

**UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF HEARINGS AND APPEALS**

THE SECRETARY, UNITED STATES DEPARTMENT OF  
HOUSING AND URBAN DEVELOPMENT, the Charging  
Party, on behalf of

NEISHA POTTER, JASON POTTER, and their minor  
children,

COMPLAINANTS,

v.

THEA MORGAN,

RESPONDENT.

HUDALJ 11-F-090-FH-49

September 28, 2012

**Appearances**

For the Charging Party: Onjil McEachin and James Wylie, Attorneys, United States Department of Housing and Urban Development, Washington, DC

For the Respondent: Thea Morgan, *pro se*, Cody, WY; and Kevin Dunn, Representative, Arvada, CO

**INITIAL DECISION AND ORDER**

BEFORE: Alexander FERNÁNDEZ, Administrative Law Judge

On September 30, 2011, the Secretary of the United States Department of Housing and Urban Development (“HUD” or the “Charging Party”) filed a *Charge of Discrimination* (the “Charge”) against Thea Morgan (“Respondent”). HUD filed the Charge on behalf of Neisha Potter, Jason Potter, and their minor children (“Complainants”) and alleged that Respondent impermissibly discriminated against Complainants in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601 *et seq.* Specifically, the Charging Party alleged Respondent (1) made oral statements indicating an unwillingness to rent to Complainants based on familial status in violation of 42 U.S.C. § 3604(c) and (2) made housing unavailable to Complainants by refusing to negotiate with them in violation of 42 U.S.C. § 3604(a). On February 29, 2012, Respondent filed her *Answer* to the Charge.

The hearing commenced on May 9, 2012, in Powell, Wyoming. It concluded the same

day.<sup>1</sup> On July 6, 2012 and July 9, 2012, Respondent and the Charging Party submitted post-hearing briefs, respectively. On August 3, 2012, the Charging Party filed its reply brief.<sup>2</sup>

#### APPLICABLE LAW

**The Fair Housing Act.** On April 11, 1968, President Lyndon B. Johnson signed the Civil Rights Act of 1968. Federal Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73, 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631). Title VIII of the Civil Rights Act of 1968 is commonly known as the Fair Housing Act (“FHA”). The FHA expanded on the Civil Rights Act of 1964, which prohibited discrimination regarding the sale, rental, and financing of housing based on race, color, religion, or national origin. *Id.* In 1988, Congress amended the FHA’s protections, this time prohibiting discrimination based on familial status or disability.<sup>3</sup> (Pub. L. 100-430, 102 Stat. 1619, approved September 13, 1988.)

The FHA defines “familial status” as one or more individuals, under the age of 18, “being domiciled with: (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.” 42 U.S.C. § 3602(k). In extending protections under the FHA to families with children, a new protected class was established, as no other federal civil rights statute based on familial status had been enacted by Congress. H.R. REP. NO. 711, 100th Cong., 2d Sess. 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2184.

Contested at bar are two of the FHA’s core prohibitions: (1) the making of discriminatory statements in the rental or sale of a property; and (2) the refusal to negotiate in the rental or sale of a property. By extending protections under the FHA to families, Congress prohibited housing providers from making, printing, publishing, or causing to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on familial status, or intention to make any such preference, limitation, or discrimination. 42 U.S.C. § 3604(c). Pursuant to the FHA, it is also unlawful to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling because of familial status. 42 U.S.C. § 3604(a).

**Discriminatory Statements.** Violations under § 3604(c) include all written notices or statements by a person engaged in the rental of a dwelling that indicate a preference, limitation or discrimination because of familial status. *See* 24 C.F.R. § 100.75(b). Actions prohibited include the use of words or phrases that convey that dwellings are not available to a particular

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<sup>1</sup> Over the course of the hearing, the Court heard the testimony of: (1) Neisha Potter, Complainant; (2) Jason Potter, Complainant; (3) Kevin Dunn; (4) Thea Morgan, Respondent; and (5) Onjil McEachin, HUD Counsel. A sixth witness, Abbie Hogg, did not appear at the hearing due to a conflict with her work schedule. As a result, Respondent sought to admit a statement prepared by Ms. Hogg after the conclusion of the hearing. The information contained in the statement, though relevant, constitutes hearsay not within any exception to the hearsay rule. As the Fair Housing Act regulations require the Court to apply the Federal Rules of Evidence, the Charging Party’s request that the Court not admit the statement of Ms. Hogg is GRANTED. Moreover, even if Ms. Hogg’s notarized statement were admitted into evidence, the Court finds that such evidence would be cumulative of testimony already proffered by Respondent and Mr. Dunn, and does not assist Respondent in the further development of her case.

<sup>2</sup> Respondent did not file a reply brief.

<sup>3</sup> Congress also amended the Act in 1974 to prohibit sex-based discrimination.

group of persons because of familial status and expressing to prospective renters or any other persons a preference or a limitation on any renter because of familial status. 24 C.F.R. §§ 100.75(c)(1)-(2). This prohibition includes notices or statements that are made orally. 24 C.F.R. § 100.75(b); Stewart v. Furton, 774 F.2d 706, 707-08, 710 (6th Cir. 1985).

To prove a violation under § 3604(c) of the FHA, the Charging Party must present evidence that (1) the respondent made the statement; (2) the statement was made with respect to the rental of a dwelling; and (3) the statement indicated a preference, limitation, or discrimination against Complainants on the basis of their familial status. White v. HUD, 475 F.3d 898, 904 (7th Cir. 2007). Courts will analyze a respondent's alleged statement or advertisement under an "ordinary listener" or "ordinary reader" standard, whereby the communication is scrutinized to determine whether it would suggest to an ordinary listener that a person from a protected group is favored or disfavored for the housing in question. Ragin v. New York Times Co., 923 F.2d 995, 999 (2d Cir. 1991); White, 475 F.3d at 905.

**Refusal to Negotiate.** A Charging Party alleging intentional familial discrimination has the burden of establishing a respondent's discriminatory treatment. Kormoczy v. HUD, 53 F.3d 821, 823 (7th Cir. 1995). In a discriminatory treatment analysis, a complainant's familial status need only be one significant factor in the respondent's decision for that decision to violate the FHA. Woods-Drake v. Lundy, 667 F.2d 1198, 1202 (5th Cir. 1982). To establish that familial status was a factor in the respondent's decision, the Charging Party may use either direct evidence of discriminatory intent or indirect evidence, from which discriminatory intent can be inferred. Kormoczy, 53 F.3d at 823-24.

Direct evidence is evidence that proves a fact without inference or presumption. HUD v. Gunderson, 2000 WL 1146699 (HUDALJ Aug. 14, 2000). If the Charging Party offers direct evidence that meets the preponderance of the evidence standard, then the evidence is sufficient to support a finding of discrimination. Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1452 (4th Cir. 1990); Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) ("A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part McDonnell Douglas analysis to get to the jury, regardless of whether his strong evidence is circumstantial."). However, if the Charging Party is unable to proffer direct evidence, then the Court applies a three-part test that is used in employment discrimination cases under Title VII of the Civil Rights Act. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Pfaff v. HUD, 88 F.3d 739, 745 n.1 (9th Cir. 1996) (stating that in fair housing cases, the court "may look for guidance to employment discrimination cases").

## FINDINGS OF FACT

Based on a thorough and careful analysis of the entire record, including evidence in the form of testimony and documents adduced at the hearing, the Court finds the facts as described below and further finds and takes cognizance of facts as described elsewhere in this *Initial Decision and Order*.

1. Thea L. Morgan (“Respondent”) is an 88-year-old woman.
2. Beginning in 2006, Respondent started to rent properties she owns that are managed by her son, Kevin Dunn.
3. Of the five properties Respondent owns, she rents out three.
4. Jason Potter and Neisha Potter are the parents of three minor children, ages one, four, and nine (collectively “Complainants”).
5. Complainant Neisha Potter is currently unemployed, but previously worked with various property management companies for over eight years.
6. Until approximately June 30, 2011, Complainants resided in the town of La Grange, Wyoming.
7. While living in La Grange, Mr. Potter would commute 30 miles to work at a correctional facility in Torrington, Wyoming.
8. In April 2011, Mr. Potter received a job offer with the Park County Sherriff’s Department located in Cody, Wyoming, which was six and a half hours from La Grange. The new position would require Mr. Potter to relocate closer to Cody.
9. In May 2011, Respondent purchased a property located on Draw Street in Cody, Wyoming. (“Draw Street Property”).
10. The Draw Street Property is a three-bedroom townhouse, containing a basement, main level, and second level, with a flight of stairs connecting each floor.
11. Mr. Dunn finds the stairs in the Draw Street Property to be “quite daunting,” as they are very long and the added carpet makes the tread very narrow.
12. Respondent believes the stairs pose a threat to the safety of young children residing in the house.
13. On or about May 18, 2011, acting on behalf of Respondent, Mr. Dunn placed an advertisement in the *Cody Enterprise* newspaper advertising the Draw Street Property’s availability for rent.

14. The advertisement that was placed in the *Cody Enterprise* read as follows:

3 bedroom 3 bathroom Town-home with nice back deck/yard with view and privacy fence.  
autosprinklers/dishwasher/washer/dryer Included. Small dog extra on Deposit. \$750/Month/deposit.

15. The advertisement included an e-mail address for Mr. Dunn and Respondent's home phone number for pictures or inquiries.

16. This initial advertisement was relisted in the *Cody Enterprise* on May 23, 2011; May 25, 2011; and May 30, 2011.

17. Sometime after Mr. Potter accepted the position with the Park County Sherriff's Department, Mrs. Potter began looking for housing in the Cody area.

18. While searching for housing in Cody, Mrs. Potter found the rental market for suitable housing to be scarce.

19. On one specific occasion, Mrs. Potter inquired about a property after it had only been advertised for 45 minutes only to find that it was no longer available.

20. Mrs. Potter became anxious and frustrated when faced with the prospect that Complainants might not find a place to live near Cody before July 5th, the date that Mr. Potter was scheduled to start his job with the Park County Sherriff's Department.

21. On or about Friday, June 10, 2011, Mrs. Potter telephoned the number referenced in the advertisement to inquire about the Draw Street Property's availability for rent and spoke with Respondent.

22. Mrs. Potter asked Respondent if she had a townhouse available for rent, to which Respondent replied in the affirmative.

23. Respondent then asked Mrs. Potter how many people she had in her family. In response, Mrs. Potter stated that her family included herself, her husband, and their three children.

24. Respondent then asked Mrs. Potter for the ages of her children.

25. Mrs. Potter, already frustrated and anxious by her failed attempts at finding suitable housing, responded tersely by blurting at Respondent: "it is none of your business."

26. Upon hearing this, Respondent explained that it was in fact Respondent's "business" because she was concerned with the children's safety, as the steps in the Draw Street Property could pose a safety hazard.

27. In response, Mrs. Potter scolded: “that is my concern, not yours, and you cannot refuse me because of my children.”
28. Mrs. Potter was rude to Respondent during their telephone conversation.
29. Respondent was angry at Mrs. Potter’s tone and statements and told her, “yes I can and I will” before hanging up the phone.
30. The entire conversation lasted between one and a half and three minutes.
31. Respondent abruptly ended the conversation because Mrs. Potter “really ticked [her] off.”
32. Respondent routinely asked prospective tenants of the Draw Street Property for the ages of their children, and always received a response.
33. Mrs. Potter was “extremely disappointed” after her conversation with Respondent because “we were back to ground zero. We had nowhere to stay and we needed to move.”
34. On June 13, 2011, Mrs. Potter contacted the Department of Housing and Urban Development (“HUD”) to complain that she had been discriminated against.
35. After being informed by HUD that it would need the address of the Draw Street Property, Mrs. Potter again telephoned the number listed in the advertisement, but this time spoke with Mr. Dunn.
36. Mr. Dunn provided Mrs. Potter with the address of the Draw Street Property and informed her that it was still available for rent.
37. On June 15, 2011, Mr. Dunn listed the Draw Street Property in the *Cody Enterprise* using the following advertisement:

3 bedroom 2.5 bathroom Town-home with nice back deck/yard with view and privacy fence. Autosprinklers/dishwasher/washer/dryer Included. Small dog extra on Deposit. \$750/Month, \$750/deposit no smoking/no cats.
38. This advertisement also included an e-mail address for Mr. Dunn and Respondent’s home phone number for pictures or application requests.
39. This subsequent advertisement was relisted in the *Cody Enterprise* on June 20, 2011.
40. Respondent received approximately 30 to 40 telephone calls inquiring about the availability of the Draw Street Property.
41. Subsequent to the conversation between Mrs. Potter and Mr. Dunn, Respondent rented the Draw Street Property to a couple without children.

42. On June 27, 2011, Complainants entered into a 12-month lease agreement for a home located in Clark, Wyoming (“Clark Property”), and moved into the home on June 30, 2011.
43. Complainants moved to Clark because they were unable to find adequate housing closer to Cody, which is approximately 37 miles south of Clark.
44. On July 25, 2011, the HUD Fair Housing/Equal Opportunity Office in Denver received a formal housing discrimination complaint from Complainants.
45. In late November of 2011, Mr. Potter was offered a job with the Cody Police Department that was contingent upon Mr. Potter relocating within Cody city limits.
46. Mr. Potter decided to accept the position with the Cody Police Department because it offered better wages and a chance to be “patrol” on the road full-time.
47. After Mr. Potter accepted the position with the Cody Police Department, Complainants broke their lease for the Clark Property. In order to break their lease, Complainants paid a \$2,000 termination fee and forfeited their \$1,000 security deposit.
48. In mid-December, Jason Potter and Neisha Potter executed a month-to-month lease agreement for a home located on Gabbi Lane in Cody, Wyoming (“Gabbi Lane Property”). The family moved to the Gabbi Lane Property on December 24, 2011.
49. Upon moving to the Gabbi Lane Property, Complainants noticed a sign in the yard advertising the house as being for sale.
50. Complainants asked the landlord of the Gabbi Lane Property if it was still for sale. The landlord assured them that the Gabbi Lane Property was being taken off the market.
51. The Gabbi Lane Property was not taken off the market, but rather was sold within three months after Complainants had moved in.
52. Rather than enforce the terms of the lease for the Gabbi Lane Property, Complainants acceded to the landlord’s request that Complainants vacate the Gabbi Lane Property within five days of being informed of the sale.
53. Complainants subsequently moved to their present address on Canyon View Avenue in Cody (“Canyon View Property”).

#### **PRELIMINARY MATTERS**

Two preliminary issues must be addressed. First, Respondent claims that the Charging Party “bullied and harassed” her throughout the litigation of this case. Second, the Charging Party requests that Respondent’s previous admissions be admitted as facts. At the root of both issues is Respondent’s misunderstanding of the procedures of litigating a case.

As evidence of what she claims to be harassment and intimidation, Respondent testified to receiving “stacks and stacks, two mailings every week for the last seven, eight months” from the Charging Party. The mailings contained documents that Respondent presumed were to prove the Charging Party’s case. Additionally, she perceived the Charging Party’s explanation that the civil penalty could potentially be “\$16 to \$18,000” to be a threat, because “that’s a lot of money.” Beyond these claims, Respondent does not produce any other evidence of the alleged harassment and intimidation. The Court finds that the Charging Party has not engaged in any harassing or threatening behavior, but rather was proceeding with the process of litigation as required. The Court also finds that Respondent misperceived these actions because she has not been educated in the area of litigation and was both overwhelmed by the documentation sent to her and worried about the prospect of having to pay a \$16,000 to \$18,000 civil penalty.

The Charging Party requests that Respondent’s responses to the Charging Party’s *Request for Admissions* be admitted into the record as admissions. Respondent, however, now denies a number of those statements that she had previously admitted as true. The Court must consider the impact of Respondent’s ill-considered admissions. The decision to excuse a party from its admissions is well within the discretion of the Court. Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 651-51 (2d Cir. 1983). As Rule 36(b) of the Federal Rules of Civil Procedure states, a court can allow the withdrawal or amendment of admissions if doing so will preserve the presentation of the case on the merits and not unduly prejudice the opposing party. FED. R. CIV. P. 36(b). It is the burden of the party that obtained the admission to prove that the withdrawal of said admission would be prejudicial. FDIC v. Prusia, 18 F.3d 637, 640 (8th Cir. 1994). Moreover, prejudice does not manifest simply because allowing the withdrawal or amendment would force the opposing party to prove those facts. United States v. Tempo Plastic Co., Inc., 8 OCAHO 1010 (1998). Rather, the opposing party must show that the withdrawal would significantly increase their difficulty in proving their case; i.e., due to the unavailability of key witnesses, etc. Id. at \*4-5; Brook Vill. N. Assocs. v. Gen. Elec. Co., 686 F.2d 66, 70 (1st Cir. 1982).<sup>4</sup>

The Court is persuaded that Respondent’s responses were the product of confusion, stress, and inexperience. To hold her to these admissions would extinguish much of the Court’s opportunity to decide the case on its merits. Courts should allow a *pro se* litigant the opportunity to correct a defect that may be “attributable to oversights likely the result of an untutored *pro se* litigant’s ignorance.” Hammad v. Bombiadier Lear Jet, Inc., 192 F. Supp. 2d 1222, 1229 (D. Kan. 2002). To hold otherwise under these circumstances would not be in the interests of justice.

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<sup>4</sup> The Charging Party claims that it will be prejudiced by the withdrawal of the admissions because the Charging Party “relied on and continues to rely on the admissions as evidence to prove the elements of its claims because Respondent was evasive and repeatedly made inconsistent statements at trial.” The Charging Party also claims that it is further prejudiced because the withdrawal of the admissions occurred at the start of the hearing. The Court finds these claims to be without merit. Respondent indicated to the Charging Party on April 30th that she now denies a number of the admissions she previously made. The Charging Party had notice that it could potentially have to proceed with its case without Respondent’s admissions. Further, the withdrawal of the admissions occurred at the start of the hearing, giving the Charging Party ample opportunity to examine Respondent and clarify any inconsistent statements.

## DISCUSSION

The Court has considered all issues raised and all documentary and testimonial evidence in the record and presented at hearing. Those issues not discussed here are not addressed because the Court finds they lack materiality or importance to the decision.

**Discriminatory Statements.** The Charging Party claims Respondent made oral statements indicating an unwillingness to rent to Complainants because of their minor children in violation of 42 U.S.C. § 3604(c) and its implementing regulations.

The FHA makes it illegal “to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination” based on familial status. 42 U.S.C. § 3604(c). To establish a prima facie case of housing discrimination under § 3604(c), the Charging Party must prove that Respondent: (1) made a statement; (2) the statement was made with respect to the rental of the Draw Street Property;<sup>5</sup> and (3) the statement indicated a preference, limitation, or discrimination against Complainants on the basis of familial status. White, 475 F.3d at 904.

At the heart of this matter is a one and a half to three minute telephone conversation, some of the content of which is in dispute. The parties agree that Respondent spoke with Mrs. Potter on June 10, 2011. The Charging Party alleges that during this minute<sup>6</sup> conversation, Respondent made three discriminatory statements that fall within the purview of § 3604(c).

First, the Charging Party claims Respondent explicitly told Mrs. Potter that “she was not going to be renting the townhouse to any families with children.” Second, Mrs. Potter maintains that “[Respondent] had stated to [Mrs. Potter] the reason it [the children’s ages] was important to [Respondent] was because the townhome had stairs, and [Respondent] was worried about the safety of [Mrs. Potter’s] children.” Third, Respondent’s statement “yes I can and I will” was in response to Mrs. Potter’s statement that Respondent could not refuse to rent to her because of the children.

Respondent tells a slightly different story. Respondent maintains that she did not tell Complainant that she would refuse to rent the Draw Street Property to *any* family with children but rather explained that her refusal to rent to Complainant was a result of Complainant’s “rudeness.” Moreover, she emphasized repeatedly that her concerns centered primarily around “safety, safety, safety” and not an intent to discriminate. When conflicting evidence exists in the record, the Court must resolve such conflicts. Thunder Basin Coal Co. v. S.W. Pub. Serv. Co., 104 F.3d 1205, 1212 (10th Cir. 1997) (noting that the fact finder “has the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions

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<sup>5</sup> It is undisputed that any statements made were with regard to the rental of the Draw Street Property.

<sup>6</sup> Interestingly, the *Waltz in D flat Major Op. 64 No. 1*, commonly known as the *Minute* (accent on second syllable) *Waltz*, by Frédéric Chopin, was not intended to be played in a minute. A typical performance of the work will last between one and a half and two and a half minutes and would have easily underscored the parties’ telephone conversation.

of fact”); see also Webco Indus., Inc. v. NLRB, 217 F.3d 1306, 1311 (10th Cir. 2000) (citing NLRB v. Wilhow Corp., 666 F.2d 1294, 1299 (10th Cir. 1981)) (“As to the credibility determinations of the ALJ, the determination of credibility is particularly within the province of the hearing examiner and the Board.”); Webco, 217 F.3d at 1311 (citing E. Eng’g & Elevator Co. v. NLRB, 637 F.2d 191, 197 (3d Cir. 1980)) (“ALJ’s credibility resolutions deserve great weight to the extent they are based on testimonial evidence of live witnesses and the hearing judge has had the opportunity to observe their demeanor.”).

The telephone conversation, of course, did not occur in a vacuum. Prior to phoning Respondent, Mrs. Potter had engaged in a search of the rental market in Cody, which Mrs. Potter described as “scarce.” Mrs. Potter added, “[t]here were very few things listed, especially within our budget.” Mrs. Potter had been searching before contacting Respondent, with only a couple of weeks left before Complainants’ required move.

Based on its observation of the witnesses and their demeanors while testifying, the facts enumerated at paragraphs 21-31, supra, constitute the Court’s findings with regard to the interactions between Mrs. Potter and Respondent. Throughout Mrs. Potter’s testimony, the Court observed that although the skeletal outline of the testimony she was providing was truthful, Mrs. Potter embellished her testimony to heighten the probability of a victory. For example, Mrs. Potter’s allegation that Respondent sounded “disgusted” when asking about the ages of Complainants’ children simply did not ring true. First, Mrs. Potter states that Respondent is *disgusted* by Complainants’ children. Then, she acknowledges that Respondent was concerned for their safety. Either Mrs. Potter was alleging a duplicitous nature akin to the Child Catcher in *Chitty Chitty Bang Bang*,<sup>7</sup> or she was attempting to mislead the Court. The latter is correct. Such mendacity has no place before this Court.

Moreover, Mrs. Potter maintains throughout her testimony that she had conducted a thorough search for suitable housing. However, she did not see the advertisement for the Draw Street Property until June 10th, when the initial advertisement had been placed on May 18th (with additional listings on May 23rd, 25th and 30th) — this, despite her testimony that she checked all listings regularly. Based on the Court’s observations, a less than suitable search, a difficult housing market, and a short timeframe for moving were all additional stressors that weighed on Mrs. Potter during her conversation with Respondent.

The Court employs the “ordinary reader” or “ordinary listener” standard when determining whether statements violate FHA § 3604(c). Jancik v. HUD, 44 F.3d 553, 566 (7th Cir. 1995)). Under this standard, a statement violates the FHA if it indicates a preference, limitation, or discrimination to the “ordinary listener.” Ragin, 923 F.2d at 999-1000. The ordinary listener is “neither the most suspicious nor the most insensitive of our citizenry.” Id. at 1002. The statement need not “jump out” at the listener with its offending message to be in violation of the FHA. Jancik, 44 F.3d at 556. Rather, the statement violates the FHA if it would

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<sup>7</sup> For the uninitiated, *Chitty Chitty Bang Bang* was a 1968 musical film featuring Dick Van Dyke and Sally Ann Howes. In the film, an eccentric inventor creates a flying car and travels to the fictional world of Vulgaria with his two children and a female companion. There, he spins a tale of Vulgaria’s evil rulers, Baron and Baroness Bomburst, who have outlawed children. The Child Catcher — who incidentally did not appear in the original novel — kidnaps children on behalf of the Bombursts by luring them with promises of candy and other treats; a truly disgusting character.

discourage an ordinary listener of a particular protected class from applying for housing. Id.

The salient statements are as follows:

1. Respondent told Complainants that the ages of Complainants' children were Respondent's "business" because Respondent was concerned with the children's safety, as the steps in the Draw Street Property could pose a safety problem.
2. In response to Mrs. Potter's statement that Respondent could not discriminate against Complainants because of her children, Respondent replied, "yes I can and I will."

The Court must look at the entire conversation to determine whether or not a particular class of person is or is not disfavored. See Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644 (6th Cir. 1991). Respondent did, in fact, request the ages of Complainants' children. At that point in the conversation, however, the record does not establish that an ordinary listener would conclude that the question would violate § 3604(c). Mrs. Potter's own testimony buttresses that point. She stated, "[Respondent] had stated to [me] the reason it [the children's ages] was important to [her] was because the townhome had stairs, and [she] was worried about the safety of [my] children." That statement does not lend itself to an interpretation that Respondent would refuse to rent the property. A reasonable listener could just as easily have concluded that Respondent was asking the question to determine whether or not Respondent needed to set up child-proof gates at the stairs. Mrs. Potter, however, already agitated and anxious by a failed housing search, easily jumped to the worst conclusion.

The conversation continued, now at a faster tempo. Believing that Respondent wanted to discriminate against her and her children, Mrs. Potter scolded Respondent by telling her she could not refuse to rent to them. Respondent replied, "yes I can and I will," then hung up the telephone.<sup>8</sup> Respondent's statement is problematic, to the say the least. It was offered in direct response to Mrs. Potter's assertion that Respondent could not discriminate and, on its face, is a direct assertion, that Respondent could, and in fact would, discriminate. The ordinary listener does not have to ponder long to conclude that Respondent has indicated a preference, limitation, or discrimination based on familial status. Respondent has stated one outright. Said statement would discourage an ordinary listener of a particular protected class from applying for housing, in violation of § 3604(c). White, 475 F.3d at 905 (holding that a landlord's statement to a prospective tenant that the landlord could not rent to the prospective tenant "because you have two children and no husband and this girl has to pay her mortgage" indicates to an ordinary listener that the landlord disfavored the prospective tenant on the basis of her familial status); Jancik, 44 F.3d at 556 (finding a violation when a landlord orally told two testers that he did not want teens or families with children in the building); Ragin, 923 F.2d at 999-1000 (holding that an ordinary reader can infer preference or dispreference even when the preference is not

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<sup>8</sup> Respondent asserts that Mrs. Potter never mentioned "her children" when stating that Respondent could not refuse to rent to her and that Respondent meant that she was only stating she would not rent to Mrs. Potter (herself). Regardless of whether or not Mrs. Potter mentioned her children in the predicate statement, given the entire conversation, an ordinary listener could easily conclude that the statement was in violation of § 3604(c).

explicitly stated); United States v. Hunter, 459 F.2d 205 (4th Cir. 1972) (holding that an advertisement saying available room was in a “White home” was discriminatory); United States v. Grishman, 818 F. Supp. 21 (D. Me. 1993) (holding that when a landlord told his rental agent that an apartment was “less suitable” for families with children, but that such families should not be excluded, such statement constituted a violation because an ordinary listener would understand the landlord was stating a preference as to who should live in the unit).<sup>9</sup>

**Refusal to Negotiate.** The Charging Party also claims that “by refusing to negotiate with Complainants, Respondent made housing unavailable to them because of familial status” in violation of the FHA and its implementing regulations. This claim of disparate treatment requires that Complainants’ familial status have been a significant factor in Respondent’s decision to refuse or deny rental of the Draw Street Property to them. Kormoczy, 53 F.3d at 823. In disparate treatment cases, “a showing of impermissible intent is pivotal.” Mountain Side Mobile Estates v. HUD, 56 F.3d 1243, 1250 & n.6, 1252 (10th Cir. 1995). To meet this burden, the Charging Party must prove Respondent acted with discriminatory intent either through direct evidence, or indirect evidence, from which Respondent’s discriminatory intent can be inferred. Kormoczy, 53 F.3d at 823.

Here, the Charging Party asserts that the record contains direct evidence that Respondent refused or denied Complainants housing because of familial status. “Direct evidence is that which can be interpreted as an acknowledgment of the defendant’s discriminatory intent” and proves a fact without inference or presumption. Id. at 824; HUD v. Gunderson, 2000 WL 1146699 (HUDALJ Aug. 14, 2000). Such evidence consists of “only the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitut[ing] direct evidence of discrimination.” Dixon v. The Hallmark Cos., Inc., 627 F.3d 849 (11th Cir. 2012) (quoting Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004)). There must be a “specific link between the alleged discriminatory animus and the

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<sup>9</sup> As an ancillary issue, all prospective tenants for the Draw Street Property who indicated that they had children were asked the children’s ages because of Respondent’s sincere concern for safety. However, “[n]othing in the [FHA] permits an owner to determine that risks and circumstances of a dwelling and neighborhood make it inappropriate for children. That decision is for the tenant.” Grishman, 818 F. Supp. at 23. “As a general rule, safety judgments are for informed parents to make, not landlords.” Fair Hous. Cong. v. Weber, 993 F. Supp. 1286, 1293 (C.D. Cal. 1997) (citing HUD v. Edelstein, Fair Housing–Fair Lending ¶ 25,018, 25,239 (1991)). Therefore, “even if [the defendant’s] preference is based on legitimate safety concerns, this does not cure the violation of § [3604](a) and (c); such judgments are to be left to parents, not landlords, especially when the landlord has failed to employ a less restrictive means of protecting health and safety.” Weber, 993 F. Supp. at 1293.

Respondent’s testimony also established that she rents another property to a family with children, but was unwilling to do so with the Draw Street Property because of the nature of its staircases. She testified consistently that her concern was that young children could fall down the stairs. The Court concludes that Respondent was genuinely motivated by a concern for the safety of any young children potentially residing in the Draw Street Property. Nevertheless, her statements violated the FHA. See Pack v. Fort Washington II, 689 F. Supp. 2d 1237, 1243–44 (E.D. Cal. 2009) (finding that an apartment building’s rule requiring all children 10 and under to be supervised by an adult while outside to be discriminatory under the FHA because it was an overly broad, unduly restrictive means for ensuring the tenants’ safety and enjoyment of the premises); HUD v. Dibari, 1992 WL 406529 (HUDALJ Oct. 6, 1992) (holding that an owner’s statements that he would not rent to families with children impermissibly indicated a preference even if the owner was motivated by a concern for the children’s safety, costs associated with removing lead paint from his walls, and potential litigation); U.S. v. Reece, 457 F. Supp. 43 (D. Mont. 1978) (finding the defendant’s policy to deny rental apartments to single women without cars because the neighborhood was poorly lit and the risk of assault, rape, “or worse” against such women was great, was insufficient as a defense because the policy was paternalistic and overbroad); Weber, 993 F. Supp. at 1293 (holding that even if a defendant’s preference is based on legitimate safety concerns, this does not cure the violation of § 3604(a) and (c)).

challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated” the adverse action. Griffith, 387 F.3d at 736.

When Mrs. Potter told Respondent “you cannot refuse me because of my children,” she was informing Respondent that Respondent could not discriminate against Complainant based on familial status. The Charging Party claims Respondent’s reply “yes, I can and I will” makes clear that Respondent intended to, and did in fact, impermissibly discriminate against Mrs. Potter because of her children. Respondent, however, asserts that she did not intend to discriminate. Rather, Respondent claimed that her refusal to negotiate was actually motivated by her perception that Mrs. Potter was “rude” and “unpleasant.” She also testified that her statement, “I can and I will” was in response to Mrs. Potter’s statement that Respondent could not refuse to rent to her (as opposed to Mrs. Potter and her children).

It is the Court’s task to determine whether Respondent acted with impermissible discriminatory intent when the evidence in the record on the point is conflicting. U.S. v. Lepore, 816 F. Supp. 1011, 1017 (M.D. Pa. 1991) (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). Respondent presents a credible claim that she hung up the telephone because she found Mrs. Potter unpleasant and not because of Mrs. Potter’s children. In fact, at the time of the refusal, Respondent did not know the ages of the children. As found by the Court, Mrs. Potter was rude to Respondent. Mrs. Potter, having worked in the property management industry for many years and being familiar with fair housing laws took umbrage with Respondent’s inquiries about her family. Respondent, who felt Mrs. Potter was being rude and evasive, was so antagonized that she hung up the phone after being told by Mrs. Potter that Respondent could not refuse to rent to her.

While this Court finds that Mrs. Potter’s rudeness was a motivating factor behind Respondent’s refusal to negotiate, Respondent was also motivated by her intent to impermissibly discriminate against families with young children. Indeed, Respondent testified that it would have been “very hard” for Respondent to rent the Draw Street Property to a family with a young child. The purpose of Respondent’s questions to Mrs. Potter during the June 10th conversation was to ascertain whether Mrs. Potter had young children. Had Mrs. Potter told Respondent that she had a baby, Respondent would have been hesitant to rent to her and would have told her that. Respondent’s discriminatory intent was integral in her refusal to negotiate with Complainants. See Woods-Drake, 667 F.2d at 1202 (finding that so long as it was demonstrated that a landlord’s eviction of his tenants was motivated by a racial animus, it was irrelevant that he may have also been upset that tenants had violated parking rules or disagreed with tenants’ political views).

Accordingly, the Court finds that the statement “I can and I will” constitutes direct evidence of discrimination based on an impermissible factor because Respondent’s interactions with Complainant were influenced by her objection to renting her property to families with children. Respondent refused to negotiate in violation of § 3604(a) when she made the statement and hung up the phone, thereby making the property unavailable to Complainants. See United

States v. Branella, 972 F. Supp. 294, 298 (D.N.J 1997) (intentional discrimination requires the plaintiff to show that familial status was a motivating factor and not necessarily the sole motivating factor).<sup>10</sup>

## REMEDY

Relief may include “actual damages suffered by the aggrieved person and injunctive or other equitable relief.” 42 U.S.C. § 3612(g)(3). “An order may, to vindicate the public interest, assess a civil penalty against the respondent.” Id.

**Complainants’ Damages.** The Charging Party seeks a total of \$35,000 in damages for Complainants.<sup>11</sup> In response, Respondent claims that Complainants’ injuries are the result of decisions Complainants made related to Mr. Potter’s career, not Respondent’s actions.

Where Respondent has been found to have engaged in a discriminatory housing practice, the Court may issue an order for relief, which may include actual damages suffered by the aggrieved person. 42 U.S.C. § 3612. Actual damages are awarded to “put the aggrieved person in the same position as he would have been absent the injury, so far as money can.” HUD v. Godlewski, 2007 WL 4578540, at \*2 (HUDALJ Dec. 21, 2007) (citing ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 25-35 (1990)). Such damages may include both out-of-pocket expenses and damages for intangible injuries, including embarrassment, humiliation, and emotional distress caused by the discrimination. HUD v. Blackwell, 2 Fair Housing-Fair Lending (P-H) (Aspen) ¶ 25,001, 25,005 (HUDALJ Dec. 21, 1989), aff’d, 908 F. 2d 864 (11th Cir. 1990).

Complainants testified that they had no other housing prospects at the time of the June 10th conversation. The family was able to secure suitable housing a week before Mr. Potter was to begin serving with the Park County Sheriff’s Department. Once the family moved, their new home was located 37 miles north of Cody, in Clark. Rent for the home was \$1,000 per month.

Towards the middle of November, 2011, Mr. Potter was offered a position with the Cody Police Department. As a condition of this employment, he was required to live within the Cody city limits. The family was able to find a house on Gabbi Lane in Cody (“Gabbi Lane Property”) and broke their lease for the Clark Property, resulting in the forfeiture of their \$2,000 deposit. On December 24, 2011, the family moved into the Gabbi Lane Property. The offered position with the Cody Police Department was rescinded before Mr. Potter could report for duty.

Complainants’ move to Cody from Clark benefitted the family. Being closer to the grocery store, the family no longer needed to stock up on groceries each time they made the trip. Mr. Potter felt he had more time with family activities, although this was also due to the fact that he now worked the three-to-eleven shift instead of the night shift.

Three months after moving into the Gabbi Lane Property, the landlord unexpectedly sold

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<sup>10</sup> As the Court has determined that direct evidence exists, an analysis under indirect evidence is not required.

<sup>11</sup> The Charging Party’s Post-Hearing Brief requests a damages award of \$40,000, while the proposed order attached to the brief requests an award of \$35,000 in damages. The Charging Party’s Reply Brief clarifies the discrepancy by requesting that the proposed order attached to the Post-Hearing Brief be entered.

the house and the family was forced to move again. Complainants decided not to enforce the lease and moved within five days. Complainants currently live in an apartment that has two bedrooms and one bathroom.

### I. Out-of-Pocket Losses.

The rental cost of the Clark Property was \$250 more per month than the Draw Street Property. Where an aggrieved party is forced to seek alternative housing due to unlawful discrimination, “the proper measure of damages is a comparison between what would have been obtained but for the discrimination and a reasonably comparable dwelling.” Morgan v. HUD, 985 F.2d 1451, 1458 (10th Cir. 1993). Accordingly, Complainants are entitled to \$1,500 for the difference in rent (July 2011 – December 2011).

The Charging Party also seeks \$500 per month for Complainants’ gas expenses incurred while they were living in Clark. In support of this claim, the Charging Party only offered the testimony of Mr. and Mrs. Potter, who testified that the family spent between \$500 and \$600 monthly for gas during the six months they were living in Clark. The record is devoid of any evidence in the form of receipts, logs, or any tangible proof the Court can examine to corroborate Complainants’ testimony. The Court does, however, accept Complainants’ testimony as true on this point. But, without any evidence as to how much more the family spent on gas because they were living in Clark, it is impossible for the Court to determine how much of the \$500 per month in gas it should attribute to Respondent’s discriminatory actions.

The Charging Party need not document alternative housing costs with exacting specificity. Krueger v. Cuomo, 115 F.3d 487, 492 (7th Cir. 1997). When it fails to do so, however, the Court will make a reasonable estimate of such expenses. Id. Unless everything within Cody was within walking distance, thereby absolving Complainants of the need to drive their automobiles, Complainants still would have had gas expenses even if Respondent rented the Draw Street Property to them. It is safe for the Court to assume that the Complainants would still attend church, go grocery shopping, visit the doctor, and use the car while living in Cody. Based on Mr. Potter’s testimony that he would fill up his truck on average two times per week, the Court finds Respondent’s discrimination caused \$250 per month in additional gas expenses for a six month period, for a total of \$1,500.

The Charging Party also claims that Respondent is liable for the out-of-pocket expenses incurred by Complainants as a result of the family’s move from the Clark Property to the Gabbi Lane Property. Respondent is only liable for damages proximately caused by the discrimination. HUD v. Hous. Auth. of City of Las Vegas, 1995 WL 678326, at \*27 (HUDALJ Nov. 6, 1995) (citing Weyerhouser Co. v. Atropos Island, 777 F.2d 1344, 1351-52 (9th Cir. 1985)). Proximate cause exists when there is a “direct relation between the injury asserted and the injurious conduct alleged.” Staub v. Procter Hosp., 131 S. Ct. 1186, 1192 (2011). However, if a “new force or power has intervened, sufficient itself to stand as the cause of resulting misfortune, an earlier source must be considered as too remote.” Scheffer v. Washington City, 105 U.S. 249 (1881). An intervening cause can “insulate the original actor from liability.” Glenn v. Union Pac. R.R. Co., 262 P.3d 177 (Wyo. 2011). Such a cause has an “independent origin that was not foreseeable.” Procter Hosp., 131 S. Ct. at 1192. An injury is foreseeable if a

reasonable person would have anticipated that the injury was reasonably likely to flow from the breach of duty, i.e., the discrimination. Hous. Auth. of City of Las Vegas, 1995 WL 678326, at \*27 (citing RESTATEMENT (SECOND) OF TORTS 452 (1965); Standard Oil Co. v. Matt McDougall Co., 381 F.2d 686 (9th Cir. 1967)).

In this case, Complainants broke their lease and moved to the Gabbi Lane Property resulting in a \$2,000 lease termination fee, moving fees, as well as monthly rent in the amount of \$1,150. Respondent's discrimination was not the proximate cause of these injuries. Mr. Potter stated that the family broke their lease because he "wanted to take the position with the Cody Police Department for better wages and more money and a chance to be on the road full-time." Complainants broke their lease because the Cody Police Department required Mr. Potter to reside in Cody. There is no evidence that Complainants would have broken their lease and moved to the Gabbi Lane Property absent the job offer from the Cody Police Department. Indeed, Complainants signed a 12-month lease when they moved into the Clark Property indicating their intent to stay in the home for at least a year.

Just as the Court finds the expenses incurred by Complainants' decision to break their lease and move to the Gabbi Lane Property are not attributable to Respondent, the Court also finds that expenses resulting from Complainants' move to the Canyon View Property after the Gabbi Lane Property was sold are not the result of Respondent's discriminatory actions.<sup>12</sup> The landlord who sold the Gabbi Lane Property after Complainants lived there for three weeks was responsible for Complainants' move.

Although both subsequent moves (after Clark) resulted in additional expenditures to Complainants, they were not proximately caused by Respondent's discriminatory actions. As such, Respondent cannot be held liable for them. They were new forces sufficient to stand as the cause of resulting misfortune. Scheffer, 105 U.S. 249 (1881). Accordingly, the Court finds that Respondent's discriminatory actions caused Complainants \$3,000 in out-of-pocket expenses.

## II. Emotional Distress and Inconvenience Damages.

Under the Fair Housing Act, an aggrieved party may recover damages for embarrassment, humiliation and emotional distress as a consequence of a respondent's discriminatory acts. Blackwell, 2 Fair Housing-Fair Lending (Aspen) ¶ 25,001, 25,011. Godlewski, 2007 WL 4578540, at \*2. To recover for emotional distress injuries, the Charging Party must demonstrate that there is a causal connection between the illegal action and Complainant's injuries. Morgan, 985 F.2d at 1459 (citing Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977)). Emotional distress damages may be granted "in Fair Housing Act cases for distress which exceeds the normal transient and trivial aggravation attendant to securing suitable housing." Id. (citing Steele v. Title Realty Co., 478 F.2d 380, 384 (10th Cir. 1973)). The key factors in determining emotional distress damages are the complainant's reaction to the discriminatory conduct and the egregiousness of the respondent's behavior. HUD v. Parker,

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<sup>12</sup> Indeed, Mr. Potter conceded that it was not Respondent's fault that the landlord sold the Gabbi Lane Property.

2011 WL 5433810, at \*7 (HUDALJ Oct. 27, 2011). Administrative Law Judges are afforded broad discretion in determining damages based on those factors. HUD v. Sams, 2A Fair Housing-Fair Lending (Aspen) ¶ 25,069 (HUDALJ Mar. 11, 1994).

Respondent's discrimination caused Complainant Neisha Potter to feel distress. Housing in Cody was particularly scarce during the summer months and, according to Mrs. Potter, she contacted over a "couple dozen" rental properties only to find that they were no longer available. Having less than a month before her husband was to begin work in Cody, Mrs. Potter was becoming frustrated and anxious about finding suitable housing for her family. After her conversation with Respondent, Mrs. Potter felt "extremely disappointed" about not being able to rent the Draw Street Property. Her testimony that she suffered emotional distress was corroborated by Mr. Potter's testimony that he once observed his wife crying when he returned home from work.

Respondent is neither responsible for the frustration Mrs. Potter felt as a result of the rental market in Cody, nor is she responsible for the anxiety Mrs. Potter brought with her to the conversation. However, Respondent is responsible for exacerbating Mrs. Potter's emotional distress with her discriminatory actions. See Godlewski, 2007 WL 4578553 (respondents "must take their victims as they find them"). Accordingly, the Court finds that Respondent's discriminatory actions caused Mrs. Potter to cry, which constitutes distress exceeding the normal transient and trivial aggravation attendant to securing suitable housing.

When determining the egregiousness of a respondent's behavior, an intentional, particularly outrageous or public act generally justifies a higher emotional damage award, because such an act affects the plaintiff's sense of outrage and distress." Parker, 2011 WL 5433810, at \*7 (citing SCHWEMM, supra, at 25-35). Respondent's behavior, although discriminatory, was not egregious. Respondent explained to Mrs. Potter that her questions were related to Respondent's concern for the safety of Mrs. Potter's young children residing in the Draw Street Property, as the stairs were dangerous. Respondent did not make any disparaging remarks, nor did Respondent intend that her statement "I can and I will" would be interpreted as a refusal to rent because Complainants had children.<sup>13</sup> Accordingly, the Court does not find Respondent's behavior to be so egregious that a higher emotional damage award would be warranted.

In addition to suffering the emotional distress of tears, Complainants were inconvenienced for the six months they lived in Clark. The Court may award damages for inconvenience that is caused by Respondent's discriminatory actions. HUD v. Krueger, 1996 WL 418886, at \*14 (HUDALJ Jun. 7, 1996); see also Baumgardner v. HUD, 960 F.2d 572, 581 (6th Cir. 1992) (holding that inconvenience is an intangible injury and should not be made as a claim separate from any claim for emotional distress). Clark is a very small town that does not offer many of the amenities the family required. To attend church, go to the doctor, or buy groceries, Complainants had to travel to Cody. Mr. Potter also had a longer commute for work because the Park County Sheriff's Department was in Cody. The longer commute took some of

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<sup>13</sup> Here, intent is important. Although unimportant in the ordinary listener analysis, a higher award requires an intentional act. Parker, 2011 WL 5433810, at \*7.

Mr. Potter's time away from spending time with his family.<sup>14</sup> Additionally, Complainant's nine year-old son also lost the benefit of attending a school with a program for gifted children for a period of four months. Complainants testified that their son was gifted and eligible for a program catering to advanced children. However, the Clark Property was not located in a school district that offered such a program.<sup>15</sup>

The Court finds that the above injuries, although proximately related injuries, are not severe enough to justify the substantial award sought by the Charging Party. See Baumgardner, 1990 WL 456960, \*10 (involving a sex discrimination case where the ALJ awarded \$500 in emotional distress damages, and noted that while the complainant was, for a few months, justifiably angered, hurt, and frustrated by the denial of the house he wanted, he "did not appear to be a man of vulnerable constitution who could easily be driven to distress in the sense of needing medical assistance"); HUD v. Colber, 1995 WL 72442, at \*3-5 (HUDALJ Feb. 9, 1995) (awarding \$500 for inconvenience of having to search for two months for suitable housing, which ended up being an extra 5-10 minutes farther than the respondent's available rental); Parker, 2011 WL 5433810, at \*7 (awarding \$5,000 to complainant who experienced substantial, though not debilitating psychological trauma, which included approximately three month's worth of heightened stress and anxiety manifesting in difficulty sleeping, weight loss, and difficulty associated with people of non-Hispanic ethnicities, among other symptoms); HUD v. Dutra, 1991 WL 657690 (HUDALJ Nov. 12, 1996) (finding both the \$25,000 and \$75,000 in emotional damages sought by the charging party and intervenor to be excessive and awarding the complainant \$5,000 for emotional distress and physical suffering after finding the threatened loss of the pet caused the complainant, for a period of five months, *significant emotional distress*, which resulted in a trip to the emergency room for treatment); HUD v. Ocean Sands, Inc., 1993 WL 471296, at \*4 (HUDALJ Nov. 15, 1993) (awarding \$12,500 to wife of disabled person who was harassed and ostracized by the respondent for her attempts to make the community grounds more wheelchair accessible for her husband. The ALJ noted that the complainants, who were "*particularly fragile*" and "*advanced in age,*" *suffered great emotional distress over a few years*).

Here, Mr. Potter testified that Mrs. Potter does not cry frequently and indicates that she is not particularly fragile. Indeed, the Court observed Mrs. Potter to be a person of average

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<sup>14</sup> However, Mr. Potter's claim that he "never really got to see [his] family" cannot be entirely attributed to Respondent's unlawful actions. Mr. Potter stated that he was unable to participate in activities with his children because he "was usually in town or sleeping, because [he] was working the night shift." When asked whether his previous 30-mile commute while living in La Grange was tough for him, he answered, "it was a different situation because we worked four on, four off." It is reasonable to infer, therefore, that Mr. Potter's work schedule was more of a factor in his inability to spend time with his family than were Respondent's actions were.

<sup>15</sup> Complainants also suffered emotional distress and inconvenience from relocating multiple times in a short period. The multiple moves caused the family to feel unsettled and caused stress in Complainants' marriage. However, Respondent's conduct was not the proximate cause of Complainants' multiple moves. Two months before even seeing the advertisement for the Draw Street Property, Complainants were already planning on moving closer to the Cody area so Mr. Potter could accept a position with the Park County Sherriff's Department. As previously found by the Court, Complainants' second move—from the Clark Property to the Gabbi Lane Property—was prompted by the opportunity for Mr. Potter to accept a position with the Cody Police Department. Finally, Complainants' third move from the Gabbi Lane Property, was due to the property owner selling the home, and not a result of Respondent's discriminatory conduct. With regards to the emotional distress the Complainants suffered as a result of their multiple moves, the Court does not find them to be attributable to Respondent's unlawful conduct.

sensitivities. Additionally, aside from the distance to amenities, the Charging Party has not demonstrated that the Clark Property was so unsatisfactory as to warrant the substantial award for emotional distress and inconvenience.<sup>16</sup> Indeed, there are no allegations (and no proof) of difficulty sleeping, weight loss, excessive noise, lawless neighbors, need for medical assistance, etc. What appears to abound, are hurt feelings and a desire to blame Respondent for every misfortune that has befallen Complainants since the day of the fateful argument. Yes. Respondent discriminated against this particular couple and must be held liable for her actions. But to hold her liable for more would be the same as holding Mrs. O'Leary's cow liable for burning down Chicago.<sup>17</sup> Accordingly, for Mrs. Potter's emotional distress and the inconvenience Complainants suffered as a result of not being able to live in Cody, the Court awards \$750.

**Civil Penalty.** Respondent may also be assessed a civil penalty to "vindicate the public interest." 42 U.S.C. § 3612(g)(3). The Court is authorized to assess a civil penalty against Respondents in an amount not to exceed:

- (1) \$16,000, if the respondent has not been adjudged in any administrative hearing or civil action permitted under the Fair Housing Act or any state or local fair housing law, or in any licensing or regulatory proceeding conducted by a federal, state, or local governmental agency, to have committed any prior discriminatory housing practice.

24 C.F.R. § 180.671.

In determining the amount of the penalty, the Court considers the following factors: (i) whether Respondent has previously been adjudged to have committed unlawful housing discrimination; (ii) Respondent's financial resources; (iii) the nature and circumstances of the violation; (iv) the degree of that Respondent's culpability; (v) the goal of deterrence; and (vi) other matters as justice may require. 24 C.F.R. § 180.671(c)(1).

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<sup>16</sup> See Krueger, 1996 WL 418886, at \*14 (finding the complainant was entitled to damages for inconvenience because the respondent's discrimination caused her to move from a comfortable three-bedroom apartment to her mother's two-bedroom apartment, which she and her two children had to share with three other adults. Additionally, the complainant suffered the inconvenience of having to search for alternative housing during the "Wisconsin Winter," while pregnant and relying on others to provide transportation as she did not have a car); HUD v. Welch, 1996 WL 755681, at \*1 (HUDALJ Dec. 2, 1996) (awarding \$500 to the complainant and her daughter for having to live for eight months in unsatisfactory housing, which was a pick-up camper that was small and too poorly heated for the baby, requiring the baby to spend extended time inside her grandparent's home); HUD v. Zbyslaw Kogut, 1995 WL 225277 (HUDALJ Apr. 17, 1995) (awarding the complainant damages for a "lost housing opportunity" after the respondent's discriminatory actions forced the complainant from her safe, spacious, apartment to a ground floor apartment, with no air conditioning or laundry facilities, that was located in an unsafe neighborhood and was robbed after she moved in); HUD v. Ineichen, 1995 WL 152740 (HUDALJ Apr. 4, 1995) (awarding each complainant \$4,000 for emotional damages and a lost housing opportunity resulting from their experiences living in alternative housing that was "disrupted by roach infestations that required repeated professional treatment and by noisy, slovenly, quarrelsome, and lawless neighbors whose behavior prompted at least three police visits. Late-night noise, including drug busts, interfered with [the complainant's] sleep").

<sup>17</sup> In 1893, Michael Ahern, *Chicago Tribune* reporter, admitted to making-up the O'Leary story because it made colorful copy.

### I. Previous Unlawful Housing Discrimination.

There is no evidence that Respondent has ever previously been adjudged to have committed any discriminatory housing practice; therefore, any civil penalty imposed upon Respondent may not exceed \$16,000 for a violation. 42 U.S.C. § 3612(g)(3)(A); 24 C.F.R. § 180.671(a)(1). The Court notes this fact may be considered a reason to “temper the government’s reaction to this violation.” HUD v. Bang, 1993 WL 23713, at \*15 (HUDALJ Jan. 5, 1993).

### II. Respondent’s Financial Resources.

Evidence regarding Respondent’s financial circumstances is within her knowledge and, therefore, Respondent has the burden to introduce such evidence into the record. Welch, 1996 WL 755681, at \*8. Here, Respondent has not shown financial hardship. Therefore, Respondent’s financial circumstances are not a constraint in determining the civil penalty to be assessed in this case. HUD v. Schmid, 1999 WL 521524, at \*11 (HUDALJ Jul. 15, 1999).

### III. Nature and Circumstance of the Violation.

The violations occurred during a telephone conversation that lasted between a minute and a half and three minutes. During this conversation, Respondent asked about the children’s ages and explained that her reason for doing so was because she felt the stairs in the Draw Street Property posed a potential risk to young children. There is no evidence that Respondent had an animus towards families with children, or that Respondent made any disparaging remarks. See HUD v. Schilling, 1993 WL 263667, at \*12 (HUDALJ Jul. 15, 1993) (finding that the respondent did not act out of malice or prejudice but rather a “humanitarian reason” and that such a concern does not preclude the imposition of a civil penalty but “certainly tempers the hand of justice”).

### IV. Respondent’s Degree of Culpability.

The Charging Party has proven, and Respondent admitted, that she would not rent the Draw Street Property to a family with a child under the age of two. Respondent stated that she refused to negotiate with Complainants but explained that the basis for her refusal was a concern for the safety of prospective child tenants and what she perceived to be a rude and unpleasant attitude from Mrs. Potter. Respondent believes her concern for child safety is a legitimate reason to refuse to rent to tenants. She also believed that she could discriminate on the basis of familial status where safety concerns are present, because she believed that landlords are responsible for the safety of tenants. Respondent’s lack of knowledge about prohibitions under the FHA does not excuse her of liability. However, her genuine concern for safety mitigates the amount of civil penalties. See HUD v. French, 1995 WL 542098, at \*15 (HUDALJ Jul. 16, 1996) (finding that a reasonable concern for safety, coupled with an ignorance of fair housing laws prohibiting discrimination because of safety concerns, is no excuse, but is a factor that may reasonably mitigate the seriousness of the offense). In this case, the stairs were not exceptionally dangerous. However, given the steepness and the narrowness of the steps, it is reasonable to believe that

they could pose a hazard to anyone who might have difficulty navigating a set of stairs.<sup>18</sup> Accordingly, the Court finds that Respondent had a genuine concern for safety, which mitigates a civil penalty award.

#### V. Deterrence.

The Charging Party seeks a civil penalty of \$8,000 because Respondent is “an owner of several rental properties, [who] should be aware of and abide by the [FHA].” Indeed, Respondent must be deterred from discriminating on the basis of family status even if her reason for doing so was a concern for safety. Edelstein, Fair Housing–Fair Lending at ¶ 25,239. Additionally, “[a]n award of some civil penalty is appropriate as a deterrence to others,” and to put those “similarly situated to Respondent” on notice that violations of the FHA will not be tolerated. HUD v. Wooten, 2007 WL 2248087, at \*6 (HUDALJ Aug. 1, 2007).

An \$8,000 penalty, however, is excessive. In a recent case, the Charging Party sought a civil penalty of \$5,000 from the general manager of a housing cooperative that housed approximately 60,000 residents. HUD v. Riverbay Corp., 2012 WL 1655364 (HUDALJ May 7, 2012), aff’d, 2012 WL 2069654 (HUDALJ Jun. 6, 2012). In Riverbay, the general manager, who had the ultimate authority to grant reasonable accommodation requests, was found to have acted in bad faith by blatantly disregarding the interactive process and elevating a “No Dog Policy” over the needs of the disabled. Id. at \*24. As a result, the Court found that a civil penalty of \$5,000 would be insufficient to deter such a respondent and, instead, awarded the maximum civil penalty. The Court cannot explain why the Charging Party believes that an \$8,000 assessment would be appropriate against an 88-year-old Respondent with responsibility over three rental properties, while an assessment of \$5,000 was appropriate for the general manager of a cooperative with 60,000 residents. Because it cannot, and the Charging Party has provided no credible justification, the penalty will be adjusted downward.

In this case, Respondent owns three rental properties. Although it is clear that she is unaware of some of her responsibilities under the FHA, the record is devoid of evidence that she blatantly disregarded those responsibilities and instead supports that any discrimination was born out of a desire to protect children. Moreover, the actual exchange took less than three minutes and caused no extensive harm to Complainants (as detailed above). Given these reasons, and the other factors analyzed supra, the Court imposes a penalty of \$500. See HUD v. Bucha, 1993 WL 169978, at \*7 (HUDALJ May 20, 1993) (awarding a civil penalty of \$250 in a case where the respondents’ refusal to the complainant was based on a concern for the safety the complainant’s three-year-old daughter. After finding that there was no evidence that the violation was knowing or intentional, but also that there was “no evidence that respondents took any cognizance of the Act in the conduct of their business,” the Court held that “the goal of deterrence would be served by a modest civil penalty”); see French, 1995 WL 542098, at \*16 (awarding a civil penalty of

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<sup>18</sup> Although the Charging Party categorizes the stairs as being “ordinary,” neither the Charging Party nor Complainants have ever been to the Draw Street Property. Therefore, the testimony of Mr. Dunn and Respondent, both of whom have first-hand knowledge of the Draw Street Property, is accepted as credible evidence that the stairs are steep and “daunting.”

\$500 by reasoning that although the respondent operates his own rental service, his complex involves “a small number of units” (nine units), and that the record was devoid of evidence demonstrating a careless disregard for the FHA or discriminatory animus towards children).<sup>19</sup>

### ORDER

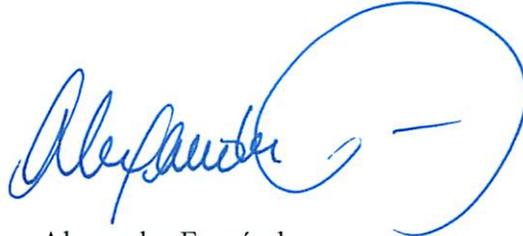
Based on the foregoing, it is **HEREBY DECLARED AND ORDERED**:

1. The Charging Party’s *Motion for Default Judgment* and *Second Motion for Default Judgment* are **DISMISSED** as moot.
2. Respondent has violated 42 U.S.C. § 3604(a) and (c).
3. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay to Complainants the total sum of \$3,750 in total damages.
4. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay to the Secretary the sum of \$500.00 in Civil Money Penalties.
5. Respondent is enjoined from discriminating because of family status against any person in any aspect of the rental, sale, use, or enjoyment of a dwelling.
6. HUD will provide, at no cost to Respondent, training on Fair Housing issues. This training will be open to any of Respondent’s agents and tenants and will be provided at a suitable location for attendees, in or around Cody, Wyoming. The date for the training will be set by HUD in cooperation with Respondent—multiple dates may be used at HUD’s discretion. Training must be completed within 180 days of the date on which this Order becomes final. HUD will make training materials available to those residents who wish to attend the training but are unavailable to attend.

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<sup>19</sup> The Charging Party also claims Respondent should be assessed a significant civil penalty for what it perceived to be a “flouting of the administrative process” and that Respondent should be made an example of. Respondent’s lack of participation in the early stages of litigation was not due to a disregard for the administrative process, but rather an ignorance of it. Respondent was acting *pro se* and it was clear to the Court that she did not understand the nature or the severity of the proceedings when she failed to answer the Charge in a timely fashion.

7. Any of Respondent's agent(s) who respond to inquiries concerning Respondent's rentals, and/or processes rental applications must attend the training specified in paragraph #6.



Alexander Fernández  
Administrative Law Judge

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**Notice of appeal rights.** The appeal procedure is set forth in detail in 24 C.F.R. § 180.675 (2009). This *Initial Decision and Order* may be appealed by any party to the Secretary of HUD by petition for review. Any petition for review must be received by the Secretary within 15 days after the date of this *Initial Decision and Order*. Any statement in opposition to a petition for review must be received by the Secretary within 22 days after issuance of this *Initial Decision and Order*.

**Service of appeal documents.** Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development  
Attention: Secretarial Review Clerk  
451 7<sup>th</sup> Street S.W., Room 2130  
Washington, DC 20410  
Facsimile: (202) 708-0019  
Scanned electronic document: [secretarialreview@hud.gov](mailto:secretarialreview@hud.gov)

**Copies of appeal documents.** Copies of any Petition for Review or statement in opposition shall also be served on the opposing party(s), and on the HUD Office of Hearings and Appeals

**Finality of decision.** The agency decision becomes final as indicated in 24 C.F.R. § 180.680.

**Judicial review of final decision.** Any party adversely affected by a final decision may file a petition in the appropriate United States Court of Appeals for review of the decision under 42 U.S.C. § 3612(i). The petition must be filed within 30 days after the date of issuance of the final decision.