

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERVIN AND ASSOCIATES,
INCORPORATED,

- and -

EAA CAPITAL COMPANY, L.L.C.,
7315 Wisconsin Avenue
Suite 1100W
Bethesda, Maryland 20814

Plaintiffs,

v.

HELEN DUNLAP, et al.,

Defendants.

FILED

AUG - 1 1996

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

Civil Action No. 96-CV01253
(Judge William B. Bryant)

**FIRST AMENDED COMPLAINT FOR PRELIMINARY AND
PERMANENT INJUNCTIVE RELIEF AND DECLARATORY RELIEF**

Plaintiffs Ervin and Associates, Incorporated and EAA Capital Company, L.L.C. (hereinafter collectively referred to, unless otherwise specifically indicated, as "Ervin" or "Plaintiff"), by and through counsel, states as and for its first amended complaint for preliminary and permanent injunctive relief and for declaratory relief 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

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America, on knowledge as to itself and on information and belief as to all others, as follows:

PARTIES

1. Ervin and Associates, Incorporated 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. EAA Capital Company, L.L.C. is a limited liability company organized and existing under the laws of the State of Maryland, with its principal place of business at 7315 Wisconsin Avenue, Suite 1100 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.

3. 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 and her official capacity as Deputy Secretary for the Office of Housing Operations 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.

4. 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. HUD has waived its immunity to suit pursuant to 12 U.S.C. § 1702.

5. 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. The Secretary's immunity is waived pursuant to the Secretary's authority to sue and be sued under 12 U.S.C. § 1702.

6. 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.

7. 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.

8. Plaintiff seeks injunctive and declaratory relief 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 injunctive and declaratory relief.

JURISDICTION

9. 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; 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.

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

SUMMARY OF CLAIMS^{1/}

11. 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 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.

^{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.

12. 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.

13. 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 having 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.

14. 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 approximately \$3 million per year for two years on the task order, be declared

technically unacceptable so that Dunlap's "contractor of choice," The Hamilton Securities Group, Inc. ("Hamilton"), which bid approximately \$10 million per year for two years, including 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.

15. 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.

16. The facts alleged in this First Amended 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.

17. 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.

18. 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.

19. 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.

20. 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 free from the harsh, unfair and discriminatory 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.

21. 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 retaliated against Ervin by breaching clear contractual obligations; 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.

22. 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.

23. 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."

24. This case involves a myriad of complex factual allegations which can be grouped into six 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) Insider Trading;
- 5) Cover-Ups; and
- 6) Retaliation Through Defamation, Rumor, Innuendo, Cancellation of Existing Work and Blackballing.

Contracting Corruption and Favoritism

25. 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.

26. As a result of Dunlap's unlawful conduct, countenanced by those at HUD responsible for supervising her, certain favored, handpicked contractors, including Hamilton, Coopers & Lybrand ("C&L"), Williams, Adley and Company ("Williams, Adley"), Ernst & Young ("E&Y") and its affiliate, E&Y/Kenneth Levethal ("E&Y/KL"), which, based on a feature story of the CBS Evening News on May 7, 1996, contributed almost \$1 million to the Democratic Party, and Tradewinds, 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.

27. 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 for Hamilton 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 Hamilton to exercise a degree of control over the making of policy by an executive branch agency, other contractors and HUD that is not appropriate. For example, Ervin has been advised that all testimony given by Dunlap and Retsinas is prepared by Hamilton or E&Y;

- 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 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 that challenge the status quo under Dunlap;
- 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.

28. In December 1995, John Ervin and Steve Ervin were advised by C. Austin Fitts, President of Hamilton, 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 caucasians. This is particularly prevalent in employment practices, but also carries over into contracting issues. Indeed, the General Counsel himself has stated that "there are too many white faces" at HUD.

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, 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 constitutional right to due process and equal protection under the law.

35. Another example of discrimination playing a role in eroding Ervin's rights under existing contracts is the "Portfolio Re-engineering" (formerly "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 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. (Ervin understands that HUD is now again attempting to "kill" the white male firm in question.)

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.

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 right to free

speech. In doing so, HUD has further violated Ervin's Fifth Amendment right to due process and equal protection.

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, in violation of Ervin's First and Fifth Amendment rights. 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 constitutionally protected interests in its contracts with HUD.

Insider Trading

45. 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.

46. 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.

47. 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.

48. 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."

49. 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.

50. 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."

51. 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.

52. 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.

53. 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.

54. 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."

55. 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.

56. 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.

57. 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.

58. 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 Hamilton 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

59. 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.

60. 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.

61. 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.

62. 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

63. 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.

64. 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.

65. 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.

66. 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."

67. 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.

68. In particular, HUD's issuance of the Multifamily Asset Management Technical Assistance RFP was 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. In an apparently defensive move, HUD has withdrawn this procurement, citing revisions needed to the scope of work in the RFP. Ervin believes that, without protection of the courts during the pendency of this lawsuit, HUD will reinstitute this procurement to the detriment of Ervin.

69. 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 to further her clearly retaliatory purposes.

70. 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.

71. 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, in late May 1996, Plaintiff 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 divesting of HUD single family properties. Given that EAA Capital/GAMEX had managed and disposed of 30,000 similar properties including over 23% of all RTC single family properties, had been the most successful provider of single family preforeclosure services, and being a HUD approved mortgagee, 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 EAA Capital/GAMEX team was in retaliation against Ervin for filing protests on other solicitations.

72. Due to the extent of the damage to Ervin's and EAA Capital's reputations 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

73. 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.

74. As described above and as more fully described below, HUD and Dunlap, in violation of Ervin's constitutional and other statutory 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.

75. By this complaint, Ervin seeks injunctive and declaratory relief, to declare Ervin's rights and to prevent further constitutional deprivations from occurring.

FACTUAL BACKGROUND

A. Ervin and Associates, Incorporated

76. 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.

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

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

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

80. 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.

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

82. 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.

83. 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.

84. 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.

85. 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 contracts for almost 2,000 apartment projects to ensure that they are maintained in decent, safe and sanitary conditions 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.

86. 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.

87. 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.

88. 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.

89. Although Ervin desires to continue working for HUD, a combination of restrictive, unfair, corrupt and unlawful contracting practices, discrimination, retaliatory breaches of contracts by HUD 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.

90. 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. EAA Capital Company, L.L.C.

91. EAA Capital was formed in late 1995, and became a HUD-approved mortgagee in early 1996, to, among other things, invest in and restructure single family mortgages formerly held by HUD. This would be accomplished using many of Ervin's proven processing systems and experienced staff.

C. HUD's Office of Multifamily Housing

92. 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.

93. 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.

D. Helen Dunlap

94. 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.

95. 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.

96. 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.

97. 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.

98. 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.

99. 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.

100. 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 C. Austin Fitts, 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.

101. 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, after urging by Hamilton during the pendency of the Financial Advisor procurement, a massive crosscutting task order

designed for the specific purpose of having Hamilton control all other financial advisors. This is a responsibility that should not be delegated and would be more appropriate to a HUD employee.

102. 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.

103. 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.

104. 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.

105. 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.

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

E. U.S. Small Business Administration

107. 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.

108. 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.

109. As will be demonstrated throughout this Amended 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.

110. 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.

F. Portfolio Management

111. 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.

112. 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.

113. 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.

114. 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.

115. 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.

G. New Mortgage Insurance Commitments

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

117. 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.

118. 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).

119. 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.

120. 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.

121. 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.

122. 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.

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

124. 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.

125. 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.

H. Note Sales-Conflicts of Interest

126. 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.

127. 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.

128. 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.

129. 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."

130. 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.

131. 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.

132. 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.

133. In furtherance of HUD's conspiring with GNMA, E&Y/KL, and others to by pass the normal procurement process, in November 1995, HUD commissioned a study costing in excess of \$1.25 million from E&Y/KL. The study, which was subsequently presented to Congress, was designed by HUD to support its position of the decrepit state of the portion of its portfolio subject to Portfolio Re-engineering (Mark to Market). E&Y/KL estimated repair and reserve requirements that would be substantially greater than would be required under HUD's standard underwriting processes. Ervin believes this was intentionally done in order to manipulate the OMB negative credit subsidy guidelines and to rationalize the sale of taxpayer assets to investors with insider connections at steep discounts.

134. In short, the worse advice the financial advisor (Hamilton and/or E&Y/KL) provides the more successful it is. By intentionally manipulating the credit subsidy and negative credit subsidy rules, HUD and its financial advisor have manufactured over \$600 million in additional budgetary authority for HUD.

135. 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.

136. 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.

137. 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.

138. 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.

139. 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.

140. 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

141. 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.

142. 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.

143. 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.

144. 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.

145. 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.

146. 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.

147. 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.

148. 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. Six Governmental Sins

1. Contracting Corruption and Favoritism

149. 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.

150. 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.

151. 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.

152. 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.

153. 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.

154. 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.

155. 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.

156. 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.

157. 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.

158. 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.

159. 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.

160. 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.

161. 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.

162. 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.

163. 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.

164. 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.

165. 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

166. 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.

167. 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.

168. 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.

169. 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

170. 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.)

171. 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

172. 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.

173. 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.

174. 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.

175. 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.

176. 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.

177. 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

178. 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.

179. 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

180. 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

181. 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.

182. 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.

183. 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.

184. 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.

185. In connection with the pending SWAT procurement, the Source Evaluation Board ("SEB") made a recommendation as to who the awardee should be, however, Dunlap interfered and requested the SEB to make a different recommendation. The SEB re-made its initial recommendation, despite Dunlap's direction to the contrary. Dunlap then refused the SEB's recommendation and, Ervin believes, arranged for the Kerry Company to receive the contract award.

f. Emergency Procurements - Retaliation for Protests

186. 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.

187. 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.

188. 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.

189. 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.

190. 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.

191. 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.

192. 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.

193. 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.

194. 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.

195. 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.

196. 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.

197. 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.

198. 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.

199. 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

200. 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.

201. 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.

202. 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.

203. 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.

204. 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.

205. 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.

206. 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.

207. 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.

208. 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.

209. 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.

210. 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.

211. Although the revised proposal was not selected, E&Y/KL received the additional award. E&Y/KL 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"

212. 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.

213. 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.

214. 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.

215. 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.

216. 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.

217. 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

218. 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.

219. 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.

220. 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.

221. 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.

222. 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.

223. 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.

224. 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.

225. 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.

226. 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.

227. 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.

228. 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**

229. 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.

230. 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.

231. 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**

232. 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.

1. **Forced Subcontracting - Other**

233. 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.

234. 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**

235. 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.

236. As a result of the above, Ervin has and will continue to suffer irreparable harm 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

237. 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.

238. 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.

239. 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.

240. 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 Kamyra; 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.

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

242. 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.

243. 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.

244. 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.

245. 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.

246. 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.

247. 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.

248. 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.

249. 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.

250. 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.

251. 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.

252. 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.

253. 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.

254. 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.

255. 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

256. 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.

257. 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.

258. 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.

259. 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.

260. 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.

261. 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"

262. 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.

263. 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."

264. 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

265. 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

266. 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.

267. 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 8(a) laws which foster this insidious form of discrimination.

f. Financial Advisor, Due Diligence and Legal Services Procurements

268. 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.

269. 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

270. 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.

271. 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.

272. 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.

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

274. 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.

275. 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.

276. 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.

277. 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.

278. 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.

279. 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 with them, further violating Ervin's right to due process.

280. 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 Kamyia - 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, Kamyia's 8(a) status to participate.

281. 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.

282. 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.

283. 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.

284. 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.

285. 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.

286. 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

287. 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.

288. Indeed, based on information anonymously provided to Ervin, the Office of General Counsel (which has responsibility for ensuring that HUD's contract procurements are not conducted in a discriminatory manner) itself has engaged in unlawful race discrimination in its hiring practices.

289. 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

290. 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.

291. 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.

292. 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

293. 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

294. 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.

295. 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.

296. In 1993, HUD issued an RFP to reprocure 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.

297. 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.

298. 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.

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

300. 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.

301. 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

302. 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.

303. 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

304. 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.

305. 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.

306. 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.

307. 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. -

308. 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.

309. 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.

310. 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.

311. 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.

312. 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.

313. In what appears to be an unusual arrangement HUD deprived Ervin of due process and equal protection by taking away existing contract rights and giving them to a minority firm. 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.

314. 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.

315. 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.

316. 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.

317. 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. Through the award of this contract, Hamilton, Coopers & Lybrand, Williams, Adley and Company conspired to take away Ervin's contract rights and appropriate such rights for themselves, with the help of HUD.

d. Sale of Formerly Coinsured Multifamily Mortgages

318. 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"

319. 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.

320. 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.

321. 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.

322. 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.

323. 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

324. 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.

325. 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.

326. 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.

327. 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.

328. 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.

329. By awarding a contract to a minority firm for work that was included in Ervin's physical inspection contract, HUD denied Ervin due process and equal protection of the law.

f. Seattle Delegated Processing Contract

330. 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.

331. 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.

332. 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.

333. 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.

334. 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.

335. 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.

336. 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.

337. 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.

338. 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.

339. 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.

340. 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."

341. 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.

342. 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.

343. 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."

344. 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.

345. 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.

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

347. 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.

348. 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.

349. 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."

350. 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.

351. 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.

352. Ervin is presently in the middle of performing a five-year contract to, inter alia, review Annual Financial Statements and provide certain categories of data to HUD on software provided by HUD. Consistent with its effort to deprive Ervin of its existing contract rights, HUD has unlawfully attempted to procure services from Advanced Technology Systems, Inc. ("ATS") and others to perform services that Ervin has the exclusive right to perform under its ATS contract with HUD.

353. Ervin has further placed ATS on notice that it has an existing contractual relationship to, inter alia, review annual financial statements and provide certain categories of data to HUD on HUD provided software and has warned ATS that if they interfere with Ervin's contractual relationship with HUD they will be held liable for Ervin's damages.

g. Failure to Issue Task Orders on a Timely Basis

354. 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.

355. 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.

356. 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.

4. Insider Trading

a. Note Sales

357. 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.

358. 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.

359. 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.

360. 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.

361. 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.

362. 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.

363. 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.

364. 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.

365. 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.

366. 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.

367. 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.

368. 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.

369. 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.

370. 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.

371. 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.

372. 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.

373. 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.

374. 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

375. 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.

376. 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.

377. 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.

378. 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.

379. 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.

380. 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.

381. 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.

382. 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."

383. 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

384. 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.

385. 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

386. 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.

387. 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

388. 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.

389. 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.

390. 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.

391. With the consent of HUD, Ervin had an agreement with the Pennsylvania Housing Finance Agency to assist it in obtaining HUD-held mortgages on properties located in Pennsylvania. Knowing the agreement would interfere with its plans, the "tag team" interfered in Ervin's agreement with the HFA to induce it to breach the agreement with Ervin. The "tag team" then became Financial Advisors to the Pennsylvania HFA.

392. 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

393. 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.

394. 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

395. 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>

396. 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.

397. 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.

398. 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.

5. Cover-Ups

a. The Need for Cover-Ups

399. 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.

400. 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

401. 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

402. 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.

403. 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

404. 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.

405. 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.

406. 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."

407. 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.

408. 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.

409. 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

Kamya. After 8 months and a follow up letter, HUD has completely ignored this request.

410. 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.

411. 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.

412. 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.

413. 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.

414. 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.

415. 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

416. 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.

417. 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.

418. 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.

419. 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."

420. 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

421. 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.

422. 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

423. 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.

424. 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.

425. 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.

426. 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.

427. 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.

428. 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

429. 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.

430. 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.

431. 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.

432. 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.

433. 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.

434. 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.

435. 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.

436. 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."

437. 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.

438. 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.

439. 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

440. 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

441. 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. Ervin has been advised that Hamilton recommended the idea of a supervisory financial advisor in a letter sent to Helen Dunlap during the pendency of the financial advisor procurement.

442. 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.

443. Ervin protested the entire financial advisory procurement. See Exhibit B. Despite this protest, HUD, under the color of an emergency procurement, issued this task order to Hamilton and is in the process of revising and expanding it. Ervin understands that the guaranteed amount of the crosscutting task order bid by Hamilton provides for \$10 million per year for two years, including a 25% incentive. Ervin also understands that despite the fact that this is approximately \$7 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

444. Dunlap has forced various contractors to hire Nancy Andrews, a close friend of Dunlap, under task orders directed by Dunlap. Anonymous sources from within HUD have informed Ervin that Andrews lives in Dunlap's home.

1. Only The Truth Can Set HUD Free

445. 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.

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

a. The Damage Caused by Rumors

446. 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.

447. 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.

448. 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.

449. 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.

450. 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

451. 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.

452. 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.

453. 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.

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

455. 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."

456. 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.

457. 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.

458. 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.

459. 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.

460. 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.

461. 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.

462. 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.

463. 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.

464. 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.

465. 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.

466. 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.

467. 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.

468. 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

469. 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.

470. 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

471. 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

472. 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.

473. 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.)

474. 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.

475. 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.

476. 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.

477. 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.

478. 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.

479. 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.

480. 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.

481. 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

482. As has been discussed elsewhere in this Amended 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.

483. 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.

484. 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.

485. 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.

486. 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.

487. 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."

488. 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.

489. 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.

490. 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.

491. 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**

492. 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.

493. 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.

494. 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.

495. 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.

496. 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."

497. 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

498. In September 1995, at an industry housing meeting, Grace Huebscher, a senior employee of Hamilton, 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 the statement with significantly more credibility than it otherwise deserves and significantly damages Ervin. Although Hamilton could not expect this comment to get back to Ervin, the fact that it would even be mentioned indicates that Dunlap's and Hamilton's overall plan to discredit Ervin is gaining strength.

i. Ervin Has Been Blackballed

499. 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.

500. 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.

501. 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**

502. 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.

503. 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.

504. 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.

505. 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.

506. 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, through Ervin, has completed contracts providing single family asset management and disposition services to the RTC and Prudential Home Mortgage Corporation.

507. 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.

508. 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.

509. 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.

510. 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.

511. 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.

512. 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.

513. 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

514. 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.

515. 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

516. 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.

517. 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.

518. 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.

519. 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.

520. 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.

521. 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.

522. 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.

523. 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.

524. 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.

525. On April 10, 1996, Ervin received an extension of the contract that had been executed by the contracting officer and dated April 1, 1996.

526. 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.

527. 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.

528. 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 constitutional rights with HUD.

529. This action on the part of HUD, and Dunlap in particular, further places the survival of Ervin in jeopardy.

530. 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 ERVIN'S FIRST AMENDMENT GUARANTEE OF FREE SPEECH:
INJUNCTIVE AND DECLARATORY RELIEF
(Retaliation and Punishment of Ervin by Dunlap)**

531. The allegations in paragraphs 1 through 530 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

532. 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 political speech, speech critical of the government or government officials or speech that the government does not like.

533. 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.

534. 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.

535. 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.

536. 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.

537. 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.

538. 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.

539. 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 fairly compete for and win

new HUD contracts or from unlawfully refusing to extend or renew Ervin's existing contracts.

540. Specifically, because Dunlap's conduct has threatened Ervin's survival, 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, contracts or Task Orders that would replace any of Ervin's existing responsibilities in whole or in part under its existing contracts with HUD.

541. Ervin is also entitled to a declaration, under 28 U.S.C. § 2201, that HUD's and Dunlap's actions violate the First Amendment.

COUNT II

**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)**

542. The allegations in paragraphs 1 through 541 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

543. 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.

544. 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.

545. 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.

546. HUD's and Dunlap's actions are and were arbitrary, capricious, an abuse of discretion, and not in accordance with law.

547. 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.

548. Ervin is entitled to an injunction preliminarily and permanently enjoining HUD from taking any acts retaliating against Ervin for bringing this lawsuit, from denying Ervin the opportunity to fairly compete for and win new HUD contracts or from unlawfully refusing to extend or renew Ervin's existing contracts with HUD.

549. 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, contracts or Task Orders that would replace any of Ervin's existing responsibilities in whole or in part.

550. 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 III

**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)**

551. The allegations in paragraphs 1 through 550 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

552. 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.

553. 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.

554. 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.

555. 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.

556. 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.

557. 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.

558. 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.

559. In addition, HUD has refused to substantively or reasonably respond to relevant written debriefing questions propounded by Ervin concerning whether procurement regulations, source selection procedures and other applicable authorities were followed in connection with the financial advisory procurement. HUD's refusal to provide reasonable answers to Ervin's relevant questions is part of HUD's and Dunlap's ongoing effort to cover-up the illegal acts which have occurred in connection with the financial advisor procurement.

560. In addition, HUD and Dunlap bypassed normal procurement processes, to Ervin's detriment, by arranging for E&Y to step into the shoes of CS First Boston, which withdrew for unexplained reasons, as one of HUD's financial advisors.

561. 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.

562. HUD's and Dunlap's actions are and were arbitrary, capricious, an abuse of discretion, and not in accordance with law.

563. 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 and has no adequate remedy at law.

564. 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.

565. 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 IV

VIOLATION OF FIFTH AMENDMENT GUARANTEE OF DUE PROCESS AND EQUAL PROTECTION: 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)**

566. The allegations in paragraphs 1 through 565 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

567. 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.

568. 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.

569. 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 and Equal Protection Clauses of the Constitution.

570. 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.

571. 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.

572. 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.

573. 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 race-based action. Both the set-asides and the awards are subject to strict scrutiny.

574. 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.

575. 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.

576. 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.

577. 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.

578. 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.

579. HUD's actions are unconstitutional and not in accordance with law.

580. 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.

581. SBA's and Lader's actions are unconstitutional and not in accordance with law.

582. As a result of HUD's, Dunlap's, SBA's and Lader'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.

583. 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.

584. Furthermore, despite the constitutional infirmities of Section 8(a) 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.

585. 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.

586. 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 V

**VIOLATION OF FIFTH AMENDMENT GUARANTEE
OF DUE PROCESS AND EQUAL PROTECTION:
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)

587. The allegations in paragraphs 1 through 586 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

588. Ervin's interests arising from its contracts with HUD are property rights protected from impairment and deprivation under the Fifth Amendment Due Process and Equal Protection Clauses of the Constitution.

589. 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.

590. 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.

591. 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.

592. 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.

593. 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.

594. 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.

595. 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.

596. 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.

597. 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 VI

VIOLATION OF EAA CAPITAL'S FIFTH AMENDMENT GUARANTEE OF DUE PROCESS: INJUNCTIVE AND DECLARATORY RELIEF (To Enjoin the Single Family Asset Management Procurement)

598. The allegations in paragraphs 1 through 597 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

599. Under the Fifth Amendment Due Process Clause of the Constitution, EAA Capital 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.

600. EAA Capital joined with GAMEX, the nation's leading single family asset management firm, to bid on the procurement for the managing and marketing of single-family HUD properties.

601. During the last week of April and first week of May, 1996, Ervin informed HUD that it intended to file suit against

HUD and Dunlap for certain of the unlawful acts set forth in this complaint.

602. In retaliation for stating to HUD that Ervin intended to file suit against HUD and Dunlap, HUD and Dunlap arranged for EAA Capital/GAMEX to be found technically unqualified to compete for a contract award. As a result, the EAA Capital/GAMEX proposal was found to be outside the competitive range.

603. EAA Capital 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.

604. 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 EAA Capital from the RFPs for Managing and Marketing of Single-Family HUD Properties, to EAA Capital's exclusion and detriment and irrespective of EAA Capital's bid price or technical capability of performing said contract.

605. 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 EAA Capital to taint and improperly influence their actions and decisions. Further, Dunlap, and those acting in concert with her, have

clearly violated EAA Capital's constitutional rights of which a reasonable person would have known.

606. HUD's and Dunlap's actions are and were arbitrary, capricious, an abuse of discretion, and not in accordance with law.

607. As a result of HUD's and Dunlap's unlawful acts in not allowing EAA Capital a fair opportunity to compete for the Single Family Asset Management Procurement, EAA Capital is being forced out of business, has suffered and will suffer irreparable harm and has no adequate remedy at law.

608. EAA Capital is entitled to an injunction preliminarily and permanently enjoining HUD from proceeding with the award of contracts and task orders under the pending Managing and Marketing of Single-Family HUD Properties procurement.

609. 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 VII

**VIOLATION OF EAA CAPITAL'S FIRST AMENDMENT GUARANTEE OF
FREE SPEECH: INJUNCTIVE AND DECLARATORY RELIEF
(Retaliation Against Ervin in the Single Family
Asset Management Contract Procurement)**

610. The allegations in paragraphs 1 through 609 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

611. 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 political speech, speech critical of the government or government officials or speech that the government does not like.

612. EAA Capital joined with GAMEX, the nation's leading single family asset management firm, to bid on the procurement for the managing and marketing of single-family HUD properties.

613. During the last week of April and first week of May, 1996, Ervin informed HUD that it intended to file suit against HUD and Dunlap for certain of the unlawful acts set forth in this complaint.

614. In retaliation for stating to HUD that Ervin intended to file suit against HUD and Dunlap, and for otherwise making critical statements about HUD and Dunlap for the acts alleged hereinabove, HUD and Dunlap arranged for the EAA Capital/GAMEX to be found technically unqualified to compete for a contract award. As a result, the EAA Capital/GAMEX proposal was found to be outside the competitive range.

615. HUD's and Dunlap's actions with respect to the finding that EAA Capital/GAMEX was technically unqualified was in retaliation against Ervin for exercising his First Amendment right to free speech.

616. As a result of HUD's and Dunlap's retaliation and punishment of EAA Capital, EAA Capital Ervin are being forced out of business, have suffered and will suffer irreparable harm thereby and have no adequate remedy at law. Further, Dunlap has clearly violated Ervin's and EAA Capital's constitutional rights of which a reasonable person would have known.

617. Ervin and EAA Capital are entitled to preliminary and permanent injunctive relief enjoining the Single Family Asset Management procurement on the grounds that HUD and Dunlap have retaliated against Ervin in violation of Ervin's and EAA Capital's First Amendment rights.

618. Ervin and EAA Capital are also entitled to a declaration, under 28 U.S.C. §2201, that HUD's and Dunlap's actions violated the First Amendment.

COUNT VIII

VIOLATION OF ERVIN'S FIFTH AMENDMENT GUARANTEE OF DUE PROCESS: INJUNCTIVE AND DECLARATORY RELIEF (To Enjoin the SWAT Procurement)

619. The allegations in paragraphs 1 through 618 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

620. 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.

621. 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.

622. 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 Special Work-out Assistance Teams (SWAT), to Ervin's exclusion and detriment and irrespective of Ervin's bid price or technical capability of performing said contract.

623. Specifically, Dunlap interfered with the Source Evaluation Board by instructing the SEB to recommend that the Kerry Company be awarded the SWAT contract. But for Dunlap's unlawful interference, the SEB would have recommended that Ervin be awarded the SWAT contract.

624. 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.

625. HUD's and Dunlap's actions are and were arbitrary, capricious, an abuse of discretion, and not in accordance with law.

626. As a result of HUD's and Dunlap's unlawful acts in not allowing Ervin a fair opportunity to compete for the SWAT procurement, Ervin is being forced out of business, has suffered and will suffer irreparable harm and has no adequate remedy at law.

627. Ervin is entitled to an injunction preliminarily and permanently enjoining HUD from proceeding with the award of contracts and task orders under the pending SWAT procurement.

628. 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 SWAT, under the circumstances declared herein, is or would be void ab initio.

COUNT IX

**VIOLATION OF EAA CAPITAL'S FIRST AMENDMENT GUARANTEE OF
FREE SPEECH: INJUNCTIVE AND DECLARATORY RELIEF
(Retaliation Against Ervin in the SWAT Procurement)**

629. The allegations in paragraphs 1 through 628 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

630. 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 political speech, speech critical of the government or government officials or speech that the government does not like.

631. During the last week of April and the first week of May, 1996, Ervin informed HUD that he intended to file suit against HUD and Dunlap.

632. In retaliation against Ervin for stating that it intended to file suit against HUD and Dunlap, and for otherwise making critical statements about HUD and Dunlap for the acts alleged hereinabove, Dunlap improperly and unlawfully interfered with the Source Evaluation Board by instructing that the SEB recommend that the Kerry Company be awarded the contract.

633. As a result, Dunlap has retaliated against Ervin for exercising its First Amendment rights to free speech.

634. 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.

635. Ervin is entitled to preliminary and permanent injunctive relief enjoining the SWAT procurement on the grounds that HUD and Dunlap have retaliated against Ervin in violation of Ervin's first amendment rights.

636. Ervin and EAA Capital are entitled to a declaration, under 28 U.S.C. §2201, that HUD's and Dunlap's actions violated the First Amendment.

COUNT X

**TRADE DISPARAGEMENT:
INJUNCTIVE RELIEF**

(Retaliation Through Rumor, Innuendo and Blackballing)

637. The allegations in paragraphs 1 through 636 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

638. Using rumor, innuendo and blackballing, Dunlap has willfully, maliciously, and with an intent to injure Ervin, orchestrated a campaign of retaliation against Ervin.

639. 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.

640. 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

641. As a result of Dunlap's actions, Ervin has suffered and will suffer irreparable harm for which it has no adequate remedy at law.

642. Dunlap's actions were arbitrary and capricious and outside the scope of her authority and employment.

643. Dunlap's actions constituted an abuse of discretion and have resulted in the deprivation of Ervin's constitutional rights, as alleged herein.

644. As a result of Dunlap's action, Ervin has suffered irreparable harm for which it has no adequate remedy at law.

645. Accordingly, Ervin is entitled to an order preliminarily and permanently enjoining Dunlap and those acting in concert with her or under her direction, 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 XI

**VIOLATION OF THE FREEDOM OF INFORMATION ACT:
INJUNCTIVE AND DECLARATORY RELIEF
(Stonewalling and Concealment of Information Evidencing
Official Misconduct)**

646. The allegations in paragraphs 1 through 645 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

647. 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.

648. 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.

649. 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.

650. 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.

651. 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.

652. HUD's actions are arbitrary, capricious, an abuse of discretion and not in accordance with law.

653. HUD cannot demonstrate exceptional circumstances upon which it can base its refusal or inability to respond to Ervin's FOIA requests. Ervin has an urgent and compelling need for the documents and information requested in its FOIA requests insofar as such documents and information will reveal gross illegalities in HUD's contract procurement process which are having the effect of putting Ervin out of business.

654. Accordingly, Ervin is entitled to an order compelling 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.

655. Ervin is also entitled to a declaration, under 28 U.S.C. § 2201, that HUD's actions violate the Freedom of Information Act.

COUNT XII
**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT:
INJUNCTIVE AND DECLARATORY RELIEF
(Unlawful Failure to Explain Agency Contracting
and Auction Decisions)**

656. The allegations in paragraphs 1 through 654 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

657. 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.

658. 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.

659. 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 favor certain hand-picked contractors, to retaliate against Ervin and thereby 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.

660. HUD's actions are and were arbitrary, capricious, an abuse of discretion and not in accordance with law.

661. 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.

662. Ervin is also entitled to a declaration, under 28 U.S.C. § 2201, that HUD's actions violate the Administrative Procedure Act.

COUNT XIII

**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT:
INJUNCTIVE AND DECLARATORY RELIEF
(Contracting Corruption, Irregularities and Favoritism to
Circumvent the Federal Acquisition Regulations)**

663. The allegations in paragraphs 1 through 662 and Exhibits A, B and C are incorporated by reference as if fully set forth herein.

664. The Federal Acquisition Regulations were promulgated to ensure fairness, integrity and impartiality in the federal government's contract procurement process.

665. 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.

666. 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.

667. 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.

668. 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.

669. 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.

670. 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 Federal Acquisition Regulations and the Administrative Procedure Act.

671. 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.

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, XI, XII and XIII preliminary and permanent injunctive relief;
- B. On Counts I, II, III, IV, V, VI, VII, VIII, IX, XI, XII and XIII declaratory relief;
- C. Attorneys' fees and other costs including in-house costs of preparing and pursuing this Complaint; and
- D. Such other and further relief, including equitable relief in the form of money damages, as this Court may deem just, equitable and proper.

Respectfully submitted,

TUCKER, FLYER & LEWIS,
a professional corporation.



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Dated: August 1, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of August, 1996. a true copy of the foregoing First Amended Complaint for Preliminary and Permanent Injunctive Relief and Declaratory Relief was served by hand delivery to Roderick L. Thomas, Esquire, Assistant United States Attorney, Office of the United States Attorney, for the District of Columbia, 555 Fourth Street, N.W., Washington, D.C. 20001, counsel for Defendants.



Counsel

EXHIBIT A
QUESTIONABLE CONTRACTS AWARDED BY HUD

This Complaint covers complex matters. Rather than including all of the contracting issues in the body of the complaint on a contract by contract basis, the following is a summary of the contracts that have been awarded and expanded over the past two years and Ervin's understanding of the potential irregularities relating to such contracts:

Initial Financial Advisor Contract

- On September 30, 1993, the first Financial Advisor contract was awarded to Hamilton. While the contract was initially competitively bid with a \$1 million maximum amount, HUD has enormously expanded it through negotiated task orders and numerous change orders, far beyond what is allowed, thereby depriving other contractors of the opportunity to compete fairly for the work. With the award of contract, the maximum amount was increased from \$1 million to \$5 million. What started out as a simple and relatively inexpensive consulting contract, that over 2 ½ years included a maximum expenditure of \$3,500,000 and was required to be paid based on hours worked, is now at least a \$19 million contract which includes tremendously lucrative performance incentives. It provides a level of power that no contractor should be allowed to wield.
- The duties HUD delegated to Hamilton went far beyond typical responsibilities of a contractor to the point where Hamilton was acting as Dunlap's personal staff. Personal services and lobbying contracts are illegal under the FAR.
- If the true size of the anticipated contract was disclosed instead of the \$1 million amount allocated to be spent on an hourly basis, it is anticipated that the competition would have been fierce.

Subsequent Financial Advisor Contract

- Because of the explosive growth of the initial financial advisor contract, many politically embarrassing questions were being raised throughout the industry about the control Hamilton was exercising over HUD. HUD determined that it would have to reprocure the contract, supposedly on a competitive basis;
- After a long and protracted procurement process, contracts were initially awarded to Hamilton, Cushman & Wakefield, and Merrill Lynch.



- - Additionally, the Source Evaluation Board was required to rescore proposals to ensure that a contract award was also made to CS First Boston.
- Every one of the 10 qualified bidders were asked exactly the same questions, indicating by definition that every one was technically equivalent. As a result, Ervin and one other offeror filed protests with HUD and GAO. HUD acknowledged that its process was flawed and agreed with GAO to conduct "corrective action" in the form of another round of BAFO discussions with all offerors. The corrective action was an obvious sham and, using an emergency procurement rationalization, most awards were made despite the corrective action.
- HUD submitted 46 questions and subquestions to Ervin. It is obvious that the questions submitted were intentionally oppressive contrary to the intent of the corrective action and not designed to provide a fair opportunity to Ervin to compete for the award of a financial advisor contract. Rather, the questions asked were in retaliation for Ervin's earlier protest and constituted a blatant attempt by HUD to paper its file to justify a decision that had already been made. Ervin has also continually attempted to obtain the cost bids of each bidder since such bids should have become the primary selection criteria in case of a tie. HUD has refused to release this information.
- After the competition was complete, HUD introduced the concept of a "crosscutting" task order to supervise the other financial advisor contract awardees. It is obvious this crosscutting task order was directed only at Hamilton for the sole purpose of allowing Hamilton to continue to control the process and passing huge guaranteed payments to Hamilton. Ervin has heard that HUD has awarded Hamilton the task order for a guaranteed \$8 million per year plus a 25% incentive award, to oversee the likes of Merrill Lynch, CS First Boston and Cushman & Wakefield. This is the equivalent of hiring Joe's Garage and Auto Repair to oversee General Motors. Ervin also understands that the lowest bidder that was not selected. Cushman & Wakefield bid \$3 million per year. However, Dunlap demanded that Cushman & Wakefield be declared technically unacceptable so that Hamilton would win the task order despite the huge price differential. This development clearly indicates that there was only one intended winner and going through the motions of accepting bids was a sham. As a taxpayer, this is outrageous.

- What is particularly outrageous is that the decision to issue the crosscutting task order did not even wait for HUD to finish its corrective action charade. It only seems appropriate that for a function that could result in payments of \$20 million over two years (which, according to the RFP, was the amount allocated to the contract in total), that HUD would have at least let the protest process play out.
- Considering nothing other than the absolute number of dollars being paid directly and indirectly to a 20 person financial advisor firm obviously demands some type of investigation into Dunlap's influence over the procurement process.

Initial Due Diligence Contract (To Support HUD Note Sales)

- HUD committed to Ervin in a series of meetings held in May 1994 that HUD expected Ervin to perform at least a large portion of the due diligence work necessary under its existing asset management contract with HUD.
- HUD then informed Ervin that Ervin could not do the work because it had to be performed by a minority firm. This was a blatant case of both breach of contract and discrimination.
- In December 1994, six months after taking the work away from Ervin, a sole source award of \$15 million, which was subsequently increased to \$30 million, was made to the minority accounting firm of Williams, Adley and Company ("Williams, Adley"). Williams, Adley at the time had 75 employees operating out of four offices.
- A predecessor to Williams, Adley was designated a disadvantaged business in 1983 over 11 years before the award, based on little more than a checklist self certification. This exceeded the graduation requirements of the 8(a) program.
- 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 award in Washington, D.C. in late 1994.
- Based on a Freedom of Information Act request, Ervin has learned that approximately \$5,000,000 of this work was subcontracted back to Hamilton, which is not a "disadvantaged" firm. Ervin suspects that this was a precondition of receiving the contract.

- Ervin, without compensation, has been required to provide all of HUD's due diligence contractors with much of the data and documentation required for the note sales from its asset management files and Audited Financial Statement review contract.
- Ervin questions exactly how disadvantaged Williams, Adley had to be to demand a \$30 million dollar gift, that Ervin was otherwise entitled to, to help solve Williams, Adley's "disadvantage."

Subsequent Due Diligence Contracts

- HUD conducted a "competitive" \$30 million procurement for subsequent due diligence contracts that was limited only to firms located in the Washington, D.C. area that were classified as being disadvantaged under Section 8(a) (small, disadvantaged, minority owned companies) by the Small Business Administration. Ervin still believes it has the right to perform this work under its existing asset management contract.
- Although the Adarand decision was made public before the contract award, HUD ignored the direction of the Supreme Court and proceeded without even considering the strict scrutiny or compelling governmental interest tests.
- Since Ervin was discriminated against and not allowed to participate in this solicitation directly, Ervin was designated as a subcontractor to Brown and Company, an 8(a) firm in the Washington, D.C. area. This team submitted a very strong and compelling proposal to perform due diligence services. Ervin learned that the Brown/Ervin Proposal received a very high rating by the Source Evaluation Board, and should have been awarded a contract. After political intervention by Dunlap, however, the proposals were rescored and the team that included Ervin as a subcontractor was eliminated from further consideration.
- Ervin has been, and continues to be, required to provide HUD's due diligence contractors with much of the data and documentation required for the note sales from its asset management files and its proprietary database and systems. Brown and Company has also been hired by HUD to assist in the due diligence process, without Ervin.

Initial Legal Services Contract

- Ervin has been informed that the recommendation of the source evaluation board for the initial legal services contract was overridden by HUD's General Counsel.

Subsequent Legal Services Contract

- Ervin, in response to a competitive solicitation and in a unique concept that would have provided tremendous value to HUD, assembled a consortium of eight of the most reputable and knowledgeable housing law firms in the country to offer legal services to HUD. With 8 firms for HUD to choose from, any conflicts of interest could have been resolved.
- In an obvious and blatant act of retaliation, HUD found Ervin's Legal Services proposal non-responsive the day after Ervin protested the manner of procurement employed by HUD for a similar but unrelated "emergency" Legal Enforcement contract. Ervin's team did not even make the best and final competition. When the winners for the Legal Services contract were announced, one of them included two of the firms included in Ervin's consortium. Apparently, the addition of the remaining six firms resulted in negative scoring.
- While this contract was being evaluated, the Supreme Court came out with its Adarand decision. HUD chose to ignore the consequences of that decision and proceeded with the solicitation, thereby damaging every non-minority firm that was not allowed to competitively bid for the work.
- HUD has, to date, refused to provide Ervin with the required debriefing on this contract.

Legal Enforcement Contract

- Selected firms, hand picked by HUD's General Counsel and senior members of HUD's Housing staff, received an invitation to bid on a one year "emergency" procurement that could result in up to \$7.5 million in legal fees. At an average rate of \$150 per hour, this could amount to between 40,000 and 50,000 hours of legal work. It is difficult to believe that up to 50,000 hours of legal work over a year represents an emergency.
- Two different groups at HUD contacted Ervin to learn how Ervin conducted enforcement activities so as to include Ervin's process in the statement of work.

- Additionally, HUD's Operations Group also contacted Ervin to identify financial information on certain projects.
- Two months previous, HUD had received bids for legal services which included enforcement services.
 - It was obvious the procurement was designated as an "emergency" procurement so as to by-pass the standard procurement process, even though the initial Legal Services procurement was already in-house at HUD, and had been languishing for some time. Ervin suspects that one or more of the favored firms had failed to bid on the Legal Services contract and this procurement was intended to correct that mistake.
 - The "emergency" contract was awarded to, among others, associates of HUD's General Counsel.
 - Ervin protested this contract, which protest was summarily rejected. In retaliation for the protest, Ervin was eliminated from competition on the legal services contract.

Special Workout Assistance Teams (SWAT) Contract

- Initially, Ervin was informed by HUD that coordination of this multifamily initiative would be performed by Ervin under an existing contract.
- In order to insert the person hand selected by HUD to lead the SWAT initiative, Dunlap forced an "arranged marriage" subcontract down the throat of Ervin. The term "arranged marriage" was used by Dunlap to describe the forced subcontract.
- Kerry was forced on Ervin as a subcontractor under its Technical Assistance contract. HUD basically allocated money to the contract which Ervin was instructed to pass through to Kerry. Ervin was not expected to do any work or supervise its subcontractor, just to act as a conduit to allow HUD to bypass the procurement process.

- Ervin attempted to voice its discomfort with HUD over the legality of this forced arrangement. It was clear from John Ervin's discussion with Dunlap that there would be no discussion. Mr. Ervin was instructed to do what he was told.
- Ervin expressed interest to HUD in being able to bid on the follow on SWAT contract, but heard nothing more from HUD on any competition. A contract in excess of \$1 million was subsequently awarded to the very company on a non-competitive basis.

SWAT Physical Inspections Contract

- HUD needed to hire a contractor to perform physical inspections under the SWAT initiative. Ervin expressed its interest in bidding for this work but HUD designated this procurement as another 8(a) set aside, thereby again circumventing open and competitive procurement procedures and preventing Ervin and other non 8(a) firms from bidding on this work.
- This "procurement" and numerous other SWAT Team procurements were administered out of the HUD Denver contracting office and were awarded to Roybal, an 8(a) firm out of Denver and others. Ervin was never given an opportunity to bid on any of the work.
- Ervin suspects many of the firms selected out of Denver as contractors had the decision based on race or gender.

Mark to Market Evaluation Contract

- HUD has contracted with E&Y/KL to evaluate approximately 500 multifamily projects in connection with its Mark to Market proposal which utilized Ervin's proprietary information. Ervin has requested information under the Freedom of Information Act on this contract. All HUD has provided is copies of a proposal relating to Public and Indian Housing, which has nothing to do with the Mark to Market contract activities.
- Ervin is also aware that E&Y was awarded a management studies contract that allows HUD to order up to \$25 million in consulting services; despite having the highest bid price and the lowest evaluation score of those selected and lowest evaluation score of those solicited.

- Based on a feature story on the CBS Evening News on May 7, 1995 it was disclosed that E&Y contributed almost \$1 million to the Democratic Party.

Multifamily Database GNMA Contract

- E&Y/KL is under contract with GNMA to provide services unrelated to HUD. HUD, in its never ending search for existing contracts it can use to bypass the competitive bidding process, expanded the scope of this existing GNMA contract to have E&Y/KL perform work on HUD's multifamily financial database that Ervin was also qualified to perform under its AFS contract with HUD.
- Separately, Ervin anticipated over two years ago HUD's data needs and developed a comprehensive multifamily financial database. Ervin developed this database using its own resources to gain a competitive advantage in bidding on future contracts with HUD.
- It has been reported that E&Y, the parent of E&Y/KL who has large contracts in its own right with HUD, including a recent award for market studies which can be as large as a \$25 million, contributed almost \$1 million to the Democratic Party.
- In violation of the safeguards under which Ervin provided various data to HUD, HUD provided the 1993 and 1994 data to E&Y KL, thereby destroying the competitive advantage developed by Ervin. In a conversation with the Managing Partner of E&Y/KL's Washington, D.C. office on another matter, Ervin was told that HUD had provided him with everything Ervin provided to HUD.
- In addition, E&Y/KL is working on matters that are more appropriate to be performed under Ervin's Audited Financial Statement review contract. Ervin believes HUD is using E&Y/KL to perform these services to become familiar with Ervin's database in anticipation of HUD breaching Ervin's Audited Financial Statement review contract.
- Ervin understands that E&Y/KL involved Andrews, a close friend of Dunlap in the mark to market evaluation.

Dataprompt Systems Contracts

- Dataprompt had three major contracts with HUD to provide systems support to HUD Headquarters.

- - At a meeting held at HUD that Ervin is aware of from a person who attended the meeting, Dunlap gave the order to get rid of Dataprompt.
- After a number of years of successful contract performance, HUD stripped a portion of Dataprompt's contract and gave it to minority contractor. When HUD recognized it could not do the work, the two other contracts were allowed to be continued by Dataprompt. However, Ervin now understands HUD is again trying to take at least one contract away through a reprocurement.
- A longtime manager at HUD informed Ervin that a contractor does not win any friends at HUD by complaining about mistreatment. He referred to the plight of Dataprompt and told Ervin that HUD is now trying to "kill" Dataprompt for complaining about the treatment it received from HUD. The same employee said that "Ervin was now in HUD's sights," clearly indicating the same fate awaits Ervin.

Aspen Systems Contract

- Aspen has done significant business with HUD over the years.
- Ervin has been advised that Dunlap directed a rescoring of proposals within the past two years to award a contract to Aspen to assist HUD in developing a clearinghouse for FHA mortgage loan sales.
- Ervin has also been told that Dunlap may have forced Aspen to subcontract with Andrews, a close friend to Dunlap.
- Ervin was also told that the Aspen contract was also used as a conduit to allow payment for speakers for a recent HUD conference, thereby bypassing the proper budget, appropriation and procurement process.

Chicago Public Housing Contract

- In 1995, the Chicago Regional Office sent out a request for proposals for a very large procurement related to the running of the Chicago Public Housing Authority. This was under the office of Public and Indian Housing, which is separate and distinct from HUD's Multifamily Housing Group. Ervin teamed up with a number of other qualified firms to bid on this contract.

- - Ervin's partner called the Chicago contracting office to follow up on the status of the evaluation and was advised that the evaluations had been completed but they had to be forwarded to Helen Dunlap's office for review.

Personal Services and Lobbying Contracts

- HUD has engaged in a practice of awarding what amount to illegal personal service and lobbying contracts to various former employees and favored contractors, including the ex-FHA controller. The standard practice is to rehire employees, who left for personal reasons or under buy-outs, through noncompetitive purchase orders, allowing them to earn a higher rate than when they were HUD employees.
- This practice circumvents the entire process of buy-outs, and negates any stated desire to downsize the government. Several ex-employees and contractors have benefitted from this practice.
- Additionally, Dunlap utilizes contractors, particularly Hamilton, to act as her personal staff. Inappropriate or illegal duties include legislative liaison, negotiation with OMB, lobbying and effectively acting as Dunlap's personal staff.

Federal Housing Corporation Contract

- Hamilton is HUD's first Financial Advisor, as outlined elsewhere in this Complaint and a subcontractor to HUD's first due diligence contract. C&L is a subcontractor to Hamilton under the initial Financial Advisor contract.
- Ervin understands that Hamilton is also a subcontractor to C&L on a substantial contract that is known to exist but about which it has proven very difficult to obtain information from HUD under FOIA. This shows the extremely incestuous nature of the contracting environment at HUD, and how favored contractors unlawfully split work on noncompetitive contract awards to prevent the light of day from being shed on these corrupt practices.

Forced Subcontracting

- As Ervin has described under SWAT contracts and in violation of the procurement requirements, it was directed by Dunlap that Ervin hire a subcontractor

selected by her with money to be added to an Ervin contract.

- Ervin has also been advised that Dunlap arranged to have her close friend, Nancy Andrews, be hired by various of Dunlap's contractors. Since Andrews had no prior involvement with these companies, the legality of this must be questioned.
- Considering the pattern of utilizing forced subcontractors, the extent of which will be proven at trial, it seems appropriate that HUD require all major contracts to describe the nature of any and all subcontracting arrangements.

As is indicated above, this outline indicates a number of areas where the requirements for fair and open competition have been intentionally bypassed. The common element in each of these procurements was that they fell under Helen Dunlap's area of responsibility and, in virtually all cases, Helen Dunlap was personally involved in the selection of the winners, at both the contract and subcontract levels.

**ERVIN and
ASSOCIATES**
INCORPORATED

May 31, 1996

Office of General Counsel
Procurement Law Control Group
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20814

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Contracting Officer
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Re: Comments to Agency Report on Protest by Ervin and Associates,
Incorporated Under Solicitation No. DU100C000018419
("Comments")

Dear Comptroller General, Ms. Ammons-Barnett, and Mr. Kasson:

Ervin and Associates, Incorporated ("Ervin") submits the following Comments to the Agency Report filed by the U.S. Department of Housing and Urban Development ("HUD") in response to Ervin's protest of the Financial Advisor procurement "corrective action" undertaken by HUD ("Protest"). Quite simply, Ervin believes that, through HUD's Agency Report, it is attempting to cover up the significant improprieties in this solicitation, which are a part of a two to three year pattern of improper and corrupt contracting abuses and favoritism at HUD.

Additionally, the Agency Report continues to stonewall Ervin's legitimate requests to obtain the price bids submitted by all offerors, despite the fact that release of this information is required by law. HUD, knowing that it cannot justify its decisions, instead has chosen to ignore Ervin's requests for this information.

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Due to the seriousness of the issues raised in the Protest and these Comments that are significant to the procurement system, Ervin vehemently objects to HUD's determination that Ervin's Protest is without merit and should be dismissed or denied.

Introduction

HUD instituted a procurement valued at \$20 million to retain the services of Financial Advisors to assist in the disposition of billions of dollars of taxpayer assets. Very simply, through this solicitation and other activities, HUD has ignored the values of honor, integrity and credibility that are essential to the continued existence of, and the public faith in, the agency. HUD has done this through highly placed political appointees who have as their agenda the subrogation of HUD's mission to provide decent, safe and sanitary housing to their own, or their favored contractors', personal, political or financial gain. As a result, HUD has put itself, the taxpayers and the millions of families living in HUD housing at risk. The longer this is allowed to continue, the greater the risk will become.

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 HUD's outrageous conduct. The problem is not that Ervin does not understand what is going on at HUD. Rather, the problem is that Ervin understands all too well.

Out of dire necessity, Ervin has had to resort to the extreme and dangerous remedy of questioning, and ultimately suing, the agency upon which it must rely as practically the only source of its existence. Ervin does not undertake this lightly. Considering the real risks Ervin believes it is necessary to take, GAO should overcome its typical presumption of agency good faith and instead, focus on independently arriving at the truth.

HUD claimed in its Agency Report that Ervin does not have a valid basis for its Protest. This is despite the fact that on May 15, 1996, Ervin had orally advised certain of HUD's contracting and other attorneys that Ervin had "pulled its punches" in the Protest to the purported "corrective action" in an attempt to investigate and resolve these matters amicably and quietly, and to avoid further retaliation from HUD for the filing of protests and for otherwise exercising its First Amendment rights. Additionally, Ervin believes that bringing to light the flaws (and possible illegalities) in this procurement provides GAO with a legitimate

reason to institute an investigation of similar problems that have existed with virtually all other HUD multifamily procurements over the last two years.

It is also important for GAO to recall that this is about a protest to HUD's purported "corrective action" that only became necessary because HUD was caught red-handed trying to wire this procurement for its favored contractors without following the rules. Utilizing HUD's standard approach that it is easier to ask for forgiveness than permission for bypassing the Federal Acquisition Regulations, HUD agreed to purported "corrective action" and in the same breath eliminated the impact that the purported "corrective action" might have had by submitting a justification of urgent and compelling need to GAO. The effect was to allow HUD to get away with maintaining the predetermined results of what even it admitted was a flawed procurement. The only problem HUD encountered was the distraction of being forced to paper its files.

Ervin now recognizes that "pulling its punches" in the Protest to the purported "corrective action" was a mistake. As evidenced by HUD's responses and other actions, rather than attempting to address the serious problems that exist within HUD's procurement processes, HUD has instead chosen to stonewall the issues in hopes they will go away. The fact of the matter is that the problems are too systemic and too massive to just disappear.

Ervin recognizes that it is raising potentially explosive issues. Because of HUD's retaliatory and unwarranted treatment of Ervin in violation of its First (free speech) and Fifth (due process) Amendment Constitutional rights, the Federal Acquisition Regulations ("FAR"), the Freedom of Information Act ("FOIA"), and other bases, however, Ervin is left with no choice but to independently challenge the validity and legality of the widespread pattern of contracting corruption and favoritism within HUD's procurement practices over the past two years, including this solicitation. The challenge will come in the form of a lawsuit to be filed in the very near future in the Federal District Court in the District of Columbia. These Comments to the Agency Report will be incorporated into the lawsuit as Exhibit B.

Ervin's Protest

Ervin initially protested HUD's purported "corrective action" plan on the following bases:

1. The oppressive number, tone and nature of the questions HUD asked of Ervin as, it believes, compared to the questions asked of other offerors;

2. The personal service and lobbying activities demanded of the Financial Advisor;
3. The unconstitutional use of bonus scoring points for minority and women participation;
4. Failure to use price as the only objective criteria to select contractors;
5. HUD's continual demands for Ervin's proprietary information; and
6. HUD's technical transfusion of Ervin's proprietary information to others.

These issues remain valid and are addressed more fully below. In addition to these original objections, which HUD did not adequately respond to in its Agency Report, however, Ervin has become aware of other more serious reasons why the Financial Advisor contract awards should be set aside, as follows:

- A. HUD's Issuance of a Crosscutting Task Order
- B. Political Rescoring of Original Proposals
- C. Credit Reform Manipulation
- D. Retaliation
- E. Contracting Corruption and Favoritism
- F. Stonewalling
- G. HUD's Agency Report is Time Barred

Each of these more current matters is discussed immediately below:

A. HUD's Issuance of a Crosscutting Task Order

Ervin understands that the \$20 million originally earmarked for all of the Financial Advisor contracts has been allocated to a single contractor to provide crosscutting services, the nature of which remains elusive. Nowhere in the original RFP or statement of work was the term "crosscutting" used, nor was there any indication that a massive task order would be issued that would effectively allow one contractor to oversee and direct the activities of other contractors and all other task orders. In fact, had such a support concept existed, many of the questions used by HUD in its purported "corrective action" to rationalize its predetermined selections would have been totally inappropriate.

It is painfully obvious that HUD is utilizing the Financial Advisor procurement at issue to rationalize a massive, unjustified, duplicative and directed crosscutting task order to a "favored contractor of choice" for services not disclosed in the original RFP's statement of work. Simply put, the

supervisory or oversight or similar type services called for in the crosscutting task order are more appropriately performed by HUD employees. As such, the crosscutting task order falls into the personal service category prohibited by FAR 37.105 *et. seq.*

It is Ervin's understanding that, despite how lucrative it is, only two of the four Financial Advisor contract awardees bid on the crosscutting task order. Ervin further understands that HUD disqualified the bid from Cushman & Wakefield for approximately \$3 million per year so that a contractor with a bid of approximately \$8 million per year plus incentives, would win the "competition" and obtain the task order. For a governmental agency, these actions are highly unusual and arouse great suspicion, especially given HUD's recent history of contracting corruption and favoritism.

Based on HUD's actions in awarding Financial Advisory contracts and task orders, it obviously concluded that Cushman & Wakefield, Merrill Lynch and CS First Boston, each of which has enormous financial and technical resources and are eminently qualified and experienced in every manner of financial transactions, were not qualified to meet the crosscutting objectives and requirements of HUD. HUD apparently wants a gullible public to believe that Cushman & Wakefield, Merrill Lynch and CS First Boston were not qualified to do the job HUD has just contracted for them to do. This flawed conclusion because the justification for HUD to hire another much smaller and more limited firm to oversee and direct the work of those financial giants. This is ludicrous on its face.

If each of these prestigious firms were not able to do the job that was required without the type of oversight contemplated by the crosscutting task order, there is absolutely no justification for them to have been found to be the most qualified to perform the Financial Advisor services in the first place. Additionally, if HUD could not find qualified contractors, it should not have proceeded with this procurement.

Given that HUD had just recently found all contract awardees to be technically qualified as part of the original procurement process, then ratified this at the highest levels with a justification of urgent and compelling need that the procurement should stand, and then shortly thereafter eliminated an awardee from the "competition" for the crosscutting task order as not being qualified, raises extremely serious questions about the legality

of HUD's conduct in this procurement. A thorough investigation of the procurement of this entire task order is demanded.

Considering all of the very obvious questions this crosscutting task order raises, all of the facts surrounding the "competition" for the crosscutting task order, including the bid prices of each of the bidders, must be made public as part of HUD's response. The investigation should also include a determination as to whether Merrill Lynch and CS First Boston, the other two contract awardees, bid for such a lucrative assignment, and if they did not, why not?

Ervin also objects to the concept of a crosscutting task order because its use effectively eliminates the ability of the new contractors to independently evaluate and correct prior problems with HUD's note sales efforts, particularly the flawed optimization model, and the intentional bias that stacks the deck against small investors. For reasons unrelated to what is best for the American taxpayers, HUD has determined it does not want to hear about these problems. In addition, because HUD knows that the note sale effort is rigged to result in the sale of such assets to a few select Wall Street insiders, HUD has whitewashed these misdeeds in the cloth of "reinventing government."

The fact is that HUD and GAO cannot justify the crosscutting task order that has been awarded based on all of the facts reaching the clear light of day, while still maintaining the charade that contracting at HUD is fair and open. Considering that these services were not contemplated in the original RFP and the other flaws with this procurement, this entire procurement should be set aside and HUD should proceed with a new procurement only under the watchful eye of GAO or another independent oversight agency.

B. Political Rescoring of Original Proposals

Ervin has been advised that the top four ranked proposals as originally scored by the Source Evaluation Board were not awarded Financial Advisor contracts. Instead, political interference demanded that a lower ranked firm be awarded one of the four contracts. This political interference, including changing the source selection procedures, must be fully explained, including disclosure of all scores contained on original and subsequent scoring sheets that were assigned by each member of the Source Evaluation Board before and after the political interference.

Considering the forced rescoring, HUD has created an extensive charade of going through the motions of producing a purported "corrective action" to ensure a selection process that was never fair in the first place. Being forced to move a favored firm up in the rankings to assure them of a contract award to the detriment of someone else validates Ervin's contention that this entire procurement is invalid and should be overturned. HUD has gone to great lengths to assure that this does not happen, and in so doing, is covering up misconduct by HUD.

If HUD does not acknowledge that the rescoring/repositioning of certain awardees' proposals occurred, Ervin demands that each member of the Source Evaluation Board be required to execute a procurement integrity certification wherein they swear an oath that the four original awards represented the originally highest ranked proposals. If they cannot or refuse to do this, the entire procurement should be thrown out and the services reprocured.

C. Credit Reform Manipulation

HUD is using the Financial Advisor to help manipulate the Office of Management and Budget's Credit Subsidy rules through improper lobbying for the purpose of manufacturing additional spending authority for HUD, which to date amounts to over \$600 million.

In short, HUD through its Financial Advisor negotiates an artificially low value for HUD's portfolio "in HUD's hands". The lower the number, the better off HUD will be. HUD then sells assets through a note sale at a much higher amount and the difference becomes "profit" to HUD in the form of additional spending authority. When one thinks about it, the most successful Financial Advisor is the one who gives HUD the "worst" advice about the value of its portfolio. Even in Washington, this should not be tolerated.

This is the result of a planned program by HUD. The following is quoted from one Financial Advisor awardee's initial Best and Final Offer to HUD:

"Because OMB's guidelines are - as a practical matter - still in the process of internal policy development it will be possible to essentially propose our own methodology for defining how these sales will be treated under Credit

Reform guidelines. We are confident that we can aggressively sell FHA's viewpoint to OMB and any Congressional staff which might become involved. Particularly exciting is the possibility (admittedly a long shot) of finding a way to justify a negative subsidy impact - that is, creating additional FY94 budget authority for HUD." (Emphasis supplied.)

Ervin contends that these activities are intentional and clearly fall into personal services and lobbying categories. As such, they are not an appropriate function for any contractor, and Ervin objects to such practices.

Unfortunately for housing, underestimating the value of assets in HUD's hands for these purposes will inevitably lead to faulty conclusions about the portfolio that are used in critical housing program decisions. These decisions could negatively impact hundreds of thousands of families who rely on HUD's affordable housing inventory for basic shelter.

D. Retaliation

HUD is engaging in a well planned, carefully orchestrated campaign of retaliation against Ervin by refusing to extend existing contracts, failing to pay Ervin monies to which it is clearly entitled under existing contracts, and denying Ervin the opportunity to win new contracts. Thus, HUD is retaliating against Ervin in violation of Ervin's First and Fifth Amendment constitutional rights for filing the original protest questioning HUD's blatantly unlawful and corrupt contracting actions. There are no provisions in the evaluation criteria for retaliation by HUD against otherwise qualified contractors, and therefore, making decisions based on these external factors violates Ervin's Fifth Amendment Constitutional Rights to due process.

Ervin has exercised its First Amendment rights to free speech by raising serious allegations about the manner in which HUD conducts its business, including the procurement of this and other major contracts. This includes allegations of corruption, favoritism, cronyism, and cover ups, which Ervin has documented and brought to the attention of the Department. Because Ervin refuses to be silent in the face of scandalous conduct by HUD and certain well-placed political appointees, and continues to point out instances of serious corruption at HUD, this procurement included, HUD has, and through this procurement continues to, illegally retaliate against Ervin by not

allowing it the right to openly and freely compete for government contracts for which it is qualified to perform. GAO should see through HUD's Agency Report and ask hard and incisive questions of HUD on the facts surrounding this procurement.

E. Contracting Corruption and Favoritism

Ervin has detailed instances of contracting corruption and favoritism in a lawsuit to be filed in the very near future in the Federal District Court in the District of Columbia, and as to which Ervin is able to provide documentation and other evidence in support of its Comments to the Agency Report. Upon filing of this action, Ervin intends to supplement its Comments to the Agency Report with documentation from such action detailing a widespread pattern of contracting corruption and favoritism within HUD. Additionally, these Comments will be incorporated into the lawsuit as Exhibit B.

F. Stonewalling

As it has with every aspect of its investigation of HUD's contracting practices, Ervin has attempted to gather significant evidence on HUD's unlawful procurement activities. On February 19, 1996, and March 18, 1996, Ervin requested lists under the FOIA of all large contracts over \$50,000 entered into by HUD since January 1, 1994. HUD provided the first copy of this report to Ervin at no cost. Subsequent to filing the Protest, and after stalling for almost 2 months after Ervin's follow up FOIA request, HUD advised Ervin in writing that the cost to run a corrected report, which was free only a few months previously, was now \$438.50, including 15 minutes of computer time at \$25 per minute. Although HUD increased the cost of this report from zero to \$438.50 and required continual follow up until it was ultimately provided, the Financial Advisor contract and task order awards were not included on the report.

Additionally, Ervin has continually tried through FOIA requests and the protest process to obtain the price bids for each offeror who either received an initial contract award or bid on the task orders. Although obligated to provide this information, HUD has so far refused to do so.

These approaches by HUD are patently retaliatory, and constitute clear evidence that attempting to utilize HUD's administrative procedures when HUD is in a stonewalling mode is prohibitively expensive and time

questions, substantiates Ervin's claim that the questions were clearly and blatantly retaliatory.

Ervin is particularly offended by the questions asked about specific note sales experience for HUD. Since the panel was fully aware that the only company who had such specific experience was the incumbent financial advisor, these questions were clearly intended to intimidate offerors. Had HUD not unilaterally converted the previous \$1 million RFP for a financial advisor into a \$20 million noncompetitively procured award, other firms might have been able to gain the experience that HUD is now demanding. Additionally, Ervin presumes that since no one but the incumbent had the ability to answer these questions affirmatively, Ervin assumes that they were also asked of all other offerors in the purported "corrective action" BAFO.

Ervin is also disturbed by the fact that it was not provided with copies of the questions asked of the other purported "corrective action" BAFO offerors. There was no legitimate reason for HUD to withhold these questions, except to prevent Ervin from documenting whether the questions were retaliatory or not. Moreover, GAO should examine the nature, tone and number of questions asked of Ervin in the overall context of the allegations made herein.

2. Personal Services and Lobbying

HUD stated in its Agency Report that it does not utilize its Financial Advisor for personal services or lobbying activities. This simply is not true. HUD has engaged in a pattern of using various contractors to provide unlawful personal services and lobbying on behalf of the Department. The broad level of power delegated to the Financial Advisor by HUD is common knowledge in the housing industry, and anyone who has any knowledge of the process knows it is clearly inappropriate for any contractor to have the kind of power that is wielded.

FAR 37.104(a) states: "...a personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws..."

FAR 37.104(b) states: "Agencies shall not award personal services contracts unless specifically authorized by statute...to do so."

FAR 37.104(d) states: "The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature: ...

- (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
- (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- (5) The need for the service provided can reasonably be expected to last beyond 1 year.
- (6) The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to-
 - (i) Adequately protect the Government's interest;
 - (ii) Retain control of the function involved; or
 - (iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee."

Question number 1 of the 46 questions and subquestions asked of Ervin by HUD reads as follows:

- "1. FHA is subject to the Credit Reform Act of 1990. Please discuss:...
- D) your proposed approach to dealing with OMB on behalf of FHA...
- E) Who on your team would be responsible for dealing with OMB on such issues as Credit Reform and FHA budgetary impacts and what are their specific qualifications and experience in the area of Credit Reform and FHA Budget?"

The activities undertaken previously, and to be undertaken in the future under the crosscutting task order, particularly those which require selling HUD's position to Congress and other oversight agencies, clearly represent personal services and lobbying activities, which should only be performed, if at all, by HUD employees. Utilizing the "rose by any other name" logic, HUD is unable to credibly argue that the services being contracted for are anything other than personal services and lobbying. It is inappropriate for an agency to hire a contractor to lobby for or sell its programs to Congress or other oversight agencies, yet that is precisely what HUD is doing.

3. Affirmative Action/EEO Evaluation Factor

It is improper for HUD to require, as a condition of awarding bonus scoring points and therefore possibly a contract, that Ervin proffer evidence of compliance with some vague affirmative action type program based on race. Contrary to HUD's Agency Report, the United States Supreme Court, in its landmark decision in Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097 (1995), provided clear judicial precedent governing the Government's use of all affirmative action programs utilizing racial classifications. The Supreme Court held that:

"...all racial classifications, imposed by whatever Federal, State, or Local governmental actor, must be analyzed by a reviewing Court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests." (Emphasis added.) *Id.* at 2113.

At a debriefing held recently on another procurement, when Ervin challenged similar race based bonus scoring points, it was told by an experienced HUD contracting officer that similar language is in every RFP as it is "just a practice that HUD has used for years." The experienced contracting officer acknowledged not understanding the meaning of narrow tailoring or strict scrutiny. She also acknowledged that "There is no compelling government interest for the award of minority points." These acknowledgments, when coupled with HUD's false statements in the Agency Report regarding the lack of clear guidance from the Supreme Court on this matter, show that HUD does not know or care what the law of racial discrimination is, let alone whether it has followed the law.

HUD's continued recklessly arrogant approach that its own judgement supersedes the clear direction of the U.S. Supreme Court, both in this procurement and the Agency Report, is further clear and compelling evidence that any attempt to utilize HUD's administrative procedures for resolving a difference with HUD is an exercise in futility.

4. Price Is the Only Remaining Objective Criteria to Select Contractors

In its original February 9, 1996 protest, Ervin asserted that, because HUD had provided the same questions to all offerors at the first Best and Final Offer (BAFO) round, all proposals at that point had to be deemed technically equivalent and that price was the only remaining criteria. This argument was supported in Ervin's

protest, as well as that of Ernst & Young/Kenneth Leventhal, by reference to GAO case rulings, sections of the FAR, and other citations.

FAR 15.609 clearly states:

"The competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award."

Because all firms in the competitive range were provided with the same questions in the first BAFO, they could not have improved their responses, making it clear that, as FAR states, all firms had an equally reasonable chance of award. It is also clear that because the questions were all the same, they had nothing to do with the technical merits of any specific proposals, and thus, the only remaining objective evaluation element for HUD to consider was price. In fact, the evaluation criteria in section M2(b) of this RFP clearly stated:

"In the event that two or more offers are considered technically equivalent, the evaluated cost or price will be of primary importance in determining the proposal most advantageous to the government."

On numerous occasions, Ervin has requested information on the cost bids submitted by each of the 10 offerors found originally to be in the competitive range. Despite being entitled to such information under FAR and FOIA, and despite HUD's obligation to explain its actions and decisions under the Administrative Procedures Act ("APA"), HUD steadfastly refuses to provide this information, showing that it has something to hide.

HUD is obligated by law to provide the reasons for its decisions. Ervin was notified on January 26, 1996 that it was not a successful offeror under this solicitation. On January 29, 1996 (meeting the FAR requirements for requesting such a debriefing), Ervin faxed and mailed a request for a debriefing. Ervin again reiterated its desire for a debriefing in the first protest that was submitted, and in its subsequent Protest. Ervin has now received notice that it will not be awarded a contract after HUD's purported "corrective action" BAFO, and Ervin has again repeated its desire for a debriefing, to include disclosures of all ranking and pricing information.

FAR 15.1004(d) states that, at a minimum, Ervin is entitled to the following information:

- (1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
- (2) The overall evaluated cost or price and technical rating, if applicable, of the successful offeror(s) and the debriefed offeror;
- (3) The overall ranking of all offerors when any ranking was developed by the agency during the source selection;
- (4) A summary of the rationale for award;
- ...
- (6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

FAR 15.1004(d) states that, "To the maximum extent practicable, the debriefing should occur within five days after the receipt of the written request." Since contracts have already been awarded under this solicitation, Ervin has been entitled to a debriefing since at least January 29, 1996, but yet has not been allowed such a debriefing. This is an intentional violation of Ervin's due process rights.

Since January 29, 1996, Ervin has asked relevant questions of HUD that deserve reasonable responses. The Department's refusal to release information that is clearly relevant only confirms the company's belief that there are improprieties surrounding this solicitation that HUD has taken severe measures to cover up. HUD asserts in its response to Ervin's protests that "Ervin doth protest too much." Instead of objecting to questions with cute quotes, HUD should instead follow the law and release the information it is trying to cover up. Ervin and GAO are entitled by law to obtain this information, particularly the price bids, and GAO should advise HUD that it will no longer tolerate the refusal to disclose the original bids, and each of the bids for subsequent task orders, most notably the crosscutting task order. It is obvious that HUD is stonewalling the release of this information as it is terrified of the obvious conclusions that will be drawn if the price bids are disclosed.

5. & 6. Theft of Data and Technical Transfusion

In very carefully chosen words designed only to mislead, HUD stated in the Agency Report that "The Department asserts that it has not, at anytime, had

access or divulged any part of Ervin's database computer program system." A few paragraphs later HUD goes on to state that FHA's Mark-To-Market contractor received data on approximately 570 of some 16,000 projects in support of their Mark-To-Market analysis. Although Ervin understands they obtained the data on all 16,000 projects, apparently, they are admitting to only misappropriating data on a selective 570 projects. HUD's own Office of General Counsel has previously acknowledged that HUD has no legal right to Ervin's proprietary data, which Ervin is able to document. Either HUD's Office of General Counsel was wrong then, or it is misleading GAO now.

The fact is that as recently as March 9, 1996, HUD demanded and took Ervin's copyrighted proprietary data and made it available to Ervin's competitors to perform Financial Advisory services on the North Central Note Sale. Despite HUD's knowing Ervin's concerns about protecting its copyrighted information, HUD has made no attempt to resolve any of the questions arising from HUD's misuse of this copyrighted data.

Since HUD does not have ownership of this data, and this data is not subject to any existing contracts, a fact which HUD's counsel has acknowledged, HUD's rationalization that GAO lacks jurisdiction over data rights because these are contract administration issues is invalid.

Ervin continues to challenge the unauthorized use by any other contractor, including the Financial Advisor contractors, directly or indirectly, of any information provided by Ervin that is included in a Data Warehouse system at HUD, or was provided by Ervin to HUD with other restrictions.

Conclusion

HUD no doubt will seek to gloss over, distort or concoct after-the-fact justifications for the allegations that Ervin has raised herein. Although Ervin expects that HUD will again object to raising some of these and other issues on procedural grounds, GAO's regulations allow GAO to consider a protest that "...raises issues significant to the procurement system." 4 C.F.R. Sec. 21.2(c). Additionally, those regulations allow GAO to review a protest where a "...determination was made fraudulently or in bad faith..." by a contracting agency. 4 C.F.R. Sec. 21.3(m)(5). This is exactly the case with which GAO is now faced.

GAO has the authority and ability to immediately conduct a comprehensive independent investigation of the very serious claims included in Ervin's protests

and these Comments. To date, GAO has not elected to do so, notwithstanding that GAO is the investigative body charged by Congress with investigating such allegations. Considering the seriousness of the claims made in Ervin's protests and these Comments, as well as the impact of these issues on the procurement system, it is imperative that HUD's actions be independently evaluated to determine the truth, rather than have the process be bogged down by administrative issues primarily designed only to obfuscate rather than enlighten. Ervin fully intends to ensure that the Federal District Court provides this independent evaluation.

The simple examples of animus toward Ervin cited above call into question the actions of HUD, and those agency officials who "...are presumed to act in good faith." While HUD may consider this approach to amount to no more than "bubkes," in the interests of brevity here, numerous other examples of HUD's retaliatory and improper actions exist and have been well documented by Ervin. From HUD's response in the form of its Agency Report, it is clear that attempts by anyone to exercise their First Amendment Free Speech right to object to any of HUD's unlawful actions results in an excessive waste of time and money due to stonewalling and retaliation by HUD.

There should be no doubt that there are others (silent for now) within HUD that know these truths told by Ervin all too well. All GAO has to do is ask.

Because of the inability to obtain truthful answers to legitimate questions that Ervin is entitled to under FAR, FOIA and the APA, Ervin has been left with no alternative but to obtain honest answers through discovery, which will be obtained after the filing of a 250 plus page lawsuit in the very near future in Federal District Court in the District of Columbia. These Comments will constitute Exhibit B to that lawsuit.

Very truly yours,

ERVIN and ASSOCIATES, INCORPORATED


Bernard S. Oleniacz
Corporate Counsel

cc: Jenner & Block

EAA
Capital Company

L.L.C.

May 29, 1996

Office of General Counsel
Procurement Law Control Group
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20814

Ms. Delores Ammons-Barnett
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Re: Pre-award Protest by EAA Capital Company, L.L.C. Under Solicitation Numbers DU100C000018501, DU100C000018502, and DU100C000018503 ("Protest"), Managing and Marketing of HUD Properties

Dear Comptroller General, Ms. Ammons-Barnett, and Mr. Kasson:

EAA Capital Company, L.L.C. (EAA) has been notified by a letter dated May 10, 1996, post-marked May 20, 1996, and received May 23, 1996 that we did not make the competitive range for the above referenced solicitation. By way of this letter, we formally protest this determination on the following grounds:

- 1) HUD has not evaluated EAA and its team's proposal in accordance with the evaluation criteria set forth in the solicitation, or in accordance with provisions of Federal Acquisition Regulations (FAR);
- 2) The elimination of EAA and its team is unlawful retaliation by HUD against Ervin and Associates, Incorporated, of which EAA Capital is an affiliate, for exercising its First (freedom of speech) and Fifth (due process) Amendment Constitutional Rights with regard to protests filed on previous procurements;

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- 3) HUD has determined to select contractors for these engagements who will not be successful in meeting the goals of the contracts, so that HUD can continue forward with a pre-determined agenda to sell these assets on "Wall Street", which does not include the goals of these contracts; and
- 4) Contracting at HUD is corrupt.

While this protest is being filed by EAA Capital Company, L.L.C., we understand that GAMEX Limited Liability Company, EAA's team partner, intends to file its own protest against this procurement because of the obvious retaliation against EAA by HUD.

Background

The Solicitations:

On December 8, 1995, HUD issued three (3) Requests for Proposals (RFPs) as follows:

- | | |
|-----------------|---|
| DU100C000018501 | Managing and Marketing of HUD Properties in the HUD Maryland State Area |
| DU100C000018502 | Managing and Marketing of HUD Properties in the HUD Sacramento Area Jurisdiction |
| DU100C000018503 | Managing and Marketing of HUD Properties in the HUD Louisiana State Area Jurisdiction |

The services required under these contracts were defined in Section B-1, "Services", of each RFP as follows:

"The Contractor shall provide, within the *{each jurisdiction listed specifically}*, all facilities, materials, supplies, equipment (except computer equipment to access SAMS which shall be Government Furnished Equipment (GFE)), labor, services, and working capital required to successfully manage single family (1-4 units) properties owned by or in the custody of the Department of Housing and Urban Development (HUD), to successfully market those single family properties which are owned by HUD, and to successfully oversee the sales closing activity, including proper accounting for HUD's sales proceeds."

The primary objectives of the contracts were stated in Section C-I of the solicitation as:

- A. Properties which are in the custody of HUD are protected and preserved pending conveyance to the Department.
- B. Properties which are owned by HUD are properly managed, evaluated and marketed in a manner which produces the highest possible return to the Department's mortgage insurance funds.
- C. Properties under sales agreements are promptly closed and, if not, they are returned to the sales market at an early date.
- D. HUD's net sales proceeds are promptly wired to its Treasury Account.
- E. Average losses on sales and the average time properties remain in inventory are reduced.
- F. The overall program, and the image of HUD's properties, is positive and complaints are minimal.

With the above stated services required and primary objectives of the contract in mind, EAA and its team partner prepared our proposal, ensuring we fully addressed all of the issues required by the solicitation.

The Offerors:

For the purpose of this solicitation, EAA teamed with GAMEX Limited Liability Company (GAMEX). GAMEX as one of the largest single family asset management and disposition firms in the country, has unmatched experience and credentials. Together, our team has more single family asset management and disposition experience and expertise than any firm in the country, and is capable and qualified to perform all the services outlined in these solicitations. Our proposal clearly and concisely expounded our proven methodology and experience in providing single family asset management. The team members of GAMEX/EAA list the following credentials:

- Have held a total of 14 single family asset management and disposition contracts with the RTC;
- Sold over 30,000 single family houses through various techniques, and almost 9,000 of these assets since 1990;

- Since 1990, sold over \$270 million in single family REO assets;
- Accounted for 23% of all single family assets sold by the RTC;
- Recovered over 97% of the Estimated Recovery Value (ERV) of all assets sold for the RTC;
- Sold over 2,000 houses on behalf of HUD and private lenders and servicers of FHA insured mortgages through the Preforeclosure Sale Program;
- Subcontracted with, and maintain a database of, thousands of appraisers and brokers throughout the country;
- Sold single family REO assets in all 50 states and Puerto Rico;
- Provided Direct Endorsement Technical Reviews to HUD on over 50,000 FHA insured mortgages with a total mortgage balance of over \$4 billion; and
- Provided Direct Endorsement underwriting to HUD for over 1,300 FHA insured mortgages with a total mortgage balance of over \$98 million.

Additionally, EAA Capital Company, L.L.C. is an FHA approved mortgagee.

As is clearly demonstrated by the above credentials, the team we proposed to perform the services required under this procurement is clearly as qualified as any in the country to do the work. Additionally, our partner was advised that price was not the determining factor in our elimination.

Section 15.609 of FAR states, "The contracting officer shall determine which proposals are in the competitive range for the purpose of conducting written or oral discussions (see 15.610(b)). The competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award. Where there is doubt as to whether a proposal is in the competitive range, the proposal should be included." We were advised that price was not a factor in the elimination of our team, therefore, we were eliminated solely on the basis that we did not meet technical qualifications set forth in the solicitation. This is impossible. The determination that our team's proposal was not in the competitive range was not made "on the basis of cost or price and other factors that were stated in the solicitation," and we are thereby protesting this solicitation.

Failure to Use Evaluation Criteria:

Based on the detailed information we provided in our proposal, which addressed the HUD evaluation criteria point-by-point, there can be no possible way that our team lost any significant evaluation scoring points in a fair evaluation, if the stated evaluation criteria had been utilized. In fact, considering our experience, we should have been the standard by which all Offerors were judged. The following

is the distribution of the 100 total evaluation points that could have been awarded in evaluating an offeror's proposals, as defined in the solicitation:

Demonstrated Experience	60 points
Past Performance	10 points
Evidence of Adequately Staffed, Trained, and Equipped Offices	10 points
Evidence of a Clear Understanding of this Solicitation and Required Tasks	10 points
Demonstrated Financial Capability to Fulfill All Requirements of this Solicitation	<u>10 points</u>
Total	100 Points

Demonstrated Experience:

Being one of the largest single family asset managers in the country, the GAMEX/EAA team's proposal clearly provided extensive and detailed information regarding the team's unparalleled Demonstrated Experience. The following information was provided in our proposal and clearly demonstrates our experience:

- 10/90-3/94 RTC Single Family Standard Asset Management and Disposition Agreement (SAMDA); Contract Number 0733-90-0035-00.
690 single family properties sold.
- 12/90-12/93 RTC Single Family Standard Asset Management and Disposition Agreement (SAMDA); Contract Number 0733-90-0025.
342 single family properties sold.
- 10/90-12/93 RTC Single Family Standard Asset Management and Disposition Agreement (SAMDA); Contract Number 712-90-041.
811 single family properties sold.
- 10/91-6/94 RTC Single Family Standard Asset Management and Disposition Agreement (SAMDA); Contract Number 733-91-0549.
247 single family properties sold.
- 1/91-12/93 RTC Single Family Standard Asset Management and Disposition Agreement (SAMDA); Contract Number 734-90-0068.
341 single family properties sold.
- 1/91-12/93 RTC Single Family Standard Asset Management and Disposition Agreement (SAMDA); Contract Number 734-91-0216.
435 single family properties sold.

- 3/92-3/95 RTC Single Family Standard Asset Management and Disposition Agreement (SAMDA); Contract Number 713-91-1067. 1,365 single family properties sold.
- 4/92-12/95 RTC Single Family Standard Asset Management and Disposition Agreement (SAMDA); Contract Number 713-91-1066. 763 single family properties sold.
- 3/94-present RTC Single Family Standard Asset Management and Disposition Agreement (SAMDA); Contract Numbers 713-02-1066 and 713-03-1066. 400 single family properties sold.
- 2/96-present Disposition of rowhouses in Baltimore City for a private investor. Contracted for disposition of 165 single family rowhouses.
- 9/91-7/95 RTC Single Family Standard Asset Management and Disposition Agreement (SAMDA). 173 single family properties sold.
- 10/89-4/92 Prudential Home Mortgage - Single Family Asset Management and Disposition. 39 single family properties sold.
- 9/92-9/94 U.S. Department of HUD - Preforeclosure Sale Demonstration Program Coordinator. 1,125 single family sales, 130 deeds-in-lieu.
- 9/94-present 52 major lending and loan servicing institutions - Preforeclosure Sale Program Coordinator. 308 single family properties sold.

Past Performance:

Clearly through the above listed single family contracts, our team provided the Source Evaluation Board with more than adequate information pertaining to our past performance. In addition, we listed contract reference sources, with telephone numbers, for the purpose of allowing the Board to call and verify our past performance on all contracts.

Evidence of Adequately Staffed, Trained and Equipped Offices:

In our proposal we clearly outlined our proven methodology and procedures for successfully managing and selling single family real estate. After closing the sale on over 30,000 single family assets, we obviously have adequately equipped offices for doing so. In addition, we provided an organizational chart which included 50 professional staff with detailed lines of authority and functional responsibility. The organization of our team was developed specifically for managing and carrying out all the duties specified in these solicitations. We also indicated in our proposal that we have worked on a national basis from our current locations. In addition EAA Capital is located in Bethesda, Maryland (a 1 hour drive to Baltimore) and GAMEX has recently established an office in Baltimore, Maryland.

Evidence of a Clear Understanding of this Solicitation and Required Tasks:

Our proposal fully described the methodology, which is time tested and proven through the single family sales we have closed to date, to be utilized in fulfilling the obligations of this engagement as outlined in the solicitation. We clearly know how to sell single family REO. In addition, Pamela Gleichman, President of GAMEX, was called upon extensively by HUD as an authority on single family asset management and disposition, clearly demonstrating the team's understanding of this solicitation and the required tasks.

Demonstrated Financial Capability to Fulfill All Requirements of this Solicitation:

Our team provided financial statements that clearly demonstrated the financial capability to fulfill the requirements of this solicitation. Our statements showed that we have access to over \$4 million in cash to carry the financial obligations of this solicitation.

Summary:

We clearly outlined and addressed the contract requirements, the tested and proven methodology to be utilized, each team member's prior and current experience, and each evaluation criteria individually in a distinct section of the proposal. We cannot, and will not, accept the fact that our team is not the most qualified to perform the services required under this contract, or at the very least, is not within the competitive range.

Section 15.608 of FAR states, " Proposal evaluation is an assessment of both the proposal and the offeror's ability to successfully accomplish the prospective contract. An agency shall evaluate competitive proposals *solely* on the factors specified in the solicitation." (Emphasis added). HUD did not evaluate our proposal "solely on the factors specified in the solicitation," and we are thereby protesting this solicitation.

Retaliation:

EAA Capital Company is an affiliate of Ervin and Associates, Incorporated ("Ervin"). As such, HUD's action is clearly a retaliatory action against Ervin, in violation of its First and Fifth Amendment constitutional rights, for filing other protests questioning HUD's blatantly unlawful and corrupt contracting actions. There are no provisions in the evaluation criteria for retaliation by HUD against otherwise qualified contractors, and therefore, making decisions based on these external factors violates our Fifth Amendment Constitutional Rights to due process.

Ervin has exercised its First Amendment rights to free speech by raising serious allegations about the manner in which HUD conducts its business, including the procurement of these and other major contracts. This includes allegations of corruption, favoritism, cronyism, and cover ups, which Ervin has documented and brought to the attention of the Department. Because Ervin refuses to go away and continues to point out instances of serious corruption at HUD, this procurement included, HUD has, and through this procurement continues to, illegally retaliate against Ervin by not allowing it the right to openly and freely compete for government contracts for which it is qualified to perform.

HUD Does Not Want This Contract to Succeed in Order to Further Its Pre-Determined Agenda:

Although this appears to be an absurd allegation if it were not true, it is the only rational explanation of why HUD might attempt to eliminate the most qualified contractor from this solicitation. However, our team is aware that a very high, politically appointed government employee, has openly confided in other government employees of HUD that her agenda is to sell HUD's single family assets through Wall Street, rather than utilizing the more conventional sales approach being solicited for in this demonstration program.

Considering the possibility that this political appointee wants this program to fail so she can go forward with her agenda of transferring HUD assets through Wall Street, GAO and HUD need to determine if the purpose of this demonstration is to

complete a self-fulfilling prophecy of failure. This is not an appropriate action as a means to administering her personal housing policy for the United States of America.

Contracting Corruption:

Because of HUD's retaliatory and unwarranted treatment of Ervin in violation of Ervin's First (free speech) and Fifth (due process) Amendment rights and violations of the Federal Acquisition Regulations and the Freedom of Information Act, Ervin intends to challenge this and other procurements in a lawsuit to be filed in the near future in the Federal District Court in the District of Columbia. Upon filing of this action, Ervin intends to supplement this protest with documentation from such action detailing a widespread pattern of contracting corruption and favoritism within HUD. Additionally, this protest will be incorporated into this lawsuit as Exhibit C.

Relief Requested:

Based on the above information, we are filing a pre-award protest of this solicitation and request the following relief:

1. That the subject procurements, DU100C000018501, Managing and Marketing of HUD Properties in the HUD Maryland State Area; DU100C000018502, Managing and Marketing of HUD Properties in the HUD Sacramento Area Jurisdiction; and DU100C000018503, Managing and Marketing of HUD Properties in the HUD Louisiana State Area Jurisdiction, not be allowed to proceed;
2. That HUD be required to make available all preliminary rankings for all proposals and to explain to the GAO HUD's logic for excluding our team. Effectively we are requesting that HUD provide at this time the same type of explanations it is required upon final award, to ensure that the FAR was followed. FAR states that at minimum, an Offeror is entitled to the following:
 - (1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
 - (2) The overall evaluated cost or price and technical rating, if applicable, of the successful offeror and the debriefed offeror;
 - (3) The overall ranking of all offerors when any ranking was developed by the agency during the source selection;

- (4) A summary of the rationale for award;
 - (6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.
2. Each member of the Source Evaluation Board, as well as the Contracting Officer, provide a statement, signed under the penalties of perjury, that they were not influenced by any person, or in any manner, or did not influence another, to ensure that EAA would not be selected;
 3. The GAO be provided with all evaluation rating sheets prepared by the Source Evaluation Board during the evaluation of the proposals submitted, with a Certification by the Contracting Officer that such evaluation rating sheets have not been altered or modified;
 4. All proposals submitted in response to these procurements be re-evaluated by the General Accounting Office (GAO), or another agency independent of HUD, and selections be made by the GAO; and
 5. That GAO undertake an independent investigation of alleged instances of contracting corruption and favoritism within HUD.

Very truly yours,

EAA Capital Company, L.L.C.



Mark R. Dellonte
Vice President

cc: Pamela Gleichman, President
GAMEX Limited Liability Company