Nos. 14-2139, 15-1223

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CASTILLO CONDOMINIUM ASSOCIATION,

Petitioner/Cross-Respondent

v.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, OFFICE OF THE SECRETARY, ON BEHALF OF CARLO GIMÉNEZ BIANCO,

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF THE FINAL AGENCY ORDER OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BRIEF FOR THE SECRETARY AS RESPONDENT/CROSS-PETITIONER

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STATEMENT REGARDING ORAL ARGUMENT

Although the Secretary believes that the issues are adequately addressed in the briefs, the Secretary does not oppose oral argument if this Court believes it will be helpful.

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STATEMENT OF JURISDICTION

Petitioner/Cross-Respondent's statement of jurisdiction is incomplete in that it lacks the basis for the agency's subject matter jurisdiction, complete citations to the statutory provisions establishing the basis for this Court's subject matter jurisdiction, and complete citations to the filing dates of the pleadings relevant to this appeal.

The administrative law judge (ALJ) and the Secretary of the United States Department of Housing and Urban Development (HUD or the Secretary) had subject matter jurisdiction under 42 U.S.C. 3612(b)-(h). The ALJ issued Initial Decisions and Orders on Fair Housing Act liability and damages that the Secretary set aside on review. These decisions culminated in a Final Agency Order dated October 2, 2014, that awarded damages, assessed a civil penalty, and ordered injunctive relief. On October 29, 2014, petitioner timely sought review in this Court pursuant to 28 U.S.C. 2343 and 2344 (No. 14-2139). On February 10, 2015, the Secretary filed a cross-application for enforcement of HUD's final agency order pursuant to 42 U.S.C. 3612(j) (No. 15-1223). By order dated February 20, 2015, this Court consolidated the two actions.

This Court has jurisdiction over the two actions pursuant to 42 U.S.C. 3612(i), 28 U.S.C. 2342(6), and 42 U.S.C. 3612(j)(1). Venue properly lies in this Court pursuant to 42 U.S.C. 3612(j)(1), because the discriminatory housing practice in this case took place in San Juan, Puerto Rico, within this Circuit.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Secretary's determination that Castillo Condominium Association violated Sections 804(f)(1) and (f)(2) of the Fair Housing Act.

2. Whether the ALJ correctly denied Castillo Condominium Association's pre-hearing motion to dismiss based on res judicata and motion in limine to exclude the testimony and expert written report of Giménez's treating psychiatrist.

3. Whether this Court should grant the Secretary's Cross-Application for Enforcement of the Final Agency Order.

STATEMENT OF THE CASE

1. In 2010, Carlo Giménez Bianco (Giménez) asked the Board of Directors of the Castillo Condominium Association (Castillo Condominium or the Association) for permission to keep an emotional support animal in his condominium unit to help him cope with his depression and anxiety. Despite the submission of a written statement by Giménez's treating psychiatrist supporting Giménez's request, the Association refused to allow Giménez to keep the animal and made clear it would fine him $100/month unless he removed the dog from his unit. As a result, Giménez was forced to move out of the condominium that had been his home for 15 years. Believing he had been discriminated against based on his disability, he filed a complaint with the Secretary, who ultimately agreed that the Association had violated the Fair Housing Act (FHA or the Act)[1] when it

[1] In 1988, Congress passed the Fair Housing Amendments Act, which extended protections against housing discrimination under the FHA to, among others, individuals with disabilities. For ease of reference, this brief refers to the statute under which HUD brought this action as the FHA or the Act.

refused to allow Giménez to keep a dog for his disability. The primary issue in this appeal is whether there was substantial evidence to support the Secretary's determination.

2. On March 29, 2012, following an investigation and determination of reasonable cause, HUD filed a Charge of Discrimination (Charge) on behalf of Giménez, against Petitioner/Cross-Respondent Castillo Condominium and Castillo Condominium Board of Directors President Carlos Toro Vizcarrondo (collectively, the Castillo respondents).[2] The Charge alleged that the Castillo respondents had unlawfully discriminated against Giménez on the basis of his disability[3] in violation of the Act by denying him a reasonable accommodation and making housing unavailable, in violation of 42 U.S.C. 3604(f)(1) and (f)(2). R.A. 4, 7.[4] The Charge further alleged that after Giménez informed the Association that he was an individual with a disability entitled to keep an emotional support animal in his Castillo Condominium unit, the Castillo respondents refused to grant him a

[2] This brief refers to HUD as the Charging Party in its role as the issuer of the Charge on behalf of Giménez. See 42 U.S.C. 3610(g)(2)(A).

[3] Although the Fair Housing Act uses the term "[h]andicap," see 42 U.S.C. 3602(h), this brief generally uses the term "disability" instead, in accordance with current usage.

[4] This brief uses the following abbreviations: "R.A. ___" for the Record Appendix; "Tr. __ " for the transcript of the hearing before the ALJ; "Br. __" for Petitioner/Cross-Respondent's opening brief filed with this Court; and "Add. __" for the addendum to Petitioner/Cross-Respondent's opening brief.

reasonable accommodation from its by-laws prohibiting residents from keeping pets. R.A. 5-6. On May 30, 2012, the Castillo respondents filed an Answer denying the charges and asserting numerous affirmative defenses. One of the affirmative defenses was that res judicata bars the Charge because Giménez declined to seek judicial review of a state-level administrative decision rejecting on the merits his complaint challenging the Castillo respondents' application of their no-pets regulation to him. R.A. 9-17.

On January 25, 2013, the Castillo respondents filed a motion to dismiss the Charge with prejudice, and reasserted res judicata as one of the grounds for dismissal. R.A. 19-20. On February 20, 2013, the ALJ denied the motion. Ruling and Order on Resp'ts' Mot. to Dismiss (Mot. to Dismiss Ruling). The ALJ determined, *inter alia*, that res judicata did not prevent the case from moving forward because the Castillo respondents failed to establish the second requirement of res judicata – a perfect identity of thing or cause between both actions. Mot. to Dismiss Ruling 6-8. Specifically, the ALJ observed that the state-level administrative decision merely found that the Castillo respondents' no-pet regulation was properly promulgated, and did not make any findings regarding Giménez's disability, his need for an emotional support animal, or his reasonable-accommodation request. Mot. to Dismiss Ruling 6-7. The ALJ concluded that "although the no-pet regulation promulgated by [the Castillo respondents] was

valid under Puerto Rico law, it was invalid insomuch as it arguably would permit discriminatory housing practices in violation of the FHA." Mot. to Dismiss Ruling 7.

3. The ALJ held a hearing on August 6 through 9, 2013, pursuant to 24 C.F.R. Pt. 180. Add. 13. Prior to the hearing, the Castillo respondents filed a motion in limine to exclude the testimony and written reports of Giménez's treating psychiatrist, Dr. Pedro Fernández, and his primary care physician, Dr. Roberto Unda Gomez (Unda). R.A. 21-72. During the hearing, the ALJ heard argument on the motion with respect to Dr. Fernández; the Castillo respondents contended that he was not qualified to testify as an expert because he was not board certified in psychiatry, had not previously testified as an expert in court, and was a friend of Giménez's. Tr. 207-214. The ALJ denied the motion, deeming Dr. Fernández an expert under the *Daubert* test "by virtue of being qualified as a medical doctor." Tr. 214. Giménez, Dr. Fernández, and Dr. Unda all testified during the Charging Party's case in chief that Giménez had anxiety disorder and chronic depression, and that his condition was helped by the presence of an emotional support animal. Tr. 19, 24, 26-29, 37-38, 45, 47, 53, 232-237, 259, 270-272, 461, 464-465, 469.

After the Charging Party presented its case in chief, the Castillo respondents moved to dismiss the case on the ground that the government failed to present a

prima facie case of a FHA violation, and that even if the government had made such a case, Giménez did not suffer any damages attributable to them. Tr. 542-559, 572-576. The Charging Party responded (Tr. 559-572), and the ALJ concluded that the government presented a case sufficient to withstand the motion to dismiss. Tr. 577-579. The ALJ reasoned that Giménez had a mental illness that substantially limited several life activities; that he needed an accommodation for the equal opportunity to use and enjoy his dwelling; that the accommodation requested was reasonable; and that the Association denied his request. Tr. 577-579. Based on the evidence presented at the hearing, the Charging Party requested that the ALJ order the Castillo respondents to pay Giménez damages in the amount of $100,000; assess a civil penalty of $16,000 against Castillo Condominium and $5,000 against Toro; and order the Castillo respondents and their agents to refrain from discriminating because of disability in violation of the Act and to undergo fair training housing. R.A. 101, 123-125.

4. Following the submission of post-hearing briefs (R.A. 73-164), the ALJ issued an Initial Decision and Order on July 17, 2014 (ALJ's Initial Decision), holding that the Castillo respondents did not violate the FHA. Add. 12-29. The ALJ's Initial Decision first denied each party's pre-hearing motion in limine to exclude the expert witness reports of the other side, reasoning that "[t]he reports offer useful insight into the relevant medical conditions and the standards of

practice in [psychiatric medicine]," and "therefore aid the Court in understanding the evidence." Add. 20. The Initial Decision then determined that the Charging Party failed to prove by a preponderance of the evidence that Giménez had a mental impairment warranting a companion animal as a reasonable accommodation. Add. 21-29. The ALJ reasoned that the Charging Party's case was based entirely on the testimony of Dr. Fernández – dismissing Dr. Unda's testimony in a footnote (Add. 28 n.26) because he was a primary care physician and thus "not in a position to diagnose [Giménez's] mental condition" – and that Dr. Fernández was biased and unreliable due to his close personal friendship with Giménez and his sparse note-taking during their counseling sessions. Add. 22-28.

The Charging Party petitioned the Secretary for review of the ALJ's Initial Decision, requesting that the Secretary vacate the Initial Decision, find that Castillo Condominium violated the Act by denying Giménez's reasonable-accommodation request, and remand the case to the ALJ to determine damages. R.A. 165-204. On August 15, 2014, the Secretary issued an Order on Secretarial Review (August 15 Order) granting the Charging Party's Petition and setting aside the ALJ's Initial Decision. Add. 31-42. The August 15 Order first determined that the Charging Party proved by a preponderance of the evidence that Giménez has a disability. Add. 33-38. In this regard, the Secretary concluded that the ALJ (1) wrongly disregarded Giménez's testimony of his 50-year history of depression and anxiety;

and (2) mistakenly discredited the testimony regarding Giménez's mental impairment by Dr. Fernández, who was a reliable third party in a position to know this information, and Dr. Unda, who had the expertise to make that diagnosis. Add. 33-37. The August 15 Order then found that the Charging Party proved the remaining elements of Section 804(f)(1) and (f)(2) violations – that the Association knew or should have known that Giménez had a disability, that Giménez made a reasonable-accommodation request, that this request was necessary, and that the Association denied this request and failed to engage in the interactive process.[5] Add. 37-42. In light of these conclusions, the Secretary remanded the proceeding to the ALJ for a determination of damages and a civil penalty. Add. 42.

5. On remand, the ALJ issued an Initial Decision and Order dated September 5, 2014 (ALJ's Remand Decision). Add. 44-51. The ALJ's Remand Decision awarded Giménez $3000 in emotional distress damages. Add. 48. The ALJ found that, although Giménez suffered emotional harm during his time at Castillo Condominium, much of this harm pre-existed the Association's denial of his reasonable-accommodation request. Add. 46-48. The ALJ also emphasized that Giménez was never required to remove his emotional support animal from his condominium, and that he moved to a larger condominium after selling his Castillo

[5] The Charging Party asked the Secretary to find that only the Association violated the FHA. Add. 31 n.1.

Condominium unit for fair value. Add. 48. With regard to the civil penalty, the ALJ's Remand Decision analyzed the six factors set forth in 24 C.F.R. 180.671(c)(1) and determined that a civil penalty in the amount of $2000 was appropriate, noting that the Association's actions "were fueled by ignorance of the law" but did not constitute "willful, malicious conduct that demands a maximum penalty." Add. 49-50. Finally, the ALJ ordered Castillo Condominium's officers to participate in and successfully complete fair housing training to be provided at the Charging Party's expense, and to implement the Charging Party's proposed Reasonable Accommodation Policy. Add. 50-51.

The Charging Party petitioned the Secretary for review of the ALJ's Remand Decision, requesting a new decision ordering Castillo Condominium to (1) pay Giménez $50,000 in emotional distress damages and HUD a $16,000 civil penalty; (2) arrange, pay for, and attend fair housing training approved by HUD; and (3) adopt, post, and maintain the Reasonable Accommodation Policy attached to the petition. R.A. 220-257. On October 2, 2014, the Secretary issued an Order on Secretarial Review (Final Agency Order) granting in part the Charging Party's Petition, and modifying the ALJ's assessment of damages, civil penalty, and injunctive relief. Add. 1-11. The Final Agency Order first found that the ALJ erroneously minimized Giménez's emotional distress damages resulting from the Association's egregious and intentional conduct by (1) failing to correctly weigh

Giménez's pre-existing depression and anxiety, and (2) mistakenly discounting his forced move from his Castillo Condominium unit. Add. 3-7. The Secretary also concluded the ALJ's assessment of a mere $2000 civil penalty was inappropriate given Castillo Condominium's failure to demonstrate financial hardship, its ignorance of the Fair Housing Act, and the importance of deterring it and similarly situated parties from committing like violations in the future. Add. 7-10. Accordingly, the Secretary awarded Giménez $20,000 in emotional distress damages and imposed upon Castillo Condominium the maximum $16,000 civil penalty for a first-time violation. Add. 11. The Final Agency Order also modified the order of injunctive relief to eliminate the requirement that HUD provide fair housing training to the Association's officers, and to replace the Reasonable Accommodation Policy included in the ALJ's Remand Decision with a different policy submitted by the Charging Party. Add. 10-11.

6. On October 29, 2014, the Association filed a timely Petition for Review of the Final Agency Order in this Court, which docketed the Petition as No. 14-2139. Following an unsuccessful attempt to mediate the case, on February 10, 2015, the Secretary filed a Cross-Application for Enforcement of the Final Agency Order, which is docketed as No. 15-1223. By Order dated February 20, 2015, this Court consolidated the two actions.

STATEMENT OF THE FACTS

1. At the time of the hearing before the ALJ, complainant Carlo Giménez Bianco was a 76-year-old man with an extensive history of anxiety and depression. Tr. 19, 24, 26-29, 37-38, 45, 47. Giménez's first episodes of anxiety and depression occurred as a child when he experienced the deaths of his uncle and grandfather. Tr. 26-27. Giménez's depression recurred in adulthood when his longtime romantic partner Tony became seriously ill, and Giménez was informed that Tony had two years to live. Tr. 28-29. Tony's illness caused Giménez to have difficulty sleeping and to withdraw from the world, and he began seeing a psychoanalyst who prescribed antidepressants to treat his condition. Tr. 28, 32, 34-35. Tony died in July 1994, which caused Giménez to experience a severe depressive episode beyond mere grief or mourning. Tr. 37, 244.

2. In June 1995, after Tony's death, Giménez moved from New York City to Puerto Rico and purchased an efficiency unit in Castillo Condominium. R.A. 5, 280, 282-283; Tr. 90, 176. This unit is located in Condado, San Juan – the neighborhood where Giménez was raised and a block away from the beach he frequented as a child. Tr. 64. In 1997, Giménez entered into a new romantic relationship with an individual who Giménez soon discovered was addicted to drugs. Tr. 37-38, 91-92, 107-108. Dealing with his partner's addiction caused Giménez to experience a new episode of depression with the same symptoms he

had experienced in the past – lack of desire to eat or socialize – and forced him to resume taking anti-depression medication. Tr. 38-39, 44.

Giménez's depression led him to begin receiving psychiatric treatment from Dr. Pedro Fernández. Tr. 39, 44-45. Dr. Fernández observed that when they first met, Giménez was "sad, depressed, [and] anxious" due to his relationship with an individual who "was kind of violent and very careless and accused him of doing things that he wasn't doing." Tr. 242. Dr. Fernández advised Giménez to end this relationship, and began treating him with a combination of medication and psychotherapy. Tr. 40-41, 108, 243, 251. Specifically, to treat Giménez's depression and anxiety, Dr. Fernández prescribed Klonopin for Giménez in 1997, and subsequently prescribed Prozac for him. Tr. 25, 40-41, 49, 243, 286, 527. Before taking Prozac, Giménez was crying all the time; the Prozac helped him to stop crying. Tr. 25, 41.

Dr. Fernández testified that he has treated Giménez for anxiety and depression since 1997, and that he diagnosed Giménez with Major Depressive Disorder Recurrent (MDD) and Generalized Anxiety Disorder. R.A. 31; Tr. 232-237, 270. Both Giménez and Dr. Fernández testified that as a result of these impairments, Giménez would not leave home to do things or to socialize with others. Tr. 39, 49-50, 259. According to Dr. Fernández, in the 16 years he has been Giménez's treating psychiatrist, he has seen Giménez 10-15 times a year,

during which time Giménez has on occasion experienced severe episodes of depression. Tr. 279-280. Although Dr. Fernández did not know Giménez before treating him, over the course of his professional relationship, both Dr. Fernández and his wife became personal friends with Giménez. Tr. 225-227. Dr. Fernández testified that this friendship did not affect his expert report on Giménez because "[a]nxiety and depression is so severe that when someone suffers from that, you don't have to lie, you don't have to be friend of anyone to show how bad is the illness." Tr. 239-240.

Dr. Unda, Giménez's primary care physician since 2009, also testified that Giménez had anxiety disorder and chronic depression and has been receiving long-term care with antidepressants. Tr. 461, 464-465. According to Dr. Unda, Giménez's mental condition from time to time negatively impacted his physical ailments, which included diabetes, coronary heart disease, and tremors. Tr. 462-466. Dr. Unda further testified that on several office visits, Giménez displayed "more than normal anxiety levels" due to conflicts at Castillo Condominium. Tr. 468-469. Dr. Unda recalled that on one occasion, Giménez "presented in an extreme state of anxiety. He was very, very anxious. His blood pressure was very

high. * * * He [told] me that he has chest pain. He was sweating. He was extremely agitated."[6] Tr. 477.

3. Giménez's depression worsened in 2009 after several years of clashing with Castillo Condominium Board (Board) President Carlos Toro Vizcarrondo (Toro). Tr. 25, 45-48, 92. Giménez believed that Toro was harassing him, and the conflict between the two caused him to fear for his safety and be afraid to go out. Tr. 48-50, 92-93, 122, 248, 271. Dr. Fernández testified, supported by contemporaneous notes, that in July 2009, due to problems at Castillo Condominium, Giménez "was feeling overwhelmed and was developing symptoms of anxiety and depression that met criteria of a full depressive episode and anxiety." Joint Ex. 4; R.A. 37; Tr. 247. Dr. Fernández also observed several physical manifestations of Giménez's deteriorated mental condition, including psychomotor retardation, difficulty sleeping, decreased appetite and energy level, feelings of worthlessness and hopelessness, and anhedonia – *i.e.*, "an emotional state in which the person no longer has the capacity to enjoy pleasure in activities." Joint Ex. 4; R.A. 37; Tr. 248-250, 271. According to Dr. Fernández, he had never before witnessed Giménez manifesting such severe symptons of depression, including "lying on the couch doing nothing, not going out, not talking to friends,"

[6] Although Dr. Unda's treatment note states that this incident occurred on April 5, 2011, other evidence in the record suggests that it took place one year earlier. See R.A. 171 n.6.

but Fernández could not increase Giménez's dose of medication for fear of adverse side effects on his other medical conditions. Tr. 316-317.

In treating Giménez for this depressive episode, Dr. Fernández discussed with him the beneficial effects of a toy poodle named Rhettskie, which he had owned several years earlier. Tr. 253-254. Rhettskie had helped Giménez cope with depression due to his partner Tony's terminal illness by forcing him to attend to Rhettskie's needs, which alleviated some of the worst symptoms of his depression. Because Rhettskie needed to be walked, Giménez was forced to leave the house, which resulted in socializing with other people. Tr. 33, 317. Likewise, because Rhettskie depended on Giménez for basic needs like food, Giménez could not simply lie in bed all day. Tr. 33, 317. Accordingly, in September or October 2009, Dr. Fernández recommended that Giménez get a dog as an emotional support animal to "force him to get out of bed to take care of that pet." Tr. 43-44, 49, 103-104, 254, 287-288, 316-317. Dr. Fernández testified that he has previously recommended emotional support animals to patients as a form of therapy to treat anxiety and depression. Tr. 222-223. According to Dr. Fernández, an emotional support animal does not require special training, but is distinguishable from a mere pet in that it helps to improve an individual's mental health. Tr. 264-266.

In December 2009, after Dr. Fernández and Giménez discussed the beneficial effects on Giménez of a companion animal, a friend gave Giménez a pug named Bebo as a Christmas gift. R.A. 280; Tr. 50, 52, 61, 83, 93-94, 257-258. According to Giménez, Bebo helped him deal with his depression in the same way that Rhettskie did years earlier by requiring Giménez to bathe, feed, and walk him, and by forcing Giménez to leave the house and socialize with other people. Tr. 53. Dr. Fernández seconded the positive effects Bebo had on Giménez's mental health, observing that Giménez "start[ed] to calm down from the psychomotor retardation[,] * * * start[ed] coming out of the apartment[, and] * * * got more active, talking to people, doing things he wasn't doing, taking care of himself better." Tr. 271-272. Dr. Fernández believed that Bebo played as important a role in Giménez's treatment as medication. Tr. 259. Dr. Unda concurred with Dr. Fernández's observations, testifying that he believed that Bebo was a "therapeutical instrument" that "serve[d] as a bond for [Giménez] and a way to relieve his anxiety" and was significant for Giménez's mental health. Tr. 469.

4. Giménez was aware that Castillo Condominium allowed its residents to keep pets in their individual units when he purchased his condominium in 1995, but was unaware that the Association subsequently amended its by-laws in November 2004 to prohibit pet ownership going forward. R.A. 5, 280, 283; Tr. 91, 94, 102, 671. At its April 6, 2010, meeting, the Board learned of Bebo's presence

from a letter written by a condominium owner complaining about Giménez's dog. Tr. 708-711, 715, 791-792, 801, 837-840, 899-900, 910, 952-953. After discussing this letter at the meeting, the Board sent Giménez, via its administrator Eduardo Figueroa Gandia (Figueroa), a letter dated April 12, 2010. Joint Ex. 1. The letter stated that Giménez was in violation of Chapter 8, Articles 1 and 2 of the condominium's by-laws, noting that he could not keep his pet unless the owners voted to amend the no-pet policy, and warning him that he would be assessed a $100 fine if he did not remove his pet within 30 days. Joint Ex. 1; R.A. 5, 280, 283-284; Tr. 57, 98-100, 146-147, 631, 669-670, 792-794, 840-841, 876-877, 918, 954-955. According to several witnesses, the Board at this time did not have a reasonable-accommodation exception to its no-pets policy for individuals with physical or mental disabilities. Tr. 403-404, 446-447, 816, 831-832, 914-917, 999.

Giménez testified that the Board's letter "devastated" and "shocked" him, and that he "felt the depression starting all over again." Tr. 57-58. He responded by sending the Board, via Figueroa, a letter dated April 24, 2010, asserting that, under federal law, he was entitled to keep his companion animal notwithstanding the no-pet provision in the Association's by-laws. Joint Ex. 2A; R.A. 5, 280; Tr. 59, 148-149, 794, 957. Attached to this letter was an e-mail from Dr. Fernández directed toward the Board stating that Giménez "is my patient, and has been under my care for his psychiatric condition since 1997"; asserting that

Giménez "meets the definition of disability under * * * the 'Fair Housing Act,'" declaring that "[d]ue to his emotional condition, * * * Giménez has certain limitations such as coping with stress/anxiety"; "recommending and prescribing an emotional support animal that will assist [Giménez] in coping with his disability"; and offering "to answer any questions you may have concerning my recommendation that [Giménez] have an emotional support animal." Joint Ex. 2B; R.A. 5, 280; Tr. 59, 149, 255-257, 293-294, 298-299, 639-641, 794, 958. Giménez and Dr. Fernández both testified that no one from the Board ever contacted them to discuss Giménez's condition and his reasonable-accommodation request. Tr. 59-60, 260-261, 299. Dr. Fernández testified that had any Board members contacted him, he would have discussed with them the importance of an emotional support animal for Giménez and explained in greater detail the nature of Giménez's emotional disability "so that they [would] have an understanding of what's going on." Tr. 261.

At its May 18, 2010, meeting, Figueroa presented the Board with Giménez's request for an accommodation, along with the attached e-mail from Dr. Fernández. Tr. 903-904, 926, 955. The Board decided that Dr. Fernández's e-mail was not valid because it was not signed and because he was a friend of Giménez's.[7]

[7] Giménez also provided Figueroa with a letter from Dr. Unda to the Board regarding the compromised state of Giménez's emotional and physical health, and (continued…)

R.A. 5; Tr. 398, 599, 631, 641-642, 650, 655-656, 829, 901-902, 963-964, 996. Accordingly, the Board unanimously voted to send Giménez a letter informing him that the 30-day period to remove Bebo had expired, and that he would be fined $100/month for as long as he kept the dog in his unit. Tr. 631, 813-814, 842, 902, 906-907, 959-960. The Board administrator and several Board members admitted that they did not request additional information from Dr. Fernández or ask him to submit a signed letter before making this decision. Tr. 632, 656, 875-876, 921, 997.

At the May 2010 meeting, the Board decided to have Gloria Rosado Morales (Rosado) verbally invite Giménez to meet with the Association's conciliation committee.[8] Figueroa and several Board members, including Toro, claimed that Giménez was invited to meet with the conciliation committee so that the Board could obtain additional information and make a better documented decision

(…continued)
requesting that the Board allow Giménez to keep Bebo in his unit. Tr. 467-469, 487-493, 535-538, 541. Toro did not recall the Board having this letter in its possession at the time of the May 2010 meeting. Tr. 1267-1268.

[8] Puerto Rico's Condominium Act requires a condominium have a conciliation committee to make recommendations to the board of directors on how to resolve disputes between the board and condominium titleholders. See P.R. Laws Ann. tit. 31, § 1293f(a); Tr. 945, 960-961, 1005-1006.

(Tr. 794, 818, 890, 900-901, 904-905, 926-927, 960, 962-963, 966-968, 974-975, 991), but Rosado offered a different explanation.[9] Contradicting the claim that this invitation was intended to facilitate a more informed decision by the Board, Rosado testified that the purpose of the meeting was simply to listen to Giménez, as they "just wanted to have him ventilate." Tr. 931-932, 937-938. According to Rosado, the no-pets policy was applied to everyone without exception, except for owners grandfathered in through the prior by-laws that allowed pets. Tr. 916, 925-926. Consequently, while offering Giménez the opportunity to meet with the conciliation committee, Rosado indicated to him that it was the Board's "job" to enforce the by-laws, and that "we have to abide by them." Tr. 937. Giménez declined Rosado's invitation. Tr. 794-795, 819, 890-891, 904-905, 927-938, 968.

5. Because he felt "very depressed" at the prospect of losing Bebo while his reasonable-accommodation request was pending before the Board, Giménez sought relief from Puerto Rico's Department of Consumer Affairs (DACO). Tr. 60. On May 3, 2010, Giménez filed a complaint with DACO under Puerto Rico's Condominium Act. R.A. 5, 280, 284; Tr. 151-152, 796, 970. The complaint challenged Castillo Condominium's application of its amended by-laws to him and sought an order that would allow him to keep Bebo in his unit. R.A. 5, 280, 284;

[9] Neither Rosado nor anyone from the Association had any written communication with Giménez about the proposed meeting. Tr. 807, 813, 821.

Tr. 151-152. Although in his DACO complaint, Giménez referenced a medical need to keep an emotional support animal in his condominium unit, he did not bring the complaint under the FHA or any other disability discrimination law. On May 20, 2010, DACO issued a cease-and-desist order to the Board, which prohibited the Board from imposing the $100 fine or forcing Bebo's removal until the DACO case was resolved. R.A. 5, 284; Tr. 968-971.

On May 21, 2010 – before it received the DACO order – the Board sent Giménez a letter informing him that the 30-day period to remove Bebo expired on May 12, and that he would be fined $100/month for as long as he kept the dog in his unit in violation of the no-pets policy. Joint Ex. 3; R.A. 6, 280; Tr. 796-797, 846, 850-851, 878-879, 902, 909, 922, 924, 968, 990-991. The Board's letter did not mention any reservations regarding Dr. Fernández's e-mail or any attempts by the Board to conciliate the dispute with Giménez. Joint Ex. 3; Tr. 184, 820-821, 923-924, 991-992, 998-999. Giménez testified that this letter depressed him further because of the continued prospect of losing Bebo. Tr. 63. Dr. Fernández similarly testified that the Board's rejection of Giménez's request made Giménez "more depressed" and "more anxious." Tr. 272.

The Board received the DACO cease-and-desist order shortly after it sent the letter to Giménez. Tr. 848, 968, 971, 974-975. Upon receiving the DACO order, the Board, through Figueroa, verbally informed Giménez that it would hold the

fine in abeyance pursuant to the order. R.A. 6; Tr. 879-882, 975. No representative from Castillo Condominium otherwise contacted Giménez after receiving DACO's cease-and-desist order to discuss and reevaluate his request, however. Tr. 178-179, 203.

6. Even with the cease-and-desist order in place, Giménez continued to experience significant stress, anxiety, and fear at the prospect of losing his companion animal. Add. 5-6. Giménez testified that he was "very worried" about staying at Castillo Condominium without permission to keep Bebo. Tr. 61. He stated that if he were to lose Bebo, he "probably would have ended up in the hospital with a real nervous breakdown or depression untreatable outside the hospital." Tr. 54. Dr. Fernández confirmed this view, testifying that if Giménez had to get rid of Bebo, he "could have gotten worse" and would "[p]robably end up even in a hospital or trying to kill himself." Tr. 272. Along similar lines, Dr. Unda stated that his "medical impression" was that removal of Bebo from Giménez's home "would have a detrimental effect both on his physical and mental state." Tr. 479. Dr. Unda believed that, based on Giménez's "special bond" with Bebo, he was "especially susceptible" to the mere threat of Bebo's removal. Tr. 522-523.

On March 3, 2011, DACO issued a ruling upholding the Association's by-laws prohibiting pet ownership under Puerto Rico's Condominium Act and finding against Giménez. R.A. 6, 282-291; Tr. 190. The DACO ruling did not mention

Giménez's disability, his need to keep an emotional support animal in his unit, the FHA, or his reasonable-accommodation request. R.A. 282-291. At this point, Giménez testified, he was forced to leave his Castillo Condominium unit, where he had lived for 15 years and which was located close to his childhood home, due to his fear of losing his companion animal. Add. 6-7; Tr. 23, 64-65, 180, 190, 206-207. Later that month, before the Board took any action to remove his companion animal, Giménez closed on the purchase of a unit in the Mundo Feliz Condominium in Isla Verde, Puerto Rico "for [his] own sanity." R.A. 281; Tr. 61, 80, 122-123, 180, 186-188, 190, 205. Giménez testified that if he had been allowed to keep Bebo, he would have remained at Castillo Condominium. Tr. 179-180, 186, 199, 201-202, 206.

Giménez moved to his new condominium unit in April 2011, and sold his Castillo Condominium unit in October 2011. R.A. 6, 281; Tr. 976. The Board did not attempt to collect the $100 monthly fine from Giménez after his move. Tr. 851, 975.

SUMMARY OF ARGUMENT

The Court should deny Castillo Condominium's Petition for Review, and grant the Secretary's Cross-Application for Enforcement of HUD's Final Agency Order.

1. Substantial evidence supports the Secretary's determination that Castillo Condominium violated the Fair Housing Act. The Association's refusal to grant Giménez's request to keep an emotional support animal in his condominium unit as a reasonable accommodation made a dwelling unavailable to Giménez, because of his disability, in violation of 42 U.S.C. 3604(f)(1); and discriminated against Giménez in the terms and conditions of a dwelling because of his disability, in violation of 42 U.S.C. 3604(f)(2). The record evidence amply demonstrated that (1) Giménez was a person with a disability within the meaning of the Act; (2) Castillo Condominium had notice that he was a person with a disability; (3) Giménez made a request for a reasonable accommodation that was necessary to allow him an equal opportunity to use and enjoy his unit; and (4) Castillo Condominium refused the request. Castillo Condominium's refusal of Giménez's request made his home unavailable to him, as it forced him to move out in order to keep his emotional support animal.

2. The ALJ correctly denied Castillo Condominium's pre-hearing motion to dismiss the Charge on the ground of res judicata. The Puerto Rico Condominium Act establishes an administrative process available through DACO that is limited to the promulgation of condominium rules and the enforcement of those rules; it does not address claims of housing discrimination. Accordingly, the DACO ruling that upheld the Association's by-laws preventing pet ownership under the

Condominium Act did not address Giménez's condition, his need for an emotional support animal, or his request for a reasonable accommodation under the Act. This proceeding and the FHA administrative proceeding thus did not share a "perfect identity of thing or cause," which is the second requirement of res judicata under Puerto Rico law. Even if the DACO ruling had addressed Giménez's disability-related claims, res judicata would not prevent Giménez's federal claims from going forward, because the Act invalidates any state law that "purports to require or permit any action that would be a discriminatory housing practice."

The ALJ acted within his discretion in denying Castillo Condominium's motion in limine to exclude the testimony and expert written report of Giménez's treating psychiatrist, Dr. Fernández. Castillo Condominium waived its argument that the ALJ should have excluded Dr. Fernández's expert testimony by failing to develop this argument on appeal beyond a conclusory assertion and citation to pages from its appendix. In any event, this argument is without merit. Dr. Fernández's expert testimony rested on a reliable foundation because he is a practicing psychiatrist who has treated Giménez since 1997. His testimony also was relevant to the task at hand, because it addressed Giménez's disability and his need for an emotional support animal to allow him the equal opportunity to use and enjoy his condominium unit.

3. Because substantial evidence supports the Secretary's determinations regarding liability, and the petition for review is without merit, this Court should grant the Secretary's Cross-Application for Enforcement of the Final Agency Order.

ARGUMENT

I

SUBSTANTIAL EVIDENCE SUPPORTS THE SECRETARY'S DETERMINATION THAT CASTILLO CONDOMINIUM VIOLATED SECTIONS 804(f)(1) AND (f)(2) OF THE FHA

A. Standard Of Review

Under the Administrative Procedure Act, this Court is bound by an agency's factual findings "as long as they are supported by substantial evidence in the record as a whole." *Astralis Condo. Ass'n* v. *HUD*, 620 F.3d 62, 66 (1st Cir. 2010). Substantial evidence requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Ibid.* (quoting *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951)). The substantial-evidence standard gives the Secretary "the responsibility * * * to determine issues of credibility[,] * * * to draw inferences from the record evidence," and to "resol[ve] * * * conflicts in the evidence." *Ortiz* v. *Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991) (per curiam). If the record evidence is capable of two different interpretations, this Court must affirm the

Secretary's interpretation. See *Pagan* v. *Secretary of Health & Human Servs.*, 819 F.2d 1, 3 (1st Cir. 1987) (per curiam).

Where, as here, the Secretary overturns the ALJ's initial decision based on his disagreement with the ALJ's assessment of witness credibility, "the Secretary should fully articulate his reasons for so doing." *Aylett* v. *HUD*, 54 F.3d 1560, 1561, 1566 (10th Cir. 1995). On review, the court of appeals subjects the Secretary's factual findings to "heightened scrutiny" to "decide whether such reasons find support in the record." *Ibid.*; accord *Earle Indus., Inc.* v. *NLRB*, 75 F.3d 400, 404 (8th Cir. 1996); *Garcia* v. *Secretary of Labor*, 10 F.3d 276, 280 (5th Cir. 1993). This heightened scrutiny does not alter the substantial-evidence standard, however, but merely adds the ALJ's findings as another element for the appellate court to consider in reviewing the Secretary's factual findings. See *Universal Camera Corp.*, 340 U.S. at 496.

B. The Record Evidence Amply Supports The Secretary's Findings Of Liability Under Section 804(f) Of The FHA

The FHA prohibits "discriminat[ing] in the sale or rental, or * * * otherwise mak[ing] unavailable or deny[ing], a dwelling to any buyer or renter, because of a handicap of-- that buyer or renter, [or] a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available." 42 U.S.C. 3604(f)(1)(A) and (B). The Act also prohibits "discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or

in the provision of services or facilities in connection with such dwelling, because of a handicap of-- that person; or a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available." 42 U.S.C. 3604(f)(2)(A) and (B). Discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [an individual with a disability] equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B).

To establish a failure to accommodate under the FHA, the Charging Party must show that (1) the complainant has a disability within the meaning of the Act; (2) the respondent knew or should reasonably have known of his disability; (3) the complainant requested a reasonable accommodation that is "necessary to allow him an equal opportunity to use and enjoy the housing in question"; and (4) the respondent refused to make the requested accommodation. *Astralis*, 620 F.3d at 67. The record in this case provides substantial evidence to support the Secretary's factual findings on each of these elements.

1. Giménez Is A Person With A Disability Under The FHA

First, substantial evidence supports the Secretary's factual finding that Giménez is disabled under the FHA. The Act defines "[h]andicap" as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3)

being regarded as having such an impairment." 42 U.S.C. 3602(h). A "mental impairment" includes, *inter alia*, "[a]ny mental or psychological disorder, such as * * * emotional or mental illness." 24 C.F.R. 100.201. The term "'[s]ubstantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree.'" *Toyota Motor Mfg., Kentucky, Inc.*, v. *Williams*, 534 U.S. 184, 196 (2002) (Americans with Disabilities Act case).[10]

The term "major life activities" covers a broad range of conduct. "Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 24 C.F.R. 100.201(b); see also *Toyota*, 534 U.S. at 197 ("'Major life activities' * * * refers to those activities that are of central importance to daily life."). This list of major life activities is illustrative, not exhaustive. See *Bragdon* v. *Abbott*, 524 U.S. 624, 639 (1998). This Court has recognized sleeping and relating to others as major life activities. See *Criado* v. *IBM Corp.*, 145 F.3d 437, 442-443 (1st Cir. 1998) (ADA case).

The record evidence amply demonstrates that Giménez has a disability as defined by the Act. Giménez, his treating psychiatrist, Dr. Fernández, and his

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[10] The Americans with Disabilities Act's (ADA) "definition of disability is drawn almost verbatim from the definition of * * * 'handicap' contained in the Fair Housing Amendments Act of 1988." *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998). Accordingly, ADA case law "is generally persuasive in assessing handicapped discrimination claims under the [FHA]." *Astralis*, 620 F.3d at 66.

primary care physician, Dr. Unda, all testified about Giménez's long history of anxiety and depression. Tr. 19, 24, 26-29, 37-38, 45, 47, 232-237, 270, 279-280, 461, 464-465. Giménez and Dr. Fernández further testified that these impairments substantially limited at least two of Giménez's major life activities: sleeping and interacting with others. See Tr. 28, 39, 49-50, 249-250, 259. Dr. Fernández testified, supported by contemporaneous notes, that Giménez had a major depressive episode in July 2009, marked by psychomotor retardation, difficulty sleeping, decreased appetite and energy level, feelings of worthlessness and hopelessness, and anhedonia. Joint Ex. 4; R.A. 37; Tr. 247-250, 271, 313-314. This evidence is clearly sufficient to support the Secretary's determination that Giménez is a person with a disability under the Act. See *Criado*, 145 F.3d at 442-443 (individual's depression and anxiety that substantially limited her ability to work, sleep, and relate to others was sufficient evidence of mental disability to survive a motion for judgment as a matter of law); *Head* v. *Glacier Nw. Inc.*, 413 F.3d 1053, 1060-1061 (9th Cir. 2005) (concluding in ADA case that plaintiff alleged sufficient evidence to survive summary judgment on his claim that his depression and bipolar disorder substantially limited the major life activities of sleeping and interacting with others); *HUD* v. *Riverbay Corp.*, HUDALJ 11-F-052-FH-18, 2012 WL 1655364, at *12-13 (May 7, 2012) (complainant had disability

where anxiety and depression substantially limited his ability to sleep and interact with others), aff'd, 2012 WL 2069654 (June 6, 2012).

Castillo Condominium erroneously contends (Br. 27-36, 44) that the evidence in the record did not support the Secretary's finding that Giménez had a disability. The Association's primary line of argument, as it was before the ALJ, is that Dr. Fernández was a biased and unreliable witness because he was a personal friend of Giménez's who did not take detailed notes of their counseling sessions. Br. 29-33. The Association also directs (Br. 31-32, 34) this Court to alleged shortcomings in Dr. Fernández's credentials and expert report, particularly compared to its expert witness, Dr. José Franceschini. Castillo Condominium further argues (Br. 36) that Dr. Fernández's e-mail attached to Giménez's accommodation request was "the only 'evidence' of [Giménez's] disability."

Castillo Condominium's argument takes an unduly cramped view of what evidence is necessary to establish the existence of a disability under the Act, and improperly ignores the record evidence supporting a finding that Giménez was disabled. A Joint Statement between HUD and the United States Department of Justice (DOJ)[11] on reasonable accommodations under the Act states that verification that an individual meets the Act's definition of disability may be

[11] HUD and the DOJ are jointly responsible for enforcing the FHA. See 42 U.S.C. 3612(a) & (o), 3614.

provided by the individual himself or by a doctor, other medical professional, or third party who is in a position to know about the disability. See Question 18, Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act (May 14, 2004) (HUD/DOJ Joint Statement), available at http://www.justice.gov/crt/about/hce/jointstatement_ra.php.[12] Conspicuously absent from Castillo Condominium's brief is any challenge to the testimony of Giménez and his primary care physician, Dr. Unda. As noted above, both of these individuals provided evidence confirming Giménez's disability, contrary to the Association's contention otherwise.

Substantial evidence supports the Secretary's finding that the ALJ erred in discrediting Dr. Fernández's testimony that Giménez was disabled. Because Dr. Fernández has treated Giménez since 1997 and has seen Giménez 10-15 times a year (Tr. 225-226, 279), he also was in a position to know about Giménez's disability and confirm its existence. Dr. Fernández's policy of not taking notes during most of his counseling sessions with Giménez is no reason to discount his testimony because Giménez's "medical records or detailed information about

[12] The HUD/DOJ Joint Statement is a policy statement that lacks the force of law and does not warrant *Chevron*-style deference, but is entitled to respect if persuasive. See *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000). This Court has cited the HUD/DOJ Joint Statement as persuasive authority. See *Astralis*, 620 F.3d at 68 & n.3.

* * * [his] disability [wa]s not necessary for" the inquiry into whether he was disabled. See HUD/DOJ Joint Statement, Question 18. Nor does Dr. Fernández's alleged lack of expertise or personal friendship with Giménez undermine the Secretary's credibility finding. The ALJ correctly found that Dr. Fernández was qualified as an expert under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), and thus, that his testimony both rested on a reliable foundation and was relevant to the task at hand. See pp. 55-58, *infra*.

Equally without merit is Castillo Condominium's attack on the disability finding itself. First, Castillo Condominium argues (Br. 33-34) that under the definition of "major depression" Dr. Fernández provided, which requires the presence of at least five symptoms (see Tr. 313-314), Giménez was not disabled according to his testimony or the testimony of his neighbors. The Association contends (Br. 30, 32, 34-36, 44) that this testimony confirmed that Giménez was an "energetic" individual and a "human dynamo," whose frequent international travel, professional conduct of business and legal affairs, and personal relationships belied a finding that he was mentally disabled. Under the Act, however, the existence of a disability depends on a complainant's physical and mental condition, not on his appearance to the outside world. See 42 U.S.C. 3602(h); *Jankowski Lee & Assocs.* v. *Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996). As noted above, Dr. Fernández testified that Giménez evinced at least five indicia of major depression in July

2009. See p. 31, *supra*. If Castillo Condominium was skeptical of Giménez's alleged disability due to his appearance and conduct, it had the obligation to request additional documentation from him or open up a dialogue. See pp. 43-44, *infra*.

Second, the Association argues (Br. 29, 33-34, 36) that Dr. Unda's medical records and the written report and testimony of Dr. Franceschini undermine Dr. Fernández's diagnosis of major depression. Neither of these is the case. The absence in Dr. Unda's records of "documented or objective confirmation that [Giménez] experienced any loss of appetite or lack of sleep" (Br. 34) is hardly dispositive considering that Dr. Unda is Giménez's primary care physician, not his treating psychiatrist. Indeed, the Association's brief cites no part of the record to support its claim that Unda's records undermine a diagnosis of major depression; in fact, Dr. Unda testified extensively as to Giménez's mental health. Tr. 464, 477, 538-530. Moreover, the records of Dr. Unda that state that Giménez tested "negative for depression" (Br. 36) are from November 2012, not 2010 – over one year after Giménez moved out of the Castillo Condominium building and when he was no longer in danger of losing his companion animal. Tr. 499-500, 521-523. In addition, Dr. Unda explained that his electronic records system automatically marks "negative for" any condition that he does not evaluate directly on a checkup, but does not imply that the patient does not have that particular condition. Tr. 528-

529. Dr. Unda further testified that he believed that Giménez's depression was controlled but not over. Tr. 530.

Equally unpersuasive is Dr. Franceschini's testimony. Dr. Fransceschini sole in-person evaluation of Giménez lasted less than four hours and took place in May 2013 – again well after Giménez had left the situation that was causing his depression and anxiety. Tr. 1078, 1080, 1095, 1104, 1148, 1167.
Dr. Fransceschini conceded on cross-examination that based on Dr. Fernández's July 2009 notes, Giménez "could have been having a major depression." Tr. 1241.

2. Castillo Condominium Had Notice Of Giménez's Disability

Substantial evidence also establishes that Castillo Condominium officials had notice of Giménez's disability. While it is correct that a housing provider cannot be liable under the Act for refusing to grant a reasonable and necessary accommodation unless it knows of the complainant's disability and the need for the accommodation, see, *e.g.*, *Schwarz* v. *City of Treasure Island*, 544 F.3d 1201, 1219 (11th Cir. 2008), in this case, it is undisputed that Giménez informed the Board by letter dated April 24, 2010, that Bebo was a "companion animal" and thus exempt from the no-pets policy. Joint Ex. 2A; R.A. 5, 280; Tr. 59, 148-149, 794, 957. Giménez attached to this letter an e-mail from Dr. Fernández directed toward the Board stating that Giménez was his patient, asserting that Giménez met the definition of an individual with a disability under the Act, recommending and

prescribing an emotional support animal to help Giménez in coping with his disability, and offering to discuss this recommendation. Joint Ex. 2B; R.A. 5, 280; Tr. 59, 149, 255-257, 293-294, 298-299, 639-641, 794, 958. These written materials served to notify Castillo Condominium that Giménez is an individual with a disability. See *Astralis*, 620 F.3d at 68 (condominium association knew or should have known of complainants' disabilities because complainants provided pertinent medical information to members of condominium board).

3. Giménez Requested An Accommodation That Was Reasonable And Necessary To Allow Him An Equal Opportunity To Use And Enjoy His Condominium Unit

Substantial evidence buttresses the Secretary's finding that Giménez requested an accommodation to keep an emotional support animal in his condominium unit, and that this accommodation was reasonable and necessary to allow him an equal opportunity to use and enjoy his unit. As an initial matter, FHA liability on a failure-to-accommodate claim cannot attach unless the respondent knows of the complainant's need for an accommodation. See *Schwarz*, 544 F.3d at 1219; *Tsombanidis* v. *West Haven Fire Dep't*, 352 F.3d 565, 579 (2d Cir. 2003) ("A governmental entity must know what a plaintiff seeks prior to incurring liability for failing to affirmatively grant a reasonable accommodation."). Accordingly, the burden is on the Charging Party first to "show that a special accommodation of a disability was, in fact, requested" by the complainant. *Colon-*

Jimenez v. *GR Mgmt. Corp.*, 218 F. App'x 2, 3 (1st Cir. 2007).

The Charging Party also must present evidence showing that the complainant's request for an accommodation is both reasonable and necessary. The reasonableness of the requested accommodation is measured by weighing the burden that this accommodation would impose on the housing provider against the benefits that would accrue to the complainant. *Hollis* v. *Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 541-542 (6th Cir. 2014). It is well-recognized that requested accommodations meet the reasonableness standard if their cost "do[es] not pose an undue hardship or a substantial burden on the housing provider." *Olsen* v. *Stark Homes, Inc.*, 759 F.3d 140, 156 (2d Cir. 2014); accord *Wisconsin Cmty. Servs., Inc.* v. *City of Milwaukee*, 465 F.3d 737, 749 (7th Cir. 2006) ("An accommodation is reasonable if it is both efficacious and proportional to the costs to implement it.") (internal quotation marks and citation omitted); HUD/DOJ Joint Statement, Question 9 (noting that a housing provider may be required to grant a reasonable accommodation that does not impose "an undue financial and administrative burden," which is determined by taking into account the provider's financial resources, the cost of the reasonable accommodation, the benefits of the requested accommodation to the complainant, and the availability of less expensive alternative accommodations). Waiving a no-pets policy for an emotional support dog is certainly a reasonable accommodation under this

standard. See *Bronk* v. *Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) ("Balanced against a landlord's economic or aesthetic concerns as expressed in a no-pets policy, a deaf individual's need for the accommodation afforded by a hearing dog is, we think, *per se* reasonable within the meaning of the [FHA].").

The analysis of whether a requested accommodation is necessary to allow a complainant an equal opportunity to use and enjoy his unit is one of causation. *Wisconsin Cmty. Servs.*, 465 F.3d at 749. The Charging Party "must show that, but for the requested accommodation or modification, [the complainant] 'likely will be denied an equal opportunity to enjoy the housing of [his] choice.'" *Hollis*, 760 F.3d at 541 (quoting *Smith & Lee Assocs., Inc.* v. *City of Taylor, Mich.*, 102 F.3d 781, 795 (6th Cir. 1996)). Equal opportunity means that an individual with a disability must be afforded the same opportunity "to use and enjoy a dwelling" as an individual without a disability, "which occurs when accommodations address *the needs created by the handicaps*." *Schwarz*, 544 F.3d at 1226. Several courts have determined that emotional support animals may qualify as necessary accommodations for individuals with mental disabilities. See, *e.g.*, *Bhogaita* v. *Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1288-1289 (11th Cir. 2014) (evidence that emotional support dog assisted plaintiff in coping with PTSD and allowed him to interact with others supported jury's verdict for plaintiff on failure-to-accommodate claim); *Janush* v. *Charities Hous. Dev. Corp.*, 169 F. Supp. 2d

1133, 1134, 1136 (N.D. Cal. 2000) (issue of whether plaintiff's cats and birds could constitute a reasonable accommodation for her severe mental health disability survived motion to dismiss); *Riverbay Corp*, 2012 WL 1655364, at *19-20 (emotional support dog that alleviated complainant's depression was reasonable and necessary accommodation); cf. *Majors* v. *Housing Auth. of DeKalb Cnty. Ga.*, 652 F.2d 454, 457-458 (5th Cir. 1981) (reversing and remanding district court's grant of summary judgment to housing authority on individual's claim that housing authority's enforcement of no-animal rule in units, which prevented her from keeping emotional support dog, violated Rehabilitation Act).

The record amply supports the Secretary's findings that Giménez requested the reasonable accommodation of keeping an emotional support animal in his condominium unit, and that this request was both reasonable and necessary to allow Giménez the equal opportunity to use and enjoy his unit. As noted above, Giménez informed the Board by letter of his request to keep Bebo and "specifically explain[ed]" in the letter and in the attached e-mail from Dr. Fernández how this request was "linked to [his] disability" under the Act. See pp. 36-37, *supra*; *Colon-Jimenez*, 218 F. App'x at 3 (noting that "a routine or 'mundane' request, such as a request to transfer to a different apartment, does not rise to the level of a request for a reasonable accommodation unless the [complainant] specifically explains 'how the accommodation requested is linked to some disability'")

(citation omitted). Furthermore, Giménez's request was reasonable: Castillo Condominium does not argue that the cost of allowing Giménez to keep Bebo would impose on the Association "an undue hardship or a substantial burden." *Olsen*, 759 F.3d at 156. Indeed, granting this accommodation would hardly impose any hardship or burden, as the Association grandfathered in pet owners when it changed its pet policy in 2004. Tr. 671, 916, 925-926. Finally, Giménez's request was necessary to allow him an equal opportunity to use and enjoy his unit, as Bebo helped ameliorate Giménez's mental disability. Giménez, Dr. Fernández, and Dr. Unda all testified that Bebo "address[ed] the *needs created by*" Giménez's anxiety and depression, see *Schwarz*, 544 F.3d at 1226, and that removing Bebo from Giménez's home would likely send Giménez into an emotional tailspin. Tr. 53-54, 259, 271-272, 469, 479.

Castillo Condominium's assertion (Br. 29, 37) that Giménez did not request a reasonable accommodation, because his letter dated April 24, 2010, was a reaction to the Board's attempt to enforce the Association's no-pet policy, finds no support in the law. A housing provider's otherwise discriminatory rejection of a reasonable-accommodation request is not immunized from FHA liability simply because the provider initiated the interaction that led to the request. Instead, the touchstone of a reasonable-accommodation request is notice: A complainant must "adequately put [the housing provider] on notice of [his] disability and need for

accommodation." *Reed* v. *LePage Bakeries, Inc.*, 244 F.3d 254, 260 (1st Cir. 2001); see HUD/DOJ Joint Statement, Question 12 ("Under the Act, a resident * * * makes a reasonable accommodation request whenever [he] makes clear to the housing provider that [he] is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of [his] disability."). Castillo Condominium does not, and cannot, dispute that Giménez's April 2010 letter to the Board and attached e-mail from Dr. Fernández satisfied the appropriate legal standard.

Castillo Condominium's argument (Br. 37-38, 40-41) that Giménez failed to participate in HUD's interactive conciliatory process[13] when he declined to meet with the conciliation committee, and thus did not provide sufficient evidence showing that his requested accommodation was both reasonable and necessary, erroneously ignores the considerable evidence of disability and need for a reasonable accommodation that Giménez had already presented. Dr. Fernández's e-mail attached to Giménez's accommodation request stated that Giménez was his patient, asserted that Giménez met the definition of an individual with a disability under the Act, recommended and prescribed an emotional support animal to help

[13] "The HUD guidelines contemplate that parties may engage in an 'interactive process' to discuss the need for the accommodation and possible alternatives if the housing provider refuses to grant a requested accommodation on the ground that it is not reasonable." *Astralis*, 620 F.3d at 68 n.3.

Giménez in coping with his disability, and explicitly invited the Board to contact him to discuss this recommendation. Joint Ex. 2B; R.A. 5, 280; Tr. 59, 149, 255-257, 293-294, 298-299, 639-641, 794, 958. No Board member took Dr. Fernández up on his invitation or requested that he submit a signed letter before the Board unanimously voted to send Giménez a letter informing him that he would be fined $100/month for as long as he kept the dog in his unit. Tr. 260-261, 299, 632, 656, 875-876, 921, 997. Had any Board member contacted him, Dr. Fernández would have discussed Giménez's disability and the importance of an emotional support animal for Giménez. Tr. 261.

If the Association was "skeptical of [Giménez's] alleged disability" after receiving Giménez's accommodation request and Dr. Fernández's e-mail, it had the obligation "to request documentation or open a dialogue." See *Jankowski*, 91 F.3d at 895. The Board did not request medical documentation from Giménez or Dr. Fernández. Instead, the Board directed Rosado, the head of the conciliation committee, to invite Giménez to appear before the committee. Some Board members testified that this invitation was for the purpose of obtaining additional information to enable the Board to make a better documented decision. Tr. 794, 818, 890, 900-901, 904-905, 926-927, 960, 966-968, 974, 991. But the testimony of Rosado, the individual designated to deliver the invitation, indicates that this meeting was about ending the conversation with Giménez, not starting one. Far

from "open[ing] a dialogue," *Jankowski*, 91 F.3d at 895, Rosado indicated to Giménez that it was the Board's "job" to enforce the by-laws, and that "we have to abide by them." Tr. 937. Rosado admitted at the ALJ hearing that the purpose of the proposed meeting was just to listen to Giménez and to allow him to "ventilate." Tr. 931-932, 937-938. Because the Board had already decided to reject his accommodation request, Giménez "had no obligation to undertake a futile act" – *i.e.*, appearing before the conciliation committee – "in order to vindicate [his] federally guaranteed rights." *Astralis*, 620 F.3d at 69. In sum, it was the Association, not Giménez, that failed to satisfy its burden under its own conciliation policy.

Finally, Castillo Condominium's contention (Br. 44-47) that Bebo was nothing more than an ordinary pet, and thus not necessary to allow Giménez an equal opportunity to use and enjoy his condominium unit, is misplaced, as it relies on a faulty district court decision. The Association cites and quotes extensively from *Prindable* v. *Association of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1256-1257 (D. Haw. 2003), aff'd on other grounds sub nom., *DuBois* v. *Association of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006), cert. denied, 549 U.S. 1216 (2007), which held that the plaintiff residents failed to provide sufficient evidence of an emotional support animal's individual training as a service animal to survive summary judgment on their

reasonable-accommodation claim. The district court based its holding on the ADA regulation's definition of service animal, which requires proof of individualized training – a requirement that does not exist under the FHA. *Id.* at 1256. On appeal, the Ninth Circuit upheld summary judgment on the alternative ground that the residents failed to show that their condominium association refused their accommodation request, see pp. 48-49, *infra,* and did not reach the issue of whether the residents needed to show that the dog was an "individually trained service animal." *DuBois*, 453 F.3d at 1179 n.2.

Prindable lacks persuasive value because there is no good reason to adopt and apply the ADA regulation's definition of service animal to the FHA context given "the distinct purposes the two statutes serve" – *i.e.*, the ADA's prohibition of discrimination in public accommodation and in places of public accommodation versus the FHA's prohibition of discrimination in housing on the basis of disability. *Fair Housing of the Dakotas, Inc.* v. *Goldmark Property Mgmt., Inc.*, 778 F. Supp. 2d 1028, 1035 (D.N.D. 2011). Both the DOJ and HUD have recognized this distinction in declining to require that an emotional support animal be individually trained to qualify as a reasonable accommodation under the FHA. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,240 (Sept. 15, 2010) ("[E]motional support animals that do not qualify as service animals under the [ADA] regulations

may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the FHA[].”); Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63,836 (Oct. 27, 2008) (explaining that ADA definition of service animal should not apply to accommodation request by persons with disabilities residing in HUD-subsidized, public housing because “emotional support animals provide very private functions for persons with mental and emotional disabilities”); FHEO Notice: FHE0-2013-01, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs (April 25, 2013), available at https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf. Several federal courts have relied on DOJ and HUD guidance in rejecting *Prindable*’s application to FHA accommodation requests for emotional service animals. See *Sanzaro* v. *Ardiente Homeowners Ass’n LLC*, 21 F. Supp. 3d 1109, 1117-1119 (D. Nev. 2014); *Fair Housing of the Dakotas*, 778 F. Supp. 2d at 1034-1036; *Overlook Mut. Homes, Inc.* v. *Spencer*, 666 F. Supp. 2d 850, 858-859 (S.D. Ohio 2009). Under these circumstances, substantial evidence supported the Secretary’s finding that an untrained dog such as Bebo was a necessary accommodation for Giménez.

4. Castillo Condominium Denied Giménez’s Reasonable-Accommodation Request, Which Made Housing Unavailable

Finally, substantial evidence supports the Secretary’s factual findings that

Castillo Condominium denied Giménez's reasonable-accommodation request to keep an emotional support animal in his condominium unit, and that this denial made housing unavailable. It is undisputed that Board members had knowledge of Giménez's disability and of his psychiatrist's recommendation that he keep Bebo as an emotional support animal by the time of its meeting on May 18, 2010. Tr. 903-904, 926, 955. Despite this knowledge, the Board members unanimously voted at this meeting to send a letter to Giménez informing him that he would be fined $100/month for as long as he kept the dog in his unit for violating the Association's by-laws prohibiting pet ownership, and sent that letter three days later. Joint Ex. 3; R.A. 6, 280; Tr. 631, 797, 813-814, 842, 846, 850-851, 878-879, 902, 906-907, 909, 922, 924, 959-960, 968, 990-991. The Board decided to hold this fine in abeyance only after receiving a cease-and-desist order from DACO, which prohibited the Board from imposing the fine or forcing Bebo's removal until the DACO case brought by Giménez was resolved. Tr. 879-882, 968-971, 975. The FHA "violation occur[ed] when [Giménez] [wa]s first denied a reasonable accommodation, irrespective of the remedies granted in subsequent proceedings." *Bryant Woods Inn, Inc.* v. *Howard Cnty., Md.*, 124 F.3d 597, 602 (4th Cir. 1997).

Castillo Condominium's denial of Giménez's request for a reasonable accommodation made housing unavailable to him. While his DACO case was pending, Giménez was "very worried" about staying at Castillo Condominium

without permission to keep Bebo. Tr. 61. Due to Giménez's "special bond" with Bebo, he was "especially susceptible" to the mere threat of Bebo's removal. Tr. 522-523. This threat became more palpable when DACO issued its ruling upholding the Association's by-laws prohibiting pet ownership in March 2011. R.A. 6, 282-291; Tr. 190. At that point, Giménez faced the dilemma of leaving his Castillo Condominium unit, where he had lived for 15 years and which was located close to his childhood home, or losing his companion animal. Add. 6-7; Tr. 23, 64-65, 180, 190, 206-207. Giménez chose the former, and closed on the purchase of a new condominium later that month. Tr. 61, 80, 122-123, 180, 186-188, 190, 205. He testified that he would have remained at Castillo Condominium had he been allowed to keep Bebo. Tr. 179-180, 186, 199, 201-202, 206.

Castillo Condominium asserts (Br. 29, 38-40) that it did not deny Giménez's request for a reasonable accommodation, because it never enforced its request for Giménez to remove Bebo from his condominium unit before Giménez moved out of the building. In support of this position, the Association cites *DuBois*, which held that the defendant condominium association never forced the plaintiff residents' dog to leave the building, and thus never denied their request to keep the dog as a reasonable accommodation under the Act. 453 F.3d at 1179. This holding rested on the condominium association's *grant* to the residents of a temporary exemption from its by-laws prohibiting pet ownership pending its

investigation into their accommodation request. *Ibid.* Because this temporary exemption was still in place when the residents brought their housing discrimination complaint to HUD, the Ninth Circuit concluded that the condominium association "never refused to make the requested accommodation." *Ibid.*

DuBois is readily distinguishable from this case. As noted above, Castillo Condominium voted to fine Giménez $100/month for keeping Bebo in his unit in violation of its by-laws prohibiting pet ownership, wrote a letter to Giménez informing him of this decision, and only refrained from collecting this fine because the DACO cease-and-desist order prohibited it from doing so. See p. 47, *supra*. While the DACO order was in effect, a representative from Castillo Condominium contacted Giménez and told him that "for the time being" the fine was being "held in abeyance," but no representative ever discussed or reevaluated with Giménez his accommodation request. Tr. 178-179, 203, 881-882. Under these circumstances, it can hardly be said that the Association "never refused to make the requested accommodation." *DuBois*, 453 F.3d at 1179. Rather, this case is closer to *Astralis*, which declined to apply *DuBois* to preclude the complainants' claim that their condominium association refused their requested parking-space accommodation. Similar to this case, the condominium association in *Astralis* never granted the complainants permission to park in the handicapped spaces closest to their unit,

and the complainants received violation notices when they unilaterally parked in those spaces. *Astralis*, 620 F.3d at 69.

Castillo Condominium also contends (Br. 40) that it did not make housing unavailable to Giménez, because Giménez sold his unit in the building for a profit and purchased a larger apartment in another condominium building for a lower price. The Association cites no legal support for its position that a profit on the sale of a condominium unit forced by the discriminatory conduct of a condominium association negates a finding that the home was made unavailable to the seller in violation of the Act. This argument also is non-responsive to Giménez's assertion that he did not want to leave the Castillo Condominium building and would have stayed had he been allowed to keep Bebo.

* * * * *

In sum, substantial evidence supports the Secretary's finding that by refusing to make a reasonable accommodation by waiving its no-pet rule, as required by Section 804(f)(3)(B), Castillo Condominium violated Section 804(f)(1) by making housing unavailable because of Giménez's disability, and Section 804(f)(2) by subjecting Giménez to different terms and conditions because of his disability.

II

THE ALJ CORRECTLY DENIED CASTILLO'S PRE-HEARING MOTION TO DISMISS THE CHARGE BASED ON RES JUDICATA AND MOTION IN LIMINE TO EXCLUDE THE TESTIMONY AND EXPERT WRITTEN REPORT OF GIMÉNEZ'S TREATING PSYCHIATRIST

A. Standard Of Review

Pursuant to the Administrative Procedure Act, this Court may set aside an agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Astralis Condo. Ass'n* v. *HUD*, 620 F.3d 62, 66 (1st Cir. 2010) (quoting 5 U.S.C. 706(2)(A) as standard of review for an agency's legal determinations). Whether the ALJ correctly denied a motion to dismiss for failure to satisfy the requirements of res judicata is a legal issue that the court of appeals reviews de novo. See *Saipan Stevedore Co.* v. *Director, Office of Workers' Comp. Programs*, 133 F.3d 717, 719 (9th Cir. 1998). Because the Federal Rules of Evidence apply to FHA administrative proceedings, see 24 C.F.R. 180.620, this Court reviews an ALJ's decision to admit or exclude expert testimony for abuse of discretion, see *General Electric Co.* v. *Joiner*, 522 U.S. 136, 138-139 (1997).

B. The ALJ Correctly Denied Castillo Condominium's Motion To Dismiss The Charge For Failing To Satisfy The Requirements Of Res Judicata

The ALJ correctly denied Castillo Condominium's motion to dismiss the Charge on the grounds that the DACO ruling upholding the Association's by-laws

prohibiting pet ownership was res judicata. "According to the doctrine of res judicata, a final judgment on the merits precludes parties from relitigating claims that were or could have been brought in a prior action." *Universal Ins. Co.* v. *Office of Ins. Comm'r*, 755 F.3d 34, 37 (1st Cir. 2014). A federal court must give preclusive effect to a state-court judgment, including the judgment of a state administrative agency acting in a judicial capacity that resolves disputed issues of fact properly before it, if a state court would. *Id.* at 37-38. In other words, the federal court must accept the rules of that State for determining the effect of the judgment – in this case, the preclusion law of Puerto Rico.[14] See *Newman* v. *Krintzman*, 723 F.3d 308, 310 (1st Cir. 2013).

Puerto Rico's law of res judicata provides that a prior judgment has preclusive effect where there is "the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such." P.R. Laws Ann. tit. 31, § 3343. To assert the defense of res judicata under Puerto Rican law, a party must establish "(i) the existence of a prior judgment on the merits that is 'final and unappealable'; (ii) a perfect identity of thing or cause between both actions; and (iii) a perfect identity of the parties and the capacities in which they

[14] Puerto Rico is the "functional equivalent of a state" for the purpose of determining the preclusive effect of a judgment of one of its courts or administrative agencies in federal court. *Boateng* v. *InterAmerican Univ., Inc.*, 210 F.3d 56, 61 (1st Cir.), cert. denied, 531 U.S. 904 (2000).

acted." *Universal Ins. Co.*, 755 F.3d at 38 (internal quotation marks and citations omitted). "A prior and current action will share a perfect identity of thing if they involve the same object or matter." *Ibid.* (internal quotation marks and citation omitted).

The ALJ correctly determined that Castillo Condominium failed to satisfy this second requirement of res judicata. The Puerto Rico Condominium Act establishes an administrative process available through DACO that is limited to the promulgation of condominium rules and the enforcement of those rules. See P.R. Laws Ann. tit. 31, §§ 1294, 1294a, 1294c. The Condominium Act does not address issues of housing discrimination. See P.R. Laws Ann. tit. 31, §§ 1294-1294e. Accordingly, the focus of the DACO administrative proceeding and its ruling was the validity of the Association's by-laws prohibiting pet ownership under the Condominium Act. Although Giménez referenced in his DACO complaint a medical need to keep an emotional support animal in his condominium unit, the DACO ruling did not mention this need, Giménez's disability, the FHA, or his reasonable-accommodation request. R.A. 282-291. Under these circumstances, the DACO administrative proceeding and the FHA administrative proceeding did not "involve the same object or matter," "flow from the same principal ground or origin," or "derive from a common nucleus of operative facts." See *Universal Ins. Co.*, 755 F.3d at 38.

Castillo Condominium's contention (Br. 24-27) that res judicata bars Giménez's FHA claim because he already litigated his "alleged federally protected right to keep his dog" (Br. 25) before DACO and received an adverse decision on the merits that he did not appeal incorrectly interprets both the law and the DACO ruling. The Association recites boilerplate on the law of res judicata, but does not cite any statutory provision authorizing DACO to hear complaints alleging a violation of the FHA and to grant remedies comparable to those set forth in the Act. Nor does Castillo Condominium address the second requirement of res judicata that the ALJ concluded it failed to satisfy. Because Castillo Condominium failed to demonstrate that DACO was authorized to hear disability discrimination cases, HUD's Charge is not barred by the doctrine of res judicata. See, *e.g.*, *Owens* v. *New York City Hous. Auth.*, 934 F.2d 405, 410 (2d Cir.) (under New York law, Article 78 court was not empowered to address Plaintiff's claims of discrimination or retaliation, thus those claims are not barred by doctrine of res judicata), cert. denied, 502 U.S. 964 (1991).

Even if DACO had discussed Giménez's disability-related claims in its ruling upholding the Association's by-laws prohibiting pet ownership under Puerto Rico's Condominium Act, this ruling would not support a res judicata defense. Allowing a DACO ruling upholding a regulation under Puerto Rican law to preclude claims under federal law from going forward would "turn[] the

Supremacy Clause, U.S. Const. art. VI, § 2, on its head." *Astralis*, 620 F.3d at 69. Indeed, the Act expressly forbids this outcome: "[A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter *shall to that extent be invalid*." 42 U.S.C. 3615 (emphasis added). Contrary to Castillo Condominium's contention (Br. 24) that Section 3615 "expressly recognizes the validity of * * * the Puerto Rico statute that confers DACO the primary jurisdiction over claims by condominium residents," this provision "manifests a clear congressional intent to vitiate the application of any state law that would permit discrimination based on * * * handicap." *Astralis*, 620 F.3d at 70. Castillo Condominium's apparent position that its "private [amendments to its by-laws] under [Puerto Rico's] condominium statute are capable of trumping federal anti-discrimination law verges on the ridiculous." *Ibid.*

C. The ALJ Acted Within His Discretion In Denying Castillo Condominium's Motion In Limine To Exclude The Testimony And Expert Written Report Of Giménez's Treating Psychiatrist, Dr. Fernández

The ALJ also acted within his discretion in denying Castillo Condominium's motion in limine to exclude the testimony and expert written report of Giménez's treating psychiatrist, Dr. Fernández. As an initial matter, Castillo Condominium has waived this issue by failing to make any developed argument in its opening brief. It is well-settled that "issues adverted to in a perfunctory manner,

unaccompanied by some effort at developed argumentation, are deemed waived." *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990). For this issue, Castillo Condominium did no more than assert that the ALJ should have granted its motion in limine and cite (Br. 27) the pages in its appendix that cover its memorandum in support of the motion in limine and supporting documents it filed with the ALJ. This effort falls well short of the showing needed to avoid waiver.[15] See *Giragosian* v. *Bettencourt*, 614 F.3d 25, 30 (1st Cir. 2010) (finding waiver where appellate brief did not fully develop argument, but rather referred Court to arguments party made in district court pleadings).

Even if Castillo Condominium had properly preserved this challenge, it is wholly without merit. Federal Rule of Evidence 702 permits the admission of expert opinion testimony if (1) "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"; (2) "the testimony is based on sufficient facts or data"; (3) "the testimony is the product of reliable principles and methods"; and (4) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. Rule 702 imposes on the district court the responsibility "of

[15] In a two-sentence footnote at the beginning of the Argument section (see Br. 21 n.4), Castillo Condominium asserts that the ALJ also erred in declining to require Giménez to provide a sample of his hair to rule out drug use. This Court should deem this argument waived for lack of developed argumentation as well.

ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). "As part of its inquiry, the trial court must 'determine whether the putative expert is qualified by knowledge, skill, experience, training, or education,' to offer testimony." *Pagés-Ramírez* v. *Ramírez-González*, 605 F.3d 109, 114 (1st Cir. 2010) (quoting *Mitchell* v. *United States*, 141 F.3d 8, 14 (1st Cir. 1998)). A trial court *must* allow a physician "with appropriate credentials and an appropriate foundation for the opinion at issue * * * to present testimony" that is relevant under the liberal admissibility standard of Federal Rule of Evidence 401. *Id.* at 115.

Applying these standards, it is clear that the ALJ acted well within his discretion in admitting the testimony and expert written report of Dr. Fernández under *Daubert*. Dr. Fernández is a practicing psychiatrist who has treated Giménez as a patient since 1997, and thus his expert testimony regarding Giménez's emotional condition "rests on a reliable foundation." *Daubert*, 509 U.S. at 597. Dr. Fernández's expert testimony also is "relevant to the task at hand," *ibid.*, as it addressed two elements of Giménez's failure-to-accommodate claim: his disability and his need for an emotional support animal to allow him the equal opportunity to use and enjoy his condominium unit. See pp. 29-36, 37-46, *supra*. Furthermore, Fernández's testimony was powerful confirmation of the

testimony from Unda and Giménez that established a FHA violation. See *Pagés-Ramírez*, 605 F.3d at 116 (district court abused its discretion by excluding expert physician testimony on causation and the standard of care that was essential to the plaintiffs' case).

In any event, even if Dr. Fernández was not qualified to testify as an expert, his testimony as to Giménez's disability and Giménez's need for a companion animal, based upon his observations as Giménez's treating psychiatrist, would be admissible as testimony of a fact witness. See Tr. 473-474, 478 (overruling objections to Dr. Unda's testimony, based upon his treatment of Giménez's condition, that he believed that Bebo was significant for Giménez's mental health and that Bebo's removal would have a detrimental effect on Giménez's physical and mental state). Dr. Fernández's testimony as an expert was not necessary to meet the Charging Party's burden of proof under the Act. Accordingly, even if the ALJ abused his discretion in admitting Dr. Fernández's testimony – which he did not – this decision would have no bearing on the outcome of this case.

III

THIS COURT SHOULD GRANT THE SECRETARY'S CROSS-APPLICATION FOR ENFORCEMENT OF THE FINAL AGENCY ORDER

A. Standard Of Review

Upon the filing of an application of enforcement, this Court has discretion to "enforce such order to the extent that such order is affirmed or modified." 42 U.S.C. 3612(k)(1)(C).

B. The Secretary's Cross-Application For Enforcement Of The Final Agency Order Should Be Granted

For the reasons explained above, substantial evidence supports the Secretary's determinations of liability and relief, and the Petition for Review is without merit. This Court should therefore affirm HUD's Final Agency Order, and grant the Secretary's Cross-Application for Enforcement of the Final Agency Order. See, *e.g.*, *Astralis Condo. Ass'n* v. *HUD*, 620 F.3d 62, 70 (1st Cir. 2010) (denying petition for review and granting cross-application for enforcement of Secretary's final order); *Ho* v. *Donovan*, 569 F.3d 677, 682-683 (7th Cir. 2009) (same).

CONCLUSION

This Court should deny the Petition for Review and grant the Secretary's Cross-Application for Enforcement of HUD's Final Agency Order.

Respectfully submitted,

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Date: June 17, 2015

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I hereby certify that on June 17, 2015, I electronically filed the foregoing BRIEF FOR THE SECRETARY AS RESPONDENT/CROSS-PETITIONER with the Clerk of the Court using the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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