UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

THE INCORPORATED VILLAGE OF ISLAND PARK, JACQUELINE PAPATSOS, in her capacity as Mayor of the Incorporated Village of Island Park, CHARLOTTE KIKKERT, in her capacity as Trustee of the Incorporated Village of Island Park, PHILLIP TAGLIANETTI, in his capacity as Trustee of the Incorporated Village of Island Park, JAMES FALLON, in his capacity as Trustee of the Incorporated Village of Island Park, MICHAEL A. PARENTE, JAMES G. BRADY, FRANCIS R. McGINTY, MICHAEL MASONE, GERALDINE McGANN, DANIEL McGANN, EILEEN McGANN, ANTHONY CICCIMARRO, JANET CICCIMARRO, JOSEPH RUOCCO, DEBRA RUOCCO, MARY ELLEN GUERIN, DENNIS GUERIN, JOSEPH DiDOMENICO, MARIA DiDOMENICO, DONNA MOORE, and KENNETH MOORE,

Defendants.

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REPORT AND
RECOMMENDATION
90 CV 0992 (ILG)

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GOLD, S., U.S.M.J.:

Introduction

Plaintiff United States (the "Government") brings this action against the Incorporated Village of Island Park (the "Village" or "Island Park") and Jacqueline Papatsos, Charlotte Kikkert, Phillip Taglianetti, and James Fallon in their capacity as Village officials (together the "Village Defendants"), under the False Claims Act, 31 U.S.C. §§ 3729 et seq., and the Fair Housing Act, 42 U.S.C. §§ 3601 et seq.[1] This action involves housing units constructed in the Village of Island Park pursuant to Section 235 of the National Housing Act ("Section 235"), 12 U.S.C. § 1715z, a mortgage subsidy program administered by the United States Department of Housing and Urban Development ("HUD"). The Village Defendants are charged with manipulating the selection process for this federally subsidized housing, and with misusing Community Development Block Grant Funds, also distributed by HUD in connection with the Section 235 housing program.

The Honorable I. Leo Glasser granted plaintiff's motion for summary judgment in part, fixing the Village Defendants' liability under the False Claims Act and the Fair Housing Act for claims accruing after March 22, 1984. Judge Glasser then referred the matter for report and recommendation on monetary damages and injunctive relief.

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[1]The Government has brought suit against other defendants as well. Those claims, however, are not relevant to the issues discussed in this report and recommendation.

Following Judge Glasser's referral, the parties conducted extensive discovery on the issue of monetary damages. At the close of that discovery, a hearing was held on January 17-19, March 28-29, and April 1, 1996, at which both parties presented fact and expert witnesses as well as documentary evidence. The parties then took discovery regarding whether injunctive relief should be granted and the appropriate scope of such relief. A hearing was held regarding injunctive relief on June 23-27, and July 14-16, 1997. For the reasons stated below, I respectfully recommend that the court award total damages and penalties in the amount of $5,393,534.88, and injunctive relief as described below.

Factual Background[2]

The Incorporated Village of Island Park is a small community located in Nassau County. The Village is part of the Nassau County Consortium (the "Consortium"), an organization formed by several communities in Nassau County to participate in federal housing programs administered by HUD. The Consortium applied for and received Community Development Block Grant ("CDBG") funds for community development programs in, among other communities, the Village of Island Park. As a condition of receiving CDBG funds, HUD required Nassau County to certify that it had adopted a Housing Assistance Plan ("HAP") and would actively promote the housing goals described

[2]This action has the been the subject of two prior published decisions which bear directly on issues raised in this report and recommendation, familiarity with which is assumed. See United States v. Incorporated Village of Island Park, 791 F. Supp. 354 (E.D.N.Y. 1992)("Island Park I"); United States v. Incorporated Village of Island Park, 888 F. Supp. 419 (E.D.N.Y. 1995) ("Island Park II").

in the HAP. Once it received CDBG funds from HUD, Nassau County entered into Cooperation Agreements with the Village of Island Park wherein Nassau County agreed to grant CDBG funds to the Village, and the Village, pursuant to the HAP, agreed not to discriminate in its use of the CDBG funds. The County and the Village agreed that the Village would use CDBG funds in part to purchase and improve land upon which housing would be built under HUD's Section 235 program. Island Park II, 888 F. Supp. at 432-33.

As discussed in greater detail below, pursuant to Section 235, now a defunct program, HUD provided mortgage subsidies to low- and moderate-income home buyers. Private developers built the housing and obtained mortgage commitments from HUD-approved mortgagees. HUD, pursuant to the Section 235 housing program, made monthly mortgage subsidy payments on behalf of qualified homeowners and insured the mortgages against default. Id.

HUD, in furtherance of its mandate to promote the equal housing opportunity policies of the Fair Housing Act, required that homes built under the Section 235 program "be affirmatively marketed 'to achieve a condition in which individuals of similar income levels in the same housing marketing area have a like range of housing choices regardless of race.'" Id. at 432-33 (quoting 24 C.F.R. § 200.610). The affirmative marketing regulations further required an Affirmative Fair Housing Marketing Plan ("AFHMP"), setting out anticipated occupancy results, which an applicant must make a "good faith effort" to attain. Id. at 433. "Anticipated occupancy results" are "the proposed outcomes if

aggressive outreach and marketing and advertising is conducted in a way which would affirmatively further fair housing by reaching the racial or ethnic groups considered least likely to apply for [a] particular type of housing." Tr. II/Pratt/21.[3] In accordance with these HUD requirements, Nassau County filed an AFHMP setting forth its commitment that Section 235 housing located in non-minority areas such as Island Park would be aggressively marketed to minority groups. Id.

Forty-four Section 235 homes were built by private contractors in Island Park in three phases. Five Phase I houses, as they are referred to by the parties, were constructed in 1979. The AFHMP for Phase I had anticipated occupancy goals of four white, and one black or Hispanic households. HUD approved the Phase I AFHMP, but required that housing be provided to applicants on a "first-come, first-served" basis. Id.

The Village, however, did not distribute the five homes on a first-come, first-served basis as required. Rather, Village officials devised a fraudulent scheme and corruptly arranged for their friends and relatives to receive Section 235 homes. The preselected homeowners were instructed to submit their applications to Village Hall before newspaper advertisements promoting the Phase I homes to the public would appear, effectively guaranteeing that other applicants would be excluded. Id. at 434.

Subsequently, twenty-two Section 235 homes were constructed in the Village as

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[3]The designation "Tr. I" refers to the transcript of the inquest on monetary damages. "Tr. II" refers to the transcript of the injunctive relief inquest. "Dep." refers to a deposition transcript.

part of Phase II. The Phase II AFHMP declared occupancy goals of 3 white, 17 black, and 4 Hispanic households. Once again, in approving the AFHMP, HUD stated that the houses were to be distributed to income eligible applicants on a first-come, first-served basis. Again, Village officials pre-selected homeowners for the Phase II houses, tipping off friends and relatives to submit applications before public notice of the program. Id. at 434-35.

HUD never received an AFHMP for Phase III of the program. Moreover, Phase III was never advertised. Instead, Village officials informally contacted Village residents, and the Phase III homes were distributed by word-of-mouth within the Village. Id. at 436.

Although the AFHMPs submitted to HUD stated an intent to aggressively market housing built in white areas such as Island Park to minorities, and although the AFHMP for Phase II stated an anticipated occupancy result of 17 black households, no blacks received Section 235 homes in the Village of Island Park. Id. at 437. As a result of the corrupt pre-selection scheme, blacks were prevented from participating in the program.

Discussion

I. Monetary Damages Recoverable Pursuant to the False Claims Act

The Government seeks actual damages under the False Claims Act reflecting the monies expended by HUD pursuant to Section 235 to subsidize mortgages of pre-selected homeowners and the CDBG funds used by the Village in connection with the construction of Section 235 homes. The Government further contends these damages should be

doubled and then reduced by amounts repaid pursuant to the recapture provision of Section 235. Finally, the Government seeks statutory damages of $2,000 for each false claim submitted as a result of the Village Defendants' fraud.

A. Calculation of Damages: Mortgage Subsidies Pursuant to Section 235

1. Amount of Mortgage Subsidies Paid by HUD Under the Section 235 Program

In Island Park II, Judge Glasser directed that an inquest be held to calculate the actual damages sustained by the Government as a result of Village officials' manipulation of the Section 235 application process. According to Judge Glasser, "[t]he amount of damages sustained by the government includes all the . . . Section 235 mortgage subsidies paid by the government since March 22, 1984." 888 F. Supp. at 443. The Government seeks $649,191 in assistance payments paid by HUD on behalf of the homeowners between March 22, 1984 and November 30, 1995; estimated additional assistance payments paid subsequent to March 22, 1984 in the amount of $18,968; and monthly handling charges paid by HUD to the mortgagee totaling $6,762. The Government contends that the sum of the previously listed items should be doubled, and then reduced by amounts repaid by homeowners under the "recapture" provisions of the Section 235 housing program, resulting in a total of $1,006,386.

a. Monthly Mortgage Assistance Payments Subsequent to March 22, 1984

The Government's case for money damages rested in large part on the testimony of

its expert witness, Robert J. Rock. Rock is a certified public accountant with undergraduate and graduate degrees in business administration. He was employed by Price Waterhouse for approximately 18 years. While at Price Waterhouse, Rock performed audit work and general business consulting, including litigation consulting, and was promoted to the position of partner. Tr. I/Rock/20-24. In 1994 Rock joined the firm of Jay Alix & Associates as a principal. At Jay Alix & Associates, Rock performs forensic accounting, which is the "investigation of alleged frauds or frauds or embezzlements. . . ." Tr. I/Rock/25. Rock has also taught auditing courses and seminars, and has testified as an expert in accounting matters at least five times prior to the hearing in this case. Tr. I/Rock/26-27.

During his testimony, Rock described his review of mortgagee and HUD records regarding mortgage subsidy payments made on behalf of the Section 235 homeowners. Based upon his experience in auditing, his apparently careful review of the documentary evidence presented by the Government, the detail and clarity of his testimony, and his manner while testifying, I found Rock to be a credible witness.

Rock testified that he was able to find specific documentary evidence that HUD made $649,191 in assistance payments for the benefit of the Section 235 homeowners since March 22, 1984. Tr. I/Rock/72-76; Exhibit 472, third column.[4] Rock based this

[4] Exhibits designated by number were introduced by the Government during the inquest on money damages. Exhibits designated by number with the prefix "FHA" were introduced by the Government during the inquest on injunctive relief. The exhibits

testimony upon a careful review of documents available, having examined the payment records of mortgage servicing companies and compared them to HUD records, including HUD checks, wire transfers, loan histories, and Forms 93102 submitted by mortgagees to HUD to request monthly mortgage subsidy payments. Tr. I/Rock/52-53, 73, 118-19.[5] The precise subsidy amounts Rock documented are set forth in a schedule to his expert report, which was received in evidence at the inquest as Exhibit 473.

Although they do not dispute that the documents Rock reviewed show mortgage assistance payments of $649,191, the Village Defendants challenge the Government's method of calculating damages under the False Claims Act. The Village Defendants argue that the true measure of the Government's damages is the time value of the monies HUD paid before recovering them pursuant to the recapture provisions of Section 235. In other words, the Village Defendants contend that the Government's damages should be limited to the interest that could have been earned on the Section 235 mortgage subsidies between the time they were paid by HUD and when they were recovered from the homeowners.

This argument is unsupported by the law. The Village Defendants have provided no authority, other than their expert's opinion, to support the proposition that the Government's damages should be calculated according to time value concepts. Indeed,

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introduced by the Village Defendants at both phases of the inquest are designated by letter.

[5] A loan history is a chronological listing of activity for each mortgage, kept and maintained by the mortgage servicer. Tr. I/Rock/78-79.

every reported case reviewed by the court uses the same method to calculate damages: the amount of money a false claim caused the Government to pay. Moreover, the Federal Circuit has explicitly rejected the approach suggested by the Village Defendants. In Young-Montenay v. United States, 15 F.3d 1040 (Fed. Cir. 1994), a contractor submitted a false invoice to the government claiming a progress payment to which it was ultimately entitled, but before the amount was due. As a result, the payment was accelerated. Even on those facts, the government's damages were calculated by the court to be the difference between the amount falsely claimed to be due and the amount actually due under the contract, rather than the time value of the money paid earlier than required. The Federal Circuit specifically rejected the argument that the damages should be calculated only as interest on the difference for the "period of time the government was deprived of the use of its funds. . . ." 15 F.3d at 1043 n.3.

Because I find Rock's testimony regarding the amount of mortgage subsidies paid on behalf of the Section 235 homeowners to be credible, and because the Village Defendants' suggested method of calculating damages is inconsistent with False Claims Act precedent, I find that the Government has established damages of $649,191.

b. Estimated Additional Monthly Assistance Payments

As Rock conceded, the mortgage subsidy records he reviewed were incomplete. Accordingly, he estimated additional monthly assistance payments on behalf of several homeowners where records did not exist. The total of these estimated payments is

$18,968.

As indicated in the fourth column of Exhibit 472, headed "Estimated Additional Assistance Payments Subsequent to 3/2/84," Rock estimated additional subsidy payments for homeowners Gunther, DeLessio, Frey, Holtje, Montanino, Rasulo, and Stumphf. Rock estimated additional assistance payments made on behalf of the Gunthers between March and August 1984 in the amount of $1,847. The data compiled by Rock, set forth in Exhibit 473, shows that HUD paid mortgage assistance payments of $369.36 per month on behalf of the Gunthers from April 1983 to August 1983,[6] from September 1984 to June 1985 in the same amount, and from July 1985 to April 1987 in the monthly amount of $369.25, thereafter dropping in increments of a few cents every few months. Based on the data available, Rock estimated that HUD paid $369.36 per month between March and August 1984. Rock was unable to establish that payments had, in fact, been made on behalf of the Gunthers or the amount paid during this five month time period. It is quite possible that no mortgage assistance payments were made during that time period; for example, a change in income could render a homeowner ineligible for assistance payments for some period. Based on the length of the gap in the Gunthers' records, and the lack of any explanation for that gap, I find that the Government has not established by a preponderance of the evidence that HUD made payments of $369.36 on behalf of the Gunthers between March and

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[6]No information was available with regard to the Gunther mortgage from September 1983 to August 1984.

August 1984.

Rock also estimated one payment of $304 by HUD on behalf of the DeLessios. The Government alleges that HUD made one mortgage assistance payment on behalf of the DeLessios after the March 22, 1984 bar date. Rock's report, however, does not indicate the specific amount of any mortgage assistance payment made on behalf of the DeLessios, either before or after the bar date. Instead, the expert report states that: "The monthly assistance payment information was not available. Consequently, pre and post March 22, 1984 assistance payments were allocated based upon the number of months and the mortgage assistance payments reported by the mortgage servicing company." Exhibit 472, note 4; Tr. I/Rock/778. Essentially, Rock divided the total assistance payments made on behalf of the DeLessios by the number of months over which these payments were made. Comparison with other homeowners whose mortgages were subsidized by HUD, however, shows that subsidy amounts were not stable over the term of the subsidy. Subsidy amounts fluctuated, increasing or decreasing over time for each homeowner. Therefore, the number arrived at by Rock is little more than an informed guess. Accordingly, I cannot find that the Government has met its burden of proof as to estimated subsidy payments made by HUD on behalf of the DeLessios.

Rock estimated that HUD made additional assistance payments on behalf of the Freys in the amount of $4,139. Rock was unable to provide the amount of any assistance payments made on behalf of the Freys from April 1984 to March 1985, a gap of one year.

Rock was able to provide specific amounts for the Freys only for the four month period between April 1985 and August 1985. The lack of data relating to the Freys makes it too speculative to extrapolate information regarding any additional assistance payments made by HUD on their behalf, and I therefore find that the Government has not met its burden as to the $4,139 in estimated additional assistance payments.

Rock estimated additional assistance payments by HUD of $3,429 on behalf of the Holtjes. Rock could not provide any specific amounts for the Holtjes between April 1984, and March 1985, a gap of one year. For the reasons stated above, such an extrapolation is insufficient to meet the Government's burden of proof regarding damages.

The Government also seeks $3,216 in estimated additional mortgage assistance payments made by HUD on behalf of the Montaninos. No information was available for the Montaninos between April 1984 and March 1985. The only information provided by the Government regarding the Montaninos is that mortgage assistance payments of $267.96 were made in April, May, June, and July of 1985, no payments were made August or September of 1985, and $803.88 was paid in October 1985. It is too speculative to extrapolate information for 13 months based on 4 months of mortgage records. Therefore, the Government has failed to meet its burden with respect to estimated additional assistance payments on behalf of the Montaninos.

The Government seeks $3,033 in estimated additional assistance payments by HUD on behalf of the Rasulos. The Government could not provide the specific amount of

mortgage assistance payments made for the benefit of the Rasulos for any month, either before or after the bar date. The number arrived at is simply the number of months divided by the total assistance payments made, without any indication of what amounts were paid before or after the bar date. This information is too uncertain to be the basis for the imposition of damages.

Finally, Rock estimated $3,002 in additional mortgage assistance payments on behalf of the Stumphfs. No information was available for the Stumphfs between July 1984 and March 1985. The only information available for the Stumphfs is that HUD paid $333.56 for the Stumphfs' benefit in April, May, and June 1985. Apparently, Rock multiplied the known subsidy amount by the number of months the Stumphfs participated in the Section 235 program to arrive at the $3,002 figure. Again, this method is too uncertain to satisfy the Government's burden of proof.[7]

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[7]Rock testified as follows:

> Q. But isn't that just an assumption, Mr. Rock, that it [the mortgage assistance payment] was spread evenly?
>
> A. I made certain assumptions that the amounts — that there were not months where one month was three months of payment and the next two months zero.
>
> So I have assumed a fairly regular pattern of monthly payment amounts similar to the pattern I observed as documented in Exhibit 473 for well over 2,000 payments where the actual payment history and the pattern was extremely regular, so, yes, I made certain assumptions based upon the work I had done in this case.

For these reasons, I respectfully recommend that no estimated additional assistance payments be awarded as damages. Rather, as noted above, I find that the Government has established that assistance payments totaling $649,191 were paid after the bar date.

c. Handling Charges Paid to Mortgagees

The Government also seeks $6,762 for handling charges paid by HUD to the mortgagees each month. Exhibit 472, seventh column. As part of the administration of the Section 235 mortgage subsidy program, HUD paid each mortgagee a $3 fee for each mortgage it serviced in a particular month. Tr. I/Rock/41, 44; see also 12 U.S.C. § 1715z(e)(authorizing Secretary of HUD to pay mortgagees servicing Section 235 mortgages an amount deemed "appropriate to reimburse the mortgagee for its expenses in handling the mortgage"). The purpose of the handling charge is clearly distinguishable from the purpose of the assistance payments. The mortgage assistance payments were intended to benefit the Section 235 homeowners and to further HUD's housing goals; the handling charge, however, was merely an administrative fee paid by HUD to the mortgagee, and did not inure to the benefit of the homeowner. The handling charge was simply a cost of administering the Section 235 program. In this sense, the mortgagee is analogous to a subcontractor hired to perform administrative tasks which would otherwise be done by HUD employees. Just as the Government does not seek to have the Village Defendants directly reimburse HUD for its administrative costs in running the Section 235

Tr. I/Rock/794.

housing program in Island Park, it is inappropriate to award the handling fees paid to the mortgagees as damages in this case.[8]

d. Reduction in Damages for Amounts "Recaptured"

Homeowners receiving mortgage subsidy benefits under the Section 235 program in Phases II and III were, and continue to be, obligated to repay the mortgage subsidies paid on their behalf by HUD on the occurrence of certain events, such as the sale of the Section 235 home. Tr. I/Eargle/ 635-36; Tr. I/Rock/131-32. These repayments are referred to as "recaptured" amounts. 12 U.S.C. § 1715z(c)(2)(A). The Government asserts that it has received $324,194 in recapture payments as of the time of the hearing on damages. Exhibit 472, eighth column, headed "Estimated Subsidies Repaid." The Village Defendants contend that the amount of recaptured subsidy payments is $396,635.28. Letter from William H. Pauley III of July 15, 1997, at 1.

The parties' numbers differ because the Village Defendants claim that amounts recaptured before the bar date should enter the computation, not because the Village Defendants challenge the Government's calculation. Judge Glasser's decision in Island Park II makes clear, however, that the Government may recover only those mortgage subsidies paid by HUD after March 22, 1984. Any amounts recaptured before the bar date must necessarily constitute repayments of subsidies paid before the bar date. Because the

[8]As discussed in greater detail below, the double damages and statutory penalties recoverable pursuant to the False Claims Act ensure that the Government is made whole.

Village Defendants are not required to pay damages based upon such pre-bar date subsidies, it logically follows that the Village Defendants should not be allowed to set off repayments of those subsidies. The Government's recovery should, therefore, be reduced only by amounts repaid by the Section 235 homeowners after March 22, 1984.[9]

The Village Defendants also seek credit for amounts which will be recaptured in the future. Because both the timing and the amount of any future recapture are speculative at this time, I respectfully recommend that the Government be directed to make an annual accounting of amounts recaptured and credit an appropriate amount against any damages still owed by the Village Defendants, or if the full amount of damages has been paid by the Village Defendants, I recommend that the Government make a payment to the Village Defendants to reflect the appropriate reduction in damages.

e. Double Damages

The False Claims Act further provides that the Government is entitled to "an amount equal to 2 times the amount of damages the Government sustains. . . ." 31 U.S.C. § 3729. The Village Defendants argue that the amount recaptured should first be

[9]The Government's calculations allow the Village Defendants to offset the damages owed to the United States by all of the $323,194 paid by the Section 235 homeowners after March 22, 1984. It appears that the recapture offset should instead equal only that amount of recapture paid which reflects repayments of mortgage subsidies paid after March 22, 1984. Presumably, some of the amounts recaptured after the bar date constitute repayments of subsidies paid before the bar date. The Government, however, has not presented any evidence on this point. Therefore, I do not recommend that the court reduce the $324,194 figure to reflect payments made after the bar date to repay subsidies paid prior to the bar date.

subtracted from the Government's actual damages, and then the remainder should be doubled. The Government claims that its damages should first be doubled and only then reduced by recaptured subsidy payments. The Village Defendants' position is not supported by precedent.

The Supreme Court has held that recaptured amounts should be subtracted from the total amount of damages only after the double damages provision of the False Claims Act has been applied. In United States v. Bornstein, 423 U.S. 303, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976), the defendant, a subcontractor, sought to subtract amounts already recovered by the Government from the prime contractor before the double damages provision was applied. The Court rejected that argument and held that "the Government's damages should be doubled before any compensatory payments are deducted, because that method of computation most faithfully comports to the language and purpose of the [False Claims] Act." 423 U.S. at 314, 96 S. Ct. at 530. Furthermore, the Court held that "[t]his method of computation . . . maximizes the deterrent impact of the double damages provision and fixes the relative rights and liabilities of the respective parties with maximum precision" and "best comports . . . with the language and purpose of the [False Claims] Act." 423 U.S. at 316-17, 96 S. Ct. at 531.

The Court supported its holding by noting that the False Claims Act calls for the doubling of "damages" rather than "net" or "uncompensated" damages. 423 U.S. at 314 n.10, 96 S. Ct. at 530 n.10. Moreover, doubling damages before the deduction of any

compensatory payments "fixes the liability of the defrauder without reference to the adventitious actions of other persons." 423 U.S. at 315, 96 S. Ct. at 531. In this case, the fortuitous acts of the homeowners, making them subject to recapture, should not relieve the Village Defendants of liability. Indeed, if all the homeowners had recaptured, the Village Defendants would argue that there would be no damages to double. The double damages provision of the False Claims Act, however, is intended to make the Government completely whole. United States ex rel. Marcus v. Hess, 317 U.S. 537, 551-52, 63 S. Ct. 379, 387-388, 87 L. Ed. 443 (1942). Thus, the Supreme Court's holding in Bornstein requires that the Government's damages be doubled before any reduction for amounts already paid.

The Village Defendants attempt to distinguish Bornstein by claiming that the method of reducing damages called for in Bornstein applies only to compensatory payments. According to the Village Defendants, amounts recaptured under Section 235 are not compensatory payments for wrongdoing. Village Defendants' Post-Inquest Memorandum of Points and Authorities at 33-34. The Village Defendants' argument that Bornstein is not applicable in this case misconstrues both Bornstein and the Section 235 program. The amounts repaid under the recapture provisions of the Section 235 program are essentially repayments of loan obligations, compensating HUD for monies expended on the homeowners' behalf. Bornstein does not distinguish between compensatory payments attributable to wrongdoing and other compensatory payments. The Supreme

Court foreclosed such an argument by holding that "in computing the double damages authorized by the [False Claims] Act, the Government's actual damages are to be doubled before <u>any</u> subtractions are made for compensatory amounts <u>from any source</u>." 423 U.S. at 316, 96 S. Ct. at 531 (emphasis added). Because recaptured amounts are compensatory payments by homeowners for mortgage subsidy payments previously made on their behalf by HUD, the holding in <u>Bornstein</u> mandates that recaptured amounts be subtracted only after the Government's damages are doubled.

Therefore, based on Supreme Court precedent, I respectfully recommend that damages in the amount of $649,191 be doubled, and that recaptured amounts of $324,194 then be subtracted, leaving a total of $974,188.

f. Likelihood of Participation by Pre-selected Homeowners

The Village Defendants claim that the Government's damages calculation is unfairly high because some of the improperly preselected homeowners would have received Section 235 homes even if the program had been properly administered on a first-come, first-served basis, as required. The probability that some of the homeowners would have participated in the program, however, is irrelevant for purposes of determining damages under the False Claims Act. What is relevant is that the Village Defendants subverted the fair housing goals of the Section 235 program and abused the selection process. The finding that the Village Defendants violated the False Claims Act does not depend upon the identities of the homeowners, but rather the fraudulent method by which

they were selected. The Village Defendants are liable under the False Claims Act because nepotism and cronyism, rather than the objective criteria stated in the AFHMPs, drove the selection process. To demonstrate the illogic of the Village Defendants' argument, assume several contractors collude to fix their bids on a series of projects so that each in succession is the lowest bidder. The Village Defendants' argument is akin to one of those collusive bidders claiming that the damages for which it is liable under the False Claims Act should be reduced by the likelihood that it would have been the low bidder on some occasion even if it had not colluded with its competitors. Cf. Hess, 317 U.S. 537, 635 S. Ct. 379. Just as every bid in this hypothetical example was won through collusion and leads to liability and damages, so every Section 235 house was distributed by means of a fraudulent scheme. The position of the Village Defendants would obviously undermine the purpose of the False Claims Act and their argument must be rejected.

2. False Claims Act Statutory Penalty

a. Number of Claims

In addition to damages based on the amount paid by the Government pursuant to a fraudulent claim, the False Claims Act imposes a $2,000 civil penalty for each fraudulent claim for payment made to the Government. 31 U.S.C. § 3729; United States v. Bornstein, 423 U.S. 303, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976)(interpreting the False Claims Act prior to the 1986 amendments which raised the $2,000 penalty to $5,000 to $10,000). The question raised by this provision is how to measure the number of fraudulent claims

involved in this case. The Government seeks a $2,000 penalty for each monthly mortgage assistance payment made by HUD; the Village Defendants argue that only the 44 original mortgage applications are "claims" under the False Claims Act. In the alternative, the Village Defendants argue that monthly vouchers submitted by the mortgage servicers to HUD, many of which sought payment of subsidies on behalf of multiple homeowners, are "claims" as contemplated by the False Claims Act.

To address this question requires an understanding of the operation of the Section 235 program. The Section 235 housing program is structured in such a way that the mortgagee and HUD enter into a separate contract for assistance payments for each Section 235 homeowner. Tr. I/Eargle/545. As part of its contract with HUD, the mortgagee must calculate the assistance payments for each individual mortgagor. Requests for assistance payment are made by the mortgagee on a Form 93102. Tr. I/Eargle/551-52. If the mortgagee holds more than one Section 235 mortgage, it submits requests for multiple assistance payments on a single Form 93102.

Although the parties have devoted substantial time and effort attempting to muster support for their respective positions, Judge Glasser has already decided that "a separate claim for liability under the False Claims Act exists with respect to each monthly mortgage subsidy claim submitted by [the mortgagee]." Island Park II, 888 F. Supp. at 441. Judge Glasser based his decision in large part on the Second Circuit's holding in United States of America, ex. rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d

Cir.) ("Kreindler"), cert. denied, 508 U.S. 973, 113 S. Ct. 2962, 125 L. Ed. 2d 663 (1993), and its approving citation of United States v. Ehrlich, 643 F.2d 634 (9th Cir.), cert. denied, 454 U.S. 940, 102 S. Ct. 474, 70 L. Ed. 2d 247 (1981).

The Village Defendants make much of the fact that the Second Circuit's decision in Kreindler was released only one week prior to oral argument before Judge Glasser on plaintiff's motion for summary judgment, but virtually ignore the facts that the Government and the Village Defendants filed lengthy supplemental letter briefs discussing the outcome in Kreindler, and that Judge Glasser specifically addressed the issues raised in Kreindler in his decision in Island Park II. Judge Glasser based his decision in part on Kreindler's holding that "the number of assertable False Claims Act claims is measured by the number of fraudulent acts committed by the defendant." Island Park II, 888 F. Supp. at 441. Judge Glasser also noted Kreindler's reliance on the holding in Ehrlich that "each monthly demand for payment submitted to HUD by an innocent mortgagee constituted a separate False Claims Act violation, where the underlying contract was entered into based on defendant's misrepresentations," and the statement of the Ehrlich court that "if a person knowingly causes a specific number of claims to be filed, he is liable for an equal number of forfeitures." Id. (quoting Ehrlich, 643 F.2d at 638). Judge Glasser reasoned that Kreindler "compels the conclusion that the Village Defendants are liable for a separate False Claims Act violation for each claim for a mortgage subsidy which the innocent mortgagee submitted as a result of the Village Defendants' fraudulent conduct,

notwithstanding the Village Defendants' attempt to characterize those claims as contracts." Id. Accordingly, the recency of the Kreindler decision provides no basis for revisiting Judge Glasser's resolution of this issue.

Furthermore, Judge Glasser's application of the Kreindler and Ehrlich holdings is borne out by the evidence presented at the inquest. As in Bornstein, upon which Judge Glasser relied, in this case the acts of the intermediaries, the mortgagees, are both irrelevant and fortuitous. The number of mortgagees and the number of Forms 93102 that they would file were completely divorced from the acts of the Village Defendants. Mortgagees regularly sold the mortgages and the number of Forms 93102 fluctuated every month. Consequently, as many as forty-four or as few as one Form 93102 could be submitted to HUD in a month. The number of forms submitted was more a reflection of banking practices than a result of the wrongdoing by the Village Defendants. Because the Village Defendants did not know the number of Forms 93102 that eventually would be filed or the ultimate numbers of mortgagees, using the number of Forms 93102 submitted to HUD to determine the number of forfeitures would be arbitrary.

Furthermore, because the Form 93102 is merely a summary form, each form contains an arbitrary number of claims. The face of the Form 93102 includes a column for the total number of mortgagors for whom assistance payments are requested, the total number of assistance payments requested and the dollar amount of the requested assistance payments. Tr. I/Eargle/551-52. HUD regulations required the mortgagee to maintain

separate records on the assistance payments requested for each mortgagor. In addition, HUD considers each mortgage subsidy payment requested on a Form 93102 to be a separate claim. Tr. I/Eargle/577. Because the number of Forms 93102 does not bear a relationship to the number of mortgage assistance payments made by on behalf of the Section 235 homeowners, it is not an appropriate measure of the number of claims.

As noted above, the court in Ehrlich held that a party is liable for the number of false claims he knowingly causes to be made. When entering into the corrupt pre-selection of Section 235 homeowners, the Village Defendants could reasonably foresee that each of the mortgages would be thirty-year mortgages, and that on a monthly basis, mortgagees would request assistance payments on behalf of the individual homeowners. While it was certainly foreseeable that some mortgages might be repaid before the expiration of the thirty-year period, and while HUD for one reason or another might not make assistance payments on behalf of each homeowner over that entire period, the Village Defendants clearly expected and endeavored to ensure that each homeowner would benefit from monthly payments on their behalf from HUD for at least a significant portion of the thirty-year mortgage repayment period.

Furthermore, imposing a penalty for each monthly mortgage subsidy request on behalf of each homeowner best reflects the scope of the misconduct by the Village Defendants. Beginning in 1979, the Village Defendants executed a scheme designed to defraud HUD of funds over a thirty year period. HUD intended to use these funds to

promote affirmative housing goals and to provide mortgage subsidies to low-income minority families that otherwise might not be able to purchase their own homes. Although the AFHMPs submitted to HUD professed goals of attracting black homeowners to Island Park, the Village Defendants subverted those goals and, as a result of their unlawful conduct, not one black person was able to purchase a Section 235 home in Island Park. Instead, Village officials hand-picked the people that they wanted to receive the mortgage subsidies, completely disregarding the purposes for which the funds were initially granted, with full knowledge that HUD funds would be expended on behalf of their friends and family members on a monthly basis for years to come. As a result, HUD expended hundreds of thousands of dollars over several years on behalf of homeowners selected in a manner designed to defeat the fair housing purposes of the Section 235 program.

Finally, the Village Defendants' alternative argument that only the original 44 mortgage applications are "claims" under the False Claims Act is easily rejected. To support their position, the Village Defendants rely on United States ex rel. Marcus v. Hess, 317 U.S. 537, 635 S. Ct. 379 (1942). In Hess, the Court held that the number of false claims was equal to the number of contracts entered into between the wrongdoer and the government. The Village Defendants' reliance on Hess, however, is misplaced. In a later decision, the Court went on to state that "no statement in the Hess opinion expressly limited the number of imposable forfeitures to the number of contracts involved in a case. . . . The Hess case, therefore, in no way stands for the proposition that the number of

forfeitures is inevitably measured by the number of contracts involved in a case." Bornstein, 310-11, 528-29; see also Kreindler, 985 F.2d at 1157 (stating that "the number of assertable [False Claims Act] claims is not measured by the number of contracts, but rather by the number of fraudulent acts committed by the defendant"). Therefore, the Hess holding provides the Village Defendants no support.

The Village Defendants' position is further undermined by Judge Glasser's prior holdings with regard to the statute of limitations applicable in this case. In Island Park I, Judge Glasser held that any claims arising under the False Claims Act prior to March 22, 1984, were time-barred. Each of the homeowners was selected before that date. To contend that the only triggering event constituting a claim was the selection of the Section 235 homeowners is to contend that Judge Glasser referred the calculation of time-barred claims for report and recommendation. Because Judge Glasser both found that the statute of limitations barred all causes of action arising prior to March 22, 1984, and directed that an inquest be held to determine the precise amount of civil penalties properly imposed in this case, he clearly contemplated that the Village Defendants would be liable for damages arising from the fraudulent pre-selection scheme for claims made after March 22, 1984. Indeed, in ordering that an inquest be held, Judge Glasser sought a determination of "the number of mortgage subsidy claims" since the bar date. Island Park II, 888 F. Supp. at 443. Furthermore, in discussing the retroactivity of the 1986 amendments to the False Claims Act, Judge Glasser wrote "[t]he false claims that are the subject of this action

include both claims that predate [the 1986] amendments, as well as claims made after the enactment of the 1986 amendments to the False Claims Act." Id. at 444. Therefore, the original 44 claims made by the homeowners can not be the only claims made subjecting the Village Defendants to liability under the False Claims Act.

Reading the False Claims Act to provide a penalty for each monthly mortgage assistance payment requested over the many months the Government was defrauded reflects the enormity of the Village Defendants' violation and accomplishes the compensatory goals of the False Claims Act. Therefore, I respectfully recommend that a penalty be imposed for each claim made by a mortgagee on behalf of an individual homeowner for a mortgage assistance payment.

Under this analysis, the Government argues that there are 2,255 false claims, whereas the Village Defendants contend that there are only 2,121 false claims. Exhibit V, Expert Opinion of Dov Frishberg at 4, ¶ 14. The difference in opinion, according to the Village Defendants' expert, is that the Village Defendants' expert counts only those monthly payments subsequent to March 22, 1984 that show an actual dollar amount and not those subsidies which Rock, the Government's expert, assumed were paid despite missing documentation.

Exhibit 473 lists every Island Park homeowner who participated in the Section 235 program and details the mortgage assistance payments each received. As discussed in greater detail above in Section I.A.1.b. of this report, the Government was unable to

demonstrate whether any assistance payments were sought or received by four homeowners and there were significant gaps in the mortgage assistance payment histories of four additional homeowners.[10] In total, the Government provided inadequate evidence of 134 of the claims for which it seeks penalties.

Considering the length of time over which the fraud continued, the amount of funds expended, and the structure of the Section 235 program, the only reasonable conclusion is that the False Claims Act requires the imposition of a penalty for each mortgage subsidy payment requested on behalf of each homeowner. Accordingly, I respectfully recommend that the Government be awarded a statutory forfeiture on 2,121 monthly mortgage assistance payment claims, for a total of $4,242,000.

b. Excessive Fines Clause

The Village Defendants argue that, even if the court accepts the Government's position with regard to the number of false claims, the Government's demand for a statutory penalty in excess of four million dollars should be rejected because such an award would violate the Excessive Fines Clause of the Eighth Amendment. "The Excessive Fines

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[10]No information was available for homeowners Calderone, Ciccimaro, Frey and Rasulo. At the hearing, the Government's expert withdrew his opinion that the Government was entitled to damages and statutory forfeitures from the Ciccimaro and Calderone mortgages. Tr. I/Rock/45; United States of America's Reply Post-Inquest Memorandum of Law on Monetary Damages at 13 n.4. Significant gaps appeared in the mortgage assistance payment histories for homeowners Gunther (April 1994 - August 1984), Holtje (April 1984 - March 1985), Montanino (April 1984-March 1985), and Stumphf (July 1984 - March 1985).

Clause limits the Government's power to extract payments, whether in case or in kind, as punishment for some offense." Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801, 2805, 125 L. Ed. 2d 488 (1993)(internal quotations omitted). While the Eighth Amendment limits the government's power to punish, however, "[i]t is commonly understood that civil proceedings may advance punitive and remedial goals . . . ." United States v. Halper, 490 U.S. 435, 447, 109 S. Ct. 1892, 1901, 104 L. Ed. 2d 487 (1989). A civil penalty that serves only remedial purposes is not viewed as punishment, and will not violate the Excessive Fines Clause. Austin, 509 U.S. at 622 n.14, 113 S. Ct. at 2812 n.14 ("The [Excessive Fines] Clause prohibits only the imposition of 'excessive' fines, and a fine that serves purely remedial purposes cannot be considered 'excessive' in any event."); Halper, 490 U.S. at 448, 109 S. Ct. at 1902 ("a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."). Before the Excessive Fines Clause can be considered, therefore, this court must determine whether any part of the civil penalty in this case can be considered punitive.

The Supreme Court has acknowledged that "in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole." Halper, 490 U.S. at 449, 109 S. Ct. at 1902. Such provisions are thus typically remedial, rather than punitive. While the Court has not addressed the issue of when a civil sanction becomes a penalty in the context of the Excessive Fines Clause, the Court has been called

upon to determine when a civil penalty under the False Claims Act is punitive for purposes of the Double Jeopardy Clause. The logic employed seems to be equally applicable in the Excessive Fines Clause setting.

In Halper, the defendant submitted 65 false claims to the United States government. The United States criminally prosecuted Halper, who was convicted of 65 counts under the False Claims Act and sentenced to two years imprisonment and a $5,000 fine. Thereafter, the United States brought a civil action against Halper under the False Claims Act. Halper was found civilly liable for 65 false claims, which caused actual losses to the government of $585. After calculating both the $2,000 penalty and double damages provisions, Halper was subject to a penalty of more than $130,000.

The Supreme Court found that the imposition of a $130,000 civil sanction, in a case involving actual losses of $585, was punitive in part, and, because of Halper's prior criminal conviction, violative of the Double Jeopardy Clause. In reaching its decision, the Court stated that a civil damages provision is ordinarily remedial in nature, and not punitive. The Court limited its holding to "the rare case . . . where a fixed penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." Halper, 490 U.S. at 449, 109 S. Ct. at 1902; see also United States v. 38 Whalers Cove Drive, 954 F.2d 29, 34-35 (2d Cir.), cert. denied sub nom. Levin v. United States, 506 U.S. 815, 113 S. Ct. 55, 121 L. Ed. 2d 24 (1992). In determining whether the civil penalty imposed "cross[ed] the line between

remedy and punishment," 490 U.S. at 450, 190 S. Ct. at 1902, the Court looked to whether the penalty imposed bore a "rational relation to the goal of compensating the Government for its loss" or whether it "appears to qualify as a 'punishment' in the plain meaning of the word . . . ." 490 U.S. at 449, 109 S. Ct. at 1902. In Halper, the ratio of the penalty sought to the actual damages to the government was 222 to 1,[11] a ratio which the Court found to "cross the line between remedy and punishment." 490 U.S. at 450, 109 S. Ct. at 1902.

The Court recognized that the point at which a penalty is no longer remedial is "no more than an approximation . . . ." 490 U.S. at 450, 109 S.Ct at 1903. See also Austin, 509 U.S. at 622, 113 S. Ct. at 2812 (declining to establish a multi-factor test for determining whether a forfeiture is unconstitutionally "excessive"). A district court must, therefore, exercise its discretion to determine whether the penalty is "rationally related to the goal of making the government whole." 490 U.S. at 451, 109 S. Ct. at 1903; see Austin, 509 U.S. at 627, 113 S. Ct. at 2814-15 ("In the case of a monetary fine, the Eighth Amendment's origins in the English Bill of Rights, intended to limit the abusive penalties assessed against the king's opponents, . . . demonstrate that the touchstone is value of the fine in relation to the offense.")(Scalia, J., concurring)(citations omitted).

The penalty sought by the Government in this case is entirely remedial. The

[11] The ratio of 222 to 1 is calculated based upon the fraud amount of $585, which is comparable to the $649,191 figure in this case. The Halper Court's reference to $16,000 included the government's expenses. 490 U.S. at 452, 109 S. Ct. at 1903. There has been no evidence presented regarding the Government's expenses in this case.

Government has suffered actual damages of $649,191, and this court recommends a judgment in the amount of $5,206,048, resulting in a ratio of 8.02 to 1, without taking the Government's legal fees into account.[12] Ratios far in excess of 8.02 to 1 have been determined by other courts not to be punitive in the Double Jeopardy context. For example, in United States v. Amiel, 813 F. Supp. 958 (E.D.N.Y.), aff'd, 995 F.2d 367 (2d Cir. 1993), the government sought a $4,000,000 forfeiture for a fraud causing damages of $225,645. The court in Amiel found that

> even assuming arguendo that the size of the alleged transactions only amounted to the $226,645 detailed in the superceding indictment, this amount hardly compares to the minuscule sums attributed to the "small-gauge offenders" at issue in Halper and Whaler's Cove. Moreover, the defendants in Halper and Whaler's Cove were subjected to civil penalties that were "overwhelmingly disproportionate" to their violative conduct, whereas, in the instant case, even defendants' estimate of the value of the forfeited assets as compared to the value of the alleged wrongdoing does not exceed all rational relation. The ratio between the civil penalty and the violative conduct was 222 to 1 in Halper and 272 to 1 in Whaler's Cove. A similar comparison in this case reveals a ratio of only 18 to 1. It is clear, therefore, that the Supreme Court and the Second Circuit never intended civil penalties of the kind assessed herein to trigger the protections of the Double Jeopardy Clause.

813 F. Supp. at 962 (citations omitted). In comparison, the ratio between the civil penalty imposed in this case and the actual damages suffered by the Government is small. Where

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[12] The total amount of damages recommended in this report, as discussed below, is $5,393,534.88. The figure in the text, $5,206,048, is the portion of the total amount which is based upon mortgage subsidies paid by HUD pursuant to the Section 235 program. This figure is used because the Village Defendants argue that it is this component of the damages sought by the Government which violates the Excessive Fines Clause.

there is such a small ratio between the penalty and actual damages, the penalty cannot be said to be "overwhelmingly disproportionate." Based on the scope of the wrongdoing and the size of the penalty, I conclude that the penalty in this case is purely remedial, and that the Excessive Fines Clause is therefore not implicated.

Even if part of the penalty imposed in this case were determined to be punitive, it is not so excessive that it violates the Excessive Fines Clause of the Eighth Amendment. The applicability of the Excessive Fines Clause to civil penalties under the False Claims Act has only been discussed by two other district courts. United States v. Advance Tool Co., 902 F. Supp 1011 (W.D. Mo. 1995), aff'd, 86 F.3d 1159 (8th Cir. 1996), cert. denied sub nom. McGillivray v. United States, 117 S. Ct. 1254, 137 L. Ed. 2d 334 (1997); United States ex rel. Smith v. Gilbert Realty Co., 840 F. Supp. 71 (E.D. Mich. 1993). Both courts found that the penalties under the False Claims Act were not "rationally related to the goal of making the government whole." Halper, 490 U.S. at 451, 109 S. Ct. at 1903. In Advance Tool, the government, although unable to establish any actual damages, sought to impose a penalty of $3,430,000; in Gilbert Realty, the government established actual damages of only $1,630, and sought a penalty of $290,000. Advance Tool and Gilbert Realty obviously involve the "prolific but small-gauge offenders" that concerned the Supreme Court in Halper. 490 U.S. at 449, 109 S. Ct. at 1902. When comparing the penalties sought to the actual damages demonstrated by the government, the courts in Advance Tool and Gilbert Realty found that the penalties sought so greatly exceeded the

actual damages that the penalties could not be said to be remedial, but rather were, at least in part, punitive. Because the penalties were partially punitive, the courts in Advance Tool and Gilbert Realty went on to analyze the Excessive Fines Clause. In so doing, the district court in Advance Tool reduced the penalty to $365,000 despite the government's inability to prove any actual damages; the court in Gilbert Realty reduced the penalty to $35,000, an amount 21 times greater than the actual damages sustained by the government.

In this case, the Government has established actual damages of $649,191, clearly far in excess of the sums involved in Advance Tool and Gilbert Realty. The total award recommended in this case is $5,393,534.88, an amount only 8.3 times greater than the actual money damages suffered by the Government as a result of the pre-selection scheme. Therefore, even if any part of the penalty sought by the Government is punitive, it is clearly not excessive in violation of the Eighth Amendment.

B. Community Development Block Grant Funds

Finally, the Government seeks $178,884.88 in damages and penalties relating to Community Development Block Grant funds expended in Island Park. According to Rock, $82,442.42 in CDBG funds were expended in Island Park and seven false claims for those funds were made. The Government claims that the $82,442.42 figure should be doubled, for a total of damages equal to $164,884.84. Adding penalties in the amount of $2,000 for each of the seven claims submitted, or $14,000, yields a total award sought stemming from Community Development Block Grants of $178,884.88. Rock's calculations are set forth

in his expert report. Exhibit 481 at 6.

1. The Community Development Block Grant Program

Community Development Block Grants are, as the title suggests, funds available from HUD for community development. During the time period in question, CDBG funds could be used by communities "for such things as acquiring real property, site improvement, and building public works and playgrounds, but not for the construction of new housing or to provide housing assistance or subsidies for occupants." Island Park II, 888 F. Supp. at 432 (citing 42 U.S.C. §§ 5305(a)(1), (2), (4) et seq. and 24 C.F.R. § 570.270(b)(3)). To receive CDBG funds, the local government must certify to HUD that it is following a housing assistance plan ("HAP") and that the local government will "facilitate achieving the goals for assisted housing in the HAP." Id.

The Village entered into Cooperation Agreements with Nassau County, the CDBG grantee. As part of the Cooperation Agreements, the Village agreed that "no person shall on the ground of race, color, sex or national origin be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity for which the parties receive federal financial assistance." Island Park II, 888 F. Supp. at 432.

2. Damages Relating to CDBG Funds

Judge Glasser specifically found that "[t]he amount of damages sustained by the government includes all the CDBG funds . . . paid by the government since March 22,

1984." Island Park II, 888 F. Supp. at 443 (emphasis added). The evidence presented at the hearing established that, subsequent to the bar date in this case, HUD paid $82,442.44 in CDBG funds to Nassau County, the CDBG grantee, which were in turn paid to Island Park.

Because the Village Defendants' liability stems from the fraudulent pre-selection scheme, only CDBG funds expended in connection with the construction or improvement of the Section 235 houses in Island Park are recoverable in this action. The evidence indicates, however, that only a portion of the CDBG funds paid to Island Park were spent for these purposes.

The Village and Nassau County executed contracts with regard to CDBG expenditures. These contracts entered into between the Village, the CDBG sub-grantee, and Nassau County, the CDBG grantee, describe the purposes for which the Village requested CDBG funds. To draw on the allocated funds, the Village submitted vouchers pursuant to each contract describing the nature of the work for which the Village sought reimbursement. These contracts and vouchers indicate those expenditures which relate to the Section 235 houses built in Island Park.

On November 24, 1982, the Village and Nassau County entered into the first contract at issue, which involved certain projects to be undertaken by the Village using CDBG funds. One of these projects was known as IP-2. The contract indicates that Nassau County allocated $148,400 for the Village to use in "Site Improvements for Section

235 Housing - road construction to serve 20 single family homes being built under the Section 235 mortgage program." Exhibit 457 at 2.

The Government has presented two claim vouchers from the Village to the County for payment of funds in connection with the IP-2 project pursuant to this contract. Exhibits 439 and 442 are claim vouchers apparently signed by Harold Scully, then Village Clerk. The vouchers itemize the funds requested. One of the itemizations on Exhibit 439 reads "10/28/83 Mid Island Excavating, Inc. $22,751.65."[13] An attached form indicates that Mid-Isle Excavating, Inc. requested payment from the Village for work completed in the amount of $22,751.65. The request from Mid-Isle Excavating attached to Exhibit 439 states that the work completed was "Site Improvements" including clearing and grubbing, excavation, fill, curbs, and manholes. Exhibit 442 states in part that the Village sought reimbursement from CDBG funds for "Site Improve. - for Sect. 235." Exhibit 442 also contains a request for reimbursement for $15,730.35 paid to Mid-Isle Excavating, Inc. and $4,314 paid to Charles Marino. The claim from Mid-Isle to the Village attached to the Village's claim voucher to the County is substantially similar to that attached to Exhibit 439. The claim from Charles Marino to the Village states that it is for the "CD Townhouse Project" and an attachment shows costs for items such as driveways, public walks, patios, and garage slabs.

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[13]Although the claim voucher from the Village to Nassau County lists a claim by Mid Island Excavating, Inc., other supporting documents make clear that this is a reference to Mid-Isle Excavating, Inc. See Exhibit 439, fourth page.

The Village Defendants offered the deposition of former Village Superintendent of Public Works Michael Masone to describe his recollection of the work performed in the Village. Exhibit AP. During his deposition, Mr. Masone reviewed Exhibits 439 and 442 and stated that the site improvements referred to in the claim vouchers relate to the construction of D'Amato Drive, a residential street in Island Park. Exhibit AP at 21-23, 32. D'Amato Drive was constructed at or around the time Section 235 homes were built in Island Park, and at least some of the houses on D'Amato Drive were constructed pursuant to Section 235. Exhibit AP at 80-81; see also Tr. II/Portman/555 (Village Defendants' witness testifying about location of 235 housing in Island Park); Exhibit BT (map of Village of Island Park).

Despite the Village Defendants' arguments to the contrary, the funds claimed in the vouchers in Exhibits 439 and 442 are plainly related to the Section 235 housing. It is clear that the Village constructed D'Amato Drive to provide access to the newly constructed 235 homes. Moreover, the work provided by Charles Marino clearly related to improvements on or directly adjacent to the 235 homes, including driveways, sidewalks, patios and garage slabs. The Village explicitly stated in its agreement with Nassau County that these funds were to be allocated to costs associated with the Section 235 housing to be constructed in Island Park.

The Village Defendants argue that funds paid pursuant to the claim voucher contained in Exhibit 439 are time barred. The Village paid Mid-Isle Excavating, Inc. in

November 1983 by check which cleared the Village's account on December 2, 1983. Exhibit J. The Village Defendants claim that because it paid Mid-Isle Excavating before the March 22, 1984 bar date, the Government is precluded from recovering that amount. The Village, however, did not make a claim for reimbursement through the CDBG program until it submitted a claim voucher to Nassau County. Dep./Breslin/251-52. The claim voucher, Exhibit 439, is dated March 12, 1984. An attached letter, however, indicates that the Village did not submit the claim voucher to Nassau County until at least April 4, 1984, after the bar date. Because the Village Defendants' False Claims Act liability turns on when claims for payment were made, the Village Defendants' False Claims Act liability could not have arisen until after April 4, when it claimed entitlement to CDBG funds. Island Park II, 888 F. Supp. at 440 ("Fraudulent conduct and false statements remain inchoate until a claim for payment causing the government to disburse funds is made."). Accordingly, the Government's claim for reimbursement for funds paid pursuant to the claim voucher contained in Exhibit 439 is timely.

The amount of CDBG funds paid pursuant to the claim voucher that is part of Exhibit 439 is also in dispute. Exhibit 439 states that, while the Village paid Mid-Isle Excavation, Inc. $22,751.65 on October 28, 1983, the amount of CDBG funds remaining for that year that the Village could claim from Nassau County was only $21,575.76. The claim voucher then subtracts from the balance of CDBG funds available $21,511 that the Village "Received from 3rd Party" for a total claim for reimbursement of $64.76. Exhibit

439. The Village received the $21,511 from third parties; these funds were what was known as "program income." Program income is comprised of "funds generated by the prior expenditure of community development block grant funds." Tr. I/Crean/255. The Village received program funds from the resale of properties it had previously purchased with CDBG funds. Scully Letter to Burns, Exhibit 439 at 4. Before a sub-grantee of CDBG funds, such as the Village, can claim additional CDBG funds, it must use program income. Tr. I/Crean/256. In this case, then, the Village generated program income in the amount of $21,511.88 through the sale of properties it originally purchased with CDBG funds. Although CDBG funds in the amount of $21,575.76 were available to the Village to pay Mid-Isle Excavating, the Village was obligated to use the program income first and was obligated to claim the use of the program income on its claim voucher to the CDBG grantee, here Nassau County. Tr. I/Crean/258-59. Therefore, the only remaining amount the Village could claim from Nassau County was $64.76, the amount of the claim voucher contained in Exhibit 439. Because the entire amount of $21,575.76 was CDBG funds that the Village claimed for use in conjunction with the Section 235 program, that amount is properly claimed by the Government as damages for the Village Defendants' violation of the False Claims Act.

The Government also seeks damages and penalties as a result of the payment of CDBG funds pursuant to a contract entered into between the Village and Nassau County on March 17, 1983, for a project known as IP-5. Pursuant to the contract, the Village

agreed to undertake a Recreation Area Program using CDBG funds that would include a "new parking area, retaining wall, road construction and recreation facilities at beachfront site adjacent to newly completed Section 235 Housing Units." Exhibit 458 at 2. In a letter from Harold Scully, then Village Clerk, dated January 24, 1983, to Raymond Malone of the Nassau County Office of Housing and Intergovernmental Affairs, the Village stated that the CDBG funds would be used for:

> Construction of an access road from the parking field to the recreation area. This access road would be in front of the new Section 235 homes and would include a three foot wall which would prevent sand from blowing on the property occupied by the Section 235 homes. This measure is necessary to preserve the Section 235 property and provide long term stability to the houses.

Exhibit 448 at 1. Scully's letter on behalf of the Village further stated that the project was important because

> it will protect the Section 235 properties from the adverse effect of sand deposits destroying lawns and shrubs and even entering the homes. As you well know, much money and effort has gone into the development of these homes. Approximately one-third of the total cost of the project that we propose is for this protection.

Id. at 3 (emphasis added). The Government produced evidence that the Village received $100,000 in CDBG funds for the project described above. Exhibits 432, 468. The Government seeks $30,000, somewhat less than one-third of the total CDBG funds paid to the Village, as CDBG funds paid in connection with the Section 235 program.

The Village submitted two claim vouchers to the County, one for $33,078.35

(voucher U 07510) and another for $66.921.65 (voucher 97077A). Exhibit 468. Only one of the vouchers submitted to Nassau County was available for examination. In his deposition testimony, Michael Masone, former Village Superintendent of Public Works stated that all the items listed in voucher U 07510 (Exhibit 441) related solely to beach improvement, and not to improvements related to the Section 235 homes constructed in Island Park. Exhibit AP at 14-20.

I find that the Government has sustained its burden of proof as to $30,000 for the IP-5 project. The Village Defendants do not dispute that the Village received $100,000 in CDBG funds for the IP-5 project. The Government has presented a letter from the Village's agent stating that the amount of the $100,000 total that would be spent on preserving the Section 235 houses was approximately one-third of that total. The Government's request for $30,000 is a conservative estimate based on a statement by then Village Clerk Harold Scully. Taking Mr. Masone's deposition testimony as true, even if none of the $33,078.35 itemized expenses in claim voucher U 07510 were spent on measures to protect the Section 235 homes, the Village Defendants have not come forward with any evidence that the remaining $66,921.65 in CDBG funds were not spent on improvements related to the Section 235 homes. Therefore, the Government has met its burden of proof that $30,000 in CDBG funds for the IP-5 project were spent in connection with the Section 235 program.

The final project for which the Government seeks damages as a result of CDBG

funds paid to the Village is the IP-3 project. Pursuant to the agreement entered into between the Village and Nassau County for the expenditure of CDBG funds for the IP-3 project, $63,000 was allocated to "Site Improvements for Single Family Section 235 Housing." Exhibit 455 at 2. The Village Defendants concede that the amounts contained in claim vouchers U 07524 (Exhibit 444) and U 14738 (Exhibit 445) are due to the Government, for a total of $3,900. The third voucher submitted in connection with IP-3 is claim voucher U 07513 (Exhibit 443) in the amount of $7,433.33. Exhibit V-1. This claim voucher states that it is "Pursuant to a Contract Agreement between the County of Nassau and the Village of Island Park for the 9th Year Community Developement [sic] Project: IP-3 Site Improve. Single Fam. Hsg." The Village Defendants presented evidence that only one of the items - fencing - on the voucher was not related to the Section 235 houses. Masone testified that the Village paid Bob Scully $1,000 for a Village map; Masone did not state that the map was not created as a result of the construction of new Section 235 houses in Island Park. Dep./Masone/25-26. Based on the contract between the Village and Nassau County and the statement on the claim voucher itself that the funds were used for site improvement for the Section 235 houses, presumably all the items, except the fencing about which there was specific testimony, were paid for with CDBG funds paid in connection with the construction of Section 235 housing in Island Park.

Based on the foregoing, I find that a total of $81,673.44 in CDBG funds was expended in Island Park in connection with the Section 235 houses in the following

amounts: for IP-2 $43,020.11 (total of exhibits 439, 442, and 444); for IP-3 $8,653.33 (total of exhibits 443, 444, and 445, less the amount for fencing claimed in exhibit 443); and for IP-5 $30,000 (one-third amounts claimed in vouchers U 07510 (exhibit 441) and 97077A). Accordingly, I respectfully recommend that the court award the Government double damages in accordance with the False Claims Act, in the amount of $163,346.88.

3. Statutory Penalties for Claims for CDBG Funds

The Government seeks statutory penalties for seven claim vouchers submitted by the Village to Nassau County for payment of CDBG funds. The Village Defendants concede that four of the claim vouchers submitted should be counted as "claims" for purposes of the False Claims Act.[14] The claim vouchers in dispute are numbers U 07510 (Exhibit 441), 97077A, and U 07513 (Exhibit 443). As discussed above, I find that the Village vouchers in dispute constitute claims for CDBG funds relating to the Section 235 housing constructed in the Village. Therefore, the Government is entitled to a statutory penalty for each of the seven claim vouchers submitted by the Village to Nassau County, in the amount of $14,000.

II. <u>Injunctive Relief to Remedy the Fair Housing Act Violation</u>

The Fair Housing Act provides that a court may award preventive relief, including a

[14]Although the Village Defendants in their memoranda of law state that they concede that CDBG funds related to the Section 235 houses were paid as a result of five claim vouchers, review of Exhibit V-1 shows that the payments conceded by the Village Defendants relate to only four vouchers. Village Defendants' Post-Inquest Memorandum of Points and Authorities at 50; Exhibit V-1.

permanent injunction, against a party responsible for violating the Act. 42 U.S.C. § 3614(d)(1)(A). Having granted the Government's motion for summary judgment, Judge Glasser entered a declaratory judgment finding the Village Defendants liable for violating the Fair Housing Act. In addition, Judge Glasser referred the question of whether any additional equitable relief is warranted for report and recommendation. 888 F. Supp. at 450, 458.

The Government seeks to have this court recommend entry of a remedial order with provisions falling into three basic categories. First, the Government proposes that the order bar the Village Defendants from engaging in discrimination and require them to adopt a fair housing resolution and participate in fair housing education. Second, the Government's proposed order would require the Village Defendants to retain an independent third party, presumably a not-for-profit entity with expertise in programs designed to remedy housing discrimination, to act as its housing administrator. The responsibilities of the proposed housing administrator would include designing and implementing an affirmative marketing plan intended to encourage minorities to move to Island Park and providing mortgage counseling and other information and services to prospective home buyers.

The third component of the Government's proposed remedial order is the most sweeping. The Government's proposed order would compel the Village Defendants in essence to recreate the Section 235 Housing program and administer it as it should have

been executed between 1979 and 1983. The proposed order would require the Village Defendants to "create or otherwise make available forty-four (44) affordable single family homes for sale in the Village" for distribution to low-income homeowners. Government's Proposed Fair Housing Remedial Order at 8. The Village Defendants would be obliged to implement an affirmative marketing plan and to make a diligent effort to achieve anticipated occupancy goals similar to those stated in the AFHMPs applicable to Phases I and II of the Section 235 program.

After allowing the parties extensive discovery, this court held a hearing on June 23-27 and July 14-16, 1997, addressed to the appropriate scope of injunctive relief. Each side presented experts in urban planning and statistical analysis. In addition, the parties presented testimony from federal and county housing officials, and from officials and residents of the Village of Island Park. For the reasons discussed below, I conclude that the evidence presented at the hearing generally supports granting injunctive relief of the first two types sought by the United States. I further conclude that the Government's proposed replication of the Section 235 program would be extremely burdensome and impracticable, and should not be required.

A. Is Injunctive Relief Necessary?

The Village Defendants contend that no injunctive relief is warranted. In support of their position, the Village Defendants emphasize the substantial period of time that has elapsed since Village officials violated the Fair Housing Act, and further point out that all

of the high-level officials involved in the violations have long since left office. Accordingly, the Village Defendants assert that the Government has failed to establish "that there exists some cognizable danger of recurrent violation." United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S. Ct. 894, 898, 97 L. Ed. 1303 (1953); see Village Pre-Hearing Memorandum at 5-8.

In this case, however, the court's authority, and indeed its responsibility, is not limited to preventing future acts of discrimination. Rather, "an injunction may issue, even though prior discrimination has ceased, and affirmative relief should be granted where the vestiges of prior discrimination linger and remain to be eliminated." United States v. Hunter, 459 F.2d 205, 220 n.21 (4th Cir. 1972) (citing Louisiana v. United States, 380 U.S. 145, 156, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965)), cert. denied, 409 U.S. 934, 93 S. Ct. 3046, 37 L. Ed. 2d 1045 (1973); see also United States v. DiMucci, 879 F.2d 1488, 1498 (7th Cir. 1989).

The Government has established that there are lingering effects from the Village Defendants' violations of the Fair Housing Act to be remedied in Island Park. These lingering effects have created a public perception of closed-mindedness which merits correction. Indeed, as the Government points out, the number of black households in Island Park would undoubtedly be greater today had selections for the Section 235 program been made lawfully and pursuant to an appropriate affirmative fair marketing housing

plan.[15]

The testimony presented at the inquest established several reasons for concluding that the black population of Island Park would be greater today had the Section 235 program been lawfully administered. A lawful selection process would most likely have resulted in at least some black families having had the opportunity to purchase Section 235 homes. In addition, experts testifying on behalf of the Government credibly described how a community with a threshold number of minority households becomes more attractive to other minority families as a place to live. Tr. II/Pratt/107-10; Tr. II/Marcuse/337. Had several of the Section 235 homes been allocated to minority households, there is a strong probability that more minority families would have considered moving to Island Park even after the Section 235 homes were filled. Furthermore, as emphasized by the Government's expert witnesses, the Village Defendant's manipulation of the Section 235 program has been the subject of significant media attention. Tr. II./Marcuse/339; Exhibit AU. This publicity is likely to have created the impression among those who do not live in the Village, whether accurate or not, that the Island Park community does not welcome minority families, thus inhibiting minorities from considering the Village as a place to live. Tr. II/Pratt/99-100. Finally, despite the finding by this court that the Village Defendants

[15] The Village Defendants, pointing to the residency preference in the applicable AFHMPs, question whether any of the Section 235 homes would in fact have been allocated to black families if the pre-selection scheme had not been perpetrated. This contention is discussed in greater detail below.

committed an egregious violation of the Fair Housing Act, the current Village administration has taken no affirmative remedial steps of its own. Tr. II/Breslin/1333; Tr. II/Papatsos/1172-73.

For these reasons, I respectfully recommend that an injunction be entered. The question that remains is the appropriate scope of injunctive relief. Choosing among remedies is a balancing process committed to the sound discretion of the district court. In crafting a remedy, the court is duty-bound to exercise its broad, flexible equitable powers to eliminate, to the extent possible, the effects of past discrimination. United States v. Paradise, 480 U.S. 149, 183-84, 107 S.Ct. 1053, 1073, 94 L. Ed. 2d 203 (1987).

B. Prohibition of Discrimination, Educational Program and Fair Housing Resolution

Section II of the Government's proposed remedial order seeks to enjoin the Village and its officials from housing discrimination based upon race. In Section III of its proposed decree, the Government suggests that the court require all Village employees to participate in a Fair Housing Education Program to be designed and funded by the Village Defendants subject to prior approval by the United States. Finally, in Section IV, the Government proposes a requirement that the Village adopt a Fair Housing Resolution affirmatively welcoming persons of all races to reside in the Village.

These relatively uncontroversial sections of the Government's proposed order seem properly geared to address the consequences of defendants' misconduct described above.

An injunction barring future discrimination and an affirmative resolution declaring the commitment of the Village to equal housing opportunities are likely to help erase the negative impression caused by defendants' prior violations of law. Similarly, an educational program for Village employees should make it clear to them that any continuation of the illegal practices of prior Village officials is simply unacceptable. Moreover, there is no reason to think the Village will find it burdensome to comply with these provisions. Adopting a resolution and complying with a decree barring discrimination will cost the Village nothing, and the educational program envisioned by the proposed decree can be accomplished at nominal expense. Tr. II/Pratt/115-19. Indeed, even defendants' experts found little if any fault with these provisions of the remedial order proposed by the Government. Tr. II/Portman/674; Tr. II/Haworth/842-45.

Accordingly, I respectfully recommend adoption of Sections II, III and IV of the Government's proposed order. I further recommend, however, that a consultant, rather than the Village, whose officials lack the requisite expertise, develop the Fair Housing Education Program at Village expense. In addition, I recommend that the requirement of prior approval of the educational program by the United States be deleted from Section III in light of the development of the program by an independent consultant with expertise in fair housing and related educational programs.

C. Affirmative Marketing Plan and Fair Housing Administrator

Sections II, III and IV of the Government's proposed order, as discussed above, are

designed to counter any lingering impression of Island Park as a place that is not equally inviting to persons of all races. Section V goes further, proposing that the Village undertake an affirmative effort to encourage minority families to move to Island Park. In Section V, the Government proposes that Island Park be required to retain an independent, not-for-profit entity to serve as its Fair Housing Administrator. Pursuant to the contract, the Administrator's responsibilities would include the "development, implementation and operation of an Affirmative Marketing Plan and a Housing Counseling Office designed to encourage African Americans to move to, and live in, the Village." Proposed Fair Housing Remedial Order at 6. The proposed order goes on to specify the services the Administrator would be expected to provide in great detail. These services are to include generating favorable publicity about the benefits of living in Island Park and the receptiveness of the Village to new black residents, providing mortgage counseling to potential home buyers, and educating local real estate salespersons about the minority outreach programs being conducted by the Administrator.

The Government contends that this relief is warranted at least in part because there are fewer blacks living in Island Park today than there would be had the Section 235 program been properly and lawfully administered. The Village Defendants challenge the Government's assertion that there would be a larger number of black families living in Island Park today had defendants not perpetrated a pre-selection scheme. The Village Defendants assert that, even absent the pre-selection scheme, few or none of the Section

235 homes would have been allocated to black households because of the preference accorded Village residents in the AFHMPs for Phases I and II of the Section 235 program. In other words, the Village Defendants reason that, because Island Park residents would have had first priority in any event, because the demand for Section 235 homes was so great that more Island Park residents would have applied than could have been selected, and because so few Island Park residents were black, few or no blacks would have received Section 235 homes even if the fraudulent pre-selection scheme had not been committed.

The Government contends that the residency preference involved in this case, had it been allowed to operate, would have had the practical effect of excluding blacks, and would therefore have been improper. The Government supports this contention with credible evidence. The Village Defendants attempt to dispute this contention by pointing out that residency preferences were used openly and with great frequency. To support their position, the Village Defendants presented the testimony of Donald Campbell, the Commissioner of the Office of Housing and Intergovernmental Affairs for Nassau County. Campbell confirmed that residency preferences were often employed, and pointed out that most communities participated in federally funded housing programs primarily because of the benefits to their own residents. Tr. II/Campbell/1391-93, 1410, 1415-16.

The AFHMP for Phase II contains anticipated occupancy results indicating that seventeen of the twenty-four Section 235 homes would be occupied by black families. Exhibit FHA-2. No AFHMP was ever prepared for Phase III. Accordingly, the best

information from which to infer what the anticipated occupancy results would have been had an AFHMP been prepared for Phase III are the anticipated results for Phase II. Even if the anticipated results for Phase III included a smaller percentage of blacks, it is reasonable to conclude that the anticipated occupancy results for the Section 235 program in Island Park would have contemplated that substantially more than 17 black families would be selected. In fact, however, no black families were offered the opportunity to obtain a Section 235 home in the Village.

The Village Defendants correctly point out that, by letter dated January 8, 1982, Village Clerk Harold Scully forwarded a letter to HUD enclosing the selection criteria the Village intended to apply when choosing among applicants for Section 235 homes. The enclosure plainly states that residents of the Village and its school district were to receive first priority. Exhibit FHA-5.

As acknowledged by Campbell, the residency preference described in the enclosure sent with Scully's letter and the anticipated occupancy results set forth in the AFHMP are blatantly inconsistent and cannot be reconciled. Tr. II/Campbell/1398-99. Moreover, the evidence established that a residency preference in a community with as small a percentage of minorities as Island Park would have been inconsistent with HUD's equal housing opportunity policies and procedures. Tr. II/Campbell/1420; Tr. II/Davis/1458-59; Dep./Pearl/69, 123. Having provided HUD with irreconcilably inconsistent information, the Village Defendants should not be permitted to rely on that information to shield

themselves from responsibility for the anticipated occupancy results provided on a HUD-approved form and called for by HUD policies and procedures.[16]

Finally, the question of whether the pre-selection scheme at issue had an adverse discriminatory impact upon blacks has already been litigated and decided in the Government's favor. Judge Glasser held that the Village Defendant's conduct violated the Fair Housing Act only after carefully analyzing the pre-selection scheme and concluding that it had a disparate impact on blacks. 888 F. Supp. at 446-48. As Judge Glasser stated,

> It is clear that the specific procedures for allocating Section 235 houses in the Village were designed to limit program beneficiaries — preferably to friends and relatives of Village officials and otherwise to Village residents. The inevitable result of those allocation procedures was to remove all blacks from the pool of applicants for benefits.
>
> To complete the . . . analysis, it is necessary to compare that population with the pool from which potential beneficiaries of the Section 235 program should have been chosen pursuant to the County AFHMP, the Phase I and II AFHMPs filed with respect to the Village's program, and HUD's

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[16] The Village Defendants have contended from time to time that the Village was not the author of the Phase II AFHMP, and have implicitly argued that the Village therefore should not be held responsible for the anticipated occupancy results it contains. Logic suggests, however, that the Village must have been involved in the preparation of the AFHMP, or at least been made aware of its contents. Moreover, in his letter to HUD dated January 8, 1982, referred to in the text above, Harold Scully expressed familiarity with the AFHMP and took responsibility for it. In the letter, Mr. Scully, then the Village Clerk for Island Park, wrote on Village stationery that "[t]his will reply to your letter . . . concerning <u>our</u> Affirmative Fair Housing Marketing Plan." Exhibit FHA-5 (emphasis added).

> affirmative fair market housing regulations. The black population of the targeted market, however it is defined, was considerably greater than that of the Village.

888 F. Supp. at 447.

For these reasons, I reject the Village Defendant's contention that no blacks would have been chosen to receive a Section 235 home even if the pre-selection scheme had not been perpetrated. I further conclude that it is therefore appropriate to grant injunctive relief requiring the Village Defendants to remedy the exclusion of blacks from the program by affirmatively encouraging blacks to consider residing in Island Park.

Section V of the Government's proposed remedial order would require the Village to retain an independent, not-for-profit entity to act as its Fair Housing Administrator. As discussed above, the Administrator's responsibilities would include developing and implementing an affirmative marketing plan designed to encourage blacks to move into the Village, offering mortgage counseling to potential home buyers, and providing educational seminars for local real estate salespersons.

These activities are appropriately tailored to remedy the discriminatory effect of the Village Defendant's conduct. The expert witnesses called by the Government testified that minority households are likely to be attracted to a community if a focused effort is made to communicate with minority organizations in towns within the marketing area. They further testified that the direct involvement of Village officials would be an important component of such an effort. Presumably, an Administrator would both contact such

organizations directly, and arrange for Village officials to have additional contact with them. Tr. II/Pratt/97-100; Tr. II/Marcuse/340-42.

The Section 235 program is no longer in operation. The government-funded housing programs now in effect typically involve direct aid to potential home buyers, rather than assistance rendered through a builder, developer or municipality. Tr. II/Campbell/1369-72. Accordingly, having an Administrator available to provide prospective home buyers with information about such programs should make Island Park a particularly attractive place to shop for a new home.

As this court envisions it, the position of Fair Housing Administrator would be a part-time endeavor for an individual or firm. The Administrator would work together with Village officials developing an affirmative fair housing marketing plan, including brochures, advertising and meetings with community groups designed to attract minorities to Island Park. The Administrator would also be responsible for developing and implementing the educational program for Village employees discussed in Section II.B, above. In addition, the Administrator would see to the implementation of the affirmative marketing plan, including arranging for participation by the Mayor and members of the Board of Trustees. The Administrator would be available as well, presumably during prescribed hours, to assist prospective home buyers interested in purchasing homes in Island Park by answering questions about mortgage applications and helping qualified persons apply for available publicly-funded benefits and other home buyer assistance

programs. Although more hours might be required when affirmative marketing plans are being developed, the responsibilities of the office could be performed on a part-time basis.

Requiring the Village Defendants to retain a Fair Housing Administrator should not impose an undue administrative or financial burden on Island Park. The unrebutted testimony of the Government's experts is that several not-for-profit entities have the expertise to assume the responsibilities of the Fair Housing Administrator, and to do so at relatively modest cost. Based on the testimony presented, it is reasonable to conclude that the services required could be obtained for $50,000 in the first year and $25,000 per year in ensuing years. Tr. II/Marcuse/374, 383-84.

Papatsos, the Mayor of the Village of Island Park, testified that the Village budget is approximately $2.5 million per year. Tr. II/Papatsos/1159. The cost of the Fair Housing Administrator would, therefore, be only slightly more than two per cent of the Village's budget in the first year, and only slightly more than one per cent of the Village's budget in ensuing years. Moreover, potential alternative sources of funding exist. First, Nassau County has been holding approximately $300,000 in CDBG funds allocated to the Village pending the outcome of this case. According to Campbell, those funds could be used to defray the costs of a Fair Housing Administrator. Tr. II/Campbell/1428-33. Furthermore, as this court is aware from related litigation pending before it, the Village's insurance carrier has been providing a defense to the Village Defendants in this case, and the policy may be available to pay all or part of any judgment rendered. National Cas. Co. v.

Incorporated Village of Hempstead, CV-90-3459 (ILG). Although counsel for the Village Defendants was asked by the court whether insurance coverage might apply to any aspect of damages awarded in this case, the Village Defendants have thus far not responded to the court's inquiry.

For these reasons, I respectfully recommend that the Village be required to retain a Fair Housing Administrator as described in Section V of the Government's proposed remedial order. I further recommend that the provisions of Section V be modified in the following respects. First, Section V suggests that the Village submit its proposed contract with the Fair Housing Administrator to the United States for review within thirty days of entry of the injunction. This seems too short a time for the Village to negotiate with various not-for-profit entities. Accordingly, I recommend that this period be extended to ninety days.

Second, the proposed order requires the proposed contract to be submitted to the United States for approval, but imposes no time limit upon the United States for its review. I therefore recommend that Section V be modified to require the United States to approve or reject the proposed contract within thirty days of receipt, and to explain the reasons for any decision to reject the contract in writing within that time.

The Government's proposed order does not suggest how the Village should go about selecting a particular not-for-profit entity to serve as the Administrator. I agree that it is best in the first instance to allow the Village to attempt to retain an entity of its own

choosing. Presumably, however, one basis on which the Government might object to a proposed contract would be that the proposed Administrator lacks appropriate qualifications. Should this occur, I recommend that the court direct the Government to submit a list of five acceptable entities to the Village, and that the Village be afforded a reasonable time in which to select from among the five.

Section V requires the Village to submit an Affirmative Marketing Plan to the United States for review within thirty days after entering into a contract with the Administrator. Again, ninety days seems more realistic, and requiring the United States to articulate any objections in writing within thirty days is a reasonable additional requirement.

On page seven of the Government's proposed order, in paragraph a, the Government suggests that a community profile be created and distributed. The paragraph goes on to describe the features the profile should contain in great detail. This court believes that the profile should be developed by the Administrator, and should contain those features which the Administrator deems appropriate and consistent with the remainder of the marketing plan.

As noted above, the Government's experts emphasized that the success of an affirmative marketing effort depends at least in part upon the good faith participation of Village leaders. Because of the importance of direct involvement in the affirmative marketing effort by Village officials, I recommend that, in addition to the other provisions

in Section V of the Government's proposed order, the Mayor be required to devote up to eight hours per month, and the members of the Board of Trustees to devote up to four hours per month each, working with the Administrator and participating in community outreach as directed by the Administrator.

The Government's proposed order makes no reference to the cost the Village should be required to incur when retaining an Administrator. For the reasons stated above, I recommend that the Village be required to expend up to but not in excess of $50,000 during the first year of the Administrator's existence, and up to but not in excess of $25,000 in ensuing years.

Finally, Section V of the Government's proposed order is silent with respect to the number of years for which the Village should be required to retain the Administrator. It is this court's judgment that it is appropriate to require the Village to retain the Administrator for a period of three years, and to allow the Government to seek a two-year extension based upon a showing that there has not been a significant increase in the number of black families owning homes in Island Park.

In Section VII of its proposed order, the Government suggests a variety of record-keeping and reporting provisions. Most of these provisions concern the Affordable Housing Program proposed in Section VI, discussed below. With respect to the Fair Housing Administrator, however, the first paragraph of Section VII, which requires that all pertinent records be maintained and made available for inspection by the United States

upon reasonable notice to counsel for the Village Defendants, should be adequate.

D. Affordable Housing Program

In the final substantive section of its proposed remedial order, the Government asks this court to require that "[t]he Village . . . create or otherwise make available forty-four (44) affordable single family homes for sale in the Village to 'Section 235 Equivalent Homeowners' moving from outside the Village to the Village during the term of this Order." Proposed Fair Housing Remedial Order at 8. The Government further proposes that the order remain in effect for a period of fifteen years. Id. at 4. The Government contends that this relief is warranted because the Village Defendants, having thwarted achievement of the results the Section 235 program was intended to accomplish, should now be required to replicate the program, administer it properly, and make a good faith effort to attain the results it should have been striving to achieve during Phases I, II and III.

This court is sympathetic to the Government's view that broad relief is warranted. Any reader of Judge Glasser's decision in Island Park II must feel alarmed and disheartened by the egregious fraud perpetrated by Village officials. The blatant cronyism and lawlessness with which the Section 235 program was administered in Island Park was further described during the inquest testimony of Ann Breslin, formerly Ann Leonard, now the Village Clerk. Tr. II/Breslin/1289-1302, 1314-1328, 1336-1346, 1350-1352, 1354-1358. Nevertheless, in light of the other extensive relief recommended in this report and for the reasons discussed below, I respectfully recommend that the relief proposed by the

Government in Section VI not be granted.

First, it may well be impossible to "create or otherwise make available" forty-four single family homes. The evidence presented at the inquest demonstrated that there is simply no vacant land available for new construction in Island Park. Tr. II/Marcuse/324. Although the Government suggests the alternative of acquiring and rehabilitating existing houses in the Village, the number of existing homes put up for sale each year is small, and only some of this small number are in a price range and condition appropriate for the housing program envisioned by the proposed remedial order. Tr. II/Portman/574-75; Tr. II/Haworth/766-77. The Government at least implicitly concedes the difficulties the Village is likely to encounter accomplishing this housing program, for it proposes that the remedial order remain in effect for a period of fifteen years.

Second, even assuming the houses necessary to execute the program could be found, the cost to the Village would be enormous. The Government nowhere explains how the Village might raise the funds necessary to acquire 44 homes and provide them for resale at affordable, and presumably subsidized, prices. The Village of Island Park is neither a large nor a wealthy community, and its government is quite small. The cost of the affordable housing program proposed by the Government would impose a major financial burden on the Village. This potential cost to the Village is a matter of particular

Yonkers, however, the City of Yonkers had already committed itself to providing sites for 200 units of public housing, and substantial Community Development Block Grant funds were available to subsidize the construction of the housing units. 837 F.2d at 1194, 1236-37. Moreover, Yonkers is among the five largest cities in the State of New York, and is far more capable of complying with a broad injunction than the Village. 624 F. Supp. at 1289. Finally, the intentional discrimination at issue in Yonkers was described by the district court as "more than thirty years of subsidized housing activity, for which a sizable and changing group of City officials shared responsibility." 624 F. Supp. at 1369. The conduct giving rise to liability in this case was not nearly so sweeping, and the appropriate scope of remedial relief is not so broad.

The holding in United States v. City of Parma, Ohio, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926, 102 S. Ct. 1972, 72 L. Ed. 2d 441 (1982), is similarly distinguishable. The district court in Parma entered a remedial order that, among other things, required defendant to undertake "whatever action is necessary in order to allow the construction of public housing in the City," and to "make all efforts necessary to ensure that at least 133 units of low and moderate-income housing are provided annually in Parma." 661 F.2d at 569. As the reviewing court's opinion makes clear, this injunction did not require the City of Parma to "create or otherwise make available" 133 units of public housing, but rather to take the steps necessary to "permit construction" of public housing in the City. 661 F.2d at 577. Moreover, the court of appeals reversed the district

concern in light of the large damages award recommended in the first part of this report.[17]

Third, the Village's entry into Island Park's small housing market, seeking to acquire such a large number of homes, would undoubtedly have a substantial impact on the price of housing in the Village. In fact, a likely side-effect of the Government's proposed housing program would be to raise prices to the detriment of families attracted to the Village by the affirmative marketing plan devised and implemented by the Fair Housing Administrator. Tr. II/Haworth/768-69. Thus, implementation of Section VI of the Government's proposed order might well threaten the success of the programs called for in Section V.

The Government argues that precedent supports its proposal that the Village be required to undertake an affordable fair housing program. In this regard, the Government points to the proceedings in United States v. Yonkers Board of Education, 624 F. Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055, 108 S. Ct. 2821, 100 L. Ed. 2d 922 (1988). After finding the City of Yonkers liable for intentional housing discrimination, 624 F. Supp. at 1369-76, the district court entered an injunction requiring the City of Yonkers to designate sites and submit a Housing Assistance Plan for 200 units of public housing. 635 F. Supp. 1577, 1580 (S.D.N.Y. 1986). As the Second Circuit noted upon its review of the district court's order in

[17] During the inquest, the court asked counsel for the Government whether any damages awarded could be used to fund the proposed housing program. As of this date, the Government has not responded to the court's inquiry.

court's decision to require that a specific number of public housing units be provided each year. Id. Finally, Parma, with more than 100,000 residents, is far larger than Island Park, and presumably more capable of complying with a broad injunction.

In its post-hearing letters dated July 29 and August 4, 1997, the Government advances an alternative to requiring the Village to create or otherwise make 44 homes available. Instead, the Government now proposes that the Village be required to use its "best efforts . . . to take all actions within its control . . . to obtain funding needed to . . . provide 44 affordable houses." Government's letter dated July 29, 1997 at 13.

With the exception of certain previously granted CDBG funds, the Government does not identify any specific sources of potential funding. Moreover, the available Community Development funds would be inadequate to subsidize 44 home purchases, and Village officials testified without contradiction that these funds are sorely needed to preserve the Village's roadways, bulkheads and deteriorating buildings. Tr. II/Papatsos/1164-67. If these repairs are not made, the Village may well end up a less attractive place to live for people of all races.

In addition, it will undoubtedly be difficult to administer a decree with the vague command that the Village use its "best efforts" to take "all actions within its control." Moreover, this report recommends that a Fair Housing Administrator be available to assist potential home buyers with, among other things, applying to participate in any available purchasing or mortgage assistance programs. As noted above, most programs available at

this time involve direct subsidies to the potential homeowner, and do not require the participation of the town or village where the home is located. Accordingly, the assistance of the Fair Housing Administrator should provide a unique benefit to potential home buyers considering a purchase in Island Park, and contribute to the attractiveness of Island Park to black families looking to purchase an affordable home.

Although this report recommends against ordering the "Affordable Housing Program" proposed by the Government, there should be no question but that the court finds the Village Defendant's misconduct in this case to be extremely serious. As public servants, Village officials had a special obligation to further, rather than pervert, the policies behind the government programs they were charged with administering. Nevertheless, particularly in light of the large damage award and other injunctive relief recommended in this report, I conclude that requiring the Village to undertake the Affordable Housing Program proposed by the Government would be unduly burdensome.

"Established principles of equity dictate that in considering whether to grant injunctive relief a court should impose upon a defendant no restriction greater than necessary to protect the plaintiff from the injury of which he complains." Hunter, 459 F.2d at 219. The housing program envisioned by the Government would pose an enormous burden on the Village of Island Park. In light of the other remedies recommended in this report, such a substantial intrusion upon the Village and its residents is unwarranted. Accordingly, I respectfully recommend that the court not adopt Section VI of the

Government's proposed remedial order.

E. Miscellaneous Provisions

Sections VII, VIII and IX of the Government's proposed order concern administration of the decree and are relatively uncontroversial. Section VII, concerning record-keeping and reporting, however, has several provisions related to the Fair Housing Program prosed in Section VI. If, as recommended above, the relief sought in Section VI is not granted, the provisions of Section VII should be modified accordingly, and limited to reporting the activities of the Fair Housing Administrator proposed in Section V. Moreover, the Government proposes in Section VII that the Village be required to submit monthly reports during the first year after the injunction is issued and quarterly thereafter. This seems unduly burdensome; quarterly reporting throughout the period of the injunction should be adequate. With these minor modifications, I respectfully recommend that Sections VII, VIII and IX be included in the court's final order.

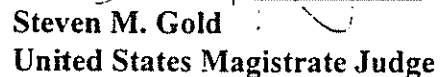
Conclusion

For the reasons stated above, I respectfully recommend that damages be awarded in the amount of $974,188, reflecting double the amount of mortgage subsidies paid by HUD pursuant to Section 235, less amounts recaptured after the bar date; $4,242,000, reflecting a $2,000 statutory penalty for each of 2,121 mortgage subsidy payments made after the bar date; $163,346.88, reflecting double the amount of CDBG funds expended in connection with the Section 235 program, and $14,000, reflecting a $2,000 penalty for each of the 7

CDBG vouchers submitted by the Village, for a total damage award of $5,393,534.88. I further respectfully recommend that the court enter injunctive relief as described in Section II of this report.

Any objections to these recommendations must be filed with the Clerk of the Court, with copies provided to the chambers of the Honorable I. Leo Glasser, within ten days of receiving this Report and Recommendation, and in any event no later than August 29, 1997. Failure to file timely objections may waive the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72; Small v. Secretary of Health and Human Services, 892 F.2d 15, 16 (2d Cir. 1989).

DATED: **Brooklyn, New York**
August 13, 1997



Steven M. Gold
United States Magistrate Judge