taken almost a year to reach the decision stage in the Financial Advisor procurement, HUD exercised emergency procurement provisions, this time under CICA, and has proceeded with "competing" task orders to the four original contract awardees for about 70% of the work to be awarded to the financial advisors. This effectively eliminated at least 70% of the effect of the corrective action HUD agreed to take.

216. Under its corrective action, HUD has issued its specific questions to Ervin on its Financial Advisor proposal. The oppressive tone, nature and number of questions (46, including all subsidiary questions) asked of Ervin, and HUD's proceeding with issuing task orders to the original awardees, are a clear indication that HUD was again trying to merely paper its files to justify the decisions it had already made instead of

giving all parties a chance to be successful. When HUD is issuing a procurement for \$20 million including the undisclosed cross-cutting task order, to help sell billions of dollars of taxpayer assets, it is not appropriate that it be so blatantly unfair in how it conducts those procurements.

217. Because of the oppressive nature of the questions issued to Ervin, the requirement to provide personal services and lobbying activities, constitutional violations regarding race based scoring points, failure to consider price in the award, HUD's demands for Ervin's intellectual property and HUD's technical transfusion of Ervin's proprietary information to others, Ervin found it necessary to protest HUD's corrective action and again requested that all awards be set aside and be replaced by the original four lowest priced offers. At the same time, Ervin submitted responses to HUD's questions, including important questions HUD should have asked but did not.

218. HUD prepared an Agency Report in response to Ervin's protest that effectively dismissed the objections primarily on technical grounds and continued to stonewall providing the cost bids. It additionally tried to paint the problems as mere contract disputes and dismissed the use of the contract for illegal lobbying and personal services activities. HUD's response made it very clear that any attempts to exhaust administrative remedies by HUD is a waste of time and effort.

219. Ervin submitted comments to the Agency Report in a letter dated May 31, 1996, which is attached hereto as Exhibit B. This letter expanded the protest to object to:

- HUD's issuance of a "Crosscutting" Task Order;
- Political rescoring of original proposals;
- Credit Reform manipulation;
- Retaliation;
- Contracting corruption and favoritism;
- Stonewalling; and
- HUD's Agency Report is time barred.

220. Subsequent to submitting its comments, Ervin was advised through the copy of another CICA that HUD was proceeding with awards based on a statement of urgent and compelling need. The CICA disclosed that C.S. First Boston had withdrawn from its right to participate in what could be a \$20 million contract. By itself, this is very suspicious. Also disclosed was that HUD intended to award an additional contract.

221. Although the revised proposal was not selected, Ervin suspects that it knows the firm that will receive the additional award. It further suspects that such firm has been provided with Ervin's proprietary database, had inappropriate contacts with Dunlap about the protest, is a very large contributor to the Democratic Party, and was working with Dunlap's close friend on another initiative at the time. Each of these possibilities calls the supplemental award into question.

h. Forced Subcontracting - "Arranging Marriages"

222. It has become clear over the past 18 to 24 months that HUD, and particularly Dunlap, have been significantly abusing the subcontracting process to steer pass-through work to selected individuals and/or firms, some of which she has a private relationship with, without having to report on or account for the activities. Utilizing this approach may also allow expenditures to be moved off-budget by funding what should be appropriated functions out of the FHA insurance funds. HUD has been accomplishing this through two methods:

- forcing firms which are already under contract with the Department to engage HUD designated and specified subcontractors under those existing contracts; and
- awarding contracts and designating to contractors the subcontractors that will be utilized under the contract, and how much of the allotted contract funds will be allocated to such subcontractors.

223. HUD and Dunlap have made it a practice to use forced subcontracting as a means of allowing them to engage selected contractors and subcontractors and to bypass competitive procurement requirements. Depending on the relationships, this may effectively be considered as a kickback. FAR clearly states that the decision to use a subcontractor is **solely** that of the prime contractor.

224. FAR limits its regulation of subcontracting to the Government's practice of consenting to the use of subcontractors. FAR does not address government forced subcontractors, thereby indicating that this practice is not appropriate or acceptable. The forced subcontracting approach allows any type of work,

whether appropriate under the prime contract or not, to be procured without subjecting the contract to disclosure obligations and competition requirements.

225. Ervin and others have been placed in positions of disadvantage through both having a subcontractor forced upon them, as well as being precluded from competing for subcontracting opportunities, because certain HUD officials like Dunlap have established themselves as the only source for designating who will be awarded subcontracts. This is particularly offensive when, in several instances, Ervin has been contacted by forced subcontractors for information and guidance, without which they could not fulfill their subcontract obligations.

226. Additionally, giving certain contractors extra consideration in procurements because they will accept forced subcontracts places other contractors at a disadvantage and deprives them of their constitutional due process rights. It also violates the FAR in that it is not listed as evaluation criteria.

227. The current political appointees at HUD can use forced subcontracting to completely bypass all contract reporting requirements. Pass through pricing information does not necessarily relate to subcontractors, as only prime contractors are subject to any serious pricing scrutiny. In addition, prime contractors are able to collect an override to do something that

HUD could just as easily have contracted for directly, thereby resulting in an unnecessary duplicate payment.

i. Forced Subcontracting - Kerry

228. After a fair, open and competitive procurement process, Ervin was awarded a contract in December 1991 to provide technical assistance to HUD's Property Disposition and Housing Management Division in all areas relating to the management and liquidation of multifamily REO. Ervin was hired under this contract to serve as an expert resource in developing approaches for the management of HUD's multifamily property disposition efforts, as well as to provide expertise and advice on areas of concern to housing management. Despite the inclusion of HUD's Housing Management Office in the contract for five years, with the exception of the Kerry work on SWAT, only HUD's Multifamily Property Disposition group utilized Ervin's services. All four option years of this contract were exercised by HUD through December 1995.

229. In early August 1994, William Harris, then GTR of Ervin's Asset Management contract, called John Ervin to inform him that HUD intended to implement a new loss mitigation program to be known as Special Workout Assistance Teams (SWAT). Mr. Harris stated that Ervin would to assist in this effort. As a result, Ervin attended a few initial SWAT organizational meetings.

230. On August 16, 1994, John Ervin received a telephone call from Dunlap, who stated "I'm arranging a marriage." Dunlap

told Mr. Ervin that she was going to modify Ervin's Technical Assistance contract and install Kerry as a subcontractor to Ervin. Until this conversation, Ervin had never heard of Kerry. Dunlap indicated that HUD was working out the contracting issues. Later that day, Ervin received by telecopy a copy of Mr. Kerry's resume and corporate profile.

231. On August 17, 1994, John Ervin received a telephone call from Mr. Harris to discuss the Kerry arrangement. Mr. Harris told Ervin that Kerry was going to be the lead resource for this effort, and the Technical Assistance contract was the likely vehicle to accomplish this. He indicated that, despite the previous discussions, Ervin would not be involved in the SWAT effort. Ervin would only serve as the conduit for engaging Kerry.

232. Mr. Harris indicated that the Technical Assistance contract would be expanded through the term of the then current option period (December 1994) to provide funds to pay Kerry.

233. Mr. Ervin stated that the Technical Assistance contract was basically over and that there was essentially no funding available under the contract. The contract had been reduced to only about \$65,000 per year. Ervin told Harris that he did not know how HUD could justify a \$260,000 per year pass-through to Mr. Kerry on a \$65,000 contract. Mr. Ervin told Mr. Harris he could not understand how Ervin fit into this deal, and that he was concerned over the legality and propriety of this whole transaction.

234. On August 19, 1994, Ervin was advised that HUD had made a modification to the Technical Assistance contract to add \$77,000. This money was to be used to pay Kerry for 3½ months through December 1994. Mr. Ervin was told that in December a "Limited Circumstances" would be done where three names would be chosen and Kerry would win. Ervin has subsequently learned that this contract is now worth in excess of one million dollars.

235. On September 7, 1994, Steve Hans (GTR, Technical Assistance contract), Marc Harris (GTM, Technical Assistance contract), and Skip Day (HUD Contracting Department) called John Ervin. They indicated to Mr. Ervin that the contract modification needed to be simplified and that Mr. Kerry's fee was to be \$20,636.14 per month, and was to be earned at a fixed rate over a 3½ month period, for a total of \$72,226.50.

236. Ervin stated again that he was concerned about the legality and propriety of this entire transaction. He was again told that there was nothing to be concerned about as this was simply a pass-through. Mr. Ervin also expressed concern about Mr. Kerry's hourly rate. Ervin said he would not approve HUD's payment to Mr. Kerry and also told HUD that neither he nor the company would accept supervisory authority over Mr. Kerry's work. Mr. Ervin stated that he would take the credit, or blame, for work he or Ervin performed, but would not take it for others. Mr. Ervin also said that, because he was concerned with the legality and propriety of the arrangement, he would refuse to take any mark up on the contract.

237. The Kerry contract amendment was being delayed by HUD's contracting division, and Kerry was calling Ervin continually to get it closed. Kerry apparently complained to Dunlap, who again called John Ervin and told him to just get it closed. Ervin believes she had apparently been told that Ervin was causing the delays.

238. Effectively, Ervin's Technical Assistance contract acted as a conduit to pay Kerry for 3½ months to do the type of service Ervin was under contract with HUD to perform and perfectly capable of providing itself, if it was given the opportunity. Although Mr. Ervin told Mr. Harris Ervin was interested in bidding on the longer term contract by being one of the three limited circumstances contractors, Ervin heard nothing more. In December 1994, a \$1,197,046 longer term contract was awarded to Kerry on a noncompetitive basis and Ervin ceased any involvement in this contract.

j. **Forced Subcontracting - Williams,
Adley/Hamilton**

239. In December 1994, HUD entered into a sole source contract with Williams, Adley to perform due diligence tasks related to mortgage note sales. This was a Small Business 8(a) set-aside procurement which was made based on no more than an interview by Dunlap.

240. Williams, Adley subcontracted approximately \$5 million of the work under this contract back to HUD's financial advisor and favored contractor, Hamilton, which is not an 8(a) firm and already had a contract to perform financial advisory services

related to the note sale. In effect, the financial advisor was overseeing the due diligence contractor who in turn had subcontracted work back to the financial advisor. This resulted in the financial advisor effectively supervising itself. The conflicts and opportunities for illegal activities inherent in this arrangement are self evident.

241. Ervin believes HUD awarded a \$30 million noncompetitive contract to Williams, Adley for due diligence services with the stipulation by Dunlap that the financial advisor would be a forced subcontractor and entitled to a major share in the contract.

k. Forced Subcontracting - Nancy Andrews

242. Ervin has been advised that Nancy Andrews, a close friend of Helen Dunlap, has functioned as a forced subcontractor to at least two of HUD's major contractors. Ervin also understands that Andrews acted as a consultant to HUD in a recent study of Section 8 subsidized housing conducted by E&Y/KL. Considering the relationship between Dunlap and Andrews, this appears to be an illegal kickback and may call the objectivity of the independent study into question.

l. Forced Subcontracting - Other

243. In March 1996, HUD held a conference in Washington D.C. for Multifamily Housing Directors. This conference included speakers from the University of Maryland that Ervin understands were subcontractors under the Aspen contract. Such training

costs should appropriately have come from HUD's operating budget, instead of being forced through an existing contract.

244. Ervin has heard of a number of other situations where women with close ties to Dunlap have been handpicked by Dunlap to act as subcontractors or prime contractors under purchase order or subcontracting procurements. The extent to which this approach to contracting has occurred will be proven at trial.

m. Summary of Contracting Corruption and Favoritism

245. As a result of the contracting corruption and favoritism engaged in by HUD and the consistent discrimination against Ervin, the existence of which has been acknowledged by various HUD staff members under Dunlap, Ervin has suffered significant damages from the failure to obtain HUD contracts, or to be paid compensation due it, including the following:

- Inability to compete as a prime contractor for all contracts HUD has inappropriately determined will only be opened to 8(a) firms.
- Inability to compete for all contracts HUD procured through sole source awards.
- Inability to compete for any and all contracts HUD procured through limited competition among firms hand-picked by certain high level political appointees.
- Having a Source Evaluation Board be told by "higher ups" not to award a contract to Ervin. To aggravate an already egregious situation, HUD then retaliated against Ervin for complaining.
- Inability to win contracts because HUD chose to ignore the Federal Acquisition Regulations by classifying Ervin as "technically competitive" but not evaluating price considerations.
- Inability to compete for work to analyze multifamily financial information that Ervin provided to HUD. HUD

demands Ervin's proprietary data through threats and intimidation, but without providing compensation. This is addressed in details below.

- Being "black balled" in future contract awards.

246. As a result of the above, Ervin has and will continue to suffer significant monetary and reputational damages resulting from failures to obtain contracts with HUD, a besmirched reputation resulting from Dunlap's actions, and Ervin's rights to do work being taken away and given to others.

2. Racial, Gender and Age Discrimination

247. Ervin is owned and headed by John J. Ervin, who is a white, middle-aged male. Although Ervin has an outstanding record of Equal Opportunity Employment, the impression spread by Dunlap, i.e., that Ervin is a "white male company," has irreparably harmed Ervin in the eyes of HUD. Ervin has been informed on numerous occasions by well-meaning career employees at HUD, as well as by a certain staff member of Hamilton, that John Ervin should only be sending female and minority professionals to meetings with HUD if Ervin is "to get anywhere" with Dunlap.

248. Ervin is not the only party that is subject to this level of obvious and blatant discrimination. It happens to other contractors run by white males, as well as to HUD employees both in the field and at Headquarters.

249. The demonstrated, practiced and consistent pattern of discrimination against white, middle-aged males is also evident in almost all of HUD's procurements over the last two years. In

procurements large or small, there is an obvious pattern of discrimination against white, middle-aged males, or companies owned and controlled by such individuals. These include 8(a) set asides, minority and woman-owned bonus scoring points, sole source awards, "emergency" procurements, directed rescoring of Source Evaluation Board recommendations, and forced subcontracting, among others.

250. For the most part, contracts are being awarded to firms owned and operated by women, African-Americans and other minorities, in processes which ignore Adarand's strict scrutiny requirements. Examples of the largest contracts that have gone to minority or women owned firms are: the initial Financial Advisor contract, now totaling \$19 million, to Hamilton, which is owned by a woman; the initial Due Diligence contract totaling \$30 million, which was a sole source 8(a) award to Williams, Adley; the follow up Due Diligence contracts totaling \$30 million, were 8(a) set asides to Tradewinds International, Deva and Associates, and Gardner Kamy; a SWAT physical inspection contract awarded to Roybal; a mark-to-market inspection contract, which was also an 8(a) set aside, awarded to DFW for \$500,000; an emergency, sole source data processing contract awarded to Soza, an Hispanic firm, to perform cash disbursements for single family loans; and one or more enforcement contracts where certain of the winners were minorities hand picked by HUD's General Counsel.

251. The extent of the discriminatory processes engaged in by Dunlap and HUD becomes obvious when one looks at the numbers.

Ervin has learned from Freedom of Information Act ("FOIA") requests to HUD that in 1995, approximately 85% of the contracts over \$50,000 issued by HUD's multifamily housing group went to minority or woman owned firms. This excludes one case where HUD, at Dunlap's direction, unlawfully tried to cancel the contracts of a white male-run company but could not because HUD found that it could not perform the work it sought to take away.

a. First Due Diligence Contract - Had To Be Given To A Minority Firm

252. In preparation for its multifamily note sales efforts, HUD advised Ervin that it was uniquely capable of providing multifamily due diligence services for HUD because of the expertise Ervin had gained in its Asset Management, Physical Inspection, Due Diligence and Annual Financial Statement Review contracts, and its knowledge of HUD and multifamily housing. Additionally, HUD acknowledged that under the disposition section of Ervin's existing Asset Management contract, Ervin had the contract authority and the right to conduct due diligence for multifamily note sales. Since money was authorized in the contract and Ervin was able to start work immediately, HUD committed to Ervin that Ervin would do this work. HUD subsequently notified Ervin that the work had to be assigned to a minority and proceeded to award contracts to minority firms totaling approximately \$60 million for this work, to the exclusion of Ervin.

253. HUD conducted a series of meetings, which were scheduled by HUD at HUD, that at various times were attended by:

- Judy May, the HUD employee who was responsible for the Note Sale effort and was the GTR on the Hamilton contract;
- Buzz Kumer, the HUD employee who was the GTR on Ervin's asset management contract and who had responsibility for assigning work under that contract;
- Frank Malone, a senior employee of HUD, then directing its property disposition group;
- Peggy Cockrell, an employee at HUD;
- Austin Fitts, President of Hamilton, HUD's financial advisor;
- Sue Ellis of Coopers and Lybrand ("C&L"), a subcontractor to Hamilton; and
- Robert Robinson, an employee of Hamilton.

254. On May 16, 1994, HUD employee Judy May called Ervin employee Bernard Oleniacz to discuss the details of Ervin's acting as HUD's due-diligence contractor. In response to that telephone call, on May 18, 1994, John Ervin and Bernard Oleniacz met with Judy May, Buzz Kumer, and Peggy Cockrell of HUD, and Austin Fitts and Robert Robinson of Hamilton. The group discussed the mechanics of how to go about performing due diligence and where HUD's data sources were. On the understanding that Ervin would be performing due diligence, Ervin apprised HUD and its Financial Advisor contractor of Ervin's processes, its database approach to information collection and the location of the data within HUD and elsewhere that would be needed to perform due diligence.

255. Judy May told Ervin that the only open issue was negotiating the task order. Ervin indicated that the per-project, per-month cost was already fixed in the contract,

leaving the only open question to be the maximum number of months it would take to complete the work. Ervin was told that the only thing delaying the start of work was that Hamilton, HUD's financial advisor, had not yet finished negotiating its task order with HUD.

256. On May 25, 1994, Ervin and Oleniacz again met with HUD. Attending this meeting were Judy May and Frank Malone of HUD, Austin Fitts and Robert Robinson of Hamilton and Sue Ellis and Rick Sampson of C&L. Again, the group discussed further how to proceed with performing due diligence and where HUD's data sources were. The group also agreed that Ervin should start to set up an action agenda to perform due diligence.

257. After the meeting on May 25, 1994, Judy May called Mr. Oleniacz and said that HUD was concerned about meeting its minority and women-owned contracting quotas. Ervin recommended that, if necessary, it would implement a subcontracting plan to assist HUD in meeting its contracting quotas.

258. Subsequently, Judy May informed Ervin that orders had come down that Ervin would not be performing the due diligence because it had to be given to a minority firm. Although Judy May was very apologetic, she said it was beyond her control.

259. About six months later, HUD awarded the Due Diligence contract to Williams, Adley, an 8(a) firm. The initial contract award was for \$15 million and was later increased to a maximum of \$30 million for work to be performed over about a year and a half. Ervin subsequently learned that Williams, Adley

subcontracted approximately \$5 million of the work back to Hamilton, HUD's financial advisor. (This issue is addressed elsewhere in this Complaint.) The contract to Williams, Adley was a completely non-competitive, sole source award based on no more than a meeting with Dunlap. Apparently no proposal was even prepared.

260. Williams, Adley had previously acted as a subcontractor to Ervin on its annual financial statement contract. Because of this, Ervin knew Williams, Adley as an African-American-owned firm with four offices and 75 employees. The firm had little multifamily experience or expertise, but it was clearly not disadvantaged utilizing any common sense standards.

261. Based on FOIA requests to SBA, Ervin learned that a predecessor to Williams, Adley was designated a "disadvantaged" business in mid-1983, based on checking a few blocks on a self-certification form. This was over 11 years prior to the award of the due diligence contract that supposedly was remediating some type of bias.

262. There is little logic or rationale to believe that "the inability to obtain adequate financing and restrictions on the market to certain racial, ethnic and social groups" in San Francisco in 1983 should be remediated by a \$30 million sole source contract award in Washington, D.C. in late 1994.

263. There is no compelling reason why HUD should have breached its existing contract with Ervin and then transferred Ervin's contract rights to a less experienced 8(a) firm. It had

a contractor (Ervin) in place with a contractual right to perform a large portion of the services, and who was ready, willing and best able to perform. In this day and age of budget deficits, HUD cannot justify a sole source award of \$30 million to an unqualified minority small business contractor without strict scrutiny.

264. For HUD to try and justify its actions by sole sourcing \$30 million in work to this firm by citing its own failure to meet a quota, that is to the best of Ervin's knowledge unpublished, is unconscionable and constitutes unlawful and unconstitutional discrimination.

265. When Ervin objected to HUD's decision on several occasions, HUD informed Ervin that the HUD official who authorized Ervin to do the work was, in fact, not authorized to do so. HUD has continued to ignore the issues of discrimination and breach of contract, the latter of which is discussed later in this Complaint.

b. Mark to Market Physical Inspections - Taken From Ervin and Assigned to an 8(a) Firm

266. Ervin has a contract with HUD's Kansas City Regional Office to conduct multifamily physical inspections for the states of Missouri, Kansas, Iowa and Nebraska.

267. In the fall of 1995, HUD Headquarters determined the need for a number of special Mark to Market physical inspections to test its Mark to Market process. It determined that existing physical inspection contractors like Ervin would perform the inspections.

268. Under its physical inspection contract, Ervin was assigned all required inspections in three of the states but not Nebraska. The Nebraska inspections were assigned to DFW, an 8(a) minority firm.

269. Both the local Field Office and Ervin objected to HUD's assignment of this work to DFW, but Ervin was told that was the way it would be. Brian Hunt, an Ervin employee, tried to discuss the injustice of this with William Hill and Albert Sullivan of HUD's Office of Multifamily Housing, but was told it was a contracting matter that should not be discussed with the program staff. This represented another case of blatant discrimination that goes far beyond preferences and where actual contract rights were taken away from Ervin and given to a minority firm.

270. Ervin is not a minority firm and does not qualify under Section 8(a) of the Small Business Act. Ervin asserts that HUD's continual use of sole source, limited competition or set aside procurements to award contracts to 8(a) firms infringes on Ervin's personal rights to due process and equal protection of the laws.

271. In addition, Ervin believes that HUD applies the 8(a) program very liberally as a way to circumvent the FAR rules that call for open and free competition, and enables Dunlap and HUD to direct contracts and force subcontractors to their favored contractors to further her own agenda. Ervin contends that the limitations placed on the procurement of large contracts to 8(a)-qualified firms is just another means for Dunlap to prevent white

males, including John Ervin, from bidding on or winning contracts with HUD. All of these contract awards violate the strict scrutiny requirements of Adarand.

c. "White Boy's Hell"

272. Ervin, and numerous other HUD contractors and employees, are the victims of ongoing race, gender and age discrimination by HUD, Dunlap and Diaz in particular. In the last few years, HUD and these senior politically appointed employees have demonstrated and practiced a consistent pattern of discrimination against white, middle-aged males. This is evident from HUD's Office of Multifamily Housing personnel management and contracting practices, and the results that have been obtained.

273. Many white, middle-aged male HUD employees have been "reassigned" to various non-multifamily housing management departments, or what the career staff have internally code named "white boy's hell."

274. A white male employee who is typically over age 40 ends up in "white boy's hell" for trying to perform a job by the rules, speaking up in dissent to Dunlap's policies, or just being in a position that Dunlap or Diaz wants to control or wants to give to someone else. Many long term HUD career professionals have all been "reassigned" into "white boy's hell" at one time or another. Others fearing such a reassignment learn quickly not to rock Dunlap's boat.

d. The Results of HUD's Reorganization

275. HUD's Field Office restructuring, which separated the single family and multifamily functions, resulted in numerous white males being replaced by females or minorities throughout the country, the extent of which will be determined through discovery. All of the discriminatory practices that have taken place have left Dunlap with a solidified power base throughout the HUD organization that makes it easier for her to carry out her personal agenda, and makes it much more difficult for anyone to dissent to the policies and practices now being carried out by HUD.

e. Roybal/SWAT Physical Inspections

276. Under its various contracts with HUD, Ervin has performed thousands of physical inspections of HUD-held and HUD-insured multifamily properties. Ervin maintains three architects on staff with over 60 years of combined multifamily property experience. Specifically, these architects and others on Ervin's staff have supervised or performed thousands of physical inspections of multifamily properties under various contracts. Ervin is highly qualified to perform multifamily physical inspections that run the gamut from routine annual inspections to more extensive inspections required for underwriting or foreclosure.

277. In 1994, HUD instituted the Special Workout Assistance Team (SWAT) program. As a part of the nationwide SWAT effort to identify, diagnose, and create solutions for troubled properties

in HUD's insured multifamily portfolio, HUD required the performance of physical inspections on multifamily properties identified for evaluation. Using an 8(a) set aside, HUD procured SWAT physical inspections using the HUD Denver contracting office. Roybal, an 8(a) firm located in Denver, won the nationwide contract to perform SWAT physical inspections. Despite Ervin's extensive experience in performing physical inspections for HUD and advising HUD it was interested in competing for this work, it was not allowed to compete because of the 8(a) set aside nature of the procurement. The only thing preventing Ervin from competing for such work was the color of Mr. Ervin's skin, and the laws which foster this insidious form of discrimination.

f. **Financial Advisor, Due Diligence and Legal Services Procurements**

278. As part of her duties, Dunlap has primary responsibility for all note sales activities, including all of the financial advisor and due diligence contracts. Considering this, Dunlap is in a position to strongly influence the bidding procedures utilized to award contracts pertaining to note sales efforts.

279. On March 20, 1995, HUD solicited and obtained proposals for two extremely large procurements related to the note sale efforts, as follows:

- Financial Advisory Services - \$20 million
- Due Diligence Services - \$30 million

280. The Financial Advisor RFP provided that 10 of the 100 scoring points available in the evaluation factors would be bonus points to be awarded based on compliance with the equal opportunity, affirmative action and subcontracting factors cited, which were directed toward minorities and women. The mere existence of these factors discriminated heavily against white males.

281. Despite the problems Ervin faced 9 months earlier with HUD on the initial assignment of due diligence work to Ervin, and then HUD's taking that work away and giving it to a minority firm, HUD designated the Due Diligence RFP as an 8(a) set aside for qualified firms in the Washington, D.C. area. Considering that this was one of the largest consulting type contracts that HUD has ever issued, that it was being used to assist in the sales of billions of dollars of taxpayer assets, and that the \$30 million is nothing more than a "honey pot" to give to a limited number of firms based on some type of fictional disadvantage, its being restricted only to 8(a) firms is not appropriate.

282. In early 1995, HUD issued the Legal Services RFP for a contractor to provide legal advisory services on note sales, with proposals due from offerors on June 19, 1995. This RFP provided that 20 of 95 scoring points in the evaluation factors would be bonus points based on compliance with the equal opportunity, affirmative action and subcontracting factors cited, which were directed toward minorities and women. The mere existence of these factors discriminated heavily against white males.

283. On June 12, 1995, the U.S. Supreme Court handed down its landmark Adarand decision.

284. On June 16, 1995, the Legal Services RFP was amended to delete the affirmative action ranking criteria in their entirety. It was obvious that HUD had concluded that including such language did not meet the strict scrutiny tests required under the just released Adarand decision. Despite this obvious knowledge by HUD's Legal Department, the direction given by the U.S. Supreme Court, and the fact that there was still time to correct the situation, HUD intentionally and willfully continued with the discriminatory aspects of both the Financial Advisor and Due Diligence procurements.

285. As Ervin itself is not an 8(a) firm, it was not eligible to submit a bid by itself as a prime contractor for the \$30 million due diligence procurement, despite being imminently qualified as indicated by the discussions with HUD nine months earlier. As a result, Ervin teamed with Brown and Company, an 8(a) firm located in the metropolitan Washington, D.C. area, and others, to submit a bid. After evaluation of its proposal, the Brown/Ervin team was found to be in the competitive range and was asked to submit to HUD a Best and Final Offer (BAFO), and to attend the oral BAFO presentation.

286. After the oral BAFO presentation, Ervin learned from a very reliable source that the Brown/Ervin team was one of the contractors recommended by the Source Evaluation Board as one of the contract awardees. Ervin also learned that, through

political interference in the procurement process, by Dunlap, the Brown/Ervin team was not awarded a contract.

287. This second due diligence contract, with a ceiling amount of \$30 million, was awarded to three 8(a) firms in late 1995. The three firms that were selected, Deva (with Williams, Adley as a subcontractor), Tradewinds, and Gardner Kamy, do not have the level of experience in multifamily or HUD that Ervin has.

288. Ervin attempted to obtain information on the proposals and contracts of the three awardees through a FOIA request dated August 4, 1995. To date, after over nine months and follow up with HUD, HUD has not responded to Ervin's FOIA request. Through this FOIA, Ervin was trying to understand how the Brown/Ervin team could have lost to any of the three firms given the Ervin team's strong knowledge of HUD, its programs, its note sales goals, and its basic knowledge of the three winning firms, who Ervin believes had no previous due diligence or note sale experience.

289. Deva had teamed with the same Williams, Adley whose "disadvantaged" status had been corrected through its prior \$30 million contract. Separately, Ervin called Deva to discuss opportunities for subcontracting work. Deva indicated that it had been told by HUD that Ervin could not subcontract to them, further violating Ervin's right to due process.

290. Profiles of the three "disadvantaged" winners allowed to split up the \$30 million HUD due diligence honey pot, are as follows:

- Deva - Teamed with Williams, Adley, who was awarded the previous \$30 million contract that was taken away from Ervin because Ervin was not a minority. The head of Deva had been a partner in a big six CPA firm.
- Tradewinds - A front organization for a group of subcontractors headed by a Wharton business school graduate.
- Gardner Kamyra - A local CPA firm with 30 to 50 people headed by an ex-manager from C&L. Mr. Gardner is a very well educated Bahamian black who for the last seven or eight years has traded his classification as an 8(a) firm to procure government contracts as a front for large CPA and other firms. In fact, the bidding team for this proposal was put together by a clearly non-disadvantaged big six accounting firm that needed Gardner, Kamyra's 8(a) status to participate.

291. It is Ervin's belief that none of these firms is sufficiently disadvantaged that the United States taxpayer should be required to remediate their disadvantage by awarding them on a restricted basis up to \$30 million in work that others were also qualified to do. Each is clearly using and abusing a discriminatory system to reap rewards no reasonable person would believe they are entitled to. Additionally, by using ostensible subcontractors instead of joint ventures, they are able to circumvent the 8(a) size limitations.

292. Ervin has requested information under FOIA to determine how these firms qualified as disadvantaged. The Small Business Administration refuses to release background information on these firms to enable those citizens not favored to participate in the

bidding process to evaluate whether such firms are really disadvantaged.

293. To utilize 8(a) set aside procurements and other programs that favor minority contractors, the Supreme Court requires that there should exist a compelling need, a compelling government interest and evidence of real discrimination in the particular service sectors which the set aside is intended to remediate. In this case, HUD can provide no evidence to substantiate such factors.

294. Ervin understands that another firm, Dataprompt, which is also headed by a white middle aged male, was effectively fired from its single family data processing systems contract by HUD so HUD could replace this white male contractor with a minority firm named Soza, who was provided with a sole source "emergency" procurement.

295. Ervin has been systematically denied work because it is not a minority firm or qualified under Section 8(a) of the Small Business Act. In addition, based on statements by a mid-level HUD career employee, Ervin has been blackballed from further contracts with HUD, even as a subcontractor to another firm. Ervin asserts that HUD's continual use of 8(a) firms through sole source or limited competition procurements infringes on Ervin's personal rights to due process and equal protection of the laws.

296. Ervin believes that HUD, under Dunlap and Diaz, intentionally applies the 8(a) program very liberally as a way to circumvent the FAR rules that call for open and free competition,

and enables Dunlap to direct contracts to her favored contractors and subcontractors she can control, to further her own agenda. Ervin also contends that the limitations placed on procurements of large contracts to 8(a)-qualified firms is just another means for Dunlap to prevent white males, particularly John Ervin, from bidding on or winning HUD contracts, thereby furthering her agenda to eliminate the power of the "white male establishment" at HUD.

g. HUD Career Staff

297. Ervin has been advised that Dunlap has publicly stated that "the only fitting job for a male is as a secretary." It is obvious that she intends to make this a self-fulfilling prophecy at HUD.

298. Based on various conversations with long time HUD employees who are white males, it has become clear that promotion and transfer opportunities are not available to white males. Most are forced to keep their mouths shut and keep out of the way and hope things will change. Many, however, are forced to leave or to toil in positions comprising a demotion if they are not willing to "retire." Ervin recently was told by a long time HUD employee that "it is not a good time to be a white male at HUD." Ervin's experience confirms this.

h. Summary of Racial, Gender and Age Discrimination

299. HUD has ignored the law of the land and engages in unlawful racial, gender and age discrimination. HUD's

discriminatory practices are so blatant as to be laughable were the consequences less serious.

300. In a debriefing, held in early May 1996, on another HUD contract Ervin was not awarded, HUD's contracting staff admitted:

- that HUD has no strict scrutiny standard by which it determines the legality of affirmative action type plans used in its procurement efforts. HUD responded that the language describing the affirmative action type plan in the RFP subject to the debriefing was ". . . standard language that is in all RFP's."
- that HUD makes no determination as to whether an affirmative action type plan is narrowly tailored. Again, HUD responded that the ". . . language is in every RFP - just a practice that HUD has used for years."
- that "There is no compelling government interest for the award of minority points" in scoring proposals for contract award.

301. HUD has failed miserably by using discriminatory affirmative action type plans. Not one person in the debriefing, to include 5 of the 6 Source Evaluation Board members and 2 contracting personnel present, had the slightest understanding of the requirements for use and implementation of affirmative action type plans, or the unlawful activities in which HUD has engaged. The U.S. Government cannot justify using practices to discriminate against anyone, even white middle-aged males, with a mere finding of what, in essence, amounts to "we have always done it that way." This is unconscionable and undermines the integrity of the entire U.S. Government, which is supposed to protect its citizens from unlawful treatment.

3. Retaliation Through Breach of Contract

302. By all normal measurement factors, Ervin had become a very successful HUD contractor until Dunlap came to the Department. Ervin provided quality services to HUD at fair prices, most often as the low bidder, and never attempted to limit the level of services or to increase what it charged under any contract. As a result of its approach to business, Ervin's existing contracts were renewed, and new contracts were won through fair and open competition.

a. Ervin's Provision of Asset Management Services to HUD

303. In June 1990, Ervin was awarded an interim 4 month competitively bid contract for asset management of HUD's portfolio of defaulted, multifamily formerly coinsured loans that were starting to be turned back to HUD as coinsuring lenders went broke. Although HUD had never contracted for multifamily asset management type services previously, the complex nature of the loans and the lack of resources in the HUD Field Offices required that the services be outsourced to a contractor.

304. In September 1990, Ervin was awarded a longer term three year contract to continue to asset manage the formerly coinsured loan portfolio. This contract was also competitively bid in a free, open and advertised procurement.

305. In 1993, HUD issued an RFP to reprocur the asset management of the formerly coinsured portfolio. In the reprocurement, HUD expanded the scope of the contract to allow the awardee to service all classes of multifamily projects, and

provided the ability for the awardee to service up to 1,125 projects at any point in time. The contract broke out the services to be provided to include Initial Evaluation Services, Ongoing Loan Servicing, and Disposition Services.

306. Because of the potential workload, HUD anticipated awarding two contracts under the reprocurement, with one contract covering projects located east of the Mississippi and the second contract covering projects located west of the Mississippi.

307. In September 1993, Ervin won the exclusive right to provide asset management servicing in both geographical areas. Ervin has been advised by HUD that this RFP was very competitively bid by 57 separate bidders, and that its proposal proved to be the highest ranking from a technical standpoint and produced the lowest price to the government.

308. The reprocured contract included a base year, with a series of one year renewals. Every renewal has been executed by HUD.

309. Early in the original contract, then HUD Deputy Secretary Albert Delabovi testified before Congress that HUD expected to lose between \$5 billion and \$8 billion as a result of the coinsurance program. Through the asset management contract, Ervin was able to influence HUD's approach to defaulted loan asset management and was able to substantially increase the recovery value of the portfolio by stabilizing the real estate collateral, rather than arbitrarily foreclosing on properties. As a direct result of Ervin's constructive approach to servicing,

the actual losses to the taxpayer from the coinsurance program have proven to be substantially less than Deputy Secretary Delabovi's estimate. Because of Ervin's involvement, HUD was able to recover billions of dollars it had expected to lose.

310. Before Dunlap started to interject herself into the administration of Ervin's asset management contract in mid-1994, the contract, and Ervin's performance of it, went extremely well. Many of Ervin's approaches to asset management services for defaulted loans were incorporated by HUD into its approaches to dealing with multifamily projects.

b. HUD's Note Sales - Initial Financial Advisory Contract

311. On September 30, 1993, HUD awarded a competitively bid contract to Hamilton for financial advisory services. Hamilton is a woman owned business headed by Austin Fitts, who was an Assistant Secretary of HUD and the Federal Housing Commissioner in the Kemp years.

312. The RFP for this effort provided for a relatively small initial contract of a consulting nature. It provided for compensation on an hourly basis, and was limited to \$1 million, which might have impacted on Ervin's ability to perform under its other contracts. Considering this, Ervin elected not to bid on the initial financial advisory contract. Although Ervin, probably better than anyone else based on its asset management of HUD's formerly coinsured portfolio, recognized the need to deal with the portfolio on a program basis, it also recognized that there were insufficient resources within this procurement to

address those issues. Ervin had no inkling of how large this contract was to become through noncompetitively bid expansions and extensions, some of which occurred between the solicitation and the award of the contract but most of which occurred after award.

c. HUD's Note Sales - Due Diligence Activities

313. In early 1994, HUD was planning to implement a multifamily note sales effort which would encompass a number of projects in the southeastern United States. Judy May, HUD's GTR on the first Hamilton financial advisor contract and the primary person responsible for the note sale, informed Ervin that Hamilton had been retained to provide financial advisory services on the loans which would be sold in the Southeastern note sale.

314. Under the disposition provision of its asset management contract, Ervin had the right to perform disposition services for at least the formerly coinsured projects being sold.

315. HUD conducted a series of meetings, which were scheduled by HUD at HUD, that at various times were attended by:

- Judy May, the HUD employee who was responsible for the Note Sale effort and was the GTR on the Hamilton contract;
- Buzz Kumer, the HUD employee who was the GTR on Ervin's asset management contract and who had responsibility for assigning work under that contract;
- Frank Malone, a senior employee of HUD, then directing its property disposition group;
- Peggy Cockrell, an employee at HUD;
- Austin Fitts, President of Hamilton, HUD's financial advisor;

- Sue Ellis, C&L, a subcontractor to Hamilton; and
- Robert Robinson, an employee of Hamilton.

316. On May 16, 1994, Ervin employee Bernard Oleniacz was called by Judy May. Ms. May advised Mr. Oleniacz that HUD wanted Ervin to meet to discuss Ervin being HUD's due diligence contractor for the note sales. In response to that telephone call, on May 18, 1994, Messrs. John Ervin and Bernard Oleniacz met with Judy May, Buzz Kumer and Peggy Cockrell of HUD, and Austin Fitts and Robert Robinson of Hamilton. The group discussed how Ervin should go about performing due diligence, where HUD's data sources were and how to accumulate the information. Judy May clearly stated that HUD expected Ervin to perform the due diligence as provided under its asset management contract.

317. On May 25, 1994, Messrs. Ervin and Oleniacz met with Judy May and Frank Malone of HUD, Austin Fitts and Robert Robinson of Hamilton and Sue Ellis and Rick Sampson of C&L. The group discussed in more detail how to go about performing due diligence, where HUD's data sources were, and that HUD wanted Ervin to perform due diligence under Ervin's asset management contract. The group also agreed that Ervin should start to set up an action agenda to perform due diligence. As a result of this meeting and the commitments that had been made, Ervin provided a copy of Ervin's proprietary database that Ervin had developed and refined over ten years, and other files for use in the process.

318. Late on May 25, 1994, Judy May called Mr. Oleniacz and stated that HUD was concerned about meeting its minority and women-owned contracting quotas. Although Ervin was not even aware that such quotas existed or what they were, Ervin recommended to HUD that Ervin could implement a subcontracting plan to assist HUD in meeting its contracting quotas.

319. On May 31, 1994, Ervin began to set up a due diligence action agenda to begin planning the work of collecting information. Ervin was told it could not start work until Hamilton had resolved its task order which was under negotiation.

320. In June 1994, Judy May informed Ervin that orders had come down that Ervin would not be performing the due diligence assignment because the assignment had to be performed by a minority firm. Although Judy May was very apologetic, she said the decision was beyond her control.

321. Despite HUD's recognition of Ervin's pre-existing contractual rights under its asset management contract, HUD awarded a Due Diligence contract to Williams, Adley in December 1994. The contract award was initially for \$15 million and was subsequently increased to a maximum value of \$30 million. This contract was awarded to Williams, Adley on a completely non-competitive basis based on an interview with Dunlap.

322. In what appears to be an unusual arrangement HUD interfered with Ervin's contract rights. Additionally, the manner in which the discussions took place allowed HUD and Hamilton to obtain Ervin's trade secrets. Ervin subsequently has

learned that Williams, Adley subsequently subcontracted approximately \$5 million of the work back to Hamilton, HUD's contract financial advisor with whom Ervin had been conducting discussions regarding the performance of due diligence. Ervin suspects that awarding the subcontract to Hamilton was a condition of William, Adley's award of the contract.

323. Since Ervin had briefed Hamilton on how to conduct due diligence for HUD, Ervin believes at least that subcontract work should have gone to Ervin rather than serve as a kickback to Hamilton. Ervin suspects that in addition to HUD and Dunlap's longer term plan to hire minorities and women at the expense of white middle aged males, Hamilton and Dunlap also saw this as an opportunity to illegally divert work and a lot of money not subject to contracting restrictions from Ervin to Hamilton, notwithstanding the existence of Ervin's contract rights. In any case, HUD breached Ervin's contract by hiring someone else to perform the work.

324. John Ervin has discussed the reason for the decision not to assign the due diligence work to Ervin with both Dunlap and Albert Sullivan on numerous occasions. These individuals have never disputed that the commitment was made to Ervin and Associates. Instead, they have said it is the Department's position that Judy May and Buzz Kumer, the persons who told Ervin it would do the due diligence work, did not have the authority to make the commitment.

325. Judy May was controlling the preparation for HUD's multifamily note sales efforts. She advised Ervin that, because of the expertise Ervin had gained in its asset management, physical inspection, due diligence and annual financial statement contracts, its knowledge of HUD and multifamily housing, and where information could be obtained, Ervin was uniquely capable of providing multifamily due diligence services. HUD also acknowledged that, under the disposition section of Ervin's asset management contract, Ervin had the right and authority to conduct due diligence for the multifamily note sales. It is also important to recognize that HUD, at that time, did not have another source of funds for these activities. Since money was authorized in Ervin's asset management contract and Ervin was able to start work immediately, HUD through Judy May and Buzz Kumer committed to Ervin that it would do this work.

326. By awarding a contract to Williams, Adley for work that was included in Ervin's asset management contract, and work that HUD committed Ervin would perform, HUD breached its contract with Ervin.

d. Sale of Formerly Coinsured Multifamily Mortgages

327. On July 15, 1994, HUD issued task order number 05 to Hamilton in the amount of \$300,000 to provide:

"services to assist in the sale of formerly coinsured multifamily mortgages in Region 4"

328. On September 30, 1994, in Modification 1 to this task order, Hamilton's July 15, 1994 task order was expanded to add

\$958,027 plus to add indemnification for Hamilton. This brought the total appropriated amount to \$1,258,027. On the same date the task order provided for payment of \$4,151,061 to be paid out of proceeds from the mortgage sales and allowed an advance payment from the FHA insurance fund. This brought the total balance of task order number 05 to \$5,409,088.

329. Since Hamilton's original financial advisor contract started out on an hourly basis with a \$1 million maximum, and then was changed to a \$1 million per year maximum, it is unconscionable that a small component of the contract was able to be converted to a \$5,409,088 award without any open competition. Ervin has learned that Judy May objected to the expansion and increase of this contract, and as a result was transferred by Dunlap to another lesser position far away from the note sale.

330. Ervin also questions whether it was appropriate for Hamilton to have been providing services as a Financial Advisor for the Southeast note sale, which encompassed overseeing the activities of a due diligence contractor, while at the same time acting as a subcontractor to that same due diligence contractor for compensation of approximately \$5,000,000, which was in addition to the \$5,409,088 discussed above.

331. Ervin maintains that, under the terms of its asset management contract with HUD, Ervin was entitled to perform this work, and would have done so at a fraction of the amounts HUD paid to Hamilton and Williams, Adley.

332. By awarding this work to Hamilton on a noncompetitive basis for work provided in Ervin's asset management contract, HUD breached its asset management contract with Ervin.

e. Mark to Market Physical Inspections

333. HUD maintains contracts on a regional basis for the performance of various types of physical inspections on HUD-held and HUD-insured multifamily properties. Contractors around the country, including Ervin, have won these contracts in free and open competitions conducted by HUD at the regional levels.

334. Ervin maintains three architects on staff with over 60 years of combined multifamily property experience, who, combined with Ervin's asset management group and a group of experienced subcontractors, have supervised or performed almost 2,000 physical inspections of multifamily properties under various contracts with HUD, including a contract with HUD's Region VII.

335. In the fall of 1995, HUD Headquarters determined the need for a number of special Mark to Market physical inspections to test its Mark to Market proposal. It was determined that the existing physical inspection contractors like Ervin would perform the work in the areas covered by their contracts.

336. Under its contract, Ervin was assigned all required inspections in three of the four states in which it had the contractual right to perform inspections, but it was not assigned projects in Nebraska. The Nebraska inspections were assigned to DFW, an 8(a) minority firm.

337. Both the HUD Field Office and Ervin objected to the assignment of these inspections to DFW, but Ervin was told that was the way it would be. Brian Hunt, an Ervin employee, talked to William Hill and Albert Sullivan about this, but was told it was a contracting matter that should not be discussed with the program staff.

338. By awarding a contract to a minority firm for work that was included in Ervin's physical inspection contract, HUD breached its contract with Ervin.

f. Seattle Delegated Processing Contract

339. Ervin believed that a combination of unique financial information, staff shortages at HUD, and a desire to avoid the type of losses HUD suffered under the coinsurance program would posture the Company to be the Delegated Processor of choice for HUD. Ervin made significant investments in staff and systems to develop this business opportunity.

340. Ervin has been involved in providing asset management services to over 620 troubled formerly coinsured multifamily loans for HUD since 1990, making Ervin an expert in identifying characteristics of loans that are at high risk of default.

341. Recognizing this experience and expertise, six of ten HUD Regions awarded Delegated Processing contract to Ervin to underwrite and process multifamily mortgage insurance applications for HUD.

342. Ervin entered into a contract with HUD's Seattle office to provide Delegated Processing services that was due for its annual renewal on December 1, 1995.

343. Ervin had been advised on both September 27, 1995, and October 5, 1995, by HUD's Region X Office in Seattle, that HUD was exercising its option to extend the contract for one year.

344. On or about December 11, 1995, after a phone call by Ervin inquiring as to the status of the extension, Ervin was advised that HUD had reversed its position and had decided not to exercise the extension option.

345. In a memo to Roger Lee, the contracting officer, Diana Goodwin-Shavey, who is a close associate of Dunlap and who was on the Source Evaluation Board for the Financial Advisor procurement for the purpose of ensuring that Dunlap's favored candidates would be selected, stated that HUD had decided not to extend the Delegated Processing contracts because "The Fast Track program developed by the Seattle office, and now used nationwide, contributed to the reduced demand for DPII and Technical Discipline funds." Based on Dunlap's continued interference with Ervin's contracts, Ervin believes Dunlap purposely interfered with the extension of Ervin's Seattle Delegated Processing contract.

346. Under the Seattle Delegated Processing contract, Ervin was required to maintain a staff with the ability and capacity to provide up to \$500,000 of Delegated Processing services per year, including the ability to process up to 10 applications per month

to meet any needs the Seattle Region might have had. This capacity level was hotly negotiated by Roger Lee in the award of the contract to Ervin leading Ervin to believe this contract would be a valuable source of business for Ervin.

347. Despite Ervin's complying with the contract requirements and maintaining this HUD-mandated capacity, the government did not make any assignments to Ervin in the previous year of the contract. Although HUD did not assign any work to Ervin, HUD's notices that it intended to renew the contract led Ervin to believe work would be forthcoming. Additionally, the government never notified Ervin that it did not expect to utilize its maximum requirements, thereby depriving Ervin of the opportunity to reduce the capacity mandated by HUD to meet its contractual obligations. Ervin can only believe that the government was operating in bad faith. This occurred despite the acknowledgments by HUD that Ervin had performed in a satisfactory manner.

348. Ervin believes the decision to not renew the contract and the subsequent treatment by the Seattle office regarding paying for the damages due to Ervin were in retaliation for a report Ervin provided to HUD on Country Village Apartments, a Los Angeles apartment project on which Ervin questioned the underwriting practices used by HUD that allowed the investor who is well connected to the Administration, to pull \$19 million out of the project and not make repairs or fund sufficient deficit reserves. Ervin later discovered through a front page Los

Angeles Times article that these practices had been forced on the Los Angeles Field Office by Dunlap.

349. Paragraph 2(a) of the Seattle Delegated Processing contract, entitled Minimum Quantity, clearly states:

"The Government shall order a minimum of one SAMA or Feasibility application processing or a minimum dollar amount of \$10,000 for services under this contract, whichever is greater, in each year of the contract."

350. HUD did not meet its minimum obligations under the contract for the period of December 1, 1994 to November 30, 1995. Ervin suspects that HUD did not intend to honor its minimum obligation but addressed it only after being challenged by Ervin.

351. Instead of processing the minimum payment due, HUD requested that Ervin "itemize expenses that [Ervin] incurred as a result of HUD's failure to order the minimum quantity" to a maximum of \$10,000.

352. On December 12, 1995, Ervin advised Roger Lee, the contracting officer in Seattle, that under the "greater of" language in the contract, Ervin was entitled to a minimum amount of \$16,800. Ervin stated "we were required to maintain a staff with the ability and capacity to provide up to \$500,000 of delegated processing services per year, including the ability to process up to 10 applications per month to meet any needs the government might have had," and that HUD, by never notifying the company that it did not expect to utilize the maximum requirements, "deprived us of the opportunity to reduce the capacity we were required to maintain to meet our contractual obligations."

353. On December 13, 1995, HUD acknowledged that "we look upon our failure to provide the minimum quantity as a breach of contract." HUD apparently reasoned that it could better its position through its own breach. HUD did not look at the minimum order quantity as liquidated damages but instead argued it was responsible only for actual damages. HUD also stated that the government's failure to extend the contract was not in any way reflective of Ervin's work.

354. On December 13, 1995, Ervin rejected HUD's approach that by intentionally breaching its contract, HUD was able to bypass its obligations in an effort to improve its position. The company estimated that the actual damages suffered by maintaining the required capacity easily would run into the hundreds of thousands of dollars, and at a minimum, it would amount to \$250,000 or half of the maximum under the contract.

355. On January 17, 1996, HUD proposed a settlement of \$1,704, which included \$176 to cover all costs and \$1,528 profit.

356. On February 5, 1996, Ervin again indicated that if HUD agreed to pay the actual damages of maintaining unnecessary capacity and staff without trying to fall back on a minimum order amount, Ervin would submit an invoice for actual damages.

357. Since February 5, 1996, HUD has made no further attempt to resolve the question of the balances that is obviously due to Ervin. Ervin suspects that without the ability to include HUD's abuses in this suit, HUD would never make any attempt to meet its obligations under this contract.

358. The Seattle HUD Office, on the same day it rejected Ervin's payment, made a separate request to Ervin as follows:

"We have an urgent need for a report of annual operating cost data per unit for each different project type, in order to clarify our underwriting requirements on projects in production. We have no other up to date source for this data."

359. The Seattle Office not having any historical financial data past 1993 is a clear indication as to both the risks of the Fast Track process for the taxpayers, and the importance of the systems Ervin has developed. HUD, by acknowledging that it did not have information necessary to adequately underwrite projects, further calls into question the motivations for not renewing Ervin's contract and trying to cheat the company out of even the minimum amount the contract called for.

360. This case further illustrates the arbitrary and capricious nature of HUD where it believes it has the cash and the ability to browbeat and intimidate any contractor into submission, despite the administrative protections that should be in place to prevent this.

g. Failure to Issue Task Orders on a Timely Basis

361. Task orders are the means by which HUD officially orders services under the Audited Financial Statement Review, Asset Management, and all other contracts. A task order must exist before HUD can process a payment to a contractor.

362. Under the Audited Financial Statement Review contract, HUD processes task orders on a consistently and chronically late basis. For example, in March 1995, Ervin began receiving audited

financial statements for review for years ended in 1995. Until April 22, 1996, Ervin still did not have a task order from HUD to process these statements, although it had sent over 30,000 letters and had keypunched and began processing over 9,000 financial statements. In order to meet delivery schedules and keep from having to lay off its experienced staff who rely on this work to pay their bills, Ervin was forced to undertake significant risks and pay for this work without any official assurances that it will be paid by HUD. In fact, the only reason Ervin was provided the task order was because Ervin refused to release financial statements for upcoming note sales without receiving such task order.

363. HUD issued a task order to Ervin in late April 1996 for financial statements received in 1995. Nevertheless, Ervin is now receiving statements for fiscal years ending in 1996. As a result, Ervin is once again being forced to front the costs to process these statements on behalf of HUD. The purpose of this is to intimidate Ervin into meeting HUD's ongoing demands for information and to limit Ervin's constitutional right to object to what is going on at HUD.

h. Refusing to Process Payments

364. Ervin has performed under its Audited Financial Statement review contract for the years 1993 and 1994 and much of 1995, but has still not been paid everything that is due. Despite numerous notices to HUD, HUD still owes Ervin \$89,766.50

for services rendered on the 1993 and 1994 financial statements that were billed on September 25, 1995.

365. Additionally, over \$200,000 was billed for work on 1995 statements, which HUD advised could not be processed because a task order had not yet been issued. HUD has since issued this payment, which contained no interest relating to payment delays. It is unconscionable that HUD can hold up issuing a task order for a year, not process an invoice because of its own delays, and then not pay interest on its late payment.

366. On its asset management contract, HUD has caused Ervin to work for up to a half a month without a task order. Although typically this is self correcting, there are cases where Ervin did work assuming a task order was coming and ended up not being paid for that work. For example, Ervin continued to work on 274 projects from September 22, 1995, to October 3, 1995. On October 3, 1995, HUD retroactively removed 107 projects from Ervin's work order and backdated the work order to the date it should have originally been issued. This deprived Ervin of one half of one month's servicing fees on these 107 projects, amounting to \$48,975 that it had earned but HUD claims is not due.

367. In addition, Ervin incurred legal fees under its previous asset management contract for which HUD was required to indemnify Ervin. While the federal judge in that case ultimately granted Ervin's motion for summary judgement based on the doctrine of official immunity, Ervin was required to go out of pocket for \$66,198.82 in legal fees starting over 14 months ago

on March 31, 1995. Of this amount, \$47,609.49 has still not been reimbursed by HUD. Although HUD has acknowledged its indemnity obligation at various times, Ervin has been told by HUD that all funds in this original contract had been recaptured, and it may be necessary to renegotiate the contract to get paid. From Ervin's standpoint, there is no need for renegotiation because of HUD's internal accounting structure or its contracting confusion. HUD must pay Ervin what it is due.

i. Failure to Pay Interest on Late Payments

368. Under government regulations, a government agency must pay interest on invoices that are not paid on a timely basis. HUD has engaged in a pattern of paying Ervin invoices on a chronically late basis, and not paying the interest that it is obligated to pay for such late payments.

369. On March 22, 1996, Ervin notified the current GTR on both the Audited Financial Statement Review and Asset Management contracts that accrued and unpaid interest calculated at the rate of 8% was due as follows:

Asset Management	\$ 38,804.12
Legal Indemnification	1,218.36
Annual Financial Statements	<u>63,274.65</u>
TOTAL	<u>\$103,297.13</u>

370. HUD has not processed the interest payments that are due to Ervin. On one occasion, the GTR of the asset management contract advised Ervin employee, Mr. Stephen Ervin, that there was no money in the Asset Management contract to pay for the interest.

371. It is simply not appropriate for HUD or any government agency not to pay contractors for the work they have completed or to refuse to pay interest on late payments that HUD is legally obligated to pay for no reason other than they think they can get away with it.

4. Theft of Ervin's Intellectual Property

a. Ervin's Multifamily Database

372. In May 1994, Judy May and Buzz Kumer had committed to Ervin that Ervin would be providing due diligence services for multifamily note sales. Based on the understanding Ervin would be performing due diligence, Ervin provided information to HUD on the structure and layout of all of Ervin's multifamily databases. This information had been developed and refined over a 10 year period by John Ervin and it represented state of the art technology in multifamily asset management and information collection.

373. This information was given to Judy May and Hamilton, HUD's financial advisor contractor, for the sole purpose of developing a due diligence program for the upcoming note sales which Ervin would be implementing. Ervin believes this proprietary database has been utilized by HUD and its other contractors in the data collection activities for both note sale due diligence and HUD's Data Warehouse.

b. Ervin's Annual Financial Statement Contract

374. It is well known within HUD and the industry that HUD's data processing and information systems are one of its most

serious problems. Its poor systems have been the subject of numerous Government Accounting Office and Inspector General reports.

375. The Regulatory Agreement for each FHA-insured multifamily mortgage requires the submission of an annual audited financial statement. This requirement covers approximately 16,200 insured and HUD held mortgages, which consist of approximately 2 million apartments with an original mortgage balance of almost \$50 billion.

376. Prior to project years ended in 1993, the annual audited financial statements were required to be reviewed by HUD loan servicers in 57 multifamily operating offices. However, varying approaches and levels of expertise caused each office to review financial statements differently. Some did an excellent job, while others did little more than stack the statements in a spare room. Due to the different standards applied by the HUD Field Offices, there was little consistency or comparability in the results obtained among the various Field Offices or the way HUD's regulations were enforced.

377. Over the years, HUD had developed a computer system called Field Office Multifamily National System ("FOMNS") that was intended to accumulate very limited information from the annual financial statements. The system and its implementation were woefully inadequate. There were limited quality control checks in FOMNS, and the data required was minimal. Only about 62% of the statements for 1992 had been input into FOMNS by HUD.

378. Although the theoretical ability exists to upload the FOMNS data from the Field Office computers to HUD Headquarters, Ervin learned that the upload was prohibitively expensive in terms of time and money. The overall FOMNS process was so bad that in early 1994 Dunlap refused to authorize funding for any future uploads, leaving HUD Headquarters with no centralized information on its multifamily portfolio.

379. In 1993, HUD's Multifamily Housing Division, faced with significant resource constraints in the Field Offices, issued a competitive procurement for a contractor to review each financial statement for the Field Offices and to input information into the existing FOMNS system. The initial request for proposals required:

- Review of 100% of all annual financial statements.
- Upload of limited data from the annual financial statements into HUD's FOMNS system.
- Preparation of semiannual portfolio level reports for each of HUD's 10 regional offices. (The reports were to be prepared on paper, not electronically.)
- Study of the implementation of electronic filing of all annual financial statements.

380. Ervin, through its president, had for over ten years (and prior to any HUD involvement) been developing and refining a database approach to the collection and utilization of critical information on large portfolios of multifamily projects. Utilizing the database approach it had developed, Ervin recognized the opportunity value of the information included in the annual financial statements as an outstanding business

opportunity and competitive advantage that would ensure its future success with HUD. Ervin joined with Reznick Fedder and Silverman, a regional CPA firm, to aggressively pursue the opportunity.

381. Recognizing that HUD had not considered the importance of the data which could be collected as part of the financial statement review process made Ervin even more confident of the future competitive advantage. Additionally, the requirement for semi-annual reports provided the opportunity to market the systems to HUD.

382. Ervin's initial Best and Final price proposal to provide these services, compared to what was actually billed, was as follows:

Original Proposal	1993 Year 1	1994 Year 2	1995 Year 3
Review of 16,000 Statements	\$9,600,000	\$5,200,000	\$5,600,000
Semiannual Portfolio Reports	\$500,000	\$300,000	\$325,000
Consulting Study	\$90,000	---	---
16,000 Advance Notice Letters	\$120,000	\$120,000	\$120,000
3,000 Follow-up Letters	\$37,500	\$37,500	\$37,500
3,400 Extension Letters & Phone Calls	\$34,000	\$34,000	\$34,000
60,000 Loading	<u>\$300,000</u>	<u>\$300,000</u>	<u>\$300,000</u>
Total (Original Proposal)	\$10,681,500	\$5,991,500	\$6,416,500
Actual Billings	\$3,740,230	\$2,424,676	

383. Upon receipt of initial bids, HUD determined that its RFP as originally issued was cost prohibitive. HUD revised the solicitation and the contract to eliminate 70% of the financial

statement reviews, the semiannual portfolio reports, and the consulting study.

384. Ervin became even more convinced that winning the contract would enable it to create a database that would result in an incredible competitive advantage to gain additional work with HUD. It became very aggressive in pricing its revised proposal and was awarded the contract.

385. HUD did not execute the contract until February 14, 1994, despite the fact that approximately 13,000 of the annual financial statements were due on March 1, 1994 for fiscal years ending in 1993, or about two weeks after the contract was signed. Implementation of the contract was further delayed for a few weeks until Dunlap's schedule would allow for a meeting on the contract. Although Ervin wanted to start immediately, it was obvious that Dunlap wanted to exercise total control over the contract.

c. Systems Design and Development

386. Each annual financial statement consists of an average 24 pages of financial and project data. This amounts to at least 384,000 total pages of information per year for the loans in HUD's portfolio.

387. By far, the most critical and expensive elements to enable use of the financial information included in the 384,000 pages of information are the consistent collection and validation of the information. Failure to recognize the importance of these components is what has prevented HUD itself from effectively

collecting and utilizing the information in the past. To design and implement a system sufficiently sophisticated to collect and validate this complex information costs **millions of dollars** and requires:

- A thorough understanding of the nature and meaning of the available information, including all of the various exceptions to what might be expected. This requires extensive experience and expertise in the fields of accounting, multifamily real estate operations and finance, and organizational structure.
- The ability to design effective and efficient data input, edit, validation check, and tracking processes.
- An in place computer system capable of running the systems being designed and programmed.
- A team of programmers to program the system, as well as a team of multifamily and accounting experts that continue to refine the approach, process, and edits.
- The creation and validation of name and address lists and all other types of information to which the systems need to tie together. (Considering the number of sponsors, managers, owners, and auditors associated with HUD's portfolio, this resulted in a list of over 50,000 names and addresses which had to be validated and corrected.)
- Sufficient computer terminals, desks, chairs, office space, etc. to support the input of over 384,000 pages of information each year.
- Keypunchers that must be continually hired, trained and supervised to input the data included in the financial statements in a consistent format.
- Continually checking, rechecking and validating data input to insure its accuracy and integrity.
- A determination as to what information is, and is expected to be, important to meet HUD's information needs.
- The ability to extract and download validated information to a usable medium to enable analysis by the end user.

388. Once extracted, validated data is available on a computer system, anyone with even minimal training on a personal computer can analyze and evaluate the information needed for proper decision making. HUD apparently believes that the only task of any value to it or which it is willing to pay for is downloading the data to a diskette.

d. Creating the System

389. Ervin modified and expanded its existing database programs, and developed many new programs, to collect and input over 90% of the information included in the 384,000 pages of annual financial statements. The information actually required by HUD for the FOMNS system requires less than 5% of what is collected. Ervin made a substantial entrepreneurial investment in the balance.

390. Computer capacity and staff had to be expanded, additional space had to be leased, and numerous clerical and professional staff had to be hired and trained. In 1994, the initial year of the contract covering financial statements for 1993, over 210 separate people were involved in developing a comprehensive system that was beyond anything HUD had ever envisioned. Initial programming alone required an out of pocket cash investment by Ervin of \$833,850.

391. The preliminary information provided by HUD from its systems was abysmal. For example, relying on the name and address database provided by HUD, Ervin sent initial letters announcing the requirements for 1993 financial statements to the

owners and managers of record for the 18,000 projects on HUD's system. Over 4,000 letters were returned as undeliverable for various reasons not previously identified by HUD. As an additional example, HUD did not know that 1,500 of the projects in its database no longer had any obligation to submit a financial statement. Finally, HUD did not have a list of the auditors or sponsors. As a result of these and other problems with the data supplied by HUD, tens of thousands of professional staff hours were invested by Ervin to clean up the various lists and files to make them useful. This work was above and beyond any obligations Ervin had under the contract.

392. Although Ervin was obligated under the contract only to keypunch and review 30% of the financial statements, the company paid out of its own pocket to have 100% of each and every data element for each and every financial statement keypunched, validated and quality controlled. Ervin undertook this very large financial investment to build the database and collect the information it anticipated HUD would need to accomplish the objectives the department was beginning to articulate. Ervin was only willing to make this large commitment in expectation of a large future return in the form of additional contracts with HUD.

393. Through all of its efforts, Ervin was successful in increasing the rate of financial statements collected from 62% by HUD in 1992 to over 96% by Ervin in 1993 and 1994. This improvement far exceeded any of HUD's expectations.

394. Building a system took more than a financial investment. John Ervin personally worked over 11 hours a day, seven days per week for 14 weeks straight until April 25, 1994 when he suffered a heart attack. His staff worked similar hours. The effort he expended prior to his heart attack represented an additional level of entrepreneurial investment in creating a data collection, analysis and retrieval system. HUD does not recognize the monetary cost to develop this system, let alone the personal investment of those involved.

395. Under the contract, HUD was obligated to develop a simple program to load the limited data required by its FOMNS systems in the Field Offices, and provide this program to Ervin. HUD was unable to develop and provide Ervin with a working copy of the FOMNS upload software and still cannot provide it. Although under no contractual obligation to do so, Ervin developed and programmed its own system to upload FOMNS data using its own resources. This was done by Ervin as an accommodation to HUD under the mutually beneficial relationship Ervin believed to exist at the time between it and HUD.

396. As HUD has acknowledged repeatedly, there is no contractual requirement for Ervin to provide any electronic or paper information to HUD Headquarters. The contract only requires Ervin to provide FOMNS information to HUD's 57 Field Offices, utilizing software supplied by HUD. There was never any intention, expectation or obligation to support any kind of a centralized database information system at Headquarters.

e. The Value of Ervin's Systems and Information

397. As the contract progressed, HUD started to recognize the value of the information Ervin's systems allowed it to collect and use. The company began receiving numerous requests for downloads and special reports from HUD Headquarters, as well as from HUD's Field Offices. With each request, HUD promised it would pay Ervin for the cost associated with running the report but it stated it did not have funding to pay for the cost of developing the capacity to produce it. Ervin repeatedly told HUD the value that was created came from Ervin's envisioning, designing, and programming the system, as well as keypunching, validating, and quality controlling the data that was in the financial statements, not from the mere act of pressing a button to run a report.

398. Ervin continually informed HUD, particularly the contract's GTR and GTM, verbally and in writing, that any information Ervin provided to HUD from the system was being provided only on a relationship basis, and as such, its use was restricted to only HUD employees and only for specific uses. Ervin was clear in each instance that the information constituted an important and valuable competitive advantage to Ervin, and under no circumstances was the information being provided to HUD to be given to Ervin's competitors.

399. HUD does not understand or acknowledge that the costs incurred by Ervin to develop, implement and maintain a system capable of providing the needed information ran into the millions

of dollars. In fact, based on standard rates through early 1996, Ervin had invested \$9,672,546 against billings of \$6,165,158, for a shortfall of \$3,507,388. That shortfall and additional profit was expected to be recovered in future years through the use of the data for other large portfolio evaluation contracts with HUD. Instead, HUD now believes it can continue to exercise its power over Ervin and demand the extraction and reporting of raw data, the incremental cost of which is measured in the hundreds of dollars, for little or no compensation. Failure to comply with HUD's demands has placed Ervin at serious risk of its survival.

400. Despite the reduced scope of the ultimate contract from the original RFP, HUD has acted like they are entitled to everything that Ervin has. HUD has demanded substantially all of the services that were contained in the original RFP for about 40% of the cost. While Ervin's entrepreneurial investment enabled it to be in a position to provide the data it knew HUD would need, Ervin is under no contractual obligation to provide any data other than the limited FOMNS data to HUD's Field Offices. Additionally, Ervin is only obligated to provide FOMNS data to HUD through software programs that HUD is first obligated to provide to Ervin.

401. An example of one of the first benefits of Ervin's system came as a result of improving the quality and reducing the cost of HUD's annual audit. Previously, HUD had been unable to obtain a clean opinion from its auditor because of a lack of reliable information to determine the loan loss reserve for

multifamily loans insured or held by HUD. Obtaining a clean opinion was in fact, one of HUD's primary objectives.

402. Previously, HUD's auditors had to select a sample of 2,187 audit reports and then collect hard copies of each statement from the individual HUD Field Offices. The CPA firms then analyzed each financial statement, extracted certain data, and developed a computer model to estimate the risk of loss to HUD. Auditors (who are not cheap) then applied the sample results to the entire portfolio. The cost to the taxpayer of this entire exercise easily ran into the hundreds of thousands of dollars each year.

403. With the information Ervin collected and provided to HUD for no compensation, HUD was able to obtain a 100% sample, rather than a 14% sample it had to settle for in the past. This eliminated much of the cost of the audit and raised the accuracy considerably.

404. As a result, in a letter to Ms. Judy A. England, Director of Housing and Community Development Issues, Secretary Cisneros stated:

"I would like to point out that the problem of not having reliable financial data that led to FHA using a sample for Fiscal Year 1993 has been overcome. FHA now has reliable financial data on over 95 percent of its insured multifamily portfolio for 1994."

Thus, HUD was beginning to realize the benefits of the system created by Ervin.

405. At this same time, Ervin was still being prevented by Dunlap from developing or disseminating portfolio level reports

that could have been used by HUD in its underwriting, portfolio evaluation and portfolio management activities.

406. Ervin was willing to provide certain of the information to HUD to show HUD the value of what Ervin had created. However, HUD has sought to usurp the benefits of the system and the information for its own use, without compensation to Ervin for its entrepreneurial investment.

407. Because of Dunlap's interference in this contract, HUD's Field Office staff began to believe that Headquarters was forcing an overly expensive program down the throats of the Field Office. Deliverables were delayed by Dunlap, who in her absolute control of HUD, did not want any information distributed before she had reviewed everything. As a part of this absolute control mentality, she ordered that portfolio information was not to be distributed at all. The delays introduced into the process by her interference, coupled with the inability to provide portfolio reports, began to infringe upon the goodwill that Ervin had spent so many years building with HUD's Field Office personnel.

408. The unwillingness of HUD to allow Ervin to market to HUD the systems and data Ervin had made a multi-million dollar investment in was particularly devastating to Ervin because it prevented the company from taking advantage of the competitive advantage it created.

409. On February 8, 1995, at a breakfast meeting in Orlando, Florida, Dunlap advised John Ervin that she was hiring Kathy Palmer from Atlanta for HUD's MIS Department. Dunlap also

reiterated her position that no portfolio level reports, information, or data was to be provided to anyone inside or outside of HUD without her permission.

410. Over the past two years, 30,000 financial analysis schedules have been provided to the Field Offices that are distorted because of Dunlap's fear of the existence of conflicting information. Ervin has made officials in the Housing Management Division associated with the audit contract aware of these problems. Despite this, providing HUD with information Ervin knows is flawed reflects negatively on Ervin's standing and reputation.

f. The Transfer of Ervin's Intellectual Property to Ervin's Competition

i. The Kerry Company

411. In the summer of 1994, Kerry, one of Ervin's competitors for work at HUD, had requested that it be provided information from Ervin's database to enable Kerry to identify potentially troubled projects for HUD. The request for information by Kerry was particularly offensive because Kerry was hired by HUD under a subcontract forced ("arranged marriage" -- see above) upon Ervin by Dunlap. Not only was Ervin not allowed to compete for this work at HUD, which it was qualified to perform and had a right to perform under its various contracts with HUD, it was now being required to give the fruits of its Ervin's proprietary systems to a competitor, thereby eliminating the value of the competitive advantage Ervin had created.

412. In September 1994, Brian Hunt and John Ervin of Ervin met with William Hill and Kenneth Hannon of HUD to discuss the progress of the annual financial statement contract. One of the topics of discussion was the request by Kerry for access to Ervin's proprietary systems and information. Neither Mr. Hill nor Mr. Hannon could accept that there was nothing under Ervin's annual financial statement review contract that required the company to provide access to proprietary systems or information to either HUD or Ervin's competitors.

413. It became very clear that if Ervin did not give this information to Kerry, Ervin would be looked upon as not working in HUD's best interests or Ervin's not being a team player. Although Ervin did not agree to provide the information directly to Kerry, Ervin provided it to Mr. Hill with restrictions as to its allowed uses by HUD only. Ervin understands that Mr. Hill then provided the information to William Harris, another HUD employee, who then provided it to Kerry.

414. Since Ervin had been previously blamed for delaying the subcontract to Kerry because concerns over the legality of this arrangement, Ervin was placed between the proverbial rock and a hard place. It was unable to adequately protect its rights to the systems and information it had developed and still maintain its good reputation with HUD. This problem has continued and has led to this portion of this Complaint.

ii. The Data Warehouse System

415. On March 7, 1995, John Ervin and Brian Hunt were summoned to a meeting with Kathy Palmer, who was placed in charge of HUD's Data Warehouse project by Dunlap. Beverly Miller, HUD's GTM on Ervin's audit review contract, also attended this meeting. The meeting was uncomfortable from the beginning and was obviously intended by HUD to intimidate Ervin. Ms. Palmer said she needed a data dump of certain fields from Ervin's 1993 data files. John Ervin told her that Dunlap had ordered Ervin not to provide any portfolio information to anyone. Ms. Palmer said she spoke for Dunlap and that Ervin was obligated to give her the information. It was clear to both Brian Hunt and John Ervin that failure to comply with her demands would negatively impact all of Ervin's contracts with HUD.

416. In attempting to avoid conflict with its sole client, Ervin agreed to provide the requested 1993 information as long as it was only used by HUD personnel and not provided to Ervin's competitors. This information ultimately became the basis for HUD's Data Warehouse project.

417. HUD would not have been able to conceive or implement the Data Warehouse process without the ideas and concepts HUD stole from Ervin. The information Ervin provided was consolidated with other files at HUD and made available not only to HUD, but to other contractors who compete with Ervin for work at HUD.

418. As the development of Ervin's system progressed, Ervin continually held update meetings and demonstrations with various individuals at HUD, including Dunlap. In these meetings, Ervin was required to explain its approach, data dictionary, logic, and all other elements used in conceptualizing and creating the database system being developed. Ervin provided frequent demonstrations and shared all of its proprietary data with HUD in the belief that HUD would recognize Ervin's significant investment in, and value of, Ervin's system to provide HUD with the information it so sorely needed. Ervin never considered the possibility that HUD would ever steal its ideas or systems, intentionally divert the fruits of those systems to Ervin's competitors, or deny Ervin work while still demanding information from Ervin's systems.

419. Between April 1994 and June 1995, Brian Hunt met with HUD personnel on many occasions. At these meetings, he was required to provide significant Ervin proprietary information to HUD personnel on the development of an effective database system.

420. HUD requested an update on the system Ervin was developing. On August 30, 1994, Brian Hunt provided Ms. Miller with Ervin's data dictionary. This document outlined all of the information collected as part of the annual financial statement input and review processes. The information supplied to Ms. Miller also included a hard copy of all of the data screens contained in the system.

421. Subsequently, Ms. Miller, who as GTM on the annual financial statement contract and who had worked very closely with Ervin on the contract was detailed to the Data Systems project. It is believed her involvement in Ervin's contract and her knowledge of Ervin's systems were motivating reasons behind HUD's decision to move Ms. Miller to the effort to develop an internal HUD database which would use Ervin's ideas, concepts and data.

422. The database, which is called "Data Warehouse," draws upon designs and other approaches that were successfully used by and taken from Ervin in the development of its multifamily and annual financial statement processes. Utilizing all of the data provided, HUD has effectively reverse-engineered many elements of Ervin's database system. This has allowed HUD to build a database it was never able to create before. The Data Warehouse is being developed to control the flow and dissemination of Ervin's proprietary information to other contractors and effectively eliminates the competitive advantage Ervin created.

423. On August 31, 1994, Brian Hunt provided Joe Riley at HUD with comparative information for all projects, primarily from the income statement, form HUD 92410, contained in the annual financial statements. The restriction that Ervin placed on any information provided was that since it was owned by Ervin and represented a competitive advantage, the information could not be given directly or indirectly to any of Ervin's competitors.

424. On February 27, 1995, Joe Riley from HUD contacted Ervin to resolve questions on the file layout he had received from Ervin in August 1994.

425. On March 10, 1995, Ms. Miller provided a draft of data elements for the proposed Data Warehouse system to Brian Hunt. Over 50% of the data elements had come from the Ervin data fields that had previously been provided to HUD.

426. HUD continued to want access to the information Ervin had created. The initial favors performed by Ervin in response to HUD's needs quickly became requests, then regressed to demands, and now are little more than threats. If someone demands that Ervin jump and the response is anything other than "how high, sir," Ervin is defamed by HUD, Dunlap and others as not being a good team player, or as holding HUD's data hostage. This occurs despite HUD's acknowledgment that it has no legal right to Ervin's proprietary information or systems.

g. Widespread Distribution of Ervin's Intellectual Property

427. In August and September 1995, HUD, particularly through Judy May, started to get much more aggressive in its demands for data from both a quantitative and qualitative standpoint. Ervin became increasingly concerned that HUD was feeding Ervin's data into Data Warehouse and then providing it to Ervin's competitors, effectively eliminating the competitive advantage Ervin had paid millions of dollars to develop.

428. On September 21, 1995, it became obvious that HUD was ignoring Ervin's concerns about its competitive advantage and was

becoming increasingly upset over Ervin's failure to provide them with the information Judy May and others were demanding. At the same time, Ervin was hearing various rumors and innuendo throughout HUD, including "Ervin made too much money," "Ervin was under I.G. investigation," "Ervin had been blackballed" and other serious defamatory rumors about itself.

429. Although Ervin had a number of discussions with its GTM about the ownership of the data and the systems, HUD continued to take the position that everything Ervin had belonged to HUD. In an attempt to avoid a serious confrontation, Ervin provided HUD with a Syquest removable disk cartridge which included all 1993 and 1994 financial data. This went far beyond anything Ervin was required to provide to HUD under its contract, and effectively trusted HUD with a file which had cost millions of dollars to create. The information was provided to HUD with the clear restriction that it was to be used only for the risk ranking process for the HUD audit, and not for any real estate purposes.

430. Ervin recognized how valuable this information was. Considering this, along with the disk, Ervin sent a letter to Ms. Miller explaining Ervin's position and restricting the use of this information so that it would not be provided by HUD to Ervin's competitors or used for purposes other than risk ranking.

431. On September 27, 1995, Ms. Miller received a cc:mail from Judy May acknowledging receipt of the Syquest disk from Ervin. Judy May, totally contrary to the restrictions Ervin placed on the data, went on to state:

"I have no desire to monopolize this data. In fact, what I have proposed to Tom Sholedice and John Chin (employees at HUD) is that we put the data on a PC with a large disk and install Windows for workgroups so several people can have access to the data."

Judy May stated Kathy Palmer supports this plan. Despite being warned, HUD refused to acknowledge the use restrictions placed on the information, and HUD had no right to steal it. This plan totally violates the restrictions Ervin put on this data.

432. On September 27, 1995, Brian Hunt responded to the Judy May cc:mail to Ms. Miller with a message that said "I just wanted to follow up with you and to ensure that you received the letter that I sent to you regarding the use of the data." Ms. Miller did not respond.

h. Transferring Proprietary Data to Ervin's Competitors

433. On October 24, 1995, Ms. Miller sent Ervin an Urgent priority cc:mail requesting a new Data Warehouse update and identifying problems E&Y has identified with the AFS data Ervin provided to HUD's Data Warehouse. Thus, HUD obviously released information to E&Y it had no right to release.

434. The release of this information was later confirmed on February 23, 1996, when Alan Gittelson ("Gittelson"), a Partner at E&Y, had a conversation with Steve Ervin about Ervin's systems. Gittelson apparently had a contract to do database analysis that was somehow attached to a noncompetitively obtained task order from GNMA. Gittelson asked about information Ervin collected. Gittelson said that the only reason he was asking was that, rather than collecting all the information manually, he

would just request a dump of the information he needed. He said he understood that the formal request would have to go through our GTR, but it did not make much sense to request information that we did not have, so before he got the process moving, he wanted to see if the information was there. Ervin then asked Gittelsohn "What did they give you? Downloads of 92410 and other MNS information, right?" Gittelsohn replied "Oh, we're getting all the information that you have given to HUD. We also have all the information from all of their other systems"

435. On October 27, 1995, in response to the October 24th cc:mail, John Ervin sent a cc:mail to Albert Sullivan outlining Ervin's concerns about the continual misuse and distribution of Ervin's proprietary information. Ervin told Sullivan that HUD was destroying Ervin's competitive advantage and that providing the benefits of Ervin's systems to other contractors to perform very big important, and lucrative, contracts was inappropriate. Ervin indicated it was being forced out of business by HUD's actions.

436. Ervin has also learned that additional proprietary 1994 information Ervin supplied to William Hill at HUD has been diverted to Kerry, who was utilizing it to gain a competitive advantage over Ervin in an upcoming SWAT procurement.

437. Ervin has been advised that the Data Warehouse system, which was populated by much of the information from Ervin's system, had been made available to both Kerry and to Hamilton.

438. On October 27, 1995, Bernard Oleniacz, Ervin's corporate counsel, met with Monica Sussman, Deputy General Counsel, about HUD's continued demands for data, the misuse of that data by HUD, and the subtle and not so subtle threats Ervin was receiving from HUD of what would happen if Ervin does not provide that data to HUD. Mr. Oleniacz explained to Ms. Sussman the significant investment that Ervin had made and Ervin's expectation that it would produce a competitive advantage for Ervin. Ms. Sussman's response was that if Ervin had provided its products and services to HUD and HUD misused them, shame on Ervin.

i. **Misappropriation of Ervin's Annual Financial Statement Data for Note Sales**

439. Ervin had always recognized that the true value of its multifamily systems and information would be in evaluating and re-engineering HUD's entire multifamily portfolio, including note sales, and in improving HUD's ability to underwrite mortgage applications, thereby reducing HUD's risk of loss as a result of defaults.

440. Throughout 1995, Ervin continued to try to convince HUD of the value of its proprietary systems and approaches for HUD's ongoing business. However, because HUD had continued to take the position that it owned and was entitled to all information and systems that Ervin had, it did not consider these issues. Additionally, HUD's plan was that it would take all of the data that it would force Ervin to provide and include it in its Data Warehouse system, which would in turn be made available to its

avored contractors. With this data laundering approach, HUD expected that it had everything it wanted from Ervin and did not need Ervin's future involvement. In fact, once the system was set up and operating, HUD could easily transfer the keypunching and validation functions to HUD's Electronic Villages Initiative, which is an affiliate of Hamilton.

441. On three separate occasions in 1995, Ervin offered HUD the opportunity to obtain the fruits and benefits of the information systems and data Ervin had developed and collected:

- As a partner with Mellon Mortgage Company and Reznick, Fedder & Silverman in a proposal to HUD on the Financial Advisory RFP.
- As a subcontractor to Brown & Company in a proposal to HUD on the Due Diligence RFP (Ervin was not allowed to bid itself because of 8(a) set aside requirements.)
- As a partner with Reznick, Fedder & Silverman in a proposal to HUD on the Management Studies RFP.

442. In each case, Ervin's offers were rejected. Despite this, HUD has demanded the fruits and benefits of Ervin's database and financial information systems to provide the information to competing contractors selected to work on the above multimillion dollar contracts as well as others.

443. Ervin understands that HUD entered into a contract with E&Y to evaluate certain components of HUD's portfolio. Where normally the contractor would need to collect all of the information, HUD simply gave the contractor Ervin's information. Ervin should have, at a minimum, been compensated for this information, but it would have been even more appropriate for Ervin to have had an opportunity to bid for the work.

444. For example, "Exhibit IV" to Ervin's original Financial Advisor proposal presented a three year summary financial statement, which was marked as "confidential." The page explaining this form stated clearly that, "the information contained in this page and the following pages is subject to the confidentiality statement at the front of this proposal."

445. That confidentiality statement at the front of the proposal read as follows:

"This proposal contains information that is to only be used by the United States Department of Housing and Urban Development (HUD) for the purpose of evaluating Ervin and Associates capability and experience in performing the required services under HUD Solicitation Number DU100C00001842419, Financial Advisory Services. Much of the information contained herein is proprietary and any disclosure of this information outside the Department is prohibited without the consent of Ervin and Associates, Incorporated."

446. The cover page additionally stated, "In addition, the report itself is a proprietary tool created by Ervin and Associates and is intended to be kept confidential. Disclosure of the report or its format is not permitted without the express written consent of Ervin and Associates."

447. Ervin is aware that HUD and its financial advisors and due diligence contractors are using this three year summary financial statement, which is subject to copyright protections, without the permission of Ervin and in violation of the disclosure restrictions Ervin included in its Financial Advisor proposal and Ervin's other rights. This format has been provided in connection with both note sales and negotiations with state HFA's.

448. Despite rejecting Ervin's proposals that would have made this summary available to HUD, this proprietary form is now being used by HUD and its advisors as part of HUD's negotiated sales efforts to State Housing Finance Agencies, and as part of HUD's due diligence efforts on note sales. HUD has continued to request this information in connection with each note sale. It also demanded that Ervin keep track of all financial statements for HUD note sales.

j. **Ervin's Proprietary Multifamily Database**

449. To provide it with a competitive advantage in securing future contracts with HUD and utilizing its own resources, Ervin developed a comprehensive database covering virtually every financial aspect of HUD-held and HUD-insured multifamily properties. For example, Ervin created a list of all owners, managers and sponsors of all HUD insured properties. It therefore has the best list available anywhere of the owners (and therefore, potential buyers) of HUD class properties. The importance of this information is underscored repeatedly by HUD. This information provides instant credibility in negotiating with State Housing Finance Authorities, as they themselves have requested Ervin's information on what it really takes to operate any particular project. Additionally, this information can provide negotiating and accounting tools to measure savings and incentives to managers to reduce the costs to operate these projects.

450. Between October 1995 and early 1996, the relationship between Ervin and HUD continued to deteriorate. This was primarily a result of disputes over the ownership and transference of the data to Ervin's competitors. HUD, without ever referring to the contract or considering Ervin's position, took the heavy handed position that they owned everything and if Ervin did not give it to HUD, Ervin would suffer the consequences. HUD information demands were also linked to Ervin's asset management contract and in fact to increase the pressure HUD assigned a new employee to be the GTR on both the Annual Financial Statement and Asset Management Contract. HUD employees continued to claim that all information contained on Ervin's systems belonged to HUD.

451. Despite the one sided, noncompromising approach HUD took in dealing with Ervin, HUD took a different approach with the outside world. In different cases, individuals and firms had requested information out of the audit system from HUD. HUD's response to one such request on July 20, 1994, said:

"The list you are requesting was compiled by Ervin and Associates. This compilation was not a contract, and was not requested, and not paid for by HUD. Therefore, the Department takes no exception to the release of this data if Ervin and Associates wishes to do so."

Although HUD has clearly taken the position that Ervin owns the information it collected, at the same time, it continues to demand the information without compensation.

452. The contents of Ervin's database far exceeds the amount of information HUD is entitled to receive under the contract.

The use restricted data Ervin provided to HUD has been provided by HUD to other contractors, for use by those contractors to receive multi-million dollar contracts to work on HUD's reengineering process, as well as to support HUD's note sale efforts. HUD, in disseminating this information, has seriously undermined, if not totally destroyed, the value of the investment made by Ervin to develop this database and collect the information, and has destroyed any competitive advantage that Ervin sought to achieve.

453. It is clear that HUD appropriated Ervin's intellectual property without authorization and transferred it to other contractors who are utilizing it to win and perform multi-million dollar contracts which Ervin has either been shut out of competing for, or has not been allowed by HUD to even subcontract on. HUD does not have the right or authority to do this. Ervin has suffered irreparable harm and significant damages flowing from HUD's appropriation of Ervin's valuable business property.

454. Because it had become obvious that Ervin's proprietary data was being routinely distributed to its competitors, Ervin advised HUD that it would no longer provide information not specifically required in its contract to HUD. As a result of this decision, further extremely damaging rumors in the halls of HUD have expanded that Ervin was holding HUD's data hostage. These rumors have seriously damaged Ervin's reputation.

455. During the first 3 months of 1996, Ervin had numerous discussions with HUD about HUD's demands for information.

Although specific requests have generally stopped, they have not stopped completely as is evidenced by the demand for all three year summaries for the upcoming north central note sale. HUD has continued to request a price list of what it would cost for various special reports. Ervin has responded to this approach by stating that it had developed a system and then populated that system at the cost of millions of dollars. This was done to create a competitive advantage that would allow Ervin to gain further business with HUD. Ervin has been forced to take the position that it will not give up that system for a few incremental dollars that it would cost to run any specific report that HUD may need at the time.

456. Recently, Ervin has been told that HUD has finally (after 2 years) evaluated the Annual Financial Statement contract and has finally concluded that Ervin's position that it is under no obligation to provide data to HUD Headquarters is well founded. Despite this acknowledgment and HUD's conclusion that it needs the information Ervin has created, HUD claims it has no additional funds to compensate Ervin for the data that HUD wants. Ervin suspects that HUD intends to, or is in the process of, reverse engineering Ervin's data collection system with another contractor, then will simply not renew Ervin's next option year on the contract. Although Ervin has copyright rights the system and all of its adjuncts, HUD's attitude seems to be that HUD is simply too big and too powerful for Ervin to fight it.

457. On March 15, 1996, Ervin staff met with Albert Sullivan and Cathy Rock, HUD's controller. HUD again reiterated the importance and the need for the data, but again stated they did not have any funds to pay for it. They did seem relieved, however, that Ervin was proceeding in good faith and at significant cost to Ervin with the processing of the 1995 financial statements for 1995, even though it had no task order. Albert Sullivan said he would be contacting Ervin within a few weeks to try to resolve the differences. John Ervin advised Al Sullivan that he feared that the problems caused by Dunlap went beyond what he was able to resolve.

458. Ervin and HUD are now at an impasse. HUD has linked the Financial Statement contract with the asset management contract by utilizing the same GTR on both, placing Ervin at very serious risk. HUD has stolen Ervin's intellectual property rights, and instead of taking responsibility for misappropriating this information and compensating Ervin for the damages these actions caused, HUD is attempting to intimidate Ervin with the threat that this and other contracts will not be renewed if Ervin does not comply with HUD's demands. Finally, HUD has informed Ervin that HUD and Ervin are going through a divorce and that HUD is moving on and is not taking Ervin with it.

459. In effect, Ervin has received a very strong message that if it does not turn over the benefits of its multimillion dollar investment, which HUD acknowledges it has no right to, and quit complaining about the unfairness at HUD, HUD will crush

Ervin. With regard to this, Ervin has been told by a well meaning HUD official that "you are in HUD's sights" and if Ervin does not comply with HUD's demands, the same thing will happen to Ervin as is happening to Dataprompt. "HUD will kill us." This heavy handed approach to business is simply not appropriate for any government agency.

5. Insider Trading

a. Note Sales

460. HUD, has concluded that it should reduce the size of its \$10 billion portfolio of single family and multifamily notes that were returned to it as a result of the payment of mortgage insurance claims.

461. HUD's primary objective in the sale of approximately \$10 billion in notes that have been assigned to HUD in payment of mortgage insurance claims is not to recover losses for the taxpayer but to shrink the portfolio so as to relieve HUD of the responsibility for servicing these assets. Ervin believes there is also a motivation on the part of some involved to transfer wealth to certain Wall Street investors and, in the process, create significant easy fee earning opportunities. The system is also being used to manufacture negative credit subsidy thereby effectively providing additional spending authority for HUD.

462. To accomplish these objectives does not require that the process be fair. In fact, allowing questionable, incestuous and insider activities and relationships where notes can be disposed of quickly clearly enables HUD to accomplish its short

term objective of disposing of the assets and creating significant fees and reduces the work required for those fees. It has also provided over \$600 million in negative credit subsidy. However, for HUD or any governmental agency to be able to operate effectively in the long term requires that it deals honestly and openly with the public. In Dunlap's effort to accomplish her disposition agenda at any cost, she has lost sight of or has ignored the imperative to be fair and honest with the taxpayers' asset and has jettisoned the values of honor and integrity which should direct the activities of any governmental agency.

463. Hamilton's best and final offer for the original financial advisor contract noted, and HUD has always recognized, that the potential for conflicts throughout the structuring and auction process is enormous. Hamilton went on to explain the risks of a "you scratch my back, I'll scratch yours" arrangement, which Hamilton stated ". . . is common among the firms that serve as both loan sales advisor and bidder." Despite this, appropriate steps have not taken to avoid the clear conflict problem. Particularly when Hamilton hired Blackrock as a co-investment advisor.

464. Whether intended or not, a dangerous result is occurring through these note sales. HUD's affordable housing inventory is being transferred to a few targeted, moneyed Wall Street players, including a "tag team" of prominent firms with inside connections to the Administration one of which who also

serves as a subcontractor to the financial advisor. Whether these transactions are improper, or just give the appearance of impropriety, they should not be allowed to continue as the integrity of HUD is being put at risk. As transactions continue to be conducted in secret by insiders who provide misinformation to non insiders, the affordable housing infrastructure that exists in the United States is being put at serious risk.

465. HUD has knowingly and continuously misrepresented both the opportunities available from the note sale portfolios being offered, particularly the single family portfolios, and the chance of small investors to participate in these opportunities by:

- referring to the single family portfolio as consisting of less attractive non-performing loans when in fact the majority of the notes are actually performing;
- misclassifying single family properties included in the sale. In the second single family note sale, 1,256 properties were advertised as non-performing when using HUD's own criteria they were in fact performing;
- allowing a process that, by requiring a combination of a limited number of bids, large deposits and a one sided optimization model, slants the playing field to favor only full pool bidders (typically those with in excess of a half billion dollars); and
- allowing or even encouraging the creation of bidding groups made up of the largest participants significantly limits competition and comes close to allowing collusion.

466. The result of these and other factors is a bid process that can only be won by a select group of a few extremely wealthy investors, some of which have and continue to use inside knowledge of the process to be successful. This is in violation

of HUD's own Rule promulgated on September 22, 1994, to encourage participation by small investors by offering non-performing loans in small pools.

467. It is statistically impossible for small investors to be successful in HUD's single family note sales. Hamilton stated in its best and final Submission offer "If pressure is put on HUD to run a 'small investor program', we could structure the auction this way also, but still would expect one large buyer to purchase all lots." Knowing this and saying exactly the opposite to appear to invite the participation of small potential investors to waste their time and money in a futile exercise is outrageous behavior for a government agency.

468. For the first note sale, Hamilton hired an expert in single family note sales, to assist with the sealed bid auction. This subcontractor became very distressed about the way HUD chose to manage the note sale process and went on the record to tell HUD about the problems. HUD, accepting that anything Hamilton tells them is right, ignored the subcontractor's warnings. Because of these problems, the subcontractor was fired or resigned, thereby depriving them of significant ongoing revenues on these sales. As with Ervin, their first amendment right to free speech was violated.

469. The result of these activities is that HUD has created a process that directs billions of dollars of United States taxpayers' assets to a few select, big money Wall Street investors who are attempting to replace HUD in controlling this

class of housing. One of the major beneficiaries of this process, and one half of the "tag team," Goldman Sachs, is one of the largest contributors to the President's election campaign.

470. Considering the size of the dollars involved, Ervin also does not believe adequate safeguards and oversight exist to ensure the integrity of the bidding process. In a country that requires a prestigious CPA firm to ensure the fairness of the ballots for various entertainment awards or of lottery drawings, it seems reckless not to have similar safeguards and oversight in place for the sale of billions of dollars in taxpayers' assets.

471. By restricting its oversight to a single financial advisor with close ties to those who have been most successful in acquiring these assets, HUD has at best been negligent in its stewardship over the assets and its obligation to insure fairness for all parties.

472. Dunlap, by instilling an atmosphere of fear, intimidation and retaliation within HUD, has forced HUD career employees and contractors who might be inclined to disclose the problems or weaknesses and produce constructive debate in an effort to solve them, has instead encouraged or cajoled them to look the other way or suffer the consequences. For example, when Judy May, the previous GTR on the Hamilton contract, after objecting to what she believed was a bait and switch contract modification, was transferred by Helen Dunlap to a less prestigious position. This sent a very strong message throughout

HUD that questioning Hamilton would bring prompt retaliation from Dunlap.

473. Dunlap and her associates wrongly believe their agenda somehow exempts them from reasonable oversight. Likewise, attempts to create an atmosphere of plausible deniability if the elaborate scheme that has been entered into is discovered are not appropriate. Dunlap and the other people involved are being paid too much money and are recognized as being too smart to convince anyone that they do not understand the full nature and impact and consequences of these abuses in the note sale process. Since they recognize the true nature of the problems and abuses, allowing those problems to continue with an unfair and one sided process is unforgivable.

474. Because of the size and nature of the transactions, especially the upcoming N Series type transaction, HUD's note sales activities fall into the category of securities. As a result, everyone involved with the sales are subject to Federal and State securities laws. These laws are intended to ensure fairness by restricting both insider trading and the disclosure of inside information, as well as intentional misrepresentations of the facts.

475. Although HUD and its advisors vehemently deny that these are securities and the consequences that would bring, HUD and its advisors recognize that the loans being sold are in fact securities. In early 1995, HUD's Financial Advisor's concluded that Ervin's servicing files had to be made available for due

diligence purposes, with the reason given for forcing Ervin to give up those files being that securities laws demanded full disclosure. Additionally, the bidder qualifications questionnaire appears to be designed to meet certain securities laws requirements.

476. Considering the extremely large value of notes being sold and the risks of corruption, fraud, and abuse, it is obvious that some governmental agency should be in a position to ensure and guarantee the fairness and integrity of the process. Since this process is being dominated by major Wall Street type players and it is clear that those Wall Street players understand the risks and consequences of inappropriate activities when securities are involved, the Federal and State securities laws must be applied. It does not seem appropriate that the risks and consequences of improper activities should simply disappear or be covered up by HUD.

477. The major areas of impropriety in the note sale process are as follows:

- A Flawed and Inappropriate Optimization Model
- Misrepresenting the True Nature of the Portfolio
- Allowing Insider Activities and Trading

b. The Optimization Model

478. HUD and its Financial Advisor have embraced and are utilizing a Bell Labs computer program that is advertised as producing the maximum dollar return to the government when evaluating pools of assets for sale. It is flawed because it is

predicated on the concept of a totally perishable commodity, i.e., the allocation of airline crews on a certain day, instead of a tangible asset with ongoing value. The model assumes that if all assets are not sold in the sale they are scheduled for, they will immediately lose all of their value. This is obviously invalid when dealing with real estate.

479. There are two other major flaws in this program that people have used to gain an unfair advantage:

- 1) No minimum price is assigned to assets not bid on; and
- 2) People who understand the optimization model but cannot afford to bid for all of the assets being offered (typically in excess of \$500 million) recognize that they have little realistic chance to win. With this understanding, they elect not to invest substantial time and money to participate in the note sales and thereby reduce the competition for the assets. This exacerbates the biased impact of the optimization model.

480. A party closely associated with HUD's note sales efforts has brought its concerns to HUD's attention, specifically, that the optimization model is:

- not fair;
- over complicates the process for bidders;
- is contrary to the way single family assets should be sold to maximize value, and is not necessary for homogeneous pools;
- Locks many people out of the opportunity to win;
- Heavily favors the "big boys" like the Berkeley/Blackrock team;
- Not the way HUD should sell affordable housing loans because smaller local banks, mortgage bankers, and investors can't participate;
- Doesn't get HUD the highest price;

- Is not in the US taxpayers' interest;
- Limits the audience; and
- Misleads smaller participants into thinking they can win and wastes their time, money, and resources while making Hamilton look good for producing a large bidder turn out.

481. The obvious effect of the optimization model, particularly for single family assets, is that only the biggest, most well capitalized investors who understand the optimization model will be successful, unless there are an extremely large number of other non-overlapping bids. Obtaining such non overlapping bids in the single family context is statistically impossible.

482. The March 20, 1996 single family note sale provides an example of how this model works:

- HUD offered 750 pools of assets for sale totaling 16,240 loans on individual single family homes. Each pool contained about 20 loans, with a pool value of approximately \$1 million each. To enable a potential investor who might have an interest in this type of opportunity to obtain the bidding package, the investor, if it was a company, had to certify that it had assets of at least \$5 million. An individual investor had to have assets of \$1 million or show he or she was actively in the business. There are a limited number of investors who can meet these tests.
- Each qualified bidder was limited to submitting a maximum of 10 bids. Contrary to the approach used for multifamily sales, a bidder could not bid for each of the 750 separate pools separately.
- A 10% cash bid deposit was required which was not returned for about 10 days. HUD kept the interest on these deposits, making it even less attractive to bid.
- The optimization model effectively starts with the largest dollar bid and then attempts to take other non-overlapping bids starting with the highest one and determining if any combination of them can beat the

highest dollar bid or combination of bids. An example follows:

Bidder #	Pools Bid On	Total Bid	Bid Price/ Pool
1	750	\$600 million	\$800,000
2	350	\$500 million	\$1,428,000
3	425	\$550 million	\$1,294,000
4	30	\$45 million	\$1,500,000

Since bidders two and three must have had to have at least 25 overlapping bids because they total 775 bids out of 750 pools, they cannot both be accepted. Although the laws of probability show that in the vast majority of cases both Bid #2 and Bid #3 will have overlapping bids with bidder #4, it is mathematically possible that they do not. Considering this, the following are the possible bid combinations to be evaluated using the optimization model:

Bidder #	# of Pools	Total Bid	Average \$ per Pool	Pools Left
1	750	\$600 Million	\$800,000	0
3 & 4	455	\$595 Million	\$1,307,692	295
3	425	\$550 Million	\$1,294,118	325
2 & 4	380	\$545 Million	\$1,434,211	370
2	350	\$500 Million	\$1,428,571	400
4	30	\$45 Million	\$1,500,000	720

It is obvious that in the above situation, any prudent seller utilizing common sense would accept bids 2&4 or bids 3&4 and resell the remaining pools at a later time. By accepting bids 3&4, the government would gross only \$5 million less than bidder #1, but would have 295 pools to offer in another future sale. They would need to gross only \$16,385 per pool to break even. Despite the common sense approach, the optimization model used by HUD demands the government to accept bidder #1's bid because the gross proceeds

are \$600 million compared to the next bid of \$595 million.

483. In the first note sale, HUD rejected all full pool bids because they did not meet an unstated minimum of 74 cents on the dollar. Because of a very limited number of bids, the optimization model allowed HUD to accept a bid for approximately 1,336 assets at about 38 cents on the dollar. In a subsequent sale that took place a week later, HUD sold approximately 3,111 similar assets for almost twice as much, or about 75 cents on the dollar. Although anyone with any common sense recognizes that selling assets at 75 cents on the dollar is better than 38 cents on the dollar, HUD does not operate that way.

484. This issue is complicated even further by the fact that each bidder, of which there are a limited number in reality, can only make 10 bids. To obtain the full coverage that is necessary for small pool bidders to be able to compete against large pool bidders, there must be a minimum of 75 small pool bidders, each bidding on 10 separate pools with no overlap, to compete with the single large pool bidders. The probability of such non-overlapping bids in a completely random situation increases the required number of small pool bidders to at least 500, each of which must bid on the maximum 10 pools. Considering the realistic size of the potential market for these loans, it is statistically impossible for small pool bidders to be successful.

485. Despite knowing that with the exception of a fluke situation as occurred in note sale number one it is impossible for small pool bidders to be successful, HUD and its advisors

have implemented a public relations disinformation campaign designed to convince smaller bidders that they have a chance to be successful. This campaign is designed to minimize the risk of the preferred players being caught in what obviously is an insider deal. A publication entitled Update, dated Spring 1996, and issued by Hamilton and HUD, discusses single family sales and states:

"The sale features new auction procedures designed to attract a wide range of buyers - including small firms, institutional investors, commercial banks and companies wishing to develop ongoing business around the purchase of FHA loans."

486. The simple fact is that considering the nature of the optimization model, stating that small players have a chance to win is an outright lie.

c. Misinformation in Describing the Portfolio

487. In addition to a flawed optimization model, artificial restrictions on the number of bids each bidder can make, and real restrictions on the number of bidders who can realistically bid on the single family loans, HUD has also misdefined the loans to make them appear less attractive than they were. The first line of the Spring 1996 edition of *Update* stated:

"The Federal Housing Administration (FHA) has set March 20, 1996 as the bid date for the sale of \$760 million of non-performing single family mortgage loans"
(emphasis added)

The fact is that of the 16,240 loans being sold, 8,393 or almost 52%, were in fact performing loans, which are much more attractive to an investor, and are much more valuable and marketable than non-performing loans. By telling potential

bidders that only non-performing loans are available encourages many otherwise potential bidders not to even investigate the possibility of bidding, thereby reducing the competition and driving down the price of the loans.

488. In addition to the above misinformation, 1,256 loans were classified by HUD in the non-performing loan categories in the offering memorandum, but were in fact, performing, further reducing the possible competition and driving down the price for the loans.

d. Predictable Results

489. Although the impact of each individual piece of this loan sale process may appear to be accidental or unintended, when they are combined together, the undeniable result is that only a few of the largest Wall Street players have a chance to win. With billion dollar portfolios involved, the possibility that this predictable result is a politically motivated and intentional effort to sell billions of dollars of assets at deep discounts to a particular group of players cannot be easily discounted. Consider:

- To even obtain a bid package requires a company to have \$5 million in assets;
- Mathematically, it would take at least 500 separate qualified bidders, each bidding for 10 separate \$1 million pools, to be able to compete at the same per pool price with a single bidder for the whole pool.
- Each of the 500 or so separate bidders would have to have done sufficient complex research to recognize that what was actually being sold is in fact substantially better than what was being represented.

- Ervin does not believe that there are anywhere near 500 separate bidders in the country ready, willing or able to make 5,000 separate bids for this type of portfolio, or who would be capable of servicing the loans after they were purchased.
- Considering the above, it is statistically impossible for smaller bidders to be successful in the single family note sales. Instead, those insiders who, through inside information, understand the process are provided with an almost unsurmountable bidding advantage.

490. Ervin believes that HUD is aware of the flaws in the system but allows it to continue, because at a minimum, it is much more convenient for HUD, and profitable for the advisors, to close a single transaction than to close multiple transactions. Additionally, it is much more convenient to sell all assets than take what is actually the best combination of bids which may result in some assets being left over for future sales. Finally, ignoring the flaws allows HUD's advisors to engage in a "You scratch my back, I'll scratch yours" arrangement.

e. Sales to State Housing Finance Agencies

491. HUD has entered into a program where it intends to sell/transfer its HUD-held subsidized multifamily loans to state Housing Finance Agencies on a negotiated, noncompetitive sale basis. A demonstration program has been undertaken and negotiations are proceeding with three to six states.

492. The presumption is that the state agencies are best able to make decisions regarding how affordable housing will be handled within their state. Although this logic is credible, since HUD has announced that it intends to implement some type of undefined portfolio re-engineering process, the risks associated

with these projects become very difficult to deal with. Since state Housing Finance Agencies are very protective of their bond ratings and are very risk adverse, HUD has in effect proposed a program that will be very difficult to implement directly with state HFA's.

493. Conspiring to take advantage of this situation, one or both of the Wall Street "tag team" firms discussed previously have made offers to be the equity/debt partner to at least two of the three first round state HFA'S HUD is now negotiating with. In effect, these firms have taken inside knowledge obtained by being a subcontractor to HUD's Financial Advisor to develop a program that will enable them to gain control of these mortgages and projects on a negotiated basis, effectively utilizing the state HFA'S as a front and circumventing HUD's rule which prohibits negotiated sales to private entities.

494. The "tag team," in effect, promises to put up the small amount of equity money needed, and takes effective control of the real estate, paying a small fee to the state HFA for acting as a conduit. The "tag team" will then scrutinize the debt and collect very large fees. Ervin believes that HUD and its advisors are aware of this scheme to effectively transfer HUD's affordable housing inventory to these few private sector insider firms with connections to the Administration, and in fact, approve of it as one of the solutions to deal with HUD's problems.

f. Structured Transactions

495. HUD is currently marketing a note sale that is similar to a structure developed by the RTC called an N series transaction. The Unpaid Principal Balances of the mortgages in the portfolio totals \$883,500,000. Under this structure a trust will be created and will sell \$515 million in rated debt, the proceeds of which is to be paid to HUD. Investors who must team up with one of only 10 rated servicers in the country are then allowed to bid to purchase between 50% and 70% of the ownership interests in the trust, with HUD retaining the balance as a silent partner. This structure is unnecessarily complex and results in excessive financial advisory and due diligence fees and limited competition for the assets. As with the single family note sale, however, it is the complexity that creates a very unlevel playing field that again benefits a few selected Wall Street insiders.

496. As with the single family note sale, this transaction provides complications, rules and uncertainties that are unnecessary, except to scare off the competition, particularly with regard to the bond structure. This results in a very unlevel playing field, which significantly favors a single bidding group. Creating this type of uncertainty, which has been unnecessarily built into the process, forces the bid prices down and will (unless the bond buyer is linked to the equity purchaser) drive down competition, making it more likely that the big players will prevail. Additionally, Ervin does not

understand the economic rationale as to why floating rate bonds, which are priced based on a spread over an index, should allow the spread to be increased after a buyer purchases equity, unless such complication and uncertainty was intended to favor a certain purchaser.

g. The Effect of Note Sales

497. To date, HUD has entered into 6 major note sale transactions, as follows:

	<u>UPB</u>
Multifamily Southeast Note Sale	\$907,000,000
Multifamily West of the Mississippi Note Sale	\$622,000,000
Multifamily Performing Note Sale	\$286,000,000
Single Family Title I Note Sale	\$188,000,000
Single Family Assigned Note Sale #1	\$641,000,000
Single Family Assigned Note Sale #2	<u>\$743,000,000</u>
TOTAL	<u>\$3,387,000,000</u>

498. To be able to pursue these types of transactions requires purchase prices, due diligence costs, bid deposit requirements and the capability to service the portfolios, all of which are valued in the hundreds of millions of dollars. These requirements significantly limit the number of potential investors who actually have a chance to purchase these to no more than a handful. This is proven by the sales history to date.

499. For those who understand the process, it becomes very clear that the program is being implemented to significantly favor a very limited number of well connected, moneyed "Wall Street" type players. However, if the natural advantages that were intentionally built into the structure were not enough, the line seems to be crossed when insiders are able to help design

the program, heavily weight it towards themselves or their "tag team" bidding partners, use their inside knowledge to better understand the consequences of that program, and then utilize that knowledge to enable them to acquire billions of dollars in taxpayer assets. Having the unmitigated gall to then say that it was done through fair and open competition is outrageous.

500. HUD is deceiving the American public and potential investors by advising potential investors that they have a fair opportunity to participate in the process when in fact they do not. More importantly, someone other than Dunlap and her cronies should decide if it is appropriate for billions of dollars of the taxpayers' assets to be given to a few well connected "Wall Street" firms to the exclusion of all others in contravention of the intention of HUD's own rules governing note sales.

6. Cover-Ups

a. The Need for Cover-Ups

501. The ability of Dunlap and others at HUD to implement their own personal and political agendas has been accomplished by squashing any dissenting opinions or facts that might contradict that agenda. The problems are varied and complex and few people are sufficiently involved in all aspects of HUD's multifamily activities to understand the extent of the improprieties. Those limited few who are in a position to know or suspect the truth are either paid off through lucrative "honey pot" type contracts or if they are employees are rewarded by being placed in positions of higher responsibility. Alternatively, if

understanding what is really going on starts to become a risk, contractors are blackballed and HUD employees have their careers placed in jeopardy. In either case, the truth can be very costly in today's HUD. There is little anyone believes they can do except wait for Dunlap to leave, which is what Ervin has been advised to do by a number of well meaning HUD employees. The effect of this system is an ongoing series of coverups and limitations on the constitutional right of free speech that is putting Ervin out of business and, if allowed to continue, ultimately places HUD at risk.

502. Dunlap and a very limited number of her associates have undertaken a scheme to transfer up to \$10 billion worth of taxpayer assets to a relatively small number of big moneyed Wall Street interests, including a few insiders that are close to the Administration. A complex scheme has been designed to accomplish this which requires the absence of a free and open interchange of ideas. Additionally, legitimate debate can not be allowed to exist. Ervin is aware of numerous of these coverups. Unfortunately, exposing this knowledge results in retaliation and prevents anyone who is not involved from getting involved for fear they could be tainted by someone else's problems.

b. Note Sales

503. As outlined in other areas of this Complaint, HUD has entered into a series of auctions for billions of dollars of loans that are different than what they are described to the

public as being for the purpose of directing these sales to a very few large Wall Street firms by:

- misrepresenting the effect of the flawed optimization model;
- misrepresenting the true nature of the portfolio being sold (i.e. performing loans are described as non-performing;
- not disclosing the relationships of co-advisors or consultants to purchasers of real estate in auctions;
- refusing to acknowledge that the sales, particularly the N series type transactions, are in fact securities and are subject to federal and state securities laws;
- making it very expensive and difficult to perform due diligence required to prudently participate in the process;
- refusing to disclose fully all closing bids which would disclose the true market for these assets.

c. Contracting Corruption

504. As is outlined in other sections of this Complaint, HUD under the direction of Dunlap, has engaged in illegal and discriminatory contracting practices. HUD's contracting department, instead of ensuring a full and fair procurement process, has implemented an approach designed to bypass the process as well as to coverup these practices, which include:

- allowing emergency procurements that are clearly not emergencies;
- ignoring the strict scrutiny requirements demanded by Adarand;
- allowing contractors to be blackballed;
- allowing source evaluation board recommendations to be rescored at the direction of political appointees;
- allowing subcontractors to be forced by HUD on prime contractors;

- allowing forced subcontracting to friends and associates of high ranking HUD employees;
- entering into personal service and lobbying contracts;
- awarding contracts to large political contributors;
- summarily rejecting any protests received;
- if corrective action is demanded, allowing the results of the inappropriate actions to stand;
- retaliating against contractors who lodge protests by eliminating them from consideration on other solicitations;
- routinely hiring former HUD employees through purchase order type procurements;
- disqualifying firms already determined to be qualified to award a huge cross-cutting task order to HUD'S favored contractor for the purpose of burying prior improprieties;
- allowing eternally expanding contracts for Dunlap's favorite contractors.

505. Although the purpose for the existence of a separate contracting department, including legal oversight, is intended to prevent these abuses, Dunlap's influence reaches sufficiently far that it has overcome these built in safeguards to the system.

d. Stonewalling/FOIA Requests

506. In an effort to accommodate and verify the facts surrounding HUD's contracting activities, Ervin has submitted numerous FOIA requests to HUD. Rather than promptly responding to such requests, Ervin has been stonewalled on many responses in total and has typically only received partial responses or has received responses to different questions than those that were asked.

507. On September 6, 1995, Ervin requested information on the SWAT contract which was awarded noncompetitively to Kerry. On February 15, 1996, Ervin received a letter stating HUD could not process the FOIA request until March 25th and advising Ervin that unless the request was reconfirmed within 10 days, it would be considered as withdrawn. On April 3, 1996, almost seven months later, Ervin was advised that HUD had to go through a final notice period before they could disclose any information under the FOIA request.

508. HUD "plays dumb" when they do not want to receive information or when the proper title is not given to it. Ervin has been unable to identify through a FOIA request dated August 4, 1995, a major contract issued to C&L relating to the proposed Federal Housing Corporation or the Mark to Market process. Ervin understands that Hamilton is providing substantial subcontract services on these contracts. HUD's response was simply that there were "no documents responsive to this request."

509. Ervin's request for a debriefing on the Legal Services procurement is still pending despite the fact that contracting requirements demand that a debriefing be scheduled within 5 days. HUD's immediate response was to summarily reject Ervin's proposal the day after Ervin protested the Legal Enforcement procurement. Ervin's requests for information on the Legal Enforcement procurement have not been responded to.

510. At a lunch meeting with Albert Sullivan and Dunlap on October 24, 1995, Dunlap advised John Ervin that he could obtain

scoring information and a debriefing on the due diligence procurement on which Ervin had acted as a subcontractor to Brown and Company. Ervin learned that Brown had been recommended for award by the source evaluation board prior to a rescoring of the proposals. Additionally, the contracting officer refused to allow Ervin a debriefing which may have uncovered the extent and nature of the corruption. It is Ervin's belief that it was not included in the debriefing with Brown and Company because Brown and Company recognizes that Ervin was being blackballed and Brown did not want to harm its chances of doing business with the Department by associating with Ervin. This animus towards Ervin by HUD has also negatively hurt Ervin's reputation with other contractors preventing it to enter into joint venture arrangements for work outside of HUD.

511. On August 4, 1995, Ervin requested under FOIA information on the three firms selected for due diligence contracts, i.e., Deva and Associates, Tradewinds and Gardner Kanya. After 8 months and a follow up letter, HUD has completely ignored this request.

512. The Small Business Administration has refused to provide Ervin with information on how much was paid to subcontractors on the initial Williams, Adley due diligence contract, as well as information on what qualified three 8(a) firms as being small and disadvantaged and therefore entitled to split up \$30 million in due diligence contracts. If the SBA is going to distribute taxpayer dollars under a discriminatory

program, it only seems appropriate that it be accountable for its actions.

513. Ervin has been unable to obtain any information on the Financial Advisor procurement, particularly original cost proposals despite requesting the information as part of a protest and through FOIA. Given that all offerors were deemed to be within the competitive range in the BAFO, the cost proposal should have been the primary determining factor for the award, but HUD has refused to release the cost information in contravention of the FAR.

514. On February 19, 1996, Ervin requested from HUD under FOIA a list of all contracts under contract on January 1, 1994, or received since January 1, 1994 with the Multifamily Housing Division. Ervin also requested copies of all contracts and/or purchase orders with estimated fees in excess of \$50,000 and any "Emergency" contracts and/or purchase orders.

515. On March 13, 1996, HUD provided a computer generated list purportedly of contracts over \$50,000 entered into since January 1, 1994. Upon examination of the list, however, Ervin discovered that only select pages of a larger list were provided, and that the list included only those contracts entered into after December 31, 1994, not January 1, 1994, as requested. On March 18, 1996, Ervin contacted HUD and informed them of the errors associated with HUD's response to the FOIA request. Believing HUD was hiding something, Ervin requested that all

contracts entered into since June 18, 1993 be included on the list.

516. On May 14, 1996, two (2) months later, HUD responded to Ervin's FOIA request with a letter requesting payment of \$438.50 for information HUD had previously tried to provide at no cost. HUD also stated that any FOIA request must contain language that the requestor agrees to pay any fees associated with the collection of the information. Ervin's two FOIA requests already contained such language.

517. It is obvious that HUD is stalling the process and retaliating against Ervin for asking tough questions, the answers to which Ervin is legally entitled. In addition, it is obvious that HUD is unartfully and improperly trying to cover up the misdeeds of HUD and Dunlap. This is egregious, unconscionable and illegal behavior on the part of a U.S. Government agency, and has no place in a free and democratic society where good government should be the norm, not the exception.

e. Performance Measurement Objectives

518. On Saturday, November 5, 1994, John Ervin attended a meeting on HUD's various multifamily initiatives. Attendance was by invitation only, was voluntary and was advertised as an opportunity to share ideas honestly and openly. It included numerous higher level HUD officials as well as contractors.

519. In the discussion on note sales, John Ervin recommended that HUD set clear performance objectives for the note sales effort. Dunlap went absolutely ballistic and lost her temper and

tore into John Ervin, berating him excessively. She stated that she did not want to measure performance because if anyone measured it, she would have the Inspector General all over her, and she would not get anything done.

520. As a result of the treatment he received, John Ervin kept his mouth shut for the remainder of the meeting. After the meeting, a number of people apologized for Dunlap's behavior saying that is the way she was and suggested that Ervin would be better off staying away from her. John Ervin has not been invited to attend any subsequent industry meetings.

521. On December 13, 1994, just a month after this meeting, Secretary Henry Cisneros, in a letter to Vice President Al Gore transmitting HUD's Semiannual Report of the Office of the Inspector General, outlined several accomplishments of HUD that are particularly noteworthy. The first was:

"The execution of the Presidential Performance Agreement indicating a commitment to set up quantifiable performance measures and be evaluated by our ability to meet those goals."

522. Ervin is aware of a similar situation where a highly respected white male contractor for HUD attended a similar meeting where an area of Housing he had extensive level of expertise in was being discussed, enabling him to contribute to the discussion. The white male contractor spoke up in the meeting on the topic he was eminently qualified to speak on. Although he was not berated at the meeting, he received a phone call at his home that evening from Austin Fitts warning him not

to express his opinions at any future meetings he might be invited to attend.

f. Early Warning Ratio Errors

523. As part of the Audited Financial Statement contract, HUD had provided Ervin with formulas and rankings that would provide early warning ratios to the Field Offices for each financial statement to enable them to identify problems as early as possible. After programming these ratios into the computer system for inclusion in the deliverables to the Field, Ervin undertook a bell curve analysis on the results and concluded that the descriptions for the early warning rankings that had been provided were very misleading. Ervin prepared an analysis of the rankings as they were calculated for 11,379 financial statements and suggested the rankings be changed to reflect accurately the portfolio's real performance. The analysis was presented to William Hill via a memorandum that discussed the issues.

524. A few days later, William Hill called Brian Hunt and told him that he had discussed the memo with Dunlap. Dunlap tore into William Hill. Mr. Hunt was ordered make sure all copies of the memo were destroyed because Helen did not want any information in existence that would conflict with what she had given to the auditors. At the same time, she ordered Ervin not to prepare any portfolio level reports or analysis for anyone, further restricting the ability of HUD to understand its multifamily portfolio.

g. Fast Track

525. In 1994, Ervin started to hear about a new procedure being implemented by the Seattle Region called "Fast Track" that might eliminate the need for delegated processors.

526. Under Fast Track, in an attempt to be more responsive to the mortgage industry, HUD accepts information provided by the mortgagor, including repair estimates and the owners appraisal to be included in its underwriting. HUD then processes the mortgage insurance application on an accelerated basis, possibly at the expense of many of the checks and balances that would otherwise be in place.

527. At a breakfast meeting on February 8, 1995 at a mortgage bankers convention, John Ervin told Dunlap that he had witnessed consistent problems with understating operating expenses on mortgage insurance applications. He further stated that information being collected through the annual financial statement contract would allow HUD Field Offices to avoid these underwriting flaws and the bad loans they produced.

528. Although information on operating expenses was available to HUD through the Ervin database which could avoid high risk mortgage insurance commitments, Dunlap again indicated she did not want portfolio level audit information released to anyone, including HUD Field Offices.

529. At the same meeting, John Ervin also told Dunlap that he believed that through Fast Track, HUD was repeating many of the same underwriting mistakes that had cost it billions of

dollars in the coinsurance program. John Ervin predicted that Fast Track would be the next big HUD scandal.

530. Dunlap became annoyed and stated that she did not know anything about Fast Track. John Ervin, knowing this was not true, recognized that Dunlap did not appreciate or desire Ervin's input, so he dropped the matter.

h. Country Village

531. On October 4, 1995, John Ervin received a request from the former GTR on the Annual Financial Statement contract to do him a favor and look over a very difficult project called Country Village in Los Angeles and provide feedback for a high level meeting that was to be held the following day.

532. Ervin reviewed the project and prepared a confidential letter concluding that a recent refinancing "appears to be highly irregular and suspect." Ervin determined that owners had been allowed to take up to \$19 million in cash in excess of what prudent underwriting would have allowed. Ervin further recommended that "considering the size of the apparent discrepancy, HUD might want to refer this project to the mortgagee review board" for investigation.

533. After reaching its conclusions, Ervin was advised that there was a Los Angeles Times reporter investigating this project and not to talk to anyone about it.

534. On October 11, 1995, John Ervin returned a phone call to Dunlap who was obviously outraged and asked why Ervin had reviewed the underwriting on Country Village? She asked, "Who

asked Ervin to do it? Why did not Ervin just review the financials?" She demanded to know what Ervin had reviewed, and then said "you are not authorized to see that information." Dunlap stated the project was "subject to an I.G. review at her request and that our memo was not helpful." She also said it was "very dangerous" and it "put the Department in jeopardy." She then abruptly hung up on John Ervin without saying goodbye.

535. Ervin's reaction to this phone call was that HUD had been attempting to cover up or divert a problem that Ervin had innocently fallen into the middle of by focusing on the underwriting.

536. On October 13, 1995, Dunlap left a message that she understood Ervin was only responding to a request for information and that she was going to share Ervin's memo and a response with the I.G. She suggested that Ervin and her have lunch to discuss the financial statement contract and contracts in general, linking this with Ervin's other contracts. Ervin took this as a not so subtle reminder of Dunlap's power over Ervin.

537. Ervin believes that Dunlap is retaliating against it for its inadvertent involvement in focusing attention on the underwriting problem on Country Village and Dunlap's involvement in it.

538. On the front page of the Sunday, October 22, 1995 Los Angeles Times, an article entitled "Troubled Project Points to Risks of Speedy HUD Loans," outlines the "difficulties that can occur when a Federal agency gives preferential treatment to a

project without following established guidelines intended to protect the government's interest." Disclosures in the article included:

- Speedy approval of the Country Village application in early 1994 allowed a politically well connected Malibu investment banker and his partners to reap some \$19 million in cash while spending virtually none of the money on repairs or improvements.
- An audit is underway by the Office of Inspector General, HUD's investigative arm, to determine whether the loan was improper.
- Dunlap intervened in the application process, enabling the owners to leap ahead of more than 200 other financing projects pending in the Los Angeles Field Office.
- The Housing staff cleared the Country Village loan in about 4 months . . . despite being overwhelmed with requests for assistance shortly after the Northridge earthquake.
- "HUD hastily processed the loan without following standard procedures. The agency failed to conduct its own thorough appraisal of the property, relied on incomplete financial data, did not review certain revised agreements until after the refinancing was approved, and failed to demand necessary repairs as a condition of the loan."
- "She (Dunlap) clearly gave us instructions on putting this project on the front burner and doing it in a short time frame" Hirsch said. "It was just another one of those that went political on us."
- HUD Officials said they were unable to explain how an architectural review failed to require any repairs as part of the refinancing of such a large project.
- Apartment Manager Jodie Pool added, "I've been here five years and there's never been two nickels to rub together."
- During a conference call with tenant representatives on February 14, 1994, Dunlap strongly urged the residents to approve the deal. Sayre (the head of the Tenants Association) said she based her decision to endorse the arrangement largely on Dunlap's advice.

- "I have just whipped myself over and over for being so stupid and being coerced into this" Sayre said. "It was a big mistake."

539. Rather than utilizing the flaws that were apparent in the underwriting of this project as a learning tool for all of HUD's offices, and using it to evaluate the risks of the Fast Track process, it has been covered up by Dunlap and her associates.

540. Despite the obvious problems with the Country Village project, which mirrored what John Ervin warned Dunlap about on February 5, 1995, HUD has pressed forward with the Fast Track Program.

541. At an address in February 1996 to a mortgage bankers meeting in San Diego, Assistant Secretary Retsinas hailed the Fast Track approach as an example of how HUD is being responsive to its customers. This is very close to a repeat of the accolades given to the coinsurance program before it resulted in the loss of a few billion of the United States taxpayers' dollars.

i. Equity Skimming

542. As part of its Annual Financial Statement processing for 1994, Ervin developed a list of projects which appeared to have the potential for equity skimming that should be investigated further. The equity skimming on this list amounted to over \$50 million. HUD requested that Ervin provide the top 100 cases for further investigation, but Ervin has not been asked for the remainder of the list. Additionally, HUD has not asked

Ervin to attempt to stratify this list to enable a more efficient investigation of these projects.

j. Crosscutting Task Order

543. Although not described in the original statement of work for the financial advisor request for proposals, HUD has determined the need for a crosscutting task order which will allow a single advisor (Hamilton) to continue to control the note sale process, and in the process, limit the understanding anyone else may bring to the abuses by HUD in previous note sales.

544. The concept of a crosscutting task order was not included in the financial advisory RFP and this approach will eliminate the major benefit of hiring multiple financial advisors, which is to provide new ideas and open up debate on important issues. With the crosscutting task order, HUD is able to limit involvement of others in the note sale process, and therefore, any criticism they might have of it.

545. Ervin has protested the entire financial advisory procurement. See Exhibit B. Despite this protest, HUD, under the color of an emergency procurement, is in the process of issuing this task order to Hamilton. Ervin understands that the guaranteed amount of the crosscutting task order bid by Hamilton provides for \$8 million per year, with the potential for a 25% incentive. Ervin also understands that despite the fact that this is approximately \$5 million per year over the next highest bidder, Cushman & Wakefield, HUD recommended that the contract be given to Hamilton. When HUD's contracting office finally said

that it could not do this because of the extensive price difference, Cushman & Wakefield was declared to be technically unqualified, leaving the award to Hamilton. Considering that Cushman & Wakefield was found to be technically qualified to act as a financial advisor just a few weeks earlier, the disparity in bid prices, and Dunlap's other abuses, the need for such task order must be fully investigated and disclosed.

k. Subcontracting to Dunlap's Close Friend

546. Dunlap has forced various contractors to hire Nancy Andrews, a close friend of Dunlap, under task orders directed by Dunlap.

l. Only The Truth Can Set HUD Free

547. As is indicated by the above examples the corruption and misconduct has been allowed to occur because of the ability of Dunlap to control and coverup the facts that would point to the significant problems that exist at HUD. Once the extent of the pattern of conduct that is occurring is disclosed, the system can correct it. However, if this approach is allowed to continue, when it is ultimately disclosed, it may place HUD in much more jeopardy of its survival than it currently is in.

7. Retaliation Through Defamation, Rumor, Innuendo, and Blackballing.

a. The Damage Caused by Rumors

548. Rumors, no matter how outrageous, circulate freely through the halls of HUD. The possibility that the rumor is an utter fabrication makes no difference if it can further someone's

personal agenda. The damage that may be done to reputations, lives or livelihoods is part of the sport and any topic is fair game. Although there is a theoretical right to due process, by allowing rumors to be spread about contractors (positive or negative), HUD is able to informally but significantly influence source evaluation board recommendations, alter the level of work assigned under a contract, or put a company out of business. Gossip about who is in or out of favor with Dunlap or HUD also sends a strong message to career staff not wanting to place themselves at risk by supporting the wrong contractor or not knowing which side of an issue to get on.

549. Ervin cannot respond to all of the rumors that circulate within HUD. Supervisory personnel at HUD, as part of their duty to act in good faith in the conduct of its contracts, however, do have a responsibility to cut off false rumors that they are aware of. Furthermore, they have a greater responsibility not to start rumors for their own purposes and not to use rumors to deprive anyone of due process. Dunlap and HUD have failed in this responsibility.

550. As retaliation by Dunlap for various problems or annoyances she believes Ervin has caused her by exercising its free speech rights, and/or as a method to access funds allocated to Ervin's contracts for her favored contractors or simply because she does not like white middle aged men, Dunlap has instituted or allowed untrue rumors and innuendo to be spread about Ervin. These rumors have resulted in irreparable harm to

Ervin's ability to continue to conduct existing business, to compete for new business at HUD or even outside of HUD or to act as a subcontractor to HUD's contractors.

551. Ervin confronted Dunlap and Albert Sullivan with the existence of these rumors on October 24, 1995. Although each committed to do what they could to cut those rumors off, the real response has been one of no action. Dunlap and Sullivan have said either they have not heard anything, they cannot do anything about the rumors, the individuals spreading the rumors are not in a position of influence, or is not on a Source Evaluation Board, so we should not worry about it. When John Ervin confronted Dunlap about statements she was known to have made in the presence of many people, she denied making those statements.

552. In various instances over the past two years, it has become apparent that Ervin has been treated unfairly in retaliation for taking positions to protect HUD and Ervin from undo public scrutiny, litigation and Dunlap's animus against white middle-aged males, and businesses owned by them. Ervin has been retaliated against for exercising its First Amendment constitutional right to free speech.

b. Ervin Makes Too Much Money

553. In mid April 1995, John Ervin received a telephone call from Annette Hancock, HUD's Director of the Program Support Division in the Office of Procurement and Contracts. Ms. Hancock requested a copy of Ervin's 1994 financial statements. When

asked why, she responded that she was looking into a complaint that "Ervin makes too much money" on its audit contract with HUD.

554. Ms. Hancock would not provide Ervin with any further explanation, how the complaint was lodged, or who made the complaint. She did say that someone had lodged the complaint.

555. In response to Ms. Hancock's request for a copy of Ervin's 1994 financials, Ervin agreed to let Ms. Hancock review them, with representatives from Ervin present. Given that Ervin is a small, privately held company, and more importantly that Ervin was concerned with what use the financials would actually be put to, Ervin did not allow Ms. Hancock to keep any copies.

556. In short order, Ms. Hancock who is well respected and who acted very professionally and objectively, satisfied herself that the complaint was groundless.

557. During the Summer of 1995, Ervin was advised or warned by a number of HUD employees that Dunlap had announced on multiple occasions to the HUD Headquarters staff that "Ervin makes too much money." Ervin believes that this was not considered by the staff as an idle comment, but instead, an order for the staff to rectify a problem Dunlap had with Ervin. The GTR and the GTM on the asset management contract said that they had also been told by Dunlap that "Ervin makes too much money."

558. Ervin subsequently learned from a HUD employee who was leaving the department that, at about the same time as Dunlap made this statement, she was "running around looking to other contracts with money left in them" to fund her more favored

contractors. The HUD employee who was leaving told Ervin that it was lucky that the ongoing asset management contract had already been renewed.

559. Ervin was advised by the GTR on the asset management contract that the housing group had requested \$4,000,000 in funding for the 1996 fiscal year for the Ervin Asset Management contract. Ervin was also advised that those new funds were reduced by Dunlap to \$2,000,000.

560. Although the contract renewal documents Ervin received indicated that, as of the September 21, 1995 renewal date, \$3,690,983 remained available in the contract, the GTR has insisted that only the \$2,000,000 in incremental funds was available and only that amount could be committed. This represented a substantial reduction in Ervin's work levels. Ervin suspects that the \$1,690,983 difference that the GTR does not believe she can commit to Ervin is being parked by Dunlap in this contract for recapture or reallocation to another contractor in the future.

561. In early October 1995, Ervin was informed by the GTR on the contract at the time that there was not enough money in Ervin's asset management contract and that projects had to be retroactively removed. Shortly thereafter, Ervin's work level was cut, much of it retroactively, from over 300 projects to approximately 150 projects, depriving Ervin of approximately \$130,000 per month in revenues.

562. HUD directed Ervin to continue to work on the projects that were ultimately dropped. The work order was finally issued by HUD on October 3, 1995, and was back dated by HUD to September 22, 1995. Ervin continued to work on these projects for approximately two weeks, but HUD has refused to pay Ervin for the servicing it was forced by HUD to assume. The amount of servicing fees to which Ervin would have been entitled for this approximate two week period amount to \$48,975.

563. HUD's unilateral action to drop over 100 projects from Ervin's servicing inventory required the company to lay off staff as the contract had not been as low as 150 projects in years. Ervin believes there was no reason for this action other than Dunlap's direction that "Ervin makes too much money," which action was designed to punish and retaliate against Ervin, and provide an additional source of funds from which to pay Dunlap's favored contractors.

564. Ervin had ongoing responsibilities for the projects that were suddenly dropped. Instead of referring the work back to the Field Offices, Ervin's GTR demanded that Ervin continue to work on certain of these projects after they were removed. Considering that this action was directed by Dunlap, there was no recourse to appeal the action without incurring further retribution.

565. On October 24, 1995, John Ervin met with Albert Sullivan, HUD's Director of the Multifamily Housing Division, and Dunlap. Mr. Ervin confronted Dunlap with the "Ervin makes too

much money" statement, the fact that the GTR/GTM on the contract was arbitrarily dropping projects, and the damage that was being done to Ervin by Dunlap.

566. Dunlap said that "She never heard this recently. About 18 months ago, people raised this issue, but nothing recently." Dunlap claimed she did not say that "Ervin makes too much money." Instead, Dunlap stated that "Our pricing structure has become the standard for HUD, but when people don't understand things, they make up something. This is apparently what happened." Dunlap's comments did little to resolve the rumors and the problems they created.

567. Both Dunlap and Albert Sullivan committed to John Ervin that they would send the message that Dunlap did not say, and does not believe, "Ervin makes too much money." There is no evidence that either of them sent the message they committed to.

568. On November 3, 1995, with its quarterly report to HUD, Ervin delivered a formal letter to Gwen Chandler, the GTR on Ervin's asset management contract, to address the issue that "Ervin makes too much money." The letter indicated that Ervin was awarded the contract after a full and open competition among 57 bidders, Ervin was determined by HUD as the most technically qualified offeror and had the lowest price. As a result, ". . . making too much money" was a relative concept that should be compared to other large national contracts HUD has awarded particularly those awarded to Dunlap's favored contractors. Ervin welcomed this comparison then and welcomes it now.

569. The letter also addressed Ervin's accomplishments, including allowing HUD to substantially cut the losses on the coinsurance program from between \$5 and \$8 billion to between \$3 and \$6 billion. In addition, during performance of the contract, Ervin collected over \$44 million in excess cash that would not have otherwise been collected had HUD been asset managing the loans. HUD has not responded to this letter.

570. HUD and Ervin recognize that a comment like "Ervin makes too much money" from an official at Dunlap's level is the equivalent of an order to cut a contractor's work. It also sends the very strong message that she questions the value of the contractor. Ervin believes this comment was clearly and intentionally designed by Dunlap to show that Ervin was in disfavor at HUD. The level of work under the asset management contract has not been restored to its previous levels and Ervin believes the Asset Management RFP HUD is contemplating is intended to retaliate against Ervin.

c. Ervin is Under I.G. Investigation

571. On September 13, 1995, the GTR under the asset management contract called Ervin and demanded that it submit copies of the last four invoices, including the backup for all expenses. Although Ervin said these had been submitted and were available in HUD's accounting group, the GTR said she needed to check the expenses to make sure the government was not being cheated. Ervin, having nothing to hide, submitted the copies.

572. The GTM also said that they were afraid of an IG audit on the contract and that the IG had already begun to look at the contract. Simply saying that people are afraid of an IG investigation gives the impression at HUD that something is wrong. Ervin has heard nothing more about this, but has nothing to hide.

d. The GTR on Ervin's Asset Management Contract is Going to Jail

573. In the fall of 1995, the GTR on the asset management contract informed Ervin that another employee of the Multifamily Housing Division who works with Dunlap on HUD's note sales, entered the GTR's office and was ranting and yelling about how Ervin's GTR was "going to jail" for her administration of Ervin's contract. The GTR was very upset about this. Ervin never received any further feedback on this.

e. Ervin Delayed HUD's Note Sales

574. Ervin produces quarterly reports to HUD on the various loans it asset manages. These reports contain various predecisional, anecdotal information and work-in-process analysis on loans Ervin asset manages. As such, this information is not subject to production under FOIA. In addition, these reports frequently show HUD's lack of action on recommendations by Ervin to HUD on its portfolio.

575. Throughout the note sale process, HUD has flip-flopped on whether these reports were required to be disclosed for securities law purposes. In late 1994 and early 1995, Ervin voiced legitimate concerns to HUD over its Financial Advisor's

demand that Ervin release its proprietary servicing files for inclusion in note sale asset review files. Ervin was concerned about the possibility of litigation arising from making such information public. (HUD had previously refused to extend indemnification to Ervin arising from note sale activities, as HUD had extended to its other contractors directly involved in note sales.)

576. Ervin tried to explain its position on disclosure of this sensitive information, the potential for legal liability to Ervin, Ervin's lack of indemnity by HUD, and the potential for embarrassment to HUD, to various HUD employees, including Dunlap. The uniform response was that Ervin was purposely delaying the note sales for its own undefined benefit.

577. Although Ervin had previously agreed to release all information at a December 1, 1995, meeting that was held to discuss Ervin's legitimate concerns over the possibility of being sued over something included in Ervin's servicing files, Dunlap handed John Ervin a registered letter demanding all of Ervin's files. It stated:

"Your failure to comply with the terms of this letter could result in termination of the contract based on failure to comply with the statement of work or other action available to the Secretary under the terms and provisions of the contract."

This action, which was entirely unnecessary, sent a very strong message throughout HUD as to how Dunlap treated contractors who crossed her, particularly Ervin.

578. It is important to note that these problems occurred only a few weeks after Dunlap berated John Ervin for suggesting that Hamilton be held to performance measurements and that Dunlap ordered Ervin to destroy the memo outlining the problems with the early warning ratios. These actions were a violation of Ervin's constitutional rights to free speech.

579. Finally, Dunlap reviewed a copy of Ervin's quarterly reports that had been previously provided to HUD. She then determined that the reports would not be placed in the asset review files to be provided to bidders on the Southeast note sale. Whether she finally recognized Ervin's concerns over its potential for legal liability to Ervin or embarrassment to HUD is not known. HUD's financial advisor was visibly upset by her decision to exclude these reports from the files.

580. In mid 1995, Dunlap, reversing her previous position, informed Ervin that the reports would be placed in the asset review files for the Western note sale because the department was concerned about securities law issues. In the same conversation, Dunlap subtly threatened Ervin with the possibility that she could declare Ervin's preparing comprehensive needs assessments as a conflict thereby depriving Ervin of substantial revenue. Ervin renewed its objections but supplied the reports to HUD.

581. In the Fall of 1995, Ervin received a notice that a former owner of a project was considering suing HUD and Ervin for statements made by HUD that Ervin included in a quarterly report. Ervin sent a notice to HUD of this threatening letter and stated

that unless HUD advised it otherwise, Ervin would not produce any further quarterly reports, which Ervin believed were its own servicing records. The letter to HUD requested guidance.

582. HUD informed Ervin in no uncertain terms that it must produce those reports or else it would be in default under its contract. This heavy-handed approach is typical of HUD's reactions to Ervin.

583. In February 1996, William Hill, HUD's Director of Multifamily Operations, informed Ervin that there was no longer a need to produce quarterly reports.

f. Ervin is Holding HUD's Data Hostage

584. As has been discussed elsewhere in this Complaint, Ervin has invested millions of dollars of its own resources in developing a multifamily data collection and retrieval system to collect financial and other data from the HUD annual financial statements.

585. Ervin has legitimate business and economic interests in this multifamily financial database. It developed this database to create a competitive advantage for itself by being able to meet HUD's future information needs.

586. Despite being advised of the use restrictions Ervin placed on the information, HUD misappropriated Ervin's valuable business assets for itself, without compensation, and provided these assets to Ervin's competitors, which has caused Ervin irreparable harm.

587. As a result of HUD's refusal to protect Ervin's proprietary information, Ervin advised HUD it was not in a position to release further information to HUD that was not required to be provided under Ervin's contract.

588. Notwithstanding that HUD has admitted that the database and the information contained in it belongs to Ervin, and HUD has an opinion of its counsel to that effect, HUD has continued to demand the fruits and benefits of Ervin's labor under some kind of greater good theory where, because the information is so valuable, Ervin is somehow betraying the Department by not releasing it. When Ervin has declined to give to HUD information it was not entitled to, Ervin has suffered significant and damaging retaliation from HUD. Rumors have spread throughout all of HUD that "Ervin is holding the Department's data hostage." Although HUD knows it has no right to this information, it allowed and continues to allow these slanderous rumors to spread. They have negatively affected Ervin's reputation with HUD, Ervin's largest client. At the same time, HUD will not negotiate in good faith to obtain this information and spreads rumors about Ervin when HUD does not get it.

589. Ervin recognized the damage that HUD had caused to its reputation and the fact that it needed time to correct that damage. Ervin tried to enter into good faith discussions with HUD over its issues. Upon request by the GTR on Ervin's Annual Financial Statement Review and Asset Management Contracts for what it would take to resolve these issues. Ervin suggested to

HUD that if HUD would renew all option years of its contracts at levels of work slightly higher than those previously in existence, Ervin would make all of the fruits and benefits of its systems available to HUD. Although these discussions were considered confidential, rumors immediately circulated through HUD's Office of Multifamily Housing that "Ervin is trying to hold up HUD for \$2 million."

590. On numerous occasions, HUD and its counsel have acknowledged it does not have a right to this data and that it is willing to pay for it, only to come back later to say it has no funds authorized to pay for it. The method of payment that had been proposed for the millions of dollars Ervin had invested in the systems and processes to collect the data was to reduce other work Ervin was doing. In short, HUD has said there is no new money, but it still demands Ervin's information.

591. Because of the value of the information and its potential usefulness to HUD, Ervin and HUD receive continual requests from HUD offices throughout the country. Each time HUD Headquarters turns down such a request, it reflects more negatively on Ervin. Instead of taking actions to negotiate a resolution of this issue and resolve the problem, HUD drags its feet.

592. In anticipation of this problem being solved and in an effort to mitigate the impact of the extortion rumors being spread about Ervin, the company worked for over a year on 1995 annual financial statements without a task order. As a result of

not having a task order, Ervin had been informed that invoices Ervin submits for work that has been completed will be returned because of the lack of a task order. HUD attempted to intimidate Ervin into giving up its rights to information and systems to receive payment for work performed. This level of bullying and intimidation is not right.

593. Ervin's alternative is to have to work at the risk of not being paid while protecting its reputation, or stopping work and having its reputation destroyed at every HUD office in the country and possibly having its contract declared in default and given to another firm. Ervin is between a rock and a hard place.

**g. Ervin Paid Off Secretary Henry Cisneros
\$167,000**

594. Ervin personnel had worked with the Oklahoma City office prior to the April 1995 terrorist bombing. Out of concern for the families of the victims from this office who suffered so terribly, Ervin organized a fundraising effort from the affordable housing industry. Ervin recruited industry leaders from such organizations, including Fannie Mae, Freddie Mac, and 22 other upstanding and notable organizations and individuals. They lent their names to, and participated in, the fundraising effort.

595. Ervin paid all of the costs of the fundraising. In addition, Ervin's entire staff contributed and the company itself matched the staff contribution. To make sure there was no question, Ervin referred its plan to conduct this appeal to HUD's Office of General Counsel for input and review prior to

implementation to ensure the proposed fundraising structure was not improper.

596. Because of its organizational efforts, Ervin raised over \$167,000 from over 600 industry leaders. Each separate check received was made payable, and went directly, to the Federal Employees Emergency Assistance Fund ("FEEA"), a government agency dedicated to assisting federal government employees in need. No cash ever changed hands.

597. Secretary Henry Cisneros learned of Ervin's fundraising efforts. To recognize the efforts of Ervin and the other sponsors, a presentation to FEEA of the first \$118,000 was arranged to take place in the Secretary's office.

598. A number of months later, as a result of an article that appeared in a federal employees newsletter, a wild rumor circulated throughout HUD that the money Ervin raised to assist the HUD victims of the Oklahoma City bombing was actually a payoff by John Ervin to Secretary Cisneros. The impression given was that Ervin was being investigated. Richard Pace in the Asset Management Division at HUD Headquarters contacted Ervin to set the record straight. Mr. Pace requested a letter from FEEA outlining what really happened. The head of FEEA, when hearing of this rumor, quipped "no good deed goes unpunished."

599. Although the rumor that Ervin had paid off Secretary Cisneros was totally without merit and false on its face, the atmosphere created by HUD and Dunlap allowing rumors like this to

be believed by some as something dirty gives a strong indication of how much Ervin's reputation has been damaged.

h. Ervin is a One Client Operation That Is Going Out of Business

600. In September 1995, at an industry housing meeting, a senior employee of HUD's Financial Advisor indicated in dinner conversation with notable industry leaders that Ervin is a one client operation which has no skills outside of HUD and that Ervin will be out of business in a few years. This observation coming from a senior individual at Dunlap's acknowledged contractor of choice, who is well known and deals with Dunlap and other senior HUD officials on an almost daily basis, is devastating to a company like Ervin whose reputation is critical to its success. This by itself provides it with significantly more credibility than it otherwise deserves and significantly damages Ervin. Although this comment getting back to Ervin was obviously not expected, the fact that it would even be mentioned indicates that Dunlap's overall plan to discredit Ervin is gaining strength.

i. Ervin Has Been Blackballed

601. In a meeting held on August 11, 1995, between Ervin employee Bernard Oleniacz and a long time mid-level HUD employee who has been on a number of Source Evaluation Boards, Mr. Oleniacz was informed that Ervin has been "blackballed" from further contract awards at HUD. The HUD employee said not to even bother to bid on upcoming work because Ervin would not receive an award.

602. Blackballing is a complete subversion of the federal procurement process that will be fully investigated through discovery. Under the Federal Acquisitions Regulations, it is not up to any one person to determine who is and is not eligible for federal contracts. Additionally, the concept of informally blackballing a contractor completely bypasses the established due process procedures to protect against such instances. Effectively, Ervin has been debarred from further work with HUD without the protections afforded by due process, trampling Ervin's constitutional rights.

603. On October 24, 1995, in a lunch meeting with Dunlap and Albert Sullivan, John Ervin confronted both Sullivan and Dunlap with the comment about being blackballed. They were much more concerned with who had said it, rather than whether it was true. Predictably, they each claimed it was not true and committed to correct that rumor. To Ervin's knowledge, neither Dunlap nor Sullivan have done anything about it, thereby allowing the staff to believe that the perception going around the halls is accurate.

j. Retaliation for Seeking Redress for Issues Raised in Complaint

604. On March 8, 1996, GAMEX and an affiliate of Ervin submitted a proposal to HUD in response to an RFP for "Managing and Marketing of Single Family HUD Properties." As it does with all of its proposals, Ervin sought to assemble a strong team to submit a winning proposal to HUD to provide these services. For

this reason, Ervin teamed with GAMEX to form the strongest bidding group HUD would see for this RFP.

605. Gamex is the premier single family asset management company in the country which is proven by its unmatched work with the RTC. GAMEX sold more single family REO assets on behalf of the RTC than any other contractor the RTC engaged. In fact, 23% of all single family houses sold nationwide by the RTC were managed and sold by GAMEX and its predecessor.

606. GAMEX is a nationwide, full service real estate asset management company headquartered in Portland, Maine. GAMEX provides comprehensive management, monitoring, compliance and liquidation services, including the management and liquidation of "distressed" residential real estate.

607. GAMEX was created in April 1994, from the merger between VEREX Mortgage Corporation, a 31 year old company owned by GE Capital Asset Management, and Gleichman Asset Management, Inc. GAMEX clients include the RTC, the Federal Deposit Insurance Corporation ("FDIC"), GAMEX affiliate Landmark America, and numerous federal and private entities.

608. EAA Capital Company, L.L.C., an affiliate of Ervin, was formed in December 1995, for the purpose of becoming an FHA approved mortgagee to provide servicing and resolution of assigned single family real estate loans acquired from the Government or other institutions, as well as single family asset disposition services. The staff of EAA Capital Company, through Ervin, has completed contracts providing single family asset

management and disposition services to the RTC and Prudential Home Mortgage Corporation.

609. Ervin successfully implemented and coordinated HUD's Preforeclosure Sale Demonstration Program as the Department's largest Demonstration Program Coordinator. Ervin surpassed the initial goals set for that pilot program including a very positive perception of the Program.

610. GAMEX and Ervin teamed together in order to provide HUD with a single contractor who would provide everything HUD was seeking under this RFP. As a team, GAMEX/Ervin offered the following credentials to HUD:

- GAMEX and Ervin combined have had a total of 14 single family asset management and disposition contracts with the RTC;
- GAMEX and Ervin combined have sold over 30,000 single family houses through various techniques, with almost 9,000 of these assets sold since 1990;
- GAMEX and Ervin combined have accounted for over 23% of all single family assets sold by the RTC;
- GAMEX and Ervin combined have recovered over 97% of the Estimated Recovery Value (ERV) of all assets sold for the RTC;
- GAMEX and Ervin combined have sold over 2,000 houses on behalf of HUD and private lenders and servicers of FHA insured mortgages through the Preforeclosure Sale Program;
- GAMEX and Ervin combined have subcontracted with thousands of appraisers and brokers throughout the country; and
- GAMEX and Ervin have worked on a national basis and have sold houses in all 50 states and Puerto Rico.

611. Because of its own lack of sophistication in developing a property disposition program, HUD requested that GAMEX assist

in the preparation of a program to reduce the number of single-family assets in its inventory. HUD recognized GAMEX's preeminence in this field.

612. On May 22, 1996, Ervin employee Mark Dellonte contacted HUD's contracting department to inquire into the status of HUD's evaluation of proposals under the single family RFP. Mr. Dellonte was informed by the HUD Contracting Specialist for this RFP that HUD was "a week to 10 days away" from completing its evaluation of the proposals received.

613. On the morning of May 23, 1996, GAMEX independently and without consultation with Ervin, contacted HUD's Contracting Specialist to make an inquiry as to the status of HUD's evaluation of proposals. The same HUD Contracting Specialist that Mr. Dellonte had spoken to the day before informed GAMEX that its proposal did not make the competitive range due to technical evaluation factors, not price. The HUD Contracting Specialist informed GAMEX that a letter had been sent earlier in the week to notify the GAMEX/Ervin team that its proposal did not fall within the competitive range.

614. Ervin has learned that Helen Dunlap, who has no authority over HUD's single family housing operations, had influenced the procurement process to cause the rejection of the GAMEX/Ervin proposal. Given that the HUD Contracting Officer on this procurement is the same as that of the Financial Advisor procurement and the HUD Contracting Specialist lied to Ervin's employee regarding the status of HUD's evaluation of proposals

submitted under this RFP, it is clear that Dunlap or others improperly and unlawfully influenced the procurement process to retaliate against Ervin. This is blatant and unconscionable blackballing conduct on the part of Dunlap or HUD, and shows the vindictive and vicious disregard for fair play, the laws and rules of the United States, and white middle aged males. Dunlap's actions in inappropriately rejecting the GAMEX/Ervin proposal jeopardizes Ervin's business relationship with GAMEX and damages Ervin's standing in the eyes of the business community. Her actions are obviously in furtherance of her concerted plan to destroy Ervin's business.

615. Ervin filed a protest with HUD and GAO over this rejection. A copy of which is attached hereto as Exhibit C.

k. Other Contracts With HUD

616. On April 1, 1996, the current Government Technical Representative on Ervin's Audited Financial Statement and Asset Management contracts requested a list from Ervin of all of its contracts with HUD, including all single family contracts that are with the various HUD Field Offices and, therefore, not within his purview to easily obtain. The reason given for requesting this list was to enable him to speak with Dunlap on various amendments to Ervin's Audited Financial Statement and Asset Management contracts. Ervin viewed the request as a threat or list of targets for further retaliation from HUD, and told the GTR that as such, Ervin would not provide the information. A few

days later, he asked for the information again and Ervin again refused to provide it.

617. In the same conversation, the GTR stated that everyone was afraid of Dunlap but that she was necessary to get the annual financial statement impasse resolved. This is despite the fact that Dunlap, after her demotion and removal from the Office of Housing, is not supposed to have any authority over, or responsibility for, any of the contracts Ervin has with HUD.

1. Other Retaliation by HUD

618. In direct retaliation against Ervin for exercising its right to file a protest against HUD's "corrective action" charade on the financial advisory procurement, Dunlap has dramatically increased her attacks on Ervin.

619. HUD is unable to counter Ervin's objections that the personal service and lobbying type activities requested are illegal, discrimination to cure discrimination is unlawful, HUD's theft of Ervin's intellectual property is wrong, with equivalent qualifications, the lower priced contractor should win, and a previously undisclosed "honey pot" crosscutting task order comes from cronyism. Being unable to attack the realities, Dunlap has focused on accelerating her campaign to demonize Ervin within HUD.

620. Ervin has been contacted by a number of HUD employees over the last two weeks of April 1996 expressing their concern over the accelerated pace of the negative rumors, innuendo and lies at HUD. Despite HUD's knowing it has no right to demand the

information not contracted for, a new rumor, designed to divert attention from HUD's illegal acts of stealing Ervin's intellectual property, have been circulating that Ervin is selling HUD's information. This is patently untrue.

621. Ervin is unable to counter the long term damage caused by these attacks. Ervin believes that it will take at least three to five years to recover from the reputational damages that have been, and continue to be, inflicted.

622. HUD is currently planning to issue a new request for proposals to provide multifamily asset management and technical assistance. HUD currently has a contract with Ervin, which has two remaining option years, available to meet all of HUD's needs.

623. Within the past few months, HUD senior employees Albert Sullivan, Director of HUD's Office of Multifamily Housing, William Hill, HUD's Director of Operations within the Office of Multifamily Housing, and Lar Gnessin, GTR on Ervin's Asset Management contract, have all acknowledged to Ervin that its existing asset management contract allows Ervin to perform this work. Because Ervin never discusses a solicitation with program staff while it is in process, however, it has been unable to confront the obvious issue that the planned procurement is clearly retaliatory.

624. Considering the existing contracting practices at HUD, and the level of defamation Ervin is currently suffering, it is obvious that Ervin has no chance of being successful in this planned procurement or any other procurements at HUD. In fact,

as discussed previously, Ervin has been told by a long-term HUD employee that the company has been blackballed and should not even waste its time submitting a bid.

625. Considering these factors, the only way Ervin can obtain justice is for HUD to cancel this planned retaliatory solicitation and prevent any reprocurement until this case is resolved by this Court.

626. On March 15, 1996, Ervin received a preliminary notice from Joe Lee, the contracting officer in Kansas City, of the government's intention to exercise its option to extend Ervin's physical inspection contract for the next option year, which spans the period from April 26, 1996 to April 25, 1997.

627. On April 10, 1996, Ervin received an extension of the contract that had been executed by the contracting officer and dated April 1, 1996.

628. On April 29, 1996, three days after the effective date of the new contract extension, Ervin was advised by the Kansas City office that HUD Headquarters had given orders not to use the physical inspection contract. Although the contract provided the ability to perform approximately 600 physical inspections per year, and the Kansas City Office had ordered that many inspections the past two years, the Kansas City office advised Ervin that it would only order one inspection thereby allowing it to meet the minimum requirements under the contract.

629. Consistent with its efforts to destroy Ervin's business, HUD has embarked upon a "rope-a-dope" strategy of

breaching as many of Ervin's contract rights as it can and thereby forcing Ervin to exhaust itself punching back through the administrative claims process. No contract right is too small for HUD to breach. Ervin's ability to exhaust its administrative remedies or to obtain information under FOIA is futile. HUD has breached so many of Ervin's contract rights under so many of Ervin's different contracts that Ervin would be required to spend enormous time, money and resources exhausting its administrative remedies.

630. This is precisely what HUD and Dunlap want. By forcing Ervin into protracted, time consuming and expensive administrative proceedings that they are able to stonewall with bureaucracy, HUD and Dunlap seek to force Ervin into exhausting itself financially. Ervin should not be required to go to such lengths in order to protect its clear contract rights with HUD.

631. This action on the part of HUD, and Dunlap in particular, further places the survival of Ervin in jeopardy.

632. As has been indicated throughout this Complaint, HUD and Dunlap are out of control. Through Dunlap, HUD is able to trample the civil, constitutional and due process rights of any employee or contractor she chooses and she does not think twice about doing it. To accomplish her own personal political and social agenda, she has taken actions designed to destroy Ervin and others. These actions are inappropriate for any government employee and cannot be allowed to continue.

COUNT I
VIOLATION OF FIFTH AMENDMENT GUARANTEE OF DUE PROCESS:
INJUNCTIVE AND DECLARATORY RELIEF
(To Prevent HUD's and Dunlap's Deliberate Destruction
of Ervin's Business)

633. The allegations in paragraphs 1 through 632 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

634. Ervin's interests arising from its contracts with HUD are property rights protected from impairment and deprivation under the Fifth Amendment Due Process Clause of the Constitution and the Administrative Procedure Act.

635. As set forth hereinabove, HUD, by and through Dunlap, and certain officials within HUD responsible for supervising her, have engaged in a course of conduct intended by them to deprive Ervin of its protected property rights in its contracts with HUD and thereby to destroy Ervin's business, its reputation within HUD and its ability to compete for or win new contracts with HUD or to have its existing contracts with HUD renewed or extended.

636. In so doing, Dunlap, and those acting in concert with her, have acted with bias, bad faith, improper motive and beyond the scope of their employment by allowing a personal bias and animosity towards Ervin to taint and improperly influence her actions and decisions. Further, Dunlap, and those acting in concert with her, have clearly violated Ervin's constitutional rights of which a reasonable person would have known.

637. HUD's and Dunlap's actions are and were arbitrary, capricious, an abuse of discretion, and not in accordance with law.

638. As a result of HUD's and Dunlap's unlawful acts, Ervin is being forced out of business, has suffered and will suffer irreparable harm thereby and has no adequate remedy at law.

639. Ervin is entitled to an injunction preliminarily and permanently enjoining HUD from taking any acts retaliating against Ervin for bringing this lawsuit or from interfering with Ervin's existing contracts with HUD.

640. Specifically, Ervin seeks an injunction requiring HUD to exercise any option years on any of Ervin's existing contracts with HUD; enjoining HUD from reducing the number of projects assigned under any contracts and enjoining HUD from issuing any Requests for Proposals (including, but not limited to, the planned national Asset Management procurement and the planned national Physical Inspection procurement), and contracts or Task Orders that would replace any of Ervin's existing responsibilities in whole or in part.

641. Ervin is also entitled to a declaration, under 28 U.S.C. § 2201, that Dunlap's actions violate the Fifth Amendment and that any award of a contract or task order based on Dunlap's bias, bad faith, or improper motive is or would be void ab initio.

COUNT II

**VIOLATION OF FIFTH AMENDMENT GUARANTEE OF DUE PROCESS:
INJUNCTIVE AND DECLARATORY RELIEF
(To Enjoin the Unfairly Procured Financial Advisory
Contracts and Task Orders and to Award Contracts to
Lowest-Priced, Qualified Contractors)**

642. The allegations in paragraphs 1 through 641 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

643. Ervin bids on all HUD Requests for Proposal for contracts to provide services in connection with HUD's portfolio of multi-family housing properties where Ervin believes it can benefit HUD.

644. Under the Fifth Amendment Due Process Clause of the Constitution and the Administrative Procedure Act, Ervin has a protected property interest, expectation and entitlement that it will not be subjected to bias, bad faith, improper motive, lack of uniformity and lack of impartiality on the part of any HUD employee in connection with the issuance of any Request for Proposal, contract award, task order, corrective action or any other material benefit arising out of HUD's contract procurement process.

645. Ervin has a right to expect that HUD will follow the laws, rules, regulations and procedures which Congress and HUD have promulgated to ensure the fair, impartial, open, and competitive administration of HUD's contract procurement process.

646. As set forth hereinabove, HUD, by and through Dunlap, and certain officials within HUD responsible for supervising her,

have engaged in a course of conduct which is and has been calculated to result in the award of the pending Financial Advisory Contracts and Task Orders to certain select, hand-picked contractors favored by Dunlap or those who supervise her to Ervin's exclusion and detriment and irrespective of Ervin's bid price or technical capability of performing said contract.

647. HUD has refused to disclose the bid amounts submitted in response to the original RFP for the Financial Advisory contracts or the amounts of the bids for the bidders which were successful in the initial award of the Financial Advisory RFP.

648. In so doing, HUD's corrective action in connection with the Financial Advisory Request for Proposal is a sham orchestrated by HUD and Dunlap to create the appearance of impartiality and fairness in said procurement notwithstanding that HUD and Dunlap had already determined which contractors would be selected to receive said contract or task order awards.

649. In addition, HUD's Best and Final Questions issued to Ervin on March 27, 1996, in connection with the Financial Advisory Contracts and Task Orders, were propounded by HUD in a tone, nature and number so as to make it impossible for Ervin to formulate meaningful or competitive responses and thereby were calculated to deprive Ervin of the ability to compete fairly for or to win said procurement.

650. Dunlap, and those acting in concert with her, have acted arbitrarily and capriciously, with bias, bad faith, improper motive and beyond the scope of their employment by

allowing a personal bias and animosity towards Ervin to taint and improperly influence their actions and decisions. Further, Dunlap, and those acting in concert with her, have clearly violated Ervin's constitutional rights of which a reasonable person would have known.

651. HUD's and Dunlap's actions are and were arbitrary, capricious, an abuse of discretion, and not in accordance with law.

652. As a result of HUD's and Dunlap's unlawful acts not allowing Ervin a fair opportunity to compete for work, Ervin is being forced out of business, has suffered and will suffer irreparable harm and has no adequate remedy at law.

653. Ervin is entitled to an injunction preliminarily and permanently enjoining HUD from awarding any Financial Advisory Contract or Task Order to any party other than the four lowest priced firms originally found by HUD to be in the competitive range in the original Best and Final Offer.

654. Ervin is also entitled to a declaration, under 28 U.S.C. § 2201, that HUD's and Dunlap's actions violate the Fifth Amendment and that any award of the Financial Advisory Contracts or Task Orders, under the circumstances declared herein, is or would be void ab initio.

COUNT III

**VIOLATION OF FIFTH AMENDMENT GUARANTEE OF DUE PROCESS:
INJUNCTIVE AND DECLARATORY RELIEF
(Unconstitutional Use of Section 8(a) Set Asides and
Minority or Woman Preference Points Under the Guise of
Affirmative Action to Deny Ervin Contracting Opportunities)**

655. The allegations in paragraphs 1 through 654 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

656. Ervin is a corporation of which 100% of the outstanding shares of voting stock is owned by John Ervin, a white male over the age of 40.

657. Ervin bids on all HUD Requests for Proposal for contracts to provide services in connection with HUD's portfolio of multifamily properties where Ervin believes it can benefit HUD.

658. Ervin's interests arising from its contracts with HUD and its interests in contracting opportunities with HUD are property rights protected from impairment and deprivation under the Fifth Amendment Due Process Clause of the Constitution.

659. The Due Process component of the Fifth Amendment of the Constitution requires strict scrutiny of all raced-based actions by the federal government. Before HUD may take away an existing contract right or contracting opportunity based on race, it must demonstrate a strong basis in evidence of specific past racial discrimination and that the racial preference is narrowly tailored to remedy the discrimination.

660. The Equal Protection component of the Fifth Amendment of the Constitution requires strict scrutiny of all raced-based actions by the federal government. Before HUD may take away an existing contract right or contracting opportunity based on race, it must demonstrate a strong basis in evidence of specific past racial discrimination and that the racial preference is narrowly tailored to remedy the discrimination.

661. As set forth hereinabove, HUD and Dunlap have set aside procurements solely for Section 8(a) contractors to provide services in connection with HUD's portfolio of multifamily properties.

662. As set forth hereinabove, the set aside of procurements for Section 8(a) contractors to provide services in connection with HUD's portfolio of multifamily properties is a race-based classification, and the award of such contracts to minority contractors is a raced-based action. Both the set-asides and the awards are subject to strict scrutiny.

663. As set forth hereinabove, HUD and Dunlap have caused contracts that should have been awarded to Ervin based on price and technical capability to be awarded to minority and women-owned firms by using so-called preference points to rate offerors based on race and gender.

664. The use of such preference points is a race-based and gender based classification and the award of such contracts to minority and women-owned contractors is a race or gender based action, respectively. The use of preference points and the

awards of contracts to minority owned firms based on the use of preference points are subject to strict scrutiny. The use of preference points and the award of contracts to female-owned firms based on the use of preference points are subject to heightened, intermediate scrutiny.

665. There is no known basis in evidence of past discrimination to justify the use by HUD of the set aside of procurements for Section 8(a) contractors or of preference points to justify awarding contracts to minority or women-owned firms in connection with contracts to provide services in connection with HUD's portfolio of multifamily properties.

666. Even if there were evidence of past discrimination which could justify some form of remediation, HUD's use of racially based 8(a) set asides or racially and gender-based preference points is not narrowly tailored to serve an important or compelling government interest. HUD cannot remediate discrimination by engaging in discrimination itself.

667. Had HUD not set aside such contracts using Section 8(a) or used such preference points to score offers, Ervin would have won said contracts.

668. HUD's actions are unconstitutional and not in accordance with law.

669. Dunlap's actions are arbitrary, capricious, an abuse of discretion, and not in accordance with law. Further, Dunlap has clearly violated Ervin's constitutional rights of which a reasonable person would have known.

670. SBA's and Lader's actions are unconstitutional and not in accordance with law.

671. As a result of HUD's and Dunlap's unlawful and discriminatory acts, Ervin is being forced out of business, has suffered and will suffer irreparable harm thereby and has no adequate remedy at law.

672. Accordingly, Ervin is entitled to an order preliminarily and permanently enjoining HUD, Dunlap and SBA from awarding any further contracts or task orders that Ervin would be entitled to perform under its existing contracts with HUD or Requests for Proposals that Ervin would be entitled to bid for or win where the basis for doing so is based on the race of the contractors, and HUD or SBA has not met the strict scrutiny standard of meeting a compelling governmental interest.

673. Furthermore, despite the constitutional infirmities of Section 8 set asides, Dunlap and HUD have used this program as a pretextual ground for depriving Ervin of contractual rights to perform work under existing contracts and to award this work to contractors favored by Dunlap.

674. Accordingly, Ervin is entitled to an order preliminarily and permanently enjoining HUD, Dunlap and SBA from awarding any further contracts or task orders in the intentionally discriminatory manner in which HUD and SBA, under Dunlap's influence, have directed such work.

675. Ervin is also entitled to a declaration, under 28 U.S.C. § 2201, that HUD's, SBA's and Dunlap's actions violate the

Fifth Amendment and that any award of such contracts based on the discriminatory motives of HUD and SBA under Dunlap's influence, is void ab initio.

COUNT IV

VIOLATION OF FIFTH AMENDMENT GUARANTEE OF DUE PROCESS: INJUNCTIVE AND DECLARATORY RELIEF

(Unconstitutional Use of Section 8(a) as an Excuse to Take Away Existing Contract Rights Under the Guise of Affirmative Action)

676. The allegations in paragraphs 1 through 675 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

677. Ervin's interests arising from its contracts with HUD are property rights protected from impairment and deprivation under the Fifth Amendment Due Process Clause of the Constitution.

678. The Due Process component of the Fifth Amendment of the Constitution requires strict scrutiny of all raced-based actions by the federal government. Before HUD may take away an existing contract right based on race, it must demonstrate a strong basis in evidence of specific past racial discrimination and that the racial preference is narrowly tailored to remedy the discrimination.

679. The Equal Protection component of the Fifth Amendment of the Constitution requires strict scrutiny of all raced-based actions by the federal government. Before HUD may take away an existing contract right based on race, it must demonstrate a strong basis in evidence of specific past racial discrimination and that the racial preference is narrowly tailored to remedy the discrimination.

680. As set forth hereinabove, HUD, acting through Dunlap, has used and is using the Section 8(a) set-aside program to award contracts and task orders to Section 8(a) contractors, for work that Ervin has the current, exclusive right to perform under its existing contracts with HUD, solely on the basis of said contractors' race.

681. HUD's and Dunlap's actions are and were arbitrary, capricious, an abuse of discretion and not in accordance with law. Further, Dunlap has clearly violated Ervin's constitutional rights of which a reasonable person would have known.

682. As a result of HUD's and Dunlap's unlawful and discriminatory acts, Ervin is being forced out of business, has suffered and will suffer irreparable harm thereby and has no adequate remedy at law.

683. Ervin is entitled to an injunction preliminarily and permanently enjoining HUD from depriving Ervin of the right to perform any due diligence work that it is entitled to perform under its existing asset management contract with HUD, by awarding such work to any contractors based solely on their race.

684. Furthermore, despite the constitutional infirmities of Section 8 set asides, Dunlap and HUD have used this program as a pretextual ground for depriving Ervin of contractual rights to perform work under existing contracts and to award this work to contractors favored by Dunlap.

685. Specifically, Ervin seeks an injunction requiring HUD to cancel all due diligence contracts and task orders issued to

others and to assign such work to Ervin under its existing Asset Management Contract.

686. Ervin is also entitled to a declaration, under 28 U.S.C. § 2201, that HUD's and Dunlap's actions violate the Fifth Amendment and that any award of a contract or task order to a Section 8(a) firm based on a contractor's race would be void ab initio.

COUNT V

VIOLATION OF ERVIN'S FIRST AMENDMENT GUARANTEE OF DUE PROCESS: INJUNCTIVE AND DECLARATORY RELIEF

(To Enjoin the Unfair Single Family Asset Management Procurement While an Investigation is Conducted of Dunlap's Unlawful Influence Over HUD's Corrupt Procurement Practices)

687. The allegations in paragraphs 1 through 686 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

688. Ervin bids on all HUD Requests for Proposal for contracts to provide services in connection with HUD's portfolio of single-family housing properties where Ervin believes it can benefit HUD.

689. Under the Fifth Amendment Due Process Clause of the Constitution, Ervin has a protected property interest, expectation and entitlement that it will not be subjected to bias, bad faith, improper motive, lack of uniformity and lack of impartiality on the part of any HUD employee in connection with the issuance of any Request for Proposal, contract award, task order, corrective action or any other material benefit arising out of HUD's contract procurement process.

690. Ervin has a right to expect that HUD will follow the laws, rules, regulations and procedures which Congress and HUD have promulgated to ensure the fair, impartial, open, and competitive administration of HUD's contract procurement process.

691. As set forth hereinabove, HUD, by and through Dunlap, and certain officials within HUD responsible for supervising her, have engaged in a course of conduct which is and has been calculated to result in the blackballing of Ervin from the RFP for Managing and Marketing of Single-Family HUD Properties, to Ervin's exclusion and detriment and irrespective of Ervin's bid price or technical capability of performing said contract.

692. Dunlap, and those acting in concert with her, have acted arbitrarily and capriciously, with bias, bad faith, improper motive and beyond the scope of their employment by allowing a personal bias and animosity towards Ervin to taint and improperly influence their actions and decisions. Further, Dunlap, and those acting in concert with her, have clearly violated Ervin's constitutional rights of which a reasonable person would have known.

693. HUD's and Dunlap's actions are and were arbitrary, capricious, an abuse of discretion, and not in accordance with law.

694. As a result of HUD's and Dunlap's unlawful acts in not allowing Ervin a fair opportunity to compete for work, Ervin is being forced out of business, has suffered and will suffer irreparable harm and has no adequate remedy at law.

695. Ervin is entitled to an injunction preliminarily and permanently enjoining HUD from proceeding with the procurement of contracts and task orders under the Managing and Marketing of Single-Family HUD Properties pending the conduct of an investigation of HUD's corrupt procurement practices.

696. Ervin is also entitled to a declaration, under 28 U.S.C. § 2201, that HUD's and Dunlap's actions violate the Fifth Amendment and that any award of Contracts or Task Orders for Managing and Marketing, under the circumstances declared herein, is or would be void ab initio.

COUNT VI

VIOLATION OF ERVIN'S FIRST AMENDMENT GUARANTEE OF FREE SPEECH: INJUNCTIVE AND DECLARATORY RELIEF AND FOR MONEY DAMAGES (Retaliation and Punishment of Ervin by Dunlap)

697. The allegations in paragraphs 1 through 696 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

698. The First Amendment to the Constitution prohibits the government from denying a contractor the opportunity to compete for and win new contracts with the government or refusing to extend or renew the contractor's existing contracts in retaliation or punishment against the contractor for engaging in speech that the government does not like.

699. HUD and Dunlap have retaliated and punished Ervin for statements made by John Ervin in a meeting on November 5, 1994, in which John Ervin recommended that HUD establish clear

performance objectives in connection with HUD's note sales effort.

700. HUD and Dunlap have further retaliated against and punished Ervin in connection with Ervin's preparation of a bell-curve analysis of early warning ratios for use by HUD to identify problems with audited financial statements as soon as possible. Ervin's bell-curve analysis, presented in a written memorandum to HUD, concluded that HUD's descriptions for the early warning rankings provided by HUD to auditors were misleading and suggested that the rankings be changed to reflect accurately the portfolio's real performance. Dunlap ordered Ervin to destroy all copies of the memo and forbade Ervin to provide portfolio analyses to anyone other than her. This deprived Ervin of valuable business opportunities.

701. HUD and Dunlap have further retaliated and punished Ervin in connection with statements made by Ervin concerning HUD's Fast Track program in which Ervin expressed concerns that the Fast Track program was resulting in consistent problems with understating operating expenses on mortgage insurance applications, thereby increasing the risks of default on newly underwritten mortgage insurance.

702. HUD and Dunlap have further retaliated and punished Ervin in connection with a letter prepared by John Ervin in response to a request from a HUD official, in which Mr. Ervin analyzed the underwriting of the Country Village project in Los Angeles. In that letter, Ervin concluded that the refinancing of

the project "appears to be highly irregular and suspect" and determined that the owners had been allowed to take up to \$19 million in cash in excess of what prudent underwriting would have allowed.

703. HUD and Dunlap retaliated and punished Ervin for making the above-referenced statements by denying Ervin the opportunity to compete fairly for and win new HUD contracts and by refusing to renew or extend Ervin's existing contracts.

704. As a result of HUD's and Dunlap's retaliation and punishment of Ervin, Ervin is being forced out of business, has suffered and will suffer irreparable harm thereby and has no adequate remedy at law. Further, Dunlap has clearly violated Ervin's constitutional rights of which a reasonable person would have known.

705. Ervin is entitled to an injunction that preliminarily and permanently enjoins HUD and Dunlap from taking any acts retaliating against or punishing Ervin for bringing this lawsuit, from denying Ervin the opportunity to compete for and win new HUD contracts or from interfering with Ervin's existing contracts.

706. Specifically, Ervin seeks an injunction requiring HUD to exercise any option years on any of Ervin's existing contracts with HUD; enjoining HUD from reducing the number of projects assigned under any contracts and enjoining HUD from issuing any Requests for Proposals (including, but not limited to, the planned national Asset Management procurement and the planned national Physical Inspection procurement), contracts or Task

Orders that would replace any of Ervin's existing responsibilities in whole or in part under its existing contracts with HUD.

707. Ervin is also entitled to a declaration, under 28 U.S.C. § 2201, that HUD's and Dunlap's actions violate the First Amendment.

708. Moreover, Ervin has suffered money damages in an amount to be determined at trial.

COUNT VII

TRADE DISPARAGEMENT: INJUNCTIVE RELIEF

(Retaliation Through Rumor, Innuendo and Blackballing)

709. The allegations in paragraphs 1 through 708 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

710. Using rumor, innuendo and blackballing, Dunlap has willfully, maliciously, and with an intent to injure Ervin, orchestrated a campaign of retaliation against Ervin.

711. As set forth hereinabove, by making false and defamatory statements to HUD employees, contracting officers, Source Evaluation Boards, HUD contractors and officers, about Ervin, its reputation, its employees, and its relationship with HUD, Dunlap and those acting under her influence and control or who are themselves fearful of retaliation if Dunlap perceives they are betraying her, have spread rumor and innuendo throughout HUD in order to prevent Ervin from winning new contracts or having its existing contracts renewed or extended.

712. Dunlap's false and disparaging statements about Ervin have caused Ervin to be blackballed within HUD and have made it impossible for Ervin to win new contracts or have its existing contracts reviewed or extended

713. As a result of Dunlap's actions, Ervin has suffered and will suffer irreparable harm for which it has no adequate remedy at law.

714. Dunlap's actions were arbitrary and capricious and outside the scope of her authority and employment.

715. Dunlap's actions constituted an abuse of discretion and have resulted in the deprivation of Ervin's constitutional rights, as alleged herein.

716. As a result of Dunlap's action, Ervin has suffered irreparable harm for which it has no adequate remedy at law.

717. Accordingly, Ervin is entitled to an order preliminarily and permanently enjoining Dunlap and those acting in concert with her or under her influence and control from making any further untrue, false, defamatory or disparaging statements about Ervin, its businesses or reputations, its employees or its relationship with HUD.

COUNT VIII
VIOLATION OF THE FREEDOM OF INFORMATION ACT:
INJUNCTIVE AND DECLARATORY RELIEF
(Stonewalling and Concealment of Information Evidencing
Official Misconduct)

718. The allegations in paragraphs 1 through 717 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

719. The purpose of the Freedom of Information Act is to ensure an informed citizenry which is vital to the functioning of a democratic society and is needed as a check against corruption by agency officials and to curb agency discretion to conceal information.

720. The Freedom of Information Act entitles Ervin to request and receive information from HUD concerning records and public information as to, inter alia, contracts and task orders that HUD has awarded, the amount of taxpayer dollars HUD is spending under those contracts and task orders and to whom those contracts and task orders are awarded.

721. Ervin has made numerous requests for information under the Freedom of Information Act for information concerning, inter alia, contracts and task orders that HUD has awarded, the amount of taxpayer dollars HUD is spending under those contracts and task orders and to whom those contracts and task orders are awarded.

722. As set forth hereinabove, HUD and SBA refuse to provide Ervin with responses to numerous of its Freedom of Information Act requests or provide answers which are self-serving, non-responsive, evasive, incomplete or otherwise not in accordance with the law.

723. HUD and SBA have refused and are refusing to produce such information to Ervin in order to conceal the unlawful acts that SBA, HUD and Dunlap have committed in connection with Dunlap's scheme to destroy Ervin's business, its reputation

within HUD, its ability to compete for and win new HUD contracts and its ability to have its existing contracts extended or renewed.

724. HUD's actions are arbitrary, capricious, an abuse of discretion and not in accordance with law.

725. Accordingly, Ervin is entitled to an order requiring HUD to provide meaningful and substantive responses to all of Ervin's outstanding FOIA requests concerning, inter alia, contracts, as set forth herein, and task orders that HUD and SBA have awarded, the amount of taxpayer dollars HUD is spending under those contracts and task orders and to whom those contracts and task orders are or were awarded.

726. Ervin is also entitled to a declaration, under 28 U.S.C. § 2201, that HUD's actions violate the Freedom of Information Act.

COUNT IX
**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT:
INJUNCTIVE AND DECLARATORY RELIEF
(Unlawful Failure to Explain Agency Contracting
and Auction Decisions)**

727. The allegations in paragraphs 1 through 726 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

728. The Administrative Procedure Act requires that a federal agency adequately explain its actions with sufficient particularity to enable a court to evaluate the agency's rationale at the time of the decision.

729. HUD has not explained its decisions to set aside or award certain contracts and task orders, particularly the financial advisory crosscutting task order, the legal enforcement, due diligence, SWAT, legal services, "mark-to-market" physical inspection, E&Y database, and C&L's Federal Housing Corporation contracts for the provision of multifamily housing services, despite repeated requests from Ervin that it do so.

730. HUD has refused and is refusing to explain its decisions to Ervin in order to conceal the unlawful acts that HUD and Dunlap have committed in connection with her scheme to destroy Ervin's business, its reputation within HUD, its ability to compete for and win new HUD contracts and its ability to have its existing contracts extended or renewed.

731. HUD's actions are and were arbitrary, capricious, an abuse of discretion and not in accordance with law.

732. Accordingly, Ervin is entitled to an order requiring HUD to explain its decisions to set aside or award certain contracts for the provision of multifamily housing services as requested by Ervin to do so.

733. Ervin is also entitled to a declaration, under 28 U.S.C. § 2201, that HUD's actions violate the Administrative Procedure Act.

COUNT X

**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT:
INJUNCTIVE AND DECLARATORY RELIEF
(Contracting Corruption, Irregularities and Favoritism to
Circumvent the Federal Acquisition Regulations)**

734. The allegations in paragraphs 1 through 733 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

735. The Federal Acquisition Regulations were promulgated to ensure fairness, integrity and impartiality in the federal government's contract procurement process.

736. Through open and competitive bidding and objective, non-biased evaluation, the FAR were intended to eliminate favoritism, bias, bad faith, improper motive, lack of uniformity and lack of impartiality by federal agencies such as HUD or any HUD employee in connection with, inter alia, HUD's issuance of Requests for Proposals, consideration of responses to Requests for Proposals, Best and Final Offers, Answers to Best and Final Questions and contract and task order awards.

737. As set forth hereinabove, HUD and Dunlap violated the FAR by, inter alia:

- a. setting aside or awarding HUD contracts, including small amount purchase orders, to a few favored, select and handpicked minority and women-owned firms that have special, inside relationships with certain HUD political appointees;
- b. by awarding contracts, which should have been subject to full, fair and open competition, on a sole source, non-competitive basis to reward minority and women-owned contractors favored by Dunlap and to discourage white, male-owned contractors, such as Ervin, who are disfavored by Dunlap;

- c. by circumventing the requirements of the FAR in connection with the original procurement of the Financial Advisory Contract whereby, through the improper and unlawful use of task orders and contract modifications, HUD and Dunlap caused a financial advisor contract with a maximum cap of \$5 million (over four years) to be increased to \$19 million over an 18 to 24 month period;
- d. by providing certain select contractors, favored by HUD and Dunlap, with advance, non-public material information concerning unannounced Requests for Proposals or task orders in order to confer upon them a competitive advantage over contractors disfavored by HUD and Dunlap;
- e. by improperly influencing the composition of Source Evaluation Boards to consist of senior individuals loyal to Dunlap so as to ensure that candidates personally favored by Dunlap, were selected to receive contract awards and of other political appointees, that other contractors, such as Ervin, would not be selected to receive such awards;
- f. by exercising improper and unlawful influence, dominion and control over members selected to Source Evaluation Boards by causing them to re-score bid evaluations initially won by Ervin on the basis of price or technical capability so as to cause other bidders, personally favored by Dunlap or her supervisors, to achieve the highest score and thereby receive the contract award, notwithstanding that they were not competitive in terms of price or technical capability;
- g. by routinely using so-called "Emergency" procurements in otherwise non-emergency situations in order to circumvent the FAR's requirement that such procurements be conducted through full, fair and open competition and thereby to confer contract awards on contractors specially favored by HUD and Dunlap and to avoid having to procure such contracts through full, fair and open competition; and
- h. by forcing Ervin and others to enter into "arranged marriages" with certain favored subcontractors handpicked by Dunlap and forced upon Ervin to perform work for HUD that should otherwise be procured on a competitive basis

through full, fair and open competition in order to funnel HUD monies to such favored contractors in order to enable them to reap the benefits of HUD contracts without having to participate in a full, fair and open competition for such contract awards.

738. HUD's and Dunlap's actions were arbitrary, capricious, an abuse of discretion and not in accordance with law. Dunlap's actions are a clear violation of Ervin's statutory rights of which a reasonable person would have known.

739. As a result of HUD's and Dunlap's unlawful actions and omissions, Ervin has been denied the opportunity to compete fairly and openly for or to win HUD contracts and to have its existing contracts with HUD extended or renewed.

740. By denying Ervin the opportunity to compete fairly and openly for or to win HUD contracts or to have its existing contracts extended or renewed, HUD and Dunlap have caused Ervin to suffer irreparable harm for which Ervin has no adequate remedy at law.

741. Ervin is entitled to a declaration under 28 U.S.C. § 2201 that the actions of HUD and Dunlap and those aiding, abetting or acting in concert with them, or acting under their dominion, influence and control, as described hereinabove, violate the Regulations and the Administrative Procedure Act.

742. Ervin is entitled to an order preliminarily and permanently enjoining HUD and Dunlap, and those aiding, abetting or acting in concert with them, from issuing any further task orders or making any further payments under any contract procured by HUD in violation of the FAR or the APA, as described above,

and requiring HUD to reprocure each such contract under full, fair and open competition.

COUNT XI

**RETALIATION THROUGH BREACHES OF CONTRACT
SPECIFIC PERFORMANCE AND MONETARY DAMAGES
(Multiple Retaliating Breaches of Contract)**

743. The allegations in paragraphs 1 through 742 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

744. HUD has breached certain existing contracts with Ervin in violation, inter alia, of Ervin's First and Fifth Amendment rights, the FAR and the Administrative Procedures Act.

745. HUD has breached Ervin's contracts as part of Dunlap's campaign of retaliation against Ervin for exercising its constitutional right of free speech. Knowing that Ervin's revenue is almost entirely derived from its contracts with HUD, HUD, at Dunlap's direction, refuses to honor its payment obligations to Ervin or has systematically choked off revenue flow to Ervin as punishment for Ervin's exercise of its constitutional rights.

746. In executing the Asset Management Contract, Ervin and HUD entered into a valid and binding contract, the terms and conditions of which were set forth therein, for valuable consideration, the receipt of which HUD acknowledged.

747. The Asset Management Contract conferred upon Ervin the exclusive right to perform services in connection with the

disposal of formerly coinsured and fully insured properties in HUD's note sales, which HUD committed that Ervin would perform.

748. HUD breached the Asset Management Contract by committing to Ervin that Ervin would perform such work and then issuing a massive \$30 million non-competitively bid sole source contract to a minority controlled firm to perform the due diligence work.

749. HUD breached the Asset Management Contract by issuing a task order to a female-controlled firm to perform services in connection with the disposal of formerly coinsured properties in HUD's notes sales that Ervin had an exclusive right to perform under its Asset Management Contract with HUD.

750. The original Asset Management Contract conferred upon Ervin the right to indemnification from HUD for legal fees that Ervin was forced to spend defending itself against claims by third parties arising in connection with Ervin's performance of said contract.

751. Ervin successfully defended itself and its employee against claims for negligence and defamation asserted in the action entitled AMI Affiliates, Inc., et al. v. U.S. Department of Housing and Urban Development, et al., Civil Action No. 94-7194 (E.D. Pa.) (the "AMI Case") for which it was required to retain counsel.

752. Ervin properly submitted invoices for legal fees to HUD incurred in connection with defending itself and its employee in the AMI case.

753. HUD breached the Asset Management Contract by refusing to indemnify or reimburse Ervin for the legal fees it incurred in the AMI case.

754. In executing the Physical Inspection Contract, Ervin and HUD entered into a valid and binding contract, the terms and conditions of which were set forth therein, for valuable consideration, the receipt of which HUD acknowledged.

755. The Physical Inspection Contract conferred upon Ervin the exclusive right to perform mark-to-market physical inspections in Nebraska, which HUD committed that Ervin would perform.

756. HUD breached the Physical Inspection Contract by assigning on a non-competitive basis mark-to-market physical inspections in Nebraska to a minority or female controlled firm, Ervin had the exclusive right to perform this work under its Physical Inspection Contract with HUD.

757. In executing the Delegated Processing Contract, Ervin and HUD entered into a valid and binding contract, the terms and conditions of which were set forth therein, for valuable consideration, the receipt of which HUD acknowledged.

758. The Delegated Processing Contract conferred upon Ervin the right to receive compensation for a minimum level of services irrespective of whether HUD issued any task orders for delegated processing services.

759. HUD, through its Seattle Field Office, acknowledged that it breached the Delegated Processing Contract by refusing to

compensate Ervin for a minimum level of services as required by the express terms of the Delegated Processing Contract.

760. Since HUD has refused to consider the minimum balance due under the Delegated Processing Contract as liquidated damages and instead demands that it pay Ervin the actual costs Ervin incurred to maintain the capacity to process up to ten applications per month, Ervin has incurred costs of managing such capacity in an amount estimated at \$250,000.

761. HUD and Ervin have entered into various valid and binding contracts, the terms and conditions of which were set forth therein, for valuable consideration, the receipt of which HUD acknowledged.

762. These contracts required HUD to issue task orders to Ervin on a timely basis for work to be performed thereunder, and without which Ervin could not be paid.

763. HUD continued to demand services under said contracts despite having failed to issue task orders, thereby requiring Ervin to perform work for which it could not be paid until such task orders were issued.

764. HUD has an obligation under its contracts with Ervin to issue task orders on a timely basis and not to demand work from Ervin without first issuing said task orders.

765. Ervin relied on HUD to issue task orders under its various contracts with HUD on a timely basis.

766. HUD breached its obligations under its various contracts with Ervin to issue task orders to Ervin on a timely basis.

767. Various valid and binding contracts, the terms and conditions of which were set forth therein, for valuable consideration, the receipt of which HUD acknowledged, require HUD to process payments to Ervin for work performed and invoiced by Ervin thereunder on a timely basis.

768. HUD continued to demand services under said contracts despite having failed to process payments for work performed and invoiced by Ervin on a timely basis.

769. HUD has an obligation under its contracts with Ervin to process payments on a timely basis and not to demand work from Ervin without first processing payments for work previously performed and invoiced by Ervin.

770. Ervin relied on HUD to process payments for work performed and invoiced by Ervin under its various contracts with HUD on a timely basis.

771. HUD breached its obligations under its various contracts with Ervin to process payments for work performed and invoiced by Ervin on a timely basis and thereby placed Ervin at risk.

772. Ervin has performed all of its obligations under said contracts and no conditions remain unfulfilled.

773. Ervin is entitled to a judgment ordering that HUD specifically perform its obligations to Ervin under contracts existing between them, including an order requiring HUD to.

774. As a result of HUD's breach of such contract, HUD has caused Ervin to suffer actual damages in an amount to be determined according to the proof at trial.

COUNT XII
VIOLATION OF THE PROMPT PAYMENTS ACT
MONETARY DAMAGES
(Failure to Pay Interest Due on Late Payments)

775. The allegations in paragraphs 1 through 774 are incorporated by reference as if fully set forth herein.

776. HUD and Ervin have entered into various valid and binding contracts, the terms and conditions of which were set forth therein, for valuable consideration, the receipt of which HUD acknowledged.

777. These contracts required HUD to process payments to Ervin for work performed and invoiced by Ervin thereunder on a timely basis.

778. The Prompt Payments Act requires HUD to process payments for work performed and invoiced by government contractors on a prompt and timely basis, failing which HUD is obligated to pay interest on any late payments made.

779. HUD routinely violated the Prompt Payments Act by failing and refusing to pay Ervin interest on late payments made to Ervin under its various contracts with HUD.

780. As a result of HUD's violation of the Prompt Payments Act, HUD has caused Ervin to suffer actual damages in an amount not less than \$100,000 as of the end of March or as may be determined according to the proof at trial.

COUNT XIII
QUANTUM MERUIT
DAMAGES
(Retroactive Removal of 107 Projects from Asset Management Contract)

781. The allegations in paragraphs 1 through 782 are incorporated by reference as if fully set forth herein.

782. Ervin entered into the Asset Management Contract to provide asset management services in connection with HUD's portfolio of multifamily projects.

783. Work under the contract is assigned under monthly task orders.

784. HUD normally assigns work under its task order on or about the 20th day of each month. Variances by a day or two or in the number of projects by one or two are self-correcting.

785. On or about September 20, 1995, Ervin expected to receive a task order for its normal monthly work under its Asset Management Contract.

786. HUD did not issue a task order until October 3, 1995, which task order HUD had intentionally back-dated to appear as if it had been timely issued on or about September 20, 1995.

787. During the period September 20, 1995 through October 3, 1995, HUD instructed Ervin to continue servicing the loans in Ervin's previous work order.

788. The work order issued by HUD on October 3, 1995 removed 107 of the loans that Ervin was servicing.

789. Ervin expected that it would be paid for the value of the services that it rendered for the half month that it performed services for HUD under the Asset Management Contract.

790. As a result of HUD's retroactive removal of the 107 loans for the task order under the Asset Management Contract, Ervin suffered damages in an amount of at least \$48,975 or as may be determined according to the proof at trial.

COUNT XIV

VIOLATION OF THE TRADE SECRETS ACT INJUNCTIVE RELIEF AND MONETARY DAMAGES (Theft and Dissemination of Ervin's Proprietary Data)

791. The allegations in paragraphs 1 through 790 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

792. Title 18, Section 1905 of the United States Code (the "Trade Secrets Act"), prohibits the disclosure of confidential information developed solely with private funding and has been construed to create a private right of action to a supplier of such data where such person is adversely affected or aggrieved by an executive agency's unauthorized disclosure of said confidential information.

793. Ervin entered into the Audited Financial Statement ("AFS") contract to provide reviews of audited financial statements for HUD's 16,000 multifamily properties for use by HUD's Field Offices, including uploading certain information into

FOMNS software supplied by HUD. HUD never provided the software to Ervin necessary to perform the contract.

794. HUD was unable to get the required FOMNS upload software to work. Although not required, using its own private funds Ervin developed its own software to accomplish the uploads.

795. In implementing the AFS Contract, Ervin developed, at enormous cost to itself, extraordinary and valuable systems to collect, summarize and report data that far exceeded HUD's capability under its non-functional and technologically antiquated FOMNS software. Ervin invested in the development of such systems in the belief that such investment would provide Ervin with a competitive advantage over its competitors for future HUD work and would assure Ervin's future success with HUD.

796. All of the data collected and summarized by Ervin, including the reports, formats and displays in which such data appeared, and Ervin's methodologies and systems for compiling such data was and is confidential and proprietary to Ervin, the public disclosure of which would subject and has subjected Ervin to severe economic and competitive harm.

797. HUD's own counsel acknowledges that HUD has no right to such data under its AFS contract with Ervin.

798. Notwithstanding that HUD has no right to such data under its AFS contract with Ervin, HUD repeatedly requested and continues to request Ervin to provide such data.

799. Ervin agreed, without prejudice, to provide certain data to HUD in the interest of building its goodwill with HUD,

establishing a long term relationship with HUD and assisting HUD in connection with, inter alia, analyzing HUD's Loan Loss Reserve and identifying multifamily properties whose owners were engaged in equity skimming.

800. Ervin provided HUD with such information in reliance on HUD's agreement not to disclose Ervin's data or processes for collecting and summarizing such data to any of Ervin's competitors.

801. Notwithstanding the express prohibitions on HUD's ability to share such data with Ervin's competitors, HUD immediately began, and has ever since continued, to provide, publish, disclose and disseminate Ervin's confidential, proprietary data and information to Ervin's direct competitors in order to enable them to acquire, take over and appropriate Ervin's business of providing services to HUD.

802. HUD breached its agreement not to disseminate Ervin's confidential and proprietary data to Ervin's competitors as part of HUD's scheme to destroy Ervin's business and to take away any competitive advantage Ervin might have gained over its competitors in HUD's procurement process.

803. As a result of HUD's and Dunlap's unlawful acts, Ervin's competitors have used Ervin's confidential data to acquire a technical capability they would not otherwise have had and have obtained contracts Ervin would have otherwise obtained.

804. As a direct consequence, Ervin is being forced out of business, has suffered and will suffer irreparable harm thereby and has no adequate remedy at law.

805. Ervin is entitled to an injunction preliminarily and permanently enjoining HUD from using in any manner all confidential and proprietary data, information, summaries, reports, displays and other property and assets unlawfully taken from Ervin and that the Court order an accounting of all business done and profits made by HUD's contractors as a result of the unlawful and wrongful use of Ervin's confidential and proprietary data as alleged herein.

COUNT XV
QUANTUM MERUIT:
MONETARY DAMAGES
(Uncompensated Requests by HUD for Ervin's
Data and Uncompensated Use of
Ervin's Data by Ervin's Competitors)

806. The allegations in paragraphs 1 through 805 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

807. The Trade Secrets Act prohibits disclosure of confidential information developed solely with private funding and has been construed to create a private right of action to a supplier of such data where such person is adversely affected or aggrieved by.

808. Ervin entered into the Audited Financial Statement contract to provide HUD with reviews of annual audited financial

statements for HUD's 16,000 multifamily properties for use by HUD's Field Offices.

809. HUD was unable to get the required FOMNS upload software to work. Although not required to do so, Ervin developed its own software to accomplish the uploads.

810. In implementing the AFS Contract, Ervin developed, at enormous cost to itself, extraordinary and valuable systems to collect, summarize and report data that far exceeded HUD's ability to generate such information. Ervin invested in the development of such systems in the belief that such investment would provide Ervin with a competitive advantage over its competitors for future HUD work and would assure Ervin's future success with HUD.

811. HUD's own counsel acknowledges that HUD has no right to data under its AFS contract with Ervin.

812. Notwithstanding that HUD has no right to such data under its AFS contract with Ervin, HUD repeatedly requested and continues to request Ervin to provide such data.

813. Ervin performed all of its obligations under its AFS Contract with HUD and no conditions remain unfulfilled.

814. In connection with the performance by Ervin of the work to be done under the AFS contract, Ervin, at HUD's request, performed significant and extremely valuable extra work, labor and services in providing HUD with certain data and reports.

815. Although not required under its AFS contract, Ervin provided HUD field offices with computerized Annual Financial

Statement Reviews and draft review letters and three year summaries on approximately 11,000 projects not selected for professional reviews for 1993 and 1994.

816. Although HUD did not provide the required FOMNS input software, Ervin provided field offices with information updates to be input into the FOMNS system.

817. Ervin further provided other data and reports to HUD field offices and headquarters for use by HUD to manage its \$50 billion portfolio which data and reports were not required under the terms of the contract that HUD prepared.

818. All of this above extra work was completed using Ervin's own resources with private funding in anticipation that developing such information would be compensated for through the provision of an unsurmountable competitive advantage which was extremely valuable to Ervin's future business. HUD was continually advised of such expectation since HUD had no contractual right to these reports and data and since HUD accepted them knowing that such reports and data was provided on a relationship basis in expectation of being compensated through additional contracts. HUD accepted such information and reports in bad faith. HUD should compensate Ervin for the fair market value of such reports and data particularly for the 11,000 computerized reviews and three year summaries at a rate to be determined at trial.

819. Ervin further provided data to HUD for use by HUD to perform its loan loss reserve calculation which has resulted in a

significant savings to HUD that HUD would not have achieved but for Ervin's ability to supply HUD with such data either through contracts or directly.

820. Ervin further provided data to HUD that enabled HUD to identify owners of multifamily properties engaged in unlawful equity skimming.

821. Ervin further provided data to HUD for use by HUD in connection with the creation of its Data Warehouse system.

822. Given HUD's repeated demands for data that was not covered by the AFS contract, Ervin reasonably had a right to expect that HUD would compensate Ervin for the value represented by Ervin's provision of such data either through additional contracts or directly.

823. Ervin further has a right to expect that HUD would compensate Ervin based on a percentage of the savings HUD realized in connection with its loan loss reserve calculations and its ability to identify unlawful equity skimming.

824. Ervin further had a right to expect that HUD would compensate Ervin for the value of its services in connection with its assistance to HUD in creating HUD's Data Warehouse system.

825. HUD has repeatedly requested and continues to request that Ervin provide it with data to which HUD knows that it is not entitled.

826. Without prejudice, Ervin conditioned its provision to HUD of such information with use and distribution restrictions not to disclose Ervin's data or processes for collecting and

summarizing such data to any of Ervin's competitors. By accepting this data, HUD agreed that it would not share such data with Ervin's competitors.

827. Notwithstanding the express prohibitions on HUD's ability to share such data with Ervin's competitors, HUD immediately began, and has ever since continued, to provide, publish, disclose and disseminate Ervin's confidential, proprietary data and information to Ervin's direct competitors in order to enable them to perform contracts for HUD that they would not otherwise be able to perform but for their unlawful receipt of Ervin's data.

828. These competitors are using Ervin's data to provide services under contracts that are worth in excess of \$50 million, which Ervin otherwise would be singularly qualified to perform but for HUD's unlawful disclosure of Ervin's confidential and proprietary data to Ervin's competitors.

829. As a result of HUD's breach of its obligations to preserve and protect Ervin's confidential and proprietary data, Ervin has been denied the opportunity to compete for and win those contracts being performed by Ervin's competitors and has suffered actual damages in an amount to be determined according to the proof at trial.

830. Accordingly, Ervin has the right to recover from HUD the reasonable value of its services in an amount to be determined according to the proof at trial.

COUNT XVI

**COPYRIGHT INFRINGEMENT:
INJUNCTIVE RELIEF AND MONETARY DAMAGES
(HUD's Unauthorized Use and Dissemination of Ervin's Data)**

831. The allegations in paragraphs 1 through 830 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

832. Sometime prior to January 1, 1995, Ervin created and produced new and original works of art consisting of computer systems to process and review financial statements and a compilation of conditions containing a detailed explanation of all findings possible through the process and review of such financial statements.

833. Ervin registered said works for copyright in the United States Copyright Office in the name of Ervin under registration Nos. TXU-708-754 and TX 4-153-789.

834. Ervin has been and now is the sole owner and proprietor of all right, title and interest in and to the copyright in said works.

835. HUD has reproduced and published to third parties, without permission, Ervin's copyrighted works in violation of the Copyright Laws of the United States, 17 U.S.C. § 101, et seq.

836. HUD did not, and does not, have permission from Ervin to reproduce or distribute its copyrighted works to third parties.

837. HUD distributed Ervin's copyrighted works to third parties who are competitors of Ervin in order to enable said

third parties to perform HUD contracts worth in excess of \$50 million.

838. Ervin created said copyrighted works at a cost in excess of \$9 million in order to obtain a competitive advantage over its competitors in its ability to win HUD contracts, which advantage HUD destroyed when it reproduced and distributed Ervin's copyrighted works to Ervin's competitors.

839. Ervin was capable of performing such contracts but was denied the opportunity to bid for or win those contracts, notwithstanding that HUD reproduced and distributed Ervin's copyrighted works in order to allow Ervin's competitors to perform such contracts and reap the enormous benefits flowing therefrom.

840. HUD distributed Ervin's copyrighted works to third party Due Diligence contractors in order to enable said contractors to negotiate note sales on HUD's behalf.

841. As a direct result of the negotiating leverage created by the availability of Ervin's copyrighted works, HUD was able to realize hundreds of millions of dollars in note sales.

842. Ervin created said copyrighted works at a cost in excess of \$9 million in order to obtain a competitive advantage over its competitors in its ability to assist HUD in negotiating note sales, and portfolio reengineering which advantage HUD destroyed when it reproduced and distributed Ervin's copyrighted works to Ervin's competitors.

843. Ervin was capable of performing such due diligence services, notwithstanding that HUD reproduced and distributed Ervin's copyrighted works in order to allow Ervin's competitors to perform such services and reap the enormous benefits flowing therefrom.

844. HUD's aforementioned acts infringe upon Ervin's exclusive rights under 17 U.S.C. § 106, all to Ervin's immediate and irreparable injury of Ervin, for which Ervin is without an adequate remedy at law, and for which Ervin is entitled to issuance of an injunction and damages.

845. HUD's aforementioned acts infringe upon Ervin's exclusive rights under 17 U.S.C. § 106, all to Ervin's immediate and irreparable injury, for which Ervin is without an adequate remedy at law, and for which Ervin is entitled to issuance of an injunction and damages.

846. HUD's acts, as described above, were, and are, blatant, deliberate, willful and in reckless disregard for Ervin's rights in and to its copyrighted work.

847. Ervin is entitled to an injunction restraining HUD, its officials, agents, contractors, and employees, and all persons acting in concert with them, from engaging in further acts of copyright infringement.

848. Ervin is entitled to collect monetary damages that it has suffered directly and indirectly as a result of HUD's infringements, including, at a minimum, the value of the HUD contracts performed by Ervin's competitors using Ervin's

copyrighted works that Ervin would have received had it been entitled to perform said contracts.

849. Ervin is entitled to collect damages that it has suffered directly and indirectly as a result of HUD's infringements, including, at a minimum, a percentage of the value that HUD was able to realize in connection with HUD's note sales as a result of the increased negotiating leverage HUD gained by reason of its unauthorized use of Ervin's copyrighted works.

850. Ervin is entitled to recover actual and/or statutory monetary damages from HUD for its wrongful acts. Ervin is presently unable to ascertain the full extent of the monetary damages it has suffered or will suffer by reason of HUD's acts of copyright infringement.

851. Ervin is entitled to recover its attorneys' fees and other costs including in-house costs of maintaining this action to enforce its rights in said copyrighted works.

PRAYER FOR RELIEF

WHEREFORE, Ervin respectfully prays that judgment be entered in its favor and against these Defendants as follows:

- A. On Counts I, II, III, IV, V, VI, VII, VIII, IX, X, XIV, and XVI, preliminary and permanent injunctive relief;
- B. On Counts I, II, III, IV, V, VI, VII, VIII, IX, and X, declaratory relief;
- C. On Count XI, specific performance;

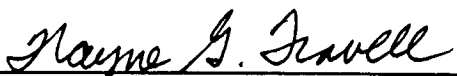
D. On Counts VI, XI, XII, XIII, XIV, XV, and XVI, actual damages in an amount to be determined according to proof at trial;

E. Attorneys' fees and other costs including in-house costs of preparing and pursuing this Complaint; and

F. Such other and further relief as this Court may deem just and equitable.

Respectfully submitted,

TUCKER, FLYER & LEWIS,
a professional corporation


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Dated: June 5, 1996