Supreme Court of Ohio Clerk of Court - Filed December 21, 2015 - Case No. 2015-0724

IN THE SUPREME COURT OF OHIO

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|---|---|---|
| LORNA B. RATONEL, et al. | : | CASE NO. 2015-0724 |
| Appellees, | : | |
| v. | : | On Appeal from the Montgomery County Court of Appeals Second Appellate District |
| ROETZEL & ANDRESS, LPA, et al. | : | |
| Appellants. | : | Court of Appeals Case No. 26259 |

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# APPELLEES' MERIT BRIEF

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## STATEMENT OF FACTS

This appeal derives from an interlocutory order denying a motion for summary judgment. That interlocutory order did not prevent judgment for, or dispose of the merits of the malpractice action against Appellants, Mark Ropchock, Esq., and Roetzel & Andress, LPA (collectively hereafter, "R&A"). Correspondingly, there is no final appealable order before this Court.

The underlying case involved Appellees' (hereafter, "Ratonel" ) acquisition of two multi-family housing properties known as Holden House and French Village, and particularly the French Village Purchase Agreement drafted by Gail Pryse, Esq., of Keating, Muething & Klekamp, PLL (collectively hereafter, "KMK").

This appeal results from cross motions for summary judgment filed between Ratonel and R&A in connection with R&A's representation of Ratonel against KMK for KMK's negligent drafting of the French Village Purchase Agreement. Quite simply, Ratonel claimed R&A committed malpractice when R&A: (i) erroneously advised Ratonel, without any factual or legal basis to support the opinion, that the French Village claims were not viable; and (ii) dismissed the viable French Village claims with prejudice, without ever informing Ratonel of the dismissal, or even suggesting that she seek other counsel to pursue the claims. The trial court granted summary judgment in favor of R&A. Ratonel successfully appealed the trial court's decision to the Second District Court of Appeals, which reversed the trial court.

## OVERVIEW

R&A asserts they never agreed to represent Ratonel respecting KMK's malpractice for negligently preparing the French Village Purchase Agreement. When drafting that Purchase Agreement, KMK excised the option for conventional financing, thereby binding Ratonel to a federally-insured mortgage and draconian provisions of a federal statute known as "MAHRA." (R&A's Brief, p. 1; *See also* Appendix 1 and 2 hereto.) R&A also claim that after communications on the subject, they restricted their representation to Holden House claims because the French Village claims were not viable in light of "speculative" damages. (R&A's Brief, pp. 4-5.) Alternatively, R&A asserts that even if they represented Ratonel in connection with French Village (a reality Mr. Ropchock conceded under oath), they properly "terminated" the representation because they believed the claims were meritless. (R&A's Brief, pp. 8-9.)

Hugely relying on an isolated quotation from Ms. Ratonel's deposition, and misapplying that quotation in a number of contexts, R&A offers the untenable proposition that Ratonel always understood that R&A would not represent her respecting the French Village claims. Thus, they ignore the innumerable e-mails, pleadings, depositions, "confidential" settlement demand, and Amended Complaint, all involving R&A in active representation of Ratonel for the French Village claims. They also glibly ignore the following additional testimony of Ms. Ratonel, to wit:

> MR. GREER: Well, your understanding of that lawsuit [against KMK] involved your acquisition of the Holden House, did it not?
>
> MS. RATONEL: For both Holden House and French Village. That's why I went to Mark, yes.

| | |
|---|---|
| MR. GREER: | Did you ever have any discussions with Mark concerning any claims involving the French Village? |
| MS. RATONEL: | Yes. |
| MR. GREER: | And what was that discussion? |
| MS. RATONEL: | I told him that he needs to do French Village and take care of it with this lawsuit with KMK because there's a lot of problems.***Yes, I did. I discuss it with Ropchock, with Mark, since I feel about putting in French Village.***I gave him paperwork from – from Chris – I don't know whether it was Musto or – it's a gentleman that HUD had helped for me to hire for me to get a market rent schedule, how much I would lose if we go to market rent.*** |
| MR. GREER: | When he told you he didn't think you had a claim on that side did you consult with another attorney to see if you could get somebody else to file that claim? |
| MS. RATONEL: | No. He [Mr. Ropchock] – was my lawyer and he came from a large firm, larger than KMK. |

(Lorna Ratonel Dep. p. 48, ll. 2-5; pp. 49-52, April 17, 2013.)

R&A's misapplication of an isolated quotation from Ms. Ratonel's deposition is also demonstrated as clearly inapposite to the issues on appeal by the following uncontroverted facts of record.

## UNCONTROVERTED FACTS ESTABLISHED PURSUANT TO CIV. R. 56(C)

### R&A Confirmed by Sworn Testimony that KMK's Negligence Involved Both §1031 Purchases by Ratonel, and Were Therefore Compulsory Claims to be Joined in Any Suit Against KMK

Ratonel were literally a "mom and pop and family" operating gas stations in California, which they sold in 2007. (Pls.' MSJ, p. 6.) Based on the advice of their accountant to avoid federal capital gains taxes and provide income to sustain the family, Ratonel sought the benefits of a tax-deferred exchange under section 1031 of the Internal Revenue Code (a "1031 Exchange"). (*Id.*) To complete the Exchange, Ratonel sought legal representation from KMK, with whom they had family affiliation through an associate, to represent them through the investigation, acquisition, and closing of properties subsidized by "Section 8" rental subsidies administered by the United States Department of Housing and Urban Development ("HUD"). (*Id.*) One property, located in Dayton, Ohio, is known as Holden House, and the other property, in Grand Island, Nebraska – subject of this appeal – is known as French Village. (*Id.*)

In connection with the investigation and acquisition of French Village, it is beyond cavil that KMK was responsible for drafting the Purchase Agreement and advising Ratonel about the import of its terms to protect Ratonels' interests in connection with Ratonels' expectation of rents and equity growth. (Mark Ropchock Dep. p. 58, ll. 22-25; p. 59, ll. 1-9, Apr. 18 and 19, 2013; *Id.* at pp. 129-131; p. 133, ll. 10-22; p. 141, ll. 17-20; p. 154, ll. 22-25; p. 155, ll. 1-5.) As will be later discussed in more detail, reserving the option of "conventional financing" for the purchase of French Village was absolutely necessary to avoid the imposition of draconian limitations on future rents and equity imposed as a matter of federal law by the Multifamily Assisted Housing Reform and Affordability Act of 1997[1] (hereafter "MAHRA"). (Appendix 1

[1] Publ. L. No. 105-65, Tit. V, 111 Stat. 1384, *et seq.*

and 2; Pls.' MSJ, pp. 22-27.) However, KMK negligently removed the option for conventional financing. (Ropchock Dep., pp. 116-119, Exhibits 6 and 7 thereto.)

On March 11, 2009, Ratonel engaged R&A to pursue malpractice claims against KMK. (Defs.' MSJ, Ex. E.) The engagement letter referred to KMK's malpractice referable to Holden House, but was silent as to any representation regarding KMK's malpractice in relation to the French Village transaction. (*Id.*) The engagement letter also expressly allowed its terms -- and therefore the scope of R&As' representation – to be modified/expanded (Defs.' MSJ, Ex. E, p. 3, ¶ 3.) Specifically, the engagement letter stated:

> Should you decide to retain our firm for additional services not specified in this letter, we will be pleased to provide such services under such terms as you and we may agree upon.

(Defs.' MSJ, Ex. E, p. 3, ¶ 3.)

Clearly, recognizing that all claims arising out of KMK's representation of Ratonel for the 1031 Exchange would be compulsory in any litigation against KMK, on April 22, 2009, R&A expanded the scope of their representation and agreed to pursue claims based on KMK's negligent preparation of the French Village Purchase Agreement. (Pls.' Reply in Supp. of MSJ, Aff. of Sam G. Caras, ¶ 16, Ex. 10; *See also* Ropchock Dep. p. 132, ll. 24-25; p. 133, ll. 5-22.) Indeed, R&A testified:

> I mean once you allege -- it's my position once you allege a malpractice action against an attorney, I mean anything is fair game, any reason why, anything they did wrong, it would be subsumed under that as malpractice.

(Ropchock Dep. p. 225, ll. 21-25.)

R&A's e-mail of April 22, 2009, informed Ratonel that R&A had reviewed the Purchase Agreement that KMK drafted for French Village, and acknowledged KMK was aware of the resulting reduced rents. (Pls.' Reply in Supp. of MSJ, Aff. of Sam G. Caras, ¶ 16, Ex. 10, pp. 1-

2.) On April 22, 2009, R&A further agreed they would include claims against KMK for negligent preparation of the French Village Purchase Agreement in the Complaint being prepared to commence litigation, to wit:

From: Ropchock, Mark <MRopchock@ralaw.com>
Subject: Limited Dividend Issue
To: "Lorna B. Ratonel" lbratonel350@yahoo.com
Date: Wednesday, April 22, 2009, 6:15 AM

I take it you never saw the words "Limited Dividend Property" while you were purchasing FV, or if you saw it, you didn't know what it meant. Whose fault do you think it was that wasn't explained to you, Hessel's, KMK or both?

***

Buck had a lot of conversation with my previous mgmt team in French village because KMK billed it to French Village so KMK can get paid
I have alot of emails regarding the problems with French Village
I need to send it to you to show how they Handled that too
let me know
so.when KMK call you can add this to our complain
Thanks Mark

***

From: Ropchock, Mark <MRopchock@ralaw.com>
Subject: RE: Limited Dividend Issue
To: "Lorna B. Ratonel" <lbratonel350@yahoo.com>
Date: Wednesday, April 22, 2009, 6:56 AM

That's ok for now. I'll just throw a line in the complaint about it against KMK. By the way, they haven't called yet. They must be a bunch of sissies...

(Pls.' Reply in Supp. of MSJ, Aff. of Sam G. Caras, ¶ 16, Ex. 10, pp. 1-2.)

R&A also testified the French Village claims were included in the initial Complaint against KMK, to wit:

| | |
|---|---|
| Q. | But you included the first issue, the limited dividend issue, as a claim for relief in the initial complaint -- against KMK, right? |
| MR. ROPCHOCK: | Sure. Correct. |

(Ropchock Dep. p. 133.)

On May 13, 2009, R&A indeed filed a Complaint against KMK, which included claims for KMK's negligent drafting of the French Village Purchase Agreement. (Compl. of May 13, 2009, p. 9, ¶ 33(g); *See also* Pls.' MSJ, pp. 22, 24; Ropchock Dep. p. 133, ll. 10-22; p. 225, ll. 18-25.)

Beginning on September 19, 2009, Ratonel wrote R&A, forwarding e-mails from Jim Stary, an expert in HUD financing, to confirm Ratonel would be losing a "substantial portion of [their] equity and rents in French Village." (Ropchock Dep., p. 107, ll. 15-25; p. 108; *Id*. at p. 109, ll. 1-21, Ex. 4.) After reviewing an e-mail from Mr. Stary, R&A again acknowledged, on October 19, 2009, its involvement in the pursuit of claims against KMK due to KMK's negligent drafting of the French Village Purchase Agreement. (Pls.' Reply in Supp. of MSJ, Aff. of Sam G. Caras, ¶ 19, Ex. 13, p. 2.) In their October 19, 2009, e-mail to Ratonel, R&A declared KMK attorney Pryse's statements regarding HUD financing demonstrated that KMK "knew, or should have known" that Ratonels' above-market-rate rents at French Village would expire relatively soon after the purchase. (*Id*.) R&A concluded by opining that attorney Pryse's statements would be "very damning to her" (at deposition) when R&A addressed the "FV issue." The e-mail stated, verbatim:

**To:** Lorna B. Ratonel[lbratonel350@yahoo.com]
**From:** Ropchock, Mark
**Sent:** Mon 10/19/2009 1:18:08 PM
**Subject:** issue

I'm prepping for Carmichael but I found something interesting on another note. You sent me an e-mail on Sept 29th, it was from 8/13/07, it dealt with financing of H.H. Interestingly, Gail recognizes that the HUD contract often doesn't last as long as the financing on the building, so the HUD contract "SHOULDN'T" (her words, all capitalized in her e-mail to you) pay at above market rates, b/c, naturally, the bank wouldn't loan based on something that might not be in existence in the future. EXACTLY. So why the hell would she let you buy a building, F.V., and not point out you were receiving above market rents, which she knew, or should have known, would expire in 18 months? Her statement with respect to H.H. I think is very damning to her when we get to the FV issue.....

Ratonels' losses from KMK's negligent preparation of the French Village Purchase Agreement were again supplemented by Mr. Stary's e-mails on October 30, 2009, November 5, 2009, January 4, 2010, and January 5, 2010, all of which were forwarded to R&A on January 6, 2010. (Ropchock Dep., p. 105, ll. 8-15; p. 112, ll. 18-25; p. 113, ll. 1-6, Ex. 5.; *See also* Pls.' Reply in Supp. of MSJ, Aff. of Sam G. Caras, ¶¶ 6, 16-19, Ex. 10, pp. 3-6; *Id.* at Ex. 11, 12, 13.) These losses, as a matter of federal law, were also laid out in comprehensive detail in the 67-page "Rent Comparability Study" that was forwarded to and reviewed by R&A. (Ropchock Dep., pp. 108-109; p. 158, ll. 19-23; *See also* MAHRA, § 514(g)(1)(A); § 524(a)(1); 24 C.F.R. §401.410 (requiring Rent Comparability Studies, exclusively for properties with HUD-insured mortgages).[2]

[2] R&A's reference to an intervening e-mail of December 21, 2009, is specious. (R&A's Brief, p. 8, ¶ 1, citing Defs.' MSJ, Ex. F.) That e-mail does not reference French Village. The e-mail was sent following the depositions of individuals involved in the sale of Holden House --- which is why the e-mail is devoted solely to the topic of damages incurred at Holden House.

On January 5, 2010, Ratonel sent Mr. Ropchock another e-mail confirming the damage caused by KMK's negligent drafting of the French Village Purchase Agreement. After referencing "MAHRA," Ratonel informed R&A: "I am out of luck. [T]he rent will be reduced to the market rent by over $100K." (Ropchock Dep., p. 112, Ex. 5.)

On January 15, 2010, R&A deposed KMK attorney Pryse regarding her failure to recognize that the rents at French Village were set to be significantly reduced. (Gail Pryse Dep., pp. 187-188, Jan. 15, 2010; *See also* Ropchock Dep., p. 129, ll. 14-25; p. 130; p. 131, ll. 1-10.) This active representation in a legal proceeding was specifically devoted to KMK's conduct in mishandling both transactions (Holden House and French Village) for Ratonels' 1031 Exchange, regardless of deadlines or "timing issues."

On January 26, 2010, R&A drafted a settlement demand letter to KMK, and told Ratonel to treat the letter as "strictly confidential." (Ropchock Dep. p. 119, ll. 23-25; p. 120, p. 121, ll. 1-14, Ex. 8.) This demand was based in part on the e-mail chain from Mr. Stary, and information provided by Ratonel. (Ropchock Dep. p. 120, ll. 16-25; p. 121, ll. 1-4.) The demand letter, referencing the pending French Village claims, stated:

> The professional negligence claim against KMK concerning French Village is a different claim which flows from a separate act of negligence. ***
>
> It is impossible for my client to renegotiate a higher above market rent with the government. She is simply going to be stuck with market rate rents.
>
> This then has effectively reduced the value of French Village by half, from approximately $2,100,000 to $1,100,000. ***
>
> Gail Pryse was responsible for and in fact billed for reviewing the HAP contract. In her deposition, [Pryse] admitted that she was not even aware that the rents were set to decrease. Accordingly, she did not, nor could she have advised my client of the rent decrease. ***

> KMK's negligence is once again undeniable. How an attorney can be responsible for reviewing a contract, bill for reviewing the contract, and not inform the client as to the significant provisions of that contract, specifically that the rent provisions in the contract would be significantly reduced, is almost incomprehensible.

(Ropchock Dep. p. 119, ll. 24-25; p. 120, Ex. 8; Pls.' MSJ, pp. 25-26.)

The demand that was ultimately sent to KMK on May 11, 2010, did not included the French Village claims, because R&A negligently determined in the interim – without performing any research – that Ratonels' damages were "speculative," as later discussed in connection with R&A's e-mail of April 30, 2010. (Ropchock Dep. pp. 154, 164.)

However, even as of the date of Mr. Ropchock's deposition in this case, on April 18, 2013, he admitted and endorsed the opinions that KMK was negligent in drafting the Purchase Agreement for French Village by failing to understand and appreciate the effects of omitting the option for conventional financing from the Purchase Agreement. (Ropchock Dep., p. 130; p. 131, ll. 1-10; ; p. 157, ll. 17-25; p. 158, ll. 1-13; p. 163, ll. 1-21; *Id*. at pp. 104-129.) It therefore remains undisputed by R&A that KMK malpracticed by removing the option for conventional financing from the Purchase Agreement, which resulted in the imposition of MAHRA's rent-reduction and debt-restructuring provisions. (*Id*.; *See also* Defs.' Expert Witness Disclosure, ¶ 3 (identifying Mark A. Ropchock, Esq., as an expert witness).

Consequently, as this appeal pends, R&A's testimony concedes and confirms KMK's negligence in preparing the French Village Purchase Agreement, ironically for the very reasons that R&A was later negligent when it removed the French Village claims from the Amended Complaint of August 4, 2010. Indeed, during Mr. Ropchock's deposition, he confirmed it is/was negligent for legal counsel not to understand the significance of the omission of the conventional financing provision/option in the Purchase Agreement:

| | |
|---|---|
| Q. | Now, I have asked you during the – the break to review page 4 that's entitled KMK's Liability for French Village. |
| MR. ROPCHOCK: | Yes. |
| Q. | In a document she was retained to interpret for my client she failed to advise my client of basic material provisions of that document. True as well, isn't it? |
| MR. ROPCHOCK: | True. |
| Q: | And then this part is a conclusion, which I think that we fairly share with you today, you can tell me if you think that conclusion has changed, but she, referring to Gail Pryse, likely failed to do so either due to neglect or due to her admitted unfamiliarity with HUD transactions? |
| MR. ROPCHOCK: | That's true. |
| Q: | Okay. And then your conclusion at the end of that, 'how an attorney can be responsible for reviewing a contract, bill for reviewing that contract, and not inform the client as to the significant provisions of that contract, specifically that the rent provision in the contract would be significantly reduced, is almost incomprehensible, [] – that statement is true, isn't it? |
| MR. ROPCHOCK: | Yes. |
| Q: | If - if legal malpractice is unreasonable professional conduct and deviation of standards of care, if that's a fair definition of legal malpractice wouldn't that, what you just recounted, be legal malpractice of KMK? |
| MR. ROPCHOCK: | If that was – yeah, if that's what - yes. |

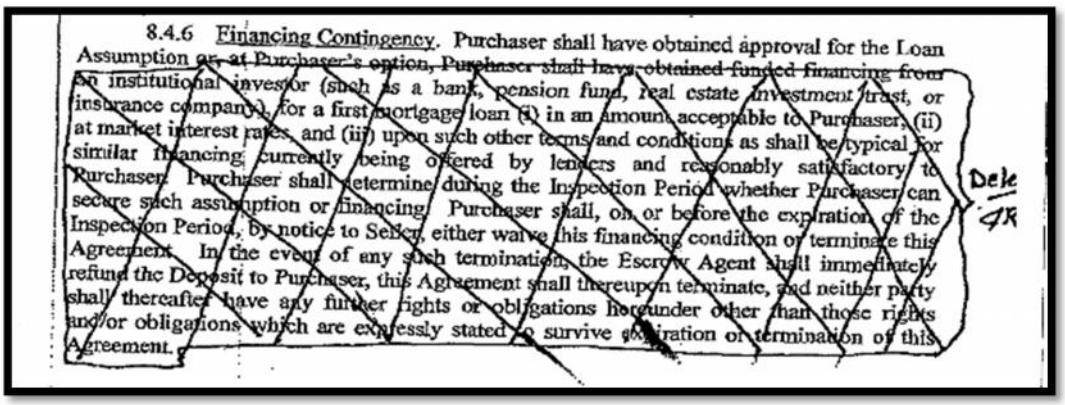
(Ropchock Dep. p. 120, ll. 16-19; p. 125, ll. 4-14; p. 126; p. 127, ll. 15-20; p. 129, l. 25; p. 130, ll. 1-8; *See also* Pls.' MSJ, pp. 22-27.)

**R&A Unilaterally Extinguished Ratonels' Compulsory Claims Against KMK for French Village, and Ratonel Had No Option to Preserve Those Claims Due to R&A's Amended Complaint**

During deposition, R&A also acknowledged they consulted with their expert, Mr. ("Jamie") Zitesman, who was designated following the filing of the Complaint that included

claims against KMK for negligently drafting the French Village Purchase Agreement, but Mr. Zitesman advised "he did not feel comfortable opining about HUD property." (Ropchock Dep. p. 146, l. 25; p. 147, ll. 1-10.) Consequently, bereft of any research or consultation with HUD experts whom Ratonel made available to them, and contrary to their acknowledged duty to retain appropriate experts, R&A simply failed to analyze and support the claims they had already inserted in the Complaint of May 13, 2009. Had R&A honored their duty to execute any of these tasks, they would have confirmed that the simple omission of the conventional financing option from the French Village Purchase Agreement would, as a matter of federal law, cause Ratonel to lose nearly $1,000,000.00 in equity, and lose rents of up to "$111,540 on an annual basis" (over a 20-year period). We know this because the e-mails Ratonel provided R&A so stated, and these effects are clearly required by MAHRA and its implementing regulations.

To illustrate the simplicity of KMK's removal of the conventional financing option, we reproduce the offending modifications by KMK to the French Village Purchase Agreement, to wit:


8.4.6 Financing Contingency. Purchaser shall have obtained approval for the Loan Assumption ~~or, at Purchaser's option, Purchaser shall have obtained funded financing from~~ an institutional investor (such as a bank, pension fund, real estate investment trust, or insurance company), for a first mortgage loan (i) in an amount acceptable to Purchaser, (ii) at market interest rates, and (iii) upon such other terms and conditions as shall be typical for similar financing currently being offered by lenders and reasonably satisfactory to Purchaser. Purchaser shall determine during the Inspection Period whether Purchaser can secure such assumption or financing. Purchaser shall, on or before the expiration of the Inspection Period, by notice to Seller, either waive this financing condition or terminate this Agreement. In the event of any such termination, the Escrow Agent shall immediately refund the Deposit to Purchaser, this Agreement shall thereupon terminate, and neither party shall thereafter have any further rights or obligations hereunder other than those rights and/or obligations which are expressly stated to survive expiration or termination of this Agreement.

Dele
JR

(Ropchock Dep. pp. 116, 118; Ex. 6 and 7.)

In lieu of analyzing, researching, or talking to HUD experts, Messrs. Stary and Mustoe, and supporting the French Village allegations already made by him in his Complaint through an appropriate expert, Mr. Ropchock declared "he did not care" because he "knew" damages were "inherently speculative." (Ropchock Dep. pp. 154, 164; *But see* Ropchock Dep. pp. 120-132, Ex. 5.) (wherein Mr. Ropchock acknowledges his demand for "$1,200,000" for the French Village claims was based in part on the e-mails from Jim Stary and Ms. Lorna Ratonel, which confirmed rents would be reduced up to "$111,540***on an annual basis.")

By this time, roughly two months before trial, facing summary judgment on the issue, and without an appropriate expert, R&A sought and was granted leave to amend on July 28, 2010, then filed an Amended Complaint on August 4, 2010, five days before its summary judgment response was due.[3] R&A's Amended Complaint removed the claims for KMK's negligent drafting of the French Village Purchase Agreement, thereby permanently extinguishing those meritorious claims. As Mr. Ropchock stated in his memorandum contra[4] KMK's summary judgment motion, filed August 9, 2010:

> **2. Allegations Concerning French Village.**
>
> The allegations concerning French Village were not included in the Amended Complaint as revised, and thus are not part of this lawsuit. Thus, allegation two of Defendants' Motion is without basis and should be denied.

[3] *See* Case No. 2009 CV 03916, Decision, Order and Entry filed July 28, 2010; *Id.* at Stipulation filed July 30, 2010.

[4] Case No. 2009 CV 03916, Pls.' Mem. Contra KMK's Mot. for Summ. Judg., p. 18, ¶ "2".

In the face of these facts, synthesized to their essence pertinent to this appeal, Appellants have not, and cannot dispute that:

(1.) R&A represented Ratonel when, on April 22, 2009, R&A advised Ratonel that they would include claims against KMK for KMK's negligent preparation of the French Village Purchase Agreement. (Pls.' Reply in Support of MSJ, Aff. of Sam G. Caras, Esq., ¶ 16, Ex. 10.)

(2.) R&A represented Ratonel when, on May 13, 2009, R&A included claims in the Complaint against KMK for KMK's malpractice for failing to properly draft the French Village Purchase Agreement. (Compl., Case No. 2009 CV 03916; Ropchock Dep. p. 394, ll. 10-12.)

(a.) R&A confirmed by deposition, on April 18, 2013, they represented Ratonel against KMK for malpractice claims referable to the preparation of the French Village Purchase Agreement. (Ropchock Dep. p. 98, ll. 6-22; *Id*. at p. 49, ll. 4-10.)

(3.) R&A represented Ratonel on October 19, 2009, when R&A advised Ratonel that KMK's statements regarding reduced rents would be "very damning" to KMK when R&A addressed the "French Village issue" during the deposition of KMK attorney Gail Pryse. (Pls.' Reply in Supp. of MSJ, Aff. of Sam G. Caras, ¶ 19, Ex. 13, p. 2.)

(4.) R&A represented Ratonel on January 15, 2010, when R&A deposed KMK attorney Gail Pryse regarding the "issue" of reduced rents at French Village. (Gail Pryse Dep. pp. 187-188; Pls.' Mem. Contra Defs.' MSJ, pp. 13-14.)

(5.) R&A represented Ratonel on January 26, 2010, when R&A drafted a settlement demand letter for Ratonels' review, which asserted KMK's "clear" and "incomprehensible" malpractice in preparing the French Village Purchase Agreement had caused damages of "$1,200,000.00." (Pls.' Reply in Supp. of MSJ, Aff. of Sam G. Caras, ¶ 11, Ex. 5, pp. 4, 5, 9; Ropchock Dep. p. 119, ll. 18-25; p. 120, ll. 1-13, Ex. 8, pp. 4, 5, 9.)

(6.) R&A was negligent *per se* when, on April 30, 2010, R&A rendered erroneous legal advice, unsupported by fact or research, and opined that Ratonels' claims were not viable and that damages were "speculative." (Ropchock Dep., p. 132, Ex. 9.)

(a.) R&A was negligent *per se* as of April 30, 2010, when they had failed to identify or retain any expert support for Ratonels' claims that KMK had negligently prepared the French Village Purchase Agreement. (*Id*.; Pls.' MSJ; Pls.' Reply in Supp. of MSJ, Aff. of Philip Feldman, Esq.; KMK's MSJ of July 20, 2010, filed in Case No. 2009 CV 03916.)

(b.) R&A was aware of its malpractice on July 20, 2010, when KMK moved for summary judgment relative to the French Village claims, based on R&A's failures to secure appropriate expert testimony to support those claims. (*Id*.)

(c.) Consistent with the demand letter of January 26, 2010, and R&As' deposition testimony in this case, in April 2013, R&A admitted KMK's "clear" and "incomprehensible" malpractice in connection with KMK's negligent preparation of the French Village Purchase Agreement. (Pls.' MSJ, pp. 26-27; Ropchock Dep. p. 130, ll. 18-23.)

(7.) R&A represented Ratonel on June 10, 2010, when R&A moved to amend the Complaint to withdraw and thereby dismiss with prejudice the malpractice claims derived from KMK's negligent drafting of the French Village Purchase Agreement. (Mot. for Leave, filed in Case No. 2009 CV 03916 on June 10, 2010.)

(8.) R&A represented Ratonel on July 7, 2010, when Ratonel sent an e-mail to R&A about KMK's malpractice in relation to French Village, and asked R&A to "make sure" KMK was held to account for their malpractice. (Pls.' Reply in Supp. of MSJ, Aff. of Sam G. Caras, ¶ 13, Ex. 7, pp. 2-3.)

(9.) R&A represented Ratonel on August 4, 2010, when they amended the Complaint, omitted and thereby dismissed with prejudice the malpractice claims referable to the French Village Purchase Agreement. (Amend. Compl., filed Aug. 4, 2010 in Case No. 2009 CV 03916; Pls.' MSJ; Pls.' Reply in Supp. of MSJ, Aff. of Philip Feldman, Esq.)

(10.) Based on R&As' conduct, Ratonel had no reasonable recourse to preserve or pursue their claims against KMK for negligent preparation of the French Village Purchase Agreement after R&A dismissed the claims one month before trial. (Ropchock Dep., p. 49, ll. 4-10.)

(11.) R&As' representation of Ratonel was confirmed on April 19, 2013, when Mr. Ropchock testified that he represented Ratonel in the litigation against KMK, a litigation which included claims for French Village until August 4, 2010. (Ropchock Dep. p. 394, ll. 10-12.)

## ARGUMENT

### I. Long-settled Ohio law establishes that this case does not involve a final appealable order

"Section 2, Article IV of the Ohio Constitution" makes clear that the "jurisdiction of the Supreme Court over the Court of Appeals" extends only to "final" judgments or orders. *Humphrys v. Putnam*, 172 Ohio St. 456, 460-61, 178 N.E.2d 506, 510 (1961). Likewise, "R.C.

2505.03 limits the appellate jurisdiction of any court, including the Supreme Court, to the review of final orders, judgments, or decrees." *State ex rel. White v. Cuyahoga Metro Hous. Auth.*, 79 Ohio St.3d 543, 544, 684 N.E.2d 72 (1997); *See also State ex rel. Boddie v. Franklin Cty. 911 Admr.*, 135 Ohio St.3d 248, 2013-Ohio-401, 985 N.E.2d 1263, ¶¶ 1-3, and cases cited therein.

The denial of a motion for summary judgment which does not involve purely legal questions[5] is neither a final nor appealable order. *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 9, and cases cited therein; R.C. 2505.02; *See also Humphrys, supra*, at 461 ("[I]t is axiomatic under our system of jurisprudence that orders must be final before they are reviewable" at any level.); *State ex rel. Overmeyer v. Walinski*, 8 Ohio St.2d 23, 222 N.E.2d 312 (1966), citing *Priester v. State Foundry Co.*, 172 Ohio St. 28, 173 N.E.2d 136 (1961); ("An order denying a motion for summary judgment is not a final appealable order."); *State ex rel. Sawicki v. Court of Common Pleas Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, 905 N.E.2d 1192, ¶ 11 (refusing to consider denial of motion to intervene in procedendo action because appellate court's denial did not dispose of merits of malpractice case or prevent judgment); *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, 831 N.E.2d 433, ¶¶ 3-4; *Komorowski v. John P. Hildebrand Co., L.P.A.*, 2015-Ohio-1295, ¶ 21 (8th Dist. Cuyahoga) (citing R.C. 2505.03, court dismissed appeal because "[t]he denial of summary judgment is***not a final appealable order.")

[5] This Court accepted such a case involving a purely legal issue in *New Destiny Treatment Center, Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 32 (upholding well-settled principle that attorneys who never performed work for a corporation cannot be sued by the corporation for malpractice). Unlike *New Destiny*, the instant appeal is highly fact-specific and involves an established attorney-client relationship between Ratonel and R&A.

## II. If this Court determines that denial of a summary judgment motion is a final appealable order, a *de novo* review is required construing the evidence most strongly in Ratonels' favor

It is axiomatic that motions for summary judgment must be construed to recognize, as viable truth, genuine factual issues that favor the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 604 N.E.2d 138 (1992). Inasmuch as this appeal continues to pend notwithstanding the *Motion to Dismiss* filed June 5, 2015, Ratonel are compelled to observe this settled law to be applied to the indisputable facts they previously set forth. However, even without such an accommodation, this Court should remand this case to the trial court to grant summary judgment to Ratonel based on the undisputed facts.

## III. The undisputed facts of this case require this Court to reaffirm long-settled Ohio law that: An attorney-client relationship is established when a lawyer:

**(1) represents a client in court proceedings;**
**(2) advises a client; and/or**
**(3) acts on a client's behalf in connection with the law**

Compelled to completely ignore the undisputed facts, Appellants are also relegated to construct the need for, and language of a proposition of law which is inapposite to this case. The settled law cited above applies to this case, and needs no alteration. *New Destiny Treatment Center, Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 26, citing *Cuyahoga County Bar Ass'n v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596, 798 N.E.2d 369, ¶ 10 ("[T]he existence of an attorney-client relationship does not depend on an express contract but may be implied based on the conduct of the parties and the reasonable expectations of the putative client."); *McGuire v. Draper, Hollenbaugh & Briscoe Co., L.P.A.*, 4th Dist. Highland No. 01CA21, 2002-Ohio-6170, ¶ 41, quoting *Landis v. Hunt*, 80 Ohio App.3d 662, 669, 610 N.E.2d 554 (10th Dist. 1991) ("[A]n attorney-client relationship exists when 'an attorney advises others as to their legal rights, a method to be pursued, the forum to be selected,

and the practice to be followed for the enforcement of their rights."); *See also Hamrick v. Union Tp., Ohio*, 79 F.Supp.2d 871, 875, 1999 WL 1282501 (S.D. Ohio 1999), citing *Landis, supra*, at 669. ("An attorney-client relationship includes the representation of a client in court proceedings, advice to a client, and any action on a client's behalf that is connected with the law."); Restatement Third of Law Governing Lawyers, §14 (2000) (noting "[a] client-lawyer relationship results when legal services are provided even if the client also intends to receive other services.")

- **R&A in fact represented Ratonel in court proceedings in Montgomery County, Ohio, *by filing claims* for KMK's negligent drafting of the French Village Purchase Agreement**

In his e-mail to Ratonel on April 22, 2009, Mr. Ropchock confirmed he would include claims for KMK's negligent drafting of the French Village Purchase Agreement. During his deposition in this litigation, taken on April 17, 2013, Mr. Ropchock also left no doubt he included and pursued claims in the original Complaint against KMK.

Mr. Ropchock testified:

> Q. [Y]ou did include in the original complaint claims against KMK derived from the fact that the purchase agreement that was negotiated, ultimately negotiated and executed, had a provision for limited dividends which limited Lorna's access to any revenue derived from French Village, and you put claims in there, in your original complaint against KMK, for KMK's failure to properly advise, counsel, and handle that aspect of the transaction; is that right?
>
> MR. ROPCHOCK: Yes.

(Ropchock Dep. p. 98, ll. 13-22.)

In fact, KMK was compelled to file a motion for summary judgment because R&A had failed to support the French Village claims with expert testimony. (*Id*.; Pls.' MSJ; Pls.' Reply in Supp. of MSJ, Aff. of Philip Feldman, Esq.; KMK's MSJ of July 20, 2010, filed in Case No. 2009 CV 03916; *See also* Ropchock Dep. pp. 135-139; p. 140, ll. 5-25; p. 141, ll. 17-25; p. 144; ll. 10-19.) [6]

- **R&A in fact represented Ratonel in court proceedings in Montgomery County, Ohio, by *taking the deposition* of Gail Pryse, Esq., on the subject of KMK's drafting of the French Village Purchase Agreement**

On October 19, 2009, R&A confirmed KMK's statements regarding financing and HUD rents would be "very damning" to KMK attorney Pryse when the "issue" of reduced rents at French Village was raised at deposition. (Pls.' Reply in Supp. of MSJ, Aff. of Sam G. Caras, ¶ 19, Ex. 13, p. 2.) Then on January 15, 2010, R&A deposed KMK attorney Gail Pryse regarding the "issue" of reduced rents at French Village. (Gail Pryse Dep. pp. 187-188; Pls.' Mem. Contra Defs.' MSJ, pp. 13-14.) R&A's act of gathering evidence regarding the reduced rents at French Village, discussing that evidence with Ratonel, and then deposing Gail Pryse about that evidence unequivocally demonstrates that R&A pursued the French Village claims on Ratonels' behalf.

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[6] It is disingenuous for R&A to conflate the involvement of Hessel & Aluise, a Washington, D.C. law firm, to purport that R&A refused to pursue the French Village claims because of Hessel & Aluise's involvement. Hessel & Aluise never advised Ratonel regarding rental subsidies at French Village or anywhere else, and was not involved in the drafting of the French Village Purchase Agreement. This reality was confirmed by Mr. Ropchock, who testified:

> Q: In any event, **IT WAS NOT THE RESPONSIBILITY OF***HESSEL & ALUISE** to advise my client as to the rental aspect of this transaction, and that seems confirmed by the documents we just went through, doesn't it?
>
> MR. ROPCHOCK: Yes.

(Emphasis added.) (Ropchock Dep. p. 127, ll. 15-20.)

- **R&A represented Ratonel *by advising Ratonel respecting the merits* of the French Village claims**

Mr. Ropchock also testified he drafted a "confidential" demand letter on January 26, 2010. The French Village claims were featured prominently in that demand letter. Under the heading "KMK's Liability for French Village," Mr. Ropchock noted the "professional negligence claim against KMK concerning French Village is a different claim which flows from a separate act of negligence." (Emphasis added.) (Pls.' Reply in Supp. of MSJ, Ex. 5.) While he was mistaken about the source of the reduced rents (a federal statute, not any "HAP"contract), Mr. Ropchock accuratley explained in the demand letter that:

> My client was attempting to refinance French Village, in order to pull out some of what she believed to be her million dollar equity in that facility. During that review process, it was discovered that the HAP contract with the federal government, which, among other things, sets forth the rent payment amounts for French Village, stated that the rents for French Village would be reduced significantly, from above market rent levels to market rent levels. It is impossible for my client to renegotiate a higher above market rent with the government. She is simply going to be stuck with market rate rents. This then has effectively reduced the value of French Village by half, from approximately $2,100,000 to $1,100,000. Gail Pryse was responsible for and in fact billed for reviewing the HAP contract. In her deposition, she admitted that she was not even aware that the rents were set to decrease. Accordingly, she did not, nor could she have advised my client of the rent decrease. In a document she was retained to interpret for my client, she failed to advise my client of basic, material, provisions of that document. She likely failed to do so either due to neglect, or due to her admitted unfamiliarity with HUD transactions.

(Pls.' Reply in Supp. of MSJ, Ex. 5.)

- **R&A further acted on Ratonels' behalf in connection with the law, when they *negligently counseled Ratonel the French Village damages were "speculative"***

On April 30, 2010, R&A e-mailed and advised Ratonel that their claims were "not viable" because damages were "inherently speculative." (Ropchock Dep. p. 164.) The e-mail further stated:

> (i) KMK will defend they told you to get an expert to review the financial aspect of the deal, but you did not;
>
> (ii) You would need an attorney experienced in HUD transactions to opine KMK's service fell below the required standard of care in that they should have told you about this provision but did not. I don't think Jamie, our current expert for Holden House, can do this …. [and]
>
> (iii) You need a way of quantifying damages, as stated above, they must be certain, not speculative.

(Ropchock Dep. p. 132, ll. 24-25; p. 133, ll. 1-4, Ex. 9; Pl.'s MSJ, pp. 25-26.)

These bases for R&A's professional advice regarding the viability of French Village related claims against KMK were erroneous, and the gravamen of Ratonels' claims against R&A.

During deposition, R&A was asked to find any support for their assertion that Ratonel were required to secure a "financial expert" to review the French Village deal. (Ropchock Dep. pp. 135-139; p. 140, ll. 5-25; p. 141, ll. 17-25; p. 144; ll. 10-19.) However, R&A could not do so. (*Id*.) On the other hand, respecting the obligation to secure an expert, R&A acknowledged it was incumbent upon R&A, not Ratonel, to retain an expert. (Ropchock Dep. p. 148, ll. 24-25; p. 149, ll. 7-12.) So, while Mr. Ropchock/R&A acknowledged it was negligence for KMK to prepare the Purchase Agreement without understanding the related HUD regulations, R&A also acknowledged they did nothing to verify or prove that the omission of the conventional financing option would cause the damages disclosed by Mr. Stary. (Ropchock Dep. p. 125, l. 25; p. 126, ll. 1-13; p. 144, ll. 20-25; pp. 145-147; p. 148, ll. 1-23.)

KMK's removal of the conventional financing option is/was significant because a federal law known as "MAHRA" requires "above-market" Section 8 rents to be reduced to "comparable market levels" when properties are financed with federally-insured mortgages, a process known as "Mark-to-Market." *See* Pub. L. No. 105-65, Tit. V, § 511(a)(5), 111 Stat. 1386; § 512(1), 111

Stat. 1388; §514(e)(1), 111 Stat. 1393; § 514(g), 111 Stat. 1395, *et seq.* (collectively, "MAHRA").

If the Rent Comparability Study required by MAHRA demonstrates the reduced "market-rate" rents cannot service the assumed/primary mortgage, then the government imposes additional mortgages on the property. 24 C.F.R. §401.461(a)(1); 24 C.F.R. §401.461(a)(5)(c); *See also* Joey Ratonel Dep. pp. 128-132, Ex. O-1; Ropchock Dep. p. 105, Ex. 4. For property owners such as Ratonel, the result was the loss of their roughly $1,000,000.00 down payment, coupled with reduced rents and additional mortgage encumbrances exceeding another $1,000,000.00. (Joey Ratonel Dep. pp. 128-132, Ex. O-1.)

In short, while critical of KMK's "incomprehensible" failures to understand the significance of removing the conventional financing option from the Purchase Agreement, R&A failed to perform any related research, and failed/refused to consult with or retain any experts to support the malpractice claims against KMK referable to the French Village transaction. (Ropchock Dep. p. 111, ll. 7-24; p. 152, ll. 13-25; p. 153, ll. 1-18; p. 164, ll. 15-23; p. 165, ll. 1-5.) Thus, R&A remained unfamiliar with "Mark-to-Market," which is the very manifestation of damages imposed, as a matter of law, by the remarkably clear terms of MAHRA. (Ropchock Dep. p. 163, ll. 1-12; p. 165, ll. 3-5.)

Although Mr. Stary had expressly referred Ratonel, and thus R&A, to a "Rent Comparability Study" and the related HUD regulations, R&A failed to research and cite these resources which verified the damages as certain to occur as a matter of law. (Pls.' Reply in Supp. of MSJ, Aff. of Ms. Joey Ratonel, ¶¶ 11-13; Joey Ratonel Dep. pp. 128-132, wherein Joey Ratonel summarizes the damages caused by KMK's drafting blunder; *See also* Pls.' Mem. Contra Defs.' MSJ, Ex. 11, pp. 3, 43, copy of the Rent Comparability Study in which Mr.

Mustoe confirms "HUD***will use [his] estimate of market rents to determine: 1) [Ratonels'] options for renewing the project's Section 8 contracts; and 2) the maximum rents allowed," and 3) that his "analyses, opinions, and conclusions were developed***in conformity with***all applicable HUD procedures for performing Rent Comparability Studies for Section 8 contracts."); *See also* 24 C.F.R. §401.410.

Indeed, the October 30, 2009, e-mail from Mr. Stary to Ratonel, which was forwarded to R&A along with a copy of the comprehensive Rent Comparability Study, confirmed Ratonels' rents were set to decrease as much as "$111,540***on an annual basis" when the Mark-to-Market program commenced. (Pls.' Reply in Supp. of MSJ, Aff. of Sam G. Caras, ¶ 17, Ex. 11, p. 1.); (Ropchock Dep. p. 108, ll. 23-25; p. 109, ll. 1-21; p. 158, ll. 14-23.) If R&A had researched – or simply read – MAHRA, they would have found the law itself controverts their "assumption" that damages were "speculative." (Pls.' MSJ, p. 22, ¶ 1.) The MAHRA regulations, incorporated into the Rent Comparability Study disclosed by Messrs. Mustoe & Stary, not only verify lost rents as a result of the Mark-to-Market program, they also confirm the complete loss of nearly $1,000,000.00 of equity. (Ropchock Depo. p. 122, ll. 22-25; pp. 123-125.); (Joey Ratonel Dep. pp. 128-132.); (Pls.' Reply in Supp. of MSJ, Aff. of Joey Ratonel, ¶¶ 11-13; *Id*. at Aff. of Sam G. Caras, ¶ 13, Ex. 7, p. 2.)

So regardless of any assertions by R&A that their March 11, 2009, engagement letter cloaks them from liability, R&A in fact provided negligent legal advice to Ratonel that the pending French Village claims against KMK were "speculative" and "without merit." (Pls.' Reply in Supp. of MSJ, Aff. of Philip Feldman, Esq., ¶ 4(d)-(e); Ropchock Dep. pp. 132-133, Ex. 9.) This erroneous legal advice resulted from R&As' admitted failure to perform legal research or confer with appropriate experts. (Ropchock Dep., p. 111, ll. 7-24; p. 152, ll.13-25; p.

153, ll. 1-18; p. 164, ll. 15-23; p. 165, ll. 1-5.); *See also DePugh v. Sladoje*, 111 Ohio App.3d 675, 687, 676 N.E.2d 1231, 1239 (2d Dist.1996) (holding attorneys' unfounded "misperceptions" about viability of claims constituted malpractice *per se*.)

Rather than analyze, research, talk to HUD experts, Messrs. Stary and Mustoe, and support the French Village allegations already made in his Complaint through an appropriate expert, Mr. Ropchock declared "he did not care" because he "knew" damages were "inherently speculative." (Ropchock Dep. pp. 154, 164; *But see* Ropchock Dep. pp. 120-132, Ex. 5, wherein Mr. Ropchock confirms his demand for "$1,200,000" for the French Village claims was based in part on the e-mails from Jim Stary and Ms. Lorna Ratonel, which confirmed rents would be reduced up to "$111,540***on an annual basis.")

- **R&A further acted on Ratonels' behalf in connection with the law, when they *negligently extinguished French Village claims by filing an Amended Complaint which omitted those claims***

Even the trial court acknowledged that Ratonel were justified in believing that R&A represented them in connection with KMK's negligent drafting of the French Village Purchase Agreement, based on R&A's inclusion of the French Village claims therefor in the initial Complaint. (Decision, Order, and Entry of May 16, 2014, p. 13, filed in Case No. 2011 CV 07832.) R&A was thus required to recognize an attorney cannot "terminate" an attorney-client relationship unless that relationship "existed." *Collett v. Steigerwald*, 2d Dist. Montgomery No. 22028, 2007-Ohio-6261, ¶¶ 32, 35-36; *Toliver v. Duwel*, 2d Dist. Montgomery No. 24768, 2012-Ohio-846. In fact, R&A confirmed it never attempted to "terminate" or "withdraw" from the representation.

Quite to the contrary, Mr. Ropchock testified:

| | |
|---|---|
| 4 | BY MR. CARAS: |
| 5 | Q. At any time did you advise Lorna in writing, |
| 6 | including e-mails, or verbally, that you were inclined to |
| 7 | cease her representation, I don't want to the pursue it |
| 8 | anymore, it doesn't have merit, anything along those |
| 9 | lines? |
| 10 | A. Not up through trial. |

(Ropchock Dep. p. 49, ll. 4-10.)

So, before R&A could act to remove the French Village claims from the case against KMK, R&A was required to determine not only if the French Village claims had merit, but to also avoid any prejudice to Ratonel by removing them from the case. This principle derives from Ohio law and the Rules of Professional Conduct, which require that:

> A lawyer who seeks to terminate representation must provide the client with due notice, allow reasonable time for employment of other counsel, and take reasonable measures to avoid prejudicing the client's rights. Prof. Cond. R. 1.16(b)(7).
>
> A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. Prof. Cond. R. 1.16(d).
>
> A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of the client and the possibility of prejudice to the client as a result of the withdrawal. Even when the lawyer justifiably withdraws, a lawyer should protect the welfare of the client by giving due notice of the withdrawal, suggesting employment of other counsel, *** and otherwise endeavoring to minimize the possibility of harm." Prof. Cond. R. 1.16(d), Comment [8A].

Had R&A complied with these settled principles, they could/would have revisited their "assumption" regarding allegedly "speculative" damages, read MAHRA, and determined that damages flowed as a matter of law for KMK's "clear" and "incomprehensible" negligence in failing to understand the consequences of their decision to remove the option for conventional financing from the Purchase Agreement. Instead, on August 4, 2010, R&A unilaterally extinguished the pending and viable French Village claims by omitting those claims from the Amended Complaint filed against KMK.

## R&A's "Public Policy Propositions" are Predicated on Hypothetical Scenarios Wholly Unrelated to the Facts of this Case

## Conclusion

To conjure a public policy argument warranting this Court's attention, Appellants have authored a fictional account of the relationship between Ratonel and R&A. This tale is predicated primarily on one quote, from one deposition, about one document (which notably included claims for French Village) to assert all parties always knew R&A would not pursue French Village claims; or, if they did, the representation was properly "terminated." However, this fictional account cannot withstand the indisputable facts of record and applicable, settled Ohio law which holds that an attorney-client relationship is established when a lawyer represents a client in court proceedings, advises a client, and acts on a client's behalf in connection with the law. *Cuyahoga County Bar Ass'n v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596, 798 N.E.2d 369, ¶ 10; *McGuire v. Draper, Hollenbaugh & Briscoe Co., L.P.A.*, 4th Dist. Highland No. 01CA21, 2002-Ohio-6170, ¶ 41, quoting *Landis v. Hunt*, 80 Ohio App.3d 662, 669, 610 N.E.2d 554 (10th Dist. 1991); *Hamrick v. Union Tp., Ohio*, 79 F.Supp.2d 871, 875, 1999 WL 1282501 (S.D. Ohio 1999), citing *Landis, supra*, at 669.

Certainly R&A would like this Court to forget that: (1) they were aware the French Village claims would have to be vetted and included, if viable, in any case against KMK; (2) they in fact filed a lawsuit including the viable French Village claims; (3) pursued those claims during the deposition of KMK; (4) engaged in ongoing dialogue with Ratonel about the viability of the French Village claims; (5) received e-mails and other documentation supporting the French Village claims and the resulting damages; (6) used those e-mails and supporting documents to draft a proposed, confidential settlement including the French Village claims; (7) RENDERED PROFESSIONAL LEGAL ADVICE TO RATONEL BASED ON THE ASSUMPTION THAT DAMAGES WERE "SPECULATIVE"; and (8) PERMANENTLY EXTINGUISHED THE FRENCH VILLAGE CLAIMS BY REMOVING THEM FROM AN AMENDED COMPLAINT. Clearly, there is no need for a new legal standard to confirm R&A in fact negligently represented Ratonel respecting French Village claims. Quite simply, R&A's acts/conduct exemplify the standard that an attorney is liable for negligently prejudicing the rights of a client.

Moreover, R&A has not, and cannot excuse their negligence for failing to read applicable federal law they were specifically directed to (MAHRA), which would have confirmed damages were certain to occur as a result of KMK's drafting error of removing the option for conventional financing. Nor can R&A excuse their negligence for permanently extinguishing Ratonels' meritorious French Village claims. Therefore this case requires no new standard to remind R&A that reading and research of the subject matter, including applicable law, is seminal to the appropriate provision of professional legal services.

If this Court is inclined to render a decision in this case, despite the fact that the denial of a summary judgment to Ratonel presents no final appealable order, we submit the incontrovertible facts and settled law require remand for summary judgment in favor of Ratonel.

Respectfully submitted,

/s Sam G. Caras

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## CERTIFICATE OF SERVICE

I certify that a copy of this document was sent by electronic mail to David C. Greer, Esq., James H. Greer, Esq., and Curtis G. Moore, Esq., counsel for Appellants Roetzel & Andress, LPA and Mark A. Ropchock, Esq., 400 PNC Center, 6 N. Main Street, Dayton, OH 45402-1908, this 21st day of December, 2015.

/s Mitchell J. Anderson
Mitchell J. Anderson, Counsel for Appellees

# APPENDIX 1

section directly to the mortgagee of the dwelling unit purchased by the disabled family receiving such assistance payments.

''(f) INAPPLICABILITY OF CERTAIN PROVISIONS.—Assistance under this section shall not be subject to the requirements of the following provisions:

''(1) Subsection (c)(3)(B) of section 8 of the United States Housing Act of 1937 [42 U.S.C. 1437f(c)(3)(B)].

''(2) Subsection (d)(1)(B)(i) of section 8 of the United States Housing Act of 1937.

''(3) Any other provisions of section 8 of the United States Housing Act of 1937 governing maximum amounts payable to owners and amounts payable by assisted families.

''(4) Any other provisions of section 8 of the United States Housing Act of 1937 concerning contracts between public housing agencies and owners.

''(5) Any other provisions of the United States Housing Act of 1937 [42 U.S.C. 1437 et seq.] that are inconsistent with the provisions of this section.

''(g) REVERSION TO RENTAL STATUS.—

''(1) NON-FHA MORTGAGES.—If a disabled family receiving assistance under this section defaults under a mortgage not insured under the National Housing Act [12 U.S.C. 1701 et seq.], the disabled family may not continue to receive rental assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C. 1437f] unless it complies with requirements established by the Secretary.

''(2) ALL MORTGAGES.—A disabled family receiving assistance under this section that defaults under a mortgage may not receive assistance under this section for occupancy of another dwelling unit owned by one or more members of the disabled family.

''(3) EXCEPTION.—This subsection shall not apply if the Secretary determines that the disabled family receiving assistance under this section defaulted under a mortgage due to catastrophic medical reasons or due to the impact of a federally declared major disaster or emergency.

''(h) REGULATIONS.—Not later than 90 days after the date of the enactment of this Act [Dec. 27, 2000], the Secretary shall issue regulations to implement this section. Such regulations may not prohibit any public housing agency providing tenant-based assistance on behalf of an eligible family under section 8 of the United States Housing Act of 1937 [42 U.S.C. 1437f] from participating in the pilot program under this section.

''(i) DEFINITION OF DISABLED FAMILY.—For the purposes of this section, the term 'disabled family' has the meaning given the term 'person with disabilities' in section 811(k)(2) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013(k)(2)).''

DETERMINATION OF ADMINISTRATIVE FEES

Pub. L. 108–7, div. K, title II, [(5)], Feb. 20, 2003, 117 Stat. 485, which provided that the fee otherwise authorized under subsec. (q) of this section was to be determined in accordance with subsec. (q) as in effect immediately before Oct. 21, 1998, was from the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2003 and was not repeated in subsequent appropriation acts. Similar provisions were contained in the following prior appropriation acts:

Pub. L. 107–73, title II, Nov. 26, 2001, 115 Stat. 660.

Pub. L. 106–377, § 1(a)(1) [title II], Oct. 27, 2000, 114 Stat. 1441, 1441A–12.

Pub. L. 106–74, title II, Oct. 20, 1999, 113 Stat. 1056.

HOMEOWNERSHIP OPPORTUNITIES DEMONSTRATION PROGRAM

Pub. L. 105–276, title V, § 555(b), Oct. 21, 1998, 112 Stat. 2613, provided that:

''(1) IN GENERAL.—With the consent of the affected public housing agencies, the Secretary may carry out (or contract with 1 or more entities to carry out) a demonstration program under section 8(y) of the United States Housing Act of 1937 (42 U.S.C. 1437f(y)) to expand homeownership opportunities for low-income families.

''(2) REPORT.—The Secretary shall report annually to Congress on activities conducted under this subsection.''

MULTIFAMILY HOUSING ASSISTANCE

Subtitles A (§§ 511–524) and D (§§ 571–579) of title V of Pub. L. 105–65, as amended by Pub. L. 105–276, title V, §§ 549(c), 597(b), Oct. 21, 1998, 112 Stat. 2608, 2659; Pub. L. 106–74, title II, §§ 213(b), 219, title V, §§ 531(a)–(c), 534, 538(b), Oct. 20, 1999, 113 Stat. 1074, 1075, 1109–1116, 1120, 1123; Pub. L. 106–400, § 2, Oct. 30, 2000, 114 Stat. 1675; Pub. L. 107–116, title VI, §§ 611–614, 616(a)(1), (b), 621, 622(a), 623(a), 624, 625, Jan. 10, 2002, 115 Stat. 2222–2227; Pub. L. 109–289, div. B, title II, § 21043(a), as added by Pub. L. 110–5, § 2, Feb. 15, 2007, 121 Stat. 53, provided that:

''SUBTITLE A—FHA-INSURED MULTIFAMILY HOUSING MORTGAGE AND HOUSING ASSISTANCE RESTRUCTURING

''SEC. 511. FINDINGS AND PURPOSES.

''(a) FINDINGS.—Congress finds that—

''(1) there exists throughout the Nation a need for decent, safe, and affordable housing;

''(2) as of the date of enactment of this Act [Oct. 27, 1997], it is estimated that—

''(A) the insured multifamily housing portfolio of the Federal Housing Administration consists of 14,000 rental properties, with an aggregate unpaid principal mortgage balance of $38,000,000,000; and

''(B) approximately 10,000 of these properties contain housing units that are assisted with project-based rental assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C. 1437f];

''(3) FHA-insured multifamily rental properties are a major Federal investment, providing affordable rental housing to an estimated 2,000,000 low- and very low-income families;

''(4) approximately 1,600,000 of these families live in dwelling units that are assisted with project-based rental assistance under section 8 of the United States Housing Act of 1937;

''(5) a substantial number of housing units receiving project-based assistance have rents that are higher than the rents of comparable, unassisted rental units in the same housing rental market;

''(6) many of the contracts for project-based assistance will expire during the several years following the date of enactment of this Act;

''(7) it is estimated that—

''(A) if no changes in the terms and conditions of the contracts for project-based assistance are made before fiscal year 2000, the cost of renewing all expiring rental assistance contracts under section 8 of the United States Housing Act of 1937 for both project-based and tenant-based rental assistance will increase from approximately $3,600,000,000 in fiscal year 1997 to over $14,300,000,000 by fiscal year 2000 and some $22,400,000,000 in fiscal year 2006;

''(B) of those renewal amounts, the cost of renewing project-based assistance will increase from $1,200,000,000 in fiscal year 1997 to almost $7,400,000,000 by fiscal year 2006; and

''(C) without changes in the manner in which project-based rental assistance is provided, renewals of expiring contracts for project-based rental assistance will require an increasingly larger portion of the discretionary budget authority of the Department of Housing and Urban Development in each subsequent fiscal year for the foreseeable future;

''(8) absent new budget authority for the renewal of expiring rental contracts for project-based assistance, many of the FHA-insured multifamily housing projects that are assisted with project-based assistance are likely to default on their FHA-insured mortgage payments, resulting in substantial claims to the FHA General Insurance Fund and Special Risk Insurance Fund;

''(9) more than 15 percent of federally assisted multifamily housing projects are physically or financially distressed, including a number which suffer from mismanagement;

''(10) due to Federal budget constraints, the downsizing of the Department of Housing and Urban Development, and diminished administrative capacity, the Department lacks the ability to ensure the continued economic and physical well-being of the stock of federally insured and assisted multifamily housing projects;

''(11) the economic, physical, and management problems facing the stock of federally insured and assisted multifamily housing projects will be best served by reforms that—

''(A) reduce the cost of Federal rental assistance, including project-based assistance, to these projects by reducing the debt service and operating costs of these projects while retaining the low-income affordability and availability of this housing;

''(B) address physical and economic distress of this housing and the failure of some project managers and owners of projects to comply with management and ownership rules and requirements; and

''(C) transfer and share many of the loan and contract administration functions and responsibilities of the Secretary to and with capable State, local, and other entities; and

''(12) the authority and duties of the Secretary, not including the control by the Secretary of applicable accounts in the Treasury of the United States, may be delegated to State, local or other entities at the discretion of the Secretary, to the extent the Secretary determines, and for the purpose of carrying out this title [see Short Title of 1997 Amendment note set out under section 1701 of Title 12, Banks and Banking], so that the Secretary has the discretion to be relieved of processing and approving any document or action required by these reforms.

''(b) PURPOSES.—Consistent with the purposes and requirements of the Government Performance and Results Act of 1993 [Pub. L. 103–62, see Short Title of 1993 Amendment note set out under section 1101 of Title 31, Money and Finance], the purposes of this subtitle are—

''(1) to preserve low-income rental housing affordability and availability while reducing the long-term costs of project-based assistance;

''(2) to reform the design and operation of Federal rental housing assistance programs, administered by the Secretary, to promote greater multifamily housing project operating and cost efficiencies;

''(3) to encourage owners of eligible multifamily housing projects to restructure their FHA-insured mortgages and project-based assistance contracts in a manner that is consistent with this subtitle before the year in which the contract expires;

''(4) to reduce the cost of insurance claims under the National Housing Act [12 U.S.C. 1701 et seq.] related to mortgages insured by the Secretary and used to finance eligible multifamily housing projects;

''(5) to streamline and improve federally insured and assisted multifamily housing project oversight and administration;

''(6) to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects through cooperation with residents, owners, State and local governments, and other interested entities and individuals;

''(7) to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation through the section 8 rental housing assistance program;

''(8) to protect the interest of tenants residing in the multifamily housing projects at the time of the restructuring for the housing; and

''(9) to grant additional enforcement tools to use against those who violate agreements and program requirements, in order to ensure that the public interest is safeguarded and that Federal multifamily housing programs serve their intended purposes.

''SEC. 512. DEFINITIONS.

''In this subtitle:

''(1) COMPARABLE PROPERTIES.—The term 'comparable properties' means properties in the same market areas, where practicable, that—

''(A) are similar to the eligible multifamily housing project as to neighborhood (including risk of crime), type of location, access, street appeal, age, property size, apartment mix, physical configuration, property and unit amenities, utilities, and other relevant characteristics; and

''(B) are not receiving project-based assistance.

''(2) ELIGIBLE MULTIFAMILY HOUSING PROJECT.—The term 'eligible multifamily housing project' means a property consisting of more than 4 dwelling units—

''(A) with rents that, on an average per unit or per room basis, exceed the rent of comparable properties in the same market area, determined in accordance with guidelines established by the Secretary;

''(B) that is covered in whole or in part by a contract for project-based assistance under—

''(i) the new construction or substantial rehabilitation program under section 8(b)(2) of the United States Housing Act of 1937 [42 U.S.C. 1437f(b)(2)] (as in effect before October 1, 1983);

''(ii) the property disposition program under section 8(b) of the United States Housing Act of 1937;

''(iii) the moderate rehabilitation program under section 8(e)(2) of the United States Housing Act of 1937;

''(iv) the loan management assistance program under section 8 of the United States Housing Act of 1937;

''(v) section 23 of the United States Housing Act of 1937 [42 U.S.C. 1437u] (as in effect before January 1, 1975);

''(vi) the rent supplement program under section 101 of the Housing and Urban Development Act of 1965 [12 U.S.C. 1701s]; or

''(vii) section 8 of the United States Housing Act of 1937, following conversion from assistance under section 101 of the Housing and Urban Development Act of 1965; and

''(C) financed by a mortgage insured or held by the Secretary under the National Housing Act [12 U.S.C. 1701 et seq.].

Such term does not include any project with an expiring contract described in paragraph (1) or (2) of section 524(e), but does include a project described in section 524(e)(3). Notwithstanding any other provision of this title, the Secretary may treat a project as an eligible multifamily housing project for purposes of this title if (I) the project is assisted pursuant to a contract for project-based assistance under section 8 of the United States Housing Act of 1937 renewed under section 524 of this Act, (II) the owner consents to such treatment, and (III) the project met the requirements of the first sentence of this paragraph for eligibility as an eligible multifamily housing project before the initial renewal of the contract under section 524.

''(3) EXPIRING CONTRACT.—The term 'expiring contract' means a project-based assistance contract attached to an eligible multifamily housing project which, under the terms of the contract, will expire.

''(4) EXPIRATION DATE.—The term 'expiration date' means the date on which an expiring contract expires.

''(5) FAIR MARKET RENT.—The term 'fair market rent' means the fair market rental established under section 8(c) of the United States Housing Act of 1937.

''(6) LOW-INCOME FAMILIES.—The term 'low-income families' has the same meaning as provided under section 3(b)(2) of the United States Housing Act of 1937 [42 U.S.C. 1437a(b)(2)].

''(7) MORTGAGE RESTRUCTURING AND RENTAL ASSISTANCE SUFFICIENCY PLAN.—The term 'mortgage restructuring and rental assistance sufficiency plan' means the plan as provided under section 514.

''(8) NONPROFIT ORGANIZATION.—The term 'nonprofit organization' means any private nonprofit organization that—

''(A) is organized under State or local laws;

''(B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual; and

''(C) has a long-term record of service in providing or financing quality affordable housing for low-income families through relationships with public entities.

''(9) PORTFOLIO RESTRUCTURING AGREEMENT.—The term 'portfolio restructuring agreement' means the agreement entered into between the Secretary and a participating administrative entity, as provided under section 513.

''(10) PARTICIPATING ADMINISTRATIVE ENTITY.—The term 'participating administrative entity' means a public agency (including a State housing finance agency or a local housing agency), a nonprofit organization, or any other entity (including a law firm or an accounting firm) or a combination of such entities, that meets the requirements under section 513(b).

''(11) PROJECT-BASED ASSISTANCE.—The term 'project-based assistance' means rental assistance described in paragraph (2)(B) of this section that is attached to a multifamily housing project.

''(12) RENEWAL.—The term 'renewal' means the replacement of an expiring Federal rental contract with a new contract under section 8 of the United States Housing Act of 1937, consistent with the requirements of this subtitle.

''(13) SECRETARY.—The term 'Secretary' means the Secretary of Housing and Urban Development.

''(14) STATE.—The term 'State' has the same meaning as in section 104 of the Cranston-Gonzalez National Affordable Housing Act [42 U.S.C. 12704].

''(15) TENANT-BASED ASSISTANCE.—The term 'tenant-based assistance' has the same meaning as in section 8(f) of the United States Housing Act of 1937.

''(16) UNIT OF GENERAL LOCAL GOVERNMENT.—The term 'unit of general local government' has the same meaning as in section 104 of the Cranston-Gonzalez National Affordable Housing Act.

''(17) VERY LOW-INCOME FAMILY.—The term 'very low-income family' has the same meaning as in section 3(b) of the United States Housing Act of 1937 [42 U.S.C. 1437a(b)].

''(18) QUALIFIED MORTGAGEE.—The term 'qualified mortgagee' means an entity approved by the Secretary that is capable of servicing, as well as originating, FHA-insured mortgages, and that—

''(A) is not suspended or debarred by the Secretary;

''(B) is not suspended or on probation imposed by the Mortgagee Review Board; and

''(C) is not in default under any Government National Mortgage Association obligation.

''(19) OFFICE.—The term 'Office' means the Office of Multifamily Housing Assistance Restructuring established under section 571.

''SEC. 513. AUTHORITY OF PARTICIPATING ADMINISTRATIVE ENTITIES.

''(a) PARTICIPATING ADMINISTRATIVE ENTITIES.—

''(1) IN GENERAL.—Subject to subsection (b)(3), the Secretary shall enter into portfolio restructuring agreements with participating administrative entities for the implementation of mortgage restructuring and rental assistance sufficiency plans to restructure multifamily housing mortgages insured or held by the Secretary under the National Housing Act [12 U.S.C. 1701 et seq.], in order to—

''(A) reduce the costs of expiring contracts for assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C. 1437f];

''(B) address financially and physically troubled projects; and

''(C) correct management and ownership deficiencies.

''(2) PORTFOLIO RESTRUCTURING AGREEMENTS.—Each portfolio restructuring agreement entered into under this subsection shall—

''(A) be a cooperative agreement to establish the obligations and requirements between the Secretary and the participating administrative entity;

''(B) identify the eligible multifamily housing projects or groups of projects for which the participating administrative entity is responsible for assisting in developing and implementing approved mortgage restructuring and rental assistance sufficiency plans under section 514;

''(C) require the participating administrative entity to review and certify to the accuracy and completeness of the evaluation of rehabilitation needs required under section 514(e)(3) for each eligible multifamily housing project included in the portfolio restructuring agreement, in accordance with regulations promulgated by the Secretary;

''(D) identify the responsibilities of both the participating administrative entity and the Secretary in implementing a mortgage restructuring and rental assistance sufficiency plan, including any actions proposed to be taken under section 516 or 517;

''(E) require each mortgage restructuring and rental assistance sufficiency plan to be prepared in accordance with the requirements of section 514 for each eligible multifamily housing project;

''(F) include other requirements established by the Secretary, including a right of the Secretary to terminate the contract immediately for failure of the participating administrative entity to comply with any applicable requirement;

''(G) if the participating administrative entity is a State housing finance agency or a local housing agency, indemnify the participating administrative entity against lawsuits and penalties for actions taken pursuant to the agreement, excluding actions involving willful misconduct or negligence;

''(H) include compensation for all reasonable expenses incurred by the participating administrative entity necessary to perform its duties under this subtitle; and

''(I) include, where appropriate, incentive agreements with the participating administrative entity to reward superior performance in meeting the purposes of this title.

''(b) SELECTION OF PARTICIPATING ADMINISTRATIVE ENTITY.—

''(1) SELECTION CRITERIA.—The Secretary shall select a participating administrative entity based on whether, in the determination of the Secretary, the participating administrative entity—

''(A) has demonstrated experience in working directly with residents of low-income housing projects and with tenants and other community-based organizations;

''(B) has demonstrated experience with and capacity for multifamily restructuring and multifamily financing (which may include risk-sharing arrangements and restructuring eligible multifamily housing properties under the fiscal year 1997 Federal Housing Administration multifamily housing demonstration program);

''(C) has a history of stable, financially sound, and responsible administrative performance (which may include the management of affordable low-income rental housing);

''(D) has demonstrated financial strength in terms of asset quality, capital adequacy, and liquidity;

''(E) has demonstrated that it will carry out the specific transactions and other responsibilities under this subtitle in a timely, efficient, and cost-effective manner; and

''(F) meets other criteria, as determined by the Secretary.

''(2) SELECTION.—If more than 1 interested entity meets the qualifications and selection criteria for a participating administrative entity, the Secretary

may select the entity that demonstrates, as determined by the Secretary, that it will—

''(A) provide the most timely, efficient, and cost-effective—

''(i) restructuring of the mortgages covered by the portfolio restructuring agreement; and

''(ii) administration of the section 8 project-based assistance contract, if applicable; and

''(B) protect the public interest (including the long-term provision of decent low-income affordable rental housing and protection of residents, communities, and the American taxpayer).

''(3) PARTNERSHIPS.—For the purposes of any participating administrative entity applying under this subsection, participating administrative entities are encouraged to develop partnerships with each other and with nonprofit organizations, if such partnerships will further the participating administrative entity's ability to meet the purposes of this title.

''(4) ALTERNATIVE ADMINISTRATORS.—With respect to any eligible multifamily housing project for which a participating administrative entity is unavailable, or should not be selected to carry out the requirements of this subtitle with respect to that multifamily housing project for reasons relating to the selection criteria under paragraph (1), the Secretary shall—

''(A) carry out the requirements of this subtitle with respect to that eligible multifamily housing project; or

''(B) contract with other qualified entities that meet the requirements of paragraph (1) to provide the authority to carry out all or a portion of the requirements of this subtitle with respect to that eligible multifamily housing project.

''(5) PRIORITY FOR PUBLIC AGENCIES AS PARTICIPATING ADMINISTRATIVE ENTITIES.—The Secretary shall provide a reasonable period during which the Secretary will consider proposals only from State housing finance agencies or local housing agencies, and the Secretary shall select such an agency without considering other applicants if the Secretary determines that the agency is qualified. The period shall be of sufficient duration for the Secretary to determine whether any State housing finance agencies or local housing agencies are interested and qualified. Not later than the end of the period, the Secretary shall notify the State housing finance agency or the local housing agency regarding the status of the proposal and, if the proposal is rejected, the reasons for the rejection and an opportunity for the applicant to respond.

''(6) STATE AND LOCAL PORTFOLIO REQUIREMENTS.—

''(A) IN GENERAL.—If the housing finance agency of a State is selected as the participating administrative entity, that agency shall be responsible for such eligible multifamily housing projects in that State as may be agreed upon by the participating administrative entity and the Secretary. If a local housing agency is selected as the participating administrative entity, that agency shall be responsible for such eligible multifamily housing projects in the jurisdiction of the agency as may be agreed upon by the participating administrative entity and the Secretary.

''(B) NONDELEGATION.—Except with the prior approval of the Secretary, a participating administrative entity may not delegate or transfer responsibilities and functions under this subtitle to 1 or more entities.

''(7) PRIVATE ENTITY REQUIREMENTS.—

''(A) IN GENERAL.—If a for-profit entity is selected as the participating administrative entity, that entity shall be required to enter into a partnership with a public purpose entity (including the Department).

''(B) PROHIBITION.—No private entity shall share, participate in, or otherwise benefit from any equity created, received, or restructured as a result of the portfolio restructuring agreement.

''SEC. 514. MORTGAGE RESTRUCTURING AND RENTAL ASSISTANCE SUFFICIENCY PLAN.

''(a) IN GENERAL.—

''(1) DEVELOPMENT OF PROCEDURES AND REQUIREMENTS.—The Secretary shall develop procedures and requirements for the submission of a mortgage restructuring and rental assistance sufficiency plan for each eligible multifamily housing project with an expiring contract.

''(2) TERMS AND CONDITIONS.—Each mortgage restructuring and rental assistance sufficiency plan submitted under this subsection shall be developed by the participating administrative entity, in cooperation with an owner of an eligible multifamily housing project and any servicer for the mortgage that is a qualified mortgagee, under such terms and conditions as the Secretary shall require.

''(3) CONSOLIDATION.—Mortgage restructuring and rental assistance sufficiency plans submitted under this subsection may be consolidated as part of an overall strategy for more than 1 property.

''(b) NOTICE REQUIREMENTS.—The Secretary shall establish notice procedures and hearing requirements for tenants and owners concerning the dates for the expiration of project-based assistance contracts for any eligible multifamily housing project.

''(c) EXTENSION OF CONTRACT TERM.—Subject to agreement by a project owner, the Secretary may extend the term of any expiring contract or provide a section 8 contract with rent levels set in accordance with subsection (g) for a period sufficient to facilitate the implementation of a mortgage restructuring and rental assistance sufficiency plan, as determined by the Secretary.

''(d) TENANT RENT PROTECTION.—If the owner of a project with an expiring Federal rental assistance contract does not agree to extend the contract, not less than 12 months prior to terminating the contract, the project owner shall provide written notice to the Secretary and the tenants and the Secretary shall make tenant-based assistance available to tenants residing in units assisted under the expiring contract at the time of expiration. In addition, if after giving the notice required in the first sentence, an owner determines to terminate a contract, an owner shall provide an additional written notice with respect to the termination, in a form prescribed by the Secretary, not less than 120 days prior to the termination. In the event the owner does not provide the 120-day notice required in the preceding sentence, the owner may not evict the tenants or increase the tenants' rent payment until such time as the owner has provided the 120-day notice and such period has elapsed. The Secretary may allow the owner to renew the terminating contract for a period of time sufficient to give tenants 120 days of advance notice in accordance with section 524 of this Act.

''(e) MORTGAGE RESTRUCTURING AND RENTAL ASSISTANCE SUFFICIENCY PLAN.—Each mortgage restructuring and rental assistance sufficiency plan shall—

''(1) except as otherwise provided, restructure the project-based assistance rents for the eligible multifamily housing project in a manner consistent with subsection (g), or provide for tenant-based assistance in accordance with section 515;

''(2) allow for rent adjustments by applying an operating cost adjustment factor established under guidelines established by the Secretary;

''(3) require the owner or purchaser of an eligible multifamily housing project to evaluate the rehabilitation needs of the project, in accordance with regulations of the Secretary, and notify the participating administrative entity of the rehabilitation needs;

''(4) require the owner or purchaser of the project to provide or contract for competent management of the project;

''(5) require the owner or purchaser of the project to take such actions as may be necessary to rehabilitate, maintain adequate reserves, and to maintain the project in decent and safe condition, based on housing quality standards established by—

''(A) the Secretary; or

''(B) local housing codes or codes adopted by public housing agencies that—

''(i) meet or exceed housing quality standards established by the Secretary; and

''(ii) do not severely restrict housing choice;

''(6) require the owner or purchaser of the project to maintain affordability and use restrictions in accordance with regulations promulgated by the Secretary, for a term of not less than 30 years which restrictions shall be—

''(A) contained in a legally enforceable document recorded in the appropriate records; and

''(B) consistent with the long-term physical and financial viability and character of the project as affordable housing;

''(7) include a certification by the participating administrative entity that the restructuring meets subsidy layering requirements established by the Secretary by regulation for purposes of this subtitle;

''(8) require the owner or purchaser of the project to meet such other requirements as the Secretary determines to be appropriate; and

''(9) prohibit the owner from refusing to lease a reasonable number of units to holders of certificates and vouchers under section 8 of the United States Housing Act of 1937 [42 U.S.C. 1437f] because of the status of the prospective tenants as certificate and voucher holders.

''(f) TENANT AND OTHER PARTICIPATION AND CAPACITY BUILDING.—

''(1) PROCEDURES.—

''(A) IN GENERAL.—The Secretary shall establish procedures to provide an opportunity for tenants of the project, residents of the neighborhood, the local government, and other affected parties to participate effectively and on a timely basis in the restructuring process established by this subtitle.

''(B) COVERAGE.—These procedures shall take into account the need to provide tenants of the project, residents of the neighborhood, the local government, and other affected parties timely notice of proposed restructuring actions and appropriate access to relevant information about restructuring activities. To the extent practicable and consistent with the need to accomplish project restructuring in an efficient manner, the procedures shall give all such parties an opportunity to provide comments to the participating administrative entity in writing, in meetings, or in another appropriate manner (which comments shall be taken into consideration by the participating administrative entity).

''(2) REQUIRED CONSULTATION.—The procedures developed pursuant to paragraph (1) shall require consultation with tenants of the project, residents of the neighborhood, the local government, and other affected parties, in connection with at least the following:

''(A) the mortgage restructuring and rental assistance sufficiency plan;

''(B) any proposed transfer of the project; and

''(C) the rental assistance assessment plan pursuant to section 515(c).

''(3) FUNDING.—

''(A) IN GENERAL.—The Secretary shall make available not more than $10,000,000 annually in funding, which amount shall be in addition to any amounts made available under this subparagraph and carried over from previous years, from which the Secretary may make obligations to tenant groups, nonprofit organizations, and public entities for building the capacity of tenant organizations, for technical assistance in furthering any of the purposes of this subtitle (including transfer of developments to new owners), for technical assistance for preservation of low-income housing for which project-based rental assistance is provided at below market rent levels and may not be renewed (including transfer of developments to tenant groups, nonprofit organizations, and public entities), for tenant services, and for tenant groups, nonprofit organizations, and public entities described in section 517(a)(5), from those amounts made available under appropriations Acts for implementing this subtitle or previously made available for technical assistance in connection with the preservation of affordable rental housing for low-income persons.

''(B) MANNER OF PROVIDING.—Notwithstanding any other provision of law restricting the use of preservation technical assistance funds, the Secretary may provide any funds made available under subparagraph (A) through existing technical assistance programs pursuant to any other Federal law, including the Low-Income Housing Preservation and Resident Homeownership Act of 1990 [12 U.S.C. 4101 et seq.] and the Multifamily Housing Property Disposition Reform Act of 1994 [Pub. L. 103–233, see Short Title of 1994 Amendment note set out under section 1701 of Title 12, Banks and Banking], or through any other means that the Secretary considers consistent with the purposes of this subtitle, without regard to any set-aside requirement otherwise applicable to those funds.

''(C) PROHIBITION.—None of the funds made available under subparagraph (A) may be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation.

''(g) RENT LEVELS.—

''(1) IN GENERAL.—Except as provided in paragraph (2), each mortgage restructuring and rental assistance sufficiency plan pursuant to the terms, conditions, and requirements of this subtitle shall establish for units assisted with project-based assistance in eligible multifamily housing projects adjusted rent levels that—

''(A) are equivalent to rents derived from comparable properties, if—

''(i) the participating administrative entity makes the rent determination within a reasonable period of time; and

''(ii) the market rent determination is based on not less than 2 comparable properties; or

''(B) if those rents cannot be determined, are equal to 90 percent of the fair market rents for the relevant market area.

''(2) EXCEPTIONS.—

''(A) IN GENERAL.—A contract under this section may include rent levels that exceed the rent level described in paragraph (1) at rent levels that do not exceed 120 percent of the fair market rent for the market area (except that the Secretary may waive this limit for not more than five percent of all units subject to portfolio restructuring agreements, based on a finding of special need), if the participating administrative entity—

''(i) determines that the housing needs of the tenants and the community cannot be adequately addressed through implementation of the rent limitation required to be established through a mortgage restructuring and rental assistance sufficiency plan under paragraph (1); and

''(ii) follows the procedures under paragraph (3).

''(B) EXCEPTION RENTS.—In any fiscal year, a participating administrative entity may approve exception rents on not more than 20 percent of all units covered by the portfolio restructuring agreement with expiring contracts in that fiscal year, except that the Secretary may waive this ceiling upon a finding of special need.

''(3) RENT LEVELS FOR EXCEPTION PROJECTS.—For purposes of this section, a project eligible for an exception rent shall receive a rent calculated on the actual and projected costs of operating the project, at

a level that provides income sufficient to support a budget-based rent that consists of—

''(A) the debt service of the project;

''(B) the operating expenses of the project, as determined by the participating administrative entity, including—

''(i) contributions to adequate reserves;

''(ii) the costs of maintenance and necessary rehabilitation; and

''(iii) other eligible costs permitted under section 8 of the United States Housing Act of 1937;

''(C) an adequate allowance for potential operating losses due to vacancies and failure to collect rents, as determined by the participating administrative entity;

''(D) an allowance for a reasonable rate of return to the owner or purchaser of the project, as determined by the participating administrative entity, which may be established to provide incentives for owners or purchasers to meet benchmarks of quality for management and housing quality; and

''(E) other expenses determined by the participating administrative entity to be necessary for the operation of the project.

''(h) EXEMPTIONS FROM RESTRUCTURING.—The following categories of projects shall not be covered by a mortgage restructuring and rental assistance sufficiency plan if—

''(1) the primary financing or mortgage insurance for the multifamily housing project that is covered by that expiring contract was provided by a unit of State government or a unit of general local government (or an agency or instrumentality of a unit of a State government or unit of general local government) and the financing involves mortgage insurance under the National Housing Act [42 U.S.C. 1701 et seq.], such that the implementation of a mortgage restructuring and rental assistance sufficiency plan under this subtitle is in conflict with applicable law or agreements governing such financing;

''(2) the project is a project financed under section 202 of the Housing Act of 1959 [12 U.S.C. 1701q] or section 515 of the Housing Act of 1949 [42 U.S.C. 1485], or refinanced pursuant to section 811 of the American Homeownership and Economic Opportunity Act of 2000 (12 U.S.C. 1701q note); or

''(3) the project has an expiring contract under section 8 of the United States Housing Act of 1937 entered into pursuant to section 441 of the McKinney-Vento Homeless Assistance Act [42 U.S.C. 11401].

''SEC. 515. SECTION 8 RENEWALS AND LONG-TERM AFFORDABILITY COMMITMENT BY OWNER OF PROJECT.

''(a) SECTION 8 RENEWALS OF RESTRUCTURED PROJECTS.—

''(1) PROJECT-BASED ASSISTANCE.—Subject to the availability of amounts provided in advance in appropriations Acts, and to the control of the Secretary of applicable accounts in the Treasury of the United States, with respect to an expiring section 8 contract on an eligible multifamily housing project to be renewed with project-based assistance (based on a determination under subsection (c)), the Secretary shall enter into contracts with participating administrative entities pursuant to which the participating administrative entity shall offer to renew or extend the contract, or the Secretary shall offer to renew such contract, and the owner of the project shall accept the offer, if the initial renewal is in accordance with the terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan and the rental assistance assessment plan.

''(2) TENANT-BASED ASSISTANCE.—Subject to the availability of amounts provided in advance in appropriations Acts and to the control of the Secretary of applicable accounts in the Treasury of the United States, with respect to an expiring section 8 contract on an eligible multifamily housing project to be renewed with tenant-based assistance (based on a determination under subsection (c)), the Secretary shall enter into contracts with participating administrative entities pursuant to which the participating administrative entity shall provide for the renewal of section 8 assistance on an eligible multifamily housing project with tenant-based assistance, or the Secretary shall provide for such renewal, in accordance with the terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan and the rental assistance assessment plan.

''(b) REQUIRED COMMITMENT.—After the initial renewal of a section 8 contract pursuant to this section, the owner shall accept each offer made pursuant to subsection (a) to renew the contract, for the term of the affordability and use restrictions required by section 514(e)(6), if the offer to renew is on terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan.

''(c) DETERMINATION OF WHETHER TO RENEW WITH PROJECT-BASED OR TENANT-BASED ASSISTANCE.—

''(1) MANDATORY RENEWAL OF PROJECT-BASED ASSISTANCE.—Section 8 assistance shall be renewed with project-based assistance, if—

''(A) the project is located in an area in which the participating administrative entity determines, based on housing market indicators, such as low vacancy rates or high absorption rates, that there is not adequate available and affordable housing or that the tenants of the project would not be able to locate suitable units or use the tenant-based assistance successfully;

''(B) a predominant number of the units in the project are occupied by elderly families, disabled families, or elderly and disabled families; or

''(C) the project is held by a nonprofit cooperative ownership housing corporation or nonprofit cooperative housing trust.

''(2) RENTAL ASSISTANCE ASSESSMENT PLAN.—

''(A) IN GENERAL.—With respect to any project that is not described in paragraph (1), the participating administrative entity shall, after consultation with the owner of the project, develop a rental assistance assessment plan to determine whether to renew assistance for the project with tenant-based assistance or project-based assistance.

''(B) RENTAL ASSISTANCE ASSESSMENT PLAN REQUIREMENTS.—Each rental assistance assessment plan developed under this paragraph shall include an assessment of the impact of converting to tenant-based assistance and the impact of extending project-based assistance on—

''(i) the ability of the tenants to find adequate, available, decent, comparable, and affordable housing in the local market;

''(ii) the types of tenants residing in the project (such as elderly families, disabled families, large families, and cooperative homeowners);

''(iii) the local housing needs identified in the comprehensive housing affordability strategy, and local market vacancy trends;

''(iv) the cost of providing assistance, comparing the applicable payment standard to the project's adjusted rent levels determined under section 514(g);

''(v) the long-term financial stability of the project;

''(vi) the ability of residents to make reasonable choices about their individual living situations;

''(vii) the quality of the neighborhood in which the tenants would reside; and

''(viii) the project's ability to compete in the marketplace.

''(C) REPORTS TO DIRECTOR.—Each participating administrative entity shall report regularly to the Director as defined in subtitle D, as the Director shall require, identifying—

''(i) each eligible multifamily housing project for which the entity has developed a rental assistance assessment plan under this paragraph that determined that the tenants of the project gener-

ally supported renewal of assistance with tenant-based assistance, but under which assistance for the project was renewed with project-based assistance; and

''(ii) each project for which the entity has developed such a plan under which the assistance is renewed using tenant-based assistance.

''(3) ELIGIBILITY FOR TENANT-BASED ASSISTANCE.—Subject to paragraph (4), with respect to any project that is not described in paragraph (1), if a participating administrative entity approves the use of tenant-based assistance based on a rental assistance assessment plan developed under paragraph (2), tenant-based assistance shall be provided to each assisted family (other than a family already receiving tenant-based assistance) residing in the project at the time the assistance described in section 512(2)(B) terminates.

''(4) ASSISTANCE THROUGH ENHANCED VOUCHERS.—In the case of any family described in paragraph (3) that resides in a project described in section 512(2)(B), the tenant-based assistance provided shall be enhanced voucher assistance under section 8(t) of the United States Housing Act of 1937 (42 U.S.C. 1437f(t)).

''(5) INAPPLICABILITY OF CERTAIN PROVISION.—If a participating administrative entity approves renewal with project-based assistance under this subsection, section 8(d)(2) of the United States Housing Act of 1937 shall not apply.

''SEC. 516. PROHIBITION ON RESTRUCTURING.

''(a) PROHIBITION ON RESTRUCTURING.—The Secretary may elect not to consider any mortgage restructuring and rental assistance sufficiency plan or request for contract renewal if the Secretary or the participating administrative entity determines that—

''(1)(A) the owner or purchaser of the project has engaged in material adverse financial or managerial actions or omissions with regard to such project; or

''(B) the owner or purchaser of the project has engaged in material adverse financial or managerial actions or omissions with regard to other projects of such owner or purchaser that are federally assisted or financed with a loan from, or mortgage insured or guaranteed by, an agency of the Federal Government;

''(2) material adverse financial or managerial actions or omissions include—

''(A) materially violating any Federal, State, or local law or regulation with regard to this project or any other federally assisted project, after receipt of notice and an opportunity to cure;

''(B) materially breaching a contract for assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C. 1437f], after receipt of notice and an opportunity to cure;

''(C) materially violating any applicable regulatory or other agreement with the Secretary or a participating administrative entity, after receipt of notice and an opportunity to cure;

''(D) repeatedly and materially violating any Federal, State, or local law or regulation with regard to the project or any other federally assisted project;

''(E) repeatedly and materially breaching a contract for assistance under section 8 of the United States Housing Act of 1937;

''(F) repeatedly and materially violating any applicable regulatory or other agreement with the Secretary or a participating administrative entity;

''(G) repeatedly failing to make mortgage payments at times when project income was sufficient to maintain and operate the property;

''(H) materially failing to maintain the property according to housing quality standards after receipt of notice and a reasonable opportunity to cure; or

''(I) committing any actions or omissions that would warrant suspension or debarment by the Secretary;

''(3) the owner or purchaser of the property materially failed to follow the procedures and requirements of this subtitle, after receipt of notice and an opportunity to cure; or

''(4) the poor condition of the project cannot be remedied in a cost effective manner, as determined by the participating administrative entity.

The term 'owner' as used in this subsection, in addition to it having the same meaning as in section 8(f) of the United States Housing Act of 1937, also means an affiliate of the owner. The term 'purchaser' as used in this subsection means any private person or entity, including a cooperative, an agency of the Federal Government, or a public housing agency, that, upon purchase of the project, would have the legal right to lease or sublease dwelling units in the project, and also means an affiliate of the purchaser. The terms 'affiliate of the owner' and 'affiliate of the purchaser' means any person or entity (including, but not limited to, a general partner or managing member, or an officer of either) that controls an owner or purchaser, is controlled by an owner or purchaser, or is under common control with the owner or purchaser. The term 'control' means the direct or indirect power (under contract, equity ownership, the right to vote or determine a vote, or otherwise) to direct the financial, legal, beneficial or other interests of the owner or purchaser.

''(b) OPPORTUNITY TO DISPUTE FINDINGS.—

''(1) IN GENERAL.—During the 30-day period beginning on the date on which the owner or purchaser of an eligible multifamily housing project receives notice of a rejection under subsection (a) or of a mortgage restructuring and rental assistance sufficiency plan under section 514, the Secretary or participating administrative entity shall provide that owner or purchaser with an opportunity to dispute the basis for the rejection and an opportunity to cure.

''(2) AFFIRMATION, MODIFICATION, OR REVERSAL.—

''(A) IN GENERAL.—After providing an opportunity to dispute under paragraph (1), the Secretary or the participating administrative entity may affirm, modify, or reverse any rejection under subsection (a) or rejection of a mortgage restructuring and rental assistance sufficiency plan under section 514.

''(B) REASONS FOR DECISION.—The Secretary or the participating administrative entity, as applicable, shall identify the reasons for any final decision under this paragraph.

''(C) REVIEW PROCESS.—The Secretary shall establish an administrative review process to appeal any final decision under this paragraph.

''(c) FINAL DETERMINATION.—Any final determination under this section shall not be subject to judicial review.

''(d) DISPLACED TENANTS.—

''(1) NOTICE TO CERTAIN RESIDENTS.—The Office shall notify any tenant that is residing in a project or receiving assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) at the time of rejection under this section, of such rejection, except that the Office may delegate the responsibility to provide notice under this paragraph to the participating administrative entity.

''(2) ASSISTANCE AND MOVING EXPENSES.—Subject to the availability of amounts provided in advance in appropriations Acts, for any low-income tenant that is residing in a project or receiving assistance under section 8 of the United States Housing Act of 1937 at the time of rejection under this section, that tenant shall be provided with tenant-based assistance and reasonable moving expenses, as determined by the Secretary.

''(e) TRANSFER OF PROPERTY.—For properties disqualified from the consideration of a mortgage restructuring and rental assistance sufficiency plan under this section in accordance with paragraph (1) or (2) of subsection (a) because of actions by an owner or purchaser, the Secretary shall establish procedures to facilitate the voluntary sale or transfer of a property as part of a mortgage restructuring and rental assistance sufficiency plan, with a preference for tenant organizations and tenant-endorsed community-based nonprofit and

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owner. These reports must comply with the Real Estate Assessment Center protocol or subsequent standards required by HUD.

(i) *Enforcement and amendment.* The Use Agreement will be enforceable by interested parties to be specified in the Agreement, which will include HUD, the PAE, project tenants, organizations representing project tenants, and the unit of local government. The Use Agreement must require the party bringing enforcement action to give the owner notice and a reasonable opportunity to cure any violations.

(j) *Modifications.* HUD will retain the right to approve modifications of the Use Agreement agreed to by the owner without the consent of any other party, including those having the right of enforcement. The owner must post prominently on project property notice of any modifications approved by HUD.

(k) *Owner obligation to accept project-based assistance.* Subject to the availability of appropriated funds, the owner of the project must accept any offer of renewal of project-based assistance if the offer is in accordance with the terms and conditions specified in the Restructuring Plan.

[65 FR 15485, Mar. 22, 2000, as amended at 65 FR 53900, Sept. 6, 2000]

### §401.410 Standards for determining comparable market rents.

(a) *When are comparable market rents required?* The Restructuring Plan must establish restructured rents for project-based assistance at comparable market rents unless the PAE finds that exception rents are necessary under §401.411.

(b) *Comparable market rents defined.* Comparable market rents are the rents charged for properties that the PAE determines to be comparable properties (as defined in section 512(1) of MAHRA, but also excluding section 202 or section 811 projects assisted under part 891 of this title). For purposes of section 512(1), other relevant characteristics include any applicable rent control and other characteristics determined by the PAE. The PAE may make appropriate adjustments when needed to ensure comparability of properties.

(c) *Methodology for determining comparable market rents.* If the PAE is unable to identify at least three comparable properties within the local market, the PAE may:

(1) Use non-comparable housing stock within that market from which adjustments can be made; or

(2) If necessary to go outside the market, use comparable properties as far outside the local market as it finds reasonable, from which adjustments can be made.

(d) *Using FMR as last resort.* If the PAE is unable to identify enough properties under paragraph (c) of this section, comparable market rents must be set at 90 percent of the Fair Market Rents for the relevant market area.

### §401.411 Guidelines for determining exception rents.

(a) *When do exception rents apply?* (1) The Restructuring Plan may provide for exception rents established under section 514(g)(2) of MAHRA for project-based assistance if the PAE determines that project income under the rent levels established under §401.410 would be inadequate to meet the costs of operating the project as described in paragraph (b) of this section and that the housing needs of the tenants and the community could not be adequately addressed.

(2) In any fiscal year, the PAE may not request HUD to approve Restructuring Plans with exception rents for more than 20 percent of all units covered by the PRA, except that HUD may approve a waiver of this 20 percent limitation based on the PAE's narrative explanation of special need.

(b) *How are exception rents calculated?* (1) Exception rents must be set at a level sufficient to support the costs of operating the project. The PAE must take into account the following cost items:

(i) Debt service on the second mortgage under §401.461(a) or a rehabilitation loan included in the Restructuring Plan;

(ii) The operating expenses of the project, as determined by the PAE, including:

(A) Contributions to adequate reserves for replacement;

(B) The costs of maintenance and necessary rehabilitation;

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(iii) *Credit enhancement from non-FHA sources.* If credit enhancement is to be provided by a non-FHA source under section 517(b)(4) of MAHRA, HUD will consider waiver of any non-statutory provision in this part only if the waiver will not materially impair achievement of the purposes of MAHRA and if the waiver is essential to meet the legitimate business or legal requirements of the provider of credit enhancement.

**§401.461 HUD-held second mortgage.**

(a) *Amount.* (1) The Restructuring Plan must provide for a second mortgage to HUD whenever the Plan provides for either payment of a claim under section 541(b) of the National Housing Act (541(b) claim) or the modification or refinancing of a HUD-held first mortgage that results in a first mortgage with a lower principal amount. The term "second mortgage" in this section also includes a new HUD-held first mortgage (not a refinancing mortgage), if a full payment of claim is made under §401.471 or if a full payment of claim is unnecessary because surplus project accounts are available to facilitate the Restructuring Plan, pursuant to section 517(b)(6) of MAHRA, or if §401.460(a) does not permit a restructured first mortgage in any amount.

(2) The second mortgage must be in a principal amount that does not exceed the lesser of:

(i) The amount the PAE reasonably expects to be repaid based on objective criteria such as the amount of anticipated net cash flow, trending assumptions, amortization provisions, and expected residual value of the property; and

(ii) The greater of:

(A) The section 541(b) claim (or the difference between the unpaid principal balance on HUD-held mortgage debt immediately before and after the restructuring), plus surplus project accounts from residual receipts accumulated pursuant to 24 CFR 880.205(e), 881.205(e), or 883.306(e) and derived from an expiring Section 8 Housing Assistance Payments contract and not otherwise distributed to the owner and made available to facilitate the Restructuring Plan pursuant to section 517(b)(6) of MAHRA, and

(B) The difference between the unpaid balance on the first mortgage immediately before and after the restructuring.

(b) *Terms and conditions.* (1) The second mortgage must have an interest rate of at least one percent, but not more than the applicable Federal rate.

(2) The second mortgage must have a term concurrent with the modified or refinanced first mortgage, if any. HUD may provide that if there is no first mortgage, the second mortgage may continue for a term established by HUD.

(3)(i) Principal and interest on the second mortgage is payable only out of net cash flow during its term. "Net cash flow" means that portion of project income that remains after the payment of all required debt service payments on the modified or refinanced first mortgage, if any, including payment of any past due principal or interest, and payment of all reasonable and necessary operating expenses (including deposits to the reserve for replacement account) and any other expenditure approved by HUD.

(ii) The priority and distribution of net cash flow is as follows:

(A) HUD or the PAE may approve the payment to the owner of up to 25 percent of net cash flow based on consideration of relevant conditions and circumstances including, but not limited to, compliance with the management standards prescribed in §401.560 and the physical condition standards prescribed in §401.558; and

(B) All remaining net cash flow will be applied to the principal and interest on the second mortgage, until paid in full, and then to any additional subordinate mortgage under §401.461(c).

(4) HUD may cause the second mortgage to be immediately due and payable on the grounds provided in section 517(a)(4) of MAHRA, including an assumption of the mortgage in violation of HUD standards for approval of transfers of physical assets (if applicable), or if the owner materially fails to comply with other material HUD requirements after a reasonable opportunity for the owner to cure such failure. A decision by HUD in this regard is subject to the

administrative appeals procedure in subpart F of this part, unless HUD acts on the basis of the grounds specified in sections 517(a)(4)(A) or (B) of MAHRA.

(5) HUD will consider modification, assignment to the acquiring entity, or forgiveness of all or part of the second mortgage, if: The Secretary holds the second mortgage; and if the project has been sold or transferred to a tenant organization or tenant-endorsed community-based nonprofit or public agency that meets eligibility guidelines determined by HUD; accepts additional affordability requirements acceptable to HUD; and requests such modification, assignment, or forgiveness. A community-based nonprofit group or public agency demonstrates that it is tenant-endorsed in accordance with § 401.480(e).

(c) *Additional mortgage to HUD.* (1) A Restructuring Plan shall require the owner to give an additional mortgage on the project to HUD in an amount that:

(i) For the restructuring of a mortgage insured by HUD, does not exceed the difference between:

(A) The amount of a section 541(b) claim paid under § 401.471 increased by any residual receipts, pursuant to 24 CFR 880.205(e), 881.205(e), or 883.306(e); and

(B) The principal amount of the second mortgage; or

(ii) For the restructuring of a mortgage held by HUD, does not exceed the difference between:

(A) The principal amount of a restructured HUD-held mortgage and the sum of, as applicable, a restructured HUD-held first mortgage at reduced principal amount, new mortgage funds paid to HUD at closing, and surplus project accounts other than residual receipts, pursuant to 24 CFR 880.205(e), 881.205(e), or 883.306(e); and

(B) The principal amount of the second mortgage.

(2) HUD may approve a Plan that does not require an additional mortgage, or provides for less than the full difference to be payable under the additional mortgage, or allows for subsequent modification, assignment, or forgiveness of the additional mortgage under any of the following circumstances:

(i) The anticipated recovery on the additional mortgage is less than the servicing costs; or

(ii) HUD has approved modification, assignment, or forgiveness of the second mortgage, pursuant to paragraph (b)(5) of this section.

(3) With respect to the second mortgage required by paragraph (a) of this section, any additional mortgage must:

(i) Be junior in priority;

(ii) Bear interest at the same rate; and

(iii) Require no payment until the second mortgage is satisfied, at which time it will be payable upon demand of HUD or as otherwise agreed by HUD.

[65 FR 15485, Mar. 22, 2000, as amended at 72 FR 66038, Nov. 26, 2007]

### § 401.471 HUD payment of a section 541(b) claim.

HUD will pay a section 541(b) claim from the appropriate insurance fund to the insured mortgagee on behalf of the mortgagor. The mortgagee must use the claim payment to prepay the principal balance of the insured mortgage, in whole or in part, as provided in the Restructuring Plan. All section 541(b) claims will be paid in cash. Part 207 of this title and sections 207(g) and 541(a) of the NA do not apply to a section 541(b) claim.

### § 401.472 Rehabilitation funding.

(a) *Sources of funds*—(1) *Project accounts.* The Restructuring Plan for funding rehabilitation must include funds from the project's residual receipts account, surplus cash account, replacement reserve account, and other project accounts, to the extent the PAE determines that those accounts will not be needed for the initial deposit to the reserves.

(2) *Debt restructuring.* The Restructuring Plan may provide for funding of rehabilitation through a new first mortgage in conjunction with a payment of a section 541(b) claim. The payment of claim may be in an amount necessary to facilitate the funding of the rehabilitation, by reducing the existing first mortgage debt to make refinancing proceeds available to fund rehabilitation.

(3) *Section 236(s) rehabilitation grant.* The Restructuring Plan may include a