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

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| **In the Matter of:** | ) | |
| **Parkside Development Corporation, Parkside Associates, L.P., and James L. Brown,** | ) | **HUDALJ 11-M-016-CMP-4** **OGC Case Number 09-041-CMF** |
| **Respondents.** | ) | |

## ORDER

On January 11, 2011, the Secretary of the U.S. Department of Housing and Urban Development ("HUD" and "Agency") filed a Complaint for Civil Money Penalties against Parkside Development Corporation, Parkside Associates, L.P., and James L. Brown (collectively, "Respondents"), pursuant to 12 U.S.C. § 1735f-15 and the rules at 24 C.F.R. Part 30. On March 9, 2011, before an answer had been filed, HUD filed a First Amended Complaint for Civil Money Penalties, seeking the imposition of a civil money penalty against Respondents, jointly and severally, for failing to file audited annual financial reports ("AFRs") for fiscal years 2005 through 2009 in a timely and acceptable manner. Respondents requested an administrative hearing on January 28, 2011. Following several procedural actions, including this case being transferred back and forth between HUD's Office of Hearings and Appeals and the undersigned Administrative Law Judge in the U.S. Environmental Protection Agency's Office of Administrative Law Judges, Respondents filed an Answer to the First Amended Complaint on May 12, 2011. This proceeding is governed by the procedural rules at 24 C.F.R. Part 26, Subpart B (referred to herein, collectively with 24 C.F.R. Part 30, as "Rules").

## I. Procedural Background

Per Order dated August 15, 2011, HUD was granted leave to file the Second Amended Complaint, which became part of the record on that date. The Second Amended Complaint alleges that Respondents failed to file audited AFRs for fiscal year 2010, in addition to fiscal years 2005 through 2009, and seeks a penalty of $220,000. In the same Order, the undersigned also provided Respondents thirty days, until September 14, 2011, to file an answer or answers to the Second Amended Complaint, and deferred a ruling on HUD's Motion to Strike Affirmative Defenses until that date.

No answer to the Second Amended Complaint having been filed by September 14, 2011, HUD filed a Motion for Default Judgment ("Motion" and "Mot.") and Memorandum in Support ("Memorandum" and "Memo.") on September 22, 2011.

## II. HUD's Motion for Default Judgment

HUD states that "in the Court's August 15, 2011 Order, it directed Respondents to file an answer to the Second Amended Complaint by September 15, 2011." Memo. at 2. Because Respondents did not file an answer or answers by that date, HUD asserts, it is permitted to file a motion for default judgment pursuant to 24 C.F.R. §§ 30.90(c) and 26.41. Therefore, HUD moves the undersigned to issue a default judgment against Respondents in the full amount sought in the Second Amended Complaint, i.e., $220,000. Memo. at 2.

The Motion was sent to Respondents on September 22, 2011, by certified mail, return receipt requested. *See* Certificate of Service to the Motion. The Rules provide that "[i]f service is by first-class mail . . . service is complete upon deposit in the mail . . . ." 24 C.F.R. § 26.30(b). Normally, a respondent has "10 days from such service" to respond to a motion for default, however, "[i]f a document is served by mail, 3 days shall be added to the time permitted for a response." 24 C.F.R. §§ 26.31(c), 26.41(a). Therefore, Respondents were permitted to file a response to the Motion on or before October 5, 2011, but did not. The Rules require the undersigned to issue a ruling on the default motion "within 15 days after the expiration of the time for filing a response" to it. 24 C.F.R. § 26.41(b).

## III. Discussion and Conclusions

The Rules provide that "the respondent shall serve upon HUD and file with the [presiding officer] a written answer to the complaint within 30 days of receipt of the complaint, unless such time is extended by the administrative law judge." 24 C.F.R. § 30.90(b). If no response is submitted, "HUD may file a motion for default judgment . . . in accordance with [Part 26, Subpart B]." 24 C.F.R. §§ 30.90(c), 26.38. In turn, the Rules at Part 26, Subpart B, state that a respondent "may be found in default, upon motion, for failure to file a timely response to the Government's complaint." 24 C.F.R. § 26.41(a). If the non-moving party does not respond to a default motion within ten days of it being served, that party "may be deemed to have waived any objection" to its granting. 24 C.F.R. § 26.40(b). Only after a party is found in default are the facts alleged in the complaint deemed admitted, and a hearing on them waived. 24 C.F.R. § 26.41(c).

The only related provision mandating a response to an *amended* pleading is Rule 26.15(a), entitled "Amendments," which is within Subpart A of Part 26. Subpart A does not

govern this proceeding, but has been viewed as guidance in prior rulings in this matter.[1] Rule 26.15(a)(1), addressing amended complaints that are filed "[b]y right," or before an answer is filed, provides that "[a] party shall plead in response to an amended pleading within 15 days of receipt of the amended pleading." 24 C.F.R. § 26.15(a)(1). The next subsection, Rule 26.15(a)(2), addressing amended complaints that are filed "[b]y leave," does not mandate a response to an amended pleading, but instead states that "the hearing officer may allow amendments to pleadings upon motion of any party." 24 C.F.R. § 26.15(a)(2).

Recognizing that Respondents have been *pro se* since June 1, 2011, the undersigned provided thirty days in which to answer the Second Amended Complaint. The August 15, 2011 Order specifically provided, in pertinent part:

> 8. Pursuant to 24 C.F.R. § 30.90(b), Respondents *may* file an answer or answers to the Second Amended Complaint for Civil Money Penalties no later than thirty (30) days from the date of this Order, **that is, on or before September 14, 2011**.

Order at 9-10 (italics added). In a footnote that immediately followed, the undersigned stated:

> Respondents are reminded that *if they choose* to file an answer to the Second Amended Complaint, Rule 30.90 requires that the answer "shall include the admission or denial of each allegation of liability made in the complaint; any defense on which [Respondents] intend[] to rely; any reasons why the civil money penalty should be less than the amount sought in the [Second Amended Complaint], based on the factors listed at [Rule] 30.80; and the name, address, and telephone number of the person who will act as [Respondents'] representative, if any." 24 C.F.R. § 30.90(b).

Order at 10, n.6 (italics added). It is clear from the Order that Respondents were not required to file an answer or answers to the Second Amended Complaint, but were instead merely provided time to do so, and were reminded of the Rule governing an answer's content in case they chose to file an answer.

It is observed that default judgment is a harsh and disfavored sanction reserved only for the most egregious behavior, and as a general rule, cases should be decided on their merits whenever possible. *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001); *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986); *Meehan v. Snow*, 652 F.2d 274, 277 (2d Cir. 1981) ("the extreme sanction of a default judgment must remain a weapon of last, rather than first, resort"). Default judgment is appropriate when the party against whom judgment is sought has engaged in willful

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[1] *See* 24 C.F.R. § 26.1 (Subpart A Rules "also apply in any other case where a hearing is required by statute or regulation, to the extent that rules adopted under such statute or regulation are not inconsistent.").

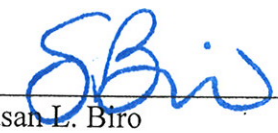
violations of court rules, contumacious conduct, or intentional delays. *Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F.3d 852, 856 (8th Cir. 1996). Importantly, a threshold matter in considering whether a party has defaulted is "whether a procedural requirement was indeed violated." *JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005) (whether default judgment was properly issued should be determined after applying a "totality of the circumstances" test).

Respondents filed an Answer to the First Amended Complaint on May 12, 2011. The Rules at Subpart A may be applied in the undersigned's discretion, and even if they were applied here, Rule 26.15(a)(1) only mandates that an amended answer must be filed in response to an amended complaint filed *by right*, not by leave as is the case here. Respondents have not violated a procedural requirement, nor have they failed to comply with an order of this Tribunal. Therefore, issuing default judgment against them would be inappropriate.

The issue remains as to whether the new allegations in the Second Amended Complaint and higher penalty sought shall be regarded as uncontested and admitted. Because Rule 26.41(c) provides that the facts alleged in a complaint are only deemed admitted *after* a party is found in default, the allegations related to the fiscal year 2010 audited AFR are not automatically deemed admitted. 24 C.F.R. § 26.41(c). In their Answer to the First Amended Complaint, Respondents denied the allegations that they failed to file audited AFRs for fiscal years 2005 through 2009. Because it is widely held that "more lenient standards of competence and compliance apply to *pro se* litigants," *Hall v. Dworkin*, 829 F. Supp. 1403, 1414 (N.D.N.Y. 1993), it is within this Tribunal's discretion to provide Respondents the opportunity to explain their position with regard to the additional fiscal year of 2010 in their Prehearing Statement, which shall be required by future order. *See also Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996).

## ORDER

HUD's Motion for Default Judgment is hereby **DENIED**.



Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[2]

Dated: October 17, 2011
Washington, D.C.

[2] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the United States Department of Housing and Urban Development pursuant to an Interagency Agreement in effect beginning October 1, 2010.